Isaac v Pryce & Ors [2001] NTSC 35

PARTIES:	SAMUEL ISAAC v LEONARD DAVID PRYCE and KEVIN DAVID WINZAR and ROBERT BRUE HOSKING and CRAIG VICTOR RYAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICITON exercising Territory jurisdiction
FILE NO:	JA40 of 2001 (20011383) JA41 of 2001 (20020768) JA42 of 2001 (20015778) JA43 of 2001 (20100982)
DELIVERED:	18 May 2001
HEARING DATES:	2, 8 and 10 May 2001
JUDGMENT OF:	THOMAS J

CATCHWORDS:
CRIMINAL LAW – APPEAL AGAINST SENTENCE

Appeal from Court of Summary Jurisdiction – appeal on grounds that sentence manifestly excessive – failure to antedate sentence – aspect of rehabilitation – minor criminal record – appellant's personal disposition – discount for plea of guilty – objective circumstances of offence – principle of totality – sentence backdated – other grounds of appeal dismissed

Juvenile Justice Act 1983 (NT), s 90

Nottle v Trenerry (1993) 113 FLR 242, adopted

R v Raggett (1990) 50 A Crim R 41; *Cranssen v The King* (1936) 55 CLR 509; *M v Waldron* (1988) 90 FLR 355; *R v Smith* (1988) 33 A Crim R 95; *R v Gray* [1977] VR 225; *Kelly v The Queen* [2000] NTCCA 3 (30 June 2000); *Mill v The Queen* (1988) 166 CLR 59, referred to

R v Tait (1979) 46 FLR 386, applied

REPRESENTATION:

Counsel:

Appellant:	D Conidi
Respondent:	G McMaster

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Isaac v Pryce & Ors [2001] NTSC 35
Nos.JA40/2001, JA41/2001, JA42/2001, JA43/2001

BETWEEN:

SAMUEL ISAAC
Appellant

AND:

LEONARD DAVID PRYCE and KEVIN DAVID WINZAR and ROBERT BRUCE HOSKING and CRAIG VICTOR RYAN
Respondents

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 18 May 2001)

[1] This is an appeal against sentence imposed in the Court of Summary Jurisdiction on 16 March 2001.

[2] On that date the learned stipendiary magistrate sentenced the appellant to a total period of 19 months imprisonment. This sentence was suspended after he had served six months on condition he be of good behaviour for a period of 18 months with a condition he be under the supervision of a probation officer and on condition that he obey the probation officer's directions with respect to counselling and or treatment for substance abuse. The sentence was backdated to 19 January 2001.

[3] The sentence was imposed in respect of a number of offences to which the appellant had entered a plea of guilty. The details of these are as follows:

"**Case No.**	**Offn**	**Offence Description**	**Sentence**
20011383	1	Enter a dwelling with intent – crime	1 Month(s) commencing on 19 January 2001
20015778	1	Enter a building with intent – crime	12 Month(s) cumulative upon the sentence imposed in case 20011383
20015778	2	Stealing	
20020768	1	Enter a dwelling with intent – crime	4 Month(s) cumulative upon the sentence imposed in case 20015778
20020768	2	Stealing	
20100982	1	Interfere with vehicle	2 Month(s) cumulative upon the sentence imposed in case 20020768"

[4] No issue is taken with the learned stipendiary magistrate's summary of the facts on each charge which is as follows (t/p 2 – 3):

> "The defendant has pleaded guilty to a series of offences, all involving theft or attempted theft. The first was on 24 June [2000] of last year. On that occasion he entered a dwelling house in the afternoon – it was at 4 o'clock in the afternoon – with the intention to steal. The occupant of the house, a lady, found the defendant lurking in a bedroom of the house. She summonsed help and a citizens arrest was effected. This occurred at about 4 o'clock.
>
> The defendant was given police bail but failed to attend court on 26 June [2000], and a warrant was issued for his arrest. He was arrested according to the warrant and brought before the court on 30 August [2000]. He was then given bail to appear in court on 19 September. He failed to appear and another warrant had to be issued.
>
> On 25 September [2000] at 11.30 pm he committed another crime. He entered the business premises of Dingo's Restaurant with intention to steal. Someone had left a brown leather satchel with the day's takings or possibly several days' takings, in it in the kitchen. That bag contained $4543.

