PARTIES:	LEWIS MARSHALL Appellant v LEONARD DAVID PRYCE Respondent
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE NO:	No. 58 of 1995
DELIVERED:	Darwin, 2 August 1996
HEARING DATES:	30 May 1996
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Appeal and New Trial - Appeal - General principles - In general and right of appeal - Justices appeal - Appeal against sentence - Cumulative sentences for assault offences - Two distinct offences each perpetrated for a different purpose upon different people - Terms of parole order breached - Weight to be given to antecedent criminal history - Mitigation on account of guilty plea only available if demonstrative of remorse (position prior to commencement of Sentencing Act 1995 (NT)) - Totality principle requires review of aggregate sentence to consider whether it is "just and appropriate" - Sentences imposed not manifestly excessive taking into account total criminality of offender.

Criminal Code Act (NT), s.188(1) and (2)(b).

Mill v The Queen (1988-89) 166 CLR 59, referred to.
R v Jabaltjari (1989) 64 NTR 1 referred to.
Veen v The Queen (No 2) (1987-88) 167 CLR 465, followed.

Appeal and New Trial - Appeal - General principles - In general and right of appeal - Justices appeal - Appeal against sentence - Whether error in failing to fix non-parole period - Court to consider both nature of offence and antecedents of offender separately and come to view that both do not warrant specifying of a lesser term of imprisonment before declining to fix a non-parole period - Objective circumstances of each offence alone did not justify depriving appellant of opportunity for parole.

Parole of Prisoners Act 1992 (NT), s4(1) and (3), s4A(1)

Beck (1984) WAR 127; 10 A Crim R 168, applied.
Sullivan and Rigby (1986-87) 26 A Crim R 205, followed.
Tyday v Maley unreported, 18 May 1995, referred to.

REPRESENTATION:

Counsel:

Applicant: Mr D Bamber
Respondent: Ms A Fraser

Solicitors:

Applicant: CAALAS
Respondent: DPP

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IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

No

BETWEEN

LEWIS MARSHALL
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 2 August 1996)

Appeal against sentence. On 3 November 1995, before the Court of Summary Jurisdiction at Alice Springs, the appellant pleaded guilty to two charges, namely:

. That on 4 June 1995 at Alice Springs he unlawfully assaulted Jenny Jackson Nabaltjari with circumstances of aggravation, being that she was a female and he a male, contrary to

s188(2)(b) of the *Criminal Code*. The maximum penalty is five years imprisonment.

- Secondly, that on the same day he assaulted Robert Smith Panunga contrary to s188(1) of the *Criminal Code,* for which the maximum penalty is one year imprisonment.

The facts as put by the prosecutor were that at about 12.05am on 4 June, the appellant, in company with another man, approached the two victims, husband and wife, in a car park near the Council Chambers adjacent to Leichardt Terrace. The appellant asked the other man for a smoke, and when it was refused, struck him twice in the jaw with a clenched fist knocking him to the ground. Mr Panunga got up and ran off. When Mr Panunga went away the appellant approached Jenny Jabaltjari, who had left the scene and walked across the road, and asked her if she wanted to go for a drink with him. She refused, and continued to walk towards a car park. The appellant followed her, again asking if she wanted a drink and telling her that there was grog under a tree in the car park. When she walked near to a tree the appellant pulled her to the ground, causing her to fall face down, and whilst she was on the ground began struggling with her which was interrupted when the first victim returned to the scene to challenge the appellant. The appellant

attempted to strike him, but he ran off and the appellant then struck the woman in the face in the right eye. He grabbed her by her left leg and began dragging her towards the Todd River, Ms Jabaltjari shouting and screaming for him to stop. A passing police patrol heard the woman's screams, and saw what the appellant was doing. When they approached he ran into the bed of the Todd River where he was later arrested. When interviewed about the assault he said that he wanted to "drag her home". Ms Jabaltjari suffered grazing to her left arm and right cheek, but no medical treatment was sought. It appears from the record made of the interview between the police and the appellant that his "home" for these purposes was underneath a bridge over the Todd River bed.

There were two distinct assaults. The first upon Mr Panunga when he refused to give the appellant a smoke which occurred in the vicinity of the Council Chambers grounds on one side of Leichardt Terrace. The other, after Ms Nabaltjari had left that scene of the first assault, crossed over Leichhardt Terrace to the car park adjacent to the Todd River bed, when the appellant pursued her, seeking her company for a drink, and upon being refused, assaulted her and ultimately took her by the leg and started to drag her across the car park.

