PARTIES:	MOORE, Daniel AND MATERNA, Robert Bruce
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 47 of 1995
DELIVERED:	Darwin, 13 December 1996
HEARING DATES:	27 March 1996
JUDGMENT OF:	Martin CJ.

CATCHWORDS:

Appeal and New Trial - Appeal - General principles - In general and right of appeal - Justices appeal - Appeal against sentence - Whether manifestly excessive - Unlawful entry, damage to property and stealing offences - Young Aboriginal first offender - Need for information as to prevalence of offending and prevailing range of sentences for like offences by persons with similar antecedents - "prevalent" offending - Importance and impact of consistency in punishment particularly in smaller communities - Considerations governing Justices Appeals - Imposition of a sentence to imprisonment must be justified in all the circumstances of the case after due consideration of other sentencing options.

Lowe v The Queen (1984) CLR 606, referred to.
Mill v The Queen (1988) 166 CLR 59, referred to.
Ronald Walter Morley (1984) 13 A Crim R 432, referred to.
Poyner v R (1986) 66 ALR 264, referred to.
The Queen v Tait and Another (1979) 46 FLR 386, referred to.
Weetra v Beshara (1987) 46 SASR 484, referred to.

REPRESENTATION:

Counsel:

Applicant: Mr Batten
Respondent: Mr Noble

Solicitors:

Applicant: KRALAS
Respondent: DPP

Judgment category classification: B
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IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

No JA47 of 1995

BETWEEN

DANIEL MOORE
Appellant

AND:

ROBERT BRUCE MATERNA
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 13 December 1996)

Appeal against sentence.

The appellant was convicted on his pleas of guilty before Mr Gillies SM, constituting the Court of Summary Jurisdiction sitting at Katherine on 23 November 1995 on the following counts:

1. That on 3 November 1995 at Beswick he

unlawfully entered a dwelling house, namely the residence of Kevin Henda, with intent to commit a crime, namely to steal. For that the maximum penalty is ten years imprisonment.

2. That on the same date and at the same place he stole a carton of VB beer valued at $30, the property of Kevin Henda. For that the maximum penalty is seven years imprisonment.

3. That on the same date and at the same place he unlawfully entered a building, namely the Beswick Social Club, with intent to commit a crime therein, namely to steal. The maximum penalty for that is seven years imprisonment.

4. That on the same day and at the same place he unlawfully damaged property, namely security mesh at the bar enclosure and roof of a toilet, being the property of the Beswick Social Club, to the value of $300 for which the maximum penalty is two years imprisonment.

He was sentenced:

. On count 1, six months imprisonment with

hard labour, but his Worship directed that he be released on giving security by his own recognizance in the sum of $1000 that he be of good behaviour for twelve months.

. On count 2, three months imprisonment to be served concurrently with the sentence on count 1, and suspended on like conditions.

. On count 3, he was ordered to perform 160 hours community service and to pay a Victim's Assistance Levy of $20.

. On count 4, because it was, as his Worship put it, "a separate situation, the unlawful damage was effected as he was trying to enter another part of the Club", he was ordered to perform 56 hours community service, and a Victim's Assistance Levy of $20 was ordered to be paid.

He was granted 28 days to pay the Victim Assistance Levies, totalling $40.

The grounds of appeal are:

1. That the sentence imposed was manifestly

excessive.

2. That his Worship placed "an inordinate emphasis on the principle of general deterrence", particularly in relation to counts 1 and 2.

3. That his Worship failed to take account of the principle of totality.

4. That his Worship erred in holding that the offences constituted by counts 1 and 2 were prevalent offences.

5. That his Worship gave too much weight to specific deterrence as a sentencing consideration.

6. That his Worship, in imposing the terms of imprisonment and making the community service orders, failed to take account of the fact that the offences all comprised a single episode of offending.

