CITATION:	*Fuller v The Queen* [2021] NTCCA 1
PARTIES:	FULLER, John Clifford v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No CA 17 of 2020 (22000363)
DELIVERED:	19 February 2021
HEARING DATE:	19 February 2021
JUDGMENT OF:	Grant CJ, Southwood & Brownhill JJ

REPRESENTATION:

Counsel:

Appellant:	S Cox QC with M Jehne
Respondent	D Dalrymple with N Loudon

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent	Office of the Director of Public Prosecutions

Judgment category classification:	C
Number of pages:	11

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

Fuller v The Queen [2021] NTCCA 1
No CA 17 of 2021 (22000363)

BETWEEN:

JOHN CLIFFORD FULLER
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, SOUTHWOOD & BROWNHILL JJ

EDITED REASONS FOR JUDGMENT

(Delivered *ex tempore* on 19 February 2021)

THE COURT:

[1] On 18 September 2020, the appellant was sentenced to imprisonment for three years and nine months for the crime of aggravated robbery and seven months' imprisonment for the crime of supplying less than a commercial quantity of cannabis. Three months of the seven month sentence was ordered to be served cumulatively with the sentence of three years and nine months, giving a total sentence of four years. The total sentence of imprisonment was backdated to 5 January 2020 to be

suspended on conditions after the appellant had served 18 months in prison.

[2] The appellant has appealed against the sentence imposed on him for the count of aggravated robbery on the following grounds:

(a) the learned sentencing judge did not properly take into account the fact that the appellant gave sworn evidence that he was prepared to identify and give evidence against two co-offenders who had not been charged; and

(b) in all the circumstances of the offence and the appellant, the total effective sentence was manifestly excessive.

The facts of the offending

[3] The facts of the offending are as follows.

[4] Sometime before 5:30 pm on 10 December 2019, the appellant and his co-offenders, CK and DH, formed the common intention to unlawfully enter a residence to take three pounds of cannabis and for the appellant to act as backup to achieve that purpose. TH and the victim, SM, lived at the address. The sentencing judge accepted that initially the appellant did not intend to rob the victim.

[5] On that day, the appellant, CK and DH drove to the victim's home. They arrived at 5:30 pm. TH and SM were both at home at the time. The three offenders entered the property through the front gate and

went around to the back veranda where AH was sitting on a chair. DH asked if SM was at home.

[6] The appellant and CK went into the house. CK searched a bedroom looking for SM and damaged a door in the process. SM heard noise and came out of his room. He saw the appellant and CK in the hallway and formed the impression from CK's appearance and behaviour that he was under the influence of the drug ice.

[7] CK said to SM, "You're a cunt. You fucken stole from me. You're a dog cunt". At this time CK was acting irrationally. He was swinging his arms in a threatening manner. SM was afraid. He went back into his room, closed the door and put his body up against the door in an attempt to stop the two offenders from getting in. CK used bodily force to break the door off its hinges and the appellant and CK forced their way into SM's room. SM grabbed a metal broom handle, which was about a metre long, to try to defend himself. CK again shouted at him, "You fucken dog cunt. You stole from me". SM told CK he did not know what he was talking about.

[8] CK lunged towards SM, who tried to defend himself. SM hit CK with the broom handle three times. The appellant took the broom handle off SM and threw it to the ground. The appellant grabbed SM by his shirt near to his neck and shook him. He said to SM, "Tell me where it is". SM felt obliged to comply with the appellant's request. He

said to the appellant, “It’s over there” and pointed to a bag of cannabis on the floor. The appellant let go of SM and grabbed the bag containing 227 grams of cannabis, which is less than a commercial quantity, and the appellant and CK walked out of the house. CK also took a small amount of cannabis from the table on the back veranda as he was leaving. The appellant received 84 grams of cannabis as payment for his part in the robbery. He supplied that cannabis to other people in the Darwin area. That supply was also in an amount less than a commercial quantity of the drug.

