*Bara v The Queen* [1999] NTCCA 42

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| PARTIES: | STUART BARA |
| | v |
| | THE QUEEN |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPEAL from SUPREME COURT exercising Territory jurisdiction |
| FILE NO: | CA 22/97 (9702219) |
| DELIVERED: | 28 July 1999 |
| HEARING DATES: | 15 March 1999 |
| JUDGMENT OF: | MILDREN, THOMAS & RILEY JJ |

**REPRESENTATION:**

*Counsel:*

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| Appellant: | R. Coates |
| Respondent: | M. Carey |

*Solicitors:*

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| Appellant: | NTLAC |
| Respondent: | DPP |

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

*Bara v The Queen* [1999] NTCCA 42
No. CA 22/97 (9702219)

BETWEEN:

**STUART BARA**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: MILDREN, THOMAS & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 28 July 1999)

**MILDREN AND RILEY JJ:**

[1] This is an appeal against sentence imposed on the appellant on 14 August 1997, leave to appeal having been granted by Angel J on 17 August 1998.

[2] On 31 July 1997 the appellant entered a plea of guilty to a charge that, on 27 January 1997 at Umbakumba in the Northern Territory of Australia, he did unlawfully cause grievous harm to Maree Mamarika, contrary to s181 of the *Criminal Code*.

[3] At the time of sentencing on 14 August 1997, the appellant was already serving two sentences of imprisonment. On 3 December 1993, the prisoner had been sentenced by this Court to terms of imprisonment totalling five years in relation to offences of aggravated assault and cause grievous harm committed on 17 July 1993. A non-parole period of two years had been fixed. Presumably these sentences were backdated because in July 1995 the appellant was released on parole by an order of the Parole Board. Whilst on parole, the appellant committed an aggravated assault on 6 November 1995 for which he was convicted on 19 February 1997 by the Court of Summary Jurisdiction, and sentenced to a term of imprisonment of twelve months. In respect of that sentence, a non-parole period of eight months was fixed by the learned Magistrate. It is clear that s57(1) of the *Sentencing Act* did not apply to this situation as the two year non-parole period fixed by the Supreme Court had already lapsed. Therefore the eight months non-parole period related only to the aggravated assault conviction.

[4] Pursuant to s5(8) of the *Parole of Prisoners Act*, the sentence of imprisonment imposed on 19 February 1997 had the effect of revoking the appellant's parole order. The learned Magistrate ordered the appellant to serve the balance of the sentence of five years imprisonment which remained to be served, in conformity with s64(2) of the *Sentencing Act*.

[5] Pursuant to ss59(1) and 64 of the *Sentencing Act*, the appellant was required to serve those sentences in the following order: first, the eight months non-parole period; thereafter the balance of four months; thereafter

the balance of three years remaining from the sentence imposed in 1993. Pursuant to s13 of the *Parole of Prisoners Act*, the Parole Board was authorised to release the appellant on parole at any time after the appellant had served the eight months non-parole period, notwithstanding that the previous parole order had been revoked by force of s5(8) of the *Parole of Prisoners Act*. The sentences imposed thus are as set out in Table A to the Schedule of these reasons.

[6] During the sentencing hearing the prosecutor submitted that any further sentence of imprisonment which might then be imposed, could not be ordered to commence to be served until completion of the balance of the five year sentence imposed 3 December 1993, and that any non-parole period his Honour might fix in relation to that further sentence would likewise not commence to run until then. Subsequently, different counsel who appeared for the Crown attempted to persuade his Honour that he could fix a new non-parole period for all of the offending pursuant to s57 of the *Sentencing Act*. His Honour rejected that submission as he considered that that section did not apply. His Honour concluded, (in the context of the sentencing exercise performed by the learned Magistrate):

> The result is that a parolee who is sentenced to a term of imprisonment during the duration of the parole order can no longer expect any amelioration from the consequence flowing from the statute pursuant to the operation of subsection (2) of s64, regardless of the nature of the offence being committed which for example may be visited by compulsory imprisonment under s78A of the *Sentencing Act*, the period of the parole order which had expired before committing the new offence, or any other circumstance which might have previously enabled a court to mitigate the overall penalty by

providing for a possible release prior to the expiry of the full term of imprisonment brought about by this sentence and order.

This is in error, and overlooks the effect of s13 of the *Parole of Prisoners Act*, to which his Honour was not referred. It is likely that this error may have contributed to the end result.

[7] The sentence his Honour imposed was expressed as follows:

> You are sentenced to seven years imprisonment. It is to be served concurrently as to one year with the term which you are presently serving, that is, the sentence and committal for breach of parole. I fix a non-parole period in relation to the seven years of five years, the five years to run from the commencement of the sentence.
>
> Gentlemen, what I have tried to do is take into account the whole of the offending. I have taken into account that he must serve the twelve months subject to the non-parole period of eight months that was set plus the period committed by order for breach of parole. The sentence for this offence is seven years but to try and provide some sense of totality, I have ordered that it run concurrently as to one year, with the term he is presently serving. It will be an effective additional six years on top of what he is now doing subject to his being released on parole to which he will be eligible after serving five years of the seven year sentence.

[8] Mr Norman, who appeared for the appellant at the time of sentence, asked whether the sentence was to be backdated to 31 July, 1997.

[9] His Honour declined to do this and observed that the appellant was currently in custody in relation to other matters. By this his Honour was referring to the sentence and order made in the Court of Summary Jurisdiction on 19 February 1997.