The defendant snatched it and took off. He hid, somehow, from the subsequent hue and cry for a while and about a quarter of an hour later he was discovered, with a group of other people said to be members of his family, sitting in the town centre. The police asked a general question about whether any of them had lots of money, whereat the defendant pulled out the balance of the money that he had not already given away, and gave it back to police.

The police recovered $1945 of it. $2538 is still missing. The defendant was arrested for this and brought before the court for this and the previous matter. On 27 September [2000] he appeared before the court. He was given bail to appear in court on 10 October. He didn't appear in court on that date and a warrant was issued for his arrest. He was arrested pursuant to the warrants issued and brought before the court on 13 December [2000]. He was again given bail, by consent, to appear in court on 17 January [2000].

One week after his appearance in court on 13 December [2000], he committed his next offence, on 21 December [2000]. This time he entered a caravan at night with intention to steal. He in fact took a handbag containing $890 cash and some other goods. He then ran away, but was apprehended in a citizen's arrest. He was very intoxicated at the time. The property stolen was recovered.

when he appeared in court for this offence on 22 December [2000], he was remanded in custody until 17 January [2001]. The court was again persuaded to give him bail on 17 January of this year. Defence counsel were seeking a psychiatric report, which was not yet available. Defence counsel had concerns about the defendant's fitness to plead and ability to give instructions.

Sure enough, when released the defendant availed himself yet again of the opportunity to get drunk and to steal. This time he was caught rifling through a van parked outside the post office. This was on 19 January of this year, two days after his latest release on bail. He was going through the glovebox when the owner discovered and arrested him."

[5] The grounds of appeal are as follows:

"1. That the aggregate head sentence of 19 months imprisonment imposed by the learned sentencing magistrate for offences contained in Files No. 20011383, 20015778, 20020768 and 20100982 was manifestly excessive in all the circumstances.

2. That the part of the sentence that was ordered to be served, namely six months imprisonment, imposed by the learned sentencing magistrate or offences contained in Files No.

20011383, 20015778, 20020768 and 20100982 was manifestly excessive.

3. In backdating the sentence to 19 January 2001, the learned sentencing magistrate erred in no[t] crediting the Appellant with the whole of the time he spent in custody prior to sentence.

4. That the learned sentencing magistrate failed to apply correctly the principle of totality.

5. That the learned sentencing magistrate had insufficient regard to the Appellant's age and the principles to be applied to youthful offenders.

6. That the learned sentencing magistrate had insufficient regard to the Appellant's minor criminal record.

7. That the learned sentencing magistrate erred in that he had insufficient regard to the Appellant's personal disposition, in particular:

    (a) the Appellant's disadvantage upbringing;

    (b) the Appellant's apparent brain damage;

    (c) the Appellant's history of substance abuse; and

    (d) the Appellant's prospect for rehabilitation.

8. That the learned sentencing magistrate had insufficient regard to the Appellant's plea of guilty.

9. In imposing term of imprisonment on File No. 20020768, the learned sentencing magistrate failed to have sufficient regard to the objective circumstances of the offence. In particular the learned Magistrate had insufficient regard to:

    (a) the opportunistic nature of the offence;

    (b) the lack of planning;

    (c) the fact that no force was used to gain entry to the dwelling;

    (d) the fact that the dwelling was no[t] damaged or diminished in any way;

    (e) the Appellant's compliance with the victim when confronted by the victim; and

    (f) the fact that the Appellant did not endeavour to escape or offer resistance to the victim.

10. That the learned sentencing magistrate had insufficient regard to the Appellant's co-operation with the police.

11. That the learned sentencing magistrate had insufficient regard to the Appellant's full admissions in the record of interview."

[6] The principles to be applied by an appellate court on the question of sentence are set out in the decision of *R v Raggett* (1990) 50 A Crim R 41, *Cranssen v The King* (1936) 55 CLR 509 and *R v Tait* (1979) 46 FLR 386.

[7] I propose to deal with the grounds as follows:

Ground 3: In backdating the sentence to 19 January 2001, the learned sentencing magistrate erred in no[t] crediting the Appellant with the whole of the time he spent in custody prior to sentence.

