PARTIES:	VELIS, John
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL
JURISDICTION:	COURT OF CRIMINAL APPEAL
FILE NO:	6 of 1993
DELIVERED:	22 June 1994
HEARING DATE:	11 May 1994
JUDGMENT OF:	Martin CJ., Thomas J. & Gray AJ.

CATCHWORDS:

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Party – Co-offenders – Discrimination between co-offenders –

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Totality –

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Hardship –

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Concurrent, cumulative and additional sentences – Sentence during unexpired sentence -

Criminal law – Appeal – Appeal against sentence – grounds for interference – Disparity – Co-offenders –

Criminal law – Appeal – Appeal against sentence – Appeal by convicted persons – Applications to reduce sentence – When refused – Offences against the person.

REPRESENTATION:

Counsel:

Appellant: S Cox
Respondent: R Wilde QC

Solicitors:

Appellant: Legal Aid
Respondent: DPP

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

No. CA 6 of 1993

BETWEEN:
JOHN VELIS
Appellant

AND:
THE QUEEN
Respondent

CORAM: MARTIN CJ, THOMAS J and GRAY AJ

REASONS FOR JUDGMENT
(Delivered 22 June 1994)

MARTIN CJ:
I agree with Gray AJ.

THOMAS J:
I have read the Reasons for Judgment of Gray AJ. I agree with his reasons and with his conclusions and I have nothing to add.

GRAY AJ:

On 21 April 1993, the appellant pleaded guilty to two counts of aggravated robbery, each committed on 1 December 1991. In each case, the aggravating circumstance was that the appellant was in company with another. The maximum penalty for the offence is life imprisonment.

After hearing a plea for leniency on the appellant's behalf, Mildren J sentenced the appellant to four years imprisonment on Count 1 and two and one half years imprisonment on Count 2. His Honour ordered that one and one half years of the sentence on Count 2 be served concurrently with the sentence on Count 1, thus imposing an effective head sentence of five years. A non-parole period of two years was ordered.

The admitted facts which were placed before the learned trial judge were as follows:

"At about 3.30 am on 1 December 1991, David Bruce Bowden left The Joint nightclub in Cavenagh Street, Darwin and went to the taxi rank outside Woolworths in Knuckey Street. As there were no cabs there, he walked down to Austin Lane and along to Edmunds Street looking for a cab. There were none there either, and Bowden bought a hot-dog from a shop in Edmunds Street, sat in the gutter around the corner in Austin Lane and commenced to eat it.

He was then approached by the accused and a companion, Both of whom had been drinking. The accused walked up to Mr Bowden and kicked him hard to the right ear area. Bowden collapsed on the ground and asked to be left alone, but was kicked again. The accused desisted when he observed blood on a wall. At that point Bowden was unconscious.

Bowden's wallet was then removed from his right back pocket. At the time, the wallet, itself worth $50, contained $300 in cash together with a Medicare card and other documents. Velis and his companion then fled. Bowden was awoken shortly afterwards by a passer-by. Police arrived soon after and called an ambulance. Bowden was subsequently treated for a cut to the back of his head, and suffered a large painful lump where he had been kicked.

At around the same time, James Joseph Sullivan left Darby's nightclub in Cavenagh Street. Sullivan had been to a number of nightspots previously and was quite intoxicated when he left. He headed for the 1990s nightclub in Edmunds Street and walked down Cavenagh Street into Knuckey Street and turned right round the corner into Austin Lane. He then walked along the left side of Austin Lane, on the road but close to the footpath, and was almost at the intersection of Edmunds Street when he was approached by Velis and his companion.

Velis struck him to the left side of his face with his Right fist, and Sullivan fell to the ground. Velis said, "Give me your wallet or you'll cop it even more", and Sullivan Handed over his wallet which contained his driver's licence and a bank card. Velis's companion then grabbed the wallet from Velis and they fled to the corner of Spain Place where Velis's companion opened it. The assailants then made their escape along Austin Lane and Knuckey Street.

Shortly afterwards, Sullivan caught a taxi and told the driver what had happened. The driver contacted police on the radio and then

proceeded to the Woolworths' taxi rank. He met with police who drove him around to look for his assailants, but the search was unsuccessful. Sullivan suffered a sore jaw from the attack. He did not seek medical treatment. His property was located by police abandoned near the scene of the robbery.

Acting on information received the police attempted to contact the accused but found him absent interstate. A message was left with the accused's father and, following the prisoner's return on 20 January 1992, he contacted the officer in charge of the case, Sergeant Chapman. When asked why he had gone interstate, the prisoner replied that he knew the police were on to him and that he had to go somewhere.

The accused was taken to Berrimah Police Centre and a Formal record of interview was conducted. During his interrogation the prisoner outlined what had occurred on the afternoon of 30 November 1991. He visited the home of a family by the name of Walker and drank a large amount alcohol. From there he took one bottle of rum and one of vodka and went to town with a companion who he has referred to throughout as "Jamie Boswell".

Police have made inquiries in an attempt to identify and locate Boswell but have been unsuccessful. No records of any such person have been able to be located. Police believe they know the identity of the co-offender but, when they spoke to this individual, no admissions were made and they have insufficient evidence to proceed at this time.

En route from the Walker family home the prisoner and his co-offender stopped at Uncle Sam's for some take-away food. The pair then walked up Smith Street towards Edmunds Street with the intention of going to the 1990s nightclub. It was at this point that a discussion took place between the two offenders.

