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| CITATION: | *AK v The Queen* [2021] NTCCA 4 |
| PARTIES: | AK<br>v<br>THE QUEEN |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction |
| FILE NO: | CA 18 of 2020 (21943700) |
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| JUDGMENT OF: | Blokland, Barr and Brownhill JJ |

**CATCHWORDS:**

CRIMINAL LAW – Appeals – Appeal against sentence – manifest excess – aggravated robbery and contempt of court – youth – lower level of offending for both charges when considered in the spectrum of sentences for similar offences and offenders – comparative sentences – appeal allowed – appellant re-sentenced.

CRIMINAL LAW – Appeals – Appeal against sentence – aggravated robbery and contempt of court – youth – effect of s 54 of the *Sentencing Act* 1995 (NT) – requiring non-parole period of 50 per cent of head sentence when sentencing a youth under *Sentencing Act* of Supreme Court – powers of the Supreme Court when sentencing youth – s 82 *Youth Justice Act* 2005 (NT) – no error shown in the exercise of the discretion to proceed under *Sentencing Act* – ground dismissed.

CRIMINAL LAW – Appeals – Appeal against sentence – parity between offenders when dealt with for different offences – different sentencing regimes – need for parties to provide sentencing court with information about co-offenders and their sentences – appeal allowed – appellant re-sentenced.

Statutes referred to:
*Youth Justice Act* 2005 (NT) ss 82, 83
*Sentencing Act* 1995 (NT) ss 7(j), 40, 53, 54, 55, 55A
*Criminal Code* 1983 (NT) s 211(i)(2)

Cases referred to:
*Emitja v The Queen* [2016] NTCCA 4; *Forrest v The Queen* [2017] NTCCA 5; *JF v The Queen* [2017] NTCCA 1; *Kilic v The Queen* [2015] VSCA 331; *ML v The Queen* [2018] NTCCA 18; *Noakes v The Queen* [2015] NTCCA 7; *The Queen v Kilic* [2016] HCA 48; *Whitehurst v The Queen* [2011] NTCCA 11.

*Anderson v The Queen* [2014] NTCCA 18*; Bloomfield* [1999] NTCCA 137; *Edmond v The Queen* [2017] NTCCA 9; *KT v The Queen* (2008) 182 A Crim R 571; *Serra* (1996) 92 A Crim R 511; *The Queen v Goodwin* [2003] NTCCA 9; *The Queen v Gurruwiwi* (2008) 22 NTLR 68; *Wesley v The Queen* [2014] NTCCA 17.

*Bara v The Queen* [2016] NTCCA 5; *Green v The Queen* (2011) 244 CLR; *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (2011) 244 CLR 462; *Shortland v The Queen* [2013] NSWCCA 4; 224 A Crim R 486.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | A Abayasekara |
| Respondent: | V Engel |

*Solicitors:*

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| Appellant: | Northern Territory Legal Aid Commission |

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| Respondent: | Office of the Director of Public Prosecutions |
| Judgment category classification: | B |
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*AK v The Queen* [2021] NTCCA 4
No. 21943700

BETWEEN:

**AK**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: BLOKLAND, BARR & BROWNHILL JJ

REASONS FOR JUDGMENT

(Delivered 19 May 2021)

**The Court**

[1] This is an application for leave to appeal against sentences imposed by the Supreme Court on 1 July 2020. At the conclusion of the hearing on 13 April 2021, we granted leave to appeal on all grounds and allowed the appeal on the first ground, namely that the sentences imposed were manifestly excessive.

[2] To facilitate the resentencing of the appellant we requested that the Crown provide us with all relevant sentencing materials of the appellant's co-offenders who had been dealt with in the Youth Justice Court. We ordered an institutional report from the Don Dale Detention Centre and a supervision

report from Territory Families. On 30 April 2021 we heard further submissions and re-sentenced the appellant. We indicated our reasons would be published and forwarded to counsel. These are our reasons.

**Proceedings in the Supreme Court**

**(i) The plea to the count on indictment**

[3] On 3 April 2020 the appellant pleaded guilty to one count of aggravated robbery contrary to s 211(1) and (2) of the *Criminal Code 1983* (NT). The date of the offending was 24 November 2019. The items stolen were a till and its contents, $484 cash. In order to obtain those items, the appellant threatened to use violence upon the victim JM, who was the console operator at the United Petroleum Service Station.[1] The circumstances of aggravation were that the appellant was armed with an offensive weapon, namely a claw hammer and he was in the company of the co-offenders SR and MP.

