CITATION:	*Amagula v Andreou* [2018] NTSC 69
PARTIES:	AMAGULA, Horrie v ANDREOU, Andreas
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 62 of 2017 (21708931)
DELIVERED:	8 October 2018
HEARING DATE:	12 June 2018
JUDGMENT OF:	Blokland J

CATCHWORDS:

CRIMINAL LAW – PROPERTY OFFENCES – APPEAL AGAINST SENTENCE

Whether justifiable sense of grievance arising from disparity or undue disproportionality between sentences of appellant and co-offenders – parity requires consistent and proportionate sentences which reflect different circumstances and degrees of culpability – all sentence components, facts and circumstances must be considered in determining whether disparity gives rise to grievance – appellant's criminal history significantly more serious than co-offenders' – appellant older than co-offenders – co-offenders had some mitigating features but not appellant – appellant had greater moral responsibility due to age and criminal history – equal level of participation between co-offenders – criminal history cannot elevate sentence beyond what is proportionate to offending and offender – disparity between sentences sufficient to give rise to grievance – appeal allowed – appellant resentenced.

CRIMINAL LAW – PROPERTY OFFENCES – APPEAL AGAINST SENTENCE

Whether sentence was manifestly excessive – offending was not very grave – criminal history relevant to sentence but must be proportionate to offence – sentence cannot be increased disproportionately to extend period of community protection – sentence was manifestly excessive – appeal allowed – appellant resentenced.

Criminal Code (NT), ss 210, 213(1), 213(2), 213(4), 213(5), 218(1), 218(2)(c), 241(1)
Liquor Act (NT), s 75B(1)
Sentencing Act (NT), s 6A
Stronger Futures in the Northern Territory Act 2012 (Cth), s 8

Bara v The Queen [2016] NTCCA 5; *Baumer v The Queen* (1988) 166 CLR 51; *Dinsdale v The Queen* (2002) 202 CLR 321; *Emitja v The Queen* [2016] NTCCA 4; *Green v The Queen* (2011) 244 CLR 462; *Liddy v R* [2005] NTCCA 4; *Lowe v The Queen* (1984) 154 CLR 606; *Morrow v The Queen* [2013] NTCCA 7; *Postiglione v The Queen* (1997) 189 CLR 295; *Shortland v The Queen* (2013) 224 A Crim R 486; *The Queen v MacGowan* (1986) 42 SASR 580; *Thomas v The Queen* [2017] NTCCA 4; *Veen v The Queen [No 2]* (1988) 164 CLR 465, referred to.

REPRESENTATION:

Counsel:

Appellant:	A Abayasekara
Respondent:	D Warner-Collins

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	BLO1811
Number of pages:	25

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Amagula v Andreou [2018] NTSC 69
No. LCA 62 of 2017 (21708931)

BETWEEN:

HORRIE AMAGULA
Appellant

AND:

ANDREAS ANDREOU
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 8 October 2018)

Introduction

[1] This is an appeal against sentences imposed by the Local Court on 25 October 2017. The original grounds of appeal were:[1]

> Ground 1: that the learned sentencing judge did not have regard to parity principles.
>
> Ground 2: that the sentence was manifestly excessive.

[2] Leave was granted to amend ground 1, "the parity ground", as follows:

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

1 Notice of Appeal, filed 22 November 2017.

[3] As above, ground 1 was originally drafted in a manner that suggests the learned sentencing judge did not have regard to parity principles. It is apparent the judge was not assisted, as he should have been, with sentencing material relevant to a number of co-offenders. The error identified on the basis of parity came about because the co-offenders were dealt with by another judge without the relevant information being provided to the Local Court when the appellant was sentenced. Although it is often said to be ideal for all offenders involved jointly in offending to be dealt with before the same judicial officer,[2] this is not always possible, especially given the number and complexity of circuit courts of the Local Court which sits in regional and remote areas. It is therefore incumbent on counsel to ensure a sentencing Court has the relevant information. In this matter, the appellant's co-offenders were dealt with in the Local Court at Alyangula and Numbulwar, while the appellant was dealt with in Darwin, presumably because he had been in custody in the Darwin Correctional Centre for some time prior to the sentence, serving another sentence.

