PARTIES:	GREEN, David Neville GREEN, Ronald Michael v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA16 & 18 of 1996
DELIVERED:	3 October 1997
HEARING DATES:	7, 10 March 1997
JUDGMENT OF:	MARTIN CJ, KEARNEY J. & PRIESTLEY AJ

CATCHWORDS:

Criminal law and procedure - Appeal and new trial and inquiry after conviction - Appeal against sentence - Exercise of sentencing discretion - Whether sentences manifestly excessive - Unclear what weight attributed to various mitigating factors - Whether offenders remorseful - Observations by trial judge as to demeanour of offenders - Fairness requires that if such observations to be held against offender trial judge should draw attention to it and give the opportunity for an explanation - Done in relation to one applicant only - No injustice caused by error -

Gronow v Gronow (1979) 144 CLR 513 at 519 per Stephen J., applied.
Veen v R (No. 2) (1988) 164 CLR 465, referred to.

Appeal against sentence - Exercise of sentencing discretion - Whether sentences manifestly excessive - Whether principle of totality infringed - Differentiation between involvement of each applicant - Regard paid to principle of parity - Different degrees of seriousness of offending by each applicant reflected in sentences imposed - Sentences at upper end of scale - Personal circumstances of each offender did not allow for substantial mitigation - No real confidence as to prospects of rehabilitation -

Lowe v R (1984) 154 CLR 606, applied

Mill v R (1983) 166 CLR 59, applied

Probation, parole, release on licence and remissions - Remissions - Ministerial determination as to amount of remission prisoner able to be granted - Remissions only applicable to a person under a sentence of imprisonment - Applicants did not become prisoners under sentence until after remission system abolished -

Prisons (Correctional Services) Act 1980 (NT), ss5 & 92.
Prisons (Correctional Services) Amendment Act (No. 2) 1994 (NT), s10.
Sentencing Act 1995 (NT), s58.

Siganto v R Northern Territory Court of Criminal Appeal, unreported 3.10.97, applied.

Statutes - Operation and effect of statutes - Where sentence imposed after 1 July 1996 Sentencing Act 1995 (NT) applies irrespective of date of commission of offence - Sentence commences on day is imposed - Where offender held in custody on account of arrest, and is then convicted and sentenced for offence for which remanded, Court empowered to backdate sentence to take into account time spent on remand - Whether such order has effect that applicants should be regarded as being prisoners under sentence of imprisonment as from date fixed by the order - Status of offender does not retrospectively change from having been on remand to having been a prisoner under a sentence of imprisonment as from the date ordered.

Prisons (Correctional Services) Amendment Act No. 2 1994 (NT), s10.
Sentencing Act 1995 (NT) ss62(1), 63(5), 130(1).

REPRESENTATION:

Counsel:

1st Appellant:	Mr D Grace QC with Mr R Coates
2nd Appellant:	Mr P Loftus
Respondent:	Mr Wild QC with Mr M Fox and Ms G O'Rourke

Solicitors:

1st Appellant:	NTLAC
2nd Appellant	Withnall Cavanagh & Maley
Respondent:	DPP

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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN
TERRITORY OF AUSTRALIA
AT DARWIN

No. CA16 & 18 of 1996

BETWEEN:

DAVID NEVILLE GREEN

RONALD MICHAEL GREEN
Appellants

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ., KEARNEY J. & PRIESTLEY AJ.

REASONS FOR JUDGMENT

(Delivered 3 October 1997)

THE COURT

Application for leave to appeal against sentence in which it is asserted that the sentences were manifestly excessive, offended against the totality principle, offended against the principles relating to parity of sentencing, and were imposed without taking into account certain provisions of the *Prisons (Correctional Services) Act* 1980 (NT) and *Sentencing Act* 1995 (NT). Each applicant was separately represented. They had been dealt with by the same

Judge, Angel J., at the one time. Their sister, Deborah Green, who had also been charged with offences arising in the same course of events, were dealt with by another Judge (Martin CJ) on a later occasion.

