Hankin v The Queen [2009] NTCCA 11

PARTIES:	DONALD BENJAMIN HANKIN
	v
	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 12 of 2008 (20528554)
DELIVERED:	30 September 2009
HEARING DATES:	5 June 2009
JUDGMENT OF:	MILDREN, RILEY and REEVES JJ
APPEAL FROM:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW – sentence – offence committed whilst on parole – parole revoked by Parole Board prior to sentence – power to accumulate sentence being served upon sentence to be served or vice-versa – Sentencing Act sub-s 50, 51, 59 and 64

CRIMINAL LAW – sentence – whether sentence imposed is manifestly excessive

Criminal Code, s 154, s 181, s 407(1), s 411(4); *Parole of Prisoners Act*, s 5(6)(b), s 5(8), s 7; *Sentencing Act*, s 50, s 51, s 51(1), s 51(1)(b), s 53(1), s 57, s 59, s 59(1), s 59(1)(a), s 59(1)(b), s 59(1)(c), s 59(2), s 64, s 111, s 112, s 112(1)(a), s 112(1)(b), s 154

Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed, Oxford University Press, Melbourne, 1999

Baumer v The Queen (1988) 166 CLR 51; *House v The King* (1936) 55 CLR 499; applied

Baumer v The Queen (1989) 40 A Crim R 74; followed

Driver v R (1990) 70 NTR 9; *Hampton v the Queen* [2008] NTCCA 5; *Hedgecock v The Queen* [2008] NTCCA 1; *Hoare v The Queen* (1989) 167 CLR 348; *Mill v The Queen* (1988) 166 CLR 59; *Nitschke v Halliday* (1982) 30 SASR 119; *R v Kirkman (*Sentencing Remarks, NTSC, Angel ACJ, 9 July 2004); *R v McInerney* (1986) 42 SASR 111; *R v Peters* (Sentencing Remarks, NTSC, Riley J, 4 May 2005); *Serra v The Queen* [2004] NTCCA 3; *Staats v R* (1998) 123 NTR 16; *Veen v The Queen (No 2)* (1988) 164 CLR 465; referred to

REPRESENTATION:

Counsel:

Appellant:	S Corish with S Musk
Respondent:	Dr N Rogers

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hankin v The Queen [2009] NTCCA 11
No CA 12 of 2008 (20528554)

BETWEEN:

DONALD BENJAMIN HANKIN
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, RILEY & REEVES JJ

REASONS FOR JUDGMENT

(Delivered 30 September 2009)

Mildren J:

[1] This is an appeal against sentence. Following a trial before Martin (BR) CJ on indictment for unlawfully causing serious harm to Paul David Eustace on 3 October 2005, contrary to s 181 of the *Criminal Code*,[1] the appellant was acquitted of that charge but found guilty of the alternative charge of dangerous act, contrary to s 154 of the *Criminal Code* with two circumstances of aggravation, namely that he thereby caused serious harm to Paul David Eustace and that, at the time, he was under the influence of an intoxicating substance. The maximum penalty for this offence was imprisonment for 11 years.

[1] The maximum penalty for this offence was imprisonment for 14 years.

[2] At the time of the commission of the offence, the appellant had been released on parole on 8 June 2005. Prior to the trial, the Chairman of the Parole Board had revoked the parole order pursuant to sub-s 5(6)(b) of the *Parole of Prisoners Act*. He was arrested (for breach of bail) on 10 April 2007 and remanded in custody. On 11 April 2007 the Court of Summary Jurisdiction purported to again revoke his parole and committed him to serve the outstanding balance of his sentences.[2] At the time of sentence by Martin (BR) CJ on 28 October 2008, he still had two years and 134 days of his previous sentences left to serve (the outstanding balance).[3] However, the learned Chief Justice had been misinformed by counsel that the appellant had only two years and 127 days left to serve.

[3] During the sentencing hearing, the learned Chief Justice sought assistance from counsel as to whether he could, or should, impose a sentence for the subject offending which would have a cumulative effect upon the outstanding balance. His Honour was referred to s 59 of the *Sentencing Act* which provides as follows:

> **"59 Order of service of sentences of imprisonment**
>
> (1) Where an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender shall serve:

[2] The Court of Summary Jurisdiction was apparently unaware that the Parole order had already been revoked. However, an order for committal could have been correctly made in either circumstance under s 7 of the *Parole of Prisoners Act* and therefore nothing turns on this.
[3] See the schedule attached to these reasons.

(a) the term or terms in respect of which a non-parole period was not fixed;

(b) the non-parole period; and

(c) unless and until released on parole, the balance of the term or terms after the end of the non-parole period,

in that order.

(2) Where, during the service of sentence of imprisonment, a further sentence of imprisonment is imposed, service of the first-mentioned sentence shall, if necessary, be suspended in order that the sentences may be served in the order referred to in subsection (1)."

[4] His Honour interpreted s 59 to have the effect that the non-parole period of any sentence he imposed would be served first and that the balance of the sentence so imposed would be served next, followed by the outstanding balance.

[5] His Honour convicted the appellant and sentenced him to serve a term of imprisonment for seven years, commencing from 16 October 2008 and he imposed a non-parole period of five years also commencing 16 October 2008, which he said meant that the appellant would be liable to serve a total period of nine years and 127 days. As the Court had some doubts about the correctness of his Honour's interpretation of the effect of s 59 in these circumstances, we invited the parties to consider their positions and, if necessary, granted leave to the appellant to file an amended ground of

appeal. We also granted leave to the respondent to file a cross-appeal and invited written submission on this question.

Does the total sentence imposed have the effect of a total sentence of nine years and 134 days?

[6] If the applicant's parole order had not been revoked by the Chairman prior to sentence, the sentence of imprisonment imposed by his Honour would have been deemed to have revoked the parole order by virtue of s 5(8) of the *Parole of Prisoners Act*. In those circumstances, s 64 of the *Sentencing Act* required that:

> "... the court by which the person is sentenced or committed shall order the person to be imprisoned for the term that the person had not served at the time when the person was released from prison under the parole order, which term of imprisonment shall commence at the expiration of the term of imprisonment to which the person is sentenced or committed for the later offence".

[7] In those circumstances, the Court could also fix a new non-parole period in respect of the new sentence vide s 53(1) of the *Sentencing Act*. The consequences would be that, if these provisions had applied to the facts of this case, the sentence and non-parole period would be served in the manner contemplated by the learned Chief Justice. However, s 64 of the *Sentencing Act*, by its express terms, applies only where the new sentence has the effect of revoking the parole order by virtue of s 5(8) of the *Parole of Prisoners Act* and does not cover the present situation.

[8] It is to be noted that s 64 of the *Sentencing Act*, where it operates, does not require the Court to fix a new non-parole period covering the whole of the

accumulated sentences. That is because if a non-parole period is fixed in respect of the new sentence imposed, the prisoner will be eligible for parole at the time of the expiration of the non-parole period fixed in respect of the new sentence. In other words, the legislation, although requiring the parole order to be revoked, does not have the effect of revoking the non-parole period fixed by the prior sentencing order.

[9] This is to be contrasted with s 57 of the *Sentencing Act* which deals with the situation where a further sentence is imposed at a time before the expiration of a non-parole period already made in respect of an earlier sentence or sentences. In those circumstances, s 57 requires the sentencer to fix a non-parole period in respect of all of the sentences. Further, in those circumstances, the legislation does not mandate that any new sentence is to commence at the expiration of the earlier sentences. The Court has a discretion whether or not to impose a cumulative or concurrent sentence under s 51 of the *Sentencing Act*.

