Sultan v Guerin & Ors [2016] NTSC 33

PARTIES:	SULTAN, Wayne v GUERIN, Malcolm And: O'NEIL, Wayne And: CASSIDY, Craig And: O'BERG, Gregory
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 14 of 2015 (21524700) JA 15 of 2015 (21527395) JA 16 of 2015 (21532740) JA 17 of 2015 (21534305) JA 18 of 2015 (21527397) JA 19 of 2015 (21535125)
DELIVERED:	29 June 2016
HEARING DATES:	13 June 2016
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	LOCAL COURT

CATCHWORDS:

CRIMINAL LAW – Justices Appeal – appeal against sentence – whether manifestly excessive –identifiable or manifest sentencing error- sentence must be "unreasonably or plainly" unjust – individual sentences not manifestly excessive

CRIMINAL LAW – Justice Appeal – appeal against sentence – whether minimum non-parole period was appropriate in all of the circumstances – unnecessary to decide this issue in the context of an adjusted head sentence

CRIMINAL LAW – Justice Appeal – appeal against sentence – whether learned sentencing Judge erred in not properly applying the principle of totality –principles in *R v Carroll* applied – concurrency should have been ordered for some offences – head sentence disproportionate to gravity of offending – appellant resentenced

CRIMINAL LAW- Justices Appeal – appeal against sentence – sentencing considerations - evidence of mental impairment - issue of procedural fairness - whether open to the learned sentencing Judge to find the evidence insufficient to enliven *R v Verdins* – finding of the learned sentencing Judge reasonably open on the evidence

Criminal Code s 213
Local Court Act s 84, s 87
Sentencing Act s 50, s 52 (1), s 103
Summary Offences Act s 61

Bugmy v The Queen (1990) 169 CLR 525; *Carroll v The Queen* [2011] NTCCA 6; *House v The King* (1936) 55 CLR 499; *Mill v The Queen* (1988) 166 CLR 59, applied

Cranssen v The King (1936) 55 CLR 509; *DPP v Terrick & Ors* (2009) 24 VR 457; *Johnson v The Queen* [2012] NTCCA 14 ; *Namarnyilk v The Queen* [2013] NTCCA 17; *Noakes v The Queen* [2015] NTCCA 7; *R v ADJ* (2005) 153 A Crim R 324; *R v Bernath* [1997] 1 VR 271; *R v Engert* (1995) 84 A Crim R 67; *R v Moyle* (1996) 186 LSJS 462; *R v Tsiaras* [1996] 1 VR 398; *R v Verdins* (2007) 16 VR 269; *R v Zander* [2009] VSCA 10; *Tomlins v The Queen* [2013] NTCCA 18; *Whitehurst v The Queen* [2011] NTCCA 11; referred to

REPRESENTATION:

Counsel:

Appellant:	R Anderson
Respondent:	J O'Brien

Solicitors:

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

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sultan v Guerin & Ors [2016] NTSC 33
Nos: JA 14 of 2015 (21524700), JA 15 of 2015 (21527395), JA 16 of 2015(21532740), JA 17 of 2015 (21534305), JA 18 of 2015 (21527397), and JA 19 of 2015 (21535125)

BETWEEN:

WAYNE SULTAN
Appellant

AND:

MALCOLM GUERIN, WAYNE O'NEILL, CRAIG CASSIDY AND GREGORY MICHAEL O'BERG
Respondents

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 29 June 2016)

Introduction

[1] This is an appeal against sentences imposed by a Judge of the Local Court,[1] on 26 August 2015 following pleas of guilty for numerous offences across six Local Court files. The appellant was sentenced to a total of 24 months imprisonment. A non-parole period of 18 months was set.

[1] The original sentences were passed in the Court of Summary Jurisdiction, now the Local Court: s 84 *Local Court Act*. Judgments and orders made by the Court of Summary Jurisdiction have ongoing effect and become judgments and orders of the Local Court: s 87 *Local Court Act*.

[2] The grounds of appeal are as follows:[2]

1. The total sentence imposed was manifestly excessive.

2. The individual sentences imposed in respect of case file numbers 218524700, 21527397, 21527395, 21532740, 21535125 and 21534305 were manifestly excessive.