The facts admitted by the applicants (then referred to as "the prisoners") and details of the sentences imposed upon them, taken from the remarks of Angel J., follow:

On the evening of Wednesday, 8 November 1995, the two prisoners, Ronald Green and David Green, together with their sister, Deborah Green, were at their home, 1 Poinciana Street, Nightcliff, drinking rum with a friend, Raymond Mills. The two prisoners and their sister became intoxicated. They were discussing a past incident involving the victims in this matter, Robert Lynn and Julianna Ryan; both victims were known to the prisoners. The victims resided at Flat 1, 16 Hakea Street, Nightcliff.

Around 11pm the prisoners made several abusive telephone calls to Julianna Ryan at her home. The prisoners and their sister Deborah Green then decided to go to Hakea Street at 11.20pm. Deborah Green left her three children in the care of Raymond Mills, who stayed at the Poinciana Street flat. Upon arriving at the Hakea Street residence the prisoners knocked loudly on the security screen door. The security screen door was locked at the time; however, the wooden front door was open. The prisoners yelled out, demanding to see Robert Lynn.

A visitor to the flat, one Ian Roberts, went to the front door and told them Lynn was sleeping. At the time Lynn and Ryan were in Ryan's bedroom. The prisoners then demanded that Roberts wake Lynn. As Roberts went to knock on the bedroom door the prisoners started to bash and kick on the screen door, to smash it to gain entry. Whilst they were doing this they were screaming out to Lynn. Ronald Green then told David Green to stand aside whilst he body-charged the screen door. Both prisoners gained entry to the flat, as the screen door was completely torn from the frame as a result of Ronald Green's actions. Roberts fled immediately and alerted neighbours who telephoned police. Deborah Green was in the car park of the flats when her brothers gained entry to the flat.

As the prisoners were attempting to gain entry to the flat Julianna Ryan came out from the bedroom and began to scream with fear. As the prisoners gained entry Lynn came out of the room. The prisoners then set upon Lynn with Ronald Green punching Lynn in the shoulder area. Lynn began to try and grab hold of Ronald Green and both men fell to the floor in the hallway. Ronald Green then started to bite Lynn on the upper left thigh, causing a deep wound to the thigh. As Ronald Green was biting Lynn David Green was punching Lynn about the face and head, causing bruising.

Lynn attempted to flee to safety in his bedroom when Ronald Green had stopped biting him. The prisoners pursued Lynn into his bedroom and Ronald Green picked up a ball-pin (sic) hammer from a toolbox in the room and commenced to strike Lynn about the body and head with the hammer. Ronald

Green struck Lynn with the hammer directly on to Lynn's nose, causing bruising. Ronald Green struck Lynn several more times about the head and body with the hammer, causing bruising and open lacerations.

Whilst Ronald Green was assaulting Lynn with the pin hammer the head of the hammer came off the handle. Ronald Green discarded the handle and left the room to see what was happening with his sister, Deborah Green. David Green also punched Lynn numerous times about the body and face. Ronald Green then went to the kitchen area and whilst there located an Excalibur brand Duke model lock-back hunting knife, which had a blade 12.5 centimetres long. He later told police that he had a glass of water from the fridge in the kitchen and then returned to the bedroom with the knife.

He then proceeded to stab or jab Lynn six times. Lynn sustained knife wounds to the following places: the front of the right bicep; the back of the upper arm; the front left wrist; the back of the left wrist; the inside right ankle; and the back of the right knee, above the calf muscle. Each of the wounds required stitching.

Ronald and David Green then ceased their attack upon Lynn. Ronald Green picked up a claw hammer from the bedroom and went into the lounge, where Deborah Green had been attacking Ryan with a metal curtain rod. The rod was approximately one metre long. Deborah Green had struck Ryan at least seven times with the curtain rod about the legs and back. Ronald Green

then threw the hammer against the wall, causing its head to fall off. He then punched Ryan in the right eye with his fist, causing her to fall to the floor.