[8] Mr Conidi, counsel for the appellant, agrees with the very useful analysis made by Ms McMaster, counsel for the respondent, of the periods of time Mr Isaac spent in custody as a consequence of these offences. These are as follows:

> "The first offence was committed on 24 June 2000 (file no. 20011383). The Appellant was granted police bail on the same day. He agreed to appear in the Court of Summary Jurisdiction on 29 June 2000. (*1 day in custody*)
>
> On 29 June 2000 the Appellant failed to appear and a warrant was issued.
>
> On 29 August 2000 the Appellant was arrested and was granted bail the following day. He agreed to appear on 19 September 2000. (*2 days in custody*)
>
> On 19 September 2000 the Appellant failed to appear and a warrant was issued.
>
> Further offences were committed on 25 September 2000 (file no. 20015778). The Appellant was arrested the following day, and granted bail on 27 September 2000, to appear on 10 October 2000. (*2 days in custody*)
>
> On 10 October 2000 the Appellant failed to appear. A warrant was issued.

> On 12 December 2000 the Appellant was apprehended pursuant to the warrant(s). He was released on bail on 13 December 2000, and agreed to appear on 17 January 2001. (*2 days in custody*)
>
> On 21 December 2000 the Appellant was arrested for further offences (file no. 20020768). He was remanded in custody until 17 January 2001. (*28 days in custody*)
>
> On 17 January 2001 the Appellant, who appeared in custody, was again granted bail, and agreed to appear on 30 January 2001.
>
> On 19 January 2001 the Appellant was arrested for committing a further offence (file no. 20100982). He appeared in custody on 22 January 2001. (*4 days in custody*)
>
> He was remanded in custody on all matters for plea and sentencing, which was finalised on 16 March 2001. (*53 days in custody)*
>
> In total, therefore, it appears that the Appellant spent 92 days in custody."

[9] I agree that in backdating the sentence to 19 January 2001, the learned stipendiary magistrate did not take into account all of the time the appellant had spent in custody with respect to these offences. The learned stipendiary magistrate gave no reasons why he did not antedate the sentence to take into account the whole of the time the appellant had been in custody for these offences. I adopt with respect the principle expressed by Mildren J in *Nottle v Trenerry* (1993) 113 FLR 242 at 244:

> "Undoubtedly the power conferred by the court under s 405(2) to antedate a sentence is discretionary, but it is well-established that the failure to antedate a sentence is sentencing error unless reasons are given for the failure to adopt that practice: see *R v Reed* [1992] 2 VR 484 at 486. The correct practice, in my opinion, is set out in a passage of the judgment of Street CJ, speaking for the Court of Criminal Appeal, in *R v McHugh* (1985) 1 NSWLR 588 at 590-591:
>
> > 'It is desirable sentencing practice that, where there has been a period of pre-sentence custody exclusively referrable to the offences for which sentence is being passed, the commencement of the sentence (and the non-parole or non-probation period) should be backdated for an equivalent period.

> This is to be preferred to a process of assessing the proper sentence (and non-parole or non-probation period) and allowing, as it were, a discount in consequence of the pre-sentence custody. The desirable practice will promote the accuracy of the record, preventing there being a hidden factor affecting the length of the custody involved in consequence of the sentencing order. In addition, this practice will remove inequalities and unfairnesses as between prisoners arising from delays prior to sentencing, in particular in relation to remission or reduction entitlements; recognition of this does not infringe the principle in *R v O'Brien* [1984] 2 NSWLR 449 that remissions and reductions are to be disregarded when determining the length of sentences, non-parole and non-probation periods. A judge departing from this practice could be expected to indicate his reasons for so doing.'"

[10] I find that in failing to antedate the sentence to take into account the time spent in custody by the appellant for these offences without providing reasons for the exercise of such discretion the learned stipendiary magistrate was in error.

[11] I should note that the learned stipendiary magistrate was informed on 13 March 2001 that the first period in custody commenced on 21 December 2000 and bailed on 17 January 2001 and taken into custody on 21 January 2001, a period of 83 days in custody. This information was not entirely accurate and the complete picture as prepared by Ms McMaster, counsel for the Crown, is as set out in paragraph 8 of these Reasons for Judgment.

Ground 5: That the learned sentencing magistrate had insufficient regard to the Appellant's age and the principles to be applied to youthful offenders.

[12] The aspect of rehabilitation is an important factor in the sentencing of a youthful offender. However, it is not the only factor to be considered, see *M v Waldron* (1988) 90 FLR 355; *R v Smith* (1988) 33 A Crim R 95.

