Bara v The Queen [2016] NTCCA 5

PARTIES:	BARA, Naamah v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA 3 of 2016 (21503400)
DELIVERED:	2 December 2016
HEARING DATES:	21 November 2016
JUDGMENT OF:	GRANT CJ, BARR and HILEY JJ
APPEALED FROM:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – PROPERTY OFFENCES – JUDGMENT AND PUNISHMENT

Whether sentence breached the principle of parity having regard to the different objective and subjective circumstances of the appellant and co-offender –– whether sentencing judge fell into error by imposing the same head sentence on the appellant as had been imposed on the co-offender – no distinction properly made between the degrees of participation of each offender in the offence – the aggravating circumstance of offensive weapons was a "neutral factor" in the sentencing calculus for the offence in question, so diminishing the distinction between the relevant conduct of the appellant and the co-offender – a record of persistent

offending will not necessarily attract a heavier sentence than a long record of offending punctuated by significant periods free of criminal conduct – not possible to say that because of differences in their criminal records the appellant's sentence should have been less than the sentence imposed on the co-offender by some quantified or quantifiable period – a proper comparison between sentences requires a consideration of all components of each sentence – it is a legitimate consideration in assessing the appellant's claim to a lack of parity to have regard to the fact that the sentencing court suspended the term of imprisonment imposed on him after he had served six months – to the extent that there was any disparity between the head sentences it was not so unjustified, significant or manifestly excessive as to warrant appellate intervention – appeal dismissed.

CRIMINAL LAW – PROPERTY OFFENCES – JUDGMENT AND PUNISHMENT

Whether sentence was manifestly excessive given the circumstances of the offending and the appellant –– having regard to the weight properly attached to the appellant's criminal record and prospects for rehabilitation it could not be said that the head sentence imposed on him fell outside any sentencing range or standard – a review of comparative sentences does not disclose any patent discrepancy between the head sentence imposed and the general run of broadly analogous matters – the sentencing court took into account the objective and subjective factors relevant to the exercise of the sentencing discretion without inappropriate individual consideration – appeal dismissed.

Criminal Code (NT) s 210, s 211, s 213
Sentencing Act (NT) s 3, s 40(3), s 52, s 78C

Lowe v The Queen (1984) 154 CLR 606, *Postiglione v The Queen* (1997) 189 CLR 295, applied.

Dinsdale v R (2000) 202 CLR 321, *Donovan v The Queen* [2010] VSCA 169, *Emitja v The Queen* [2016] NTCCA 4, *Green v R* (2011) 244 CLR 462, *Gumurdul v Reinke* [2006] NTSC 27, *Kristiansen v Young* [2010] ACTSC 61, *Liddy v R* [2005] NTCCA 4, *Markarian v The Queen* (2005) 228 CLR 357, *Morrow v The Queen* [2013] NTCCA 7, *Pastras v The Queen* (1993) 65 A Crim R 584, *Pavicevic v The Queen* [2010] ACTCA 25, *Pearce v R* (1998) 194 CLR 610, *Pecora v The Queen* [1980] VR 499, *R v Boyle* (1996) 87 A Crim R 539, *R v Cox* (1996) 66 SASR 152, *R v Kane* [1974] VR 759, *R v Kerr* [2003] NSWCCA 234, *R v MacGowan* (1986) 42 SASR 580, *R v Mussett* [1999] NSWCCA 419, *R v Wei Pan* [2005] NSWCCA 114, *R v Perre* (1986) 41 SASR 105, *R v Wilton* (1981) 28 SASR 362, *R v Wing Cheong Li*

[2010] NSWCCA 125, *Riley v The Queen* [1986] Tas R 199, *The Queen v Stone* [2010] QCA 157, *Wong v The Queen* (2001) 207 CLR 584, referred to.

A Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria*, 3rd edition (Lawbook Co, 2014).

REPRESENTATION:

Counsel:

Appellant:	M Aust
Respondent	W J Karczewski QC, Director of Public Prosecutions

Solicitors:

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

Judgment category classification: B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Bara v The Queen [2016] NTCCA 5
No. CA 3 of 2016 (21503400)

BETWEEN:

NAAMAH BARA
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BARR and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 2 December 2016)

THE COURT:

[1] By indictment dated 10 July 2015, the appellant and his co-offender were both charged in Count 1 with unlawfully entering a building with intent to commit an offence therein contrary to s 213 of the *Criminal Code* (NT).[1] The indictment pleaded against both offenders the circumstances of aggravation that the offence intended to be committed was the crime of stealing; that the building was a dwelling house; and that the unlawful entry occurred at night-time. The indictment pleaded against the co-offender the additional circumstance of aggravation that

1 Appeal Book 1-4.

he was armed with offensive weapons at the time of the unlawful entry in the form of two screwdrivers and a torch.

[2] The maximum penalty to which the appellant was exposed for that offence was imprisonment for 20 years. The maximum penalty to which the co-offender was exposed for that offence was, by virtue of the additional circumstance of aggravation, imprisonment for life.

[3] In addition to the offence of unlawful entry, the indictment also charged the appellant in Count 2 with stealing four bottles of wine and $65 in cash contrary to s 210 of the *Criminal Code*. The maximum penalty for that offence was imprisonment for seven years.

[4] In addition to the offence of unlawful entry, the indictment also charged the co-offender in Count 3 with robbing the occupants of the dwelling house of the four bottles of wine and $65 in cash contrary to s 211 of the *Criminal Code*. The indictment pleaded the circumstances of aggravation that the co-offender was armed with the offensive weapons and caused harm to one of the occupants of the dwelling house. The maximum penalty for that offence was imprisonment for life.

[5] Both the appellant and the co-offender pleaded guilty to those charges.