He then picked her up by the hair and manhandled her about the room. Ronald Green then picked up a 12 inch portable television with both hands and threw it at Ryan. Ryan was hit in the arms as she attempted to shield herself from the assault. As a result of both assaults Ryan sustained extensive and severe bruising to her back and legs, as well as a blackened right eye.

As already related, at the onset of the entry by the prisoners Ian Roberts, who was staying at the Hakea Street residence at the time, fled from the flat, alerted a neighbour and police were called. Other people from neighbouring premises heard the incident and also telephoned police.

At the conclusion of the incident in the flat the prisoner Ronald Green was first to leave via the front door and ran towards the car park, which is located at the front of the flats. At the time he was still carrying the knife he had used to stab Lynn.

Bradley Ian Klein had walked from his first storey flat after hearing the disturbance in Ryan's flat, which was downstairs from his own. He walked towards Flat 1 and was confronted by Ronald Green as he was running towards the stairs. Ronald Green told Klein to get out of the way. Almost immediately the prisoner crashed into Klein front on and both fell to the ground with the prisoner landing on top of Klein.

Ronald Green told police that at the time of colliding with Klein he was still carrying the knife and was holding it in front of him. After falling to the ground Klein was stabbed with the knife. Doctor Lee gave evidence at the committal proceedings that the injury suffered by Klein was not inconsistent with the version given by Ronald Green.

Ronald Green then removed the knife and ran out on to the street before fleeing back to 1 Poinciana Street, Nightcliff. The victim managed to walk up some of the stairs to his flat before falling. He was transported to hospital where he died whilst doctors attempted to resuscitate him.

Whilst running back to his residence Ronald Green discarded the knife and his shirt. Upon his return to 1 Poinciana Street Ronald Green instructed Raymond Mills, who had been at the flat minding Deborah Green's children, to burn the clothes.

On 12 September 1996 the prisoner David Neville Green pleaded guilty to four counts. The first count, that on 8 November 1995 he unlawfully entered an occupied dwelling house at night, intending to commit the crime of assault there, contrary to s213 of the *Criminal Code* 1983 (NT). The second count, that having entered that dwelling house he unlawfully assaulted Robert Lynn, causing him bodily harm and threatening Lynn with offensive weapons - namely, a hammer and a knife - contrary to s188 of the *Criminal Code*.

The third count, that on the same occasion he unlawfully assaulted Julianna Ryan with the following circumstances of aggravation, that Julianna Ryan suffered bodily harm and that Julianna Ryan was a female and the prisoner David Green was a male, contrary to s188 of the *Criminal Code*. The fourth count, that the prisoner David Green assaulted First Class Constable Ronald Heymans whilst in the execution of his duty, contrary to s189A of the *Criminal Code*.

The prisoner Ronald Green pleaded guilty to six counts. The first count, that he unlawfully entered an occupied dwelling house at night with the intention of committing assault therein, contrary to s213 of the *Criminal Code*. The second count, that of aggravated unlawful assault on Robert Lynn, contrary to s188 of the *Criminal Code*. The third count, that of aggravated unlawful assault on Julianna Ryan, contrary to s188 of the *Criminal Code*, read with s8 of the *Criminal Code*.

The fourth count, that of an unlawful dangerous act, contrary to s154 of the *Criminal Code*, with the following circumstances of aggravation: namely, that the prisoner was under the influence of intoxicating liquor and that he caused the death of another; namely, Bradley David Klein. The fifth count, that on 9 November 1995 the prisoner assaulted Senior Constable John Nixon whilst in the execution of his duty, contrary to s189A of the *Criminal Code*. And the final and sixth count, that on 9 November 1995 the prisoner assaulted Senior Constable Paul Manuell whilst in the execution of his duty, contrary to s189A of the *Criminal Code*.