[13] The learned stipendiary magistrate referred to the age of the appellant being 20 years of age and commented that he turned 21 on 1 April 2001. There was no specific reference made to the principles of sentencing a youthful offender. However the learned stipendiary magistrate was well aware he was dealing with a young man. The principles of sentencing youthful offenders are well established. Rehabilitation is an important aspect of the sentencing process. The learned stipendiary magistrate had to balance the age of the appellant with the problems in respect of rehabilitation; in particular the appellant's refusal to acknowledge his substance abuse problem that gave rise to these offences and his refusal to seek help.

[14] The learned stipendiary magistrate did make reference to the effect on the victims of the appellant's offending. His Worship was entitled to take this into account in assessing the need to protect the community from the appellant's offending.

[15] In this context the learned stipendiary magistrate also noted that the final offence was committed whilst the appellant was on bail for the other offences. In view of the repetition of the offending the circumstances of the

offences and the offending whilst on bail, the learned stipendiary magistrate was entitled to have due regard to the aspects of general and specific deterrence as well as the aspect of rehabilitation.

[16] I am not persuaded the learned stipendiary magistrate has been shown to be in error.

Ground 6: That the learned sentencing magistrate had insufficient regard to the Appellant's minor criminal record.

[17] Mr Conidi, on behalf of the appellant, referred to the Record of Prior Convictions which are attached to the Notice of Appeal documents.

[18] This record indicates that the appellant has a prior conviction in the Alice Springs Juvenile Court for an offence of Criminal Damage for which he was convicted on 16 March 1998 and released on a Good Behaviour Bond for a period of nine months. There are other matters on the same date which were proved but the court did not proceed to record a conviction.

[19] Section 90 of the Juvenile Justice Act 1983 (NT) provides as follows:

> "90. Certain convictions not to be mentioned, &c.
>
> Where a juvenile has, whether before or after the commencement of this Act, been found by a court to have committed an offence but no conviction was recorded by the court, no evidence or mention of that offence may be made to, or the offence be taken into account by, a court other than the Juvenile Court."

[20] Mr Conidi, on behalf of the appellant, submitted that these offences were the first matters the appellant was being dealt with in the Court of Summary

Jurisdiction apart from convictions imposed by the Court of Summary Jurisdiction on 18 July 2000 for offences of Furnish False Name to Member and Trespass on Enclosed Premises, which were both dealt with ex parte.

[21] Mr Conidi referred to the following statement made by the learned stipendiary magistrate in the course of his reasons for sentence (t/p 3):

> "The defendant has had a court appearance for a series of offences committed on different dates. These were all dealt with in the Juvenile Court, all on the one date. They were all dealt with on the one date because, on each occasion when remanded for each individual offence, he failed to appear and mesne warrants had to be issued to get him before the court.
>
> On that occasion he was not convicted of anything, but discharged on a recognizance to be of good behaviour. In fixing sentence, these matters cannot be taken into account, but they are mentioned simply by way of his general background, because his general background is of some importance in this case.
>
> It's apparent from the above recital that the defendant has no regard for the law, nor for court orders such as bail, nor for the concept of property ownership. ....."

[22] It is Mr Conidi's submission that although the learned stipendiary magistrate stated the matters in the Juvenile Court could not be taken into account in fixing sentence, that nevertheless his Worship had regard to them, even though the Juvenile Justice Act precluded him from doing so.

[23] I do not accept this submission. The learned stipendiary magistrate, from his comments, was clearly aware that he could not take into account matters in the Juvenile Court where no conviction was recorded. In fact, his Worship does not even make mention of the one offence for which there was a conviction in the Juvenile Court being the offence of criminal damage.

His comments which are the subject of complaint must be taken in context of comments made immediately before this statement with respect to the appellant committing the final offence two days after he was released from bail. This comment in turn follows immediately after the learned stipendiary magistrate refers to the details of the four offences committed by the appellant between 24 June 2000 and 19 January 2001 and the details of his failing to answer bail and the warrants that issued for his arrest during this period.

[24] I do not consider this ground of appeal has been established.

7. That the learned sentencing magistrate erred in that he had insufficient regard to the Appellant's personal disposition, in particular:

(a) the Appellant's disadvantaged upbringing;

(b) the Appellant's apparent brain damage;

(c) the Appellant's history of substance abuse; and

(d) the Appellant's prospect for rehabilitation.