3. The learned Magistrate erred in not properly applying the principle of totality.

4. The learned Magistrate erred in failing to give proper weight to the appellant's medical condition.

[3] The highly discretionary nature of the sentencing orders appealed against necessitates a review of the proceedings in the Court below to ascertain whether any of the grounds are made out in the context of well-established principles regarding the restraint to be exercised when reviewing discretionary sentences on appeal.[3] It is presumed there is no error in the sentence. The ground of manifestly excessive cannot be made out unless it is shown that the sentence is "unreasonable or plainly unjust"[4] In relying on this ground it is incumbent upon an appellant to show that the sentence was clearly and obviously and not just arguably excessive.[5]

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[2] Amended Notice of Appeal, 7 April 2016.
[3] *House v The King* (1936) 55 CLR 499 at 504, 507 – 508; *Cranssen v The King* (1936) 55 CLR 509 at 519 – 520.
[4] *R v ADJ* (2005) 153 A Crim R 324 at [51] per Batt JA.
[5] *Whitehurst v The Queen* [2011] NTCCA 11 at [2]; *Noakes v The Queen* [2015] NTCCA 7 at [23].

[4] With respect to Ground 3, as will be discussed further, the Court of Criminal Appeal in *Carroll v The Queen* confirmed and reviewed the principles to be applied with respect to totality.[6] Ground 4 raises similar issues as those raised in a ground alleging manifest excess. The proposition that too much or too little weight was given to a particular sentencing factor is almost always untestable.[7] An appellate court must be especially cautious not to substitute its own opinion for that of the judge in the absence of identifiable or manifest sentencing error.[8]

[5] Applying all appropriate caution to the analysis as required, as will be seen later in these reasons, it is apparent the principle of totality was not applied in a manner consistent with the authorities. This is particularly so in respect of the less significant examples of offending. Further, although I have concluded the individual sentences could not be characterised as excessive, it is not apparent why a non-parole period at 75 per cent of the head sentence was set. In the circumstances of the overall features of the case, the non-parole period is of a very significant order. As was said in *Namarnyilk v The Queen,* even when denunciation, general deterrence and punishment are properly taken into account, as they must when fixing a non-parole period, they ought not to be permitted to dominate the considerations to the exclusion of rehabilitation.[9] In any event, not a great deal turns on that aspect of the appeal. I will be quashing some of the orders for

[6] [2011] NTCCA 6.
[7] *DPP v Terrick*; *DPP v Marks*; *DPP v Stewart* (2009) 24 VR 457 at 459 – 460.
[8] *R v Bernath* [1997] 1 VR 271 at 277 per Calloway J, cited in *Johnson v The Queen* [2012] NTCCA 14 at [25]; *Noakes v The Queen* [2015] NTCCA 7 at [16].
[9] [2013] NTCCA 17 at [53].

accumulation in response to Ground 3, which in turn necessitates the setting of a new non-parole period.

Proceedings before the Local Court

[6] The proceedings overall concern primarily property offending, two breach of bail offences, two counts of driving a motor vehicle unlicensed and one count of possess cannabis. Charges that resulted in fines are not the subject of appeal. While the primary offending is property offending, that characterisation should not obscure the fact that some of the offending is very serious, particularly with respect to a number of the offences committed on 27 May 2015, File 21524700.

File 21524700

[7] The charges the appellant pleaded guilty to on this file were all committed on 27 May 2015. Three of the charges (Counts 2, 3 and 4) were laid on complaint. Those counts were all charges of unlawful entry of a dwelling but without any allegation of intent to steal, rather intent to commit a simple offence was alleged. Counts 1, 5, 6, 7 and 8 were all laid on information and charged stealing a swipe key (Count 1), unlawful entry with intent to steal (Count 5), stealing (Counts 6 and 8) and obtain property by deception (Count 7).

[8] Initially a single aggregate sentence of 15 months imprisonment was passed by the learned sentencing Judge for all offences on that file. During

sentencing remarks, his Honour indicated he had amended the charges on complaint to being on information. It was pointed out by counsel for the appellant after his Honour completed sentencing that the amendment was incorrect. His Honour accepted that was the case.[10] To correct that matter, his Honour instead passed an aggregate sentence of five months with respect to Counts 1, 5, 6, 7 and 8 and a separate aggregate sentence of 15 months with respect to the three charges on complaint (Counts 2, 3 and 4). It was ordered that both sets of aggregate sentences be served concurrently.

