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| PARTIES: | LAWRENCE LEERING<br><br>v<br><br>WAYNE KENNETH NAYDA<br><br>LAWRENCE LEERING<br><br>v<br><br>GEOFFREY JOHN SULLIVAN |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPEALS from COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction |
| FILE NO: | JA65, JA66 & JA67 of 1996 |
| DELIVERED: | 23 January 1997 |
| HEARING DATES: | 16 January 1997 |
| JUDGMENT OF: | Kearney J |

**CATCHWORDS**:

CRIMINAL LAW AND PROCEDURE - appeal and new trial - Justices appeal - appeal against sentence - unlawful entry, stealing, unlawful damage - five similar offences same premises over short period - 19 year old Aboriginal male - first offender - 8 months imprisonment suspended after 6 weeks - no material error in magistrate's exercise of sentencing discretion - sentence not manifestly excessive - element of general deterrence necessary

Sentencing Act (NT) 1995 s5(2)(e), s6.
*GDP* (1991) 53 A Crim R 112, applied.
*R v Tait* (1979) 46 FLR 386, applied.
*Nieto v Mill* (1991) 54 A Crim R 35, applied.
*Nichols* (1991) 57 A Crim R 391, applied.

CRIMINAL LAW AND PROCEDURE - appeal and new trial - appeal against sentence - Justices appeal - whether if statutory circumstance of aggravation is not charged it can be treated as an aggravating factor.

Criminal Code (NT) s305(4), 314
*The Queen v De Simoni* (1981) 147 CLR 383, applied.
*Ruatapu Teremoana* (1990) 49 A Crim R 207, referred to.
*Hietanen* (1989) 45 A Crim R 26, referred to.
*Overall* (1993) 71 A Crim R 170, referred to.
*Newman v Turnbull* (1995) 81 A Crim R 191, applied.

CRIMINAL LAW AND PROCEDURE - appeal and new trial - appeal against sentence - Justices appeal - offences by Aboriginal - significance of cultural background - whether level of sentencing may be lower for same offence if committed within a remote Aboriginal community.

*Neal v The Queen* (1982) 149 CLR 305, applied.
*Roberts v Young* (unreported, Supreme Court (SA) (White J), 30 September 1986), applied.
*Friday* (1984) 14 A Crim R 471, applied.
*Leech v Peters* (1988) 40 A Crim R 350, applied.
*Houghagen v Charra* (1989) 50 SASR 419, applied.

CRIMINAL LAW AND PROCEDURE - appeal and new trial - appeal against sentence - Justices appeal - significance of offender being on bail when committing offence.

*Readman* (1990) 47 A Crim R 181, referred to.
*R v Gray* [1977] VR 225, applied.

**REPRESENTATION:**

Counsel:

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| Appellant: | C.J. Gibson |
| Respondent: | I. Rowbottom |

Solicitors:

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| Appellant: | Katherine Region Aboriginal Legal Aid Service Incorporated |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | A |
| Judgment ID Number: | kea97003 |
| Number of pages: | 19 |

kea97003

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

IN THE MATTER of the Justices Act

AND IN THE MATTER of appeals against the severity of sentences imposed by the Court of Summary Jurisdiction at Katherine

BETWEEN:

No. JA65 of 1996

LAWRENCE LEERING
Appellant

AND:

WAYNE KENNETH NAYDA
Respondent

AND BETWEEN

No. JA66 & 67 of 1996

LAWRENCE LEERING
Appellant

AND:

GEOFFREY JOHN SULLIVAN
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 23 January 1997)

**The appeals**

These are appeals under s163(1)(a) of the *Justices Act* against the severity of sentences imposed by the Court of Summary Jurisdiction in Katherine on 6 September 1996, set out at pp9-10. By consent the 3 appeals were heard together, as were the charges.

Appeal JA65 of 1996 is from a sentence imposed on the appellant for unlawfully entering a building in Katherine, 'Katherine Mensland', between 24 and 25 August 1996, with intent to steal. That is an offence under s213 of the Criminal Code; on summary conviction it carries a maximum punishment of 2 years imprisonment or a fine of $2000, under s120(2) of the *Justices Act*. (It was accepted that s122 of the *Sentencing Act* did not apply, on the principle 'generalia specialibus non derogant').