[4] During the course of the plea hearing, the sentencing judge specifically asked counsel, "Is everybody armed with information about the disposition of those matters, if they have been disposed of?" The prosecutor answered, "We have that information".[3] Regrettably, neither counsel who appeared before the Local Court informed the sentencing judge of the further

---

2 *Shortland v The Queen* [2013] NSWCCA 4; 224 A Crim R 486 at 501, per Johnson J.
3 Transcript, Local Court, 25 October 2017, p 10.

information. The failure to provide the information sought by the sentencing judge led to error.

[5] The amended ground appropriately deals with the concern at the heart of parity issues, namely whether, objectively assessed, there exists a justifiable sense of grievance on the part of an offender to an extent that justifies appellate intervention. The application of the principle of parity has recently been considered by the Court of Criminal Appeal in *Bara v The Queen*.[4] In broad terms, the principle of parity is considered to be an aspect of equal justice which requires that sentences be consistent and proportionate,[5] that like offenders be treated in a like manner, but also that different sentences be imposed on like offenders to reflect different degrees of culpability or circumstances.[6]

[6] Although the relevant material concerning the co-offenders takes some time to assess and absorb, and each relevant co-offender is in a somewhat different position from the point of view of associated similar offending, their antecedents and subjective circumstances, it is clear there is a disparity of the kind that justifies and requires appellate intervention in respect of the sentence passed on the appellant on 25 October 2017. It is accepted, as submitted by counsel for the respondent, the Court is not bound to intervene in a case of mere disparity; however, in my view, the disparity pointed out

---

4 [2016] NTCCA 5.

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

6 *Postiglione v The Queen* [1997] HCA 26; 189 CLR 295 at 301, per Dawson and Gaudron JJ.

during the course of the appeal is of the kind and quality that gives rise to a justifiable sense of grievance, objectively assessed.[7]

Proceedings in the Local Court on 25 October 2017

[7] The appellant pleaded guilty in the Local Court at Darwin to six counts on information and two counts on complaint. Three counts on information were withdrawn on the same day. The offences were committed over the course of two episodes of offending: the first on 26 January 2017 and the second on 17 February 2017.

[8] The offences committed on 26 January 2017 are as follows:

> Count 1: unlawfully enter a building with the intention to steal, including a circumstance of aggravation, namely that the building was a dwelling house, contrary to ss 213(1), (2) and (4) of the *Criminal Code*. The maximum penalty is 10 years imprisonment.
>
> Count 2: stealing two cartons of beer, one carton of cider and a set of car keys, contrary to s 210 of the *Criminal Code*. The maximum penalty is 7 years imprisonment.
>
> Count 3: unlawful use of a motor vehicle, a Holden dual cab utility, with a circumstance of aggravation, namely that the value of the vehicle was reduced by $5000, contrary to ss 218(1) and (2)(c) of the *Criminal Code*. The maximum penalty is 7 years imprisonment.
>
> Count 4 on complaint: consume liquor in an alcohol protected area, namely Alyangula, contrary to s 75B(1) of the *Liquor Act* read with s 8 of the *Stronger Futures in the Northern Territory Act 2012* (Cth). The penalty for this offence is 100 penalty units or 6 months imprisonment.

[9] The offences committed on 17 February 2017 are as follows:

> Count 7: unlawful entry of a building, namely the Alyangula Golf Club, with the intention to steal. This count included a circumstance

---

7 *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Gibbs CJ and 623 per Dawson J; *Postiglione v The Queen* (1997) 189 CLR 295 at 301.

of aggravation that the unlawful entry occurred at night time, contrary to ss 213(1), (4) and (5) of the *Criminal Code*. The maximum penalty is 14 years imprisonment.

Count 8: cause damage to property, namely a security screen, a Perspex window and a caged spirit cabinet belonging to the Alyangula Golf Club, contrary to s 241(1) of the *Criminal Code*. The maximum penalty is 14 years imprisonment.

Count 9: stealing assorted alcohol, cigarettes, tobacco, lighters, rolling papers and soft drink to the value of $3,689, the property of Alyangula Golf Club, contrary to s 210 of the *Criminal Code*. The maximum penalty is 7 years imprisonment.