The maximum penalty for each aggravated unlawful entry count is 20 years imprisonment. The maximum penalty for each aggravated unlawful assault, contrary to s188 of the *Criminal Code*, is 5 years imprisonment. The maximum penalty for each count of assaulting police officers in the execution of their duty, contrary to s189A of the *Criminal Code*, is 2 years imprisonment. And the maximum penalty for the aggravated unlawful dangerous act, contrary to s154 of the *Criminal Code*, is 14 years imprisonment.

The learned Judge imposed the following sentences:

- David Neville Green - imprisonment for:
    1. aggravated unlawful entry, eight years;
    2. assault on Robert Lynn, three years;
    3. assault on Julianna Ryan, two years;
    4. assault police, three months.

    It was directed that sentences 1, 2 and 3 be served concurrently, and sentence 4 cumulatively, an effective head sentence to imprisonment of eight years and three months. A non-parole period of four years and six months was fixed, and it was ordered that the sentences be regarded as having commenced on 9 January 1996 to take into account time spent in custody.

- Ronald Michael Green - imprisonment for:

    1. aggravated unlawful entry, eight years;
    2. assault Robert Lynn, five years;
    3. assault Julianna Ryan, three years;
    4. dangerous act causing death, four years;
    5. assault police - Nixon, six months;
    6. assault police - Manuell, six months.

    It was directed that the sentences on counts 1, 2 and 3 be served concurrently, the sentence on count 4 cumulatively on that, the sentence on counts 5 and 6 concurrently with each other but cumulatively upon the others. The effective head sentence was twelve years and six months and a non-parole period of seven years was fixed, the sentence being ordered to be regarded to have commenced on 9 November 1995 to take account of time spent in custody.

It is convenient to firstly consider whether his Honour erred in the application of the provisions of the *Prisons (Correctional Services) Act* and *Sentencing Act*. The legislation came into operation after the commission of the offences, but prior to the plea, conviction and sentencing. The sentences were, however, ordered to be regarded as having commenced on a day prior to the commencement of the *Sentencing Act*. A brief chronology shows:

Offences committed - 8 November 1995.

Sentences imposed on 12 September 1996 regarded as having commenced in November 1995 and January 1996.

The *Sentencing Act* and *Prisons (Correctional Services) Amendment (No 2)* Act 1994 commenced 1 July 1996.

Convictions and sentences imposed, 12 September 1996.

In *Siganto v The Queen* (unreported, Court of Criminal Appeal, Northern Territory, 3 October 1997) this Court determined the application of certain provisions of the *Prisons (Correctional Services) Act (No.2)* 1994 in relation to offences committed prior to 1 July 1996, when the Act came into force, but where sentence was imposed after that date. It held that the abolition of executive remissions by that legislation operated in those circumstances. Accordingly, an offender sentenced to imprisonment after the commencement of that legislation in respect of offences committed prior thereto was not entitled to the benefit of the remissions previously available to prisoners. It followed that the constraint upon the Court's discretion to fix a period during which a prisoner was not to be eligible for parole, bearing in mind the pre-existing remission system, no longer applied. Furthermore, the minimum non-parole periods prescribed in the *Sentencing Act* apply to such a sentence. In the course of those reasons the Court considered the common law, *Interpretation Act* 1978 (NT), s12, *Criminal Code* s14(1) and the *Sentencing Act* ss121 and 130.

