*The Queen v Gurruwiwi* [2008] NTCCA 02

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| PARTIES: | THE QUEEN |
| | v |
| | GURRUWIWI, (Yunupingu) Dominic |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CA 10 of 2007 (20613846) |
| DELIVERED: | 28 FEBRUARY 2008 |
| HEARING DATES: | 18 FEBRUARY 2008 |
| JUDGMENT OF: | MARTIN (BR) CJ, ANGEL AND RILEY JJ |
| APPEAL FROM: | SOUTHWOOD J |

**CATCHWORDS:**

APPEAL - CRIMINAL LAW

Appeal against sentence – Sentencing Act and Youth Justice Act – powers of Supreme Court in sentencing a youth – suspending term of imprisonment – setting a non-parole period. Appeal allowed.

*Criminal Code* (NT), s 154(1), s 154(3) and s 154(4) (Repealed);
*Sentencing Act* (NT), s 40, s 40(1), s 40 (6), s 43, s 53 and s 112;
*Youth Justice Act* (NT), s 4, s 5, s 45, s 52, s 82, s 82(1)(a), s 82(1)(b), s 82(2), s 83, s 83(1)(c), s 83(1)(b), s 83(1)(i), s 83(1)(k), s 83(1)(*l*), s 83(1)(m), s 83(2), s 85, s 85(1), s 86, s 87, s 98, s 98(3), s 125, s 127, s 129 and s 143.

*Braun and Ebatarintja v The Queen* (1997) 6 NTLR 94; *The Queen v Lane* (2005) 149 NTR 16, followed.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | R Coates and E Armitage |
| Respondent: | J Tippett QC |

*Solicitors:*

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

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| Judgment category classification: | A |
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*The Queen v Gurruwiwi* [2008] NTCCA 02
No. CA 10 of 2007 (20613846)

BETWEEN:

**THE QUEEN**
Appellant

AND:

**DOMINIC GURRUWIWI (YUNUPINGU)**
Respondent

CORAM: MARTIN (BR) CJ, ANGEL AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 28 February 2008)

**Martin (BR) CJ:**

[1] The facts of this appeal are set out in the judgment of Angel J. I agree that the appeal should be allowed for the purposes of setting aside the suspension of four years of the six year sentence and substituting for suspension a non-parole period of two years. For the following reasons, in my view the learned sentencing Judge did not possess the power to suspend all or part of a sentence exceeding five years.

[2] As the sentencing Judge observed, the primary source of the sentencing powers of the Supreme Court is the Sentencing Act: *Braun and Ebatarintja v The Queen* (1997) 6 NTLR 94 at 100. However, s 82(1)(a) of the Youth

Justice Act provides that if a youth is found guilty before the Supreme Court the Court may, in addition to its powers, exercise the powers of the Youth Justice Court. Speaking generally, therefore, when sentencing a youth, in addition to the powers found in the Sentencing Act, the Supreme Court may call upon the powers of the Youth Justice Court contained in the Youth Justice Act.

[3] In the words of counsel for the appellant, s 83 of the Youth Justice Act is the "workhorse" of the Youth Justice Court. The construction of s 83 is critical to the determination of the issues presented by this appeal. Section 83 is as follows:

> "83. Orders Court may make
>
> (1) If the Court finds a charge proven against a youth it may, whether or not it proceeds to conviction, do one or more of the following:
>
> (a) dismiss the charge for the offence;
>
> (b) discharge the youth without penalty;
>
> (c) adjourn the matter for a period not exceeding 6 months and, if during that period the youth does not commit a further offence, discharge the youth without penalty;
>
> (d) adjourn the matter to a specified date not more than 12 months from the date of the finding of guilt, and grant bail to the youth in accordance with the *Bail Act* –
>
> (i) for the purpose of assessing the youth's capacity and prospects for rehabilitation; or

(ii) for the purpose of allowing the youth to demonstrate that rehabilitation has taken place; or

(iii) for any other purpose the Court considers appropriate in the circumstances;

(e) order the youth to participate in a program approved by the Minister, as specified in the order, and adjourn the matter for that purpose (*see* Division 3);

(f) order that the youth be released on his or her giving such security as the Court considers appropriate that he or she will –

(i) appear before the Court if called on to do so during the period, not exceeding 2 years, specified in the order; and

(ii) be of good behaviour for the period of the order; and

(iii) observe any conditions imposed by the Court (*see* Division 4);

(g) fine the youth not more than the maximum penalty that may be imposed under the relevant law in relation to the offence (*see* Division 5);

(h) make a community work order that the youth participate in an approved project for the number of hours, not exceeding 480 hours, specified in the order (*see* Division 6);

(i) order that the youth serve a term of detention or imprisonment that is suspended wholly or partly (*see* Division 7);

(j) order that the youth serve a term of detention or imprisonment that is suspended on the youth entering into an alternative detention order (*see* Division 8);

(k) order that the youth serve a term of detention or imprisonment that is to be served periodically under a periodic detention order (*see* Division 9);

(*l*) order that the youth serve a term of detention or imprisonment;

(m) make any other order in respect of the youth that another court could make if the youth were an adult convicted of that offence.