Count 10 on complaint: consume liquor, namely bourbon, vodka and beer, in an alcohol protected area, namely Alyangula, contrary to s 75B(1) of the *Liquor Act* read with s 8 of the *Stronger Futures in the Northern Territory Act 2012* (Cth). The penalty for this offence is 100 penalty units or 6 months imprisonment.

[10] The facts for the offending on 26 January 2017 were that the appellant and the co-offenders formed a plan to enter a residence in Alyangula and steal alcohol. The appellant remained as a lookout across the road, while the co-offenders entered the residence after pulling off a security screen. The co-offenders stole the alcohol from the fridge as well as a set of car keys from a Holden dual cab. They drove the vehicle from the residence and picked up the appellant across the road. They drove to an area where they began to consume the stolen alcohol and became intoxicated. The appellant remained a passenger in the vehicle as it did burnouts and skids and became damaged. They were stopped by a concerned resident and all offenders fled the vehicle. Additional damage was done by a co-offender to the windscreen.

[11] In terms of the offending on 16 February 2017, the appellant and co-offenders planned again to steal alcohol, this time from the Alyangula Golf

Club. They obtained a lift from the outskirts of Alyangula and walked to the Golf Club. At 3:15am on 17 February 2017 the appellant and co-offenders arrived at the Golf Club. One of the co-offenders began to physically remove the security screen and kick the Perspex window. The appellant instructed all the co-offenders to enter and steal the alcohol as he kept watch. They ran into a caged bar and physically removed another screen in order to access the alcohol behind the bar. They began to raid the alcohol fridges, grabbing bottles of alcohol and filling a large bin. In the course of this offending they damaged the door of the spirit cabinet. The co-offenders met the appellant outside. They all went to the beach to consume the alcohol. Some of the offenders walked, dragged or carried bins filled with the stolen goods to the Malkala Community, approximately five kilometres from Alyangula. They continued to consume the alcohol, becoming increasingly intoxicated.

[12] Police attended Malkala Community and intercepted them. Upon seeing police, the appellant evaded attempts to be arrested and hid in the bushland. Some of the offenders were arrested at that time, and the appellant was arrested later at approximately 5:00pm when he identified himself and was arrested without incident. He declined to speak to police in a record of interview. Groote Eylandt is an alcohol protected area. The appellant was spoken to by police in relation to the offending on 26 January 2017. He told police he did not break in, the other boys did, and he waited in the bush. He agreed that he knew the car was stolen.

[13] In terms of the appellant's subjective circumstances, the Local Court was told the appellant is 42 years old and from Groote Eylandt. He has five children aged between 6 and 13 years. The children all reside on Groote Eylandt.

[14] The appellant has an extensive record for previous offending of the same kind. His previous offending commenced when he was a youth. He was dealt with primarily for property offences from 1989 up until 1992 in the then Juvenile Court. His offending continued as an adult. The sentencing judge remarked that altogether there were 22 previous convictions for unlawful use of a motor vehicle, the most recent being in 1997. His Honour noted nine convictions for criminal damage, 25 convictions for stealing and 35 convictions for unlawful entry. It may also be noticed that apart from the sentence the appellant was serving at time of the plea hearing, he had previously been dealt with by way of relatively short periods of imprisonment, and at times community-based dispositions.[8] As counsel for the respondent pointed out, the appellant has a 21-page criminal history.

[15] The principal submission made below on behalf of the appellant was that the Court should have regard to the totality principle, particularly given the appellant was sentenced on 20 July 2017 to 2 years imprisonment with a non-parole period of 18 months for offences on four court files committed between October 2016 and July 2017. It was pointed out to the sentencing

8 Local Court, exhibit P2, 25 October 2017.

judge that some of that offending occurred during the same time period as the matters currently the subject of this appeal.

[16] The current charges had been set down for hearing on 20 October 2017 at the Alyangula Local Court. The hearing did not proceed. The sentencing judge allowed an adjustment of 15 percent for the utilitarian value of the plea. His Honour remarked the offending was very serious and the appellant had committed the offences in company, which is an aggravating factor under s 6A of the *Sentencing Act*. His Honour took into account the appellant's lengthy criminal history for similar offending, concluded the appellant had no prospects of rehabilitation and placed emphasis on protection of the community and denunciation. The need for regard to totality was expressly mentioned in relation to the sentence the appellant was already serving.