[9] Counsel drew his Honour's attention to the fact that the three charges on complaint did not involve an allegation of intent to commit a crime and therefore within the terms of s 213 of the *Criminal Code* the allegation was intent to commit a simple offence. The structure of s 213 of the *Criminal Code* is that unlawful entry with intent to commit a simple offence provides for significantly lesser maximum penalties than for a charge of unlawful entry of a building, a dwelling that is occupied with an intention to commit a crime and stealing.

[10] The agreed facts for Count 1 (stealing) were that a maintenance supervisor at the Doubletree Hotel had placed his hotel swipe card on a nearby table where he had been working. The appellant located the swipe card sometime during that day and formed an intention to use the swipe card to access rooms at the hotel and steal property.

[10] Transcript 26/08/2015 at 3-5.

[11] On the next morning the appellant returned to the Doubletree Hotel and commenced entering rooms or in some instances attempted to enter rooms between 6:15 am and 6:45 am. He approached room 182 (Count 2) and unlocked the door and walked into the room. A female occupant heard the door and called out "hello." The appellant replied "room service, ma'am" and the occupant said "yeah, wrong room". The appellant apologised to the occupant and walked out, closing the door. The appellant again used the swipe card to enter room 233 (Count 3) occupied by another woman who yelled at him "who the fuck are you? What the fuck are you doing?" He turned around and left the room. He approached a number of rooms that could not be opened using the swipe card as the latch on those doors had been attached. Those attempts were not subject of charge and were expressly disregarded by his Honour in assessing the objective gravity of the offending.

[12] At 6:30 am he again used the swipe card and unlocked room 288 occupied by another woman (Count 4). He entered room 288, said he was from room service, was told to leave and he left. He then approached and entered room 102, occupied by a woman. He entered that room and walked to the table near where she was sleeping. He picked up her wallet and turned to leave the room. She woke up and saw him walking out of the room. The appellant stole one brown leather wallet valued at $50, a business card, a credit card, a debit card and a Queensland drivers licence valued at $170.

[13] The appellant then left the hotel and called an associate to be picked up. The associate took him to a petrol station. After obtaining petrol the appellant used the stolen debit card to purchase a $30 Telstra pre-paid card, orange juice, petrol and cigarettes at the store on Gap road. The value of the card stolen from the Doubletree Hotel was $100. The value of the property stolen from the occupant of room 102 was $220. The items stolen using the stole NAB Visa Card came to $109.98. The total value of property stolen was $429.98.

[14] After corrections were made to the initial sentence structure by his Honour, the appellant was sentenced to an aggregate 15 months for the counts on information and 15 months imprisonment for the three counts on complaint, to be served concurrently.

File 21527397

[15] The single charge on this file that was the subject of the appeal,[11] was unlawfully possess property suspected of being stolen, contrary to s 61 of the *Summary Offences Act*. The maximum penalty for this offence is 12 months' imprisonment. The property, the subject of the charge, was various amounts of foreign currency.

[16] The owner of the currency had discovered items had been taken from his travel bag while he was on a trip to Uluru. The items included his Canadian

[11] The appellant was convicted and fined for one count of drive unlicensed on this file, not the subject of appeal.

passport, a laptop, laptop bag, wrist bag, brown leather wallet, credit cards in various currencies, Thai Bhat equal to A$422, US$32 equal to A$32 and Canadian dollars that were valued at A$210. On 7 June 2015, the appellant was found in possession of amounts of US, Canadian and Thai currencies at Lasseter's Casino. He attempted to exchange the foreign currency but was unable to. He did not have permission to have the currency in his possession. He then left the Casino. He was arrested on 10 June 2015. When asked why he was in possession of foreign currency he said "a bloke gave it to me, you know, what it's like you don't ask questions".

[17] On this Count, the appellant was convicted and sentenced to two months' imprisonment, cumulative on file 21524700.