**(ii) The facts of offending for the aggravated robbery charge**

[4] In summary, the Crown facts were that on the evening of the offending the appellant suggested a plan to his co-offenders to rob the console operator of the petrol station. At around 9:33pm the appellant carried out reconnaissance at the service station and purchased a chocolate bar. Shortly after, all offenders waited until JM was alone in the fuel pump area. The appellant approached JM and brandished a large blue handled claw hammer, moved towards him and said, “Wait outside, don’t try stopping us”. The

**1** Appeal Book (**AB**) 1.

appellant and SR entered the service area while MP waited outside and kept watch. The appellant jumped behind the service counter through a wire partition, ripped the till from the bench, and threw it onto the ground. SR picked up the till and its contents and all the offenders left the area. The incident was captured in full on CCTV. The appellant was arrested at his grandmother's house at Minmarama Community. He took part in a conversation with investigating police officers and disclosed the location of the claw hammer and the till. After he was taken to Palmerston Police station and given legal advice, he declined to participate in an interview with police.

**(iii) The course of the plea proceedings**

[5] The sentencing proceedings were adjourned in order to obtain a pre-sentence report. In the light of the material contained in the pre-sentence report and the psychiatric report, on 19 May 2020 the sentencing Judge ordered a psychological assessment.[2] The proceedings were adjourned to 1 July 2020 for further submissions after consideration of the reports.

[6] On 1 July 2020 counsel for the appellant told the sentencing Judge the appellant was adamant that he would not agree to supervision and for that reason Territory Families had found him unsuitable for supervision. His Honour suggested that some of the matters arising from the reports might need to be further or properly explored. In relation to a suggestion in the

**2** AB 22.

reports of the possibility of attending boarding school, the appellant's counsel informed the Court she would need a further adjournment of two to three weeks to formulate a plan to put before the Court. The adjournment application was not opposed by the Crown.[3] As the sentencing Judge was announcing the order for the adjournment, the appellant interrupted him a number of times and stated that he wanted to be sentenced on that day without conditions. The appellant swore and did not respond to various exhortations from his counsel and others present in Court to calm down.[4]

**(iv) The contempt of court charge**

[7] As a result of the appellant's threatening behaviour, which included throwing the frame of the closed-circuit television screen at the sentencing Judge and attempting to leave the dock, he was dealt with on the same day for contempt of court. The appellant pleaded guilty to the charge of contempt which was particularised as follows:

> AK threatened to harm the presiding judge. He spoke the following words: "Sir, I'm going to hurt you if you don't sentence me, sir."
>
> AK then threw the front rectangular outside frame of the closed-circuit television screen at the presiding Judge. The screen missed the Judge.
>
> AK then attempted to leave the dock in a threatening manner and had to be restrained by security staff.[5]

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**3** AB 26-27.

**4** AB 28-29.

**5** AB 3, 30-32.

**(v) The sentence**

[8] His Honour then proceeded to sentence the appellant for both the aggravated robbery and the contempt of court. After a 25 per cent reduction in the head sentences on account of the guilty pleas, the appellant was sentenced to 3 years detention for the aggravated robbery and 9 months detention for the contempt of court. The sentence for contempt of court was ordered to be served cumulatively on the sentence for the robbery which gave a total sentence of three years and nine months imprisonment. A single non-parole period of two years was fixed. The sentence was ordered to commence on 4 February 2020.

**(vi) The appellant's subjective circumstances**

[9] In his remarks on sentence, the Judge described the appellant's background, based on submissions made on his behalf and the reports before the Court. The appellant was 15 at the time of the offending. His younger life had been characterised by instability as the family moved often between Darwin and Croker Island. The appellant was one of six brothers. His younger brothers are his half-brothers. His parents separated when he was very young. He had a good family upbringing and had been supported by family throughout Court proceedings. For a period when he was about to start primary school, his mother raised the appellant and his two older brothers alone. When he was about seven years old, his mother commenced a relationship with a man who was a chronic alcoholic and often was not at home. He is the father of

the appellant's three younger brothers.[6] His mother now has a new partner with whom the appellant gets along well.

[10] In terms of his education, the appellant attended a number of primary schools and he once won the Chief Ministers Literacy Award. However, the appellant had behavioural problems during primary school and would get angry if he could not get his own way. His Honour remarked that the same problem persisted and, as demonstrated by the appellant's behaviour in Court, had become worse. The appellant experienced racism when he attended middle school, which included being assaulted by three boys who filmed the incident. He stopped going to school and started smoking cannabis when he was about 14 years old. His Honour emphasized the appellant's continued problem with the misuse of cannabis. He noted the appellant had also attended school at the Don Dale Detention Centre.