[17] On the counts on information, the appellant was convicted and sentenced to an aggregate term of imprisonment of 3 years. For the charges on complaint of consuming liquor, the appellant was fined an aggregate sum of $1,540. Six months of the sentence of imprisonment was ordered to be served concurrently and 30 months cumulatively with the sentence imposed on 20 July 2017. The total period for all sentences, inclusive of the sentence the appellant was already serving, was 54 months imprisonment commencing on 18 February 2017. A new non-parole period of 40 months was fixed to commence on 18 February 2017.

The parity ground

[18] Unlike his Honour below, on appeal, this Court has had the benefit of detailed information about the dispositions of all co-offenders, the relevant facts alleged against each, their criminal histories and, to some extent, their subjective circumstances.[9] The affidavits sworn by Mr Abayasekara are comprehensive and helpful. Notably, it is apparent from the affidavits Mr Abayasekara received information and cooperation from various prosecutors in the Office of the Director of Public Prosecutions and the Registries of the Supreme and Local Court.[10] Cooperation between members of the profession, notwithstanding the different interests that each practitioner is duty-bound to protect, is commendable in cases of this kind. At the same time, counsel for the respondent on appeal has appropriately drawn the Court's attention to matters that may militate against appellate intervention. The rigorous preparation by both parties, especially the provision of the affidavit material mentioned, has resulted in this Court being thoroughly informed in respect of all offenders.

[19] The co-offenders Alverston Lalara and Ramiley Wurramara were involved in the offending on 26 January 2017. They were not involved in the offending of 17 February 2017. However, Alverston Lalara was dealt with for other similar offending committed on 13 February 2017. It is acknowledged that neither of the co-offenders were participants in both sets of offending;

---

9 Affidavit of Ambrith Abayasekara, sworn 6 June 2018; affidavit of Ambrith Abayasekara, sworn 11 June 2018.

10 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, [3]-[6].

however, for those offences they participated in, there is a relevant parity question. It is obvious that consideration is to be given to the fact that neither Alverston Lalara or Ramiley Wurramara were involved in the second set of offending when undertaking the objective assessment of whether there is a justifiable sense of grievance.

[20] Alverston Lalara was dealt with on 20 September 2017 in the Local Court at Alyangula for the same four offences committed on 26 January 2017. He was also sentenced for three other charges, unlawful entry of a building at night time, stealing and damaging property, all committed on 13 February 2017. As expected, the facts of the offending presented to the Court sitting at Alyangula on 20 September 2017 are very similar to those presented in respect of the appellant.[11] The facts presented to the Court at Alyangula named four co-offenders including the appellant. Although the offending by Alverston Lalara on 13 February 2017 involves offending not associated with this matter, the offences took place at the Alyangula Golf Club. It would appear from the facts tendered in that matter in the proceedings concerning Alverston Lalara that the appellant was also involved in that offending. It is likely the appellant had already been sentenced for that offending of 13 February 2017, prior to being sentenced for the matters the subject of this appeal.[12]

---

11 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexure AL2.

12 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexure AL2.

[21] Alverston Lalara's previous convictions tendered to the Local Court in Alyangula[13] indicate a lengthy history of property offending, commencing in 2008 in the Youth Justice Court through to 14 October 2016. On that occasion he was dealt with in the Supreme Court for offending of a different kind, namely recklessly endangering life. The property offending, while extensive, is not in the same order as the appellant's record. In broad terms, the information for courts ran for seven pages. It included four convictions for unlawful entry, three for stealing and two for unlawful use of a motor vehicle.

[22] Counsel in the Local Court for Alverston Lalara acknowledged he had a reasonably lengthy criminal history for the same type of offending.[14] Alverston Lalara by comparison with the appellant is a younger offender at 26 or 27 years old.[15] As mentioned, at the time of the offending, he was subject to a Supreme Court suspended sentence. The motivation for his offending was said to be stealing alcohol, he was in a group on both occasions and felt it was a "shame job" not to go through with the offending. He has had problems with alcohol and cannabis. He had been on bail since the offending and there had not been any other offending while on bail. While on bail he had been abstinent of alcohol and substances. His personal circumstances were that he was married and had a daughter who was six years old, and was at boarding school in Cairns. Alverston Lalara grew up in

13 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexure AL3.