At the time of his arrest the appellant was on parole, but three days before this offending, the Parole Board had taken steps to bring an alleged breach of his parole conditions before the Court of Summary Jurisdiction in Alice Springs. He had failed to abide by a residential condition. He was not bailed after arrest for these offences and remained in custody in respect of them until 6 July when the question of breach of parole came before the Court and the order was cancelled. His Worship, the presiding Magistrate, committed him to prison for the balance of the sentence in relation to which he had been released on parole, a period of twelve months. He had thus spent approximately a month in prison on account of these offences whilst awaiting trial.

Counsel for the appellant informed the Court that his client had been drinking moselle, beer and rum in a creek bed where he was staying at Alice Springs, and that he had little recollection of the assault upon the male. He did appear to have recalled the incident with the woman as he thought he knew her and he had tried to get her to go with him and share his drink, with a view to having her go home with him. According to the appellant, she did go some way with him, but then indicated she had no intention of going any further, whereupon he became angry and the assault ensued. He was

cooperative and gave a full account of himself when sober enough to be interviewed by the police. Although it does not appear why it took from the time of his arrest in June until November for him to come before the Court, it was said that he had pleaded guilty at the first opportunity.

The accused is an Aboriginal man, aged about 28, who had suffered many deprivations brought about by the grave social and family problems afflicting much of the Aboriginal community. He was a petrol sniffer from the age of about four or five which brought him into trouble with the Courts at the age of nine, and into the welfare system at ten. He had spent a great deal of his time in institutions, either of a welfare nature or in custody for offending. His substance abuse problem was continuing and there were indications in past reports available to his counsel that he may have suffered some brain damage. According to his counsel, he had not had the benefit of any attempts at rehabilitation by way of professional assistance in dealing with his problems. It seems that petrol sniffing may have given way to alcohol abuse.

I will come to his criminal record shortly, but it was a condition of his release on parole that he reside at Wallace Rockhole, a community not far from

Hermannsburg, where he was doing some work on CDEP programmes That is a dry community and it appears that the appellant was accustomed to going to Alice Springs to drink. It was his absence from Wallace Rockhole without permission that brought him to the attention of the parole authorities. It was put to her Worship the learned sentencing Magistrate, that she should apply the totality principle, by taking into account his then custody, that nothing beyond minor physical injury was suffered by either victim, and that he cooperated with police and pleaded guilty. It was suggested that a sentence be imposed that did not greatly increase the time that he was then due to serve.

Her Worship had before her a record of the appellant's prior convictions. It had commenced when he was in his teens with dishonesty offences of unlawful entry into premises, stealing and the like, but by 1985 he had accumulated a conviction for an assault, an aggravated assault with a weapon and an aggravated assault on a female. In 1986 there were three counts of assault, in 1987 three further assaults, including assaults on females; an aggravated assault in 1988, an assault in 1991 and an aggravated sexual assault in 1993. Those particularly relevant offences were interspersed with others, mainly for dishonesty. He had had the advantage of conditional release consequent upon a

conviction for aggravated assault in 1988, for which he was sentenced to 21 months imprisonment, but ordered to be released after six months upon his entering into a bond to be of good behaviour for two years and conditioned upon his not drinking alcohol or sniffing petrol. That undertaking was breached and dealt with in March 1990, when he was returned to prison for the balance of the term and a non-period of nine months was set. It is not clear from the records available as to what caused that breach. On 23 November 1993 he was convicted of an aggravated sexual assault and sentenced to three years imprisonment, in respect of which a non-period of 12 months from 8 October 1993 was ordered upon appeal to this Court. He was released on parole in October 1994, with two years of the sentence to run, and committed these offences about seven months later. In the meantime he had been dealt with for being armed with an offensive weapon and disorderly behaviour in a public place in November 1994, for which he was released on a bond to be of good behaviour without proceeding to conviction, and in June 1995 he was convicted and fined for escaping from custody, resisting police and interfering with a motor vehicle. (Those convictions and fines are noted on the record as having been imposed on 5 June, the day after the offences now under consideration were committed. It seems likely that he was serving time in gaol in default of payment of the

fines imposed after 5 June. However, it was put in address to this Court that he had spent about a month in custody on account of these present matters, and I will proceed on that basis).