[9] As a result of the appellant’s action, SM suffered pain. During the physical confrontation between the appellant, CK and SM, the TV in SM’s bedroom was damaged. The cost of replacing the door was $500. The victim sought restitution for the damage caused.

The appellant’s subjective circumstances

[10] The appellant was 49 years of age at the time of the offending. He moved from New Zealand to Australia with his parents in 1987.

[11] He had been in meaningful employment. He has worked as a welder on the railways. He has worked with Alcan at Gove and has done bar and security work. He had a problem with the misuse of dangerous drugs for an extended period of time. He had used methamphetamine for ten years prior to this offending. His misuse of substances

resulted in the breakdown of the relationship he had with his partner and two children.

[12] The appellant has a criminal record which extends over 16 pages. Of relevance, he has four prior convictions for property offences, eight prior convictions for assault and one prior conviction for a low-level drug offence. Prior to committing the crimes which are the subject of this appeal, the appellant last committed a property offence on 6 February 2015. He last committed an offence of violence on 26 August 2014. He last committed a drug offence on 20 September 2019. He has also breached a suspended sentence on two occasions.

The objective circumstances

[13] The offending was objectively serious. It involved the following factors.

[14] The appellant was a common purpose party to a plan formed with two others to enter a residential premises against the will of the occupants, if necessary, and use such force as was necessary to take an anticipated three pounds of cannabis from the victim.

[15] The utility and value of the appellant's participation was that he was a large 49-year-old man who was familiar with violence and capable of overcoming resistance. He was paid to be the "muscle".

[16] The appellant intervened to prevail in and complete an assault which had been initiated by the co-offender on the victim, and the appellant continued the application of force until the object of the criminal plan was achieved.

[17] The appellant received 84 grams of cannabis for his participation in the robbery.

[18] The objective seriousness of the offending is qualified by the fact that the victim only suffered pain. He did not suffer any significant harm.

Ground 1 – assistance to authorities

[19] Following an extended period of charge negotiation between counsel for the respondent and counsel for the appellant, the appellant ultimately agreed to cooperate fully with the authorities. He gave sworn evidence to this effect at the hearing of the plea. During his oral evidence he stated he was prepared to give evidence against his co-offenders. The information given to authorities was ultimately established to be valuable. He identified his co-offenders and provided sufficient evidence to assist the authorities.

[20] During the hearing of the appeal this court received a statement which was not before the sentencing judge detailing the extent to which the appellant has now cooperated. It is well recognised that such a level of cooperation entitles an offender to a greater discount than the discount an offender may receive for a simple plea of guilty.

[21] The sentencing judge's approach to the recognition of the appellant's cooperation with the authorities in the sentencing disposition was somewhat unorthodox. However, it is apparent from the sentencing judge's sentencing remarks, and from the exchange with senior counsel who appeared for the appellant on sentence, that the sentencing judge properly took into account the appellant's assistance to authorities – or at least his promise to assist authorities – and discounted his sentence of imprisonment accordingly.

[22] It is apparent from the sentencing judge's remarks that, but for the appellant's cooperation with authorities, a head sentence of six years' imprisonment would have been adopted as a starting point for the crime of aggravated robbery. Instead, the sentencing judge started with a head sentence of five years' imprisonment and reduced that sentence further by a discount of 25 per cent for the appellant's plea of guilty.

[23] As the sentencing judge started with a head sentence of 6 years and in the end sentenced the appellant to 3 years and 9 months' imprisonment, it is apparent that the total discount given to the appellant for his cooperation with authorities and his plea of guilty was in the vicinity of 37.5 per cent. Such a discount is an appropriate discount for the appellant's cooperation with the authorities and his plea of guilty.

[24] Consequently, ground 1 of the appeal should be dismissed.