14 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexure AL5.

15 Alverston Lalara's counsel told the Local Court he was 27 years old; the information provided in the respondent's submissions notes he was 26. Nothing turns on the discrepancy.

Angurugu and attended school until year 9. He had previously worked in community work projects but was unemployed at the time of the plea hearing. It was acknowledged that offending of this kind was prevalent.

[23] The sentencing judge took into account his history of similar offending and that he had committed offences shortly after being placed on a suspended sentence. The sentencing judge considered he had very poor prospects of rehabilitation. In terms of prevalence, the sentencing judge described this type of offending as "endless on Groote Eylandt".[16] Her Honour remarked a stern sentence was required to deliver a message both to Alverston Lalara and others that behaviour of this kind must stop. An adjustment of 20 percent was made on account of his pleas of guilty.

[24] For the offending on 26 January 2017, Alverston Lalara was sentenced to an aggregate 6 month sentence. For the offending on 13 February 2017 he was sentenced to an aggregate 6 month sentence, with 4 months of that sentence ordered to be served cumulatively on the sentence for the offending of 26 January 2017. The total effective sentence for all his offending was 10 months imprisonment. The sentence he received for the offending committed with the appellant on 26 January 2017 was 6 months.

[25] Regard must be had to the obvious points of difference between the appellant and Alverston Lalara, in particular, the appellant's greater number of previous convictions. Alverston Lalara is younger, although at 26 or

16 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexure AL5.

27 years old it might be expected he has maturity beyond a teenager or young adult. Even though the appellant was dealt with for two sets of offending, in my view the relevant disparity between the two for the January offending is made out once all of the components of the sentence and the offenders are considered. The offending was a genuine group enterprise; there is no reason to infer any greater level of participation as between the offenders. Even allowing for, as submitted on behalf of the respondent, the appellant's extra offending experience, and even if he may be regarded as the senior and most influential in the group, there is still relevant disparity between the appellant's sentence and Alverston Lalara's sentence allowing for the relevant adjustments . It was not suggested in the appellant's proceedings in the Local Court that he played a greater role than the other offenders. For the offending of 17 February 2017, which Alverston Lalara was not involved in, the agreed facts state the appellant instructed the offenders to enter and steal while he kept watch. On the facts, however, the plan between all of the co-offenders was well entrenched before the actual entry of the premises. It would be dangerous to infer, and indeed would be an error to infer on appeal, that his level of culpability on account of his part in the relevant criminal conduct is higher than the other offenders. The appellant certainly does not have the benefit of youth, nor any other matters that would generally mitigate or give much hope to his prospects of rehabilitation.

[26] Ramiley Wurramara also participated in the offending of 26 January 2017. He pleaded guilty in the Local Court at Alyangula on 21 September 2017 to the same four charges. He was sentenced to a total effective sentence of 3 months imprisonment to commence on 28 September 2017. The facts presented to the Court are very similar to those presented in respect of the appellant.[17] According to the facts presented against Ramiley Wurramara, he told police his reason for participating in the offending was: "them boys, they tempt me". Although Ramiley Wurramara's previous convictions are numerous and although they include similar offending, his previous convictions are not nearly as numerous as the appellant's previous convictions.[18] In broad terms the information for courts is seven pages long with nine previous convictions for unlawful entry, five for stealing and two for the unlawful use of a motor vehicle.

[27] A letter was tendered from the site manager for CDP Angurugu.[19] The site manager praised Ramiley Wurramara's "exemplary work ethic" and advised the Court he attended his work daily. His work ethic and respectful manner were mentioned and he was described as a positive role model. As a result of the contents of the letter it was submitted he had some prospects, but was

---

17 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexure RW2.

18 There appeared to be some difficulty obtaining the correct information for courts. It is accepted the information for courts annexed to the affidavit of Ambrith Abayasekara, sworn 11 June 2018 is correct. The explanation of how the record was obtained is contained in that affidavit, paragraphs [2]-[5].