Her Worship adjourned the question of sentence for a few days, and on 7 November convicted the appellant for the simple assault and sentenced him to six months imprisonment, and for the assault upon the female imposed a sentence of 12 months imprisonment. It was ordered that the two sentences be served cumulatively, to commence at the date of completion of the term he was then serving due to expire on 6 July 1996. Her Worship did not fix a non-parole period.

Her Worship's reasons in relation to the sentencing were not recorded in the usual way and no transcript is available of what she said.

However, this Court has been supplied with affidavits sworn by the prosecutor and counsel for the appellant upon that hearing, and a written report prepared by her Worship. There is no need to go into the differences that appear from the affidavit material as I am satisfied from examination of her Worship's notes and the content of her report as to how she approached the sentencing exercise. Those notes disclose features of

the agreed facts and submissions made on behalf of the appellant, including as to matters in mitigation, such as the lack of physical injury, cooperation with police and plea at an early opportunity. She noted the submission that she should take into account the totality principle, and that the appellant wished to do a rehabilitation course. Her Worship says she made those notes at the same time as submissions were made.

There is an additional page of notes which her Worship says were made shortly before sentencing. It reads:

> "Assaults on apparent strangers. People lawfully going about their own business. Unprovoked. May be said the woman returned to the tree to have a drink but she had previously walked away from D and thereby made it plain she wished to disassociate from him. After being attacked she made it plain she wanted nothing to do with him by screaming for help. If it were not for the intervention of the Police there is no reason to believe the attack would not have continued".

Her Worship says in her report that she also noted the prior convictions, the fact that the appellant was on parole at the time of committing the offences, and after referring to community attitudes to such offending, spoke of the need to deter the offender and others. Her Worship said in her report that she referred to the submissions made by counsel for the then defendant, but

that she did not think she gave a great deal of weight to the assertion that he wanted to undertake an alcohol treatment programme, given he was loathe to comply with previous undertakings to be of good behaviour. Her Worship says in her report that she gave consideration to the fixing of a non-parole period, but declined to do so on the basis that the offences to which he had pleaded guilty were serious, committed on relative strangers going about their lawful business, that he was in no way provoked or encouraged by his victims, and the assault on the female had continued for some time before being stopped by the arrival of police. She also thought it inappropriate to set a non-parole period because the appellant was on parole at the time of committing the offences, they were of a like nature to previous offending, and he had failed to comply with the bonds. Her Worship said she also took into account the number of occasions he had been convicted of offences of violence. She recalled, as does counsel prosecuting, that she specifically referred to a decision of his Honour Justice Angel in *Tyday v Maley* delivered on 18 May 1995.

The effect of the sentence imposed was to extend the period of the appellant's term in custody for a period of 18 months beyond 6 July 1996, at which time he would finish serving the sentence in respect of which he had breached his parole. As to the requirements in

relation to the fixing of a non-parole period, the circumstances described in s4A(1) of the *Parole of Prisoners Act* 1992 (NT) applied and thus s4 of that *Act* came into play. It is provided in subs(3) of s4 that the requirement to specify a lesser term of imprisonment during which the offender sentenced to an aggregate period of imprisonment of 12 months or longer is not eligible to be released on parole, does not apply if the Court considers that the nature of the offence or offences and the antecedents of the offender, do not warrant the specifying of the lesser term of imprisonment (s4(3)(a)).

The grounds of appeal are:

1. That the sentence imposed was in all the circumstances manifestly excessive.

2. That the learned Stipendiary Magistrate gave undue weight to the prior convictions of the Appellant when sentencing him.

3. That the learned Stipendiary Magistrate imposed a sentence of imprisonment which was not proportional to the objective circumstances of the offence.

4. That the learned Stipendiary Magistrate failed to pay sufficient regard to the totality principle.

5. That the learned Stipendiary Magistrate erred in the circumstances of the case in failing to set a non-parole period.

I put to one side for the time being the ground of appeal which asserts that the sentence was manifestly excessive.

As to ground 2 and the weight to be given to prior convictions, the law established in *Veen v The Queen [No 2]* (1987-88) 164 CLR 465 at 477-78 is that the antecedent criminal history of an offender is a factor which may be taken into account, although it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the offence under consideration. It is relevant, however, to show:

> "whether the instinct offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose

> condign punishment to deter the offender and other offenders from committing further offences of a like kind."