The sentences at first instance

[6] The co-offender's plea hearing proceeded on 4 August 2015.[2] The court sentenced the co-offender to imprisonment for two years and three months for the unlawful entry offence in Count 1 and to imprisonment for three years for the robbery offence in Count 3. Those sentences were ordered to be served in partial concurrence, resulting in a total effective period of imprisonment for four years, backdated to commence on the date of the co-offender's arrest on 22 January 2015. The court fixed a non-parole period of two years. Even had it been disposed to do so, it was not open to the court to impose an aggregate sentence of imprisonment across the two charges.[3]

[7] The appellant's plea hearing proceeded on 11 February 2016.[4] During the course of the hearing the court received into evidence a letter from the appellant's Case Manager at FORWAARD certifying that the appellant was participating in a residential rehabilitation program with that organisation, and stating that the appellant had demonstrated motivation to change his behaviours and exhibited a positive attitude towards recovery and reintegration.[5] The proceedings were adjourned to allow the Commissioner for Correctional Services to undertake an

2 Appeal Book 72-77.

3 Section 52(3) of the *Sentencing Act* precludes the imposition of an aggregate sentence of imprisonment if one of the offences in the indictment is a "violent offence". The term "violent offence" is defined relevantly by ss 3 and 78C of the *Sentencing Act* to mean relevantly "an offence against a provision of the Criminal Code listed in Schedule 2". That Schedule includes the offence of robbery contrary to s 211 of the *Criminal Code.*

4 Appeal Book 5-19.

5 Appeal Book 41-42.

assessment pursuant to s 103 of the *Sentencing Act* (NT) of the appellant's suitability for supervision.[6]

[8] During the course of the plea hearing, counsel for the appellant drew attention to the parity principle and the distinction between the appellant's circumstances and those of the co-offender. Counsel for the appellant placed particular emphasis on the facts that the appellant had pleaded guilty to a lesser charge and to a charge carrying a lesser penalty; that the co-offender had a more extensive criminal history; and that the appellant had successfully completed an alcohol rehabilitation program.

[9] The Crown's position on the issue of parity was that it had application to the unlawful entry offence because the appellant and the co-offender were jointly engaged in the commission of that crime. It was further submitted that the requirement for parity in the sentences was not displaced by the co-offender's more extensive criminal history because the principles of punishment, denunciation and deterrence carried greater weight than considerations of rehabilitation and mitigation in the context of this offending. On that basis it was submitted that the term of imprisonment for two years and three months imposed by the court on the co-offender in respect of the unlawful entry offence should also be applied to the appellant for that same offence.

6 Appeal Book 53-56.

[10] The Crown conceded, however, that the principle of parity could have no application to the disposition appropriately made for the appellant under Count 2 and the co-offender under Count 3. So much followed from the very different conduct comprehended by those charges.

[11] The appellant's sentencing proceedings resumed on 16 February 2016.[7] The court imposed an aggregate sentence for Counts 1 and 2 of imprisonment for two years and three months, backdated to 5 December 2015 to take into account the time he had spent in prison. That sentence was suspended after the appellant had served six months in prison, subject to supervision by a probation and parole officer for a period of 18 months and subject to various conditions in relation to residence, reporting and the consumption of alcohol and dangerous drugs. An operational period of 21 months was fixed for the purposes of ss 40(6) and 43 of the *Sentencing Act*.

The grounds of appeal

[12] The appellant has appealed that decision on the following grounds:

> 1. The learned Sentencing Judge erred in failing to properly apply the principle of parity to the head sentence.
>
> **Particulars**
>
> The circumstances of the appellant and the co-offender Mamarika differed in the following material respects, not adequately reflected in the disparity between the sentences:

7 Appeal Book 20-25.

(a) Their criminal history, particularly the appellant's 27 year gap in property offending;
(b) The different objective circumstances of the offending, namely the co-offender Mamarika was armed;
(c) The appellant's remorse as accepted by the learned Sentencing Judge; and
(d) The appellant's good prospects of rehabilitation, including his completion of rehabilitation at FORWAARD while on bail.

2. The sentence was manifestly excessive, taking into account the personal circumstances of the appellant, including:

(a) The 27 year gap in property offending for the appellant;
(b) The appellant's remorse as accepted by the learned Sentencing Judge; and
(c) The appellant's good prospects of rehabilitation, including his completion of rehabilitation at FORWAARD while on bail.

[13] The appellant's complaint under both grounds is restricted to the length of the head sentence.

[14] The appellant's primary contention on the parity ground may be summarised as follows. The sentencing judge acknowledged that there were differences between the appellant and the co-offender in relation to both the objective circumstances of the offending and their subjective personal circumstances, *viz* the appellant was not armed with a screwdriver or any other weapon, his criminal history was "shorter" than that of the co-offender, and he had completed the rehabilitation program at FORWAARD. During the course of oral submissions, counsel for the appellant also pressed the contention that the appellant's criminal culpability in respect of the unlawful entry charge in Count 1 was lower than that of the co-offender having regard to their respective roles in the planning and execution of the crime.

Having regard to those differences, it is said that the sentencing judge fell into error by effectively imposing the same head sentence on the appellant for Count 1 as had been imposed on the co-offender, namely imprisonment for two years and three months.

[15] In making that contention, the appellant acknowledges that the sentence imposed on the appellant was an aggregate sentence of imprisonment in respect of both Counts 1 and 2, but draws attention to the fact that the offence charged in Count 2 was stealing property of nominal value. It was submitted that any sentence imposed in respect of that Count would have been served concurrently with the sentence imposed in respect of Count 1 or, as in the result, would not properly have sounded in a higher aggregate sentence.

[16] The appellant's primary complaint on the ground of manifest excess is that insufficient weight was given to the appellant's subjective circumstances in arriving at the head sentence.

