R v Evans [2013] NTCCA 9

PARTIES:	The Queen
	v
	EVANS, Matthew Robert Peter
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	21248730
DELIVERED:	16 AUGUST 2013
HEARING DATES:	15 JULY 2013
JUDGMENT OF:	SOUTHWOOD ACJ, BLOKLAND & BARR JJ
APPEAL FROM:	KELLY J

CATCHWORDS:

APPEAL – Commonwealth offences – Sentencing – Crown appeal against sentence – Aggravated robbery – Whether sentence manifestly inadequate – Whether sentence failed to reflect the objective seriousness of the offending – Whether breach of trust by offender given appropriate weight – Whether sentence failed to reflect the principle of general deterrence – Whether too much weight placed on the subjective features of the offender – No finding of error – Sentence not manifestly inadequate – Appeal dismissed – *Crimes Act 1914 (Cth) Part 1B*

Criminal Code (Cth) s 132.3(1); *Crimes Act 1914* (Cth) 16A(1), 16A(2); *Criminal Code* (NT) 196(1), s 181, s 188(1)(2)(a)(d)(m)

Bui v DPP (Cth) (2012) 244 CLR 638 at [650]; *Director of Public Prosecutions v El Karhani* (1990) 21 NSWLR 370 at [378]; *Elliott v Harris*

(No 2) (1976) 13 SASR 516 at 527, per Bray CJ; *Hili v The Queen* (2010) 242 CLR 520 at [528]; *Parry v Hales* [2003] NTSC 83; *R v Bara* (2006) 17 NTLR 220; *R v Davey* (1980) 50 FLR 57; 2 A Crim R 254 at FLR 65; A Crim R at 260-1; *R v Gillan* (1991) 100 ALR 66 at 71; *R v Martyn* (2011) 30 NTLR 175 at 161 [10]; *R v Nadich* [2012] NTCCA 4 per Southwood J at [28]; *R v Osenkowski* (1982) 30 SASR 212 at 212-13; *R v P* (1992) 39 FCR 276 at 285; *R v Richards* [1981] 2 NSWLR 464 at [465]; *R v Riley* [2006] NTCCA 10; *Wong v The Queen* (2001 207 CLR 584; *R v Wurramara* (1999) 105 A Crim R 512; cited

Dinsdale v The Queen (2000) 202 CLR 321 at [6]; *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 243 FLR 28 at [304]; *DPP v Buhagiar and Heathcote* [1998] 4 VR 540 (CA); *DPP (Cth) v Carter* (at 607-608 229); *Lodhi v The Queen* of s 16A (2) *Crimes Act* (Cth); *Markarian v The Queen* (2005) 228 CLR 357 at [30] and [31]; referred to

Della-Vedova v R (2009) NSW CLA 107; distinguished

REPRESENTATION:

Counsel:

Appellant:	R Bromich SC with R Rankin
Respondent:	J Tippett QC

Solicitors:

Appellant:	The Office of the Commonwealth Director of Public Prosecutions
Respondent:	Maleys Barristers and Solicitors

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

R v Evans [2013] NTCCA 9
No. 21248730

BETWEEN:

THE QUEEN
Appellant

AND:

MATTHEW ROBERT PETER EVANS
Respondent

CORAM: SOUTHWOOD ACJ, BLOKLAND & BARR JJ

REASONS FOR JUDGMENT

(Delivered 16 August 2013)

THE COURT:

Introduction

[1] This is a Crown Appeal against a sentence imposed on the respondent for the crime of aggravated robbery, contrary to s 132.3(1) of the *Criminal Code* (Cth). In the same proceedings the respondent was sentenced for four offences charged against the *Criminal Code* (NT). The sentences passed for the Northern Territory offences are not the subject of appeal.[1]

[1] Written submissions filed on behalf of the respondent, 27 June 2013 suggest the unlawful confinement offence was a Commonwealth offence. That appears to be an error. That offence was charged under s 196(1) NTCC.

[2] On 5 April 2013 the respondent entered guilty pleas to the following five counts charged across four indictments:

(1) That on or about 29 November 2012 at Larrakeyah he committed a robbery and at the time had an offensive weapon, namely a knife, contrary to s 132.3(1) of the *Criminal Code* (Cth).

(2) That on or about 29 November 2012 at Larrakeyah he unlawfully confined a person, Matthew Mendes, against his will by tying both his hands with cable ties and dragging him into the boarding party room on HMAS Bathurst, contrary to s 196(1) of the *Criminal Code* (NT).

(3) That on or about 23 October 2010 at Darwin, unlawfully caused harm to Rhys Curtis, contrary to s 181 of the *Criminal Code* (NT).

(4) On 27 May 2012 at Darwin unlawfully assaulted Ian Cuniss with a circumstance of aggravation being harm suffered by Ian Cuniss, contrary to s 188(1) and (2)(a) of the *Criminal Code* (NT).