(2) If the Court orders that the youth serve a term of detention or imprisonment, the term must not exceed the lesser of –

(a) the maximum period that may be imposed under the relevant law in relation to the offence; or

(b) for a youth who is –

(i) 15 years of age or more – 2 years; or

(ii) less than 15 years of age – 12 months.

(3) The Court must not order the imprisonment of a youth who is less than 15 years of age.

(4) If the Supreme Court remits a case to the Youth Justice Court under section 82(1)(c), the Youth Justice Court must deal with the youth as if the youth had been found guilty of the offence in that Court.

(5) This section does not limit the power of the Supreme Court to impose on a youth a sentence it could otherwise impose on him or her."

[4] Section 83 of the Youth Justice Act identifies a number of orders, including sentencing orders, which may be made if a "court" finds a charge proven against a youth. "Court" is defined in s 5 as meaning the Youth Justice

Court and, "if the context requires," the Supreme Court "exercising its jurisdiction under or pursuant to this Act". Hence the Youth Justice Court, or the Supreme Court exercising its jurisdiction under the Youth Justice Act, may make any of the sentencing orders found in s 83.

[5] Of particular significance in the matter under consideration is the specific power in s 83(1)(*l*) to order that a youth "serve a term of detention or imprisonment" or, pursuant to s 83(1)(i), to order "that the youth serve a term of detention or imprisonment that is suspended wholly or partly". If the Court orders that a youth serve a term of detention or imprisonment, the term must not exceed the lesser of the maximum penalty provided by the relevant law or two years for a youth aged 15 years or more or 12 months for a youth aged less than 15: s 83(2). Section 82(3) directs that a court must not order imprisonment of a youth who is less than 15 years of age.

[6] In sentencing the respondent the sentencing Judge could have exercised the powers contained in s 83 of the Youth Justice Act, but if his Honour had done so he would have been constrained by a maximum period of imprisonment or detention of two years. However, by another route his Honour was not constrained by the maximum of two years.

[7] Section 83(5) of the Youth Justice Act provides that s 83 "does not limit the power of the Supreme Court to impose on a youth a sentence it could otherwise impose on him or her". Section 82(1)(b) provides that if a youth is found guilty before the Supreme Court, the Court may order the youth to

be detained or imprisoned "for a period not exceeding the period of imprisonment for which such an offence would be punishable if committed by an adult". In the case of the respondent, therefore, the Judge was able to exercise the power conferred by s 82(1)(b) to impose a sentence longer than two years. It follows that in sentencing the respondent to six years imprisonment, the Judge could not have been exercising the powers contained in s 83 of the Youth Justice Act. His Honour was either drawing upon the power contained in s 82(1)(b) or, independently of that power, his powers under the Sentencing Act: s 82(1)(a).

[8] It is common ground that the legislative scheme of the Youth Justice Act is designed to provide the Supreme Court with flexibility and a range of powers wider than those contained in the Sentencing Act when dealing with youths. Hence the ability of the Court to draw upon the powers found in both the Sentencing Act and the Youth Justice Act. Care must be exercised, however, in identifying the source of power for a particular sentencing order because the exercise of a particular power might be accompanied by a requirement such as the fixing of a non-parole period under the particular Act providing the source of power. For example, s 53 of the Sentencing Act directs that if a court imposes a sentence of 12 months or longer that is not suspended in whole or in part, the Court "shall", as part of the sentence, fix a non-parole period. Special cases aside, s 54 of the Sentencing Act prescribes a minimum non-parole period of not less than 50% of the period of imprisonment. It appears, therefore, that if in imposing a sentence of

imprisonment the Court resorts to the powers contained in the Sentencing Act, the minimum non-parole period that the Court is able to fix is 50%. In that situation the terms of the Sentencing Act prevent resort to the powers in the Youth Justice Act in respect of the non-parole period.

[9] On the other hand, if in imposing a term of imprisonment the Court exercises the power conferred by s 82(1)(b) of the Youth Justice Act, in fixing a non-parole period the Court would be free to call upon the power contained in s 85 of the Youth Justice Act. In that event, the Court would not be constrained to fix a non-parole period of not less than 50% of the sentence. No such restriction exists in s 85.

[10] As to suspension of a sentence, if the Court imposes sentence by resorting to its powers under the Sentencing Act, the Court is not able to suspend all or part of a sentence of longer than five years. Section 40(1) of the Sentencing Act empowers the Court to suspend a sentence only if the sentence is not more than five years. In the case of the respondent, therefore, no power exists in the Sentencing Act to suspend all or part of the six year sentence.

[11] If it is assumed that in imposing a sentence of six years the Judge was exercising the power contained in s 82(1)(b) of the Youth Justice Act, attention must then be addressed to the source of the power to suspend or partially suspend such a sentence. That power cannot be found in the Sentencing Act. The respondent contended it is found in s 83(1)(i) of the Youth Justice Act.