Appeal JA66 of 1996 is from 2 sentences imposed on the appellant. The first was for an unlawful entry on the same premises, 'Katherine Mensland' between 29 and 30 August 1996, with intent to steal; the second was for stealing therein shirts, caps and jeans to a total value of $438, the property of 'Terrace Emporium'. The first offence is punishable under Code s213; the second is punishable under Code s210(1), and also carries a maximum punishment on summary conviction of 2 years imprisonment or a fine of $2000.

Appeal JA67 of 1996 is from an aggregate sentence imposed on the appellant for 2 offences. The first was an unlawful entry on premises in

Katherine, 'Terrace Emporium', on 5 September 1996, with intent to steal; the second was for unlawfully damaging a plate glass window in the course of entering those premises - valued at $245.65, the property of 'Terrace Emporium'. The first offence is punishable under Code s213; the second, punishable under Code s251(1) as a simple offence, carries a maximum punishment of 2 years imprisonment.

Although the names 'Katherine Mensland' and 'Terrace Emporium' are different, it is common ground that the premises entered on each occasion were the same.

**The offences as committed**

The facts relating to the 5 offences, as admitted by the appellant, are as follows.

*(1) The offence of 24-25 August 1996*

At about 11.55pm on Saturday 24 August the appellant and another, his younger brother, a juvenile, (who lives at Kalano in Katherine), were at the rear of a store, Katherine Mensland, on Railway Terrace. The appellant used a nearby rubbish bin to smash the glass panel on the rear door, and entered the store with the co-offender. Once inside, they both went to the front part of the store. The appellant selected a pair of jeans from the rack and put them on. Both of them then rummaged through various items kept behind the cash register, and scattered them around the store.

They were apprehended inside the store by a security guard.

The police were called. The appellant was arrested and taken to Katherine Police Station. He was later charged and bailed; the co-offender was informed he would be summonsed. They drove home. At the time the appellant did not have permission to force an entry into the

store. He intended to steal the jeans he was wearing at the time of his arrest; they were valued at $70. The damage done to the rear door was valued at $245.65.

The appellant was not charged with stealing, attempted stealing, or criminal damage on this occasion.

*(2) The offences of 29-30 August 1996*

About 12.05am on Friday 30 August, the appellant went to the same store, Katherine Mensland, picked up a Besser brick and threw it through the bottom panel of the same glass door. The appellant then entered the store through the smashed door, collected three shirts, two caps and two pairs of jeans, and left the building. He walked to 33 Pearce Street, dropping some of the items along the way, as he went. He was apprehended at 33 Pearce Street with property from the store in his possession. He was arrested and conveyed to the police station.

He was later interviewed there. He fully admitted the offences. He stated during the interview that he was forced by others to do it. He was subsequently charged with the offences. At no time was permission given to the appellant by the owner to enter the building and take the clothing, which was the property of Mensland and had a total value of $438. Again, the damage caused was $245.65.

He was not charged with criminal damage on this occasion.

*(3) The offences of 5 September 1996*

At approximately 12.30am on Thursday 5 September the appellant was at the rear of the store, Katherine Mensland, and the Terrace Emporium. This time he smashed a window and thereby gained entry to the shop. He selected a large number of clothes including shirts, jeans and caps to the total value of $752. When he entered the store he set off a silent alarm. Security, police and the key-holder attended. The appellant hid in the shop and was not located by the search. All persons left and the appellant came out of hiding with the clothing.

In doing so he set off another alarm. Security and the key-holder again attended, and located the appellant hiding in the shop. They told him to sit down until police attended.

> Police arrived and the appellant was arrested and conveyed to the police station. He was held there until sober. He did not wish to participate in a formal interview. He was charged; this time bail was refused. The appellant did not have permission to smash the window, or to enter the shop. The damage to the window was valued at $390.

The appellant was not charged with attempted stealing. The prosecutor sought an order for compensation in the sum of $736.95, under s88(c) of the *Sentencing Act*, being the total cost of repairing the broken glass doors and the window on the 3 occasions.