Ground 2 – manifest excess

[25] In our opinion, the sentence of imprisonment for three years and nine months imposed on the appellant for the crime of aggravated robbery, coming as it did from a starting point of six years' imprisonment, was manifestly excessive. It was plainly unjust. The crime of aggravated robbery was towards the lower end of the range of seriousness of such offences. The assault on the victim was of relatively short duration. The appellant did not strike the victim in any way, and nor did he assault him with a weapon of any kind.

[26] The appellant appears to be at a crossroads. He has pleaded guilty to the offences which are the subject of this appeal and he gave oral evidence that he intended to cooperate fully with the authorities, including by naming his co-offenders. Despite his lengthy criminal history, he was entitled to significant leniency for his cooperation with the authorities. In addition, he has gained insight into the impact his use of dangerous drugs has had on him and he has indicated that he believes he would benefit from undertaking a residential rehabilitation program. The Probation and Parole officer who undertook the appellant's assessment for supervision in the community stated that the appellant displayed a positive motivation to change and he had expressed a willingness to obtain employment.

[27] In our opinion, the appeal should be allowed on ground 2. The sentence for the crime of aggravated robbery should be set aside and the appellant should be resentenced.

Resentence

[28] For the crime of aggravated robbery, the appellant is sentenced to two years and eight months' imprisonment. As a result of the appellant's cooperation with the authorities and his plea of guilty, we have reduced the sentence that we would otherwise have imposed on the appellant by one third, that is, 16 months.

[29] We order that three months of the sentence for the crime of supply of less than a commercial quantity of cannabis should be served cumulatively on the sentence we have now imposed for the crime of aggravated robbery. That gives a total sentence of two years and 11 months' imprisonment. The sentence of imprisonment is backdated to 5 January 2020 and is to be suspended after the appellant has served 18 months in prison.

[30] We fix an operational period of 17 months under s 40(6) of the *Sentencing Act*, which is to commence from the date of the appellant's release. The sentence to imprisonment is to be suspended on the same conditions that the sentencing judge imposed on the appellant, which are as follows:

(a) for the operational period, the appellant is to be under the ongoing supervision of a Probation and Parole Officer. He is to obey all reasonable directions of his Probation and Parole Officer and he must report to the Probation and Parole Officer directly after the order comes into force;

(b) the appellant must tell a Probation and Parole Officer of any change of address or employment within two working days of the change;

(c) the appellant must not leave the Northern Territory, except with the permission of a Probation and Parole Officer;

(d) the appellant will, at the direction of his Probation and Parole Officer, enter into the Mission Australia Residential Rehabilitation Treatment Service program, or any other program assessed as suitable, participate fully in that program and do nothing to cause his early discharge;

(e) the appellant must not purchase, possess or consume alcohol and he must submit to testing as directed by his Probation and Parole Officer or a Police Officer;

(f) the appellant is not to consume any dangerous drug and must submit to testing as directed by his Probation and Parole Officer for detecting the presence of a dangerous drug; and

(g) if called upon to do so by the Office of the Director of Public Prosecutions, the appellant is to give evidence at the trial of CK

and DH in relation to the robbery, in accordance with the evidence he gave at his sentencing hearing on 14 September 2020.

[31] In our opinion, the 18 month period which the appellant is to serve in prison is proportionate to his offending and takes into account his lengthy history of prior offending, which results in a reduction in the extent of leniency which he otherwise may have been accorded. We have also taken into account the matters set out in paragraph [14] of counsel for the appellant's written outline of submissions on the appeal, namely:

(a) on 24 February 2021, the appellant did cooperate with the police and identify his co-offenders;

(b) during the appellant's incarceration, he has been incident-free;

(c) the appellant has been called a "dog" and threatened in prison;

(d) the appellant has now turned 50 years of age;

(e) the appellant has successfully completed the Safe Sober Strong program and has graduated as a quick smart tutor from the Bachelor Institute of Technology. The appellant is one of five tutors at the prison teaching literacy and numeracy; and

(f) the appellant is participating in that teaching under the paid employment program and is being paid for it.

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