19 Affidavit of Ambrith Abayasekara, sworn 11 June 2018, annexure RW8.

making bad decisions in circumstances where he had a desire to obtain alcohol that was too great.[20]

[28] The sentencing judge noted Ramiley Wurramara had a relevant record for similar offending, including seven previous convictions for unlawful entry.[21] The sentencing judge also mentioned that Ramiley Wurramara was in breach of a suspended sentence. The offending took place shortly after he was placed on the suspended sentence, although it was not for similar offending. On the positive side, and it is to be remembered the appellant did not enjoy the same positive features, Ramiley Wurramara's productive employment was taken into account, as was the assistance he gave to authorities by giving a statement about the offending and co-offenders and the relatively early plea.

[29] Ramiley Wurramara was sentenced to a total of 3 months for the offending on 26 January 2017. There are many obvious points of differentiation. The appellant could not reasonably expect in his circumstances to receive a lenient sentence of the kind imposed on Ramiley Wurramara; however, even absent the mitigating features that were present and taken into account in respect of Ramiley Wurramara and the overall more serious features relevant to the appellant, the disparity between the two is stark indeed. However, Ramiley Wurramara's circumstances differ deeply from the appellant's circumstances. His sentence is only marginally relevant to the issue of

---

20 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexure RW5.

21 In fact the record shows nine convictions for unlawful entries.

parity. On its own, the sentence could not form the basis of a successful argument on parity; however, it does inform at the margins.

[30] Hayden Lalara was a co-offender with the appellant in relation to the offending of 17 February 2017. On 16 May 2017 he pleaded guilty in the Local Court at Numbulwar to the same four charges as the appellant. He was also sentenced for four traffic offences for which he received fines.[22] The facts presented to the Local Court are similar to those presented in the appellant's case for the offending of 17 February 2017. More co-offenders are listed in the facts: Horrie Amagula (the appellant), Alex Lalara, Dylan Lalara, Ramus Barabara and Delviston Jaragba. Further, the facts mention that Hayden Lalara implicated those co-offenders when he made admissions to police. He also said the appellant waited outside the Golf Club "like a boss". As above, although by virtue of the appellant's age, maturity and criminal history, he is to be regarded in a more serious light for sentencing purposes, the facts admitted in his case would not permit this Court to conclude he was the "boss" of the offending. The facts of the offending accepted by the appellant and the Local Court do not allege such a role. It may also be noticed that Hayden Lalara was 29 years old at the time of the offending.[23] He was not a youthful offender. Although Hayden Lalara has a six-page criminal history, there was no offending of this kind. His previous offending is primarily traffic offending as well as previous drug offending

22 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexures HL2 and HL7.

23 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexure HL7.

and two convictions for aggravated assault. He had previously served short terms of imprisonment. For the offending of 17 February 2017, he was sentenced to a term of 4 months imprisonment, suspended forthwith for 12 months. The sentencing judge had regard to the prevalence of the offending and that it was the first time he had been involved in offending of this kind, although the sentencing judge remarked he had been involved in lots of other trouble. A discount of 30 percent was permitted given his early plea and assistance to police to identify co-offenders. He was also found to have good work prospects. A reference was tendered from the Roper Golf Regional Council attesting to Hayden Lalara being a reliable worker who attended work every day and was enthusiastic about his role. The reference also set out the certificates he obtained while working for the Roper Golf Regional Council. He was described as a "valuable team member". Given the offending, the author of the reference said he would be placed in the alcohol and other drugs workshop which was conducted in Numbulwar every second Thursday and Friday.[24]

[31] A further co-offender charged was a youth. It is understood he was accepted for youth diversion. His case is plainly not to be considered for these purposes, save that it increases the gravity of the offending for all offenders, including the appellant, that a youth was involved.

24 Affidavit of Ambrith Abayasekara, sworn 6 June 2018, annexure HL5.

[32] It is accepted and argued on behalf of the respondent that a mere grievance because of dissimilarity in sentences passed on different offenders will not in itself require an appellate Court to interfere with the sentence. In *Green v The Queen*[25] French CJ, Crennan and Kiefel JJ stated:[26]

> The sense of grievance necessary to attract appellate intervention with respect to disparate sentences is to be assessed by objective criteria. The application of the parity principle does not involve a judgement about the feelings of the person complaining of disparity. The Court will refuse to intervene where disparity is justified by differences between co-offenders such as age, background, criminal history, general character and the part each has played in the relevant criminal conduct or enterprise.