[17] A secondary, and related, complaint is that adopting a starting point of imprisonment for two years and three months prior to taking into account the appellant's personal circumstances was akin to engaging in the two stage process criticised in *Markarian v The Queen*.[8]

8 (2005) 228 CLR 357 at [37]-[39] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

The objective circumstances of the offending

[18] The Agreed Facts were essentially the same for both sentencing proceedings, and may be summarised as follows.[9]

- The appellant was 49 years old at the time of the offending. He had lived the majority of his life on Groote Eylandt. His wife was deceased and there was one child of the union. At the time of the offending he was in receipt of a pension from Centrelink. He had limited formal education.

- The co-offender was 40 years of age and also lived on Groote Eylandt. He also had limited formal education and was unemployed at the time of the offending.

- The occupants of the dwelling house were husband and wife. Both were nurses who had lived and worked on Groote Eylandt for 16 years prior to the offending in question.

- The appellant and the co-offender were both intoxicated at the time of the offending and had formed a common intention to break into properties to steal alcohol and/or money. At about 10 pm on 18 January 2015, the appellant and the co-offender entered the dwelling and took the wine and cash the subject of the charges.

9 Appeal Book 26-30.

- The male occupant was woken by the noise and went to investigate. By that point the appellant had left the dwelling house but the co-offender remained. As the co-offender was leaving the dwelling house by the laundry exit he turned and struck the male occupant in the head with the torch he was carrying. A struggle ensued, during which the co-offender stabbed the male occupant several times with a screwdriver to the back and chest area causing small superficial lacerations. The male occupant then stepped away and the co-offender ran into bushland adjacent to the dwelling house.

- As a result of the blow using the torch, the male occupant suffered a laceration to the top of his head requiring five staples. As a result of the attack using the screwdriver he suffered small puncture wounds to the left shoulder blade and chest. He also sustained a small wound to his bottom lip.

- The appellant was arrested on 20 January 2015. He participated in an electronic record of interview, during which the made full and frank admissions.

- The co-offender was arrested on 22 January 2015 after voluntarily surrendering to the Alyangula Police Station. He also participated in an electronic record of interview, during which he admitted

throwing the torch at the male occupant and stabbing him with the screwdriver.

- Both matters proceeded by way of "hand-up" committal, and both the appellant and the co-offender indicated they would enter pleas of guilty to the counts on the indictment immediately following the committal process.

- The appellant was granted bail by the Court of Summary Jurisdiction on 19 February 2015 and completed the 12 week residential rehabilitation program at FORWAARD while on bail.[10] The co-offender was not granted bail.

[19] As in the proceedings at first instance, the appellant contends that there was a material disparity in the objective circumstances of the offending comprised by Count 1 in that the co-offender pleaded to the additional circumstance of aggravation that he was armed with offensive weapons.

[20] The respondent contends that the additional circumstance of aggravation was "an almost neutral factor in determining the length of the sentence". The respondent points to the finding made during the sentencing of the co-offender that the decision to engage violently with

10 As it transpired, on 10 December 2015 the appellant did not appear in court in accordance with the conditions of his bail. As a result, his bail was revoked and he was arrested on 4 January 2016. He remained in custody from that time until the date of his sentencing on 16 February 2016 (see Appeal Book 22).

the male victim was spontaneous rather than premeditated.[11] That finding is said to support the view that the weapons were being carried primarily as "housebreaking implements", so diminishing the distinction between the relevant conduct of the appellant and the co-offender in relation to the offending comprised by Count 1.

The subjective circumstances of the appellant and the co-offender

[21] A record of the appellant's criminal history was received by the sentencing court at exhibit P2.[12] It is a relatively extensive history dating back to 1980 when the appellant was still a juvenile. So far as the appellant's adult offending is concerned, it has been intermittent and episodic. The record is punctuated by long periods during which the appellant had no convictions. It does include convictions for property offences, but none more recent than 1989. An examination of the appellant's criminal history in chronological order, starting with the most dated offences, reveals the following matters.

[22] In 1987, the appellant was convicted of six offences of unlawful entry, seven offences of stealing, two offences of unlawful use of a motor vehicle, two offences of criminal damage, one offence of attempted stealing and one offence of interfering with a motor vehicle. As is so often the case in such matters, those convictions were attended by eight convictions for various liquor-related offences. Most of those

11 Appeal Book 76.

12 Appeal Book 31-37.

convictions were entered during the course of a single hearing before the Court of Summary Jurisdiction on 16 December 1987.

[23] In 1989, the appellant was convicted of one count each of stealing, unlawful entry and unlawful use of a motor vehicle. Again, those convictions were accompanied by three convictions for liquor-related offences. There was also a conviction for breaching the bond imposed on 16 December 1987.

[24] In 1992, the appellant was convicted of two liquor-related offences.

[25] In 2004, the appellant was convicted of an assault aggravated by the fact that the victim was a female who was defenceless at the time. He was sentenced to imprisonment for five months.

[26] In 2012, the appellant was again convicted of an assault aggravated by the fact that the victim was a female who was defenceless at the time. In addition to that conviction, he was convicted of two counts of engaging in conduct that breached a domestic violence order, four counts of unlicensed driving, one count of going armed in public, and one count of breaching bail.

[27] Ranged against that history, during the course of sentencing the co-offender the court made the following observations in relation to his criminal history:[13]

13 Appeal Book 73.

> You have a very significant record of prior offending, dating back to January 1991, when you were 16 years old. On analysis, you have been convicted of 36 counts of unlawful entry, many of them aggravated unlawful entries. You have been convicted of 8 counts of trespass. You have been convicted of 5 counts of damaging property. You have been convicted of 29 counts of either unlawful use of a motor vehicle, including attempted unlawful use of a motor vehicle, or interfering with a motor vehicle. You have been convicted of 30 counts of stealing and 2 of receiving stolen goods. You have been convicted of 10 counts of aggravated assault, mainly male-on-female assaults. You have been convicted of 9 breaches of restraining orders or DVO contraventions. You have been convicted 6 times for being armed with an offensive weapon, or going armed with an offensive weapon at night-time. Finally, you have been convicted of committing a dangerous act, the particulars of which are not disclosed in your record of offending.
>
> I must acknowledge, of course, that sometimes you have committed several offences on the one occasion, for example, damaging property to effect an unlawful entry, the unlawful entry itself and then stealing.