It is not because of the record itself that a more severe penalty may be warranted than if there were no such record. The importance of the record, as the High Court points out, is its relevance to the offender's culpability in so far as it may touch upon whether the instant offence is an uncharacteristic aberration, that is, out of character with the offender's antecedents, or whether by the offence the offender has manifested a continuing attitude of disobedience of the law. It may be that the antecedent criminal history is in relation to offending of a type different to that involved in the instant offence, and it may be that in the circumstances the offender has not manifested a continuing attitude of disobedience of the law by committing it. For example, the instant offence may have been committed many years after the last conviction for breach of the law. In a case where it is appropriate to take into account the antecedent criminal history however, a penalty weighted towards retribution, deterrence and protection of society may be more appropriate than one in which rehabilitation is given more significant emphasis. It is permissible to take into account aggravating features such as those referred to by the High Court in assessing the gravity of the instant offence. This was certainly a case in which

a more severe penalty was warranted because of the appellant’s antecedent criminal history.

Her Worship said that she took into account the appellant’s cooperation with police and guilty plea, and there is no reason to think she did not. In that regard, however, it will be recalled that he was caught in the act of assaulting Ms Nabaltjari. At the time this matter came before her Worship the *Sentencing Act* 1995 (NT) had not come into operation, and thus mitigation on account of a plea of guilty was only available if it was demonstrative of remorse: *R v Jabaltjari* (1989) 64 NTR 1. The fact that this offence was committed whilst the appellant was on parole would not, given the consideration applying to his prior criminal record, warrant a more severe penalty. There would be a danger in doubling up if that were done.

The individual sentences imposed are not shown to be in error given the appellant’s antecedents.

Grounds 3 and 4 of the appeal may be dealt with together. It is complained that the imposition of the two sentences on a cumulative basis was an error in principle. The circumstances of each offence have already been given in detail. Attention has already been drawn to the fact that there were two separate incidents,

one being concluded in the area of the Council Chambers. The appellant then sought out Ms Nabaltjari and after a period of time, probably short, during which it might be thought that she was prepared to accompany him for a drink, there was a refusal and continuing assault was then perpetrated upon her. In the circumstances, as they were described at the time the police intervened, I think it was reasonable for her Worship to infer that had it not been for the police intervention the assault would have continued, for how long, it is not possible to say, but there was nothing done by the appellant which brought the assault to an end. One was an assault on a male and the other on a female, two distinct offences, they were each perpetrated for a different purpose and had no connection each with the other apart from the fact that the two victims happened to be in the same vicinity. I am not prepared to hold that her Worship erred in failing to order that the sentences be served concurrently or partly concurrently. In any event, the final determinant of the appropriateness of the total sentence lay in consideration of the principle of totality which requires the sentencer in these circumstances to review the aggregate and consider whether it is "just and appropriate". It is always necessary for the Court imposing a series of penalties to look at the result and compare the aggregate sentence with the totality of criminal behaviour to determine whether the sentence was

appropriate for all the offences. See *Mill v The Queen* (1988-89) 166 CLR 59 at 62-63. The preferred means by which that principle might be implemented is indicated by the Court at p63. However, in this case, the question of adjustment does not arise as I am satisfied that the total sentence of 18 months imprisonment imposed in respect of the two offences fell within the area of discretion properly available to the sentencing Magistrate, given all of the circumstances and the appellant's antecedents. Nor do I think her Worship erred in accumulating the sentences to imprisonment for these offences upon the term of imprisonment then being served by the appellant consequent upon his breach of parole. It will be recalled that he was on parole consequent upon a conviction and sentenced to three years imprisonment for aggravated sexual assault imposed on 23 November 1993, and that he had breached the terms of his parole order within seven months of being released. Although it may well be that circumstances arise when it is appropriate to order that there be a degree of concurrency between a sentence being served and a sentence to be served where the first arises from a breach of parole, I do think that this is such a case. To ameliorate the effect of the committal to prison for breach of parole, or the effect of the total sentence for the offences under consideration, would be to reduce the personal deterrent effect of the terms of imprisonment

upon the appellant, give rise to thought in the appellant and others that the Courts are lacking in consistency or determination in seeing that recidivist offenders are properly punished and fail to fully implement the primary objective of sentencing, the protection of the public.