[12] While the desirability for flexibility in sentencing options lends itself to the interpretation for which the appellant contended, there are a number of difficulties facing this construction. Section 83(1)(*l*) specifically provides for an order that a youth serve a term of detention or imprisonment. There is no subparagraph of s 83(1)(*l*), nor any other provision in the Youth Justice Act that separately states that the Court may suspend "any" or "a" term of detention or imprisonment imposed by the Court. Rather, the only relevant source of power to suspend is found in s 83(1)(i) which provides for a single order, namely, "that the youth serve a term of detention or imprisonment that is suspended wholly or partly". If the Court is exercising the power in s 83(1)(i) to make such a single order, the Court is also bound by the maximum of two years prescribed by s 83(2). In my opinion the proper construction of s 83(1)(i) in the context of the balance of s 83 does not support the view that a sentence longer than two years may be imposed by resorting to the power in s 82(1)(b), leaving the order for suspension to be made under s 83(1)(i).

[13] In addition, s 83(1)(i) specifically connects the order made under that subparagraph to Division 7 which contains s 98:

> "***Division 7 – Suspended sentences***
>
> 98. **Making order to suspend sentence**
>
> (1) This section applies in relation to an order under section 83(1)(i).

(2) The Court may suspend all or part of a sentence of detention or imprisonment on the conditions it considers appropriate.

(3) If the Court suspends all or part of a sentence, it must specify a period, not exceeding 2 years, during which the youth must not commit any further offences.

(4) The period in subsection (3) begins –

(a) if the whole of the sentence is suspended – on the date of the order; and

(b) if part of the sentence is suspended – on the date specified in the order."

[14] Section 98 is not a source of power to suspend a sentence. It provides for the fixing of conditions to accompany suspension of a sentence. Importantly, s 98 applies only to an order made under s 83(1)(i) and has no application to a sentence imposed pursuant to the Sentence Act or through resort to the power contained in s 82(1)(b) of the Youth Justice Act.

[15] Of relevance is the requirement in s 98(3) that if, exercising the power in s 83(1)(i), the Court suspends all or part of a sentence, the Court "must specify a period, not exceeding 2 years, during which the youth must not commit any further offences". This maximum period of two years is directly linked to the maximum period of two years detention or imprisonment that may be imposed pursuant to s 83. In this way, the maximum period of suspension being two years, s 98(3) directs that the Court is unable to fix a period longer than two years during which the youth must not commit any further offences.

[16] If s 83(1)(i) was the source of the power to suspend the sentence of six years imposed upon the respondent after service of two years, by reason of the mandatory direction in s 98(3) the Court would be obliged to specify a period, not exceeding two years, during which the respondent was not to commit any further offences following his release. This restriction to a maximum of two years would apply notwithstanding that the period suspended is four years. Such a result is contrary to the policy identified by the Court of Criminal Appeal in *The Queen v Lane* (2005) 149 NTR 16 that, ordinarily, the period during which the offender must not commit any further offences for the purposes of the suspension of the sentence should not be less than the balance of the sentence suspended. As Riley J pointed out in *Lane*, if the operational period is less than the balance of the sentence suspended, "an offence committed after the expiration of the operational period would not constitute a breach of the suspended sentence and the Court would lose control of the situation in those circumstances" [42].

[17] The Court in *Lane* was concerned with the sentencing of an adult and suspension of a sentence under the Sentencing Act. Nevertheless, the observations apply equally to suspension under the Youth Justice Act.

[18] There is a further matter of relevance. In respect of adult offenders, the Legislature has restricted the power of the Court to suspend all or part of a sentence to sentences of not more than five years: Sentencing Act s 40(1). This restriction is imposed in conjunction with s 40(6) which limits to a maximum of five years the period during which the offender is not to

commit further offences. It would be surprising if the Legislature intended that the Court not be bound by the same limitations when sentencing youths.

[19] In my opinion, notwithstanding the desirable goal of flexibility, it would be straining construction of the various provisions too far to find that the power to suspend all or part of the six year sentence imposed upon the respondent is found in s 83(1)(i). There is no justification for such a strained construction. Significant flexibility with respect to sentencing options remains.

[20] As there is no challenge by either party to the head sentence of six years, I would allow the appeal for the limited purpose of setting aside the order for suspension. I would fix a non-parole period of two years.

**Angel J:**

[21] On 14 August 2007 the respondent, an Aboriginal youth, was convicted of an aggravated dangerous act contrary to the now repealed s 154(1), (3) and (4) Criminal Code NT and sentenced to six years imprisonment. It was ordered that he be released after serving two years. An operational period of four years from the date of his release was fixed for the purposes of s 43 Sentencing Act NT.

[22] On 23 August 2007 the learned sentencing Judge dismissed an application by the appellant pursuant to s 112 Sentencing Act NT to reopen the sentencing proceedings on the basis that the sentence imposed was not according to law.