[28] It may be accepted that the co-offender had a more extensive and relevant history of criminal offending than did the appellant. On the appellant's contention, all other things being equal, that would necessitate the imposition of a lower head sentence on the appellant.

[29] The respondent points to the principle of proportionality requiring the sentence to be set by the objective circumstances of the offence. In the application of that principle the court could not properly take the co-offender's prior criminal history into account in order to fix the upper boundary of the sentence at some higher level than would otherwise be set. The obverse of that proposition, in the respondent's contention, is that the court equally could not properly take into account the fact that the appellant's prior criminal history was not as extensive in order to

fix the upper boundary of a proportionate sentence at some level lower than that fixed for the co-offender.

[30] On that contention, both the appellant and the co-offender stood to be sentenced for the formulation and execution of a plan to unlawfully enter properties in order to steal alcohol and/or money. As the objective facts reveal little difference between the roles of the appellant and the co-offender in the execution of that plan, the upper boundaries of the proportionate sentences for each were appropriately the same.

The application of the principle of parity

[31] The principle of parity operates to ensure that sentences are proportionate and just as between co-offenders. It is an aspect of "equal justice" in sentencing, which requires identity of outcome in cases that are relevantly identical and different outcomes in cases that are different in some relevant respect.[14]

[32] In *Lowe v The Queen*, Gibbs CJ described the principle of parity in the following terms:[15]

> It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the

14 *Wong v The Queen* (2001) 207 CLR 584 at 608 per Gaudron, Gummow and Hayne JJ; *Green v R* (2011) 244 CLR 462 at [28] per French CJ, Crennan and Kiefel JJ.

15 (1984) 154 CLR 606 at 609.

> offence, have to be taken into account. The fact that one co-offender has received a sentence which is more severe than that imposed on a co-offender whose circumstances are comparable would provide no reason in logic for reducing the former sentence, if the only question were whether that sentence, viewed in isolation, was manifestly excessive.

[33] In that same case, Dawson J made the following observation:[16]

> There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn between them. Obviously where the circumstances of each offender or of his involvement in the offence are different then different sentences may be called for. But justice should be even-handed and it has come to be recognized both here and in England that any difference between the sentences imposed upon co-offenders for the same offence *ought not be such as to give rise to a justifiable sense of grievance on the part of the offender with the heavier sentence or to give the appearance that justice has not been done*. (Emphasis added)

[34] Those formulations were adopted in *Postiglione v The Queen* in the following terms:[17]

> The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated. On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of the error will result in there being a due proportion between the sentences and there will then be equal justice. However, the parity principle, as identified and expounded in *Lowe v The Queen*, recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to 'a justifiable sense of grievance'. If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options.

16 (1984) 154 CLR 606 at 623.

17 (1997) 189 CLR 295 at 301-2 per Dawson and Gaudron JJ.

> Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality.

[35] As is apparent from those formulations, it may be accepted at the outset that prior criminal history and the degree of culpability and criminality are among the matters properly taken into account in determining the sentences properly imposed on co-offenders in respect of the same type of criminal conduct.[18] The respondent does not contend otherwise.

[36] The appeal court takes an entirely objective approach when assessing the existence or otherwise of what Dawson J referred to in *Lowe* as "a justifiable sense of grievance on the part of the offender" or "the appearance that justice has not been done". As the New South Wales Court of Criminal Appeal observed in *R v Wei Pan*:[19]

> The test for determining the existence of a sense of grievance is objective not subjective. What has to be demonstrated by the person complaining on the grounds of parity is not that he feels aggrieved, but that a reasonable mind looking overall at what has happened would see that the offender's grievance is justified.

18 See also *R v Wilton* (1981) 28 SASR 362; *R v Kerr* [2003] NSWCCA 234; *R v Stone* [2010] QCA 157; *Donovan v The Queen* [2010] VSCA 169; *Kristiansen v Young* [2010] ACTSC 61; *R v Wing Cheong Li* [2010] NSWCCA 125.

19 [2005] NSWCCA 114 at [34] per Johnson J; cited with approval in that *Pavicevic v The Queen* [2010] ACTCA 25 at [10].

[37] This is not to say that an appeal court is bound to intervene in every case of disparity. As the South Australian Court of Criminal Appeal observed in *R v MacGowan*:[20]

> Marked disparity of sentences imposed upon co-offenders by different judges is a ground upon which the Court of Criminal Appeal may intervene on an appeal by the Attorney-General or an offender. If both sentences are within the maximum authorised by law and are within the range of sentences properly open on the facts of the case, the Court of Criminal Appeal is not bound to intervene. In such circumstances disparity, although a ground for interference, will not necessarily lead the Court of Criminal Appeal to interfere. It is a matter for the discretion of the Court. There may be considerations against interference. The protection of the public may require the higher sentence to stand. The lower sentence may be so inadequate that to establish parity may be felt to compound the error in a way which would be unacceptable to the public conscience. The sense of grievance experienced by the offender may have to be tolerated in the public interest. But in the absence of strong countervailing considerations, the Court of Criminal Appeal will interfere to eliminate marked disparities which cannot be justified in the circumstances of the case.

[38] This is not an appeal in which the complaint is one of unjustifiable disparity between the sentences imposed upon the appellant and the co-offender. Rather, the appellant seeks the intervention of the appeal court on the basis that the same head sentence was imposed in circumstances where the respective conduct and antecedents warranted the imposition of disparate sentences.[21] It is in that sense that the term "disparity" is used in the following discussion.