[25] A pre-sentence report requested by the learned stipendiary magistrate was prepared by the Department of Correctional Services. This report is also attached to the Notice of Appeal. The report details the appellant's early family situation, his lack of any education and the fact he has been on a disability support pension for a number of years. The pre-sentence report provides considerable background concerning Mr Isaac's general state of health. Most significant is organic brain damage consequent upon his petrol sniffing. Mr Isaac denied any petrol sniffing. He did admit to being drunk

at the time of the offence. However, he does not think he consumes too much alcohol and states he does not need counselling for his alcohol intake. On 17 January 2001, a psychiatric assessment was completed by Marcus Tabart. A report from Dr Tabart dated 17 January 2001 is also attached to the Notice of Appeal. This report stated there were no psychiatric issues relevant at the time of the appellant's alleged offences. He was found fit to plead. This report also refers to the appellant's petrol sniffing and substance abuse. In the final paragraph of this report Dr Tabart states: "He is significantly improved in his mental and physical well being since his imposed abstinence from petrol."

[26] The pre-sentence report refers to the difficulties in compiling the report due to "Isaac's acquired brain injury". There is also a summary of discussions with various family members and with Mr Isaac as to an appropriate place for him to reside upon his release from gaol. It is clear from this report that the aspect of rehabilitation is difficult because of Mr Isaac's perceived inability and capacity to understand his responsibilities, his refusal to accept help and his denial of any substance abuse or alcohol problems which should be addressed.

[27] On 13 March 2001, the learned stipendiary magistrate stated "I will sentence him upon the basis that he does suffer from some brain injury and that that is a significant contributing factor to the offences that were committed."

[28] Counsel for the appellant submits that when his Worship came to sentence Mr Isaac on 16 March 2001 he did not take account of the brain damage suffered by Mr Isaac. Mr Conidi contrasts the learned stipendiary magistrate's statement on 13 March 2001 referred to in paragraph 27 with his reference to "mild brain damage" in his reasons for sentence delivered on 16 March 2001.

[29] I do not accept this submission.

[30] The learned stipendiary magistrate in his reasons for sentence delivered on 16 March 2001 stated as follows (t/p 4):

> "On the personal side, the defendant is young, being 20 years of age – 21 on 1 April of this year, according to one source, although there is some doubt as to his exact age. The psychiatric report says there is no particular psychiatric issue relevant. He is fit to plead. He's been admitted in the past to ward 1 with petrol sniffing leading to intoxication delirium. A stay in that ward for a time led to a significant improve in his condition.
>
> A presentence report, however, mentioned Prodromal, which I think means incipient schizophrenia. This seems to be negatived by Doctor Tabart's report. I simply don't know the situation with respect to that.
>
> It appears he had a difficult, fractured upbringing. It is almost as if he brought himself up. It is more a case of survival or existence rather than an upbringing. He had very limited schooling. He has impaired vision in one eye. Medical investigations, reported secondhand in the presentence report, indicate mild brain damage, probably as a result of petrol sniffing.
>
> It is obvious he had ongoing problems with substance abuse. He sniffs petrol, he drinks alcohol to excess, he smokes cannabis. Unless he can get his substance abuse under control, he cannot properly participate in society; he will continue to offend and continue to damage his brain and continue to be sentenced to terms of imprisonment.

> Like so many others with substance abuse problems, he denies he has a problem. ...."

[31] From an analysis of the report prepared by Dr Tabart read with the pre-sentence report, it is difficult to ascertain the exact extent of the brain damage. The author of the pre-sentence report states "His inability to recall the events of the offence is possibly an indication of the extent of his organic brain damage". However, this comment is speculation and does not purport to be a professionally qualified assessment. The fourth page of the pre-sentence report states that Ms Pagan Richards, the Community Corrections psychologist, had interviewed Mr Isaac at the Alice Springs Correctional Centre for the purpose of the pre-sentence report. Ms Richards reported that in her opinion Mr Isaac has organic brain damage and that he had been referred to Community Mental Health.

