PARTIES:	JAMES DUDLEY BISHOP v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA AT DARWIN
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA20 of 1996 (9514047)
DELIVERED:	29 August 1997
HEARING DATES:	18 August 1997
DECISION OF:	MARTIN CJ, KEARNEY J and BAILEY J

CATCHWORDS:

Criminal Law – Sentencing – Application for leave to appeal against sentence – 27 counts – Aggravated robbery most serious – Whether sentence manifestly excessive – Whether Judge's sentencing discretion miscarried – Whether Judge erred in failing to give any (or any sufficient) weight to the applicant's guilty plea – Whether sentence disparate from that imposed upon co-offender – Whether Judge failed to give sufficient regard to the totality of sentence imposed.

Criminal law – Sentencing – Application for leave to appeal granted – Aggregate sentence imposed was manifestly excessive – Failure to have sufficient regard to the totality of overall sentence in light of mitigating factors – Non-parole period imposed by sentencing Judge not manifestly excessive – Where s52 of Sentencing Act is relied upon to impose an aggregate sentence it would be of benefit to the Court if an indication was given of the proportions of the aggregate sentence which are attributed to offences of disparate seriousness and criminality, with an express indication that totality of the sentence was given due consideration.

Cases

Lowe v R (1984) 154 CLR 607; 58 ALJR 414 – Referred
Mill v R (1988) 166 CLR 59 – Followed
R v Bibaoui (1996) 87 A Crim R 527 at 531 – Referred
R v Cranssen (1936) 55 CLR 509 at 519 – Followed
R v Ragget, Douglas and Miller (1990) 50 A Crim R 41 – Followed
R v Serra (Unrep) Northern Territory CCA, CA11/1996 – 24 February 1997 – Referred
Salmon v Chute (1994) 94 NTR 1 at 24 – Followed

Legislation

Crimes Act 1914 (Cth) ss4K(3) and (4)
Sentencing Act 1995 (NT) ss52(2), 54(1)

REPRESENTATION:

Counsel:

Appellant	Mr J Lawrence
Respondent:	Mr R Wild QC and Ms G O'Rourke

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	BAI97024
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BAI97024

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

No.CA20 of 1996
(9514047)

BETWEEN:

JAMES DUDLEY BISHOP
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, KEARNEY J and BAILEY J

REASONS FOR JUDGMENT

(Delivered 29 August 1997)

THE COURT:

Background

On 26 September 1996, the applicant pleaded guilty to the following twenty-seven charges:

(a) one count of aggravated robbery;

(b) twelve counts of aggravated unlawful entry;

(c) ten counts of stealing;

(d) one count of unlawful use of a motor vehicle;

(e) one count of receiving stolen property;

(f) one count of supplying a dangerous drug

(g) one count of criminal damage.

On 30 September 1996, the applicant was sentenced to an aggregate sentence (pursuant to section 52 of the *Sentencing Act*) of imprisonment for twelve years, with a non-parole period of six years, backdated to 23 November 1995 (to take account of the period spent by the applicant in custody after his arrest on the present offences). By notice of 28 October 1996, the applicant sought leave to appeal against this sentence.

Aside from the single count of aggravated robbery (count number 27 on the indictment), it is not necessary to deal with the facts of the applicant's offences in any detail. The twelve counts of aggravated unlawful entry and related ten counts of stealing all follow a similar pattern. The applicant alone or with others engaged in opportunistic unlawful entries of commercial premises, on each occasion with the intent to steal and on ten occasions at night, and then sought to take cash, food, drink and portable items of value. The one count of unlawful use of a motor vehicle and the one count of criminal damage arose in connection with offences of unlawful entry. The count of receiving stolen property concerned the applicant's receipt of a stolen video cassette recorder while that of supplying a dangerous drug related to the applicant's supply of cannabis to another.

While undeniably serious, the first twenty-six counts on the indictment, taken individually or even as a whole, are substantially less serious in terms of criminality than the aggravated robbery. The facts of this offence, taken from the learned sentencing Judge's reasons for sentence, are as follows:

> "Count 27, this is the armed robbery count: during the evening of Sunday 19 November 1995, the prisoner and two other persons, armed themselves with a

.22 bolt-action rifle and a knife, with the intention of committing an armed robbery at the Malak Civic Video Store. The rifle had been obtained some days before.