The circumstances of the offending, as agreed, were as follows:

At about 8pm on 3 November the appellant climbed through a louvred kitchen window in the residence belonging to Mr Henda, the store manager, at Beswick. Whilst gaining entry he broke two of the louvres. Once inside, he went to the freezer and took a carton of VB beer cans and left through the same window. There was no one at home at the time. The defendant drank the beer over the next couple of hours, and at about 10.30pm went to the Beswick Social Club where he used a star picket to pry the security mesh from the bar enclosure and entered the bar games area. He attempted to gain entry to the bar area, where the main refrigerators were located, by using the star picket to pry security mesh from the roof of the Club toilet. He failed to get inside the bar, and hearing persons approaching, he ran from the Club leaving through the hole he had made in the security mesh. He further tried to enter the bar by climbing on top of the roof of the Club and prying the roof capping up, giving up when it appeared impossible to gain entry from that position. (It was not indicated how long after the first entry into the Club premises the appellant attempted to do so again). The appellant was identified by a local resident and the matter reported to police, whereupon he was apprehended. He made full admissions saying he entered the Club area to get more beer, having consumed that obtained from Mr Henda's house. Without having sought legal advice or acting under any other

disclosed compulsion, he paid Mr Henda the value of the beer, $30.

As to the appellant, when the offences were committed, he was a 19 year old Aboriginal man with no prior convictions. He worked as a baker at Beswick on five mornings a week from first light until about 11am. His counsel told his Worship that he had a bit of a problem with drink, and that his breaking into these premises was to get alcohol. He had been drinking during the course of the afternoon, and wished to continue with his alcoholic intake.

Mr Henda was the bar manager of the Beswick Social Club. The Beswick community, apart from the Club, is a dry community, but Mr Henda has a permit which enables him to have liquor at his home. Counsel for the appellant said, during the course of submissions to his Worship, that he thought it was widely known in Beswick that Mr Henda had liquor at his home, and that the appellant was not the first young man to come to Court charged with breaking into Mr Henda's house. His Worship immediately responded: "So there's an issue of general deterrence here, is there?". Counsel for the appellant agreed, but said there was also an issue of parity of sentencing, referring to three other young men who were dealt with in the same Court about a month earlier for together committing similar offences, including breaking into

Mr Henda's house and attempting to break into the Club. Each were ordered to perform community service; for what number of hours was not disclosed. It was urged upon his Worship that the appellant, being a "solid young member of that Beswick community" was suitable for assessment for community service or to be convicted, but not having any sentence passed then and there. His Worship immediately responded that the offending was too serious for that. Having been asked to note the voluntary payment for the beer and the fact that he had made full admissions and pleaded guilty, his Worship called for a community service report. After receiving the report the hearing was resumed. His Worship said that he was motivated to impose a suspended gaol term on one of the unlawful entry charges because he had heard that Mr Henda's house had been broken into before, "...it seems to be a prevalent offence and something has to be done to show the community that if people continue to break in, gaol can be expected". The other reason for the proposed suspended gaol term was to "bring home to the defendant he can't just break in. It's a pretty wrong thing to do breaking into somebody's house just for the purpose of satisfying a lust for alcohol". His counsel responded that he could not take issue with his Worship on either of those propositions. He did not accept that a sentence to imprisonment was appropriate, but submitted that, given the other matters raised, all of the offences could properly be dealt with by way of a community service

order. His Worship was not dissuaded. In his remarks on sentence his Worship took into account the fact that the appellant had pleaded guilty, that he was a first offender, and said he was entitled to leniency for those reasons. But having said that, he expressed himself to be of the view that a suspended gaol term should be imposed for the unlawful entry into Mr Henda's house:

> "I'm told that his place has been broken into before. Something has to be done to show members of the community that his house is not fair game and if people continue to break in they can expect gaol. In the case of Mr Moore he will not have to serve a gaol term. He should be given one last chance to show that he can stay out of trouble because he's working at the bakery .... He doesn't come before the court as a person who has been in trouble before so he deserves a chance to stay out of gaol."

As to the proposed orders in relation to community service, his Worship said that if he did not complete it within three months, that is, by 23 February 1996, he, his Worship, "expect him to be breached" and enquired of the Correctional Services officer then present as to whether he understood that. The officer replied: "Yes, sir". A person ordered to do community service may be imprisoned for one day for eight hours of such service not completed, up to a maximum of 7 days.