[10] His Honour then added (AB 48):

> The order that the prisoner be imprisoned consequent upon the deemed revocation of parole is by the order made by His Worship, to commence at the expiry of the term of imprisonment to which he was sentenced. He's now in custody in relation to other matters, isn't he? And I let them run – and this is tacked on the end subsequent to the concurrency of one year?

[11] His Honour concluded the proceedings with the following remarks (AB 48):

> Might I say I think it is a matter that needs to be reviewed. I trust that somebody will take the appropriate steps to take the matter before the Court of Criminal Appeal.

[12] The grounds of appeal are as follows (AB 54):

> (a) That the Learned Sentencing Judge erred in failing to fix a non-parole period in accordance with the provisions of the *Sentencing Act*.
>
> (b) That the Learned Sentencing Judge failed to take into account the totality of the sentence imposed.
>
> (c) That the sentence is manifestly excessive.

[13] We agree with the submission made by Mr Coates, counsel for the appellant, and Mr Carey, counsel for the respondent, that the effect of the order of the Chief Justice is not clear from a full reading of the sentencing transcript.

[14] Neither is it clear from a reading of the Warrant of Commitment for Imprisonment which after noting the case number, the offence and the sentence of seven years, imprisonment reads as follows:

1. ONE (1) YEAR is to be served concurrently upon the sentence the said Stuart BARA is currently serving;

2. the non-parole period in relation to the sentence of SEVEN (7) YEARS is FIVE (5) YEARS;

3. the non-parole period is deemed to commence at the beginning of the sentence of SEVEN (7) YEARS.

[15] In her supporting affidavit sworn 12 December 1997, Ms Suzan Cox deposes *inter alia* to the way in which, on her information, his Honour's sentence has been interpreted by the authorities at Berrimah Prison. Paragraphs 10 and 11 of the affidavit sworn 12 December 1997 by Ms Cox read as follows (AB 53):

10. On 17 October 1997 I received information from Berrimah Prison concerning all sentences the applicant is currently serving. I was advised that the applicant will complete his full term of imprisonment on 18 February 2007 and has a release date with remissions on 20 June 2005.

11. On 9 December 1997 I was advised by Berrimah Prison that the applicant is not eligible for parole until 18 February 2004.

[16] We turn to consider each of the grounds of appeal.

[17] **Ground 1:** ***"That the Learned Sentencing Judge erred in failing to fix a non-parole period in accordance with the provisions of the Sentencing Act".***

[18] So far as any sentence to be imposed by the Court in August 1997 is concerned, the true effect of the legislative provisions to which we have referred is as follows:

(a) the sentence of seven years his Honour imposed by way of a head sentence, required his Honour to fix a non-parole period: see s53(1) of the *Sentencing Act*.

(b) at the time of sentencing on 14 August 1997, the eight month non-parole period fixed by the learned Magistrate on 19 February 1997 had not expired. Therefore his Honour was required to fix a non-parole period in respect of all of the sentences the appellant had to serve or complete: see s57(1) of the *Sentencing Act*. It was submitted by both Mr Coates and Mr Carey that the words "or complete" in s57(1) must refer to a sentence referred to in s57(1)(a). We do not consider that this is the meaning to be given to the words used by the legislation. The plain and ordinary meaning of the expression "in respect of all the sentences the offender is to serve or complete" when contrasted with the language used in subsection (1)(a) is that the draftsman intended to cover the very situation which has arisen here, *viz.*, a sentence ordered to be completed pursuant to s64(2) of the *Sentencing Act*. There is no other provision of the Act which casts doubt on the plain and ordinary meaning to be given to the words of the subsection.

(c) it was open for his Honour to order his own sentence to be served cumulatively upon the sentences already being served: *Sentencing Act*, s51(1). Had he done so, as a new non-parole period had to be fixed in respect of all of the sentences, the appellant would serve the new non-parole period first, and then the balance of the terms.

(d) in the absence of an order under s51(1) of the *Sentencing Act*, the sentence of seven years would be served concurrently with the other earlier sentences, *vide* ss50 and 63(4) of the *Sentencing Act*.

(e) if the appellant had been under arrest for this offence at the time of sentence by the learned Magistrate, it would have been open to his Honour to have backdated his sentence to the date of the arrest, *vide* s63(5) of the *Sentencing Act*.

[19] Looking at the sentences actually imposed, assuming his Honour correctly applied the law, his Honour's sentences and orders are open to the interpretation that his Honour must have made an order pursuant to s51(1)

of the *Sentencing Act* that the sentence of seven years would commence at the time when the previous sentences had but one year left to run. If that was his Honour's intention, the position would be that the remainder of the sentence of twelve months would be served first; then the three year balance (less any remissions) of the 1993 sentence would be served, *vide* s64(2); his Honour's sentence of seven years would therefore commence to run from a date one year before that three year sentence (less remissions) had expired. The effective head sentence is therefore likely to be as calculated by the prison authorities, i.e. expiring on 20 June 2005: see Table B set out in the Schedule hereto. Another way of looking at it is to say that the total head sentences amounted to ten years commencing on 19 February 1997, less remissions of twenty months due on the 1993 sentence. So far as the head sentences are concerned, this result is consistent with his Honour's comments referred to in paragraph [7] above.