[32] The report dated 17 January 2001 signed by Dr Siva Velan the psychiatric registrar and Dr Marcus Tabart consultant psychiatrist, does not mention "brain damage". The report states "it was evident there were no particular psychiatric issues relevant at the time of his alleged offence." Brain damage may well be a separate issue and there is reference in the report to the effect of "abuse of intoxicating substances" as a contributing factor to the offences. This report also notes information received that Mr Isaac had been petrol sniffing and smoking cannabis for several years. It is relevant to note the comment made by Dr Tabart and Dr Velan that Samuel Isaac had

"significantly improved in his mental and physical wellbeing since his imposed abstinence from petrol."

[33] From all of this information the learned stipendiary magistrate cannot be criticised for using the term "mild brain damage", a condition that appears to fluctuate with the appellant's level of substance abuse. This does not mean that his Worship failed to sentence the appellant on the basis that the brain injury "is a significant contributing factor to the offences that were committed."

[34] Under this ground of appeal, Mr Conidi is critical of the learned stipendiary magistrate for refusing to order a further psychiatric report. Mr Conidi referred to the submissions he made on this issue on 23 January 2001 and recorded at transcript pages 5-7. The learned stipendiary magistrate made it clear he did not intend to order a further psychiatric report because the report he had before him from Dr Tabart dated 17 January 2001 stated there were no relevant psychiatric issues. There was no application by the defence to cross examine. Dr Tabart on this statement or any other matters set out in his report. It is relevant to note that the defence at that time could have arranged for a further psychiatric report to be prepared without the necessity of a court order. In submissions to this Court, Mr Conidi made reference to the scarcity of psychiatric resources in Alice Springs and the logistical difficulties of obtaining a further report. I understand those difficulties. Presumably these same difficulties existed if the learned stipendiary magistrate had requested a further report. Mr Conidi submitted

to this Court that if the learned stipendiary magistrate had requested the further psychiatric report the appellant could have been released on bail rather than being remanded in custody while the defence obtained a further psychiatric report. The appellant's previous failures to comply with conditions of bail were well known to the learned stipendiary magistrate. This included the commission of a further offence a few days before 23 January 2001, that is on 19 January and only two days after he had been granted bail on the last occasion. An expectation that the appellant would again be released on bail whilst a further report was obtained from a psychiatrist or a neurosurgeon, was somewhat unrealistic. When Mr Conidi indicated he would seek bail at the time the pre-sentence report was ordered the learned stipendiary magistrate stated he would not be disposed to grant bail.

[35] On 23 January 2001 the learned stipendiary magistrate did order a pre-sentence report. This report was prepared and presented to the Court when the matter resumed on 13 March 2001. The transcript of proceedings on 13 March sets out a further interchange between Mr Conidi and the learned stipendiary magistrate on the issue of a further psychiatric report and the length of time this would take to prepare. His Worship stated (t/p 6) on 13 March 2001:

> "Well he's already had a fair whack in gaol, I'll bear that in mind and I'll certainly – ideally I would have liked an assessment on his condition by a specialist but I think he'd rather know what his fate is. …"

[36] In considering all of the circumstances I do not consider the learned stipendiary magistrate erred in the exercise of his discretion not to request a further psychiatric or neurosurgeon's report.

[37] Mr Conidi on behalf of the appellant submits the magistrate should have given greater consideration to the options outlined in the pre-sentence report with regard to the appellant's placement during the period of suspended sentence instead of describing the matter as he did on 16 March 2001 as a "depressing case with a gloomy outlook".

[38] An analysis of the pre-sentence report demonstrates the difficulties associated with all of the available options for Mr Isaac's placement.

[39] Mr Isaac's sister had offered to take him to an outstation near Hermannsberg to reside with her and she would help him obtain work. Mr Isaac had told the author of the pre-sentence report he had no interest in staying at Hermannsberg.

[40] Mr Isaac's mother had expressed a willingness to have him reside with her at Yuendumu. The pre-sentence report indicates that Mr Isaac's uncles would first need to be properly consulted before any such plan was put in place. The author of the pre-sentence report indicated this may be the best of the alternatives for placement available.

[41] Residence at Amata Community was canvassed in the pre-sentence report and it was noted that his uncle, who resides at Amata, reported Samuel Isaac

is “mixed up with sniffers” and further stated that when Samuel has been sniffing he gets into arguments and throws stones. It was further noted in the pre-sentence report that members of the Amata Community had indicated an unwillingness to have Samuel back in the community.