[33] In determining objectively whether the disparity gives rise to a sense of grievance, a Court must consider all the components of the sentence[27] and all of the facts and circumstances applicable to the different co-offenders.[28] Unjustified disparities will be rectified even though the sentence under review, considered apart from disparity, might be regarded as within the permissible sentencing range.[29]

[34] Above, the components of each sentence and the known relevant subjective circumstances of each offender have been set out. Notwithstanding the appellant is the oldest of the offenders (and with respect to some, significantly older), and a youth participated, there was nothing in the facts

---

25 [2011] HCA 49; 244 CLR 462.

26 *Green v The Queen* (2011) 244 CLR 462 at 474-5; *Postiglione v The Queen* (1997) 189 CLR 295 at 232, per Gummow J and at 338 per Kirby J; *Lowe v The Queen* (1984) 154 CLR 606 at 609 per Gibbs CJ.

27 *Postiglione v The Queen* (1997) 189 CLR 295 at 303, per Dawson and Gordon JJ.

28 *Green v The Queen* (2011) 244 CLR 462 at 474 per French CJ, Crennan and Kiefel JJ.

29 *The Queen v MacGowan* (1986) 42 SASR 580 at 583, per King CJ.

to indicate this offender played a greater part than the co-offenders. However, it is accepted that his age and background means that he bears greater moral responsibility than the other offenders. Further, some of the mitigating features in respect of the co-offenders led to the exercise of some leniency in respect of their sentences. I would not however criticise their sentences as too lenient or otherwise inappropriate. Although all offending of this kind is serious, particularly because of its prevalence in Groote Eylandt, and the offences were committed in company, in all other respects it is not particularly grave.

[35] Although assessing the sentence imposed on the appellant presents some difficulties because it was a single aggregate sentence for the two episodes and no two co-offenders participated in precisely the same incidents, in my opinion, the overall sentence the appellant received is so markedly different from the sentences received by all other co-accused, appellate intervention is appropriate. The main point of differentiation between the offenders is the appellant's greater criminal history, which is substantially worse than the other co-offenders. However, as has been set out, some of the co-offenders, although younger, also had previous convictions for offending of this kind. In any event, although previous convictions have some role, the criminal history cannot elevate the sentence beyond what is duly proportionate to the offending and the offender. Although a somewhat lesser consideration, taking into account the appellant’s circumstances also requires some

consideration of the whole of the sentence he was serving.[30] The fact that his total sentence was 54 months with a non-parole period of 40 months is a relevant consideration.

[36] I would allow this ground and resentence the appellant.

Manifestly Excessive

[37] As indicated, aside from the prevalence of offending of this kind on Groote Island, thus heightening general deterrence and the protection of the community in sentencing, and that the offending was in company, the facts of the offending are not in the more serious category for offending of this generic kind. The criminal history of an offender cannot increase the sentence beyond what is proportionate to the offence.[31] Prior history is however a relevant consideration when determining an appropriate sentence including the protection of the community. The following from *Emitja v The Queen*[32] is instructive:

> While there can be no doubt that the principle of proportionality precludes the imposition of a sentence beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender, or merely to educate possible offenders in the penalties attached to proscribed conduct, this is not to say that the protection of society is not a material factor in fixing an appropriate sentence. The exercise of the sentencing discretion having regard to the protection of society, among other factors including retribution and deterrence, is clearly permissible provided that the purpose is not simply preventative detention and provided that the sentence does not go

30 *Postiglione v The Queen* (1997) CLR 295 at 302-303, per Dawson and Gaudron JJ.

31 *Veen v The Queen [No 2]* [1988] HCA 14; 164 CLR 465 at 477; *Baumer v The Queen* [1988] HCA 67; 166 CLR 51 at 57.