[20] However, if his Honour had correctly applied the law, the non-parole period of five years should have commenced to run from the date of his Honour's order, unless his Honour had decided that it should be calculated to run from some other date. We note that s53 of the *Sentencing Act* requires a court to fix a period during which an offender is not eligible to be released on parole. Consequently, so long as the minimum periods fixed by ss54 and 55 are complied with and s57(2)(c) is complied with, it does not matter how the court expresses its order, so long as the date can be arrived at with certainty. In this case the order that his Honour made fixed

a non-parole period of five years *commencing from the date on which the seven year sentence commenced to run.* Assuming that the earned remissions on the 1993 sentence remained unrevoked, the five year minimum term would commence to run in approximately mid-June 1998 and the appellant would be eligible for release on parole in mid-June 2003. Alternatively, if the remissions are to be ignored in the calculation the non-parole period would expire on 20 February 2005 (see Table B). Whether or not the remissions should be ignored depends on the meaning to be given to the words in s51(1) "… may be directed to start from the end of the term of imprisonment for the first offence or an earlier date". Is the end of the five year term, the balance of the three year term, or the balance of the three year term less remissions earned? The fact that his Honour fixed the non-parole period in this manner and rejected counsel's submission that s57(1) of the *Sentencing Act* applies, and the difficulty of construing the effect of his Honour's order, and his Honour's suggestion that the matter should be reviewed by this Court leads us to conclude that his Honour's order was arrived at in error, because his Honour considered that no other course was open to him. As we have attempted to demonstrate this was not so.

[21] Before considering what should now be done, it is appropriate to deal with two other grounds of appeal which were argued together and go to a completely separate issue.

[22] **Ground 2:** ***"That the Learned Sentencing Judge failed to take into account the totality of the sentence imposed".***

[23] **Ground 3:** ***"That the sentence is manifestly excessive".***

[24] Mr Coates, on behalf of the appellant, argues that this was not the worst example of the offence of causing grievous harm to come before the Court. Mr Coates pointed out that the offence consisted of a single stab wound, there had been no victim impact statement tendered and the victim had indicated she did not want these matters to proceed. Counsel for the appellant submitted that his Honour placed undue emphasis on the appellant's prior record rather than looking at the particular circumstances of the case and that his Honour failed to apply the principle of totality (*Mill v The Queen* (1988) 166 CLR 59).

[25] The Court allowed counsel for the appellant to tender *de bene esse* certain certificates relating to courses of study the appellant has successfully completed during the time he has been in custody. These certificates were accepted by the Court on the basis that they would be considered if the Court came to the conclusion that the Court should resentence the appellant.

[26] Further, counsel for the appellant submitted that the learned sentencing judge did not reduce the sentence he was imposing because of the problems his Honour perceived with the *Sentencing Act*. It is the complaint of the appellant that accordingly his Honour did not adequately address the principle of totality.

[27] The facts found by his Honour in this matter, with which there is no dispute, are as follows (AB 44 – 45):

> Stuart Bara, you have pleaded guilty that on 27 January 1997 at Umbakumba you unlawfully caused grievous harm to Maree Mamarika.
>
> On that evening you had been drinking alcohol and after about twelve cans of beer you asked Maree to find your woomera. You had a hunting knife with a five and a half inch blade and told her if she did not find it you would stab her with the knife. You repeated your request and your threat.
>
> Maree went looking for the woomera but could not find it and you became angry and, when she attempted to run away, you ran over to her and stabbed her with the knife in her right upper back, which caused her to lose a large amount of blood. You removed the knife from her body and gave it to a male relative of your victim. Maree then sat down with concerned relatives who tried to comfort her but you told her to go into the nearby bushes with you. She refused. You threatened her if she did not go with you, and being scared she went into the bush and sat down with you. She wanted to get away from you, having just been stabbed, but was scared that if she attempted to do so, you would assault her again. You kept her constrained in that way from about 9 o'clock till 10.30 that night.
>
> When the police arrived, you decamped. In the meantime, Maree had lost sufficient blood to make her feel weak and she had to be helped to an ambulance, then to the health centre and eventually hospital. The stab wound had penetrated her chest cavity and punctured her lung and she was admitted into the hospital.

[28] His Honour then proceeded to consider the appellant's previous record of convictions and stated (AB 45- 46):

> This was a vicious and unprovoked assault upon your wife, Maree, and standing alone would warrant a sentence of imprisonment. But your antecedent criminal history is a factor which must be taken into account as well in determining the sentence to be imposed, although it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of this particular offence.

Your criminal history, however, is relevant to show that what you did was not an uncharacteristic aberration. You have manifested in your commission of this offence a continuing attitude of disobedience to the law in which case retribution, deterrence and protection of society, particularly women acquaintances of yours, all indicate that a more severe penalty is warranted. That prior history illuminates your moral culpability in the present case and shows a dangerous propensity on your part and also shows a need to impose condign punishment to deter you and others from committing further offences of a like kind. All that arises because of your appalling criminal record including other instances of personal violence.

The record starts in 1974 when you were convicted of being armed with an offensive weapon and in 1975; three counts of aggravated assault; a further count in 1976, and of riotous behaviour later that year; assault in 1979 on two counts; aggravated assault on two counts in 1986; one such count in 1987; aggravated assault and causing bodily harm on one count and causing grievous harm on another in 1993.

Those particular offences were scattered through an almost continuous record of criminal behaviour of other kinds.

The 1993 assaults were both perpetrated upon your then-wife; on one occasion when you struck her on the face, head and back a number of times with a stick; and on another occasion when you stabbed her with a knife causing a seven centimetre wound to her abdomen.

All of that led to you being imprisoned for five years and to not be released on parole until the expiry of two years. You were released on parole in August 1995 but on 6 November, you again committed an aggravated assault, which was not dealt with until February 1997. For that you were sentenced to twelve months imprisonment and for breach of the 1993 parole order, committed to prison for the balance of the term which has not been served.