(5) On 27 May 2012 at Darwin unlawfully assaulted Dean Vlassco with circumstances of aggravation being harm suffered by Dean Vlassco who was unable to defend himself and use of an offensive weapon (a shoe) contrary to s 188(1)(2)(a)(d)(m) of the *Criminal Cod*e (NT).

[3] For the offence of aggravated robbery against s 132.3(1) of the *Criminal Code* (Cth), (the subject of this appeal), a sentence of three and a half years imprisonment was imposed, commencing on 20 December 2012, to be

released on a recognisance for a five year period after serving 18 months.[2] The practical effect of the sentences imposed for all offences is that the respondent will serve two and a half years of a total sentence of five and a half years. The partial suspension of the various sentences is subject to supervision for three years in the case of the Territory offences, and two years in the case of the recognisance for the aggravated robbery. The total operational period for all offences is five years from the respondent's release. As well as general supervision and reporting to a probation and parole officer, significant conditions were ordered for two years after release including conditions that the respondent not purchase, possess or consume alcohol or illicit drugs; that he submit to random tests and that he participate as directed for assessment, counselling and treatment.

[4] With respect to the sentence under appeal, her Honour indicated that but for the respondent's plea and co-operation, (including an undertaking to give evidence against others), an appropriate sentence would have been imprisonment for seven years. Her Honour indicated she would apply a reduction of 50% in total from the notional seven year term, 25% due to the respondent's willingness to facilitate the course of justice by pleading guilty and evident remorse and 25% due to co-operation with authorities. No complaint is made about the percentage value of the reductions.

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[2] A five year $1,000 recognizance pursuant to s 20(1) of the *Crimes Act*. For the offence of unlawful confinement the respondent was sentenced to nine months imprisonment, also commencing on 20 December 2012; for unlawfully cause serious harm, three years imprisonment commencing on 20 June 2014, to be suspended after serving 12 months and for the two counts of unlawful aggravated assault, 12 months imprisonment concurrent with each other but cumulative on the cause serious harm, effectively suspended after serving 12 months of the cause serious harm count.

[5] The grounds of appeal are that the sentence was manifestly inadequate in all the circumstances; that the sentence failed to reflect the objective seriousness of the offending given the maximum penalty of 20 years imprisonment, the gross breach of trust of the respondent's position as a member of the Royal Australian Navy and that the respondent knew the weapons were likely to come into possession of people who could use them for criminal purposes; that the sentence failed to properly reflect the principle of general deterrence and that the learned sentencing Judge erred in placing too much weight on subjective factors including age and prospects of rehabilitation.[3]

[6] In our view the sentence does not suffer from the errors alleged on behalf of the appellant. This conclusion becomes inevitable when all of the factors that were taken into account by the learned sentencing Judge are properly considered. It may be readily observed that the facts and circumstances constituting the aggravated robbery are serious and deeply confronting, in particular because the respondent was a member of the Navy at the relevant time, and his actions constituted a breach of trust of a high order, however, there were other aspects of the offending, the post offending conduct and the personal circumstances that lead to reductions in both the head sentence and the minimum term ordered to be served. It is evident on a fair reading of the sentencing remarks that her Honour was at pains to carefully balance the competing principles and particular considerations. In short, while this was

[3] Grounds of Appeal, 10 May 2013, AB 370.

very serious offending, the matters of mitigation were also significant and necessarily informed the sentence ultimately imposed.

Relevant material before the learned sentencing Judge

[7] The agreed facts were that on 29 November 2012, the respondent was a regular sailor enlisted with the Royal Australian Navy. He was a leading seaman, boatswain's mate. He was sailing on HMAS Armidale. The respondent was 17-18 years of age when he joined the Navy and 26 at the time of the offending.[4]

[8] Late on the evening of 29 November 2012 the respondent drove to the military base at Larrakeyah. He showed his identification at the barrack's gates and drove into the base. Once inside the base he disguised himself. The disguise included a beanie pulled over his face with two eye holes cut in it. He wore pink washing up gloves. He carried a black backpack. He had cable ties in his pocket.

[9] At about midnight, the respondent entered the HMAS Bathurst. A few years earlier he had worked on the HMAS Bathurst, knew the layout and how many people might be expected to be on board at that time of day. As he was approaching the boarding party room, the respondent saw Leading Seaman Mendes; the respondent ran towards Mendes, grabbed him, and a violent struggle ensued. Leading Seaman Mendes tried to grab the respondent's arms; the respondent got behind Mendes and put him in a

[4] Statement of Crown Facts, AB 130-136; Sentencing Remarks AB 346-368.

choker hold. The hold was hard enough for Mendes to feel he was starting to lose consciousness. Leading Seaman Mendes started tapping the respondent as he thought the attack may be part of an exercise. The respondent whispered to him to lay down on his belly. Mendes complied. The respondent then secured Mendes's hands behind his back with two cable ties, and dragged him downstairs "in a gentle manner,"[5] supporting his upper body so that his face did not bang on the stair case. The respondent then threatened Mendes with an eight inch diving knife by placing it in front of his face and pulling Mendes's shirt over his head so he could not see.

