PARTIES:	PETER MACKEY
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA4 of 1996
DELIVERED:	13 March 1997
HEARING DATES:	4 March 1997
JUDGMENT OF:	Kearney, Bailey and Priestley JJ

CATCHWORDS:

Criminal Law – Sentencing– Application for leave to appeal against sentence for aggravated robbery – whether sentence was manifestly excessive – Whether error in trial judge's sentencing discretion shown – Whether commission of the offence in circumstances of drug addiction is a mitigating factor – Whether sentence disparate from that imposed upon co-offender.

R v Ellis (1993) 68A Crim R 449 at 460, adopted.
R v Nagy [1992] 1 VR 637, referred to
R v Lowe (1984) 154 CLR 606, applied
VU (NSW Court of Criminal Appeal, 11 November 1993, unreported), referred to.
Pham and Ly (1991) 55 A Crim R 128, referred to.
R v Spicer & Ors (NT Court of Criminal Appeal, 7 April 1994, unreported), referred to.

REPRESENTATION:

Counsel:

Appellant:	Mr D Grace QC
Respondent:	Mr John Adams

Solicitors:

Appellant:	NTLAC
Respondent:	McBride & Stirk

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BAI97001

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

No. CA4 of 1996

BETWEEN:

PETER MACKEY
Appellant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, BAILEY AND PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 13 March 1997)

KEARNEY J: I respectfully concur in the judgment of Bailey J.

BAILEY J:

The application for leave to appeal against sentence

On 28 March 1996 the appellant pleaded guilty to one count of aggravated robbery committed on 12 February 1996 in Alice Springs. The aggravating circumstances were that the robbery was committed in company with another, namely Sean Anthony Young; that at the time the appellant and his co-offender were armed with an offensive weapon

and that immediately before the robbery the offenders caused bodily harm to one Cathy Mackay.

The maximum penalty for the offence is imprisonment for life.

After hearing mitigation on the appellant's behalf, Mildren J sentenced the appellant to seven-and-one-half years imprisonment with a non-parole period of two years and nine months.

The admitted facts which were placed before the learned judge were as follows:

> The accused, who was employed as a food and beverage waiter at the Alice Pacific Resort, completed his shift at 10.30 p.m. on Sunday 11 February 1996. He then went to the home of his co-offender at 14/11 Undoolya Road where they completed a plan they had commenced to formulate during the previous week to go to the Alice Pacific Resort and steal cash from the safe and other places in the reception area. The accused then returned to his residence at 16 Bath Street where he changed from his work clothes into jeans and a T-shirt and black boots. The accused then made a balaclava from an old T-shirt. He then took this balaclava with him to the co-offender's flat at Undoolya Road. There he obtained a pair of white cotton gloves. At this time his co-offender produced four thin lengths of cloth which he had manufactured and a brown knapsack.
>
> About 1.00 a.m. on Monday 12 February 1996, the accused and his co-offender left the flat in Undoolya Road and walked to the Alice Pacific Resort via Sturt Terrace. They had in their possession the brown knapsack, four strips of material, two pairs of cotton gloves and two balaclavas and gloves and attempted to gain entry to the premises through a sliding glass door near the pool area but found this to be locked. They then went to the rear of the building and climbed the fence near the kitchen door, which they knew would be open. At this time the victim was in the kitchen area. The accused and co-offender then waited for the victim to leave the kitchen area. Before entering the kitchen area one of the offenders had armed himself with a piece of concrete which was wrapped in a piece of cotton cloth. They then lay in wait for the victim to return to the kitchen. When the victim returned to the kitchen at about 2.00 a.m. both the accused and the co-offender lunged at her, knocking her to the ground. She was struck with the piece of concrete a number of times to the head in an effort to knock her out. She was then kicked several times to the head. Her hands were then tied with one of the strips of cloth and another used to gag her, and another was used to tie her legs. The victim's keys were then taken from her belt and one of the co-accused went to the reception area whilst the co-offender stood guard over the victim. Cash was removed from the safe and from a

number of adjoining drawers. The accused and the co-offender then placed the money into the brown knapsack and returned to the flat at Undoolya Road where the money was divided up between them. The accused then left the flat and travelled to his home by taxi with his share of the money contained in the brown knapsack.