It was realised that they did not have any money and they sought to remedy the situation - see for example, page 3.8 of the record of interview. Quoting here from the accused's interrogation: "We were going to get someone and take it off them if they won't give it to us, you know". The prisoner admitted reaching the corner of Austin Lane and Edmunds Street and then seeing Bowden sitting on the gutter eating a hot-dog. The robbery then occurred.

A second record of interview was conducted in relation to the Sullivan robbery. Admissions were also made in relation to this matter. When asked whether anyone else was in the vicinity during the second robbery, Velis replied at page 7 of that interview, "No I

didn't take much notice; I was pretty - you know, I was pretty aggressive, you know, at the time of – at that time of night, so I didn't really worry about anyone being there".

He was then asked what he meant by being "pretty aggressive" and replied, "Like, you know, I had that, like, fighting, you know, mood sort of, you know; like I was drunk and that and I was, you know, like, where do you go, you know, for a fight. So I didn't, if anyone was around, you know, come and just do anything; probably would have, you know, got stuck into them or something". Following the two interrogations, the accused was taken to the watchhouse at Berrimah Police Centre and charged."

At the hearing of this application, the foregoing facts were amplified by Ms. Cox, who appeared for the appellant. The Court was told that the appellant's companion, one Damien Zammit, was charged with two counts of receiving in relation to the present transaction. It appears that, there being no admissible evidence of Zammit's participation in the actual robberies, the Crown accepted a plea of guilty to receiving the stolen property. He was sentenced by the Court of Summary Jurisdiction to three months imprisonment on each count, such sentences being passed on 22 November 1993.

Ms. Cox conceded that Zammit's sentence could not be used to found an argument that there was unreasonable disparity between the sentences of Zammit and those of the appellant. Ms. Cox contented herself with a suggestion that the way in which Zammit was dealt with tended to weaken the impact of the ggravating circumstance of being in company. But Ms. Cox conceded that the fact that Zammit was convicted of less serious charges stemmed from the appellant's refusal to implicate Zammit in the robberies.

The appellant who was seventeen years and two months at the time of the offences, admitted a number of convictions. The convictions extended from October 1989, when the appellant was fifteen years, to 7 August 1992 when the appellant was convicted on a number of counts and was sentenced to an effective term of sixteen months imprisonment with a three month non parole period.

The convictions on 7 August 1992 were for offences committed in March 1992. It appears that after the appellant was charged with the present offences in January 1992 he was released on bail and soon after he committed the offences which resulted in the convictions on 7 August 1992.

The Court was told that the appellant was not released on parole at the end of the non-parole period. It was suggested to the learned trial judge, although there was no evidence of it, that the failure to release the appellant on parole was due to the fact that the present proceedings were then pending.

At the time of His Honour's sentence, the appellant had served about eight and a half months of the sentence imposed on 7 August 1992. Allowing for remissions, the applicant had about two months to serve to complete that sentence.

The sentence imposed by the learned trial judge was expressed to be cumulative upon the sentence then being served.

It was submitted by Ms. Cox that one result of the present proceedings has been that the appellant has been required to serve about seven and a half months longer than would have been the case if the appellant had been released on 7 November 1992 at the end of the non-parole period. This led Ms. Cox to contend that the learned trial judge failed to appreciate this circumstance and was misled into passing a sentence which, in its overall effect, was longer than His Honour intended and which can be seen to be excessive.

This argument, in my opinion, fails at each level. First, it remains completely unknown why the appellant was not released at the end of the non-parole period. Secondly it is apparent that His Honour was perfectly aware of the duration of the sentence then being undergone and its effect upon the effective duration of His Honour's sentence.

Ultimately, Ms. Cox conceded that she could not point to any

specific error made by the learned trial judge but contended that, nevertheless, the sentence was manifestly excessive.

She drew attention to the extreme youth of the appellant, the deprivations to which he has been subjected, his plea of guilty, the long delay, the lack of planning of the enterprise and its unsophisticated execution. Further points made were the small amount of money involved, the absence of a weapon, the low level of violence and the indications of recent attempts at rehabilitation.

Ms. Cox did not dispute that all these points were taken into account by His Honour but she submitted that they were undervalued in a way which led to a manifestly excessive sentence which disregarded the totality principle.

His Honour expressly referred to the totality principle in determining that there should be partial concurrency of the sentences. Accordingly, the only question is whether His Honour's judgment as to the appropriate sentence fell outside the range of his sentencing discretion.

As against the mitigating factors which His Honour was bound to and did consider, there were in this case aggravating circumstances of considerable weight. As His Honour noted, the robberies, particularly the one alleged in Count 1, were cowardly attacks upon an unsuspecting victim. They were carried out at night and in company and were accompanied by a considerable degree of violence. The appellant had three previous convictions for violence which disqualified him from any reduction for good character. His Honour expressed the view that community opinion requires that muggings of this type be sternly dealt with. This is reflected in the maximum penalty fixed by Parliament.

Although the hideous deprivations associated with the appellant's childhood and youth attract considerable sympathy, I am quite unpersuaded that His Honour erred in passing the sentences he did.

Not only do I consider that the sentence passed was within the range of His Honour's sentencing discretion, I consider that it was perfectly appropriate both in its head sentence and non-parole period.

I would dismiss the application.