[39] It is not necessary for the appeal court to conclude that the sentence imposed on the appellant was manifestly excessive in order to ground

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20 (1986) 42 SASR 580 at 583 per King CJ; cited with approval in *R v Cox* (1996) 66 SASR 152.

21 As considered in *Riley v The Queen* [1986] Tas R 199; *R v Mussett* [1999] NSWCCA 419.

intervention.[22] It is necessary, however, that the disparity be both unjustified and significant before the appeal court will intervene. As the Full Court of the Supreme Court of Victoria has noted, it must be shown that the unjustified disparity between the sentences – as opposed to one or other sentence considered individually – "is manifestly and not merely arguably excessive".[23] The same formulation was picked up by Gummow J in *Postiglione*, where his Honour observed:[24]

> The principle for which *Lowe* is authority appears to be that the Court of Criminal Appeal intervenes where the difference between the two sentences is manifestly excessive and such as to engender a justifiable sense of grievance by giving the appearance, in the mind of an objective observer, that justice has not been done.

[40] The reasons underlying this restraint on the application of the principle of parity were expressed by Kirby J in *Postiglione* in the following terms (footnotes omitted):[25]

> The quest for perfect consistency involves a search for the unattainable. The facts of no two crimes, nor the criminality of any two individual offenders involved in a single crime, will be exactly the same. No two offenders will have precisely the same antecedents and experience of life when they appear for sentence. Inevitably, different judicial officers will respond differently to particular features of the evidence relevant to the offence or the offenders. The independence and individual responsibility of each sentencing judge require that, subject to appellate supervision, his or her sentence will ordinarily be respected.
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> …

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22 *Lowe v The Queen* (1984) 154 CLR 606 at 609-10 per Gibbs CJ.

23 *Pecora v The Queen* [1980] VR 499 at 504; cited with approval in *Pastras v The Queen* (1993) 65 A Crim R 584 at 588.

24 (1997) 189 CLR 295 at 323 per Gummow J.

25 (1997) 189 CLR 295 at 336-7 per Kirby J.

> Out of recognition of the discretionary character of the sentencing function, and the unavoidable scope for disparity where that function is performed by different judicial officers, it is well established that when performing their function sentencing judges must be accorded a wide measure of latitude which will be respected by appellate courts. So long as the sentencing judge has taken into account the relevant considerations of law and fact, the appellate court will not ordinarily intervene merely because some arguable discrepancy appears between the sentencing of otherwise apparently connected or like offenders. Similarly, this Court will respect the discretion which the law reserves to courts of criminal appeal and their equivalents, acting under their respective statutes, in disposing of sentencing appeals and applications for leave to appeal against sentences, including on the ground of suggested disparity

[41] That approach reflects the discretionary nature of the sentencing process generally, and informs the point made in *Pavicevic v The Queen* that "disparity between sentences is not itself a basis for appellate intervention but a factor to be weighed when the court considers whether there is error in the sentencing process and, if so, whether the court should intervene".[26]

[42] Turning then to the case in question, it is necessary first to give some attention to the factors identified by the appellant as giving rise to the disparity.

[43] The first assertion made during the course of oral submissions was that for the purposes of the unlawful entry, the co-offender was the principal in terms of the planning and execution of the crime and the appellant a subordinate player. That assertion was based primarily on a passage appearing in the submissions made on behalf of the appellant

26 [2010] ACTCA 25 at [22].

during the course of proceedings on 11 February 2016. Following the sentencing judge's observation that the appellant had not committed a property offence since 1989 counsel for the appellant said:[27]

> Your Honour, in relation to why this has then happened at this point, given that there has been such a long time since the last time that he was in court for such an offence, your Honour, he says that he was persuaded or influenced by the co-accused. Of course, Mr Bara is much older than his co-accused but, your Honour, it remains that [these are] his instructions in relation as to why that particular – why this particular incident occurred.

[44] During the course of the appeal, counsel for the appellant drew attention to the fact that no objection was made by the Crown to that submission. Counsel for the appellant also suggested that the submission drew some support from facts that were expressly agreed for the purposes of the sentencing process. In particular, attention was drawn to the fact that the co-offender carried the implements, the fact that the co-offender's criminal history was more extensive and recent in relation to these types of offences, and the fact that the appellant left the premises before the co-offender. These matters were said to require an approach to the sentencing process in which the co-offender was cast as the leader and the appellant as a mere follower.

[45] The assertion that the appellant was persuaded or influenced by the co-accused was an assertion of a fact that had not been agreed, and thus not included in the Agreed Facts.[28] The assertion of fact was not

27 Appeal Book 14.

28 Appeal Book 26-30.

evidence. For reasons of convenience and efficiency, criminal courts will ordinarily accept and act on statements advanced by defence counsel from the bar table, particularly where the statement is consistent with facts already in evidence and not disputed by the Crown.[29] However, even if a statement asserting mitigating circumstances put forward on behalf of the accused is not contested by the Crown, the court is not bound to adopt that matter in the sentencing calculus.[30] The weight to be given to it is a matter for assessment by the sentencing judge.

[46] It may be noted that the submission now relied on by the appellant was not adopted by the sentencing judge, either at that stage or when the matter resumed for sentence on 16 February 2016. The only reference made by the sentencing judge to that question generally was to note that "[o]n 18 January 2015 the offender and a co-offender drank alcohol together and they got drunk. They decided to unlawfully enter a property and steal alcohol and money so they could purchase more alcohol and some cannabis."[31] That reference was entirely consistent with the Agreed Facts on which the plea proceeded, the relevant part of which stated:[32]

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29 See, for example, the observations of Olsson AJ in *Gumurdul v Reinke* [2006] NTSC 27 at [47]-[49].

30 A Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria*, 3rd edition, Lawbook Co, 2014, p 143 citing *R v Perre* (1986) 41 SASR 105 and *R v Boyle* (1996) 87 A Crim R 539.