These cases are said to be distinguishable because of the additional factor that the sentences were ordered to be regarded as having commenced prior to 1 July 1996. To decide this issue it is necessary to return to the precise terms of the legislation. By s92 of the *Prisons (Correctional Services) Act* the Minister was authorised to make a determination specifying the amount of remissions which may be granted to a prisoner and the circumstances in which that remission may be granted. The determination of 3 June 1981 provided that the maximum amount of remission which shall be granted in respect of the term of imprisonment being served by a prisoner, who had been industrious and of good behaviour, shall be calculated in accordance with rules there set out. The maximum amount of remission that might be earned was not to exceed one third of the maximum length of the sentence. By its terms, and logically, the remission only applied to a person under a sentence of imprisonment (see definition of "prisoner" s5). By the amending Act which came into operation on 1 July 1996, s92 was repealed. The transitional provision in s10(1) relevantly provides that notwithstanding the repeal of s92, a determination made under it which was in force immediately before the commencement of the Act, shall, on that commencement, continue in force in respect of a person who is a prisoner on that commencement. In this context, "prisoner" must also mean the person under a sentence of imprisonment. For reasons already given, it was only in respect of such a person that a remission could apply. The applicants were not prisoners in that sense whilst in custody on remand prior to 1 July 1996. The determination did not then apply to them. They did not become prisoners under sentence until 12 September 1996 by which time the remission system had been abolished.

It is plain from s58 of the *Sentencing Act* limiting the power of a sentencing court to take account of the abolition of remissions in the restricted circumstances set out therein, that such a court could not take into account those factors upon imposing a sentence to imprisonment in excess of twelve months. Both applicants were sentenced to imprisonment for a term in excess of twelve months.

The *Sentencing Act* applies to a sentence imposed after 1 July 1996 "irrespective of when the offence was committed" (s130(1)). It is provided in s62(1) that, subject to that Division (ss40-78), a sentence of imprisonment commences on the day it is imposed. But, it is provided in s63(5) that where an offender has been in custody on account of his or her arrest for an offence and is convicted of that offence and sentenced to imprisonment, "it may be ordered that such imprisonment shall be regarded as having commenced on the day on which the offender was arrested or on any other day between that day and the day on which the court passes sentence". The obvious intention of this provision is to enable the sentencing court, in the exercise of discretion, to give to an offender a benefit by backdating the commencement of a sentence of imprisonment to take into account time spent in custody on remand in relation to the offence. It was put that it had more than a mathematical effect, however; in these cases the orders had the effect that the applicants should be regarded as being prisoners under sentence of imprisonment as from the date fixed by the order in each case. They would thus be entitled to remission

under the system in place prior to 1 July 1996 and certain consequences which flow from that.

The words of the subsection do not support that contention. It is the term of imprisonment that is to be "regarded as having commenced" on the day ordered. The term of imprisonment under the sentence does not in fact commence on that day. By its terms, the provision does not retrospectively change the status of the offender from having been on remand to having been a prisoner under a sentence of imprisonment as from the date ordered. (Although not the subject of argument, it seems to us that the parole period provisions (ss53-57) take effect such that non-parole periods may be fixed by reference to the date upon which the sentence of imprisonment is to be regarded as having commenced. That, again, is a mathematical exercise and does not depend in any way upon the status of the imprisoned offender).

The transitional provisions in s10 of the *Prisons (Correctional Services) Amendment Act No.2* (1994), pursuant to which Act remissions were abolished, do not assist the applicants. They specifically apply only to a "person who is a prisoner" (in the sense referred to above) as at 1 July 1996. Neither applicant was such a prisoner at that date, and regarding their sentences of imprisonment as having commenced before that date does not mean, in our opinion, that the offenders retrospectively became prisoners under sentence of imprisonment.

In our view his Honour had no choice other than to sentence each applicant and fix a non-parole period in accordance with the *Sentencing Act*

without regard to the abolition of remissions. The Act applies to sentences imposed after 1 July 1996, there are no exceptions or provisos; s130(1). It is not readily apparent that his Honour bore s54 in mind when he fixed that period. The non-parole period fixed in each case is not necessarily beyond the period which could have been fixed in accordance with the discretion available to the Judge prior to 1 July 1996. Prior to that date the practice had been to fix a period of less than two thirds of the head sentence recognising that the remission would probably be operative and that the prisoner would be released, as a result of the executive act, after having served only two thirds of the head sentence imposed. Non parole periods were fixed bearing that in mind and with a view to encouraging rehabilitation under supervision in the community; see *Bain* (1983) 9 A Crim R 303 at 305-6. In the case of David Green, the non-parole period was twelve months less than the term of imprisonment after deducting one third, and in the case of Ronald Green, sixteen months.

