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| CITATION: | *SH v Masani* [2024] NTSC 19 |
| PARTIES: | SH |
| | v |
| | MASANI, Kolisi |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPEAL from LOCAL COURT exercising Territory jurisdiction |
| FILE NO: | LCA 20 of 2023 (22315696) |
| DELIVERED: | 25 March 2024 |
| HEARING DATE: | 25 March 2024 |
| JUDGMENT OF: | Grant CJ |

**REPRESENTATION:**

*Counsel:*

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| Appellant: | C Leonard |
| Respondent: | P Williams |

*Solicitors:*

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| Appellant: | Northern Territory Legal Aid Commission |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | C |
| Judgment ID Number: | Gra2404 |
| Number of pages: | 12 |

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

*SH v Masani* [2024] NTSC 19
LCA 20 of 2023 (22315696)

BETWEEN:

**SH**
Appellant

AND:

**KOLISI MASANI**
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* on 25 March 2024)

[1] This is an appeal against sentence imposed by the Youth Justice Court on 26 July 2023. The appellant had pleaded guilty to the offences of property damage, violent disorder, use of an offensive weapon, two counts of trespass and theft. The Youth Justice Court sentenced the appellant without conviction to an aggregate period of seven months' detention which was suspended forthwith subject to conditions. The sole ground of appeal is that the sentence imposed was manifestly excessive. At hearing, the appellant abandoned a second ground of appeal that the Youth Justice Court sentenced the appellant to an

aggregate period of detention greater than the maximum available pursuant to s 125(2) of the *Youth Justice Act 2005* (NT).

**The objective circumstances of the offending**

[2] The objective circumstances of the offending may be summarised as follows. In the early hours of the morning of 20 May 2023, the appellant attended the Alice Springs Hospital in company with two co-offenders who were aged 23 and 17 respectively. They were accompanying an older woman who had suffered a head injury. The appellant and her co-offenders took the older woman into the Emergency Department, presumably for treatment. The appellant and her co-offenders then exited the Emergency Department, but not before one of those co-offenders had argued with security staff and became aggressive.

[3] After standing outside the Emergency Department for a short period, the appellant slammed the automatic sliding doors together on three occasions. The appellant and her co-offenders then took turns slamming and kicking the sliding doors for several minutes. This damaged the doors to such a degree that they began to fall apart with the component parts falling to the ground. The appellant then picked up a metal pole which had broken away from the doorframe and used it to strike a pane of glass in the door. One of the appellant's co-offenders then dislodged another pane of glass from the door and smashed it on the ground. The other co-offender then armed himself

with a metal pole and threw it in a spear-like fashion through the waiting room of the Emergency Department. The first co-offender then picked up a different metal pole and threw it in a spear-like fashion causing it to strike a woman in the stomach.

[4] The appellant then entered the waiting room and threw a metal pole at the front counter. She then returned outside and continued to kick the glass sliding doors. The offenders were spoken to by a Registrar working at the hospital. One of the co-offenders threw a traffic cone at the Registrar which struck him on the left shoulder. The appellant then threw a metal pole at him in a spear-like fashion, which fortunately did not make contact with him. The co-offenders then used a metal pole to smash the window of a motor vehicle which was parked outside the Emergency Department. The appellant then entered the vehicle and stole a number of items from it. The appellant and her co-offenders left the scene, and the appellant was arrested later that morning.

[5] There was no doubt that this offending was violent, destructive, protracted, disturbing and therefore objectively serious. It was also the case that the incident was precipitated and initiated by the appellant. So much was conceded during the course of the sentencing proceedings. It is also of some relevance to the assessment of objective seriousness that this conduct was directed towards a facility which provides health care for the community generally, including Aboriginal people. It was conceded that the offending caused

disruption to the operation of the hospital and caused fear to hospital staff and patients.

[6] The seriousness of the offending is marked by the fact that the property damage offence attracted a maximum penalty of imprisonment for 10 years; the theft offence attracted a maximum penalty of imprisonment for 10 years; the violent disorder offence attracted a maximum penalty of imprisonment for 12 months; the use of the offensive weapon offence attracted a maximum penalty of imprisonment for 12 months; and each count of trespass attracted a maximum penalty of imprisonment for six months.

**The subjective circumstances of the appellant**

[7] The appellant was 15 years old at the time she committed these offences. She is an Aboriginal female who was born in Alice Springs with cultural and familial ties to the Santa Teresa community. She has been subjected to a number of child protection notifications relating to exposure to domestic violence, parental alcohol misuse, emotional and physical neglect and sexual exploitation. Six of those reports have been substantiated. She has largely disengaged from education and is a polysubstance abuser. She is apparently in a relationship blighted by domestic violence which has resulted in her hospitalisation on a number of occasions.