[10] The respondent then went upstairs to the bridge and broke into a locked key board and took the keys to the armoury. He knew which key opened the weapons rack. He returned to the boarding party room where the armoury was stored, used the keys to open the armoury and removed 12 high powered Browning nine millimetre self loading pistols and two Remington 870 pump action shot guns and put them in his back pack. Before he left he removed a Leatherman Multi-Tool from Mendes's belt, folded it out to become a pair of pliers and put it near Mendes's arm so he could get out of the cable ties; Mendes was aware the pliers were a means for his release. The respondent placed the diving knife back in its sheath in the locker.

[11] After three to five minutes Mendes tried to break free of the cable ties. After unsuccessful attempts he opened the tool into a knife, stabbed himself

[5] Crown Facts AB 131.

several times in the wrist while continuing his attempts, and managed to remove the cable ties.

[12] The theft from the armoury was reported at 12:34 a.m.

[13] Following the robbery, the respondent delivered the weapons to an address occupied by his friend, James Hau. Mr Hau inspected the weapons and in the process touched a pistol. In a search of the premises on 1 December 2012 Northern Territory Police found the two pump action Remington shot guns and the 12 Browning MK111 pistols that had been stolen from HMAS Bathurst. The respondent's finger print was found on one pistol and Mr Hau's finger print was found on one pump action shot gun and one of the pistols.

[14] When spoken to by police on 30 November 2012 and 19 December 2012 the respondent gave an account of his movements but did not admit to committing the robbery, however, late on the evening of 19 December 2012 the respondent contacted police and asked to participate in another interview on 20 December 2012. He made full admissions to the facts. He said he was not offered anything in return for obtaining the guns. In the interview and in a statutory declaration made on 8 March 2013 he described a series of events about how he came to know a person who was a member of the Rebels Motor Cycle Gang through his second job as a security guard. He declined, after a suggestion from this person to join the Rebels. The respondent told police he was attending a course in Sydney between March

and May of 2012 and received a text from Mr Hau who he had known previously. Mr Hau wanted to rent a room from the respondent. The respondent agreed. Hau later said the room would be used for storage. The respondent allowed him to use the room, knowing that Hau was in the business of selling drugs.

[15] After the respondent had returned from duty at sea, he discovered evidence of drugs in his unit and explained to Hau that he could lose his job as a result of this activity. Hau agreed to get rid of the drugs. About a month before committing this offence, Hau introduced the respondent to a man called Davis, a member of the Rebels Motor Cycle Gang. The respondent discussed his work in the Navy and told Davis that he was in charge of the armoury on the patrol boat. Davis made a list of the types of weapons the respondent had access to.

[16] After this time Hau told the respondent that Davis wanted firearms; that the Rebels were good people to have on his side, and that the club wanted him to get the guns. After being asked about this again when at sea, the respondent said that he felt he was being told to get the guns, not being asked to get them. This was followed up with text messages and a visit during which the respondent felt pressured, but not directly threatened. He began to think about how he would get the firearms.

[17] Mr Hau came around the day before the respondent committed the robbery and told him he needed to get the guns. There was no mention of what the

respondent would get out of it but Hau told him that the Rebels were not the kind of people you would want to get off side. In his statutory declaration, the respondent stated that at this point he felt threatened. He explained that if he did not steal the guns, given Hau had keys to his unit, he was nervous they were going to come and "start something";[6] "like they were going to come and do something" (to him). The respondent told police it was not his intention to tie up Leading Seaman Mendes and leave him there and that he "felt shit" about what he did to him; that he had been thinking about it a lot; and that Mendes did not deserve that.

[18] The total value of the firearms stolen in the robbery was $8,075.00.

[19] A victim impact statement from Leading Seaman Mendes was tendered. Her Honour noted the injuries Mendes reported: sustained bruising to his wrist, neck and chest. He was stiff and sore for about five to six weeks. He experienced a tingling sensation in his wrists which he attributed to nerve damage because of the ties being very tight. He had received counselling but still relives the incident thinking that he had failed in his job and that he should have done more to stop the respondent. Both he and his wife are now nervous.