[23] On 23 August 2007 the learned sentencing Judge of his own initiative reopened the sentencing proceedings pursuant to s 143 Youth Justice Act NT and amended the orders of 14 August 2007. He vacated the operational period of four years and, purportedly pursuant to s 98 Youth Justice Act NT specified a period of two years from the respondent's release from prison during which the respondent was not to commit any further offences.

[24] The appellant appeals as of right against the sentencing orders on two grounds, first, that it was contrary to law in that neither the Sentencing Act NT nor the Youth Justice Act NT empowered the Supreme Court to suspend a head sentence of more than five years imprisonment, and secondly, that the learned sentencing Judge erred in specifying a two year period pursuant to s 98(3) Youth Justice Act NT which expired two years short of the head sentence of six years.

[25] In my opinion, there was no legislative basis for the sentencing orders and the appeal should be allowed.

[26] In seeking to sustain the sentencing orders counsel for the respondent submitted that the learned sentencing Judge was exercising a combination of powers granted to the Supreme Court by the Sentencing Act NT and the Youth Justice Act NT. It was submitted that the Supreme Court was not confined to operating under one or other discreet piece of legislation alone when undertaking the task of sentencing youths. It was submitted the learned sentencing Judge was entitled to select and use any power that is

contained in either piece of legislation to craft a sentence having as its objective, in the case of a youth, the general principles set out in s 4 Youth Justice Act NT. Reference was made to *Braun and Ebatarintja v The Queen* (1997) 6 NTLR 94.

[27] It was submitted that the head sentence of six years was imposed pursuant to the Sentencing Act NT since the maximum period of imprisonment pursuant to the Youth Justice Act NT is two years: s 83(2) Youth Justice Act NT. Because s 40 Sentencing Act NT limits the imposition of periods of suspension of sentences to terms of imprisonment of five years or less and no such limit appears in the Youth Justice Act NT it was submitted the learned sentencing Judge had power to suspend the six year head sentence pursuant to the Youth Justice Act NT. Accordingly, so it was submitted, the Supreme Court had power to impose a head sentence of greater than two years under the Sentencing Act NT and to suspend that sentence if it so chose pursuant to the Youth Justice Act NT. In so doing it was necessarily confined to the maximum period of suspension of two years provided for in s 98(3) Youth Justice Act NT.

[28] These submissions should be rejected.

[29] Contrary to the submissions of the respondent, the question is not whether the Supreme Court was confined to operating either under the Sentencing Act NT or the Youth Justice Act NT but not both. The question rather is whether the learned sentencing Judge had power under the Youth Justice Act

NT partially to suspend a head sentence of more than five years imprisonment imposed upon a youth.

[30] Section 98 Youth Justice Act NT applies to s 83(1)(i) Youth Justice Act NT orders of the Youth Justice Court or the Supreme Court exercising the powers of the Youth Justice Court that a youth serve a term of detention or imprisonment that is wholly or partly suspended. Section 83 Youth Justice Act NT enables the Youth Justice Court or the Supreme Court exercising that court's powers to order a youth to serve a term of detention or imprisonment (s 83(1)(*l*)) or by a single order to serve a term of detention or imprisonment that is wholly or partly suspended (s 83(1)(i)). It does not enable a court to order a term of detention or imprisonment and by separate order wholly or partially suspend that term. Section 98 Youth Justice Act NT supplements s 83(1)(i). It is the latter section which authorises the Youth Justice Court to order a suspended sentence not the former. Section 98 does not authorise the suspension of a sentence passed, for example, under s 83(1)(*l*) Youth Justice Act NT. In particular s 98 does not apply to a sentence of six years imprisonment ordered by the Supreme Court under s 82(1)(b) Youth Justice Act NT or the Sentencing Act NT.

[31] Under s 5 Youth Justice Act NT "Court" means the Juvenile Court established by the repealed Juvenile Justice Act NT which continues in existence as the Youth Justice Court by s 45 Youth Justice Act NT and, if the context requires, the Supreme Court exercising its jurisdiction under or pursuant to the Youth Justice Act NT. Section 82 Youth Justice Act NT

deals with powers of the Supreme Court in sentencing youths. Section 83 Youth Justice Act NT contains the powers of the Youth Justice Court. Under s 83(2) the maximum term of detention or imprisonment which may be imposed is two years in respect of a youth who is fifteen years of age or more. There is no suggestion that the Supreme Court in the present case was thus confined, see s 82(2) Youth Justice Act NT which provides –

> "(2) If the Supreme Court makes an order under subsection (1)(b), it may also make any order in relation to that detention or imprisonment that it could make in relation to a sentence of imprisonment under the Sentencing Act."