[11] His Honour mentioned that while the appellant had no previous convictions at the time of the offending, he had been dealt with by the Youth Justice Court for offending subsequent to the robbery, namely the assault of a worker who suffered harm and the assault of a worker who did not suffer harm. The Youth Justice Court placed him on good behaviour bonds for 12 months for that offending.[7]

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**6** AB 33-34.

**7** AB 39, 44.

[12] His Honour summarised elements of the reports before the Court. He noted the conclusion of the Group Conferencing Outcome Report,[8] which stated it was "the opinion of the conveners that the group conference was a beneficial process for the youth".[9] His Honour remarked that in the light of the appellant's behaviour in Court, he was doubtful whether the appellant truly had any insight into his offending and that he had limited capacity to appreciate what was in his best interest.

[13] His Honour mentioned the Psychiatric Registrar's diagnosis to the effect that the appellant may be suffering from Ganser syndrome. As a result of that possible diagnosis, a report was obtained and an assessment undertaken by a clinical psychologist. The psychologist was unable to confirm Ganser syndrome but suggested the appellant may experience disassociation frequently which disrupts his integration of consciousness, memory, emotion, behaviour and perception.[10] The report concluded that the experience of disassociation was most likely as a result of childhood trauma.

[14] The sentencing Judge concluded that the appellant had complex needs. His Honour affirmed the principle that given the appellant's age, a sentence of imprisonment should only be imposed as a last resort and for the shortest appropriate period of time; and that the sentence should be structured in a way to acknowledge the youth's needs and provide him with an opportunity

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**8** AB 50-61.

**9** AB 36.

**10** AB 38.

to develop in socially responsible ways. His Honour also emphasised that the appellant must be held accountable for his conduct and be encouraged to accept responsibility for his behaviour. He was to be made aware of his obligations under the law and the consequences of contravening the law.[11]

[15] In the circumstances the sentencing Judge concluded there was no alternative but to sentence him to a term of imprisonment with a non-parole period.

**Ground 1 – That in all the circumstances of the offending and the offender the total effective sentence (including the contempt penalty) was manifestly excessive.**

[16] The relevant principles applicable to this ground are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. The appellate court does not interfere with the sentence imposed unless it is shown that the sentencing Judge was in error. The error may appear in what the sentencing Judge said in the proceedings or the sentence itself may be so excessive as to manifest error. It must be shown that the sentence was clearly and not just arguably excessive.[12]

[17] We were reminded by counsel for the respondent and accept that the test for manifest excess is not whether this Court thinks a different sentence should

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**11** AB 39-41.

**12** *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *Noakes v The Queen* [2015] NTCCA 7 at [23]; *Emitja v The Queen* [2016] NTCCA 4; 39 NTLR 159 at [39]; *JF v The Queen* [2017] NTCCA 1 at [49].

be imposed. Further, there is no one correct sentence. Bearing in mind the relevant principles governing a ground of this kind we have nevertheless concluded, for the reasons that follow, the sentence was manifestly excessive.

[18] By its nature aggravated robbery is a serious crime. The maximum penalty is imprisonment for life. The offence potentially covers a wide range of conduct. The gravity of the objective circumstances will vary from cases of the utmost seriousness to those which exhibit much lower levels of offending. Additionally, subjective circumstances between offenders will inevitably vary in infinite ways.

[19] In *ML v The Queen* this Court discussed the range of offending in aggravated robbery cases by reference to a detailed schedule of 36 comparative sentences passed on youths.[13] We have been provided with a similar schedule by counsel for the appellant.[14] Upper range offending for aggravated robbery cases involving youths was discussed in *ML v The Queen* and was said to generally have the following characteristics.[15] The offender was usually the main offender; the offences were committed in company; the offender was armed with a weapon such as a knife; there was a level of physical contact between the offender and the victim, or the offender rushed at the victim while armed with a weapon, so that there was

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**13** [2018] NTCCA 18 at [27].

**14** Comparative Sentencing Chart: s 211 - Armed Robbery in Company (Juvenile Offenders), Helen Edney (NTLAC Library Services), filed 1 April 2021.

**15** *ML v The Queen* [2018] NTCCA 18 at [28].

actual violence. In some instances, offending in the upper range was noted to have caused physical harm to the victim as a result of being stabbed or assaulted. The Court referred to console operators as one example of victims who were in a vulnerable position, which tended to elevate the assessment of the gravity of the offending. Other examples of upper range offences noted by the Court in *ML v The Queen* were cases where the robbery was coupled with home invasion or when offenders wore disguises. Upper range penalties also tended to be passed on youths with lengthy criminal records who had lost the benefit of leniency to some degree.[16]

[20] The sentencing Judge referred to the following features of the appellant's offending. He was the ringleader and came up with the plan to rob the service station. The offending involved forethought and a reconnaissance. It was committed in company with a dangerous weapon. Console operators are vulnerable to offending of this kind. The form of offending was prevalent.[17]

[21] While we agree the offending was serious for the reasons stated by the sentencing Judge, we nonetheless consider that this offending was at the lower level of offending for cases of this kind. While the appellant was the principal offender and engaged in some planning, the robbery was not sophisticated. There was no attempt by the appellant or co-offenders to hide their identity or to use a vehicle to make their escape. While the weapon

**16** *ML v The Queen* [2018] NTCCA 18 at [28].

**17** AB 35.

must have been confronting and threatening for the victim, it was not used to cause physical harm. The proceeds were not substantial.