We turn now to the grounds of appeal which suggest error in the exercise of discretion. They do not point to any error discernible from his Honour's sentencing remarks. They proceed upon the basis that the head sentences and non-parole periods were "just too much", and suggest how that could have come about. As to the ground claiming that the impositions were manifestly excessive, a number of particulars are given suggesting that there was failure to give any, or sufficient weight, to the circumstances of each applicant. In that regard Stephen J. in *Gronow v Gronow* (1979) 144 CLR 513 said at p519:

> "The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge."

These remarks are as apposite to an appeal concerning a sentence in criminal proceedings as they were to the context in which they were used. It is not suggested by the particulars, nor put in argument, that his Honour's remarks disclosed any error in regard to the circumstances of the offences, including factors going to the increased culpability of the applicants.

The motivation for the attacks apparently arose from it coming to the notice of the applicants that Mr Lynn had asserted that Ms Ryan had been raped by the applicant David Green. His Honour's sentencing remarks include the following:

- as to the assault by Ronald Green upon Mr Lynn, it was described as "of the worst category of its type, that is, an assault causing bodily harm";
- the assaults generally were "premeditated, protracted and unprovoked acts of violence clearly calculated to terrorise their victims and to

punish them for perceived wrongs. They were done with great violence";

- in that regard Ronald Green's conduct "was worse than David Green's";
- there was "an element of callousness and ruthlessness in Ronald Green's conduct";
- Ronald Green punched Ms Ryan when she was defenceless and being assaulted by Deborah Green;
- The attack and bashing of people in their own home late at night was "deserving of stern punishment";
- retribution and deterrence, both personal and general, were called for in addition to the Court's "plain duty" unequivocally to denounce the conduct as "wholly unacceptable" to the community;
- as to the accidental killing of Mr Klein, it also called for a sentence with elements of personal and general deterrence. Knives are to be lawfully used with care, not carried like a " bull at a gate" while fleeing a crime scene;
- both applicants had criminal records, had been in gaol before and they had a propensity for violence. (In that regard we note that David Green had prior convictions for assault occasioning bodily harm, assaulting police on a number of occasions in 1991 and for stealing and break and enter in 1993 amongst other convictions. As to Ronald Green, he had been convicted in 1991 of aggravated assault on a female, and prior to

> that for sundry offences of stealing, breaking and entering a dwelling house, assault occasioning bodily harm, resist police and otherwise - although not mentioned his Honour probably had in mind the sentencing principles established in *Veen (No2)* (1988) 164 CLR 465).

Here the weight assigned by his Honour to the various mitigating factors is not disclosed in his remarks. It is not possible to assess just what weight was given to the age, the effect of intoxication, the prospects of rehabilitation, remorse, cooperation with authorities, pleas of guilty and the unfortunate background of each applicant as they were put in respect of each of them. His Honour mentioned those matters, took them into account and commented upon them, but no clear indication is given as to the weight or relative weight attributed to each factor. However, in relation to the applicants' claim for mitigation arising from remorse, his Honour said that the psychologist who saw David Green said he expressed remorse, but that the psychologist did not say that in his opinion David Green was remorseful. His Honour went on:

> "I must say I have grave reservations as to whether he is. I notice that both prisoners smiled inappropriately during the course of their pleas. This was not out of any apparent nervousness on their part, as judges sometimes see in this court. I notice that in the psychological report, amongst other things, the psychologist says David Green "seems to be relatively impervious to the emotional and personal implications of everyday life" and that "he has poorly developed emotional and behavioural resources". I cannot say, on the material before me, that David Green is truly remorseful. Ronald Green is not remorseful in any true sense. This offending and his prior criminal record indicates a

person who thinks little or nothing of inflicting his will and violence on others."