This offence also had a feature which was current in one of the prior offences, that is, the constraint of your victim from escaping after the assault.

I do not take into account the 1997 convictions as being prior convictions, because for these purposes they were not. However, what is shown is that you committed the present offence while awaiting to be dealt with for the 1995 attack. You had done nothing effective to control your violent disposition.

[29] His Honour took into account the appellant was a thirty-nine year old Aboriginal man from Groote Eylandt. His Honour made reference to the appellant's problems with alcohol and the problem alcohol has caused on Groote Eylandt. His Honour gave credit to the appellant for his efforts after his release from gaol in July 1995 to rehabilitate himself and his attendance at courses at Batchelor College.

[30] There is no error demonstrated either in his Honour's view of the offence or with the way in which he dealt with the appellant's antecedents including his prior convictions.

[31] Having arrived at a sentence of seven years imprisonment with a non-parole of five years, his Honour, was clearly disturbed by the consequence for this appellant of what he perceived to be problems under the *Sentencing Act*.

[32] It was submitted that his Honour was led to this view by counsel for the Crown at the time of sentence, who submitted that the prisoner had to serve the order for the balance of the 1993 sentence before the sentence imposed by his Honour could commence to be served. This was clearly in error. Unless his Honour otherwise ordered, the sentence of seven years would have commenced from the date of passing of sentence and would be served concurrently with any other sentences he was serving: see ss63(4) and 50 of the *Sentencing Act*. However his Honour does not appear to have accepted this submission.

[33] The totality principle required his Honour to take into account all of the offending, and to consider whether he should not order that the sentence he imposed be served cumulatively or partly cumulatively, upon the sentences which the prisoner had already been ordered to serve. This is what in effect his Honour did by ordering that there be one years' concurrence, as we have attempted to demonstrate. However, the end result was an effective total head sentence of ten years (less the remissions already earned). In our opinion this was manifestly excessive.

[34] There was a demonstrated error in the way in which his Honour perceived that the sentences were to be served and in the final order that his Honour made. The consequence of his Honour's order did not give account to the principles of totality. For these reasons this Court will allow the appeal and resentence the appellant.

[35] In these circumstances it is appropriate for us to consider the additional material which is referred to in para [25] above. It is apparent that the appellant has, whilst in prison, completed a number of courses in a variety of subjects in the last two years. These courses are likely to equip the appellant with skills which will enable him to pursue paid employment when he is ultimately released. They enable us to conclude that the appellant's prospects of rehabilitation are somewhat better than the learned sentencing judge was able to discern at the time of sentencing. In all other respects we would agree with the assessment by the learned sentencing

judge of the prisoner's culpability for the total offending which has to be considered.

[36] In our opinion, bearing in mind the totality principle, the appropriate head sentence to be imposed in this case is one of six years and six months, to commence from the date the original sentence was imposed, *viz*. 14 August 1997. We fix a new non-parole period of four years and 3 months to commence from 14 August 1997. The appeal will be allowed and orders made accordingly.

**THOMAS J**:

[37] I agree with Mildren and Riley JJ that this appeal should be allowed. However, I differ in my reasons and my conclusion.

[38] Accordingly, I have prepared separate reasons for decision.

[39] This is an appeal from a sentence imposed on the appellant on 14 August 1997.

[40] An application for leave to appeal was granted by Angel J on 17 August 1998.

[41] On 31 July 1997 the appellant entered a plea of guilty to a charge that:

[42] On 27 January 1997 at Umbakumba in the Northern Territory of Australia, did unlawfully cause grievous harm to Maree Mamarika.

Contrary to s 181 of the *Criminal Code*.

[43] On 14 August 1997, the learned Chief Justice imposed the following sentence (AB 47):

> "…. You are sentenced to seven years' imprisonment. It is to be served concurrently as to one year with the term which you are presently serving, that is, the sentence and committal for breach of parole. I fix a non-parole period in relation to the seven years of five years, the five years to run from the commencement of the sentence."

[44] His Honour then went on to say (AB 47):

> "Gentlemen, what I have tried to do is take into account the whole of the offending. I have taken into account that he must serve the 12 months subject to the non-parole period of eight months that was set plus the period committed by order for breach of parole. The sentence for this offence is seven years but to try and provide some sense of totality, I have ordered that it run concurrently as to one year, with the term he is presently serving. It will be an effective additional six years on top of what he is now doing subject to his being released on parole to which he will be eligible after serving five years of the seven year sentence."

[45] Mr Norman, who appeared for Mr Bara at the time of sentence, asked whether the sentence was to be back dated to 31 July.

[46] His Honour declined to do this and observed that Mr Bara was currently in custody in relation to other matters. By this his Honour was referring to the sentence and order made in the Court of Summary Jurisdiction on 19 February 1997.

[47] His Honour then added (AB 48):

> "The order that the prisoner be imprisoned consequent upon the deemed revocation of parole is by the order made by His Worship, to commence at the expiry of the term of imprisonment to which he was sentenced. He's now in custody in relation to other matters, isn't he?

> And I let them run – and this is tacked on the end subsequent to the concurrency of one year?"

[48] His Honour concluded the proceedings with the following remarks (AB 48):

> "Might I say I think it is a matter that needs to be reviewed. I trust that somebody will take the appropriate steps to take the matter before the Court of Criminal Appeal. …."