[32] The Supreme Court pursuant to s 82(1)(b) Youth Justice Act NT and the Sentencing Act NT is empowered to order that the respondent be detained in a detention centre or imprisoned for a period not exceeding the period of imprisonment for which such an offence would be punishable if committed by an adult, that is, the maximum penalty fixed under the Criminal Code NT, in this case for a breach of s 154(1), (3) and (4) thereof, fourteen years imprisonment.

[33] The position may be summarised as follows:

(a) The Supreme Court, exercising the power of the Youth Justice Court, can pass a sentence of up to two years detention or imprisonment upon a youth of 15 years of age or more via ss 82(1)(a) and 83(1)(*l*) and (2) Youth Justice Act NT.

(b) A sentence of detention or imprisonment in excess of two years can be passed upon a youth by the Supreme Court via s 82(1)(b) Youth Justice Act NT and the Sentencing Act NT: s 82(2) Youth Justice Act NT.

(c) In respect of sentences of two years detention or imprisonment or less the Supreme Court can suspend that sentence partially or wholly via s 40 Sentencing Act NT or make an order under ss 83(1)(i) and 98 Youth Justice Act NT.

(d) Alternatively if the sentence exceeds 12 months detention or imprisonment but is two years or less a non parole period can be fixed under s 53 Sentencing Act NT or s 85 Youth Justice Act NT.

(e) Any sentence of detention or imprisonment of a youth for a period in excess of two years but of five years or less can be suspended via s 40 Sentencing Act NT or a non parole period fixed under that Act: s 82(2) Youth Justice Act NT.

(f) A sentence of detention or imprisonment of a youth for a period in excess of five years can not be suspended under the Sentencing Act NT: s 40. Nor could it be suspended under s 98 Youth Justice Act NT which applies to dispositions under s 83(1)(i) Youth Justice Act NT but not to sentences of detention or imprisonment imposed via ss 82(1)(b) or 83(1)(*l*)Youth Justice Act NT.

(g) Because "Court" in s 85(1) Youth Justice Act NT includes the Supreme Court, the Supreme Court in its discretion can fix a non parole period pursuant to s 85 Youth Justice Act NT with respect to a sentence in excess of five years in lieu of fixing a non parole period under s 53 Sentencing Act NT. The Supreme Court has this discretion in relation to youths whether sentencing under s 82(1)(b) or ss 82(1)(a) and 83(1)(*l*) Youth Justice Act NT. The Supreme Court therefore has power under the Youth Justice Act NT to fix non parole periods of less than the statutory minimum non parole periods fixed by the Sentencing Act NT when sentencing youths.

[34] Neither side challenged the six year head sentence fixed by the learned sentencing Judge as being inappropriate having regard to the circumstances of the offending and the offender.

[35] The circumstances of the offending giving rise to the contested orders were as follows.

[36] The respondent and his co–offender were sixteen years of age at the date of the offending. Their victim was thirty years of age at the time of his death. At 9.30 pm on Monday 27 March 2006 the deceased left the Walkabout Hotel and started to walk home. He walked towards the Arnhem Shopping Centre on Arnhem Road at Nhulunbuy. As he approached the Catholic Church on Matthew Flinders Way he was chased by the respondent and his

co–offender across the road and into a new subdivision situated directly across from the Catholic Church. There they assaulted the victim hitting him with a piece of wood with a nail in the end and a metal concrete screed. The deceased was struck to the head, arms, stomach and legs a number of times by both offenders. The offenders obtained their weapons from the vacant lot where the incident took place. The area was dark. Both offenders were intoxicated. The offenders then left the area. They subsequently told two others that they had been fighting and had "smashed a man".

[37] The deceased was located by workers at the new subdivision on Tuesday 28 March 2006. Following police investigations which were described as extensive, both offenders were arrested on 31 March 2006. Both declined to participate in interviews with police. Forensic examples were obtained and both offenders were released without charge. There was community unrest at the time and police took steps to ensure the safety of the offenders upon their release. Forensic investigations failed to produce any relevant evidence.

[38] On a date in April or May 2006 the mother of the deceased travelled from Lake Evella where she normally resides to Nhulunbuy. There was a lot of talk in the community about who was responsible for the death of her son. The deceased's mother attended Ski Beach Community and learned that the respondent was living there. The deceased's mother arranged to speak to the respondent in front of a number of family members including the respondent's caretakers. The deceased's mother exhorted the respondent to

tell her the truth about her son. He told her that both offenders were responsible for the death of her son. They had a fight with the deceased when they were drunk.

[39] The respondent's admissions were reported to police. On Friday 19 May 2006 both offenders were arrested at Nhulunbuy. Arrangements were made for an interpreter to attend. Formal records of interview were conducted. Both of the offenders again declined to make any comment in relation to the matter. They were charged and bail was refused.

[40] As a result of the assault on the deceased the deceased received four fractured ribs on his right side, a ruptured liver, both lungs were heavily bruised and he received a fractured skull which ran from just above the eye sockets to the centre of the skull, a piece of the skull being dislodged due to the amount of force used. The deceased also sustained severe bruising to his arms and stomach area. The cause of death was multiple blunt force trauma.