[20] In terms of previous convictions the respondent's Tasmanian criminal history lists a number of traffic offences; 2001, possess house breaking implement; no conviction was recorded; April 2003 possess a dangerous

[6] see Sentencing Remarks of Kelly J, AB at 351

article in a public place; a caution was recorded; 14 July 2010 common assault; no conviction was recorded on an undertaking for two years to be of good behaviour; and an offence of resist police committed and dealt with on the same date for which no conviction was recorded.[7]

[21] The Northern Territory previous convictions are primarily traffic offences ranging from driving an unregistered and uninsured motor vehicle through to convictions for drink driving and one conviction for drive a motor vehicle while disqualified.[8]

[22] When the respondent committed the aggravated robbery he was on bail for the offence of unlawfully causing serious harm committed on 23 October 2010 and for two counts of unlawful aggravated assault committed on 27 May 2012.[9] Her Honour was well aware of those matters as she dealt with them in the same sentencing proceedings as the sentence under appeal. She also heard the respondent give evidence about those offences during the plea proceedings.[10]

[23] Before her Honour was a significant amount of material concerning the respondent's personal circumstances. Her Honour accepted he was an adopted child, however, he was secure in his family environment. His parents travelled from Hobart to Darwin throughout the sentencing proceedings. The respondent had met his birth mother only once as a young

[7] AB 128-129.
[8] AB 126-127.
[9] AB 71-72.
[10] Particulars set out in para [3] above.

child. He was educated to year 11, played soccer, and as a younger person had engaged in athletics and in sea scouts. After joining the Seaman Branch of the Royal Australian Navy at 17 he progressed well, receiving commendations from his captain and was given responsible positions. Her Honour accepted he began to drink alcohol soon after entering the Navy as part of the social activities with fellow trainees. He began to turn to alcohol beyond social occasions and drank when depressed or anxious. He would then take offence readily, become aggressive and violent and he had some awareness of this tendency.

[24] Her Honour noted the 14 character references from relatives and friends of the respondent's family who had known him for a long time. The referees included an officer in the Navy who gave a reference in the full knowledge of the crimes the respondent was pleading guilty to. The officer spoke of the respondent being an exemplary worker, his professionalism, leadership, courage and ability to act selflessly. Despite the fact that the crime involved the breach of trust against the Navy and the community, her Honour observed the support from serving members of the Navy, (many were present at the plea hearing), and the opinion offered by the respondent's previous commanding officer who said that the respondent will still have plenty to offer and contribute to society. Other references dealt with personal qualities of the respondent in positive terms with respect to family and community activities involving, in some instances, levels of trust. The character material before her Honour overall expressed the view

that the crimes were out of character for the respondent. Before her Honour also were two commendations the respondent received prior to the offending. The first concerned an exceptional contribution to a particular mission and the second involved the rescue of crew in arduous conditions outside of safe operating limits. The respondent was commended for his courage and exemplary conduct in the finest tradition of the Navy in rescuing five crewmen or assisting their rescue.

[25] Her Honour also noted the moral courage of the respondent to come forward and make admissions after initially failing to do so. It was also accepted that by implicating others the respondent was quite justly afraid. Her Honour accepted he had been assaulted while in prison. The respondent gave evidence of his concern for his safety.[11] Tendered in the proceedings was an undertaking by the respondent to give evidence. Her Honour noted the respondent continued to be threatened despite being placed on protection in prison. Her Honour acknowledged the conditions of the protection area at Berrimah Correctional Centre are considerably more onerous than those in other parts of the prison.

Grounds of appeal

(1) Manifest inadequacy

[26] A number of the specific grounds will be discussed below. Those grounds are also relied on to support the principal ground of manifest inadequacy.

[11] AB 70.

The particular features of the case the appellant points to as disclosing error have relevance to all grounds.

[27] The principles governing Crown appeals against sentence are well established.[12] Sentences which are so inadequate as to indicate error or departure from principle and sentences which depart from accepted sentencing standards constitute error which allows the Crown to seek correction from this Court. In *Dinsdale v The Queen*[13] Gleeson CJ and Haine J observed that a sentence may be manifestly "inadequate or excessive because the wrong type of sentence has been imposed, (for example custodial rather than non-custodial), or because the sentence imposed is manifestly too long or too short".

[28] In terms of the sentence under appeal the Crown submits the sentence of imprisonment of three and a half years of which 18 months was to be served in respect of the aggravated robbery offence which carried a maximum penalty of 20 years, was manifestly inadequate in all of the circumstances, particularly having regard to the features that the Crown submits are aggravating. It was submitted the sentence is inadequate so as to meet the description of a manifestly inadequate sentence as being "so

[12] *R v Bara* (2006) 17 NTLR 220; *R v Riley* [2006] NTCCA 10; *R v Martyn* (2011) 30 NTLR 175 at 161 [10].
[13] (2000) 202 CLR 321 at [6].

disproportionate to the objective seriousness of the offending as to shock the public conscience".[14]

[29] In our view once the full background is appreciated, including the reduction permitted for the plea of guilty and significant co-operation, the sentence does not have the attributes of a sentence that would shock the public conscience. It is acknowledged there are striking features of this offending that place it in a serious category of offending of this type, primarily the high level breach of trust involved, however, the imposition of a sentence still requires balancing all relevant matters. It may be noted some of the features associated with high level robberies are not present in this case, for example, weapons used to inflict serious injury and robberies committed in company. When the balancing exercise undertaken here is properly appreciated, in our opinion it cannot be concluded that the sentence is of a type that would shock the public conscience. We will deal with the balance of the grounds on their particular merits and in so far as may further inform the question of whether the sentence was manifestly inadequate.