The prisoner and his accomplices went to the Malak Civic Store at approximately 2300 hours. They kept watch in the park opposite the video store, waiting for customers to leave the premises at the end of the night's trading. Whilst they were waiting the prisoner loaded the rifle. One of the prisoner's accomplices armed himself with a hunting knife, which was about six to eight inches long with a serrated edge on one side and a smoothing cutting edge. The prisoner and his accomplices all wore dark clothing. The prisoner wore gloves.

At about 2340 hours, after satisfying themselves that all customers had left, the prisoner and his accomplices approached the store and donned balaclavas. One of the offenders remained outside the premises and kept watch while the prisoner and one co-offender entered the premises. The prisoner was armed with a rifle; the other co-offender who entered the premises was armed with a knife.

The prisoner and his co-offender walked towards the victim, Allan Michael Greatorex. The prisoner raised the firearm. He pointed it directly towards the victim and said, 'Open up your till'. When the prisoner told the victim to open up the till the victim moved his left hand down near the till button, to open the till. As the victim did this the prisoner moved closer to the counter and lent over to see what the victim was doing. The tip of the barrel of the rifle was close to the victim's chest at this stage.

The prisoner's co-offender was standing nearby armed with a knife. The co-offender said words to the effect 'Hurry up. We don't want to hurt you. We're not joking'. When he said this the co-offender was holding the knife in his right hand near his chest area, pointed at the victim. The victim opened the till.

The prisoner then either said, 'Get out of there', or motioned with the gun because the victim knew the prisoner wanted the victim to go into the foyer area. The victim heard the prisoner say, 'Lay down there'. The victim got down on to his stomach straightaway and did not look up because he was too scared. The victim said that he had his face to the side, towards the window, with his eyes closed and recalls that he thought he was praying. The victim remembered hoping that the offenders would not kill him or hurt him and that he was thinking about his three sons.

The victim then felt something being pressed on the right-hand side of his chest, on his ribs, just under his armpit. The victim believed this to be the barrel of the rifle. As he felt this the victim heard a voice say, 'Don't move'. The victim recalls feeling the sensation of something being pressed into his body for about ten seconds. During this time the victim heard the batwing doors swing and

presumed that the second person with a knife had run around and got the till drawer.

The victim heard the rattle of the till and then the doors swing again. He heard something light being dropped on the carpet which he believed to be coins. The victim then heard one of the offenders say, 'Open up the safe'. The victim got up and walked directly to the office. The prisoner and his co-offender were behind him. The victim walked over to the safe, got his keys out of his pocket, knelt down and unlocked the safe with the key. The safe was both a combination and a lock safe.

Whilst the victim did this nothing was said by the two offenders. When the safe was open one of the offenders said, 'Lie down'. The victim immediately lay down on the floor as instructed, in-between the safe and the desk, facing the back wall of the office. The prisoner then grabbed the victim's wrists one at a time and tied them together behind his back with socks which the prisoner had taken to the crime scene for the purpose of using them to restrain the victim. The prisoner did not tie the victim's wrists tightly. The prisoner then tied the victim's ankles together. They were tied slightly tighter than the victim's wrists.

After the victim had been tied up the prisoner and the co-offender removed bags from the safe. The contents of the safe were two cash tins, three plastic zip-up money bags and a calico cash bag. The prisoner and his co-offenders stole a total of $7354 in cash from the register and safe of the Malak Civic Video Store. The prisoner and his co-offenders also stole two cash tins, three plastic zip-up money bags, a calico cash bag and a black till drawer from the Malak Video Store. Mr Greatorex was in charge of the property at the time it was stolen.

The prisoner and his co-offender left the premises via the main doors. All three offenders decamped the area through the park opposite the store. The prisoner advised the police that he made the rifle safe by clipping it when he left the store. Extensive police inquiries commenced and, as a result of certain information received, police attended room 14 of the old Nightcliff Hotel on 23 November 1995. The prisoner was located at that address. He was arrested and subsequently participated in a record of interview on 23 November 1995 and made full admissions to the offence. The prisoner refused to name his co-offenders and advised the police he had spent all the proceeds of the robbery on himself.

The weapons and clothing worn by the offenders were not discovered and have not been recovered by the police. The prisoner was unable to tell the police where he had dumped the items used in the robbery.

The matter proceeded by way of handup committal on 1 April this year. The victim in this matter, Allan Michael Greatorex, went to see a counsellor twice following the armed robbery on 19 November. He took a few days off work.