[41] The respondent's co–offender was sentenced to six years imprisonment with a non parole period of three years. He was born in Darwin on 3 July 1990. He was raised by his grandmother and her partner. His mother helped on occasions. However she was a heavy drinker during his entire childhood. He attended Nhulunbuy Primary School until he was seven years of age. His family moved to Darwin where he attended Stuart Park Primary School. He was there for one year and then moved to Milner Primary School where he completed his primary schooling. He later attended Yirrkala Community

Education Centre. He has a good understanding of both spoken and written English and is able to communicate effectively in English. He has never been employed. Four of his brothers have died in tragic circumstances including suicide and car accident. He has been deeply affected by this loss. At the time of sentencing he was still coming to terms with their deaths. There have in addition been numerous deaths of other close family members during this time. The co–offender's family has tried to stay strong together during the difficult times. He began misusing alcohol and cannabis. For a short period he experimented with petrol sniffing. It was the co–offender's older brothers and their friends who taught him to drink and smoke. He has an extremely short temper and is known for his bursts of rage and anger. He has a criminal history. He began getting into trouble late in 2005 when he committed relatively minor offences of stealing and property damage. His offending escalated. He had been on supervised orders in the past. He has had difficulty following the direction of his supervisors and in acting appropriately.

[42] The respondent is also an Aboriginal youth. He was born in Darwin on 10 October 1989. He takes his ceremonial business seriously and attends all men's ceremonies in his area where he lives. He was shown his responsibilities in ceremony by his grandfather and he values his traditions. He grew up in the Ski Beach Community. He is the second eldest of five siblings. At four years of age he went to live with his grandmother. The respondent's biological mother resided in the long grass in Darwin for a

long time. Some time during the period 2003 and 2005 the respondent moved to Elcho Island to be with his father and his father's partner. As a result of problems he ran away from Elcho Island when he was fourteen years of age. He went to stay with an uncle at Ski Beach Community. He resided with his uncle until he was arrested on the present offences. He went to school at Yirrkala. He left school at the age of fifteen years. He can speak English well. Like his co–offender he has never been employed. He enjoys hunting and fishing, likes to play football and is a member of a local football team. During 2006 he began using alcohol and cannabis. The respondent's friends all drink and smoke. The use of cannabis and alcohol by young people is widespread in Nhulunbuy. He is a first offender having no prior criminal history.

[43] The appellant submitted that having regard to issues of parity it would be appropriate to reimpose the head sentence of six years but fix a non parole period of two years with respect to the respondent. In the circumstances I agree with that submission.

[44] I would allow the appeal, confirm the head sentence of six years imprisonment backdated to 19 May 2006 to take account of time already spent in detention, set aside the other orders of the learned sentencing Judge and fix a non parole period of two years backdated to 19 May 2006.

**Riley J:**

[45] The issue in this appeal is the application of the sentencing powers of the Supreme Court in light of the provisions of the Sentencing Act (NT) and the Youth Justice Act (NT).

[46] By virtue of the Supreme Court Act, the Supreme Court has general criminal jurisdiction to try offences charged on indictment: *Braun and Ebatarintja v The Queen* (1997) 6 NTLR 94 at 100. Although the law in relation to sentencing is expressed to be consolidated in the Sentencing Act the provisions of the Youth Justice Act also contain relevant provisions.

[47] The Youth Justice Act was introduced to replace the Juvenile Justice Act following a lengthy review of that legislation. The Act recognizes that the sentencing of young offenders requires different approaches from those adopted in relation to adult offenders. It provides for "justice in relation to youths who have committed or are alleged to have committed offences" and establishes the Youth Justice Court as a continuation of the Juvenile Court which existed under the repealed Act. Section 52 of the Youth Justice Act provides, inter alia, that all charges of a summary or indictable nature against a youth who is alleged to have committed an offence shall be dealt with by the Youth Justice Court. The court must hear summarily all charges of a summary or indictable nature unless the offence, if committed by an adult, would be punishable by imprisonment for life. Further, where the offence, if committed by an adult, would require the consent of the defendant to be heard summarily, and the youth does not consent, then the

court must proceed to deal with the matter by way of preliminary examination pursuant to the terms of the Justices Act. Section 57 of the Act permits the Youth Justice Court in an appropriate case to refer a youth to the Supreme Court for sentencing. In those ways matters involving a person under the age of 18 years may come before the Supreme Court.