[22] Further, as an offender who had not previously come to the attention of the courts, coupled with his young age and complex personal circumstances, the appellant was to be distinguished from those offenders with more serious antecedents. Having considered the sentencing table provided to us of sentences for young offenders charged with robbery in company,[18] we are of the view that the level of sentence imposed on the appellant was appropriate only to a repeat offender who had committed a grave example of offending of this kind.

[23] The fact that more serious features are not present in this case is not mitigating in itself,[19] but is relevant to the assessment of where on the scale the offending lies.[20] Comparisons with other sentences form part of the broad context in which the gravity of the offending and the circumstances of the particular offender fall to be assessed.[21] In *The Queen v Kilic*[22] the High Court held similar cases may provide a yardstick which assists in achieving consistency in sentencing but that the yardstick:

> … does not mean that the range of sentences imposed in the past fixes the boundaries within which future sentences must be passed;

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**18** Comparative Sentencing Chart: s 211 - Armed Robbery in Company (Juvenile Offenders), Helen Edney (NTLAC Library Services), filed 1 April 2021.

**19** *Emitja v The Queen* [2016] NTCCA 4; 39 NTLR 159 at [52].

**20** *Forrest v The Queen* [2017] NTCCA 5 at [66].

**21** *Forrest v The Queen* [2017] NTCCA 5 at [66].

**22** [2016] HCA 48; 259 CLR 256 at [22].

> rather the range of sentences imposed in the past may inform a "broad understanding of the range of sentences that would ensure consistency in sentencing and a uniform application of principle.[23]

[24] In our view, the starting point of four years detention, reduced by 25 per cent on account of the plea of guilty, was manifestly excessive in all of the circumstances leading to an error in the overall sentence.

[25] For similar reasons, although the contempt is properly characterised as a serious contempt of court, the penalty was not proportionate to the offending when the appellant's circumstances are taken into account. The appellant was 16 years old at the time. The outburst and behaviour was spontaneous and to some extent was illustrative of his immaturity bearing in mind his underlying complex welfare and psychological problems.

[26] As we upheld this ground, we re-sentenced the appellant.

**Ground 2: That the learned sentencing Judge did not adequately, or at all, consider the various custodial options when sentencing a first offender youth. Accordingly, the learned sentencing Judge did not consider adequately, or at all, that a term of imprisonment, less than 50 per cent of the head sentence, was the minimum term which justice required that the youth offender remain in custody.**

[27] In light of the Crown's concession as regards ground 4, this ground will be dealt with relatively briefly.

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**23** *The Queen v Kilic* [2016] HCA 48; 259 CLR 256 at [22], citing *Kilic v The Queen* [2015] VSCA 331 at [48]; *Forrest v The Queen* [2017] NTCCA 5.

[28] After referring to the appellant's expressed opposition to a suspended sentence with supervision, the sentencing Judge remarked:

> In the circumstances, it is my opinion that there is no alternative but to sentence the youth to a sentence of imprisonment with a non-parole period. The offending was adult-like offending, and I elect to sentence the youth under the *Sentencing Act* (NT).[24]

[29] His Honour then fixed a non-parole period of two years in respect of a total sentence of imprisonment for three years and 9 months. The non-parole period comprises approximately 53% of the total sentence. The appellant argued that the sentencing Judge proceeded on the erroneous assumption that he was obliged to fix a non-parole period of at least 50% of the total sentence. The appellant also argued that the characterisation of the offending as "adult-like" offending was erroneous and, in any event, did not compel the decision to deal with the appellant under the *Sentencing Act*.

[30] Relevantly, s 82 of the *Youth Justice Act* 2005 (NT) is in the following terms:

> **82 Powers of Supreme Court in sentencing**
>
> (1) If a youth is found guilty before the Supreme Court of an offence, the Supreme Court may do any of the following:
>
> (a) exercise, in addition to its powers, the powers of the Youth Justice Court;
>
> (b) order that the youth be detained in a detention centre or imprisoned for a period not exceeding the period of imprisonment for which such an offence would be punishable if committed by an adult;

**24** AB 15.

(c) remit the case to the Youth Justice Court.