31 Appeal Book 21.

32 Appeal Book 27 at [7].

> The offender and the co-offender had been consuming alcohol on 18 January 2015 and had become intoxicated. Both the offender and the co-offender formed a common intention to unlawfully enter properties in Angurugu and steal alcohol or money so that they could purchase alcohol and/or cannabis.

[47] A further point to note here is that it appears the submission was made in order to explain the appellant's reoffending in the nature of property related crime after a long period free from offending of that type, rather than to draw a distinction between the relative moral culpabilities of the appellant and his co-offender. The limited purpose for which the submission was apparently made did not make it incumbent on the sentencing court to notify counsel that evidence would be required.

[48] If it is intended by counsel to assert from the bar table an important fact that has not already been agreed, the fact and its purpose in the sentencing submissions should be clearly identified, and reasonable notice should be given to opposing counsel. This would ideally be done in writing and far enough in advance of the hearing to afford the other party opportunity to make inquiries concerning the matter and to challenge the assertion if considered necessary or appropriate. It is common and desirable practice in the Supreme Court for both parties to provide each other and the Court with a written outline of submissions in advance, and for the outline provided by defence counsel to include a summary of the submissions intended to be made in relation to the

objective circumstances of the offending and the accused's subjective personal circumstances, including matters going to mitigation.

[49] A final point to be made is that the agreed fact in relation to common intention was not apt to be displaced by advertence to circumstantial matters such as the co-offender's criminal history and who carried the implements. Those matters are too slight to sustain the inference sought.

[50] For these reasons, no distinction was properly made between the degrees of participation of each offender in the offence comprising Count 1. On the facts, neither played a more or less active role in the planning and execution of the offence. Neither could lay claim to a lower level of participation in the unlawful entry. It could not be said that the co-offender was the principal, ringleader or instigator, and the appellant merely a follower. That the co-offender committed the further discrete offence of robbery is reflected in the fact that he received a discrete penalty in respect of that offence, and that the total penalty imposed upon him was significantly and substantially harsher than that imposed on the appellant.

[51] The second matter relied upon by the appellant as giving rise to a disparity in the sentencing outcome is the fact that the co-offender pleaded guilty to, and was thus criminally liable for, the additional circumstance of aggravation that he was armed with offensive

weapons. Count 1 in the indictment alleged against the co-offender that "at the time of the unlawful entry [he] was armed with offensive weapons, namely two screwdrivers and a torch".[33]

[52] The offence of unlawful entry is committed at the point in time when the offender actually enters the building or dwelling in question. It follows that the time of entry is also the point in time at which the aggravating circumstances must be made out. Hence the circumstance of aggravation is pleaded in the form that "at the time of the unlawful entry [he] was armed with offensive weapons, namely two screwdrivers". The time for assessing whether the corresponding aggravating circumstance was made out for the purpose of the robbery offence was that the co-offender "is armed with [an] … offensive weapon … immediately before, at or immediately after the time of the robbery".[34]

[53] While it may be accepted that the relevant circumstance for the purpose of the unlawful entry offence was the carriage of offensive weapons at the time of entry, and the relevant circumstance for the purpose of the robbery offence was being armed in the course of the robbery, in this case it was effectively the same conduct which constituted both

33 Appeal Book 1. Although they were the terms of the indictment presented for the purpose of the appellant's sentencing proceedings, in the original indictment against the co-offender in file 21503823 the words "and a torch" were deleted from Count 1 (amendment initialled by the sentencing judge on 29 June 2015) but remained in Count 3. That omission makes no difference for these purposes.

34 *Criminal Code*, s 211(2).

circumstances. That calls into play the principle discussed by the High Court in *Pearce v R.*[35]

[54] In that case the appellant was charged in the one indictment with the two separate offences of maliciously inflicting grievous bodily harm with intent to do so and breaking and entering a dwelling house and while therein inflicting grievous bodily harm on an occupant. In considering the matter the plurality recognised that the elements of the two offences overlapped but were not identical.[36] The former offence required a specific intent to do grievous bodily harm whereas the latter did not; and in the latter offence the grievous bodily harm was an incident of breaking and entering whereas in the former it was not. Those distinctions notwithstanding, the plurality made the following observations (footnotes omitted):[37]

> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.
>
> In the present case we need not decide whether this result is properly to be characterised as good sentencing practice or as a positive rule of law. There is nothing in ss 33 or 110 or the Crimes Act 1987 more generally

35 (1998) 194 CLR 610.

36 (1998) 194 CLR 610 at [7] per McHugh, Hayne and Callinan JJ.

37 (1998) 194 CLR 610 at [40]-[42] per McHugh, Hayne and Callinan JJ.

> which suggests that Parliament intended that an offender such as the appellant should be twice punished for his inflicting grievous bodily harm on his victim ….
>
> It is clear in this case that a single act (the appellant's inflicting grievous bodily harm on his victim) was an element of each of the offences under ss 33 and 110. The identification of a single act as common to two offences may not always be as straightforward. It should, however, be emphasised that the enquiry is not to be attended by "excessive subtleties and refinements". It should be approached as a matter of common sense, not as a matter of semantics.

[55] As a matter of common sense, the possession of the offensive weapons was a single act common to both offences, and it was not open to the sentencing court in sentencing the co-offender to punish him twice for the conduct constituting the relevant aggravating circumstances. The appeal court is entitled to proceed on the assumption that the court which sentenced the co-offender would not have effectively punished him twice for the same circumstance of aggravation. The appeal court is further entitled to proceed on the assumption that the aggravating circumstance sounded principally in the sentence imposed for Count 3, because that was the offending in which the offensive weapons were deployed. That is reflected in the fact that both offences carried a maximum penalty of life imprisonment, and the sentencing court adopted a starting point of three years for the unlawful entry offence and four years for the robbery offence.