[48] Section 82 of the Youth Justice Act provides the powers of the Supreme Court in sentencing a youth who is found guilty before that court of an offence. The section provides as follows:

> "82. Powers of Supreme Court in sentencing
>
> (1) If a youth is found guilty before the Supreme Court of an offence, the Supreme Court may do any of the following:
>
> (a) exercise, in addition to its powers, the powers of the Youth Justice Court;
>
> (b) order that the youth be detained in a detention centre or imprisoned for a period not exceeding the period of imprisonment for which such an offence would be punishable if committed by an adult;
>
> (c) remit the case to the Youth Justice Court.
>
> (2) If the Supreme Court makes an order under subsection (1)(b), it may also make any order in relation to that detention or imprisonment that it could make in relation to a sentence of imprisonment under the *Sentencing Act*.
>
> (3) If the Supreme Court finds a youth guilty of murder, the Supreme Court may, despite section 157(2) of the Criminal Code, sentence the youth to life imprisonment or a shorter period of detention or imprisonment as it considers appropriate."

[49] In addition to the sentencing options available to the Supreme Court under the Sentencing Act it has available to it the powers of the Youth Justice Court which are found in Part 6 of the Youth Justice Act. Section 83 of that Act is in the following terms:

> "83. Orders Court may make
>
> (1) If the Court finds a charge proven against a youth it may, whether or not it proceeds to conviction, do one or more of the following:
>
> (a) dismiss the charge for the offence;
>
> (b) discharge the youth without penalty;
>
> (c) adjourn the matter for a period not exceeding 6 months and, if during that period the youth does not commit a further offence, discharge the youth without penalty;
>
> (d) adjourn the matter to a specified date not more than 12 months from the date of the finding of guilt, and grant bail to the youth in accordance with the *Bail Act* –
>
> (i) for the purpose of assessing the youth's capacity and prospects for rehabilitation; or
>
> (ii) for the purpose of allowing the youth to demonstrate that rehabilitation has taken place; or
>
> (iii) for any other purpose the Court considers appropriate in the circumstances;
>
> (e) order the youth to participate in a program approved by the Minister, as specified in the order, and adjourn the matter for that purpose (*see* Division 3);

(f) order that the youth be released on his or her giving such security as the Court considers appropriate that he or she will –

(i) appear before the Court if called on to do so during the period, not exceeding 2 years, specified in the order; and

(ii) be of good behaviour for the period of the order; and

(iii) observe any conditions imposed by the Court (*see* Division 4);

(g) fine the youth not more than the maximum penalty that may be imposed under the relevant law in relation to the offence (*see* Division 5);

(h) make a community work order that the youth participate in an approved project for the number of hours, not exceeding 480 hours, specified in the order (*see* Division 6);

(i) order that the youth serve a term of detention or imprisonment that is suspended wholly or partly (*see* Division 7);

(j) order that the youth serve a term of detention or imprisonment that is suspended on the youth entering into an alternative detention order (*see* Division 8);

(k) order that the youth serve a term of detention or imprisonment that is to be served periodically under a periodic detention order (*see* Division 9);

(l) order that the youth serve a term of detention or imprisonment;

(m) make any other order in respect of the youth that another court could make if the youth were an adult convicted of that offence.

(2) If the Court orders that the youth serve a term of detention or imprisonment, the term must not exceed the lesser of –

(a) the maximum period that may be imposed under the relevant law in relation to the offence; or

(b) for a youth who is –

(i) 15 years of age or more – 2 years; or

(ii) less than 15 years of age – 12 months.

(3) The Court must not order the imprisonment of a youth who is less than 15 years of age.

(4) If the Supreme Court remits a case to the Youth Justice Court under section 82(1)(c), the Youth Justice Court must deal with the youth as if the youth had been found guilty of the offence in that Court.

(5) This section does not limit the power of the Supreme Court to impose on a youth a sentence it could otherwise impose on him or her."

[50] The power vested in the Supreme Court is to exercise the powers vested in the Youth Justice Court under the Youth Justice Act in addition to the powers it has under the Sentencing Act. Whilst the sentencing regimes established by those Acts have many similarities they are different. In contrast to its predecessor the Youth Justice Act now permits a court exercising jurisdiction under that Act to fix a non-parole period (ss 85 to 87), impose an aggregate sentence (s 125), impose cumulative terms of imprisonment (s 127), backdate a sentence of imprisonment (s 129) and correct a sentencing error (s 143). The Youth Justice Act now provides a comprehensive range of sentencing options akin to those found in the Sentencing Act however some differences remain. For example the

sentencing options provided in s 83 of the Youth Justice Act include dispositions not available under the Sentencing Act.

[51] In my view the legislative intention is clear. It is, as the Second Reading Speech of the Attorney General noted, to provide a wide range of sentencing options to ensure maximum flexibility for magistrates and judges allowing them to order the most appropriate sentencing outcome for the young offender in question. That intention is given effect, inter alia, by providing the Supreme Court with the powers of the Youth Justice Court in addition to those available to it under the Sentencing Act. The intention also appears in s 83(1)(m) of the Act which permits the Youth Justice Court to make "any other order in respect of the youth that another court could make if the youth were an adult convicted of that offence". The legislation should be read with the purpose or object underlying the Act in mind. Insofar as the words of the legislation permit, it should be read so as to provide to the courts the maximum flexibility to order the most appropriate sentence for the offender in question. The issue is how, consistent with the terms of the legislation, the two sentencing regimes are to be integrated to achieve that result when a youth comes before the Supreme Court for sentence.