(2) If the Supreme Court makes an order under subsection (1)(b), it may also make any order in relation to that detention or imprisonment that it could make in relation to a sentence of imprisonment under the *Sentencing Act 1995*.

…

[31] In *The Queen v Gurruwiwi* ('*Gurruwiwi*'),[25] the Court of Criminal Appeal held that there was no power to sentence a youth to a term of imprisonment of six years which was to be suspended after serving two years. That conclusion was reached because:

(a) the power to order a youth to serve a term of detention or imprisonment suspended wholly or partly in s 83(1)(i) of the *Youth Justice Act* was subject to the constraint in s 83(2)(b) that the term of detention or imprisonment not exceed two years; and

(b) while there was power to order a term of detention or imprisonment in excess of two years in s 82(1)(b) of the *Youth Justice Act*, the only power to suspend a term of detention or imprisonment not subject to the constraint in s 83(2)(b) was found in the *Sentencing Act*, and that power was subject to the constraint in s 40(1), namely that the power is only exercisable in respect of a term of imprisonment of no more than five years.

[32] The Court of The Court of Criminal Appeal held that, when sentencing a youth to a term of imprisonment,[26] the Supreme Court has three alternative sources of power available to it.[27]

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**25** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68.

**26** That is, not remitting the case to the Youth Justice Court under s 82(1)(c) of the *Youth Justice Act*. The word "imprisonment" is used here in its generic sense which does not discriminate between detention in a detention centre and imprisonment in a prison and which accepts that, in the usual case, a youth serves a sentence of a term of imprisonment in a detention centre until

[33] The first source of power is found in s 82(1)(a) of the *Youth Justice Act*, namely to exercise the powers of the Youth Justice Court which are found in s 83(1) of the *Youth Justice Act*.[28] Section 83(1)(i) includes the power to order a term of detention or imprisonment that is suspended in whole or in part. These powers are constrained by s 83(2), which provides that the term of imprisonment must not exceed two years for a youth aged 15 years or more and 12 months for a youth aged less than 15 years.[29]

[34] The second source of power is found in s 82(1)(b) of the *Youth Justice Act*, namely to order that the youth be detained or imprisoned for a period not exceeding the period of imprisonment for which such an offence would be punishable if committed by an adult.[30] This source of power is not constrained by s 83(2), as s 83(2) operates only in respect of the powers in s 83(1).[31] By virtue of s 82(2), the Supreme Court has, when exercising the power to order a sentence of imprisonment under s 82(1)(b), the powers that it has in relation to a sentence of imprisonment under the *Sentencing Act*.[32] Hence, there is power in s 40 of the *Sentencing Act* to suspend a sentence of

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they turn 18 years old, and then is transferred to the adult prison to serve the remainder of the term of imprisonment.

**27** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [7] per Martin (BR) CJ, at [52] per Riley J. See also at [33] per Angel J.

**28** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [4]-[6] per Martin (BR) CJ, at [33] per Angel J, at [53] per Riley J.

**29** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [4]-[6] per Martin (BR) CJ, at [33] per Angel J, at [53] per Riley J.

**30** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [7] per Martin (BR) CJ, at [33] per Angel J, at [53] per Riley J.

**31** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [7] per Martin (BR) CJ, at [31] per Angel J, at [53], [55] per Riley J.

**32** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [33] per Angel J.

imprisonment or detention, but that power does not apply to sentences in excess of five years.[33]

[35] The third source of power, confirmed by the words "in addition to its powers" in s 82(1)(a) of the *Youth Justice Act*, is found in s 7(j) of the *Sentencing Act* independently and exclusively of the provisions of the *Youth Justice Act*.[34] Again, there is power in s 40 of the *Sentencing Act* to suspend a sentence of imprisonment or detention, but that power does not apply to sentences in excess of five years.[35]

[36] Although not necessary for the decision, in explaining the three sources of power referred to above, the Court of Criminal Appeal in *Gurruwiwi* made some observations about the Supreme Court's powers in relation to fixing a non-parole period. Essentially, where the Supreme Court is exercising a power sourced in the *Youth Justice Act* (the first and second sources of power referred to above), s 85(1) of the *Youth Justice Act* obliges the Court to fix a non-parole period, if it sentences a youth to a term of detention or imprisonment longer than 12 months that is not suspended, unless the Court considers that to be inappropriate. No minimum non-parole period is

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**33** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [10]-[11] per Martin (BR) CJ, at [33] per Angel J, at [55] per Riley J.