*The submissions in mitigation before his Worship*

Mr O'Connell of counsel for the appellant before his Worship, submitted in mitigation as follows. The appellant was then aged 19, an Aboriginal man born in Kununurra; he had 4 sisters and 2 brothers. He had lived most of his life in the Kildurk community, about 150 kilometres from Timber Creek. He did Year 8 at Kormilda College in Darwin and then returned to Kildurk where he worked on the CDEP since age 16. He earns $500 per fortnight. He had come to Katherine to take part in a rodeo, and stayed on.

This was his first visit to Katherine, and the first time he had had continual exposure to liquor. It was also the first occasion on which he had seen such attractive clothing in a store; such displays are unknown in Kildurk. Under the influence of alcohol and with "no real idea of the consequences of his actions" he committed these 3 offences. He had no prior criminal record. He never sought to steal any cash from the cash register in the store.

On being freed on bail by the Police after they had arrested and charged him for his first offence, he thought -

> "Fair enough, I can [continue to] do this - I get picked up by the Police, and then they let me go again."

I note that his Worship accepted during the submissions that it was a "possibility" that the appellant indeed thought that way; see p7. Mr O'Connell submitted that the appellant maintained this belief, when he was arrested and bailed once again by the Police, after his second offence. And so he had for a third time broken into the same premises, while intoxicated.

His Worship accepted during submissions that the procedure of being arrested and then freed on bail was "quite confusing" to the appellant; he noted that the appellant had failed to appear in court on the day after his second arrest, 30 August 1996; he had been bailed on 25 August to appear in court on 30 August, to answer a charge for his first offence of 24 August.

Mr O'Connell relied on the appellant's youth, his previous good character, the fact that he came from a remote area where the shopping temptations of Katherine were lacking, and his lack of any prior experience of the working of the criminal justice system. Mr O'Connell characterised the offences as "pathetic and drunken attempts" to take the property taken. He noted that the appellant had pleaded guilty at the earliest opportunity.

He submitted that his Worship should order by way of punishment that the appellant carry out community service work at Kildurk or at Timber Creek.

**The sentencing by his Worship**

His Worship responded immediately that in the circumstances to order community service work "doesn't sound very satisfactory"; however, he asked that an assessment for that purpose be made, while "giving [the appellant] no promises". The assessment was promptly made. It seems that such work could be carried out at Timber Creek. After considering the report, and the question of punishment generally during an adjournment, his Worship said:

> "I've formed an opinion that this young man has committed a sufficient series of serious offences, that I don't think it's proper just to let him go on [a] CSO. I proposed to impose suspended sentences. … He's going to serve a short time in custody, actually. And then he'll be released on supervision. And I'm going to make restitution orders."

His Worship then asked for and obtained a probation assessment of the appellant, under s103 of the *Sentencing Act*. That afternoon, his Worship proceeded to sentence. First, he reviewed the facts. In the course of doing so, he specifically observed that "night time is not charged", despite the agreed facts as to the times at which the offences were committed; the significance of this observation is discussed at pp11-12. He treated the appellant's statement to the Police (p4) that, "he was forced by others" to commit the second offence, as a reference to 'some sort of dare'. He proceeded to sentence the appellant as follows:

> *"I'm told that he had no real idea of the consequences [of his behaviour], and that I can believe when it was so easy for him to get bail on the second occasion.*
>
> …
>
> Now he can do community work provided he lives at Timber Creek. In

> other words, gives up his job at Kildurk for a while and does his community work; stays near the pubs at Timber Creek and does his work. If this young man had committed these offences or similar offences [at his own community at Kildurk] … I might well at the beginning be looking at community service, to get the message home to him that he'd damaged community property. To give the community the chance to get the message through to him, that they all suffer with increased prices and the like. That this is not just 'white-fellow' law, superimposed on 'black-fellow' law, with absolutely no relevance to his life." (emphasis added)