File 21527395

[18] This file involved one count of aggravated unlawful use of a motor vehicle and one drive unlicensed. On 8 June 2015, employees of a car company parked a Nissan Nirvara valued at $30,000 between the company's car wash and car yard with the keys still in the ignition. The appellant approached the car, opened the driver's side door and entered the vehicle. He then drove it and used it as his own for 44 hours. He was seen by an off duty police officer on 10 June 2015. When asked who the car belonged to, the appellant replied "it's my mates, he's coming back soon". The appellant was arrested at 8:25 pm on 10 June. He participated in a formal record of interview. He was not the holder of a drivers licence at that time. After

making admissions he stated “can’t say much but they’re only minor incidents it’s not like I’m hurting anyone”.

[19] For the aggravated unlawful use the appellant was convicted and sentenced to three months cumulative on file 21527397. For the drive unlicensed the appellant was convicted and sentenced to two months imprisonment to be served concurrently with the aggravated unlawful use.

File 21532740

[20] After participating in the record of interview referred to with respect to File 21527395, a Northern Territory Police Officer granted the appellant bail with conditions. The conditions included a night curfew and a condition to present at the front door when requested by police. On 30 June 2015, the appellant did not comply with a bail check. He attended the police station on 3 July 2015 in relation to another matter. For the breach of bail the appellant was convicted and sentenced to one month cumulative on File 21527395. On the same File, the appellant was convicted and fined for the offence of possess cannabis on 3 July 2015. The fine is not the subject of appeal.

File 21534305

[21] This File concerned a further breach of bail charge. The appellant was granted bail by the Alice Springs Local Court on 7 July 2015. A condition of bail was to enter DASA Residential Rehabilitation Programme on 7 July

2015 and not do anything to cause his early discharge. He became aggressive on 9 July 2015 and was discharged from the program. He was arrested on 13 July 2015. He was convicted and sentenced to two months imprisonment cumulative on File 21535125.

File 21535125

[22] This File concerned charges of unlawful entry of a building and stealing. This offending took place on 7 July 2015 at the Desert Rose Inn. The appellant walked into the communal kitchen and stole approximately $2 worth of food from the fridge. The appellant ate the food. The owner requested he leave. The appellant complied and left. He was convicted and sentenced to an aggregate one month imprisonment, cumulative on File 21532740.

Victim Impact Statements

[23] Victim impact statements were provided with respect to one of the victims on File 21524700 and the victim with respect to File 21527397.

[24] The first victim impact statement is from a female occupant whose room had been unlawfully entered. As might be expected, it is foreseeable and totally understandable that she stated the offending scared her. It has made her think about whether she should travel by herself. In relation to the charge of unlawfully possess property, the victim stated the theft negatively affected his time in Australia and caused him a lot of problems. As well as stolen

money and property, he had to go to Sydney to apply for a replacement passport. The appellant of course was not charged or alleged to be implicated in the stealing. While the victim impact statement was relevant, it needs to be seen in the context of the appellant coming into possession of the currency, not being liable for the theft itself.

[25] The appellant has an extremely poor record in terms of previous offending and breaches of orders. The record is typical of an offender with a long term drug dependency issue.

[26] The previous convictions in the Northern Territory are primarily for drug charges and also property offences in 1998, 2002 and 2003. The Northern Territory record indicates he had been subject to modest sentences of imprisonment, including suspended sentences. Recorded also were a number of breaches of suspended sentences and bonds from 2002 to 2003. The 1998 offences were dealt with in the Juvenile Court. His previous convictions in South Australia are far more significant. As his Honour noted, his South Australian record indicated serious previous offending for dishonesty. In 2003, the appellant was sentenced to eight years imprisonment with a non-parole period of three years and six months for an aggravated robbery. His parole was subsequently revoked. In 2008, he received a two month sentence, suspended for unlawful possession of property, stealing and other property offences. In 2009, he received a three and a half year sentence for property offences including unlawful use of a motor vehicle and one count of assault. In 2012 he was sentenced to one

year and eleven months with a non-parole period of one year and one month. For a series of driving offences in 2013, he was sentenced to eight months imprisonment. A warrant was issued in South Australia, and the record indicates is still current for non-compliance with orders.

Submissions Made on Sentence

[27] Counsel told the Local Court the appellant was the third sibling in a family of four. His father was present at Court during the Local Court proceedings, and his mother was working in Darwin. The appellant's parents were described as well-known contributors to the Alice Springs community through their involvement in a number of professional positions over many years.