[10] There is no specific provision of the *Sentencing Act*, apart from s 59, which deals with the current situation. In my opinion, s 59 does not have the effect which his Honour thought it had. Although the parole order in respect of the outstanding balance had been revoked, the appellant was still eligible for release on parole in respect of the outstanding balance. Therefore, the outstanding balance was not, in terms of s 59(1)(a) "… the term or terms in respect of which a non-parole period was not fixed". The minimum term of five years imposed by his Honour clearly fell within s 59(1)(b), so that

would be served first. However, s 59(1)(c) does not direct that the balance of the terms are to be served cumulatively. The ordinary rule is that, "unless otherwise provided by this Act or the Court imposing imprisonment otherwise orders" terms of imprisonment are to be served concurrently.[4] In my opinion, s 59(2) does not have the effect of suspending the whole of the outstanding balance to commence until after the whole of the new sentence has been served, because it is not *necessary* to do so to give effect to the natural meaning of s 59(1).

[11] That being so, the effect of his Honour's sentence is that the total sentence is seven years and 134 days commencing from 16 October 2008, with a non-parole period of five years commencing from 16 October 2008. In other words two years of the period of two years and 134 days is served concurrently with the period of two years after the expiration of the new non-parole period.

[12] It was submitted that his Honour intended that the outstanding balance of the sentence of two years and 134 days be served cumulatively upon the sentence of seven years. I have no doubt that this was so, but s 59(2) of the *Sentencing Act* did not compel this course unless his Honour refused to fix a new non-parole period in respect of the sentence of seven years. I agree with the submissions of counsel for the appellant that s 59(2) is a machinery provision which operates automatically in the circumstances envisaged by the section.

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[4] *Sentencing Act*, s 50.

[13] I do not accept that in the circumstances of this case an order could have been made under the *Sentencing Act* to order that the outstanding balance be ordered to be served wholly cumulatively upon the new sentence of seven years imposed, absent statutory authority. The only other possible source of power is s 51(1) of the *Sentencing Act* which is in the following terms:

> "**51. Cumulative orders of imprisonment**
>
> (1) If an offender is:
>
> (a) serving, or has been sentenced to serve, a term of imprisonment for an offence; and
>
> (b) sentenced to serve another term of imprisonment for another offence,
>
> the term of imprisonment for the other offence may be directed to start from the end of the term of imprisonment for the first offence or an earlier date."

[14] In this case the "other offence" referred to in s 51(1)(b) was the offence of aggravated dangerous act. Therefore an order for accumulation, whether total or partial, could only be made in relation to that offence and not the other way around.

[15] If an order had been made under s 51(1)(b), the seven year sentence could have been ordered to commence from the date of the expiration of the outstanding balance, which would have resulted in a total effective head sentence of nine years and 134 days. In these circumstances the non-parole period of five years would run from the date of the commencement of the

seven year sentence. There is no statutory authority to back date the non-parole period to a date which commences to run before the start of the seven year sentence and no statutory authority to fix a new non-parole period covering the whole term as is the case where s 53(1) applies. However, in these circumstances, s 59(2) applies so that the five years in respect of which a non-parole period had not been fixed must be served first and then the balance of two years and 134 days and the accumulated balance of two years would be required to be served (making a total new balance of four years and 134 days) unless the appellant was again ordered to be released on parole after the five year sentence had been served.

[16] The conclusion I have reached is that the orders made do not properly reflect the effect of what the Chief Justice intended. During submissions his Honour said:

> "Well I'll make it clear now in case there is any question asked about it, that when I do impose a sentence for the offence that is currently before me, I will fix a non-parole period and I will do so on the understanding that the balance of the sentence yet to be served; namely 857 days, service of that period will be suspended by virtue of s 59(2) until completion of the sentence that I impose. In other words *the existing sentence is cumulative upon the sentence I am about to impose*. I will fix a non-parole period on the basis that at the expiration of the non-parole period, the prisoner will be eligible to apply for parole in substance in effect with respect to both sentences." (emphasis mine)

[17] I think it is clear from this passage that his Honour intended that there would be a total sentence of nine years and 134 days, with a non-parole period of five years. In these circumstances, is it open to this Court to

correct the errors made so as to reflect properly what the Chief Justice intended to achieve?

[18] The power to correct sentences imposed by a court is to be found in Part 7 of the *Sentencing Act*. Section 111 deals with the power of the Supreme Court[5] to amend a sentence imposed which was beyond the power of the sentencing court or its own power. The sentence actually imposed was not beyond power. Alternatively, this Court has power to reopen a proceeding to correct sentencing errors under s 112 of the *Sentencing Act*, but the power to do so is limited to circumstances where the sentence imposed was not in accordance with law, or where the sentencing court failed to impose a sentence which the Court legally should have imposed.[6] Although these provisions should not be narrowly construed,[7] neither s 111 nor s 112 applies in the circumstances of this case.

[19] The only other source of power is s 411(4) of the *Criminal Code*, which empowers this Court, on an appeal against sentence, if this Court "is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed" to quash the sentence and "pass such other sentence in substitution therefor".

[20] The Crown had not cross-appealed although an opportunity to do so has been given. In these circumstances, this Court should not increase the

[5] It is clear that the Supreme Court includes the Court of Criminal Appeal: see *Criminal Code*, s 407(1).
[6] See *Sentencing Act*, s 112(1)(a) and s 112(1)(b).
[7] *C.f. Staats v R* (1998) 123 NTR 16 at 25-25 per Angel J.

sentence.[8] Subject to the remaining grounds of the appeal, there is no proper basis for interfering with the sentence actually imposed.

The facts

[21] Before dealing with the remaining grounds of appeal it is necessary to consider the facts.

[22] In the early hours of 2 October 2005, Mr Eustace left a nightclub in Smith Street, Darwin and, with friends, moved out onto Smith Street. At this time the appellant was walking along Smith Street in the direction of Daly Street in a very drunken condition, having celebrated a birthday with his partner and having attended a sporting function during which he had consumed a large quantity of alcohol. The appellant was behaving in a very aggressive manner.

[23] For reasons unknown, a group of young men had chased the appellant and confronted him in Smith Street. A "type of standoff" occurred. A security officer stood between the appellant and the group of young men. He urged the appellant to calm down and move away. The appellant moved a short distance along the footpath on Smith Street until he came upon a tourist sitting on a flower box minding his own business. Without any provocation or reason whatsoever, the appellant punched the tourist in the face.

[24] At this time, Mr Eustace had just left the nightclub and saw the appellant strike the tourist. He came across Smith Street to calm the appellant down.

[8] See *Driver v R* (1990) 70 NTR 9.

There was nothing aggressive in Mr Eustace's behaviour. He had his hand out in a conciliatory fashion, trying to calm the situation. Without any warning the appellant stuck Mr Eustace with a blow to the side of the face, which the learned Chief Justice described as "a king hit". Mr Eustace reeled back and again the security officer intervened.

[25] The appellant then moved off down Smith Street and the group of males followed him. The appellant moved through the Woolworths car park into Cavenagh Street. He was apprehended by police in Cavenagh Street, in the vicinity of either Whitfield Street or Lindsay Street. The appellant was placed in the rear of the police vehicle and taken to the watch house where he was held in protective custody because of his intoxication. He was released mid-morning. He was apparently not then charged.