[42] Another alternative referred to in the pre-sentence report was placement in the care of Mr Isaac’s aunt at Mulga Park in South Australia. However, the Probation and Parole Officer had not been able to contact Mr Isaac’s aunt to ascertain if she would agree to such a placement.

[43] The learned stipendiary magistrate ultimately concluded that where the appellant lived was a matter for the appellant.

[44] I note that the appellant has been placed under supervision of a Probation and Parole Officer during the period of the suspended sentence. Mr Isaac will have an opportunity to discuss his place of residence with his Probation and Parole Officer.

[45] I am not persuaded that in imposing the sentence he did the learned stipendiary magistrate erred in not giving the options for Mr Isaac’s placement appropriate consideration. His Worship in fact referred to all of the options and noted the problems that existed at that time with making any specific order as to where Mr Isaac reside.

[46] Based on the information contained in the pre-sentence report none of which was subject to challenge, I consider the learned stipendiary magistrate made

a very realistic assessment of Mr Isaac's prospects of rehabilitation at the time he imposed sentence. Reference was made by his Worship to effects of the appellant's brain damage (which appear to be induced by substance abuse), his history of substance abuse, the obvious disadvantages of his upbringing and the appellant's refusal to acknowledge his substance abuse or to accept help. This coupled with the information before his Worship as to the appellant's continued re-offending whilst on bail are an indication of his prospects of rehabilitation – see *R v Gray* [1977] VR 225.

[47] The learned stipendiary magistrate did not discount the prospect of rehabilitation. He did as is required in the sentencing process and looked at all the factors that affect the aspect of rehabilitation.

[48] I do not consider this ground of appeal has been made out.

Ground 8: That the learned sentencing magistrate had insufficient regard to the Appellant's plea of guilty.

[49] The Court of Criminal Appeal decision in *Kelly v The Queen* [2000] NTCCA 3 (30 June 2000) is authority for the principle that a discount should be given for a plea of guilty. At paragraph 27 their Honour's stated:

> "In our opinion it is desirable that a sentencing court should indicate the extent to which, and the manner in which a plea of guilty has been given any weight as a mitigating factor, but we do not consider that it is possible to lay down any tariff. The weight to be given to the plea will vary according to the circumstances."

[50] In this matter his Worship has acknowledged the plea of guilty. Although he has not referred to the weight that he has given to the plea of guilty, I consider in looking at the total sentences imposed that it has been taken into account in mitigation.

[51] I have concluded that this ground of appeal has not been made out.

Ground 9: In imposing term of imprisonment on File No. 20020768, the learned sentencing magistrate failed to have sufficient regard to the objective circumstances of the offence. In particular the learned Magistrate had insufficient regard to:

(a) the opportunistic nature of the offence;

(b) the lack of planning;

(c) the fact that no force was used to gain entry to the dwelling;

(d) the fact that the dwelling was no[t] damaged or diminished in any way;

(e) the Appellant's compliance with the victim when confronted by the victim; and

(f) the fact that the Appellant did not endeavour to escape or offer resistance to the victim.

[52] In the course of submissions to the learned stipendiary magistrate on 13 March 2001, Mr Conidi had stated (t/p 4):

> "Yes. It's just unusual that he seems to get caught on each occasion, but there's no real explanation as to what he's doing and why he's doing it. There is – I have not been able to discern any particular motive as to the offences. All I can say to Your Worship is that he was drunk at the time and it appears that perhaps he didn't know himself why he was doing them. And a lot of these offences could be described as opportunistic, especially the one at the Dingo Restaurant."

[53] The learned stipendiary magistrate acknowledged the force of this submission and replied:

> "I don't think much premeditation has gone into it."

[54] In his reasons for sentence delivered 16 March 2001, his Worship again acknowledges Mr Conidi's submission by stating that "the offences were, by and large, opportunistic rather than planned". His Worship then went on to say (t/p 3):

> "…. That acceptance is, up to a point, but it does take some planning and some forethought to decide to trespass upon someone else's house, caravan and restaurant."

The learned stipendiary magistrate then made reference to the anger and fear experienced by victims who suffer another person entering their dwelling with intention to steal.

[55] I consider the learned stipendiary magistrate was entitled to make the findings that he did as to the objective seriousness of the offences particularly the theft of a large sum of money from the restaurant.