[49] The Grounds of Appeal are as follows (AB 54):

> "(a) That the Learned Sentencing Judge erred in failing to fix a non-parole period in accordance with the provisions of the Sentencing Act.
>
> (b) That the Learned Sentencing Judge failed to take into account the totality of the sentence imposed.
>
> (c) That the sentence is manifestly excessive."

[50] I agree with the submission made by Mr Coates, counsel for the appellant, and Mr Carey, counsel for the respondent, that the effect of the order of the Chief Justice is not clear from a full reading of the sentencing transcript.

[51] Neither is it clear from a reading of the Warrant of Commitment for Imprisonment which after noting the case number, the offence and the sentence of seven years, imprisonment reads as follows:

> "1. ONE (1) YEAR is to be served concurrently upon the sentence the said Stuart BARA is currently serving;
>
> 2. the non parole period in relation to the sentence of SEVEN (7) YEARS is FIVE (5) YEARS;
>
> 3. the non parole period is deemed to commence at the beginning of the sentence of SEVEN (7) YEARS."

[52] In her supporting affidavit sworn 12 December 1997, Ms Suzan Cox deposes inter alia to the way in which, on her information, his Honour's sentence has been interpreted by the authorities at Berrimah Prison. Paragraphs 10 and 11 of the affidavit sworn 12 December 1997 by Ms Cox read as follows (AB 53):

> "10. On 17 October 1997 I received information from Berrimah Prison concerning all sentences the applicant is currently serving. I was advised that the applicant will complete his full term of imprisonment on 18 February 2007 and has a release date with remissions of 20 June 2005.
>
> 11. On 9 December 1997 I was advised by Berrimah Prison that the applicant is not eligible for parole until 18 February 2004."

[53] This is an effective period of ten years imprisonment.

[54] I turn to consider each of the grounds of appeal.

[55] **Ground 1:** ***"That the Learned Sentencing Judge erred in failing to fix a non-parole period in accordance with the provisions of the Sentencing Act."***

[56] This Court is of the view that an error in the sentencing disposition did occur. On analysing the proceedings before his Honour it would appear that his Honour proceeded on the assumption that the appellant would have to serve the sentences in the following order:

> 1) Sentence of 12 months imprisonment with a non parole period of 8 months imposed by the Court of Summary Jurisdiction on 19 February 1997.

2) The unexpired portion of the sentence for breach parole order made on 3 December 1993 which was revoked by the magistrate on 19 February 1997.

3) The sentence of 7 years imprisonment with a non parole period imposed by his Honour on 14 August 1997.

[57] The essential problem is that no one had drawn to his Honour's attention during the course of the plea in mitigation the provisions of s 13 of the *Parole of Prisoners Act* which provides as follows:

> "A parole order may be made in relation to a person notwithstanding that a previous parole order in relation to the person has been revoked or is deemed to have been revoked, or has been cancelled."

[58] See *Mitchell ats Maley* NT Supreme Court (unreported) decision of Bailey J 17 June 1997, JA20/97 and *Egan v Seears & Another* a decision of Martin J (1991) 1 NTLR 146.

[59] Counsel for the respondent agreed that the procedure adopted by the learned Chief Justice was impermissible and demonstrates error.

[60] The error made by the learned sentencing judge is contained in the course of his reasons for sentence delivered on 14 August 1997 at AB 43 - 44:

> "….. The result is that a parolee who is sentenced to a term of imprisonment during the duration of the parole order can no longer expect any amelioration from the consequence flowing from the statute pursuant to the operation of subsection (2) of section 64, regardless of the nature of the offence being committed which for example may be visited by compulsory imprisonment under section 78A of the Sentencing Act, the period of the parole order which had expired before committing the new offence, or any other circumstances which might have previously enabled a court to mitigate the overall penalty by providing for a possible release prior

to the expiry of the full term of imprisonment bought about by this sentence and order."

[61] His Honour proceeded on the false premise that the appellant has to serve the whole of the period relating to breach of parole before commencing the sentence imposed by his Honour. His Honour in effect added his sentence to the sentence of the Court of Summary Jurisdiction and the breach of parole. Whereas the breach of parole should have followed the sentence of 12 months imprisonment imposed by the Court of Summary Jurisdiction on 19 February 1997 and his Honour's sentence of 7 years imprisonment imposed on 14 August 1997.

[62] The sentence imposed by his Honour should have followed the regime provided in s 59 of the *Sentencing Act* which provides as follows:

> "(1) Where an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender shall serve –
>
> (a) the term or terms in respect of which a non-parole period was not fixed;
>
> (b) the non-parole period; and
>
> (c) unless and until released on parole, the balance of the term or terms after the end of the non-parole period,
>
> in that order.
>
> (2) Where, during the service of a sentence of imprisonment, a further sentence of imprisonment is imposed, service of the first-mentioned sentence shall, if necessary, be suspended in order that the sentences may be served in the order referred to in subsection (1)."

[63] Section 59(1)(a) is not relevant in this matter because there were no term or terms of imprisonment in respect of which a non parole order was not fixed. To find otherwise would be an error.

