PARTIES:	HOWE, Garry Lee
	v
	TRENERRY, Robin Laurence
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	13 of 1997
DELIVERED:	16 MAY 1997
HEARING DATES:	30 April 1997
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Criminal law - Appeal and new trial and inquiry after conviction - Appeal and new trial - Appeal against sentence - Appeal by convicted person - Application to reduce sentence - Whether sentence manifestly excessive - Not possible to determine how much weight a sentencing court gives to particular factors in the sentencing process - Insufficient express recognition of mitigating factors.

Sentencing Act (NT) 1995, s5
Gronow v Gronow (1979) 244 CLR 513 AT 519.

Criminal law - Appeal and new trial and inquiry after conviction - Appeal and new trial - Appeal against sentence - Appeal by convicted person - Taking of a motor vehicle and driving whilst disqualified are not part of one transaction as different type of offences - Failure to take the totality principle sufficiently into account.

Sentencing Act (NT) 1995, s103

REPRESENTATION:

Counsel:

Appellant:	Mr G Georgiou
Respondent:	Mr C Roberts

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	DPP

Judgment category classification:	C
Judgment ID Number:	mar97026
Number of pages:	10

mar97026

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 13 of 1997

BETWEEN:

GARRY LEE HOWE
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 16 May 1997)

Appeal against sentence. The appellant was convicted on his pleas of guilty in the Court of Summary Jurisdiction sitting at Alice Springs on 20 February 1997 on charges brought on the one complaint for that on 31 December 1996 he unlawfully used a motor vehicle, and on that day and the following day, he drove that motor vehicle whilst being disqualified from holding a drivers licence. On a separate information, he was charged and pleaded guilty for that on 1 January 1997 he stole two back packs and clothing valued at $1,000. He was also convicted on that.

The sentences were twelve months imprisonment for the unlawful use of the motor vehicle, six months imprisonment on each conviction for driving whilst disqualified to be served concurrently, but cumulatively upon the sentence of twelve months, and he was sentenced to a further twelve months for stealing, that to be served cumulatively on the sentences already imposed, giving an effective total of two and a half years. A non-parole period of two years was fixed. The sentences and non-parole period were ordered to commence as from 13 February.

The maximum sentences for the offences are for unlawful use, two years, stealing, seven years, and drive disqualified, one year.

The appellant had taken the motor vehicle from a car yard on the evening of 31 December and driven it away. The keys were in the vehicle. The next day he drove the vehicle around, broke into another motor vehicle and stole the goods from it. He dumped some of the stolen property at a construction site and then drove to his residence. The vehicle was identified by the owner of the goods and he was later tracked down. He assisted the owner to recover most of the property. He had been disqualified from driving by order of the Court for a period of eighteen months from 18 November 1996. When apprehended he co-operated with police.

The amended grounds of appeal are:

"1. The learned Magistrate erred in not giving sufficient weight to the circumstances of mitigation relied on by the appellant.

2. The learned Magistrate erred in not giving weight to the principle of rehabilitation.

3. The learned Magistrate erred in giving undue weight to the principle of general deterrence.

4. The learned Magistrate erred in giving undue weight to the principle of retribution.

5. The sentence imposed was in all the circumstances manifestly excessive.

6. The learned Magistrate failed to take into sufficient account the Totality Principle of sentencing.

7. The learned Magistrate erred in that he failed properly to apply principles relating to concurrency of sentence."

In his sentencing remarks his Worship paid regard to the provisions of the *Sentencing Act* (NT) 1995, applicable to the circumstances before him, such as were known. The appellant was aged 31, his father a member of the criminal fraternity in Melbourne and his mother addicted to illegal drugs. He had been badly influenced by his father and his father's friends, members of a notorious motor cycle gang, had adopted criminal ways himself (as his record shows) and had taken to abuse of alcohol and other drugs. According to his counsel, he had spent 22 years in institutions, detention centres or prisons, but had made significant attempts at rehabilitation by his own efforts in recent years. He had come to Darwin to escape from the malign Melbourne influences, contacted the Salvation Army and admitted himself to hospital with a view to trying to deal with his drug abuse problems. However, he was bashed and

robbed of his little money on his birthday in October. As a result of that, and meeting some of his father's friends, he revisited his old ways. After committing these and other offences, he had contacted Odyssey House, Sydney, and his legal adviser had followed that up and obtained confirmation that the appellant would be accepted into that organisation's drug rehabilitation assessment programme. With further reference to the appellant's criminal history, it was put that there was a need to break his cycle of offending by giving him the opportunity for reform. It is not suggested that his Worship did not take those matters into account, but it was the appellant's criminal record which particularly impressed itself upon him. It extended from 1983 to 1991, principally in Victoria, and then nothing relevant until 1996. His Worship reviewed the record in detail, noting, correctly, numerous convictions for theft, unlawful use of motor vehicles, robbery, burglary and so on. There were fourteen prior convictions for unlawful use or theft of a motor vehicle, two for driving whilst disqualified, and at least 28 for other theft, robbery and like dishonest offences. He had been sentenced to numerous and significant terms of imprisonment. The record out of the Territory stops in March 1990. On 7 May 1991 he was fined for fighting in a public place in Alice Springs, and then no further offending until convicted on 18 November 1996 for driving whilst unlicensed, exceeding .08, unlawful use of a motor vehicle, disorderly conduct in a police station, and using objectionable words. For the most part he was fined, but for the unlawful use, was penalised with a sentence of two months imprisonment, backdated to 23 October 1996. It was

then that he was disqualified for that period of eighteen months which extended to the time when he committed these offences. This offending occurred within days of his release from prison from those earlier sentences.