[8] So far as the incident in question is concerned, the appellant's instructions were that she had taken her grandmother to the Emergency Department because she had suffered an injury. The grandmother was intoxicated and distressed. She was causing a disturbance within the Emergency Department and the appellant had to repeatedly reclothe her. At one point the appellant's grandmother was asked to leave because of her behaviour, and this is said to have triggered the offending by the appellant and her co-offenders.

**Manifest excess**

[9] The principles governing appeals on the ground of manifest excess are well-settled: see *Emitja v The Queen* [2016] NTCCA 4 at [39]; *Liddy v The Queen* [2005] NTCCA 4 at [12]; *Morrow v The Queen* [2013] NTCCA 7 at [36]. 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 is shown that the sentencing judge committed 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.

[10] In relying upon this ground it is incumbent on the appellant to show that the sentence was clearly and obviously, and not just arguably, excessive. A court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised the discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. This is because the discretion which the law commits to sentencing judges is of vital importance in the administration of the system of criminal justice: see *Lowndes v The Queen* (1999) 195 CLR 665 at [15]. An appellate court is bound to allow to sentencing judges 'as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies': *Markarian v The Queen* (2005) 228 CLR 357 at 371.

[11] Before sentencing the appellant in this case the Youth Justice Court ordered a pre-sentence report under s 69 of the *Youth Justice Act*. At the time that report was ordered, the Court warned the appellant against any breach of bail pending delivery of the sentence. During the course of the sentencing proceedings, the Youth Justice Court expressly recognised that the appellant was the youngest of the three co-offenders, that she had pleaded guilty at an early opportunity, that she had a strong family network, and that she was making attempts to engage with education. The Court also acknowledged that the appellant had a limited prior criminal history. Against that

background, the Court was required to fashion a sentence which recognised the importance of rehabilitation but at the same time held the youth accountable and made her aware of her obligations under the law and the consequences of contravening, and continuing to contravene, the law.

[12] As the Court of Criminal Appeal observed in *TM v The Queen* [2017] NTCCA 3 at [27], the manner in which the balance is to be struck between rehabilitation and the other sentencing purposes will be guided by a consideration of both the seriousness of the offending behaviour and the prior criminal history. That balance will be reflected in such matters as whether the sentence is custodial or non-custodial; and, if custodial, the length of the head sentence, whether a non-parole period or an order suspending sentence is imposed, and the minimum time to be served. By way of example, the purposes of punishment, denunciation and deterrence may be primarily served by the imposition of a stern head sentence, while at the same time the purpose of rehabilitation may be primarily served by an order suspending sentence after a period of incarceration of lesser duration than would otherwise have been required but for the offender's youth.

[13] In the present case, even if it is accepted that the Youth Justice Court imposed a stern head sentence for this offending, the purpose of rehabilitation was clearly given voice and effect in the order suspending that sentence to detention forthwith. While it may well be

that the offending committed by the appellant was impulsive, unsophisticated and unplanned, it cannot be said that the Youth Justice Court sentenced her like an adult. So much is apparent from the relatively short period the appellant was required to spend in detention and the fact that no convictions were recorded. The fact that both defence counsel and the prosecutor submitted that a good behaviour order was within range is not a marker of error. While it will often be the case that youth offending will attract a non-custodial sentence, given the particular circumstances of this case and the fact that the appellant was already subject to a good behaviour order at the time of the offending which had been imposed only three months previously, it was open to the Youth Justice Court to form the view that a custodial sentence was appropriately imposed. In undertaking the balancing exercise, it does not follow that a good behaviour order would necessarily have been a more effective disposition for promoting the appellant's rehabilitation. There will be many circumstances in which a suspended sentence subject to close supervision will afford greater prospects for an offender's rehabilitation.

[14] Counsel for the appellant properly accepts that a custodial sentence was within range. The complaint made is that the length of the custodial term was excessive, and the conditions of the order suspending sentence involving curfew and electronic monitoring for 12 months were unnecessarily draconian. There was no error that under

the terms of the order suspending sentence the appellant was required to reside in Alice Springs for a period of 12 months. Even if it is accepted that her residence in Santa Teresa might have militated against further offending, there was nothing to suggest that the appellant would elect to reside in the community if unsupervised, and much to suggest that supervision in Alice Springs would be of some utility in fostering the appellant's development as a law-abiding member of the community. The curfew condition recognises that the offending occurred late at night after the accused had been drinking, and the electronic monitoring condition is a useful tool in the supervision of the appellant and efforts to keep her engaged with education and other pro-social activities.