> When he first returned to work, he left at 8 pm and he worked up to completing a full shift within ten days of the offence.
>
> He had to leave work early in the evening to begin with, because he found that when he returned to work, he got very nervous late in the evening to the point of his stomach cramping up. The symptoms abated after about ten days, but even now Mr Greatorex is affected by noises late at night when he is on duty on his own."

We add that it is not in dispute that Nelio Serra was the applicant's co-offender who also entered the video store and who was armed with the hunting knife.

The Learned Sentencing Judge's Reasons for Sentence

Before passing sentence, the learned sentencing Judge sought a pre-sentence report and psychological assessment of the applicant. The learned judge noted the applicant's age (twenty at the time of his arrest) and his difficult adolescence. The applicant's mother (an Aboriginal) and his father (a Caucasian) separated when he was an infant and the applicant led an unsettled life with his father and stepmother before becoming a 'street kid' with an alcohol problem at the age of 13. The applicant has a substantial record of convictions for offences of unlawful entries, stealing and petty offences, some eighteen offences in all. He received various non-custodial sentences, but in 1994 eventually was incarcerated for 14 months for breach of suspended sentences and further dishonesty offences.

The learned sentencing Judge noted that the applicant has an overall IQ of 74 "which places him in the well-below-average range for his age group", and while describing this as "of significance" did not further elaborate on the nature of such significance. The learned sentencing Judge accepted that the applicant needed counselling to improve his communication skills, control his anger and deal with the lack

of direction and purpose in his life. He was also in need of treatment for drug and alcohol abuse.

Before passing the aggregate sentence which is the subject of appeal, the learned sentencing Judge reminded himself that the applicant is relatively young and that he should avoid a crushing sentence.

The Grounds of Appeal

The applicant sought leave to appeal upon the grounds that the aggregate sentence (and non-parole period) is manifestly excessive and that the learned sentencing Judge erred in failing to give any (or any sufficient) weight to the applicant's guilty pleas. At the hearing of the appeal, Mr Lawrence, on behalf of the applicant, sought leave to add a further appeal ground based upon alleged disparity with the sentence imposed upon the co-offender, Nelio Serra, in relation to the count of aggravated robbery. Serra, who was convicted after trial, received a sentence of imprisonment for nine years (with a non-parole period of four-and-a-half years) for his part in the aggravated robbery. No objection was taken by Mr Wild QC, who appeared with Ms Austin, for the respondent, to the additional ground of appeal.

Aside from his general submissions that the sentence is manifestly excessive, Mr Lawrence faced an immediate difficulty in relation to the specific grounds of appeal. The learned sentencing Judge did not indicate in his reasons for sentence what weight he had given to the applicant's pleas of guilty, nor did he refer to the nine year sentence (after trial) passed on Serra in relation to the count of aggravated robbery. It is apparent from the transcript that the learned sentencing Judge was made aware of the sentence imposed on Serra and he indicated that he would consider the comments made by the

learned trial Judge who had dealt with Serra. It is right to assume that the learned sentencing Judge did so. Similarly, it must be assumed that he took into account the applicant's pleas of guilty in arriving at the aggregate sentence. However, the absence of express reference to these factors, combined with the imposition of an aggregate sentence pursuant to section 52 of the *Sentencing Act* necessarily makes both the applicant's task in attacking his sentence and this Court's task in evaluating the validity of that attack more difficult.

Mr Lawrence submitted that, having regard to the sentence imposed, it can and must be assumed that the learned sentencing Judge:

(a) failed to give any, or any sufficient, weight to the applicant's pleas of guilty; and/or

(b) failed to have regard or sufficient regard, to the relatively worse criminal history of Serra when compared with the applicant who, unlike Serra, had co-operated with the police, pleaded guilty and demonstrated genuine remorse; and/or

(c) failed to have sufficient regard to the totality of the sentence and its crushing nature given the relative youth of the applicant.

On behalf of the respondent, Mr Wild emphasised the escalating seriousness of the applicant's offending over a substantial period of time (close to one year). He stressed that the applicant's offences commenced within weeks of the applicant's release from prison in November 1994 and that the offences in count nos. 18 to 27 were committed while the applicant was on bail for the offences in count nos. 1 to 17. In Mr Wild's

submission, while the sentence was undoubtedly stern, it was justified having regard to all relevant circumstances and the learned sentencing Judge's decision to fix the minimum non-parole period (i.e. 50% of the total sentence) demonstrated the learned sentencing Judge's recognition of the applicant's relative youth and consequent focus upon rehabilitation.