One of the difficulties in this matter is that neither his Worship nor this Court has any information as to

the prevailing range of sentences for offences like these committed at Beswick by people with similar antecedents to the appellant. Such material is available in respect of some other communities inhabited mainly by indigenous Australians. Nor is there any evidence, except as may be gleaned from the case, as to the prevalence of the offending. For some such communities the position is notorious, but that can not be said of Beswick, at least so far as this Court is aware. It is most desirable that this Court give considerable weight to the sentences and sentencing tariffs established in areas where the Court of Summary Jurisdiction sits and deals with such offending on a fairly frequent basis. I would not wish it to be thought that by entertaining this appeal I am demeaning the value of local judicial knowledge. The problem here is that there is nothing in the course of the proceedings in question, nor produced to this Court on appeal, which would indicate that his Worship was working with the benefit of such information. It is an important part of the criminal justice system that so far as possible like offenders be dealt with in a like manner. Cases to do with parity of sentencing between co-offenders demonstrate the desirability of proceeding in that even handed way (*Lowe v The Queen* (1984) 154 CLR 606) but, the principle has wider application as Mason J. said at pp610-611:

> "Just as consistency in punishment ... is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community."

Where different Magistrates attend in various places, constituting the Court of Summary Jurisdiction, it is important that records be established and maintained so that consistency in punishment prevails, so far as it is possible. The question of even handedness probably has a greater impact in smallish communities, such as those in remoter parts of the Northern Territory, because it is likely that the discrepancies will be noted, the like offenders probably know each other and a sense of grievance which might be entertained is not merely a theoretical matter, but one likely to assume real importance. None of this means, of course, that all sentences for all offences under a particular penal provision will be the same. Far from it. But a consistent approach will reflect the relevant material differences from case to case.

I am reminded of the considerations which govern appeals of this type, as to which, see the often quoted passage from the reasons for judgment of Brennan, Deane and

Gallop JJ. in *The Queen v Tait & Anor* (1979) 46 FLR 386 at 388. What must be demonstrated, before this Court will interfere, is that the learned Magistrate acted on a wrong principle, or in misunderstanding, or in wrongly assessing some salient feature of the material before him, or the error may be disclosed by the sentence itself as being obviously (manifestly) excessive.

I consider that his Worship erred in a number of relevant respects. As his Worship's remarks show, he regarded this type of offending as being prevalent. The fact that three other young men had been dealt with for breaking into Mr Henda's house together some time before does not make it so. Undoubtedly the prevalence of a particular offence in a particular locality at the time of the commission of the offence deserves to be considered, and plays part in the sentencing process, particularly, where justified, in emphasising the importance of general deterrence. See the reference to Burt CJ. in *Peterson* (1983) 11 A Crim R 164, and the South Australian case of *Giles v Barnes* [1967] SASR 174, both referred to by the Court of Criminal Appeal of Western Australia in *Ronald Walter Morley* (1984) 13 A Crim R 431 at 437. However, that begs the question because one must first determine whether or not it is accurate to categorise the offending as "prevalent". In its ordinary meaning that word denotes something being widespread or of regular occurrence.

That could not be said of the circumstances disclosed here. If his Worship was rightly concerned that ordering community service was not having the desired general deterrent effect, thinking that past penalties had been too light, the position could be corrected by an upward trend in penalties rather than by an abrupt increase. To my mind, to convict somebody and sentence him or her to gaol, even if the sentence is suspended, is an abrupt increase in penalty beyond imposition of a community service order. Although, as the High Court held in *Poyner v R* (1986) 66 ALR 264, considerations such as that do not state a binding principle, they nevertheless do provide useful guidance. Judges of this Court have taken the opportunity on occasion to give due warning that since past levels of sentence have apparently not had the desired effect, it was proposed to increase the penalties. Suspended gaol sentences may be regarded by some as a soft option in the order of things, but it should be noted that the conviction is followed by the record of a custodial sentence having been imposed, and stands for all time as part of the offender's antecedents. What is more, he may be called upon to serve it. It must be determined that the imposition of a sentence to imprisonment is justified in all of the circumstances of the case, after due consideration of other sentencing options. They are provided by the Parliament as a means of enabling courts to tailor the penalty to fit the crime and achieve the numerous objectives of the sentencing process. (As to

suspended sentences generally see *Weetra v Beshara* (1987) 46 SASR 484).