His Worship then referred by way of comparison to the factual situation in *Wanambi v Thompson* (unreported, Supreme Court (NT) (Kearney J), 12 December 1994), where a non-resident of Groote Eylandt committed a crime there and was held (pp24-9) rightly *not* to have been sentenced on the basis of a *special* sentencing regime (involving very extensive use of community service orders) then applicable to inhabitants of Groote Eylandt who committed crimes there. As appears below, his Worship proceeded to deal with the appellant quite differently - in accordance with the *usual* sentencing regime applicable to persons who commit offences in Katherine. His Worship then explained why he would not sentence the appellant in the way he may have done had the appellant committed his offences within his own community at Kildurk; he said:

> "But it's not like that. [This was a reference back to his preceding remarks, above.] This is a situation [of crimes committed] in a town [Katherine] where there is a great deal of thieving, a good deal more than … comes formally to the notice of the courts. … He has … three times within a fortnight really, smashed this shopkeeper's door (sic) causing a total bill of … nearly $750. He has clearly got the impression … that one can do as you like in 'whitefellow' shops. And somebody tried to tell me at the Conference the other day that this is how it is, that *the Aboriginal people in communities don't see the 'whites' as having any law,* except 'do as you like and maybe you get caught, and maybe you don't'. *If you get caught they're not quite sure what happens. I don't believe that many people take that view.* I don't believe that many people who watch television and can follow the plot can possibly get that view.

This bloke *has gone in the dead of night on each occasion*, to this shop and has burst his way in. Sacking and pillaging is what it amounts to. The people are fed up with it. I believe that *it is my plain duty to deal with this young fellow in a way that he won't readily forget, and that the proper way to do that is to impose proper terms of imprisonment, and make him serve enough to make him quite disliked to (sic) the penal system.*

I realise that there are risks of contamination [in prison], but *the alternative that he is allowed at Timber Creek to just live about the place and do some work, [in] circumstances where no one is any the wiser about what he's doing it [for], is laughable.*

… For the offence of 24 August he is *convicted*, sentenced to 4 months imprisonment commencing on 5 September. I order that [that] sentence be suspended after serving six weeks. I specify pursuant to section 40 subsection 6 [of the *Sentencing Act*] [a] period of 12 months from the date hereof during which the offender is not to commit another offence punishable by imprisonment, if he is to avoid being dealt with under section 43.

[The] condition [is] that he will place himself under the supervision of a delegate of the Director of Correctional Services and obey all reasonable conditions as to employment, residence, associates and reporting.

On matters of 30 August, … on both of them [the unlawful entry and the stealing] there is … a conviction on each, and an aggregate sentence [under s52 of the *Sentencing Act*]. He's sentenced to four months imprisonment with effect from 5 September. That will be … served concurrently with [the sentence for the offence of 24 August] and suspended after six weeks, on the same terms.

And on [the charges relating to the offences of 5 September] on count one which is the [unlawful] damage, he is convicted and sentenced to two months imprisonment cumulative upon [the sentence of 4 months imprisonment for the offence of 4 August]. On count two, the [unlawful] entry, he's convicted and sentenced to four months imprisonment, concurrently run [with the first sentence of 2 months]. And [those two sentences] are suspended on the [same] terms [as the sentence for the offence of 24 August].

The effect of all that therefore is an aggregate sentence of eight months imprisonment suspended after six weeks." (emphasis added)

His Worship then ordered that compensation of $245.65 arising from the offence of 24 August be paid by 5 February 1997; and compensation of $491.30 arising from the offences of 30 August and 5 September be paid by 5 May 1997.

His Worship directed, pursuant to s40(2) of the *Sentencing Act*, as a condition of suspending service of part of the aggregate sentence of 8 months imprisonment, that the appellant obey the directions of the Director of Correctional Services for a period of 12 months.

**The grounds of appeal**

The Notice of Appeal sets out four grounds of appeal, viz:

1. This sentence was manifestly excessive;

2. His Worship erred in that -

   (a) he failed to give sufficient weight to the appellant's age, personal circumstances and lack of any prior conviction;

   (b) he took into account against the appellant a circumstance of aggravation with which he was not charged - that the offence occurred at night time; and

   (c) he failed to give proper consideration to the imposition of a sentence other than a sentence of immediate imprisonment.