[15] As the Crown has submitted, the offending was violent, unprovoked, gratuitous, protracted, performed brazenly in the public gaze, committed in company and involved the use of offensive weapons. At the time of the offending the appellant was already on a good behaviour order which had been imposed three months previously. The commission of these further offences was aggravated by that fact. The fact that the appellant had breached her bail on a number of occasions spoke to her circumstances, current proclivities and prospects of rehabilitation, and required particular consideration to be given to deterrence and community protection. As the victim impact statement submitted by the clinical nurse manager of the hospital described, the

damage to both property and persons was significant and contributed to the trauma experienced by healthcare professionals when subjected to attacks of this nature. Offending of this general nature is prevalent, and it is difficult to overstate just how corrosive this sort of conduct is to the wellbeing, morale and reputation of the Alice Springs community.

[16] When considering a ground of appeal expressed in these terms, 'an appellate court must be especially cautious not to substitute its own opinion for that of the sentencing judge in the absence of identifiable or manifest sentencing error': see *Johnson v The Queen* [2012] NTCCA 14 at [25]. The sentencing court clearly gave consideration to the appellant's youth, deprived upbringing and the sentencing purpose of rehabilitation. Having regard to the principles, considerations and features which are described and discussed above, I am unable to conclude that the duration of the custodial term imposed or the conditions of the order suspending that term to detention were excessive, much less so excessive as to manifest error.

**Maximum aggregate period available**

[17] Although the second ground of appeal was not pressed, I will take this opportunity to make some observations concerning the question because it has not previously been subject to consideration by the Supreme Court. Section 125(2) of the *Youth Justice Act* provides:

**Aggregate sentences of detention or imprisonment**

(1) If the Court finds a youth guilty of 2 or more offences arising out of the same incident or course of conduct, the Court may impose one term of detention or imprisonment in respect of both or all of those offences.

(2) The term of detention or imprisonment must not exceed the lesser of:

(a) the maximum term that could be imposed if a separate term were imposed in respect of each offence; or

(b) for a youth who:

(i) has turned 15 years of age – 2 years; or

(ii) is under 15 years of age – 12 months.

(3) Subsection (1) does not apply if one of the offences is a violent offence, or a sexual offence, within the meaning of the *Sentencing Act 1995*.

[18] Section 52(1) of the *Sentencing Act 1995* (NT) is in substantially identical terms, and provides:

> Where an offender is found guilty of 2 or more offences joined in the same information, complaint or indictment, the court may impose one term of imprisonment in respect of both or all of those offences but the term of imprisonment must not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence.

[19] The operation of that provision was considered by the Court of Criminal Appeal in *Tomlins v The Queen* [2013] NTCCA 18. The argument run by the applicant in that matter was that the aggregate sentence imposed impermissibly exceeded the maximum penalty for one of the counts on the indictment. The Court of Criminal Appeal found that the interpretation pressed by the applicant was based upon a misunderstanding of the provision which was unsupported by the text, context or purpose of the subsection. The Court stated at [21]-[22:

> The text of the s 52(1) of the *Sentencing Act* clearly contemplates a "maximum term of imprisonment" that is calculated by having regard to the total sentence of imprisonment that could be imposed on an offender if the maximum penalty for each offence on the indictment were passed and the sentences were ordered to be served cumulatively…
>
> Where discrete sentences of imprisonment are passed for each offence on an indictment and there is some cumulation in order to pass a sentence that is proportionate to the whole of the offender's criminal conduct it is not unusual for the total sentence to exceed at least one of the maximum penalties fixed for the offences on the indictment. It would be at odds with the provisions in the *Sentencing Act* dealing with accumulation and concurrency if an aggregate sentence were limited in a different way to sentences imposed separately and could not exceed the lowest maximum penalty for any of the offences. The purpose of provisions such as s 52(1) of the Act, which enable a court to impose an aggregate sentence, is to allow a sentencing court to view an offender's criminal conduct as a whole and to impose a sentence that is proportionate to the whole of the offender's criminal conduct. This could not be done in all cases if s 52(1) of the *Sentencing Act* were constrained in the manner contended by the applicant.

[20] I respectfully consider that reasoning to be demonstrably correct, and consider further that I would in any event be bound by that decision when interpreting the substantially identical provision in s 125(2) of the *Youth Justice Act*.

**Disposition**

[21] For these reasons, the appeal is dismissed.

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