(2) Failure to adequately reflect the objective seriousness of the offending

[30] As her Honour was sentencing for a Federal offence, the appellant emphasises that the sentence must be imposed in accordance with Part IB *Crimes Act* 1914 (Cth), in particular having regard to s 16A(1) requiring the Court to impose a sentence of severity appropriate in all the circumstances

[14] *R v Osenkowski* (1986) 30 SASR 212, King CJ at [213]; *R v Nadich* [2012] NTCCA 4 per

of the offence having regard to the matters specified in s 16A(2) as are relevant and known to the Court. It may be noted her Honour was obviously aware that she was sentencing under the *Crimes Act* (Cth). Although her Honour, during the same proceedings, was also sentencing for Northern Territory offences, save for the obvious statutory differences, many of the principles as reflected in both the *Crimes Act* and the *Sentencing Act* (NT) are broadly the same. While s 16A of the *Crimes Act* applies of its own force,[15] both sentencing regimes to a large degree accommodate the application of common law principles of sentencing. Section 16A is able to accommodate common law sentencing principles where such principles give relevant content to the statutory expression in s 16A(1) "of a severity appropriate in all the circumstances of the offence" as well as "the need to ensure that the person is adequately punished for the offence".[16] The section accommodates the principles of general deterrence, proportionality and totality.

[31] It was emphasized on appeal that sentencing for Federal offences has particular significance given the sentences have relevance to all Australian jurisdictions. This was especially so, it was argued, when dealing with a sentencing matter as an intermediate Court of Appeal. We agree consistency is to be achieved in Federal sentencing through the intermediate courts of

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Southwood J at [28].
[15] *Bui v DPP* (Cth) (2012) 244 CLR 638 at [650].
[16] *Director of Public Prosecutions v El Karhani* (1990) 21 NSWLR 370 at [378]; *Hili v The Queen* (2010) 242 CLR 520 at [528]; *Bui v DPP* (Cth) (2012) 244 CLR 638 at [651].

appeal.[17] Although sentences passed for Federal offences are imposed in the knowledge of the broader implications of national sentencing standards rather than any unique State or Territory considerations, that in itself does not displace the primary principles to be applied in appeals against sentence, particularly given there is no established pattern of sentencing for this offence and as with all sentencing decisions, this sentence is discretionary in nature and may only be disturbed if the well known criteria is met. The facts of this case are unique and are unlikely to be replicated even in a broadly similar way in future Federal cases of aggravated robbery. As is acknowledged in *Director of Public Prosecutions (Cth) v De La Rosa*,[18] sentencing patterns are of considerable significance as they result from the accumulated experience of Judges. Past sentences may stand as a 'yardstick' against which to examine a proposed sentence but it is only by examining the whole of the circumstances of the sentences that 'unifying principles' may be discerned.[19] There is no 'yardstick" relevant here. We discuss later one suggested relevant Federal sentencing matter.

[32] The appellant submits the learned sentencing Judge failed to have proper and sufficient regard to the maximum penalty of 20 years imprisonment. It was said the learned sentencing Judge made only passing reference to the fact the maximum penalty for the aggravated robbery offence was 20 years and did not otherwise refer to it or acknowledge its importance to the

[17] *Wong v The Queen* (2001 207 CLR 584; *Hili v The Queen* (2010) 242 CLR 520.
[18] (2010) 243 FLR 28 at [304]; as approved in *Hili v The Queen* (2010) 242 CLR 520 at [528].
[19] *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 243 FLR 28 at [304].

sentencing exercise. Clearly her Honour was aware of the maximum penalty. In our view it would be unusual for a sentencing Judge to state much more about the maximum penalty than her Honour did in this case, especially given the multiple charges heard in the same proceedings.

[33] In *Markarian v The Queen*[20] the High Court emphasised that careful attention to maximum penalties will almost always be required, firstly because the legislature has enacted them; secondly because they invite comparison between the worst possible case and the case before the Court at the time; and thirdly because they provide, "taken and balanced with all of the other relevant factors, a yardstick". The learned sentencing Judge in our view appropriately acknowledged the maximum penalty and having set the starting point of seven years imprisonment, has obviously used the maximum as a "yardstick", appropriately "balanced with all of the other relevant factors". Although as we acknowledge, this is a serious and confronting case, in our opinion it is not in the worst category of aggravated robbery or necessarily at the mid to upper end as submitted by the appellant once all factors are synthesised. It is an error, as was also acknowledged in *Markarian* to misuse the maximum penalty by proceeding to make proportional deductions from it. It may also be noted that in terms of maximum penalties, (although it is unlikely to have had a bearing on the sentence passed), the crime of aggravated robbery in the Northern Territory attracts the greater maximum penalty of life imprisonment. There is no

[20] (2005) 228 CLR 357 at [30] and [31].

reason to doubt the learned sentencing Judge's full appreciation of the maximum penalty in cases of this kind.