[64] Accordingly, the appellant should have been required to serve the sentence in the following order:

| | | |
|---|---|---|
| 1. | 8 months | minimum non parole period of Court of Summary Jurisdiction sentence imposed 19 February 1997. |
| 2. | 5 years | minimum non parole period imposed by Martin CJ on 14 August 1997. |

[65] At this point the appellant would become eligible for parole at the discretion of the Parole Board at any time during the period of the following sentences:

| | | |
|---|---|---|
| 3. | 2 years | being the balance of the term of 7 years imprisonment imposed by the Supreme Court on 14 August 1997. |
| 4. | 3 years | being the unexpired portion of the sentence imposed on 3 December 1993 less remissions. |
| 5. | 4 months | being the balance of 12 months imposed by the Court of Summary Jurisdiction on 19 February 1997. |

[66] This regime preserves in the Parole Board the discretion contained in s 13 of the *Parole of Prisoners Act* as to when the appellant is to be released once the non parole period has been completed. To do otherwise is to render that provision nugatory (*Egan v Seears & Another* supra).

[67] Clearly the learned sentencing judge was unhappy about the unfairness he perceived in the way in which he considered he was required to go about his task of sentencing this appellant.

[68] In attempting to ameliorate this unfairness, his Honour made orders that 12 months of the sentence of 7 years that he imposed be concurrent with the sentence the appellant was serving following orders made in the Court of Summary Jurisdiction on 19 February 1997. For the reasons already stated this was not in accordance with law.

[69] Because there is demonstrated error in the sentencing process this Court is entitled to re-sentence the appellant.

[70] First it is appropriate to deal with the other two grounds of appeal which were argued together and go to a completely separate issue.

[71] ***Ground 2: "That the Learned Sentencing Judge failed to take into account the totality of the sentence imposed."***

[72] ***Ground 3: "That the sentence is manifestly excessive."***

[73] Mr Coates, on behalf of the appellant, argues that this was not the worst example of the offence of causing grievous harm to come before the Court.

Mr Coates pointed out that the offence consisted of a single stab wound, there had been no victim impact statement tendered and the victim had indicated she did not want these matters to proceed. Counsel for the appellant submits that his Honour placed undue emphasis on the appellant's prior record rather than looking at the particular circumstances of the case and that his Honour failed to apply the principle of totality (*Mill v The Queen* (1988) 166 CLR 59).

[74] The Court allowed counsel for the appellant to tender de bene esse certain certificates relating to courses of study Mr Bara has successfully completed during the time he has been in custody. These certificates were accepted by the Court on the basis that they would be considered if the Court came to the conclusion that there had been demonstrated error in the sentencing process and this Court concluded it should re-sentence the appellant.

[75] Finally, counsel for the appellant submitted that the learned sentencing judge did not reduce the sentence he was imposing because of the problems his Honour perceived with the *Sentencing Act*. It is the complaint of the appellant that accordingly his Honour did not adequately address the principle of totality.

[76] The principles to be applied by an Appeal Court in reviewing a sentence are well established (*R v Anzac* 50 NTR 6; *R v Nagas* (1995) 5 NTLR 45; *Wiren v The Queen* (1996) 5 NTLR 211), see generally *House v The King* (1936) 55 CLR 499.

[77] The facts found by his Honour in this matter, with which there is no dispute, are as follows (AB 44 - 45):

> "Stuart Bara, you have pleaded guilty that on 27 January 1997 at Umbakumba you unlawfully caused grievous harm to Maree Mamarika.
>
> On that evening you had been drinking alcohol and after about 12 cans of beer you asked Maree to find your woomera. You had a hunting knife with a five and a half inch blade and told her if she did not find it you would stab her with the knife. You repeated your request and your threat.
>
> Maree went looking for the woomera but could not find it and you became angry and, when she attempted to run away, you ran over to her and stabbed her with the knife in her right upper back, which caused her to lose a large amount of blood. You removed the knife from her body and gave it to a male relative of your victim. Maree then sat down with concerned relatives who tried to comfort her but you told her to go into the nearby bushes with you. She refused. You threatened her if she did not go with you, and being scared she went into the bush and sat down with you. She wanted to get away from you, having just been stabbed, but was scared that if she attempted to do so, you would assault her again. You kept her constrained in that way from about 9 o'clock till 10.30 that night.
>
> When the police arrived, you decamped. In the meantime, Maree had lost sufficient blood to make her feel weak and she had to be helped to an ambulance, then to the health centre and eventually hospital. The stab wound had penetrated her chest cavity and punctured her lung and she was admitted into the hospital."

[78] His Honour then proceeded to consider the appellant's previous record of convictions and stated (AB 45 - 46):

> "This was a vicious and unprovoked assault upon your wife, Maree, and standing alone would warrant a sentence of imprisonment. But your antecedent criminal history is a factor which must be taken into account as well in determining the sentence to be imposed, although it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of this particular offence.

Your criminal history, however, is relevant to show that what you did was not an uncharacteristic aberration. You have manifested in your commission of this offence a continuing attitude of disobedience to the law in which case retribution, deterrence and protection of society, particularly women acquaintances of yours, all indicate that a more severe penalty is warranted. That prior history illuminates your moral culpability in the present case and shows a dangerous propensity on your part and also shows a need to impose condign punishment to deter you and others from committing further offences of a like kind. All that arises because of your appalling criminal record including other instances of personal violence.

The record starts in 1974 when you were convicted of being armed with an offensive weapon and in 1975; three counts of aggravated assault; a further count in 1976, and of riotous behaviour later that year; assault in 1979 on two counts; aggravated assault on two counts in 1986; one such count in 1987; aggravated assault and causing bodily harm on one count and causing grievous harm on another in 1993.

Those particular offences were scattered through an almost continuous record of criminal behaviour of other kinds.

The 1993 assaults were both perpetrated upon your then-wife; on one occasion when you struck her on the face, head and back a number of times with a stick; and on another occasion when you stabbed her with a knife causing a seven centimetre wound to her abdomen.