[56] Those assumptions are also consistent with the respondent’s submission, adverted to above, that the offensive weapons were essentially a “neutral factor” in the sentencing calculus in respect of

Count 1. Approaching the matter on the basis that the weapons were being carried primarily as "housebreaking implements" in that context operates to diminish the distinction between the relevant conduct of the appellant and the co-offender in relation to the offending comprised by Count 1.

[57] The third matter relied upon by the appellant as giving rise to a disparity in the sentencing outcome is the co-offender's more extensive criminal history. A number of observations may be made in that regard. First, there is no principle of sentencing that requires a more severe sanction to be imposed on an offender who has a more extensive criminal history than a co-offender. Secondly, while it may be accepted that the recidivist will ordinarily receive a heavier sentence than a person who has previously led a blameless life, the same cannot necessarily be said of co-offenders who each have extensive criminal records even in circumstances where one of those records is more extensive, relevant and recent. Thirdly, a repetitive pattern of offending followed by a gap followed by reoffending may lead to the conclusion that an offender is not capable of long-term reform.[38] That is particularly so in the case of a 50-year-old offender. It does not necessarily follow that a record of persistent offending will attract a heavier sentence than a long record of offending punctuated by significant periods free of criminal conduct.

38 *R v Kane* [1974] VR 759.

[58] Subject to those qualifications, and all other things being equal, a more serious criminal history may attract a more severe sentence than a markedly less serious record. Extreme recidivism will elevate the weight to be attached to considerations of deterrence and protection of the community. A serious criminal history will tell against an offender's prospects of rehabilitation. Recidivism will bear upon the assessment of moral culpability in circumstances where it can be said to demonstrate an attitude of continuing and flagrant disobedience to the law.

[59] Determining the extent to which these matters weigh in the sentencing process when comparing the circumstances of co-offenders is, as with most parts of the sentencing calculus, not a mathematical exercise. In the ordinary course a degree of mitigation will be extended to first offenders and those with minor criminal records. There is a lesser claim to mitigation in any degree where, as in this case, an offender's criminal record cannot be characterised as "minor". It cannot be said in these circumstances that because the co-offender's criminal record was more extensive the appellant's sentence in respect of Count 1 should have been less than the sentence imposed on the co-offender by some quantified or quantifiable period. That makes it difficult to characterise the sentencing court's approach to the matter as erroneous.

[60] The same conclusion may be drawn in relation to what are said to be the appellant's demonstrated attempts at rehabilitation and superior

prospects for rehabilitation, which is the fourth matter on which the appellant relies in arguing there was an unjustifiable disparity in this case. While it may be accepted that the appellant completed a residential rehabilitation program with an alcohol counselling service while he was on bail (the co-offender having been refused bail), it cannot be said that that matter, either alone or in combination with the co-offender's more extensive criminal history, warranted a reduction in sentence by some particular measure.

[61] There can be no doubt that the sentencing court had regard to these matters when sentencing the appellant. His Honour observed in part:[39]

> In my opinion the offender is properly sorry and he has good prospects of rehabilitation. There is a difference between his offending and his circumstances and that of [the co-offender]. Mr Bara was not armed with a screwdriver or any other weapon. His criminal history is shorter than [the co-offender's] and he has completed the time at FORWAARD.
>
> Nonetheless, he must be punished and other people must be stopped from breaking into houses and stealing things in the future. The community strongly disapproves of those sorts of crimes.
>
> In all the circumstances, I sentence Mr Bara to 2 years and 3 months imprisonment, backdated to 5 December 2015. The sentence of imprisonment is to be suspended after he has served six months in prison. So he will be released from prison on or about 4 June 2016.

[62] If it be assumed for the sake of the argument that by reason of those matters the appellant's sentence to imprisonment in respect of Count 1 should have been shorter in at least some degree than that imposed on

39 Appeal Book 23-24.

the co-offender, it remains to consider whether the application of the principle of parity requires appellate intervention in this case.

[63] In making that determination, the appeal court is entitled to consider the full effect of the disposition. As Dawson and Gaudron JJ observed in *Postiglione*:[40]

> If regard is had solely to the head sentences – twenty-five years in the case of Savvas, eighteen years in Postiglione's case – the difference may fairly be regarded as reflecting their different roles in the conspiracies in respect of which they were convicted and Postiglione's subsequent cooperation with police and prosecuting authorities. However, the head sentence is but one component of the sentences. A proper comparison involves a consideration of all components.

[64] Their Honours went on to observe (at 303) that different criminal histories and custodial patterns between co-offenders may justify or be reflected in "a real difference in the time each will serve in prison".

[65] In the matter of *Lowe v The Queen*, for example, the aggrieved offender had received a head sentence of imprisonment for six years with a non-parole period of two years. The co-offender who acted as lookout received 200 hours' community service. The Queensland Court of Criminal Appeal did not conclude that the original sentence was manifestly excessive, but for reasons of parity determined it should be varied by ordering that the applicant be eligible for release after 12 months. So it was that the principle of parity was given effect by reducing the non-parole period rather than the head sentence. The

40 (1997) 189 CLR 295 at 302 per Dawson and Gaudron JJ.

application for special leave to appeal to the High Court against the head sentence was refused.

[66] Counsel for the appellant in this matter contended that the Queensland appeal court adopted that approach in *Lowe* because the head sentence was not manifestly excessive. It was for that reason, he submitted, that the Queensland appeal court reduced the non-parole period rather than the head sentence in order to achieve parity; and why the High Court refused leave to appeal against the head sentence. The same considerations are at play here. For reasons discussed further below in the context of the second ground of appeal, the head sentence imposed on the appellant cannot be said in isolation to be manifestly excessive. In those circumstances, the assessment of parity must also take into account the other components of the sentences, including the non-parole period and the order partially suspending the sentence of imprisonment.