[34] The Crown argued the high level breach of trust was not reflected in the sentence. Emphasis was placed on the respondent providing a list of weapons to Jared Davis; the respondent's prior knowledge of the layout through his prior service, the degree of planning and abuse of trust. In our opinion in setting the starting point at seven years imprisonment, her Honour acknowledged that this was a serious example of crimes of this type because, among other things, "it was committed in circumstances of gross breach of trust"; it "cast suspicion on fellow sailors"; and "had the potential to seriously affect public confidence in the integrity of the defence force".[21]

[35] In addition, her Honour found the offending was further aggravated "by the fact that [the respondent] knew that these operating weapons would come into the possession of people who were likely to use them for violent, criminal purposes and criminal gain".

[36] However, her Honour also found the following matters qualified the objective seriousness of the offending. The respondent did not arm himself before he set out. He was unarmed when he restrained leading Seaman Mendes. He got the knife from on board the vessel and he simply placed it in front of leading Seaman Mendes who had already been restrained. After he obtained the weapons he returned the knife to where he found it. He did

[21] AB 354.

not injure Mendes. The victim injured himself trying to cut the cable ties. There was no permanent or longstanding physical injury inflicted that ordinarily would place the offending in a more serious category. All of these competing considerations were in our view appropriately dealt with by a nuanced assessment of proportionality by the learned sentencing Judge. Even if another judge would have imposed a higher sentence, that is not a sufficient reason to disturb a discretionary sentence calibrated to take account of significantly competing factors.

[37] The Crown points out that the offence under appeal was committed while the respondent was on conditional liberty for bail for the earlier offences, committed while he was subject to the two year undertaking to be of good behaviour set in Tasmania for common assault. Clearly, as the appellant submits, it is an aggravating factor, significantly so, to commit offences while on conditional liberty.[22] That was a matter clearly before the learned sentencing Judge as she was sentencing the respondent for a series of offences committed in 2010 and 2012. Although the matters the respondent was on bail for were offences of violence, it may be noted they were of quite a different character to the aggravated robbery. They were associated with alcohol consumption and late night club activity. Her Honour isolated the problem of the respondent's increase in alcohol consumption while he was in the Navy and his associated offending. Her Honour sought to address this problem in the conditions set for later conditional release. Her Honour

heard all of the material in relation to the other offending. We are not persuaded that the breach of conditional release would properly increase the sentence beyond that passed by the learned sentencing Judge when considered with all of the relevant circumstances including the need to reflect the 50% reduction for the plea and co-operation with authorities. It may be noted totality was also a consideration, albeit a minor consideration, in relation to this count and the unlawful confinement count being served concurrently. No complaint is made in relation to that; nor could there be in our view. The facts comprising the unlawful confinement are substantially subsumed within the aggravated robbery charge.

(3) Failure to properly reflect general deterrence

[38] The appellant submits general deterrence should have been reflected more substantially in the sentence given the planned use of force; the misuse of position; the likelihood that others may use the weapons for unlawful purposes and that the respondent was on bail for violent offences. We have already discussed some of these issues.

[39] Her Honour acknowledged the importance of the use of the cable ties in the assessment of the level of criminality, however, as already mentioned, it was open to her Honour to find the level of force used or planned to be used was not of the most serious kind. The finding was that the respondent intended to steal, not commit armed robbery. While the respondent contemplated

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[22] *R v Richards* [1981] 2 NSWLR 464 at [465]; *R v Wurramara* (1999) 105 A Crim R 512; *Parry v Hales* [2003] NTSC 83.

how to obtain the weapons for some time and felt under some pressure, and the commission of the offence was not spontaneous, neither could the planning be described as sophisticated.

[40] We have no reason to conclude that this sentence would not deter others, both generally, and particularly those who like the respondent was, are members of the armed services. This form of criminal activity by members of the armed forces is not prevalent; it is virtually unheard of. Her Honour well acknowledged the most salient factor that aggravated the offending was the breach of trust and the undermining of the integrity of and public confidence in the armed forces. While deterrence is a paramount consideration in cases of this kind, deterrence was well reflected in the sentence passed. Members of the armed services, if not already deterred for other reasons such as apprehension of disciplinary proceedings, the inevitable loss of career and other incidental punishments, would in our view be deterred by the sentence the subject of appeal. That members of the Navy were present when the respondent was sentenced supports the likely deterrent effect of the sentence in a most tangible way.