[28] The appellant was 34 years of age and grew up in Alice Springs. He went to school in Alice Springs, save for some time at Sacred Heart School in Adelaide. He left school towards the end of year eleven and worked at the Aboriginal Arts and Cultural Centre in Todd Street. He worked as a retail officer and also took cultural tours for visitors to Alice Springs. His role was to explain cultural matters relevant to sites of significance and bush tucker. The appellant worked in that employment for one year. He then entered a training program to train as an Aboriginal Liaison Officer at Alice Springs Hospital. He did not complete that training but was employed in paid work as a bricklayer for several months, worked in retail and took a series of positions in the Aboriginal art business. He then moved to

Adelaide working as a caseworker with homeless people providing accommodation and support services.

[29] The appellant's counsel told the Local Court that in 2009 he was diagnosed with medical issues that resulted in him being placed on a disability support benefit. Since 2009 he has been on that benefit. The Court was told the appellant believes he had a diagnosis of bipolar and anxiety, although counsel commented the diagnosis was somewhat unclear. Counsel said he was not in the position to provide medical material to the Court, however it was pointed out that the appellant had been prescribed and was taking Olanzapine at the prison. It was submitted this was medication the Court would be aware was an anti-psychotic.

[30] Counsel told the Court that recently "in the last few weeks" the appellant had gone from extremely agitated when his capacity to provide coherent instructions was seriously compromised to being much calmer and coherent. It was submitted the appellant was an intelligent man whose contribution as a young person had been interrupted by mental illness or mental illness in combination with a very serious drug problem.

[31] The Court was told that since being in custody, the appellant was "detoxified, his body …clean and his mind…certainly much more ordered."[12] He had plans to go back and live with his parents who had confirmed they would not turn him away. It was submitted that with

[12] Transcript 14/08/2015, p 18.

assistance, and given the appellant was highly intelligent, he had the potential to be gainfully employed.

[32] Counsel also said the appellant recognised he needed to free himself from the scourge of drugs. At the time of committing the offences he was using drugs and it was submitted it was clear the appellant was suffering from mental health problems. When the appellant returned to Alice Springs from Adelaide he was able to live at his parents' house, however he did not have much money and had an attitude that he could obtain other people's money. His Counsel also told the Court that when the appellant returned to Alice Springs he was clearly in a state of distress and agitation. Information from his father confirmed that the appellant went to Alice Springs Hospital and was hoping to have a mental health assessment but after waiting several hours he gave up and left. It was submitted this showed the appellant had made an attempt to engage with mental health assistance.

[33] It was pointed out to the Court that he did not threaten or harm anybody in the course of the episode of the offending. Neither did the offending involve spending vast amounts of money or on buying extravagant goods. It was submitted the offending was not as serious as cases involving large amounts of property, making threats or harming people.

[34] Counsel asked the Local Court to apply the totality principle and that the sentence be constructed having regard to the fact that the appellant was 34 and still had an opportunity to rehabilitate.

[35] In the letter to the Court from the appellant, the appellant expressed remorse for his actions "in our community."[13] Amongst other matters he referred to his goals, serious issues and "bipolar symptoms in which I've been diagnosed with. I also have a bad drug habit of methamphetamine, or ice that is of [sic] 16 years old."[14]

[36] Counsel for the prosecution told the Court the appellant was recorded as an intravenous drug user and asked for a strong sentence of imprisonment given the offending took place over a period of time with multiple victims.

[37] His Honour ordered a supervision assessment including alcohol and drug rehabilitation and counselling.

Sentencing Considerations in the Local Court

[38] His Honour noted the pleas of guilty were to a number of offences across multiple Files committed in a fairly short period of time. His Honour discussed the appellant's history of offending set out above in these reasons, in both the Northern Territory and South Australia, the latter being far more serious offending.

[39] His Honour referred to having amended three of the counts, as discussed already, in the context of File 21524700. In terms of the gravity of the offending his Honour described it as "clearly concerning that somebody would be going into a hotel rooms in the early hours of the morning using a

[13] Exhibit D1 in the Local Court
[14] Ibid.

security key. It must have been quite frightening and alarming for those occupants of the room. A number of the occupants were female and it would be quite alarming for a male to suddenly turn up in your room between 6:15 and 6:45 in the morning."[15] Clearly his Honour was entitled to take a grave view of the offending for the reasons he stated.