**The submissions on appeal**

*General*

Ms Gibson of counsel for the appellant noted that the property charged as stolen on 30 August had all been recovered, in saleable condition.

In general she stressed the personal circumstances of the appellant, which she submitted were sufficiently "unusual" to have warranted a different disposition to that which was made - either a community service order or a fully suspended sentence. She relied on all of the matters which Mr O'Connell had put to his Worship (see pp5-6): the appellant's youth, his having grown up in a "very isolated" community, the fact that the offences occurred on his first visit to Katherine which involved his first exposure to continual liquor, his lack of prior convictions and of any prior contact with the criminal justice system.

Ms Gibson stressed that the appellant was never conscious of the possible consequences of his behaviour in the sense "not that he did not know he was doing wrong, but … that he did not know that what he was doing was so bad that he might go to gaol". His perception that what he was doing was "not so serious" was reinforced by the fact that the Police had freed him on bail, twice, after arresting him.

*Ground 2(b) - error on circumstance of aggravation*

As to ground 2(b) Ms Gibson relied on his Worship's reference (p0) to the appellant having "gone in the dead of night on each occasion". As can be seen from the admitted facts at pp3-5 his Worship's words merely reflect what the appellant admitted to be the fact. To commit an unlawful entry at night time is a "circumstance of aggravation" of that offence - see ss1 and 213(5) of the Code - and increases the maximum penalty. However, his Worship could not take such a circumstance into account for sentencing purposes in any way

unless it was specifically charged: see ss305(4) and 314 of the Code; *The Queen v De Simoni* (1981) 147 CLR 383 at 389, per Gibbs CJ; *Ruatapu Teremoana* (1990) 49 A Crim R 207; *Hietanen* (1989) 45 A Crim R 26 at 28-30; and *Overall* (1993) 71 A Crim R 170 at 173-5, per Mahoney JA. In Western Australia it could have been taken into account as an aggravating factor, even though not charged; see s7(3) of the *Sentencing Act* 1995 (WA) which has no counterpart in the *Sentencing Act* (NT). No such circumstance was in fact charged; had it been charged, his Worship would have lacked jurisdiction to hear the charges - see s121B of the *Justices Act*, read with ss213(4) and (5) of the Code.

In my opinion there is no substance in this ground of appeal, on the facts. Earlier in his remarks (p7) his Worship had specifically noted that despite the admitted times at which each offence was committed "night time is not charged". In light of that observation and his other sentencing remarks it is clear that his Worship did not treat the fact that the offences were committed at the times admitted as a statutory "circumstance of aggravation" such as to attract the heavier penalty in Code s213(5), or as an aggravating factor. See *Newman v Turnbull* (1995) 81 A Crim R 191 at 196-7.

*Ground 2(a) - failure to give weight to the appellant's circumstances*

As to ground 2(a) Ms Gibson referred to the evidence before his Worship, submitting that he gave insufficient weight to the matters specified (p10). It is a "cardinal rule" that an otherwise good character may reduce a sentence which the objective facts of an offence would otherwise warrant; see ss5(2)(e)

and 6 of the *Sentencing Act* and *R v McInerney* (1986) 42 SASR 111 at 113, per King CJ. The proper general approach to the sentencing of young offenders is to my mind unaffected by the *Sentencing Act* and is set out in *GDP* (1991) 53 A Crim R 112 at 116, per Matthews J; considerations of general deterrence are not to be completely ignored, but considerations of rehabilitation are very important, and to that end the damaging effect of imprisonment (to which his Worship referred at p9) from which the community is liable to suffer further and more severely, is to be avoided if practicable. This principle is frequently applied where a young offender is being sentenced for his first offence; see, for example, *Smith* (1988) 33 A Crim R 95 at 97, per Young CJ. However, I consider that his Worship clearly took all those matters into account when sentencing. Whether or not he gave them sufficient weight is really only capable of being determined if the 'manifestly excessive' ground of appeal succeeds.