[56] Mr Conidi has made very forceful submissions about the learned stipendiary magistrate's description of the appellant as "an idle loafer". I agree that description is somewhat unfortunate in view of the appellant's "fractured upbringing", his lack of any formal education and his health problems which have led to his being a recipient of a disability pension. Nevertheless, this

remark must be considered in the context in which it was said which appears in the following paragraph of his Worship's remarks on sentence (t/p 3-4):

> "The most serious charge was, of course, the theft of the large sum of money from the restaurant. In my opinion, looked at objectively, it warrants a substantial term of imprisonment. Small business, such as the victim in this case, can ill-afford to have thieves like the defendant making off with their daily takings. The victim no doubt had to work for his/her or its money, and it must've been aggravating to see an idle loafer, like the defendant, snatching it and disbursing it."

[57] A comparison was being drawn between the victim who had to work to earn the money stolen and the appellant who had not. It was viewing the offence through the eyes of the victim. I do not consider it indicates a failure by the magistrate to take into account all the mitigating factors including the appellants disadvantaged background to which the learned stipendiary magistrate made reference and the objective circumstances of the offending.

[58] I do not consider this ground of appeal has been substantiated.

Ground 10: That the learned sentencing magistrate had insufficient regard to the Appellant's co-operation with the police.

Ground 11: That the learned sentencing magistrate had insufficient regard to the Appellant's full admissions in the record of interview."

[59] The Crown concedes that admissions were made with respect to the offences on files number 20011383 and 20015778.

[60] With respect to the offences on file 20100982, the appellant declined to participate in a record of interview. With respect to offences on file

20020768 the record of interview was terminated as the caution could not be understood.

[61] Again I consider that the sentence itself does not reflect a failure to take these matters into account and accord appropriate weight to the appellant's cooperation with police.

[62] Having dealt with the more specific grounds of appeal, I now turn to consider the two grounds of appeal concerning the sentence being manifestly excessive.

Ground 1: That the aggregate head sentence of 19 months imprisonment imposed by the learned sentencing magistrate for offences contained in Files No. 20011383, 20015778, 20020768 and 20100982 was manifestly excessive in all the circumstances.

Ground 2: That the part of the sentence that was ordered to be served, namely six months imprisonment, imposed by the learned sentencing magistrate or offences contained in Files No. 20011383, 20015778, 20020768 and 20100982 was manifestly excessive.

[63] I apply the following principle as stated by the Federal Court, Brennan, Deane and Gallop JJ in *R v Tait* (supra) at 388 (paragraph 2):

> "An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or 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 in 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 or inadequate as to manifest such error (see generally, *Skinner v The King*; *R v Withers*; *Whittaker v The King; Griffiths v The Queen*."

[64] Apart from the failure to antedate the sentence in full, I am not persuaded the learned stipendiary magistrate acted on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. Neither do I consider the sentence itself is so excessive as to manifest error.

[65] Accordingly, this ground of appeal does not succeed.

Ground 4: That the learned sentencing magistrate failed to apply correctly the principle of totality.

[66] The learned stipendiary magistrate did make reference to the principle of totality when he stated in the course of his reasons for sentence (t/p 5):

> "The total sentence is a period of 19 months. With respect to the 19 months' imprisonment, I've assessed the totality of that sentence and it seems to me fair, looking at the totality of what the defendant did and the manner in which it was done."

[67] In *Mill v The Queen* (1988) 166 CLR 59, the Justices of the High Court discussed the totality principles and stated at 62 – 63:

> " The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a 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'."
>
> See also Ruby, *Sentencing*, 3rd ed. (1987), pp. 38-41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."

[68] From a full reading of the learned stipendiary magistrate's reasons for sentence in arriving at a total head sentence and the minimum time to be served I consider the learned stipendiary magistrate did have regard to and applied the principle of totality.

[69] Accordingly, I dismiss this ground of appeal.

[70] I allow the appeal with respect to my finding that the learned stipendiary magistrate failed to antedate the sentence to take account of the full period of time the accused had spent in custody. The parties are in agreement that this is an additional 35 days and that this would take the date back to 15 December 2000. Accordingly, I backdate the sentence to 15 December 2000.

[71] With respect to the other grounds of appeal, for the reasons stated above, the appeal is dismissed.

[72] I note the decision in this matter was announced to the parties in Court on 10 May 2001. I indicated at that time I would publish my reasons which I now publish with a copy provided to the parties on 18 May 2001.

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