**34** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [2], [7]-[8], [10] per Martin (BR) CJ, at [52] per Riley J.

**35** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [10]-[11] per Martin (BR) CJ, at [33] per Angel J, at [55] per Riley J.

prescribed in the *Youth Justice Act*.[36] However, where the Supreme Court is exercising a power sourced in the *Sentencing Act* (the third source of power referred to above), s 53 obliges the Court to fix a non-parole period if it sentences an offender to be imprisoned for (relevantly) 12 months or longer that is not suspended, unless it considers doing so to be inappropriate, and the obligation is subject to the minimum non-parole periods set out in ss 54, 55 and 55A of the *Sentencing Act*.[37] By s 54, the minimum non-parole period is 50 per cent of the period of imprisonment the offender is to serve under the sentence.

[37] As Martin CJ observed:

> Care must be exercised, however, in identifying the source of power for a particular sentencing order because the exercise of a particular power might be accompanied by a requirement such as the fixing of a non-parole period under the particular Act providing the source of power. It appears, therefore, that if in imposing a sentence of imprisonment the court resorts to the powers contained in the *Sentencing Act*, the minimum non-parole period that the court is able to fix is 50%. In that situation the terms of the *Sentencing Act* prevent resort to the powers in the *Youth Justice Act* in respect of the non-parole period.[38]

[38] As has already been observed, there is no minimum non-parole period applicable where the Court proceeds to sentence under either s 82(1)(a) or (b) of the *Youth Justice Act*.

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**36** Gurruwiwi [2008] NTCCA 2; 22 NTLR 68 at [8] per Martin (BR) CJ, at [33(g)] per Angel J. See also *Wesley v The Queen* [2014] NTCCA 17 at [44] per Riley CJ, Kelly and Blokland JJ; *Anderson v The Queen* [2014] NTCCA 18 at [21], [26] per Blokland, Barr and Hiley JJ.

**37** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [9] per Martin (BR) CJ, at [33] per Angel J.

**38** *Gurruwiwi* [2008] NTCCA 2; 22 NTLR 68 at [8] per Martin (BR) CJ.

[39] Returning to the present case, the sentence imposed by the sentencing Judge was a period of imprisonment of three years and nine months. Consequently, applying the reasoning in *Gurruwiwi*:

(a) The source of power in ss 82(1)(a) and 83(1) of the *Youth Justice Act* was not available because the sentence exceeded two years.

(b) The sources of available power were:

(i) s 82(1)(b) of the *Youth Justice Act*, to which s 85 applied with no minimum non-parole period applicable; and

(ii) s 7(j) of the *Sentencing Act*, to which ss 53 and 54 applied with a minimum non-parole period of 50%.

[40] The sentencing Judge expressly stated that he intended to sentence the youth under the *Sentencing Act*, namely independently of the provisions of the *Youth Justice Act*. Having determined to exercise his discretion in that way, it is clear that his Honour was bound to fix a non-parole period consistent with the minimum set out in s 54 of the *Sentencing Act*.

[41] As to whether the exercise of the discretion in the selection of the source of power miscarried, it is for the appellant to establish error. In *The Queen v Goodwin*,[39] the Court of Criminal Appeal observed that it is well established that if a young offender commits a criminal offence like an adult then that justifies sentencing them in a fashion more akin to an adult because, where crimes of considerable gravity are committed, the protective function of the

**39** [2003] NTCCA 9 at [11].

criminal court would cease to operate unless denunciation, general deterrence and retribution are significant sentencing considerations even in respect of youths.[40]

[42] As was observed by McClennan CJ at CL in *KT v The Queen*, the emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders may be moderated when the young person has conducted himself or herself in the way an adult might, and has committed a crime of violence or considerable gravity.[41] It was held that, in determining whether a young offender has engaged in "adult behaviour", the Court will look to various matters including the use of weapons, planning or pre-mediation, the existence of an extensive criminal history and the nature and circumstances of the offence. In the present case, we consider there are aspects of the offending which may be described as "adult-like" and there are aspects of the offending which may be described as "child-like". Aspects which may be considered "adult-like" are that the offence is one of aggravated robbery of a service station and particularly a sole operator at night,[42] the appellant brandished a weapon, he was in company and there was some brief pre-meditation and planning (of approximately 20 minutes). Aspects which may be considered "child-like" are that there was no attempt to conceal identity, there was no actual physical violence, the weapon

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**40** Reference was made to *Serra* (1996) 92 A Crim R 511 and *Bloomfield* [1999] NTCCA 137 at [21], [34].