(4) Excessive weight given to subjective features

[41] The Crown submits the learned sentencing Judge placed weight beyond what was permissible on the evidence on the subjective features of the respondent in the sentencing exercise, particularly his age and prospects of rehabilitation. Particular issue is taken with her Honour's remarks when

referring to the respondent's criminal record as comprising "minor brushes with the law, several drink driving charges and a conviction for driving while disqualified in the Northern Territory, which shows some disrespect for the law and court orders". Her Honour included also mention of the assault charge in Tasmania. Her Honour's conclusion was that the respondent did not come before the court as "a person of entirely previously good character" and was not entitled to leniency as a first offender. Issue is particularly taken with her Honour's finding that the respondent's prospects of rehabilitation are "excellent" and the description that the respondent was "a good young man with a promising career in the Navy who got sucked into a situation where he felt threatened and out of control and did not, at that time, have the courage to stand up to those who had insidiously entered your life and by whom you felt pressured and threatened and that is a total shame, because you have demonstrated physical and moral courage both before and since".

[42] While it is the case that the respondent had committed some of the Territory offences and the aggravated robbery while on conditional liberty, generally speaking the earlier offences did not display the higher level criminality displayed in this offending. Her Honour, as is the practice of many sentencing Judges, was reflecting not only on the negative and poor aspects of the respondent's behaviour and criminal activity, but also on the more positive aspects such as the wealth of material before her attesting to good prior character, commendations for physical and moral courage, co-

operation with authorities and protective factors such as a supportive family who had travelled to Darwin from Tasmania. While it can fairly be said that after committing the assault and serious harm offences in 2010 and 2012, when the focus is on the tendency to violence, the respondent was not, at that particular time "a good young man", there was still positive material in respect of the respondent before her Honour. It may be remembered that sentencing remarks at times are framed to encourage persons who are being sentenced to embrace the more positive side of their character, rather than continuing on a destructive path. The tone of her Honour's remarks emphasise the positive aspects of the respondent's character that had been demonstrated, by him.

[43] Her Honour formed a view that the respondent's character had deteriorated over time. Even if her Honour was in error by describing him as a "good young man," (immediately before committing this offence), it is not an error of a type that would justify interference by this Court when the full history of the respondent is known. Despite this particular respondent having breached Court orders and committed a number of offences, her Honour at one point described his prospects as "excellent"; and "good prospects", of rehabilitation. In context, her Honour was referring to the strong evidence available on that point. Her conclusions are somewhat predicated on the respondent dealing with alcohol, which in turn formed part of the conditional release orders. Her Honour was obviously impressed with the co-operation the respondent gave to police despite the fact that the

respondent continued to be justly afraid for his safety, having been assaulted while in prison.

[44] Her Honour considered it was in the public interest that the respondent have a fixed release date for all offences as he was still fairly young; he had good prospects of rehabilitation; and it was in the community interest for him to rehabilitate and to get on with becoming a useful and productive member of society. It was noted he would be serving his sentence under extremely onerous conditions.[23] The respondent's 'fairly young' age, as found by her Honour is in our view a factor relevant to rehabilitation. The conditions imposed are also relevant to specific deterrence and protection of the community as they are designed to reduce the risk of further offending. The operational period of five years is a significant deterrent bearing in mind that by breaching it, the respondent risks the whole balance being restored.

[45] Her Honour was well aware of the complexity of the respondent's character, acknowledging that she had found him capable of moral courage but suspecting that he was somewhat impressionable.

[46] Even if her Honour had been in error in assessing the respondent's prospects too positively, it is obvious that the sentence would have been more severe if not for the reductions for the plea and co-operation of 50%. Those reductions assist the administration of justice. It is important they not be undermined indirectly by re-emphasising other features, already taken into

[23] AB 357.

account that may have a tendency to diminish the legitimate mitigation accounted for in the percentage adjustment.

[47] In Federal matters the sentencing judge has a broad discretion. As Spigelman CJ said in *Lodhi v The Queen*[24] of s 16A(2) *Crimes Act* (Cth):, "the very generality of the language – "a severity appropriate in all the circumstances of the offence" – indicates the breadth of the discretion conferred upon the sentencing judge. In this formulation the parliament has indicated that the sentencing principles developed at common law ... should apply to sentencing for Commonwealth offences".

[48] Mention has been made of *Director of Public Prosecutions (Cth) v De La Rosa*[25] as an approach that should guide the Federal sentencing; particularly the use of sentencing patterns as a 'yardstick' as discussed above. It is acknowledged there is no established sentencing pattern that would serve as a 'yardstick' in this matter in terms of illuminating the sentencing range.