[40] In relation to the letter written to the Court by the appellant his Honour remarked the appellant makes a lot of reference to himself, and does not express any "real remorse" or empathy for the people who would have been frightened and alarmed by what he was doing. His Honour acknowledged that the appellant did not attempt to use force when challenged and left immediately.

[41] After reviewing the facts his Honour acknowledged the appellant had been in custody since 13 July 2015 and that he was not suitable for supervision by corrections. He noted that the authors of the supervision report were concerned about the recent diagnosis of the appellant being bipolar and what that may involve. It was emphasised the appellant had spent lengthy periods of time in custody and there was nothing to suggest mental health issues until more recent times. He said he did not have a medical report to tell him there was a confirmed diagnosis of bipolar, its duration, whether it had been long-standing or was a more recent onset. In short, that he simply did not know the extent of the condition. He acknowledged the appellant was

[15] Transcript 26/08/2015 at [3].

currently on medication and appeared to be responding well. He did not know if the diagnosis of bipolar would be a long-standing diagnosis.

[42] His Honour concluded that when first viewing all the Files and sentences he came to a total of about three years' imprisonment. Taking account of totality, his age and the fact that the appellant was now on medication for mental health issues that "may help change his ways", his Honour adjusted the sentences to ensure that the sentences were not crushing and to take into account totality across all the Files.[16]

Further Discussion of the Grounds of Appeal

[43] I do not agree that any individual sentence is manifestly excessive. Given the appellant's background of previous offending, nothing less than an appropriate proportionate sentence would be expected with respect to each charge. Certain parts of the offending represent a particularly serious course of conduct, especially the charges on File 21524700. It would be expected that full weight would be given to deterrence, personal and general. It is however, a fair point raised on behalf of the appellant that the sentences for the three counts on complaint, having at first been dealt with as part of the overall aggregate sentence, should not have amounted to a separate 15 month sentence. It was submitted the proper application of s 52 (1) of the *Sentencing Act* had not been adhered to, that required the Court

[16] Transcript 26 August 2015, 4-5.

to have regard to proportionality, totality and concurrency,[17] when setting an aggregate sentence. It was submitted this was evident as his Honour, after correcting the sentence, spoke of the correction as "I've got the same result but in a more convoluted way."[18]

[44] In my view the sentence for the counts on complaint on File 21524700 should be regarded as at the outer limits of what could be considered a proportionate sentence, however, as pointed out by counsel for the respondent the sentence was ordered to be served concurrently. In terms of the total course of conduct relevant to File 21524700 it would not be appropriate to interfere with the sentence on appeal, bearing in mind the discretionary nature of the sentences.

[45] In terms of the possession of stolen property charge (File 21527379), the sentence imposed appears entirely proportionate to the offending, as does the sentence for aggravated unlawful use of a motor vehicle (File 21537395). The sentences of one month and two months for the conditional breaches of bail (Files 21532740 and File 21534305) are stern sentences for conditional breaches but not necessarily excessive in the context of sentencing this particular appellant. Similarly, a sentence of one month for the final, and what must be considered a low level unlawful entry and theft (File 21524700) could not be considered excessive in the circumstances of multiple offending and the appellant's background.

[17] *Tomlins v The* Queen [2013] NTCCA 18.
[18] Transcript 16 August 2016 at 6.

As discussed during the hearing of the appeal, with respect to the total sentence, it is not apparent why a non-parole period amounting to 75 per cent of the total sentence was imposed. It is of course accepted his Honour must have considered 18 months to be the minimum that he considered appropriate for the appellant to serve before being eligible for parole.

[46] I am not to be taken as suggesting the minimum non-parole period would be sufficient in this case, however in setting a non-parole period, the task is to set an appropriate minimum in all of the circumstances.