[52] There are four options available to the Supreme Court in proceeding to deal with a youth who comes before it for sentence:

(a) it may remit the case to the Youth Justice Court (s 82(1)(c));

(b) it may proceed exclusively under the regime provided for in the Sentencing Act;

(c) it may proceed under the regime provided for in s 83 read with the remaining provisions of Part 6 of the Youth Justice Act; or

(d) it may proceed under s 82(1)(b) of the Youth Justice Act to order that the youth be detained in a detention centre or imprisoned for a period not exceeding the period of imprisonment for which such an offence would be punishable if committed by an adult. If the court proceeds in this way, the court may also make any order in relation to the detention or imprisonment that it could make under the Sentencing Act and may exercise the powers contained in Part 6 of the Youth Justice Act.

[53] Options (a) and (b) above do not require further discussion in these proceedings. In relation to options (c) and (d), and consistent with the submission of the appellant, it is my view that s 83 of the Act is to be read as a whole. When considered with the later sections of the Act to which it refers, the section provides a comprehensive sentencing regime. Where the Supreme Court elects to exercise the sentencing powers of the Youth Justice Court under s 83 it must do so in a manner consistent with all of the provisions of the section. For the Supreme Court to make an order pursuant to s 83 that a youth serve a term of detention or imprisonment that is wholly or partly suspended (s 83(1)(i)); or that a youth serve a term of detention or imprisonment that is to be served periodically (s 83(1)(k); or

that a youth serve a term of detention or imprisonment (s 83(1)(*l*)); the court must comply with any relevant requirements of the section. In particular such orders can only be made under the section in relation to a sentence which reflects the limiting requirements of s 83(2).

[54] In the present case the respondent youth was to be sentenced for the offence of doing a dangerous act causing death. The sentencing judge determined that a head sentence of imprisonment for six years should be imposed and proceeded to do so. There is no challenge to that sentence. The issue which arose then, and arises now, is whether the judge had power to suspend the sentence or part of it or, alternatively, was required to impose a non-parole period. The order made by his Honour was that the sentence be suspended after the respondent had served two years in prison. The appellant submits that the sentence so imposed was not permitted by law.

[55] In sentencing the respondent to imprisonment for a period of six years the learned judge must have been exercising jurisdiction under s 82(1)(b) of the Youth Justice Act or under the Sentencing Act. Such a sentence could not have been imposed under s 83 of the Youth Justice Act because of the limitations contained in s 83(2). The order suspending the sentence could not have been made under the Sentencing Act. The Sentencing Act did not permit the court to impose a suspended sentence as s 40, which provides the power to suspend sentences of imprisonment under the Act, is expressly limited to apply to terms of imprisonment of not more than five years.

[56] In suspending the sentence after two years the learned judge expressly relied upon s 82(1)(a) of the Youth Justice Act noting that it vested in the Supreme Court the powers of the Youth Justice Court. He observed that s 98 of the Youth Justice Act then permitted the Supreme Court to suspend all or part of a sentence of detention or imprisonment on conditions considered appropriate. In so doing his Honour erred.

[57] It is necessary to consider the terms of s 83(1)(i) and s 98 of the Act. Section 83(1)(i) creates the power to order a youth to serve a term of detention or imprisonment that is suspended wholly or in part. The section then refers to Division 7 which division includes s 98. Section 98 is in the following terms:

> "98. Making order to suspend sentence
>
> (1) This section applies in relation to an order under section 83(1)(i).
>
> (2) The Court may suspend all or part of a sentence of detention or imprisonment on the conditions it considers appropriate.
>
> (3) If the Court suspends all or part of a sentence, it must specify a period, not exceeding 2 years, during which the youth must not commit any further offences.
>
> (4) The period in subsection (3) begins –
>
> (a) if the whole of the sentence is suspended – on the date of the order; and
>
> (b) if part of the sentence is suspended – on the date specified in the order."

[58] By its terms it is clear that s 98 applies only to orders made under s 83(1)(i). It does not itself create the power to impose a suspended sentence - that power is to be found in s 83(1)(i) – but, rather, provides conditions in relation to the making of such an order pursuant to the power granted in s 83(1)(i).

[59] In circumstances where his Honour imposed a head sentence of imprisonment for six years relying on the provisions of the Sentencing Act he was not able to suspend the sentence. Section 40 of the Sentencing Act did not apply because the head sentence imposed exceeded five years. The only other source of power to suspend the sentence, s 83(1)(i) of the Youth Justice Act, did not apply because the sentence exceeded the limits found in s 83(2) of the Act. It follows that his Honour erred in purporting to suspend the sentence imposed upon the respondent in reliance upon s 82(1)(a) and s 98 of the Youth Justice Act.

[60] The appeal must be allowed. It is necessary to re-sentence the respondent. In this regard I adopt, with respect, the observations and orders of Angel J.

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