In the case of a 19 year old Aboriginal man who has had no prior convictions, who has a regular job and who voluntarily makes good the loss he has caused, a sentence of six months imprisonment is manifestly excessive. In addition, when considering the penalty imposed upon apparently like offenders for a like offence the general principle of parity or consistency has been breached. Basing a sentence upon the need for general deterrence in a case such as this, where prevalence in the commission of the offence is not demonstrated is an error. Further, I am of the view that in imposing all of those penalties his Worship infringed what has become known as the "totality principle", as to which see the remarks of the High Court in *Mill v The Queen* (1988) 166 CLR 59 at 62-63.

Before leaving this matter, I should also point out that it is not evident that his Worship had not followed the procedures prescribed under the *Criminal Law (Conditional Release of Offenders) Act* as applying at the time of sentencing in this matter. His Worship indicated that he expected the terms of the orders to be completed, that is, a number of hours of community work performed, by a particular date. I have been unable to find any particular warrant for

that in the then legislation. In any event, in the circumstances of this case, bearing in mind the appellant's commitments to his regular employment, it may be thought that the time for completion of the number of hours ordered was somewhat onerous. He would have been required to work for an average of 18 hours a week, or say three hours a day, and there is nothing before his Worship which would indicate that that was appropriate to the circumstances. As I understand it the direction as to the doing of the work was left to Correctional Services officers who were in a position to evaluate the situation from time to time.

Considering that the appropriate course in this case is to set aside the sentences to imprisonment and substitute orders for community service, I requested the solicitors for the appellant, who worked in Katherine, to seek a report pursuant to the *Sentencing Act* 1995 (NT) from the Director of Correctional Services. It took a little time to obtain. The officer who provided the report certifies that the appellant has been assessed and may be considered to perform such work; that he has agreed to enter into the order, the purpose and effect of the order together with the rights, obligations and "breach penalties" have been carefully and fully explained to him. According to the assessment, the applicant has "stated a full understanding of the Conditions of a Community Service Order and the consequences of breaching such an Order". A

suitable approved work project will be available at the Beswick community where the appellant still resides, and it is said that due to his work commitments he is able to complete 15 hours per week. That assumes no intervening events beyond the control of the appellant which may inhibit his ability to perform that number of hours of work per week, such as illness. I am satisfied as to the matters referred to in s35 of the *Sentencing Act*.

In addition to the matters already referred to, I bear in mind that all of this offending was part of a continuous escapade comprising a series of like incidents with the same objective. A substantial degree of concurrency of penalty would normally be called for and the totality principle must be borne in mind. The *Sentencing Act* does not contemplate an aggregate penalty by way of community service for a number of hours where multiple offences are being considered. Such an aggregate penalty may be imposed in respect of a sentence of imprisonment. Taking all of these factors into account I order that:

1. The several sentences to imprisonment and other penalties, apart from the orders for payment of a Victim Assistance Levy imposed in the Court of Summary Jurisdiction, are quashed.

2. The appellant participate within 30 weeks in an approved project within the meaning of the *Sentencing Act* for 300 hours, being 120 hours on count 1, 30 hours on count 2, 120 hours on count 3 and 30 hours on count 4. The individual number of hours to be served by way of community service order in respect of each offence may seem a little light on, but for reasons already given, it was necessary to tailor the individual penalties such that in total the penalty represented what was fitting in all the circumstances.

3. That the appellant present himself at a place and to a person within the time and by the means as directed by the Director in writing.

There was no argument as to the orders for payment of Victims Assistance Levies.