[47] In *Bugmy v The Queen* it was stated "the practical effect of fixing a minimum term is that thereafter the Parole Board may, but of course need not, grant the prisoner parole." [19] After reviewing relevant decisions, the Court said:

> The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all of the circumstances of his offence."[20]

[48] As will be seen below, although I agree with counsel for the respondent that the medical material was such that it is unsurprising that it may not have been a significant part of the sentencing considerations, his Honour did acknowledge the current treatment may assist the appellant "change his

[19] (1990) 169 CLR 525.
[20] Ibid at 536 quoting *Deakin v The Queen* (1984) 54 ALR 765 at 766.

ways." This is a factor that is relevant to the question of parole that may be considered at a later time by the Parole Board, however, additionally, personal factors are commonly considered when setting the non-parole period, provided it is still a proportionate sentence.[21]

[49] In any event, as I will be dealing with the matter of totality, I will set a new non-parole period in the context of an adjusted head sentence and will not finally determine this question.

[50] Although I do not agree the individual sentences have been demonstrated to be manifestly excessive, the accumulation of almost all of the offences not included in File 21524700, which were committed within a very short period of time, has led to an overall sentence that does not reflect the totality of the appellant's conduct. A number of those offences were matters on complaint and did not add significantly to the overall gravity of the offending episode. Counsel for the respondent pointed out that in his Honour's remarks his Honour indicated he had reduced individual sentences instead of ordering concurrency to have regard to totality. In the application of the principle of totality his Honour also referred to taking account of the appellant's age and that he may be helped through medication. This is not a situation where his Honour lowered individual sentences to below what was appropriate in order to achieve proportionate sentences and in turn serve the principle of totality.

[21] See discussion in Fox and Freiburg, Sentencing, State and Federal Law in Victoria, at 859, particularly quoting Perry J in *R v Moyle* (1996) 186 LSJS 462, 465.

[51] In *Mill v The Queen* it was said lowering individual sentences below what would otherwise be appropriate to reflect the fact that a number of sentences are being imposed is not the preferred method.[22] The orthodox approach to totality is to determine the appropriate sentence for each count, determine the extent to which there should be accumulation and finally the sentencer should "stand back" and consider what is an appropriate overall total effective sentence having regard to the principle of totality. If necessary, the sentencer should then moderate accumulation to ensure the total effective term complies with that principle.[23] That process was not undertaken in this instance.

[52] This was a proper case for the application of the principles explained in *Carroll v The Queen.*[24] The Court of Criminal Appeal confirmed the relevant principles. First, that s 50 of the *Sentencing Act* creates a prima facie rule that terms of imprisonment are to be served concurrently unless the Court "otherwise ordered." There is no fetter on the discretion exercised by the Court in this regard and the prima facie rule can be displaced by a positive decision. Second, it is both impractical and undesirable to attempt to lay down comprehensive principles according to which a sentencing Judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively. The assessment is always a matter of fact and degree. Reasonable minds might differ as to the

[22] (1988) 166 CLR 59 at 63.
[23] *Mill v The Queen* (1988) 166 CLR 39 at 63.
[24] [2011] NTCCA 6.

need for accumulation. Often there will be no clearly correct answer. Third, an offender should not be sentenced simply indiscriminately for each crime he is convicted of but for what can be characterised as his criminal conduct. The sentences for the individual offences and the total sentence imposed must be proportionate to the criminality in each case.[25]

[53] Concurrency may be appropriate because the crimes are closely related. Sound discretionary judgment is required in every case as to whether there should be cumulation or concurrency.[26]

[54] In accordance with the principle of totality, there should have been orders for concurrency in respect of some of the later offences given they were committed in very close proximity with each other and did not add in any significant way to the overall criminality. This needs to be evaluated in the context of certain of the sentences within File 21524700 being set at the outer limits of the exercise of the discretion. The breaches of bail on counts on File 21532740 and 21534305 did not involve any further violation of any person or property. The penalty for other offences committed while on bail is generally aggravated because of the very fact that an offender is on bail. Ordering a cumulative sentence in respect of conditional breaches of bail resulted in an excessive overall sentence. The final unlawful entry and stealing on File 21535125 was not of the same significance as any of the other property offences. It involved the appellant walking into a communal

[25] *Carroll v the Queen* at [42] (footnotes omitted).
[26] Ibid at [44].

kitchen and stealing and eating food to the value of $2. It did not add to the overall criminality of the course of conduct that can readily be seen to be part of a multi-faceted course of conduct.