*Ground 2(c) - failure adequately to consider other possible dispositions*

It is clear (pp7,8) that his Worship considered sentencing by way of a community service order, as Mr O'Connell had sought. In realistic terms, that was the only possible alternative to a sentence of imprisonment. See *Nieto v Mill* (1991) 54 A Crim R 35 at 37 and 40, for the history and purpose of community service orders; such a disposition is not a lenient sentencing option. His Worship expressed his reasons for rejecting that option at pp8-9.

Ms Gibson submitted that his Worship's observation that to order the appellant to carry out community service work at Timber Creek was

"laughable" (p9) was an inappropriate characterisation of that sentencing option. It involved a real punishment, and the appellant should not be denied such a disposition because of a wrong conception that 'somehow it was not any real punishment'. While it was relevant to its imposition that members of an offender's remote Aboriginal community should see him carrying out such work as his punishment, that was not the only relevant consideration; the appellant's personal circumstances were such as to warrant the making of such an order in his case.

I consider that in the context of his preceding remarks (pp8,9) his Worship clearly meant by "laughable" that a sentencing disposition by way of a community service order at Timber Creek would be quite inadequate punishment for the 3 crimes of unlawful entry committed; they had not been committed within the appellant's own community at Kildurk, but within the town of Katherine where there was a "great deal of thieving". I do not consider that such an approach lay outside his Worship's sentencing discretion. Although the *Sentencing Act* does not refer to cultural background as a sentencing factor, a lower punishment may be warranted for a similar offence within a remote Aboriginal community: *Roberts v Young* (unreported, Supreme Court (SA) (White J), 30 September 1986); *Friday* (1984) 14 A Crim R 471 at 472, per Campbell CJ; *Leech v Peters* (1988) 40 A Crim R 350 at 353; *Houghagen v Charra* (1989) 50 SASR 419 at 422; and *Neal v The Queen* (1982) 149 CLR 305 at 315 per Murphy J. But that was not the case here.

*Ground 1 - sentence manifestly excessive*

As to ground 1 Ms Gibson stressed that all the circumstances of the case and of the appellant, particularly his youth and clear previous record, should be taken into account. I have already noted that his Worship did so. She stressed that the appellant had lacked an understanding of what would be the consequences of his behaviour, a matter to which his Worship gave some credence (pp6,7), but to which he ultimately appeared to give little or no weight; I consider it was open to his Worship to do so.

Ms Gibson rightly accepted that ordinarily the fact that a person commits an offence while on bail itself indicates that he is unlikely to reform, and therefore it may (at least) militate against leniency in sentencing; see *Readman* (1990) 47 A Crim R 181 at 184-5 per Maxwell J; and *R v Gray* [1977] VR 225 at 229-230, per McInerney and Crockett JJ. Here the second and third offences were committed while the appellant was on bail. I note, however, that his Worship did not advert to that aspect; clearly, he did not treat it as a factor which required heavier sentencing, or as militating against leniency. Doubtless this was because he accepted in part that the granting of bail by the Police, particularly after the second offence, was a circumstance which possibly tended to induce the unsophisticated appellant to believe that what he had done was "not too serious". It followed - and this seems to have been his Worship's approach - that the fact he had committed the last 2 sets of offences while on bail should not be held against him.

Ms Gibson submitted that the appellant took property for his *own* use; he did not steal to sell. Further, he did no wanton damage within the store and all the property was recovered, in saleable condition. All of the offences had been committed as part of a 'spree' over a period of 2 weeks. The appellant had pleaded guilty to each charge; as to that, I consider that the pleas could not carry much mitigating weight, since on two occasions he had been caught 'red-handed'. As to the other matters there is nothing to suggest that his Worship did not take them into account; whether he gave them sufficient weight, really depends on whether the sentence is "manifestly excessive".

Ms Gibson submitted that in sentencing as he did, his Worship had in mind the need for general deterrence. I accept that. She submitted that the circumstances of the appellant were not such as to warrant an element of 'strong' general deterrence in his sentencing. I consider that the order for his release after serving 6 weeks imprisonment indicates that his Worship did not place excessive weight on the need for general deterrence; the effective head sentence of 8 months imprisonment does not per se indicate excessive weight having been put on the need for general deterrence.