[67] Given that the proper comparison between sentences requires a consideration of all components of each sentence, it is a legitimate consideration in assessing the appellant's claim to a lack of parity to have regard to the fact that the sentencing court suspended the term of imprisonment imposed on him after he had served six months. Ranged against that, the total effective period of imprisonment imposed on the co-offender was four years with a non-parole period of two years

(bearing in mind that sentence also incorporated in the co-offender's punishment for the crime of robbery).

[68] When considered in that light, while the appellant and the co-offender both received a head sentence of imprisonment for two years and three months in respect of the offending in Count 1,[41] the different levels of criminality and culpability, and their different subjective personal circumstances, was appropriately accommodated by the fact that the appellant was guaranteed of release after he had served six months.

[69] Even were that not so, to the extent that there is any disparity between the head sentences, it is not so unjustified or significant as to warrant appellate intervention. The disparity between the sentences in this case – which is said to lie in the fact that the same head sentence was imposed despite different objective and subjective circumstances – is incapable of characterisation as manifestly excessive.

[70] Two further matters require some attention in this context.

[71] First, mention has already been made of the fact that the sentence imposed on the appellant was an aggregate sentence of imprisonment in respect of both Counts 1 and 2. On one argument, it might be said that because the head sentence imposed on the appellant was in respect of both charges the sentence imposed in respect of Count 1 must

41 But bearing in mind that the sentence imposed on the appellant was an aggregate sentence in respect of both Counts 1 and 2.

necessarily have been for some period less than two years and three months. As the Director fairly and properly conceded, however, the sentence imposed in respect of Count 2 would probably not have sounded in a higher aggregate sentence.

[72] Secondly, the conclusion in relation to the level of disparity in this case is drawn recognising the operation of s 40(3) of the *Sentencing Act*, which precludes the imposition of a suspended sentence of imprisonment unless the sentence of imprisonment, if unsuspended, would be appropriate; and recognising what was said by Gleeson CJ and Hayne J in *Dinsdale v R*[42] to the effect that the commission of a further offence during a period of suspension should not produce an unintended consequence. Section 40(3) of the *Sentencing Act* is concerned with the circumstances of the individual offence and offending. It is not directed to the principle of parity. And for the reasons already given, the head sentence imposed in this case was not so excessive or disparate that it could be said its restoration on breach would produce an unintended consequence.

[73] Moreover, given the more lenient overall disposition in favour of the appellant, *vis-à-vis* the co-offender, the fact that the appellant may be "at risk" under his suspended sentence for an unspecified longer period than he arguably might have been does not amount to a significant

42 (2000) 202 CLR 321 at [14].

failure by the sentencing judge to give effect to the differences between the appellant and co-offender such as to justify appellate intervention.

[74] For those reasons, this ground of appeal must fail.

Manifest excess

[75] As this Court has most recently observed in *Emitja v The Queen*,[43] the principles which govern appeals on the ground that a sentence is manifestly excessive in all the circumstances are well known.[44] 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.

[76] 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. In relying upon this ground it is incumbent on the appellant to show that the sentence was not just excessive but

43 [2016] NTCCA 4 at [39].

44 See, for example, *Liddy v R* [2005] NTCCA 4 at [12]; cited with approval in *Morrow v The Queen* [2013] NTCCA 7 at [36].

manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive.

[77] As already canvassed, the appellant asserts that insufficient weight was given to his subjective circumstances – principally the significant lapse of time since the last episode of property offending and the completion of the rehabilitation program while on bail – in arriving at the head sentence. The argument follows that by adopting a starting point of two years and three months prior to taking into account the appellant's personal circumstances was akin to engaging in the two stage process criticised in *Markarian v The Queen*.[45]

[78] This ground of appeal may be disposed of shortly.

[79] First, it needs to be shown that a sentence falls well outside the usual or nominal "range" or "standard" for a particular crime before it may be said to be manifestly excessive. For the reasons that are given above in relation to the weight properly attached to an offender's criminal record and prospects for rehabilitation, it cannot be said that the head sentence imposed on the appellant fell without any range or standard, assuming that there is one for this offence.

[80] Secondly, the fact that the sentence imposed on the appellant was the same as the sentence imposed on the co-offender suggests in and of itself that it did not fall outside the range or standard. There is no

45 (2005) 228 CLR 357 at [37]-[39] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

challenge to or criticism of the head sentence imposed on the co-offender. To the extent there was any difference in their objective and subjective circumstances, that difference was only to be found in their respective criminal records and the appellant's participation in a residential rehabilitation program. Even if it is accepted that the distinction in those respects warranted the imposition of different head sentences, the distinction was not of any great degree and the failure to do so did not result in the imposition on the appellant of a head sentence that was manifestly excessive.

[81] Thirdly, a review of comparative sentences imposed by the Supreme Court for the crime of unlawful entry in this general type of circumstance reveals that it is not unusual for the Court to adopt a starting point of imprisonment for between two and four years before any discount for an early plea of guilty. Of course, that type of review is fraught with difficulty given the wide variances seen in matters such as the facts of the offending and the age and antecedents of the offender. It is useful for these purposes only to the extent that it does not flag any patent discrepancy between the head sentence imposed in this case and the general run of broadly analogous matters.

[82] Finally, a proper analysis of the sentencing court's disposition does not disclose the adoption of a two-tiered approach wherein the objective circumstances of the offending determined the first tier, followed by individual additions or subtractions having regard to the appellant's

subjective circumstances. The sentencing court's approach was entirely instinctive in the sense that, although guided by the sentence imposed on the co-offender, it took into account the objective and subjective factors relevant to the exercise of the sentencing discretion without individual consideration. In that synthesis the sentencing court determined to impose a head sentence of two years and three months notwithstanding some of the distinctions that presented between the circumstances of the appellant and his co-offender.

[83] For those reasons, this ground of appeal must fail.

Disposition

[84] The appeal is dismissed.