**41** (2008) 182 A Crim R 571 at [25].

**42** A vulnerable class of victims, see *Edmond v The Queen* [2017] NTCCA 9 at [33], [55] per Grant CJ and Hiley J.

featured only in the demand that the operator not follow the offenders into the service station, the offenders made off with the till, and the appellant had no prior criminal history. As for the contempt offence, there are similarly features of both "adult-like" and "child-like" offending. The offence was a serious intrusion into the administration of justice, but was akin to a tantrum by a youth unfamiliar and frustrated with the court procedures, rather than an effort to disrupt and disrespect the Court and its process.

[43] In the exercise of our re-sentencing discretion, we do not characterise the offending as "adult-like" to the degree of proceeding solely under the *Sentencing Act*. However, we are not satisfied that the sentencing Judge erred in exercising his discretion differently. The discretion is broad and its exercise in this particular case is a matter on which minds might reasonably differ.

[44] In those circumstances, no error is shown in the imposition of a non-parole period of approximately 53 per cent of the total sentence. This ground was not made out.

**Ground 3: That the appellant has a justifiable sense of grievance arising from the disparity and/or lack of due proportionality between the sentence imposed on him and the sentence imposed on his co-offenders.**

**Ground 4: That the learned sentencing Judge erred by failing to consider parity as regards the sentences imposed on the appellant's co-offenders.**

[45] Leave was granted to the appellant with the consent of the respondent to add grounds 3 and 4.

[46] We will deal briefly with these grounds together. The respondent concedes that the material relating to the sentencing of the co-offenders should have been placed before the sentencing Judge and that the absence of that material led the sentencing Judge into error.[43] Accordingly, the respondent conceded ground four was made out. We agree the concession was properly made. We now have the sentencing materials relevant to the co-offenders which was not provided to the sentencing Judge.

[47] In *Shortland v The Queen*[44] the New South Wales Court of Criminal Appeal emphasized the need for a sentencing Judge to be fully apprised of the sentence imposed on a co-offender, including the remarks on sentence. Here, the mechanics of providing the sentencing remarks were not straight forward as the co-offenders were dealt with in the Youth Justice Court at different times. It is clear that in this case there were strong grounds for a significant disparity in the sentencing between the appellant and the co-offenders,

**43** Respondent's supplementary submissions at [3]-[4].

**44** [2013] NSWCCA 4; 224 A Crim R 486.

however the co-offenders' sentences were not irrelevant to setting the sentence for the appellant.[45]

[48] At its heart, the principle of parity requires that sentences be consistent and proportionate.[46] The principle requires that like offenders be treated in a like manner but sentences may be differentiated on like offenders to reflect different degrees of culpability or circumstances.[47]

[49] As between co-offenders, a marked or clearly unjustifiable or manifest disparity which objectively engenders a justifiable sense of grievance may indicate the principle of parity has been breached.[48] The Court must consider all of the facts and circumstances applicable to the different offenders, bearing in mind the principle is governed by substance over form. It matters not that different charges have been preferred, or additionally as in this case that a different regime is in place for sentencing. The central point is whether given all of the circumstances there exists a justifiable sense of grievance.

[50] The co-offender MP was dealt with in the Youth Justice Court on 19 February 2020. He pleaded guilty to one charge of unlawfully assaulting JM, who was working in the performance of his duties at the time of the assault, contrary to s 188A (1) (2) (b) of the *Criminal Code*. Further, he

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**45** *Green v The Queen* [2011] HCA 49; 244 CLR 462 at [31]-[32].

**46** *Lowe v The Queen* [1984] HCA 46; 154 CLR 606 at 610-11; *Bara v The Queen* [2016] NTCCA 5 at [31].

**47** *Postiglione v The Queen* [1997] HCA 26; 189 CLR 295 at 301.

**48** *Green v The Queen* [2011] HCA 49; 244 CLR 462 at [31]-[32].

pleaded guilty to stealing cash in the sum of $484, the property of the United Petroleum Service Station contrary to s 210 of the *Criminal Code*. The maximum penalty for the assault charge is imprisonment for two years if dealt with summarily and five years if found guilty on indictment. The maximum penalty for stealing is imprisonment for seven years.

[51] The facts presented to the Youth Justice Court in respect of SR on 21 February 2020 are almost identical with those presented against AK in the Supreme Court. The facts in SR's case state AK is the co-offender who came up with the idea to rob and also that AK threatened the victim. Further, SR entered the business premises with AK and picked up the till and its contents. SR was arrested the day after the offending when police apprehended him at a house at Minmarama Community.

[52] SR was 15 years old. He had not been in trouble previously, nor since the offending. He had assistance through a programme to help him attend school. The Youth Justice Court Judge found that the other two offenders were responsible for getting SR involved in the offending. SR was placed on a good behaviour bond without conviction for eight months on the condition that he not contact AK or MP. The Youth Justice Court was closed for a period during submissions when confidential welfare matters were discussed. SR was in the care of the CEO of Territory Families. SR was being managed through mental health medications and had also been found to have a moderate intellectual disability. He qualified for the National

Disability Insurance Scheme. The Youth Justice Court was told he was not yet on the scheme at the time of sentencing.