[26] Mr Eustace suffered significant facial fractures which later required surgery to insert plates and screws. The Victim Impact Statement indicates that Mr Eustace was off work for a month. When he returned to work he was conscious of people looking at his face and wondering if he was a fighter. For a while, when he went out at night he was very anxious and wary of large groups of people and walking around at night. He still felt, as at the time of sentence, that his life was more restricted: "a significant loss of sense of self, of safety and trust and of predictability to life".

Matters personal to the appellant

[27] The appellant was aged 27 at the time, having been born on Thursday Island on 13 May 1978. He was exposed as a child to high levels of alcohol and violence including violence towards women. At the age of nine his mother travelled interstate and he was left to be brought up by his grandmother. He never met his father. At the age of 10, he and one of his brothers moved to Townsville with his grandparents, to live with his great aunt. He attended school there. At age 14 or 15, he went to Darwin with his brother to live with his mother who had relocated there to study. He attended Driver High School for a period of time.

[28] At age 16 or 17 he and his peer group started consuming cannabis and alcohol and his application to school work declined as his consumption increased. His first conviction was on 9 October 1997 for aggravated assault when he was aged 19. He was sentenced to seven months imprisonment suspended on a three year good behaviour bond. His next offending was for a stealing offence committed on 31 August 1997 for which he received a sentence of imprisonment for 14 days – at that time, a mandatory minimum term of 14 days was required for this offence, so the sentence tells us nothing about the level of seriousness of this offence. The next serious offending was for a group of offences committed in 1999 for which he was sentenced on 5 August 1999. No information was provided to the learned Chief Justice concerning the circumstances of that offending, nor indeed of any of the subsequent offending. A presentence report was not

ordered. The only information concerning any of the offending are the bare facts which are summarised in the schedule, the fact that the assault offences for which he was sentenced on 12 December 2001 were all committed on 29 April 2001 when he was in prison and assaulted prison guards and other inmates, as was the assault conviction on 24 July 2003 (victim not specified) which also occurred whilst he was in prison on 15 February 2003.

[29] The appellant also had two subsequent convictions on 23 March 2007 for failing to comply with a restraining order and for aggravated assault male/female, which are referred to in the schedule. The victim in that matter was his partner.

[30] Apart from work experience "for a short period of time" at Berrimah Farm when he was about 16 or 17 he has never been employed until shortly before his arrest when he participated in a course in plaster boarding with Industry Services and Training in Darwin.

[31] In 2001 he was transferred to the Alice Springs Correctional Facility because of a need to control the prison population at Berrimah Correctional Facility. He found this difficult as he was cut off from family visits. He spoke to his mother by telephone on one occasion whilst she was in hospital. His mother passed away shortly after that. He was unable to attend her funeral.

[32] About a month or so after his release on parole on 8 June 2005, he commenced a relationship with his present partner, Ms Osaga. Immediately

after his release he was assisted by a friend to find accommodation but in the latter stages of 2005 he moved in with Ms Osaga at her house. They have two children aged two and a half years and seven months at the time of sentence.

[33] During the latter part of 2006 the appellant lost two close relatives which it was submitted caused him to increase his alcohol consumption. After his arrest, his partner has still been very supportive of him with regular prison visits.

Remarks on sentencing

[34] The learned Chief Justice, in his remarks on sentencing, referred to the following matters in addition to the matters I have already referred to above:

- The fact that the offence was committed whilst under the influence of alcohol was an aggravating matter.
- Alcohol was a major problem.
- At the time of his release on parole, he had no employment, no experience in living in the community by himself and no supportive relationships.
- Although the appellant hoped to undergo courses in prison, his prospects of rehabilitation were not good.
- Personal deterrence was a significant sentencing consideration.

- He was not entitled to the benefit of a guilty plea and there was no material to suggest that he was remorseful.

- There were no mitigating personal or objective factors.

- The offending was in the more serious category of crimes of dangerous act of this type.

- General deterrence was an important factor.

Grounds of appeal

[35] The grounds of appeal are:

1. That the sentence imposed was manifestly excessive.

2. That the learned sentencing Judge failed to give proper weight to the principle of totality.

3. That the learned sentencing Judge erred in fixing a non-parole period of five years.

[36] Ground 3 was abandoned on the basis that it was taken into account on ground 1.

Ground 1

[37] Counsel for the appellant submitted that there were a number of features which were mitigating which were overlooked. First, the conduct was extremely spontaneous and unplanned. Secondly, the injury to the victim was caused by a single punch and may be contrasted with cases where

multiple blows were delivered. Thirdly, no weapon was used. I would not regard these factors as mitigating, but they are clearly relevant to the appellant's degree of culpability.

[38] Essentially, the appellant's contention was that the sentence imposed was disproportionate to the objective seriousness of the offence.

[39] In further support of the appellant's argument, we were provided with a table of sentences imposed by this Court for offences against s 154 with the same circumstances of aggravation (excluding offences involving the driving of motor vehicles). The table referred to 32 such sentences. In 30 of these cases there had been a plea of guilty. In 26 cases, a weapon of some kind had been used. The table demonstrates that the longest head sentence imposed was imprisonment for six years with a non-parole period of three years.[9] In that case the defendant was convicted after trial. A knife had been used to inflict wounds to the shoulder, neck and stomach. The average head sentence imposed was in the order of 3-4 years. In every case (except for *R v Kirkman*[10] and *R v Peters*[11]), the Court imposed either a fully suspended sentence or a partly suspended sentence. In many, if not most of the cases, the injuries imposed appear to have been at least as severe if not more severe than the instant case. Whilst the table excites interest, in my view the material available to the Court is not sufficiently detailed and

[9] *R v Kirkman (*Sentencing Remarks, NTSC, Angel ACJ, 9 July 2004).
[10] Sentencing Remarks, NTSC, Angel ACJ, 9 July 2004.
[11] Sentencing Remarks, NTSC, Riley J, 4 May 2005.

extensive to form a view, based solely on past sentences, that the instant sentence is necessarily manifestly excessive.

[40] However, it is difficult to see how the objective circumstances of the offence were so serious as to warrant a head sentence of seven years. Apart from the circumstances of aggravation which increased the maximum penalty to 11 years, the only aggravating feature was that the offence was committed so shortly after release on parole. In *Baumer v The Queen*,[12] the High Court had occasion to consider s 154, observing in the joint judgment of Mason CJ, Wilson, Deane, Dawson and Gaudron JJ[13] the section is unusual and that it

> "...casts a wide net so as to cover all acts and omissions endangering the life, health or safety of any member of the public where the risk ought to have been clearly foreseen and the act or omission avoided. The offence so created can therefore cover an enormous range of conduct from the comparatively trivial to the most serious. The maximum penalties prescribed must be seen in that light".

[41] Their Honours went on to say:[14]

> "...the task of the sentencing judge was to evaluate the circumstances of the offence in their entirety, including the influence of alcohol, and to determine an appropriate term of imprisonment having regard to the prescribed maximum of 11 years and to the possible range of offences to which it applied. His Honour purported to proceed in this way. However, the manner in which his Honour performed the task is open to question in two respects. We have already referred to his Honour's observation that "the literally appalling record" of the applicant increased the seriousness of the offence. If this means no more than that such a record would make it difficult to view the circumstances of the offence or of the offender with any degree of

[12] (1988) 166 CLR 51.
[13] *Baumer v The Queen* (1988) 166 CLR 51 at 55.
[14] *Baumer v The Queen* (1988) 166 CLR 51 at 57-58.