[55] It was an error in this instance to tot up short sentences for the less significant matters. This has produced a total head sentence disproportionate to the gravity of the offending, particularly the later offending. The graver offending on File 21524700 stands apart from the later examples of rather chaotic offending.

[56] No formal medical report was tendered or sought in the Local Court. As already summarised, counsel however made submissions from the bar table that were not contested. The section 103 report from Correctional Services confirmed that while in Alice Springs Correctional Centre, the appellant had been psychiatrically assessed and a diagnosis of bipolar disorder had been recorded. His Honour referred to the appellant commencing on medication, consistent with that report.

[57] The authorities indicate it is important for sentencing purposes that there be evidence about the "nature, extent and effect of the mental impairment experienced by the offender at the relevant time."[27] The ground of appeal relevant to the weight given to the mental health status (Ground 4) moved in oral argument into a ground more akin to an alleged breach of procedural fairness. On appeal, when pressed, counsel for the appellant indicated he

[27] *Carroll v the Queen* [2011] VSCA 150 at [19] citing *R v Verdins* (2007) 16 VR 269, [8]; *R v Zander* [2009] VSCA 10, [29].

would not be seeking a medical report if the appellant were to be re-sentenced. A previous ground relating to fresh evidence was abandoned. Although successful treatment may have had some relevance for the appellant's rehabilitation, it was open to his Honour to find the material insufficient to enliven the principles in *R v Verdins,*[28] in any significant way. Whether or not one of the principles in *R v Verdins,* apply in a particular case is a finding of fact that may only be overturned on appeal if it is shown that the finding was not reasonably open on the evidence.[29] It was open to his Honour to decline to find any of the evidence before him established a basis on which to mitigate the sentence in a significant way. His Honour seemed to accept however that treatment may assist the appellant. I would not however uphold this ground.

[58] The appeal will be allowed in part with respect to Ground 3 and the closely related Ground 1 as the resulting overall sentence was manifestly excessive by virtue of accumulation of certain of the counts.

[59] It will be necessary to fix a new non-parole period. General, specific deterrence and punishment are relevant to fixing the non-parole period. These are significant considerations in this case and I would not order the minimum available term. As the appellant is now being treated, I take into account there are improved prospects of rehabilitation than was the case during the course of the offending. His prospects are still however not

[28] *R v Verdins* (2007) 16 VR 269 at [32] applied also *R v Tsiaras* [1996] 1 VR 398 at [400]; *R v Engert* (1995) 84 A Crim R 67.
[29] See discussion in Fox and Freiberg Sentencing, State and Federal Law in Victoria, third edition at 290.

good. It would however be counterproductive to his possible rehabilitation and consequently to the community's interest if an overly lengthy non-parole period were to be fixed. Whether he is to be released on parole is a matter to be assessed by the Parole Board. The Parole Board is best placed to make an assessment in this case. I will fix a new non-parole period in the order of 60- 65 per cent of the head sentence.

[60] As the appeal is allowed in part only, the following orders remain:

File 21524700

Counts 1, 5, 6, 7, 8	Aggregate sentence of 15 months imprisonment commencing 13 July 2015.
Counts 2, 3, and 4	Aggregate sentence of 15 months imprisonment commencing 13 July 2015.

File 21527397

Count 1	Two months imprisonment to be served cumulatively with all other sentences commencing 13 July 2015.

[61] By way of re-sentencing, the orders of full accumulation in respect of the service of the following sentences are quashed and instead are to be served as follows:

File 21527395

Count 1	Three months imprisonment to commence after serving one month imprisonment upon the sentence imposed on offence 1 in case 21527397.
Count 2	Two months imprisonment, concurrent with offence 1 on File 21527395

File 21532740

Count 1	One month imprisonment to be served concurrently with all other sentences commencing 13 July 2015.

File 21535125

Counts 1, 2	Aggregate 1 month imprisonment to be served concurrently with all other sentences commencing 13 July 2015.

File 21534305

Count 1	Two months imprisonment to be served concurrently with all other sentences commencing 13 July 2015.

[62] The total effective term is 19 months imprisonment commencing 13 July 2015. I set a new non-parole period of 12 months.