[53] MP was charged and pleaded guilty to the same offences as SR in the Youth Justice Court. The facts tendered in relation to MP were consistent with the facts tendered in AK and SR's matters, namely that MP stayed outside of the premises, keeping watch. MP was also arrested on 25 November 2019 at a house at Minmarama Community. He declined to participate in a record of interview. MP was 15 years old at the time of the offending and was 16 at the time of sentence. He had not attended school since the end of 2017. He had a past diagnosis of a mild intellectual disability. A recent report indicated that he had significant difficulties engaging in formal education. He had no criminal history. He played football for the Nightcliff under 16s team. As SR was a neighbour of MP, there was no order made that he not contact SR. MP was placed on a good behaviour bond without conviction for eight months with the condition that he not contact AK.

[54] There were obvious grounds to differentiate AK from the co-offenders, principally on the basis that AK was the ringleader, was armed with a weapon and threatened the victim. Like SR and MP, AK was 15 years old at the time and had no prior criminal history at the time of the offending. However, he had a further finding of guilt before he was sentenced in the Supreme Court which was relevant to his prospects of rehabilitation. Although it is not suggested he had an intellectual disability, the

psychological material indicated problems, particularly with AK's memory and a history of welfare interventions.

[55] In our view grounds 3 and 4 are made out on the basis that the sentence AK received in comparison with the co-offenders, when objectively assessed, was likely to engender a justifiable sense of grievance, notwithstanding there was justification for some differentiation between him and the co-offenders.

[56] We have found the sentence to be erroneous on the basis of disparity. That error was a consequence of the lack of the provision of material relevant to sentencing the co-offenders.

**Re-sentencing**

[57] We received the assessment of suitability for supervision from Territory Families dated 27 April 2021 and the Institutional Report from the Don Dale Youth Detention Centre of 14 April 2021.

[58] We re-sentenced the appellant on the basis that the offences are both generically serious, however for the reasons discussed, the offending is in a less serious category than was found by the Supreme Court. We bear in mind the age of the appellant and his complex and difficult circumstances. Our attention has also been drawn to the appellant's offending subsequent to the

robbery,[49] which bears on his prospects of rehabilitation and the need for continued supervision.

[59] The appellant has expressed the strong desire to live at Mumukala, a small outstation 22 kilometres west of Jabiru with his grandfather Sammy Cooper. However, Territory Families have not yet been able to properly assess whether such arrangement would be appropriate. Although he can reside with his mother in Darwin police expressed some concerns to Territory Families in relation to issues in the household. The suggested supervision conditions provide sufficient flexibility for Territory Families to direct the appellant to live in a particular place, once appropriate assessments can be made.

[60] It is reported and is accepted that the appellant's behaviour has improved since December 2020 and he has engaged well in the Balanced Choice Program which can possibly continue after his release. We also note his educational activities, including the completion of a First Aid Certificate in December 2020.

[61] In re-sentencing the appellant we have had regard to the material before the sentencing Judge, the remarks of and material before the Youth Justice Court Judge in relation to the co-offenders, the reports ordered by this Court and the material tendered on behalf of the respondent relevant to the appellant's subsequent offending.

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**49** Exhibit 2, 30 April 2021.

[62] Although the precise residence arrangements are not currently settled, we imposed a sentence that would allow AK to be released on 4 May 2021 to reside where directed by Territory Families.

[63] We reduced each sentence by 25 per cent on account of the timely pleas of guilty to both offences.

[64] Utilizing our powers under the *Youth Justice Act*, we re-sentenced the appellant as follows:

> On the count on indictment, namely robbery with circumstances of aggravation, without proceeding to conviction, the appellant was sentenced to detention for 18 months.
>
> For the charge of contempt of Court the appellant was sentenced to detention for six months to be served cumulatively on the sentence for the aggravated robbery.
>
> The total sentence is detention for two years to commence on 4 February 2020, and the balance is to be suspended on 4 May 2021.
>
> The appellant is to be subject to the following conditions for 9 months after his release:
>
> 1. Engage in good behaviour and not commit another offence during the period of the order (whether in or outside the Territory);
>
> 2. Be under the supervision and follow the reasonable directions of a Community Youth Justice Officer (CYJO);
>
> 3. Reside at [*a designated address*] or an address approved by a CYJO;
>
> 4. Participate and engage in any therapeutic services as directed by a CYJO; and

5. Not associate with SR, MP or any other persons as directed by a CYJO.

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