> leniency then, of course, such a remark would be understandable and unobjectionable. It would clearly be wrong if, because of the record, his Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence. Similarly, his Honour's observation that people with the propensity of the applicant to continue to commit driving offences must be "kept away" for the protection of the public is open to misunderstanding. Propensity may inhibit mitigation but in the absence of statutory authority it cannot do more. In applying a section like s 154, the sole criterion relevant to a determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence".

[42] In *Baumer*, the original sentence passed was imprisonment for eight years with a non-parole period of four years, plus a licence disqualification for 20 years. The High Court allowed the appeal and remitted the case to the Court of Criminal Appeal for re-sentence. On re-sentencing, the Court of Criminal Appeal[15] allowed the appeal and imposed a sentence of imprisonment for five years, with a non-parole period of two and a half years. The period of licence disqualification was reduced to seven years. In dealing with the appeal, Nader J was unable to find any specific error by the sentencing Judge, but he concluded from the severity of the sentence imposed that it was not possible to say with confidence that his Honour did not impose a sentence greater than that which fitted the crime by allowing the appellant's bad record and propensity to operate as aggravating factors.

[43] Kearney J referred, in his judgment, to the well-known passage in *Veen v The Queen (No 2)*[16] where the High Court dealt with the relevance of

[15] *Baumer v The Queen* (1989) 40 A Crim R 74.
[16] (1988) 164 CLR 465 at 477-478.

antecedent criminal history, observing that this passage must now be understood in the light of what was later said in *Baumer* as to the "sole criterion" for the determination of the upper limit of the appropriate sentence.[17] Kearney J was of the view that the learned trial Judge had in fact erred in treating the appellant's record as "increasing the seriousness of the crime beyond that warranted by the circumstances of its commission".[18] Martin J also agreed that the trial Judge erred in his treatment of the appellant's prior convictions.

[44] These decisions are binding on this Court. It would be appealable error if the Chief Justice had permitted the appellant's prior record to increase the sentence beyond that which the objective circumstances warranted. The submission of counsel for the respondent that the appellant's record was highly relevant to the sentencing exercise, referring to the passage in *Veen v The Queen (No 2)*[19] to which I have referred, cannot be taken further than *Baumer* permits.

[45] There is nothing in the sentencing remarks which indicates that his Honour specifically treated the appellant's prior record as aggravating the objective seriousness of the offence. His Honour said that there was nothing to mitigate the objective circumstances of the crime and nothing in the appellant's personal circumstances by way of mitigation either. I am unable to find any specific error. However, even if no error is shown this Court

[17] *Baumer v The Queen* (1989) 40 A Crim R 74 at 85.
[18] *Baumer v The Queen* (1989) 40 A Crim R 74 at 85.
[19] (1988) 164 CLR 465 at 477-478.

may infer from the severity of the sentence imposed that an error must have occurred, if the sentence is unreasonable or unjust,[20] or disproportionate to the objective circumstances of the offence. It is difficult to see how the objective circumstances warranted a sentence of such severity, even allowing for the absence of any mitigating factors. All the more so, if as Riley J contends, that the learned Chief Justice in fact imposed his sentence cumulatively upon the outstanding balance pursuant to s 51 of the *Sentencing Act*.

[46] Furthermore, it is relevant to take into account that in 2005 s 154 had been repealed by the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* which came into force on 20 December 2006 (assented to on 22 November 2005).

[47] At the time of sentence in 2008, although still liable to be convicted of and sentenced for this offence,[21] the new offence of negligently causing serious harm, which relevantly replaced s 154, provided for a maximum penalty of 10 years.[22]

[48] The effect of the repeal of the section, when the only other available relevant alternative is a conviction for an offence carrying a lesser maximum penalty is relevant to sentencing discretion,[23] on the basis that the legislature

[20] *House v The King* (1936) 55 CLR 499 at 505.
[21] See s 444 of the *Criminal Code (NT)*.
[22] See s 174E.
[23] See Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed at 1.406-1.408.

has shown that it regards the offending to be somewhat less serious than was formerly the case.[24]

[49] I would allow the appeal on this ground.

Conclusions

[50] In my opinion, the appeal should be allowed and the appellant re-sentenced. At the hearing an affidavit was received dealing with the appellant's circumstances since his sentence was imposed. The appellant has since then been a model prisoner. There have been no reports of further offending, prison misconduct or negative behaviour. He has been in permanent fulltime employment in the kitchen as a store-person for the last 11 months. He intends to voluntarily undertake alcohol and other drugs counselling and is presently on a waiting list.

[51] Whilst the circumstances of the appellant since his return to Darwin Correctional Facility are encouraging, the appellant's prospects of rehabilitation are perhaps only slightly better than was assessed by the learned Chief Justice.

Orders

[52] I would allow the appeal and set aside the sentence imposed and substitute a sentence of five years and six months commencing from 16 October 2008. I would fix a non-parole period of four years. The effect of this sentence is that the appellant will serve four years before again being eligible for

[24] *R v McInerney* (1986) 42 SASR 111; *Nitschke v Halliday* (1982) 30 SASR 119.

parole. If he is not released on parole he will not be released until he has served six years and 134 days.

Riley J:

[53] Following a trial by jury, the appellant was found guilty of committing a dangerous act which caused grievous harm to his victim. At the time of the offending the appellant was intoxicated. The maximum penalty applicable to the offence was imprisonment for 11 years. On 28 October 2008 the appellant was sentenced to imprisonment for a period of seven years with a non-parole period of five years.

[54] The appellant was granted leave to appeal on two grounds:

(a) the sentence imposed was manifestly excessive; and

(b) the learned sentencing Judge failed to give proper weight to the application of the totality principle.

[55] During the hearing of the appeal the appellant sought and was granted leave to add a further ground of appeal in the following terms:

(c) The learned sentencing Judge erred in ordering that, pursuant to sections 59 and 64 of the *Sentencing Act*:

- the service of the unexpired sentence of 2 years 127 days relating to the revocation of parole be suspended in order that the sentence of seven years imprisonment be first served; and
- that sentence of 2 years 127 days commence at the expiration of the seven-year sentence.

The circumstances of the offending

[56] The offending occurred outside licensed premises in Smith Street Darwin in the early hours of 2 October 2005. At the time the appellant had been present in Smith Street in a heavily intoxicated condition. There was a confrontation between the appellant and some young men. A security officer intervened and the appellant moved a short distance away. The appellant then saw a person, simply described as "a tourist", sitting on a flower box. Without any provocation or warning, and whilst the tourist remained vulnerable in his seated position, the appellant punched him in the face.

[57] The male victim of the subsequent attack observed the appellant strike the tourist and he approached the appellant in an effort to calm him. The appellant then struck the victim without warning and without any provocation. The blow was described by the learned sentencing Judge as a "king hit to the side of his face causing significant facial fractures which later required surgery to insert plates and screws".

[58] Thereafter, the appellant left the area and was subsequently located and apprehended by police. The appellant was placed in the watchhouse in protective custody until he sobered up.

[59] At the trial the appellant pleaded not guilty and argued that the prosecution had not proved that he was the assailant. He was found guilty of the offence of committing a dangerous act. The jury also convicted the appellant of two

circumstances of aggravation being that the appellant caused grievous harm to his victim and that, at the time of delivering the blow, he was under the influence of an intoxicating substance, alcohol.