If his Honour noticed each of the applicants smiling during the course of the proceedings (as opposed to Ronald Green) he did not mention it at the appropriate time. As to Ronald Green, he drew his observation to the attention of his counsel (AB65) who said: "I wonder if perhaps your Honour has misinterpreted, but perhaps you will allow me to take instructions about that". The Judge agreed, saying: "He's been smiling in the course of the proceedings. It seems somewhat odd, I must say". It appears twelve days then elapsed during which counsel for Ronald Green had the opportunity of obtaining instructions on that matter, but nothing was put upon resumption of the hearing. His Honour's remarks about the smiling appear in a passage having to do with his assessment of the applicants' claim to mitigation based upon remorse. It was but one factor which led his Honour to hold that neither man was genuinely remorseful. No doubt fairness requires that if observations by a trial judge as to an offender's demeanour is to be held against him, then the judge should draw attention to it and give the opportunity for an explanation. That was done in respect of Ronald Green. Notwithstanding that was not done in relation to David Green, I do not accept that that error led to any injustice. There was the other material mentioned upon which his Honour could base his assessment of remorse and make his finding of fact. As to the pleas of guilty, his Honour remarked that "the Crown had a strong case, the victims being able to identify their assailants".

Arguments directed to errors said to arise from infringement of the principle of totality (*Mill v R* (1988) 166 CLR 59) and avoidance of unjustified disparity (*Lowe v R* (1984) 154 CLR 606) are but different shades of an overall claim by each appellant, based upon the assertion that the sentences imposed were manifestly excessive. The learned sentencing Judge expressly referred to both principles at AB115:

> "The unlawful entry into the house and the assaults that took place therein are really all part of the one incident. It does not follow from that that the sentences in respect of the unlawful entry and the two assaults should automatically be ordered to be concurrent. There is no absolute rule in this regard. It is a matter for the discretion of a court. In circumstances such as the present the predominant sentencing factor is to ensure that the net sentence for all the offending truly reflects and has regard to the overall offences and the circumstances of each offender. I have endeavoured to do this in reaching my conclusion."

As his Honour's remarks, referred to above, demonstrate, he carefully differentiated between the involvement of each applicant.

The orders relating to concurrent and cumulative sentences for the separate offences also go to demonstrate that his Honour had the principle of totality in mind. The differentiation between each applicant as to the sentences imposed show regard having been paid to the principle of parity. There is no discernible error of fact or principle demonstrated in this regard. Is any error shown by asking the question whether in each case the final head sentence or non-parole period was too much? We think not. Upon the

admitted facts, his Honour's view of the seriousness of the offences was well justified. Both men had, at the time of the unlawful entry, an intention to together assault the two victims, a man and a woman. The nature and circumstances of that entry carry the greatest maximum penalty available for that type of offence. The two men, in combination, violently entered the premises, and there is nothing to show that at that time either of the applicants had an intention to commit the assaults in a different manner to the other. There is nothing to differentiate between them up to the completion of the unlawful entry or, as counsel put it, the time they stepped over the threshold to the flat. The maximum penalty is twenty years imprisonment. The violent and prolonged nature of the attacks were severally described by his Honour. They each carried a maximum penalty of five years imprisonment. The different degrees of seriousness of the attacks carried out by each applicant is reflected in the sentences imposed for those offences. The quite separate offending involving assaults upon police in the execution of their duty carried a maximum penalty of two years imprisonment. David Green was charged with one such offence, and Ronald Green with two. Quite independently of all that, Ronald Green also stood to be punished for the death of Bradley Klein in circumstances carrying a maximum penalty of fourteen years imprisonment.