All of that led to you being imprisonment for five years and to not be released on parole until the expiry of two years. You were released on parole in August 1995 but on 6 November, you again committed an aggravated assault which was not dealt with until February 1997. For that you were sentenced to 12 months' imprisonment and for breach of the 1993 parole order, committed to prison for the balance of the term which has not been served.

This offence also had a feature which was current in one of the prior offences, that is, the constraint of your victim from escaping after the assault.

I do not take into account the 1997 convictions as being prior convictions, because for these purposes they were not. However, what is shown is that you committed the present offence while awaiting to be dealt with for the 1995 attack. You had done nothing effective to control your violent disposition."

[79] His Honour took into account the appellant was a 39 year old aboriginal man from Groote Eylandt. His Honour made reference to the appellant's problems with alcohol and the problem alcohol has caused on Groote Eylandt. His Honour gave credit to Mr Bara for his efforts after his release from gaol in July 1995 to rehabilitate himself and his attendance at courses at Batchelor College.

[80] There is no error demonstrated either in his Honour's view of the offence or with the way in which he dealt with the appellant's antecedents including his prior convictions.

[81] Having arrived at a sentence of seven years imprisonment with a non parole of five years, his Honour, the sentencing judge, was clearly disturbed by the consequence for this appellant of what he perceived to be problems under the *Sentencing Act*.

[82] Unfortunately, his Honour was led to this view by counsel for the Crown, at the time of sentence, who submitted that the prisoner had to serve the order for the balance of the 1993 sentence before the sentence imposed by his Honour could commence to be served. Neither counsel for the Crown nor for the accused, addressed his Honour on the provisions of s 13 of the *Parole of Prisoners Act* or s 59 of the *Sentencing Act*.

[83] Counsel for the respondent before his Honour submitted that his Honour could in his discretion adjust the head sentence for the offence committed

on 27 January 1997 as a way of ameliorating the perceived problem under the *Sentencing Act*.

[84] His Honour in our respectful opinion quite correctly declined to proceed this way for the reason he stated (AB 30):

> "it would mean imposing a head sentence here that was not proportionate to the criminality …… it would mean fixing a penalty that was artificially reduced …… and it would then stand as a sentence in the records of the court for parity purposes and all sorts of things."

[85] The appellant in this matter was arrested on 30 January 1997 for the offence committed by him on 27 January 1997. He has been in custody since 30 January 1997. The offence for which he was convicted and sentenced in the Court of Summary Jurisdiction on 19 February was not a prior conviction for the purpose of sentencing for the offence committed on 27 January 1997.

[86] His Honour was entitled to backdate the sentence of seven years imprisonment with a non parole period of 5 years to 30 January 1997. His Honour did not need to concern himself with the order to serve the unexpired term of the sentence imposed by the Court on 3 December 1993 as that order had already been made by the magistrate on 19 February 1997.

[87] By backdating the sentence of seven years imprisonment to 30 January 1997, that would automatically be concurrent with the 12 month sentence

imposed by the magistrate on 19 February 1997 and would address the principle of totality that his Honour was obviously struggling to achieve.

[88] The offence committed by the appellant for which he was sentenced on 14 August 1997, was extremely serious. His Honour with respect took into account all the relevant factors including the appellant's prior record of convictions. He imposed a sentence of seven years imprisonment with a non parole period of five years. I accept these should be taken into account as testimony to efforts he is making to rehabilitate himself. However, even taking these certificates into account I have come to the conclusion the sentence itself was correct and I would not re-sentence the appellant for this offence.

[89] There was a demonstrated error in the way in which his Honour perceived that the sentences were to be served and the final order that his Honour made. The consequence of his Honour's order did not give account to the principles of totality. For this reason I would allow the appeal and vary the sentence imposed by his Honour as follows:

1. For the offence committed on 27 January 1997 I would affirm the conviction and the sentence of seven years imprisonment with a non parole period of 5 years.

2. This sentence is back-dated to commence on 30 January 1997.

[90] The effect of such an order would be as follows:

1. The appellant will serve the sentence of seven years imprisonment concurrent with 12 months sentence of imprisonment with a non parole period of eight months imposed in the Court of Summary Jurisdiction on 19 February 1997.

2. The appellant will be eligible for consideration for parole five years from 30 January 1997 which is 30 January 2002.

3. The appellant will then be eligible for consideration for parole during the following periods of imprisonment he has been ordered to serve:

    - two years being the balance of the term of imprisonment imposed by the Supreme Court on 14 August 1997.

    - the unexpired portion of the sentence imposed on 3 December 1993 in accordance with the order of the Court of Summary Jurisdiction on 19 February 1997 less remissions.

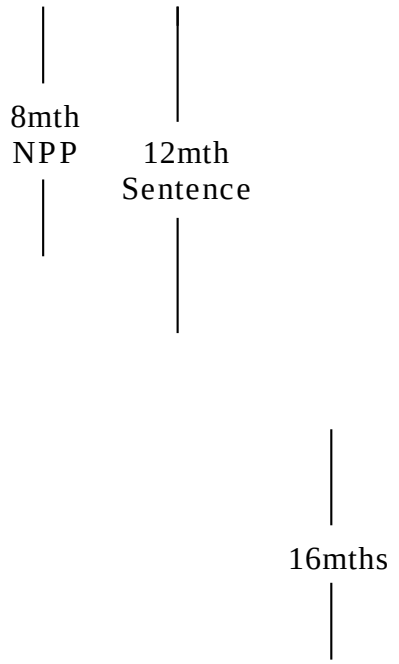
    - four months being the balance of 12 months imprisonment imposed by the Court of Summary Jurisdiction on 19 February 1997.