32 [2016] NTCCA 4 at [36]-[37].

beyond what is proportionate to the crime in order to protect society from the risk of recidivism on the part of an offender. As the majority observed in *Veen v The Queen [No 2]*:

> … the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v. Ottewell* (1970) AC 642, at p 650. 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. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties.

This is reflected in s 5(2)(e) of the *Sentencing Act* (NT), which requires a court to have regard to an offender's character when sentencing that offender. Section 6 of the Act provides expressly that in determining the character of an offender a court may consider "the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender". As the plurality in *Weininger v The Queen* observed in relation to a similar provision in the *Crimes Act 1914* (Cth):

> A person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are

> relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative, of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration *(footnotes omitted)*.

[38] For all of the reasons expressed in *Emitja*, the fact of the appellant's multiple previous convictions would be expected to be reflected in a more severe sentence than that imposed on a person without such convictions. It is clearly a relevant consideration. The sentence must, however, be proportionate to the crime. The sentence cannot be extended beyond what is proportionate, having regard to character and previous convictions, in order to extend the period of protection of the community from the risk of recidivism.

[39] In *Thomas v The Queen*[33] the Court of Criminal Appeal, citing *Veen v The Queen [No 2]*[34] held:

> The exercise of the sentencing discretion having regard to community protection is clearly permissible provided that the sentence does not go beyond what is proportionate to the crime in order to achieve a form of preventative detention.

[40] Applying all of the appropriate and well known restraints engaged in an appeal against a discretionary judgement, it is concluded here the sentence is manifestly excessive.

---

33 [2017] NTCCA 4 at [28].
34 (1988) 164 CLR 465 at 473.

[41] The principles of restraint in relation to sentence appeals are well known and are summarised in both *Bara v The Queen*[35] and *Emitja v The Queen*[36] in the following terms:

> 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 insufficient or 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.

[42] Further, as described in *Dinsdale v The Queen*:[37]

> Manifest inadequacy of sentence, like manifest excess, is a conclusion. A sentence is, or is not, unreasonable or plainly unjust; inadequacy or excess is, or is not, plainly apparent. It is a conclusion which does not depend on attribution of identified specific error in the reasoning of the sentencing judge and which frequently does not admit of amplification except by stating the respect in which the sentence is inadequate or excessive. It may be inadequate or excessive because the wrong type of sentence has been imposed (for example, custodial rather than non-custodial) or because the sentence imposed is manifestly too long or too short. But to identify the type of error amounts to no more than a statement of the conclusion that has been reached. It is not a statement of reasons for arriving at the conclusion.

[43] Given the facts of the offending, including the matters already identified as relatively serious factors, overall the offending was unsophisticated, obviously in pursuit of alcohol, no persons were disturbed at the time of the entries and the value of the damage and goods stolen was not in the higher levels that are seen in cases of this kind. The offending is likely to have

---

35 [2016] NTCCA 5 at [75]-[76]; see also, e.g., *Liddy v R* [2005] NTCCA 4 at [12] cited with approval in *Morrow v The Queen* [2013] NTCCA 7 at [36].
36 [2016] NTCCA 4 at [39].
37 [2000] HCA 54; 202 CLR 321, 325-326, per Gleeson CJ and Hayne J.

been difficult for the victims to cope with, both given the obvious financial loss and a reduced sense of security. Sentences of imprisonment are deserved, and well deserved in respect of the appellant; however, the sentence must be proportional in the relevant sense, having regard to the appellant's poor prospects and history.

[44] The starting point of three and a half years imprisonment, reduced to three years on the plea for this offending does provoke the response implied in the description "manifest excess". I would allow this ground.

Orders and Resentence

[45] The appeal is allowed against the sentence of imprisonment imposed by the Local Court on 25 October 2017.[38]

[46] The sentence of imprisonment for 3 years is quashed.

[47] Instead the appellant is sentenced to an aggregate term of 18 months imprisonment for counts 1, 2, 3, 7, 8 and 9.

[48] Six months of the sentence will be concurrent with the sentence the appellant is currently serving.

[49] The total effective term is 3 years imprisonment commencing on 18 February 2017.

---

38 There will be no order in relation to the fines for counts 4 and 10 which remain.

[50] There will be a non-parole period of 24 months commencing from 18 February 2017.