I am not persuaded by the argument that the appellant has not had a reasonable opportunity to rehabilitate himself. I have already described the circumstances prevailing at Wallace Rockhole and the appellant's concession that he left there periodically to go into Alice Springs to drink. That would take quite a reasonable amount of effort, of the order of two hours driving in my rough estimation. Grounds 3 and 4 do not avail the appellant.

Given all that has gone before, it follows that it has not been shown that the sentences imposed were manifestly excessive, nor, indeed, that the sentences imposed together with the term of imprisonment then being served when added together was manifestly excessive taking into account the total criminality of the offender. No information was before this Court to guide it in relation to the range of sentences for offences of this type, and her Worship would be far better aware of that range of sentencing for the Alice Springs area than I.

As to ground 5, the failure of her Worship to fix a period during which the appellant would not be eligible to be released on parole, subs(3) of s4 of the *Parole of Prisoners Act* provides that the requirement to fix that period does not apply:

> "(a) if the court considers that the nature of the offence or offences and the antecedents of the offender do not warrant the specifying of the lesser term of imprisonment…"

In *Sullivan and Rigby* (1986-87) 26 A Crim R 205 the Court of Criminal Appeal said at p209 that the provisions of the *Parole of Prisoners Act* were structured so as to create a prima facie obligation on the sentencing court to specify a non-parole period and that it should not be declined except on substantial grounds of the character referred to in subs(3). Attention was drawn to the similarity between that provision and those in other jurisdictions and the differences of opinion between the courts as to how provisions such as those were to be construed. It adopted the approach in *Beck* (1984) WAR 127; 10 A Crim R 168 from the Court of Criminal Appeal of Western Australia. The word "and" in subs(3)(a) has conjunctive effect such that the court has to consider both the nature of the offence and the antecedents of the offender separately and come to the view that both do not warrant the specifying of a lesser

term of imprisonment before declining to fix the non-parole period. Both factors must be considered independently of the other. Her Worship's report disclosed that she was referred to the decision of his Honour Justice Angel in *Tyday v Maley*, unreported 18 May 1995 which includes a reference to *Sullivan and Rigby*, supra. In her report, her Worship said that she declined to set a non-parole period firstly on the basis that the offences to which he had pleaded guilty were serious, committed on relative strangers going about their lawful business, in no way provoked or encouraged by the victims, and that the assault upon the female continued for some time before being stopped by the arrival of police. Next, her Worship considered it inappropriate to set a non-parole period on the basis that the appellant was on parole at the time of committing the offences, the offence to which that parole related was of a like (albeit not identical) nature, and further that he had failed to comply with bonds undertaken in the past for similar offending. Her Worship said she also took into account the number of occasions he had been convicted for offences of violence.

Although having considerable sympathy with her Worship's approach to this particular case, I think that she has erred in considering that the nature of the offences were such as to enable her to decline to fix a

non-parole period. There was no doubt that that was a proper course if the only consideration was the antecedents of the appellant, but looking at the objective circumstances of each of the offences, it cannot be said that they alone justified depriving the appellant of the opportunity for parole. However, I consider that the period during which the appellant will not be eligible to be released on parole should, for the reasons already given, be at the upper end of the available range. I bear in mind that the appellant would have the benefit of the executive remission available prior to 1 July 1996 when the *Sentencing Act* came into operation. The effective term to be spent in gaol therefore under the sentence will be but 12 of the 18 months imposed plus the 12 months he was serving after committal for breach of the previous parole order. The total effective term of imprisonment is therefore 24 months. What is required is the fixing of a time prior to two years, upon which the appellant will be eligible for release on parole to provide him with an incentive to accept the opportunity presented to him and possibly to encourage good behaviour during his term in gaol. Whether he is granted parole or not will depend upon the attitude of the Parole Board at the relevant time, taking into account all the information concerning him and his then circumstances, including his failure to comply with the conditions of previous conditional release. The

Board might also consider at that time whether more stringent conditions ought to be applied to the appellant upon conditional release so as to better provide for his rehabilitation, inhibit his access to alcohol and protect the community from his alcohol abuse.

The sentences imposed and associated orders in relation to them are affirmed. I fix the period during which the appellant will not be eligible to be released on parole at 19 months from the date upon which the parole order was cancelled, 6 July 1995.