[49] Our attention was, however, drawn to *Della-Vedova v R*[26]. Little can be drawn of assistance from *Della-Vedova*. The first charge was brought under s 7(1) of the *Weapons Prohibition Act* 1988 (New South Wales), alleging the unauthorised possession of prohibited weapons. The prohibited weapons in *Della-Vedova* were ten rocket launchers containing ten rockets. The second charge was pursuant to s 131.1(1) of the *Criminal Code* (Cth), alleging

[24] (2007) 179 A Crim R 470 at [81].
[25] (2010) 243 FLR 28; especially at [304]; as approved in *Hili v The Queen* (2010) 242 CLR 520 at [56].
[26] (2009) NSW CLA 107.

dishonest appropriation of Commonwealth property specified as ten rocket launchers containing the same ten rockets. The maximum penalty under the *Weapons Prohibition Act* is 14 years imprisonment and a standard non-parole period of three years is prescribed. The maximum penalty for an offence against s 131.1(1) is ten years imprisonment. The appellant was sentenced for the Commonwealth offence to imprisonment for six years with a non parole period of four years; on the State charge he was sentenced to imprisonment for eight years comprising a non parole period of five years with a balance of a term of three years which was partly accumulated. The total effective sentence was imprisonment for ten years with a non parole period of seven years.

[50] The commonality pointed to is that *Della-Vedova* was a long serving member of the Australian Defence Forces. From that point, the case diverges significantly. *Della-Vedova* worked with the Army Explosive Ordnance Disposal Team. He was an officer. He was 40 years of age. His duties included the disposal of redundant weapons of various kinds including rocket launchers. Those weapons contained highly explosive charges that detonated on impact, capable of a wide range against targets and were described in the judgment as "devastating against a standard or light armoured passenger vehicle. A direct hit to a passenger vehicle would be likely to kill all occupants".[27] *Della-Vedova* had retained ten rocket launchers that he had certified, (as part of his duties), as being destroyed.

[27] At para [17].

He then disposed of one to his brother-in-law who then disposed of it to a well known criminal. *Della-Vedova* dealt with an intermediary who liaised with the ultimate recipients of the rocket launchers. Only one of the weapons was recovered by authorities. Nine remained in the community in the possession of criminals. Large sums of money, ($10,000 - $20,000 was mentioned in the Judgment although the final sum is unclear), were paid to *Della-Vedova*. There are such significant disparities in the facts and the types of charges, that on examination this is not a genuinely comparable situation. So far as it can be ascertained from a comparison with *Della-Vedova*, the levels of remorse, co-operation, frankness with authorities and early plea are far more favourable to the respondent here than to *Della-Vedova*. The weapons in that case, (rocket launchers), were sold and were serious military weapons capable of wide range destruction. All but one was recovered. All the weapons taken by the respondent were recovered. The respondent did not intend to make money as opposed to *Della-Vedova* who was motivated by money. The respondent here gave evidence on his plea that was accepted as opposed to *Della-Vedova* who did not give evidence and answers given in his record of conversation with police were rejected by the court. It is quite a different situation. The mitigation available to the respondent here is far more significant than any mitigation that might have been available in *Della-Vedova's* case.

[51] Much of the argument on behalf of the appellant was directed to the minimum 18 months to be served. The criticism was that the term to be

served did not fulfil the objectives of sentencing. The criticism overlooks what was said in *DPP v Buhagiar and Heathcote* [28] by Batt and Buchanan JJA (at 547):

> [T]here are cases where a judge may reach the view that suspension of a sentence is appropriate, not because it would be less unpleasant for the offender, but because it may be productive of reformation, which offers the greatest protection to society: *R v Davey*[29]. A suspended sentence of imprisonment is not an unconditional release or a mere exercise in leniency. Rather it is an order made in the community's interest and generally designed to prevent re-offending:[30] In deciding whether to suspend in whole or in part a term of imprisonment a judge is deciding whether, in all the circumstances, the offender should have the benefit of a special opportunity for reform, to rebuild his own life, or to make some recompense for the wrong done, or should have the benefit of the mercy to which King CJ referred in *R v Osenkowski,*[31] or for some other sufficient reason should have this particular avenue open to him, provided the conditions of the suspension are observed: R v P,[32] a decision of the Full Court of the Federal Court. (The three cases cited in this paragraph all concerned Crown appeals).

In our opinion, those remarks are applicable to this case.

[52] Further, a suspended sentence is not without an aspect of general deterrence. In *DPP (Cth) v Carter*[33] Winneke P said[34]:

> The authorities make it clear that it is wrong to assume that a sentence of imprisonment, albeit wholly or indeed here partially suspended, does not play a role in deterring others. [35]

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[28] [1998] 4 VR 540 (CA)
[29] (1980) 50 FLR 57; 2 A Crim R 254 at FLR 65; A Crim R at 260-1.
[30] At FLR 67; A Crim R at 262.
[31] (1982) 30 SASR 212 at 212-13
[32] (1992) 39 FCR 276 at 285
[33] [1998] 1 VR 601; (1997) 91 A Crim R 222 (CA)
[34] (At 607-608; 229)
[35] *Elliott v Harris* (No 2) (1976) 13 SASR 516 at 527, per Bray CJ; *R v Gillan* (1991) 100 ALR 66 at 71; *R v P* (1992) 39 FCR 276 at 285

[53] In our opinion the time set to be served before release on a recognisance accords with the principles we have outlined.

[54] The appeal will be dismissed.

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