[60] During the course of the sentencing hearing it was revealed that the appellant had an unfortunate criminal history. His offending commenced with a conviction for aggravated assault in 1997 for which he was sentenced to a fully suspended term of imprisonment of seven months and he was placed on a good behaviour bond for a period of three years. Regrettably, he was convicted of stealing on two separate occasions during the course of the bond. He was sentenced to imprisonment for periods of 14 days and 90 days in relation to those offences. On 5 August 1999 he was convicted of the very serious offences of entering an occupied dwelling at night with intent to commit a crime and of having had sexual intercourse with the occupant without her consent. In relation to those offences he was sentenced to imprisonment for the term of seven years with a non-parole period of five years.

[61] Whilst in prison the appellant continued to display violent behaviour. On 29 April 2001 he committed offences of assaulting prison officers and two inmates involving the occasioning of bodily harm to two of the victims. This offending occurred when the appellant was not under the influence of alcohol. A term of imprisonment for 18 months was imposed as a consequence. In July 2003 the appellant was again dealt with for assault occasioning bodily harm in relation to an incident which occurred in

February 2003. He was sentenced to a further period of imprisonment of three months.

[62] On 8 June 2005 the appellant was released from prison on parole having served just over six years. He was then aged 27 years. He remained out of trouble for the short period between June 2005 and October 2005 when the offending that is the subject of these proceedings occurred. He was released on bail on 13 April 2006.

[63] On 19 January 2007, whilst on bail, he assaulted his de facto wife and, in so doing, breached a restraining order. He was remanded in custody in relation to that offending and then, on 23 March 2007, sentenced to imprisonment for a period of six months and 14 days with the sentence being backdated and then wholly suspended. This offending was subsequent offending for the purposes of the sentencing exercise before the learned sentencing Judge.

[64] On 27 April 2007 the Parole Board revoked his parole and he was eventually arrested on 10 April 2008 and remanded in custody. At the date of his sentencing hearing on 28 October 2008 it was thought that a period of two years and 127 days represented the unserved balance of the restored sentence. Following a recalculation by the parties it seems that the total effective time the appellant was liable to spend in custody, as at the date of imposition of the sentence, was a period of nine years and 134 days with a non-parole period of five years.

Ground 3: The Sentencing Act

[65] In the course of the hearing of the appeal the appellant was granted leave to add the fresh ground of appeal referred to above[25]. It is convenient to address this ground first. The parties were directed to provide written submissions and they have now done so. The ground of appeal requires a consideration of the application of s 51, s 59 and s 64 of the *Sentencing Act* in the circumstances of this matter.

[66] The offending history of the appellant is complicated, however, it is sufficient for present purposes to note the following summary of relevant events and the dates upon which they occurred:

15.08.1999	appellant convicted of rape and sentenced to imprisonment for seven years;
08.06.2005	released on parole;
02.10.2005	committed the dangerous act the subject of these proceedings;
25.11.2005	remanded in custody regarding the offence of dangerous act;
13.04.2006	released on bail;
19.01.2007	assaulted de facto wife and breached restraining order;
25.01.2007	remanded in custody regarding the assault and breach;
23.03.2007	convicted of the assault and breach and sentenced to imprisonment (backdated and suspended);
29.03.2007	again released on bail regarding the offence of dangerous act;
27.04.2007	parole revoked by the Parole Board under s 5(6) of the *Parole of Prisoners Act*;

[25] Paragraph 55

10.04.2008	warrant executed, appellant remanded in custody;
28.10.2008	appellant sentenced in relation to the offence of dangerous act.

[67] During the sentencing submissions counsel discussed with the learned sentencing Judge the application of the various provisions of the *Sentencing Act*. Reference was made to s 51, s 59 and s 64 of the Act. In the course of that discussion and before settling upon the applicable provision his Honour made it clear that he was intending to accumulate the sentences and he did so by saying:

> "Well I can tell you I am going to accumulate them ... In one form or another, there will be accumulation either totally or at least partially."

[68] In submissions made to the learned sentencing Judge, and again in this Court, it was correctly agreed by the parties that s 64 of the *Sentencing Act* has no application to the present proceedings. Section 64 has application where a person is sentenced or committed to a term of imprisonment for an offence occurring while a parole order is or was in force and where the parole order is by reason of that sentence deemed to have been revoked by operation of s 5(8) of the *Parole of Prisoners Act*. In those identified circumstances the section requires the court to order the person to be imprisoned for the term that he had not served at the time of his release under the parole order and also provides that the restored term of imprisonment shall commence at the expiration of the term of imprisonment to which the person is sentenced for the later offence. At the time of the

imposition of the sentence in the present proceedings the appellant was already in custody, his parole having been revoked by the Parole Board under s 5(6) of the *Parole of Prisoners Act*. Section 64 of the *Sentencing Act* had no application, the learned sentencing Judge did not rely upon it and his Honour did not fall into error in this regard.

[69] In the sentencing proceedings his Honour was also referred to s 59 of the *Sentencing Act*. That section is as follows:

> 59 Order of service of sentences of imprisonment
>
> (1) Where an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender shall serve:
>
> (a) the term or terms in respect of which a non-parole period was not fixed;
>
> (b) the non-parole period; and
>
> (c) unless and until released on parole, the balance of the term or terms after the end of the non-parole period,
>
> in that order.
>
> (2) Where, during the service of a sentence of imprisonment, a further sentence of imprisonment is imposed, service of the first-mentioned sentence shall, if necessary, be suspended in order that the sentences may be served in the order referred to in subsection (1).

[70] His Honour considered the submissions and then, with the apparent agreement of counsel appearing before him, made the following observations:

> All right, so s 59 makes the order. All right. Well I will make it clear now in case there is any question asked about it, that when I do impose a sentence for the offence that is currently before me, I will fix a non-parole period and I will do so on the understanding that the balance of the sentence yet to be served; namely, 857 days, service of that period will be suspended by virtue of s 59(2) until completion of the sentence that I impose. In other words, the existing sentence is cumulative upon the sentence I am about to impose. I will fix a non-parole period on the basis that at the expiration of the non-parole period, the prisoner will be eligible to apply for parole in substance in effect with respect to both sentences.

[71] When his Honour imposed the sentence he observed:

> ... service of that balance of over two years will be suspended while you serve the sentence I am about to impose. In other words, the existing sentence will be cumulative upon the sentence I am about to impose. So I must also look at the question of what the law calls totality.

[72] Division 5 of Pt 3 of the *Sentencing Act* deals with custodial orders. Subdivision 3 deals specifically with imprisonment. The sections with which we are concerned in this appeal fall within subdivision 3. For present purposes s 50 of the Act provides a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders": *Hampton v The Queen*.[26] Section 51 of the Act then provides for a general discretion in the court to direct accumulation of sentences either wholly or in part. Section 59 provides for the order in which sentences of imprisonment are to be served where an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed. In such circumstances the section logically provides that a

[26] [2008)] NTCCA 5 at [35].

sentence in respect of which a non-parole period was not fixed shall be served first, followed by the non-parole period and then the balance of the term or terms during which the prisoner is eligible to apply for parole.

[73] The appellant submitted the learned sentencing Judge may have relied upon s 59 of the *Sentencing Act* as the source of his power to accumulate. If his Honour did so he was in error. However, my reading of the remarks of the learned sentencing Judge suggest that his Honour regarded the provision as a machinery provision which necessarily applied to regulate the order of service of the sentences he was about to impose.