Conclusions

In order to succeed upon his appeal, the applicant must show that the exercise of the learned sentencing Judge's discretion has miscarried (see *Salmon v Chute* (1994) 94 NTR 1 at p24). It is not, however, a prerequisite that a specific error can be identified (*Raggett, Douglas & Miller* (1990) 50 A Crim R 41). A classic formulation of the basis of the appellate court's revising jurisdiction appears in the judgment of the High Court in *Cranssen* (1936) 55 CLR 509 at p519:

> "…the appeal is from a discretionary act of the court responsible for the sentence. The jurisdiction to revise such a discretion must be exercised in accordance with recognized principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears

unreasonable, or has not been fixed in the due and proper exercise of the court's authority."

Reference has been made above to the difficulty presented in the present appeal because of the use made of section 52 of the *Sentencing Act*, combined with the absence of express reference by the learned trial Judge to the sentence imposed upon the co-offender Serra and to the weight afforded to the applicant's pleas of guilty.

In relation to the applicant's pleas of guilty, it was to the applicant's credit that he made admissions of guilt to the police with respect to all 27 offences, indicated at an early stage that he would be pleading guilty and saved considerable time, expense and inconvenience by not claiming his right to a full committal. On the other hand, his co-operation with the authorities was by no means as full as it could have been and accordingly he cannot claim the mitigation in penalty which would otherwise apply. He refused to identify co-offenders in relation to those offences where he had not acted alone – and in particular he refused to identify Serra and the other co-offender who participated in the aggravated robbery. While Serra was apprehended, prosecuted and convicted, the other co-offender has not been identified or brought to justice.

Mr Lawrence sought to argue that the applicant was entitled to feel a justifiable sense of grievance (see *Lowe v R* (1984) 154 CLR 607) when comparing his sentence with that imposed upon his co-offender, Serra, in relation to the aggravated robbery. Mr Lawrence emphasised that while the applicant's previous record of offences was poor, it compared favourably with

that of Serra, a man of similar young age, who had accumulated more than one hundred convictions for dishonesty offences in addition to miscellaneous other transgressions of the criminal law. However, Mr Lawrence placed even greater weight on the sentence of nine years imprisonment imposed upon Serra after trial as evidence that the applicant's sentence did not give the appearance of justice having been done to the applicant, who had demonstrated his genuine remorse by co-operation with the authorities and pleas of guilty to all counts on the indictment.

Mr Lawrence sought to demonstrate by notional calculations that the learned sentencing Judge must have had in mind a sentence of some seven or even eight years imprisonment for the offence of aggravated robbery, with four or five years imprisonment of the total aggregate sentence being allocated for the offences represented by the remaining 26 counts. In Mr Lawrence's submissions, such figures were beyond the usual range of sentences for the relevant offences, having regard to the mitigating factors and, in particular, the applicant's pleas of guilty evidencing genuine remorse.

In response, Mr Wild for the respondent noted that in dealing with the appeal against his sentence by the applicant's co-offender, in *Serra* (unreported CCA NT CA 11 of 1996, delivered 24 February 1997), the Court of Criminal Appeal suggested that robberies of the present kind (i.e. armed robbers holding up small enterprises at vulnerable times and involving the menacing of a person with a rifle and a knife) "…should normally attract sentences of six to eight years, on a plea of guilty and absent other circumstances of aggravation…". On such an approach, a notional allocation of

seven years imprisonment on count 27 would accord with the guidance provided by this court. In addition, Mr Wild submits that four or even five years imprisonment for the other 26 counts to which the applicant pleaded guilty would not be beyond the limits of a sound exercise of sentencing discretion.

Taken in isolation, there is a good deal of force in the submission of Mr Wild. A sentence of seven years on a guilty plea for the aggravated robbery here would not be manifestly excessive and having regard to all the circumstances of the remaining 26 counts, a sentence of four or even five years after guilty pleas would similarly not be manifestly excessive per se. However, while a strictly arithmetical approach can be used to justify the total sentence of twelve years imprisonment, there is of course a need to consider the overall totality of the sentence in the light of the figure produced by adding together individual sentences, each of which considered individually is justifiable.