[91] I would allow the appeal. Because I am in the minority as to the sentence the appellant should serve, the orders of the Court and the sentence to be served will be in accordance with the orders of Mildren and Riley JJ.

———————————————————

**TABLE A – SENTENCES IMPOSED BY CSJ**

| **Date** | **Comment** |
|---|---|
| 19/2/97 | Sentenced to l year by CSJ 8 mth NPP fixed<br>Ordered to serve balance of 5 yr sentence |
| 19/10/97 | Expiry date of 8mth NPP |
| 19/2/98 | Expiry date of 1 year sentence |
| 20/2/98 | Commencement date of balance of 5 year sentence |
| 20/6/99 | Expiry date of balance of 5 year sentence (less remissions) |
| 20/2/2001 | Expiry date of balance of 5 year sentence if remissions are revoked. |



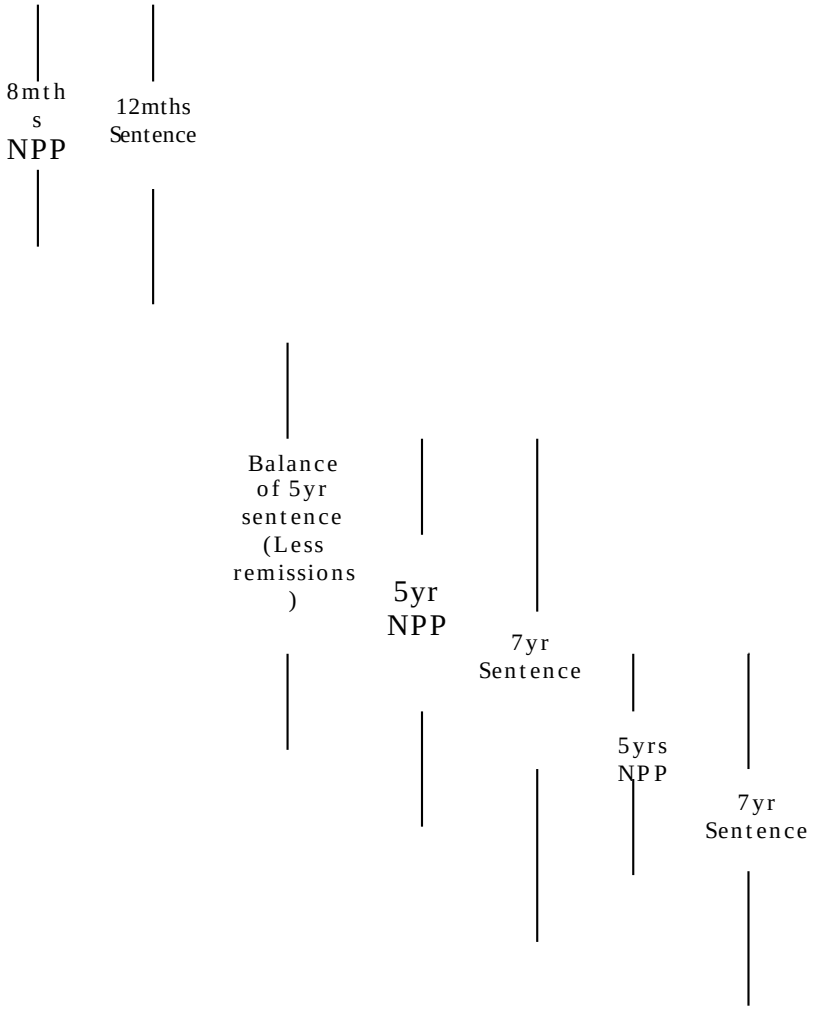

Note: Remissions of 1/3 are due on the 5 year sentence, notwithstanding the abolition of remissions by the Prisons (Correctional Services) Amendment Act (no 2) 1994. The 16 months calculation is arrived at as follows:

| | |
|---|---|
| 5 yr sentence | 60 months |
| less 1/3 | 20 months |
| Balance | 40 months |
| Less 2 yr's served | 24 months |
| Balance | 16 months |

**TABLE B – SENTENCES IMPOSED BY MARTIN CJ AND BY CSJ**

(Martin CJ's sentences appear in italics)

| DATE | COMMENT |
|---|---|
| 19/2/97 | Sentenced to l year by CSJ. 8mth NPP fixed. Ordered to serve balance of 5 yr sentence |
| 14/8/97 | Date of sentencing by Martin CJ |
| 19/10/97 | Expiry date of 8mth NPP |
| 19/2/98 | Expiry date of 1yr sentence |
| 20/2/98 | Commencement date of balance of 5yr sentence |
| 20/6/98 | ***Commencement date of 7yr sentence and 5yr NPP*** |
| 20/6/99 | Expiry date of 5yr sentence (less remissions) |
| 20/2/2000 | *Alternative Commencement date of 7yr sentence and 5yr NPP** |
| 20/2/2001 | Expiry date of balance of 5yr NPP sentence if remissions are revoked |
| 20/6/2003 | ***Expiry date of 5 yr NPP*** |
| 20/2/2005 | *Alternative expiry date of 5yr NPP** |
| 20/6/2005 | *Expiry date of 7yr sentence* |
| 20/2/2007 | *Alternative expiry date of 7yr sentence* |




* Alternative dates are given on the basis that the remissions earned may be revoked.