[74] The section offers no guidance in relation to the accumulation or otherwise of sentences. The section creates a regime providing for the order in which sentences are to be served. The section does not create an independent source of power to order accumulation. Section 59(2) of the Act does not mandate the suspension of any existing sentence but, rather, is a machinery provision, having application only if it be "necessary" for the purposes of ensuring compliance with the order of priorities established in s 59(1) of the Act.

[75] In the course of discussions with counsel the learned sentencing Judge identified s 51 of the *Sentencing Act* as a relevant source of power to achieve the result upon which he had settled. Although his Honour did not expressly refer to the section at the time of imposing sentence it is the applicable provision allowing a sentencing Judge to provide direction as to

concurrency or accumulation of sentences in the circumstances of this matter. Section 51 is in the following terms:

> (1) If an offender is:
>
> (a) serving, or has been sentenced to serve, a term of imprisonment for an offence; and
>
> (b) sentenced to serve another term of imprisonment for another offence,
>
> the term of imprisonment for the other offence may be directed to start from the end of the term of imprisonment for the first offence or an earlier date.
>
> (2) Subsection (1) applies whether the term of imprisonment for the first offence is being served concurrently with or cumulatively on the term of imprisonment for another offence.

[76] In the present case the appellant was serving a term of imprisonment for the assault and breach (the first offence). He was then sentenced by the learned sentencing Judge to serve another term of imprisonment for "another offence" being the aggravated dangerous act. The learned sentencing Judge was, therefore, able to order that the term of imprisonment for the dangerous act start from the end of the term of imprisonment for the earlier offending.

[77] His Honour having so ordered, s 59 would then dictate the order in which the sentences were to be served. Both the sentence for the first offence and that for the dangerous act were sentences in relation to which non-parole periods had been fixed and, therefore, s 59(1)(a) would not apply. It follows that, pursuant to s 59(1)(b), the first sentence to be served would be the non-parole period fixed in relation to the dangerous act ie the period of five

years. Thereafter, unless the offender was released on parole, the balance of the terms would be served. In effect, and as his Honour noted, the sentence he imposed and the non-parole period would commence on 16 October 2008. In order to give effect to the order of service of sentences provided for in s 59(1) it was "necessary" for s 59(2) to have application. This appears to have been the view adopted by his Honour.

[78] In my opinion, the fact that his Honour did not expressly rely upon s 51 of the Act does not lead to a need for this Court to interfere with the sentence. It is apparent that the learned sentencing Judge had identified the sentence he wished to impose and any view he may have formed as to the terms of s 59 did not have any impact upon his determination of the appropriate sentence.

[79] Reading the transcript of the submissions and also the sentencing remarks it is readily apparent that the learned sentencing Judge intended to make the sentence he imposed cumulative upon the sentence to be served as a consequence of the earlier revocation of parole. In the course of the discussion his Honour said to counsel that he was going to "accumulate them" and then went on to say "there will be accumulation either totally or at least partially". When the learned sentencing Judge sentenced the appellant it is plain that he intended to wholly accumulate the sentences. He did not do so because s 59 of the *Sentencing Act* mandated such a result but, rather, his Honour relied upon the provisions of s 59 to achieve the outcome

he regarded as appropriate in all the circumstances. His Honour then considered that sentence in light of the totality principle and confirmed it.

[80] This is not a case such as *Bara v The Queen*[27] where the learned sentencing Judge considered himself bound by an incorrect view of the provisions of the *Sentencing Act*. In the present case his Honour had a clear view of the sentence he wished to impose and, in my opinion, the terms of the *Sentencing Act* permitted him to impose that sentence.

[81] I would dismiss the appeal on this ground.

Ground 2: The principle of totality

[82] The appellant complained that his Honour failed to give proper weight to the principle of totality. Reference was made to the judgment of this Court in *Serra v The Queen*[28] where it was said:

> In determining the appropriate sentence for a person such as the appellant it is necessary for a court to take into account the total period to be spent in custody and not just the period of the sentence then to be imposed. In so doing the court is able to mitigate "what strict justice would otherwise indicate" and thereby avoid a sentence that is crushing: *Postiglione v The Queen* (1996-1997) 189 CLR 295 at 308.

[83] Reference was also made to the judgment of the High Court in *Mill v The Queen*[29] where the following was said:

> The totality principle is a recognised principle of sentencing formulated to assist a court when sentencing an offender for a

[27] [1999] NTCCA 42
[28] (2004) NTCCA 3 at [13]
[29] (1988) 166 CLR 59 at [62 - 63]

number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed (1979), pp 56 - 57 as follows (omitting references):

> The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong'; 'when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.

[84] Whilst the appellant did not submit that the learned sentencing Judge failed to take the totality principle into account, it was argued that "improper weight was given to this principle as evidenced by the magnitude of the head sentence imposed in conjunction with the two years and 141 days remaining to be served at the expiration of the new sentence." The appellant contended that the combination of sentences was "overly severe". It was also submitted that his Honour erred in failing to take a "last look" at the total sentence to see whether it "looked wrong".

[85] Immediately before imposing sentence the learned sentencing Judge dealt with the issue of totality. His Honour stated:

> In imposing the sentence I am about to fix I do so on the basis that you have something in the order of two years and 127 days (sic 134 days) left to serve on the previous sentences that were imposed. I note that service of that balance of over two years will be suspended

> while you serve the sentence I am about to impose. In other words, the existing sentence will be cumulative upon the sentence I am about to impose. So I must also look at the question of what the law calls totality. What is the total period that you will be liable to serve and I must consider the total criminal conduct and whether that total period is proportionate and not, as it is said in the law, crushing.

[86] It is clear that his Honour gave due consideration to the principle of totality. It remains to consider whether the sentence imposed was manifestly excessive in all the circumstances.

Ground 1: The sentence was manifestly excessive

[87] It was submitted on behalf of the appellant that the magnitude of the sentence imposed, when measured against the objective seriousness of the offending, was manifestly excessive.

[88] The principles applicable to such an appeal are well known and have been restated in many authorities. 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. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive, but manifestly so. The appellant must show

that the sentence was clearly and obviously, and not just arguably, excessive.

[89] It was submitted on behalf of the appellant that the offence was constituted by one punch, no weapon was used and there was no evidence the injury was life-threatening. The conduct was said to have been spontaneous and unplanned although it was correctly acknowledged on behalf of the appellant that this was not a matter of particular weight in the circumstances of an outburst of drunken violence. In addition, it is to be noted that the attack came after two other incidents including one where the tourist was punched. The suggested spontaneity is to be seen in light of the ongoing aggressive conduct of the appellant over a period of time.

[90] In the course of submissions other matters that had been placed before the learned sentencing Judge were highlighted. These included that the appellant had entered into a long-term relationship just prior to the offence and that he was, at the time of sentencing, the father of two children with his partner. In this regard it is of relevance to note that the sentence of imprisonment imposed in March 2007 related to an assault upon the partner of the appellant and occurred in circumstances where the appellant breached a restraining order.