Ms Gibson submitted that it was "not uncommon" for young persons charged with unlawful entry, where all the property stolen was recovered and there were no aggravating matters, to receive a non-custodial sentence. I consider that even if correct, this does not establish that the sentencing was "manifestly excessive". She further submitted that it was "not common" for a young person to receive a custodial sentence "on his first Court appearance";

and that the young appellant was an "unsophisticated defendant" whose unlawful entries were not "serious examples" of that offence. I accept the first 2 points, but not the third; in any event, an 'uncommon' sentence is not per se manifestly excessive. I note that in his sentencing remarks his Worship indicated why he had sentenced as he did (pp8-9). He clearly took account of the fact that the appellant was a young, unsophisticated, first offender. I consider that the imposition of a sentence which included service of a relatively short period of immediate imprisonment lay within the proper exercise of his Worship's discretion, in the circumstances of this case.

As to any need for personal deterrence, Ms Gibson submitted that there was "nothing in [the appellant's] record" to suggest that he needed to serve 6 weeks in prison to bring home to him the gravity of his offending. She submitted that a sentence of imprisonment of 4 months for the first offence of 24 August was "heavy". I note that sentencing must be viewed as a totality; his Worship imposed concurrent sentences for the first 2 sets of offences.

**Conclusions**

It is vital to understand that this Court does not intervene on an appeal against sentence merely because it may consider the actual sentence imposed was heavier than the Court itself would impose. The appellant must show material error in his Worship's approach to sentencing or that the sentence itself is so excessive as to indicate that some such error or departure from principle must have occurred. See *R v Tait* (1979) 46 FLR 386 at 388. I note that there must always be a reasonable proportion between a sentence and the

objective circumstances of the offence in question; see *Nichols* (1991) 57 A Crim R 391 at 395, per Lee AJ. The relative importance of the objective facts of the offence and the subjective features of the case will vary from case to case.

The persistence of the appellant in committing 3 unlawful entries in the manner he did, over a period of 2 weeks, was open to be treated as an aggravating feature.

His Worship was clearly and rightly concerned (p8) about the incidence of this type of crime in Katherine. He was in a very knowledgeable position in that regard. It is notorious that many - indeed, about 70% of - unlawful entries are committed by young men. The only source of protection for the people of Katherine are the police and the courts. They rightly expect the courts to do their part in protecting their community from deprivations of this type. The prime responsibility of the courts is the protection of the community.
His Worship, a most experienced Magistrate, was clearly well aware of these considerations. I consider that his aggregate head sentence of 8 months imprisonment reflects the proper need to protect the community. There is an obvious need in sentencing for such offences to incorporate an element to deter like-minded offenders; that is, there is a need for general deterrence.

It is also clear that his Worship took particular account of the appellant's personal circumstances, when directing that he serve only 6 weeks of an effective head sentence of 8 months. His Worship is very experienced in

dealing with young Aboriginal offenders; there is nothing to suggest that in this case he did not bear in mind the well established principles in sentencing such offenders, usefully summarised in *Fernando* (1992) 76 A Crim R 58 at 62-4 particularly, in this case, the propositions therein set out at (A), (B) and (F-H). See also *Rogers v Murray* (1989) 44 A Crim R 301 at 305 and 307 per Malcolm CJ, and per Wallace J at 314; *Juli* (1990) 50 A Crim R 31 at 36-7, per Malcolm CJ; and *Leech v Peters* (supra) at 353.

His Worship clearly had some knowledge of the remote Kildurk community, south west of Timber Creek. It should be well known that 'Kildurk' is the old name for what is now known as 'Amanbidji' and that there is a fairly sizeable Aboriginal community there, the Mialuni community.

It has been said that whether or not a sentence is manifestly excessive is not a question capable of sustained argument. I agree. I consider that his Worship's overall sentencing was merciful in all the circumstances of the 3 sets of offences and the appellant; it was in no way manifestly excessive.

As the appellant has failed to establish any of the grounds of appeal relied on, pursuant to s177(2) of the *Justices Act* I dismiss the appeals and affirm the sentencing of 6 September 1996.

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