As to parity between the applicants, once it is understood that there is nothing to distinguish one from the other at the time the unlawful entry was completed, there is no disparity. The sentences for the other offences

reflected the difference between the objective circumstances. No arguments were directed as to the non-parole periods fixed in each case other than that detailed above. Whether his Honour considered himself bound by the sentencing and remission regime operable from 1 July 1996, is not expressed, but whether he did so or not, the non-parole periods fixed are not manifestly excessive. They may be seen as being at the upper end of the scale, but that is explicable by reference to the personal circumstances of each offender which did not allow for substantial mitigation, and could instil no real confidence as to their prospects of rehabilitation. There is a degree of differentiation between the brothers. Had the same proportion of non-parole period been fixed for David Green as for Ronald Green, the period for the former would have been about five years, an increase of approximately six months.

The parity submissions were further advanced, by reference to the sentence imposed upon Deborah Green. She was sentenced after the brothers and the sentence imposed upon them was taken into consideration. As the remarks on sentence in that case show:

- she pleaded guilty to unlawful entry of a dwelling at night with intent to commit an assault and to having assaulted Julianna Ryan, whereby Ms Ryan suffered bodily harm and she was threatened with an offensive weapon, a curtain rod;

- the maximum penalty for the unlawful entry was said to be fourteen years, whereas in fact it was twenty years;
- the background to her involvement with her brothers in going to the unit was the same;
- when she and they stopped in a car park she remained whilst her brothers entered the flat and set about the assaults for which they were convicted;
- she was not charged with being an accessory to that entry or those assaults;
- during the time those assaults were taking place, however, she unlawfully entered the flat by walking through the door;
- she saw Julianna Ryan in the lounge room, picked up the metal curtain rod, about a metre in length, and struck Ms Ryan seven times with it about her legs and back. Ms Ryan suffered bruising to various parts of her body;
- Ronald Green then commenced assaulting Ms Ryan, but Deborah Green was not charged with anything to do with that;
- she was under the influence of alcohol having consumed, with her brothers, a quantity of rum which was not a drink to which she was accustomed. She was angry arising from a variety of circumstances, not all having to do with Mr Lynn and Ms Ryan, though she attacked Ms Ryan arising from the same perceived wrong as had apparently motivated her brothers;

- she was arrested on 9 November, made a full confession, was bailed and pleaded guilty;
- being a female, general deterrence was not regarded of such significance as it might otherwise have been;
- as to her personal circumstances, she:
    - was aged 29 at the time of the offence;
    - had had a sad and sorry childhood;
    - had commenced employment at the age of fifteen;
    - had four children, one born not long before she was dealt with;
    - had no relevant criminal history;
    - other events on the day of the offences unrelated to the matter involving the two victims had caused her to become upset;
    - since that event she had drastically reduced her alcohol consumption, had moved to Queensland where she had family support, and had undertaken counselling by a doctor to assist in overcoming problems arising from her family and domestic circumstances;
    - what she did was out of character;
    - she was found to be genuinely remorseful.

For the unlawful entry she was sentenced to six months imprisonment, and for the assault, two years to be served concurrently, fully suspended upon

her entering into a bond to be of good behaviour for two years. Twelve months had elapsed between the date of the offence and the sentencing. It is not likely that the error as to the maximum penalty would have increased the overall sentences. The Crown did not appeal.

The disparity between the circumstances of the offences committed by Ms Green on the one hand and her brothers on the other, and between her personal circumstances and theirs, accounts for the disparity in sentencing imposed on her and them. They could have no legitimate sense of grievance.

A number of cases were referred to with a view to supporting the argument that the sentences imposed were so far beyond the range that they must be regarded as excessive. There is no established tariff for this type of offending. The cases are distinguishable, for example, on the facts of the offending, by reason of the age of the offender or other personal circumstances, including relevant previous criminal behaviour (if any), some were decided as a result of Crown appeals. They do not show that his Honour erred.

We grant leave to appeal, but dismiss the appeal in each case.