[91] In his sentencing remarks the learned Judge referred to the matters raised by the appellant by way of mitigation and went on to say:

> Although there are features of your background which are capable of evoking a degree of sympathy for you, those features do not provide any mitigation of significance in connection with your offending. You are a mature person who has previously been in trouble with the law for crimes of violence and you have been given opportunities to endeavour to mend your ways, but you have not learned from your previous experiences in the criminal system. Personal deterrence, that is, deterring you from offending again is a significant factor in the exercise of the sentencing discretion.
>
> When I look to the future I should also mention that you are not entitled, in terms of the sentence today, to the benefit of a plea of guilty and there is no material before me to suggest that you are in any way sorry for what you did. Until you learn to accept responsibility for your actions, and until you have true insight into your problems, and until you are able to truly regret what you did and feel sorry for the victim, it cannot be said with any confidence that you have any prospects of rehabilitation. So, Mr Hankin, there is nothing to mitigate your offending by way of matters personal to you.

[92] In my opinion, those observations accurately reflect the personal position of the appellant at the time he appeared before the learned sentencing Judge.

[93] The offending was clearly serious. It was, as his Honour observed, a vicious attack by “a big, strong man and without any provocation or reason whatsoever". The attack upon the victim in the present proceedings occurred without warning. The victim had not been involved in any prior altercation with the appellant and was simply an innocent bystander trying to calm the appellant down to prevent him from committing further offences of violence. The appellant was intoxicated at the time of the offending and that is an aggravating circumstance for the purpose of sentencing.

[94] By his conduct the appellant caused serious facial injuries to the victim leaving him with ongoing psychological problems. The victim described his condition in the following terms:

> I was hit to the side of the face by one punch; my left side of my face was shattered and a broken nose. I now have three plates which make up my left socket and cheek area. I was taken to hospital that day and had x-rays. I was operated on at a later date. Before I had the operation I had to take it very easy, I was always wary of people around me. The doctors told me that if I didn't have the operation I could go blind if I had a knock to the area. As a result of the attack I had been off work approximately 1 month.

[95] The appellant had already been involved in two incidents, one of which included punching an innocent bystander to the face without any provocation or warning. The act of violence which followed was random, unexplained, unnecessary and unprovoked. It occurred whilst the appellant was on parole in relation to another offence of violence. Both the consumption of alcohol and the re-offending were in breach of the terms of his parole. There were no mitigating circumstances. In my view, his Honour was correct in characterising the offending as being within the more serious category of "crimes of dangerous act of this type" referring to offences of drunken street violence.

[96] In determining the sentence to be imposed his Honour clearly and appropriately distinguished this offending from the offence of which the appellant had been found not guilty, being the offence of unlawfully causing grievous harm.

[97] The learned sentencing Judge gave emphasis to the need for general deterrence and the denunciation of alcohol fuelled violence which is, regrettably, commonplace in the Northern Territory. In addition, and consistent with the ongoing violent behaviour of the appellant, his Honour placed emphasis upon the need for specific deterrence. The appellant had a history of violence including violence committed whilst serving a term of imprisonment, violence committed whilst on parole and violence committed in breach of a restraining order. As the respondent submitted, his history of offences of serious violence was highly relevant to the sentencing exercise.

[98] The assessment of the relevance of the criminal history of the appellant is guided by the much quoted observations of the High Court in *Veen v The Queen (No 2)*[30]:

> The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.

[99] In *Hoare v The Queen*[31] the High Court observed that a sentence of imprisonment imposed by a court should never exceed that which can be

[30] (1987-1988) 164 CLR 465 at 477
[31] (1989) 167 CLR 348 at 354

justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.

[100] In *Baumer v The Queen*[32], the High Court had occasion to consider s 154 of the *Criminal Code*, where, in the joint judgment of Mason CJ, Wilson, Deane, Dawson and Gaudron JJ[33] it was noted that the section was unusual and that it:

> "…casts a wide net so as to cover all acts and omissions endangering the life, health or safety of any member of the public where the risk ought to have been clearly foreseen and the act or omission avoided. The offence so created can therefore cover an enormous range of conduct from the comparatively trivial to the most serious. The maximum penalties prescribed must be seen in that light".

[101] Their Honours went on to say:[34]

> "…the task of the sentencing judge was to evaluate the circumstances of the offence in their entirety, including the influence of alcohol, and to determine an appropriate term of imprisonment having regard to the prescribed maximum of 11 years and to the possible range of offences to which it applied. His Honour purported to proceed in this way. However, the manner in which his Honour performed the task is open to question in two respects. We have already referred to his Honour's observation that "the literally appalling record" of the applicant increased the seriousness of the offence. If this means no more than that such a record would make it difficult to view the circumstances of the offence or of the offender with any degree of leniency then, of course, such a remark would be understandable and unobjectionable. It would clearly be wrong if, because of the record, his Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence. Similarly, his Honour's observation that people with the propensity of the applicant to continue to commit driving offences must be "kept away" for the protection of the public is open to misunderstanding. Propensity may inhibit mitigation but in the absence of statutory

[32] (1988) 166 CLR 51.
[33] *Baumer v The Queen* (1988) 166 CLR 51 at 55.
[34] *Baumer v The Queen* (1988) 166 CLR 51 at 57-58.

> authority it cannot do more. In applying a section like s 154, the sole criterion relevant to a determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence".

[102] There is nothing in the sentencing remarks of the learned sentencing Judge to suggest that he increased the sentence of the appellant beyond what he considered to be an appropriate sentence because of the poor criminal history of the appellant or that he did other than impose a sentence designed to fit the crime.

[103] The appellant demonstrated no contrition. His prospects for rehabilitation were correctly assessed as being "not good" and the observation was made that there was "at the very least ... a long way to go".

[104] The circumstances of the offending, considered in light of the criminal history of the appellant, demonstrated a continuing attitude of disobedience of the law on his part. The criminal history illuminated the moral culpability of the appellant and highlighted his dangerous propensity. The record plainly made it difficult to view the circumstances of the offence or of the offender with any degree of leniency. General deterrence and personal deterrence were factors of significance in this case. Retribution and the protection of the public were also matters demanding a sentence reflecting condign punishment.

[105] In support of the submissions of the appellant a schedule of sentences imposed under the relevant section (now repealed) of the *Criminal Code* was

presented to the Court. In my opinion, there was insufficient information contained in the schedule to enable any meaningful comparison to be made between the offences referred to and the matter presently under consideration. Counsel for the respondent helpfully reviewed the matters referred to in the schedule and highlighted some of the differences between the matters identified and the matter before the Court. The schedule did not serve to assist in identifying the standards of sentencing customarily observed with respect to this type of offending or the place the particular offending occupied in the scale of seriousness of crimes of this type: *Hedgecock v The Queen*[35]. I found the schedule to be of little assistance.

[106] Notwithstanding my conclusion that identified error on the part of his Honour has not been established, I am of the view that the sentence imposed was so excessive as to manifest error. Whilst the offending was clearly serious and demanding of a significant sentence, the sentence imposed was disproportionate to the objective circumstances of the offence.

[107] The appeal should be allowed on this ground and the sentence should be set aside. I agree with the substitute sentence proposed by Mildren J.

Reeves J:

[108] I have had the benefit of reading the draft Reasons for Judgment prepared by Mildren J and Riley J. They each set out the relevant facts and provisions of

[35] [2008] NTCCA 1 at [21].

the *Sentencing Act* ('the Act'), so it is not necessary for me to do more than set out the conclusions I have reached.

[109] First, I respectfully agree with Mildren J (at [10]) that the learned trial judge appears to have misconstrued the effect of s 59 of the Act, particularly sub-s 59(1)(c), in concluding that the balances of the existing and new terms of imprisonment were to be served cumulatively.