In *Mill v The Queen* (1988) 166 CLR 59, in a unanimous judgment of the High Court, their Honours commented generally on the question of totality in the following terms at p62–63:

> "The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed. (1979), pp56-57, as follows (omitting references)):
>
> > 'The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the

> aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['];
> 'when...cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'.'

See also Ruby, *Sentencing*, 3rd ed. (1987), pp38-41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.

The totality principle has been recognized in Australia. In *Reg v Knight* (1981) 26 SASR 573 at p576, the Full Court of the Supreme Court of South Australia (Walters, Zelling and Williams JJ.) said, in a joint judgment:

> 'it seems to us that when regard is had to the totality of the sentences which the applicant is required to undergo, it cannot be said that in all the circumstances of the case, the imposition of a cumulative sentence was incommensurate with the gravity of the whole of his proven criminal conduct or with his due deserts. To use the language of Lord Parker LCJ in *Reg v Faulkner* (1972) 56 Cr App R 594, at p596, 'at the end of the day, as one always must, one looks at the totality and asks whether it was too much'.

See also *Reg v Smith* (1983) 32 SASR 219; *Ryan v The Queen* (1982) 149 CLR 1 at pp21, 22-23."

The learned sentencing Judge imposed an aggregate sentence for the 27 counts on the indictment without indicating the number of years he attributed to particular offences or groups of offences. Against this background, we have had to assess the aggregate sentence and, in particular, its totality on the limited materials available. We have concluded that, while no specific error in

the learned sentencing Judge's reasons can be identified, the aggregate sentence of twelve years imprisonment imposed is manifestly excessive by failing to have sufficient regard to the totality of the overall sentence in the light of the mitigating factors.

Accordingly, we grant the applicant leave to appeal, set aside the aggregate sentence of twelve years imposed and substitute an aggregate sentence of ten years imprisonment (backdated to 23 November 1995).

While we are of the view that a sentence of twelve years imprisonment is manifestly excessive in all the circumstances, it is not so readily apparent that a non-parole period of six years is similarly excessive. It is apparent that the learned sentencing Judge in arriving at his decision to impose the minimum period of parole permitted by section 54(1) of the *Sentencing Act* must have placed a good deal of weight on the applicant's relative youth and the need to promote his rehabilitation. Doubtless the fact that Serra received a similar minimum non-parole period also influenced the learned sentencing Judge's approach. In all the circumstances, we will adopt a similar approach and set aside the non-parole period of six years and substitute one of five years to run from 23 November 1995.

It should, however, be emphasised that adoption of the minimum period of non-parole allowed by section 54(1) of the *Sentencing Act* is not in any sense a precedent for sentencing in future cases of armed robbery or other serious offences. The fixing of an appropriate non-parole period is a matter to be determined in the light of all the particular circumstances of an offence and

an offender. It should not be assumed in any way that the minimum period pursuant to the *Sentencing Act* is to apply in the ordinary course of events.

We would also add that the present appeal highlights the potential difficulties which can arise in reviewing sentences imposed pursuant to section 52 of the *Sentencing Act*.

The power to impose an aggregate sentence of imprisonment provided by that provision is in broad terms. Such a sentence may be imposed where an offender is found guilty of "two or more offences joined in the same information, complaint or indictment". The only express restriction relates to the prohibition in section 52(2) of imposing an aggregate sentence which would include a term of imprisonment for an offence against section 192(3) of the *Criminal Code* (sexual intercourse without consent). Section 52 may be contrasted with the more restrictive provisions of the Commonwealth *Crimes Act* which limit the imposition of an aggregate penalty to two or more "offences against the same provision of a law of the Commonwealth" (see sections 4K(3) and (4) of the *Crimes Act*); see the discussion in *Bibaoui* (1996) 87 A Crim R 527, especially at p531. The Territory's provision for aggregate sentences provides greater flexibility, but as the present appeal demonstrates, carries the potential for difficulties when an appellate court is required to consider an aggregate sentence.

Such difficulties are likely to increase where, as here, an indictment contains a large number of counts which differ markedly in degrees of seriousness and criminality. In such cases a sentencing judge may wish to

consider carefully the wisdom of using the procedure provided by section 52. In the event that section 52 is relied upon to impose an aggregate sentence, it would be of great assistance if an indication was given of the proportions of the aggregate sentence which are attributed to offences of disparate seriousness and criminality, together with an express indication that the totality of the sentence has been given due consideration.