During the course of his remarks, the learned Magistrate said that he must have regard to the prior convictions as showing that these offences were not isolated incidents, and looked at the penalties in an attempt to ascertain the best way in which "both the community and the defendant can be served … a difficult sentencing problem". He reminded himself of the sentencing guidelines in s5 of the Act. In conclusion, his Worship clearly expressed the opinion that previous penalties not having dissuaded the appellant from offending, he had a clear duty to protect the community from the appellant and those like him who interfered with the property of others. He did not accept that rehabilitation should take precedence. He said he had paid regard to the principle of totality, noting the orders for concurrent sentences he was about to impose.

Grounds 1 to 4 of the Amended Grounds of Appeal are really in the nature of particulars of ground 5. It is not possible to determine how much weight a sentencing court gives to particular factors in the sentencing process. Unless some specific error can be identified as having operated upon the exercise of the sentencing discretion, there can only be conjecture as what weight, if any, was placed on any of the competing principles or factors. However, it may

often be convenient to identify the features of the case to which particular attention should be given.

As to this question of weight, I am reminded of what Stephen J. said in *Gronow v Gronow* (1979) 244 CLR 513 at 519:

> "While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that the appellate court, left to itself, would have arrived at a different conclusion".

Grounds 6 and 7 are two sides of the same coin, and together seek to assign specific error.

As to the circumstances of mitigation and the issue of rehabilitation, the appellant's submissions were taken into account, his Worship noted what he had done to help himself. In my opinion, the mention of Odyssey House does not mean much, beyond demonstrating the appellant's present attitude, given that what was on offer was an assessment of suitability for the rehabilitation programme. There was no mention by his Worship of any benefit to be given to the appellant for his non offending from 1990 to 1996 (at least in any relevant way). That was a significant break in the well established pattern and an indication of a turning of the corner. The precipitating factors which caused the appellant to backtrack were not entirely of his doing. However, it is certainly a concern that he so quickly embarked on this course of offending

so soon after his release from prison. It must be accepted that general deterrence has a significant part to play in dealing with crimes as prevalent as these, but rehabilitation has its part to play as well, especially if there is a willingness to tackle a root cause of the criminal behaviour. Punishment is called for when the offender has not responded to leniency or when earlier punishment has obviously not proved sufficient to deter. But these things do not stand alone and isolated from each other. What seems to be missing, however, is a sufficient express recognition of the mitigating effect of the appellant's relative freedom from crime during the period 1990 to 1996, coupled with his express desires and efforts to do something about his drug problem.

As to ground 6 and 7, each of the offences were separate and distinct. I do not agree that the taking of a motor vehicle and driving it whilst disqualified is part of the one transaction. One is an abuse of property, and the other a disobedience to an order of a court or the operation of the statute. To treat them as converging into one would be to minimise the different character and seriousness of each act. The stealing of the other property was separated in time from the taking of the motor vehicle, and it was not alleged that the taking of the car was associated with the stealing of that property (s218(2)(d) *Criminal Code* (NT) 1983).

There is substance, however, in the allegation that the learned Magistrate failed to take the totality principle sufficiently into account. Certainly he made the two sentences of six months each for driving whilst disqualified concurrent, but that would be appropriate in any event given the fact that the two occasions were separated by a matter of hours and in the course of driving the same motor vehicle. It was not, with respect, an exercise of the requirement to, "take a last look at the total to see whether it looks wrong".

The sentence of two and a half years imprisonment, in all the circumstances, was manifestly excessive and it is apparent that his Worship's discretion miscarried by his not having properly applied the totality principle. The sentence must be significantly reduced and something done which may have the effect of encouraging the appellant's desire to get off drugs.

Having that result in mind, I referred to s103 of the *Sentencing Act* requiring that a Court shall, before imposing a sentence on an offender that requires the offender to be under the supervision of a probation officer, to have regard to a report of the Director as to the suitability of the offender to be under supervision. Such a report was obtained and disclosed that the appellant was interviewed at the prison and the conditions of supervision explained. Just what those conditions were is unclear, none having been determined by the Court at that stage. The appellant is said to have continued stating that without the support of a programme similar to that provided by

Odyssey House, he was not fully confident of rehabilitating himself into society. In the opinion of the author of the report, Mr Cornock, Manager, Regional Services, it would appear essential that the appellant acquire rehabilitation not readily available in the Territory.

> "The writer is confident this service could provide strict supervision, but strict supervision without the ability to direct the offender to a suitable rehabilitation programme could result in Howe re-offending. This would be considered not in the best interests of Howe or the community therefore, he is considered to be unsuitable for supervision by community corrections".

It is inherent in that assessment that the Service does not think it can supervise or arrange to have the appellant supervised out of the Territory. That can be achieved if the appellant were to be subject to a parole order upon his release from prison with suitable conditions relating to drug rehabilitation, and the parole order then transferred to the appropriate authorities outside the Territory.

Since the appellant must be sentenced to a term of imprisonment of not less than twelve months, that option is available and I propose to use it. It will, of course, be a matter for the Parole Board in due course, taking into account all relevant circumstances if and when the appellant is due to be released.

The sentence and non-parole period imposed on the offender on 20 February 1997 is quashed. He is sentenced to twelve months imprisonment in the aggregate for the offences on the one complaint, and six months imprisonment for the stealing charge on the information, those two sentences to be served cumulatively, an effective sentence of eighteen months. I have arrived at this sentence bearing in mind the totality principle. The period during which he will not be eligible to be released on parole is fixed at twelve months. In doing that, I bear in mind, particularly, the aim of rehabilitation and the need to have the appellant assessed, and if suitable, progressed along the way to overcoming his drug abuse which is at the root of his offending. The sentence and non-parole period are to date from 13 February 1997.