[110] It appears that the learned trial judge was led to that conclusion during sentencing submissions, in the following exchange with Mr McGorey, Counsel for Mr Hankin:

> HIS HONOUR: … if I impose a sentence now, 59(1) provides: 'Where an offender has been sentenced to several terms'; well once I impose sentence that applies, doesn't it?
>
> Mr McGOREY: It's just, your Honour, when I go through the progression of (a), (b) and (c) there it seems to read that you would - - -
>
> HIS HONOUR: Well that's right, (a) is out.
>
> Mr McGOREY: That's correct.
>
> HIS HONOUR: I impose a sentence now and I fix a non parole period, he serves the non parole period first - - -
>
> MR McGOREY: That's correct.
>
> HIS HONOUR: **--- and then until released on parole, the balance that's due; namely, the balance under my sentence, followed by the balance of the existing sentence**.
>
> MR McGOREY: That would seem to make sense because technically Mr Hankin is entitled to apply for parole in the current sentence he's serving.
>
> HIS HONOUR: Yes.
>
> (emphasis added)

[111] About one page later in the transcript, the learned trial judge summarised his conclusion about these issues. That summary is set out in the Reasons for Judgment of Riley J at [70] and Mildren J at [16].

[112] I should record that, in his Reasons, Riley J has expressed the same view about the correct construction of s 59 (at [73]), but he then observes that the learned trial judge did not err in his treatment of s 59 of the Act. It follows that I respectfully disagree with Riley J on this latter aspect.

[113] Secondly, when it comes to the next issue, I respectfully disagree with Mildren J (at [13] to [15]) that neither s 51 of the Act, nor any other provision, gave the learned trial judge the power to order that the balance of the existing term of imprisonment was to be served wholly cumulatively upon a new term of imprisonment.

[114] On this issue, subject to the additional comments I have set out below, I essentially agree with the reasoning of Riley J (at [72] to [78]).

[115] The comments I would wish to add are as follows.

[116] First, in my view, the express source of power to order that two or more terms of imprisonment are to be served cumulatively is contained in the excepting words of s 50: "Unless … the Court … otherwise orders …", the terms of imprisonment shall be served concurrently. In other words, in my view, s 50 provides that all sentences of imprisonment are to be served

concurrently unless the Court otherwise orders that they be served cumulatively.

[117] It is quite clear from the exchanges that occurred during sentencing submissions before the learned trial judge that, from early on in that process, his Honour intended to order that the existing term of imprisonment be served cumulatively with the new term of imprisonment that he was about to fix. The following provides an example:

> Mr McGOREY: Your Honour, my starting point is I consider s 59 …. I note the approach of his Honour Riley J in the decision of – sentencing remains of Peter Russell Collins where it wasn't even deemed necessary to immediately accumulate both sentences.
>
> HIS HONOUR: Well I can tell you I'm going to accumulate them.
>
> Mr McGOREY: Your Honour, I - - -
>
> HIS HONOUR: In one form or another, there will be accumulation either totally or at least partially.

[118] Later, after discussing ss 64 and 59 at some length, the learned trial judge turned to the provisions of s 51 of the Act and identified it as an alternative provision under which he could order that the sentences be served cumulatively. That exchange was as follows:

> HIS HONOUR: Now, the other alternative would be for me to direct under s 51(1) that the sentence I impose now be directed to start at the end of the current sentence, which would have the same effect.
>
> Mr McGOREY: Your new – the sentences be served today, your Honour?
>
> HIS HONOUR: Yes. I could make that – under 51(1) I could make it cumulative on the current sentence, couldn't I? 'If an offender is serving a term', which he is, 'and is sentenced to another term for another offence, the term for the other offence; that is, for mine, the

one I'm dealing with, 'may be directed to start from the end of the term of imprisonment for the first offence.'

…

HIS HONOUR: I think you're right but - - -

…

HIS HONOUR: - - -in theory it wouldn't make any difference, would it?

Mr McGOREY: No, I don't think so. Well - - -

HIS HONOUR: Sorry, not in theory, in practical terms.

[119] While s 51 of the Act gives the discretion to a judge to order that two or more terms of imprisonment be served cumulatively, I do not consider that the discretion contained in s 51 limits the general power contained in s 50 to order that the sentences be served cumulatively. Moreover, I do not consider that the discretionary provisions of s 51 prescribe the only way in which cumulative sentences may be ordered by the Court, particularly as to the sequence in which the sentences of imprisonment are to be accumulated.

[120] Even if I am wrong about this conclusion, I consider the words at the end of s 51: "or an earlier date", would allow for a different sequence to that described in sub-ss 51(1) by fixing an earlier date for the commencement of the new term of imprisonment.

[121] Finally, on this aspect, I do not consider it is of any moment that, when he came to his concluding remarks on the sentencing of Mr Hankin, the learned trial judge did not specifically refer to any of these sections, ie ss 50, 51 or 59. Even if his Honour was in error about the construction of s 59, or s 51 for that matter, I consider he had the power under s 50 to order that the

sentences in question were to be served cumulatively and that is clearly what he did.

[122] Turning to the final matter raised in this appeal, ie whether or not the total cumulative sentence imposed of nine years 134 days was manifestly excessive, I respectfully agree with both Mildren J and Riley J, for the reasons they have given. That is, I consider a sentence of nine years 134 days against a maximum penalty of eleven years imprisonment was manifestly excessive in all the circumstances.

[123] I also agree with Mildren J as to the orders proposed by him at [52].

SCHEDULE

HANKIN v THE QUEEN 20528554

Date	Head sentence	NPP	Date head sentence expired	Earliest release date	Date of commencement of sentence	Total time served	Balance outstanding on The Queen v Hankin	Notes
5.8.99	7 years 90 days 9909858	5 years commencing 4.08.99	04.08.06	03.08.04	05.05.99 (head sentence only)			
12.12.01	18 months cumulative on 05.08.99 20106653	5 years 6 months commencing 4.08.99	04.02.08	05.02.05	04.08.04			
24.07.03	3 months cumulative on sentence dated 12.12.01 20302592	5 years 9 months commencing 5.8.99	04.05.08	05.05.05	04.05.08		3286 days (8 years 9 months 90 days)	
08.06.05	Released on parole					2227 days (6 years 37 days)	1059 days (2 years 329 days)	
03.10.05	Offence re Hankin v The Queen committed. Told he would be summonsed							
13.04.06	Late for court re Hankin v The Queen. Bail was set 20528554							
25.01.07	Arrested and remanded in custody 20702539							
23.03.07	6 months 20702539 14 days 20702539	Released on suspended sentence Released on suspended sentence			25.01.07 25.01.07	56 days	1059 days (2 years 329 days)	Crown: Does not count as time served – s 63(4) Sentencing Act
29.03.07	Released on bail re Hankin v The Queen 20528554					7 days	1052 days	This 7 days not taken into account by Corrections
27.04.07	Parole revoked by Chairman of Parole Board							
21.05.07	Warrant issued by Supreme Court Hankin v The Queen							
10.04.07	Arrested on warrant - Hankin v The Queen remanded in custody							
11.04.07	CSJ issued a warrant for commitment to prison 9909858, 20106653, 20302592						Crown: 1052 days	According to Corrections, this was calculated as being 1059 - ie failed to take 7 days served into account
28.10.08	7years	5years commencing 16.10.08	15.10.15	15.10.13	16.10.08	188 days	Crown: 864days	

HankinD167 Schedule.doc