The accused was later apprehended by police and, following a search of his premises, $2475.00 in notes and coins was recovered. The accused participated in a video and audio taped record of interview during which he made admissions to the offences. During the interview the accused stated that he clearly foresaw that the victim would be injured as a result of the offences committed but still continued with the offences. The accused further stated that he had participated in the offences in order to obtain money to fix his motor car.

As a result of this incident the victim received substantial abrasions and bruising to the head area. She also had ligature marks around her wrists and mouth and has required hospital treatment for her injuries. Neither the accused nor co-offender had any permission to assault the victim or cause her injuries. Nor did they have any permission to remove any money or other property from the premises of the Alice Pacific Resort.

In relation to the injuries received by Mrs Mackay, the learned judge referred in the following terms to a medical report admitted into evidence without objection:

"Her injuries include the matters that are referred in Doctor Yazdani's report, which is P1: 'Contusions on both wrists and bruises and grazes to the scalp. She had a quite swollen left ear and showed features of haematoma of pinna. The right ear also had a small haematoma of pinna.' The remainder of the examination was unremarkable. I am told, however, that she still has even now some residual bruising and swelling to the right eye. She has some pain in the jaw on the right side.

It is proposed that further x-rays will be done to her right eye socket by a craniofacial surgeon to see if there is an existing problem with that eye. She has tinnitus in the right ear or a ringing in the right ear which appears to be permanent. There is a possibility of some hearing loss to the right ear which is to be investigated. There are some residual problems at the top of the spine at the neck level which also have to be investigated. She is receiving ongoing treatment by her general practitioner. She suffers from sleeplessness; concern about turning her back on doorways and loud noises; insecurity when left alone at the premises where she works and she has dermatitis which has probably been brought on by stress, that dermatitis being in the hands."

Leave to appeal against sentence was sought upon the following grounds:

(a) The sentence as a whole is manifestly excessive in all the circumstances of the case of the applicant.
(b) The learned sentencing Judge erred in not giving sufficient weight to the circumstances of mitigation relied on by the applicant including:
    i) the plea of guilty.
    ii) the plea of guilty at a very early stage.
    iii) his co-operation with police.
    iv) his remorse and contrition.
    v) his prospects of rehabilitation.
    vi) that offences of this type are not prevalent in the community.
(c) The learned sentencing Judge erred in giving undue weight to sentencing considerations of retribution and personal and general deterrence.

Subsequently, it was sought to add an additional ground of appeal as follows:

"The overall effective sentence and non-parole period are manifestly disparate from the sentence and non-parole period upon the co-accused Sean Anthony Young thereby giving rise to a substantial miscarriage of justice."

Leave to appeal upon the original grounds and the additional ground was not opposed by Mr J Adams on behalf of the Crown.

In relation to the additional ground of appeal, the appellant's co-offender, Sean Anthony Young, was sentenced by Martin CJ on 30 May 1996 to imprisonment for five years, with a non-parole period of two years.

The approach of the learned sentencing Judge

In his reasons for sentence, Mildren J emphasised the serious nature of the appellant's offence. He noted:

"It was committed on commercial premises at night when it was anticipated that there would be a staff member present. It was committed in company. It was discussed first about a week beforehand; there was planning involved; the planning involved the preparation of the lengths of cloth to tie up the victim. It involved the obtaining and the use of white gloves no doubt to

prevent finger print detection.

> Balaclavas were made and used as disguises; a weapon was used and a serious feature of this case is that actual violence was used on the victim who is still suffering from the aftermath of the attack on her and she appears to have been left with at least one permanent problem, the tinnitus in the ear."

The learned judge went on to consider the personal circumstances of the appellant – a 27-year old male from a dysfunctional family background with a serious addiction to the drug "speed". His Honour found that the motive for the offence was to obtain money to support that addiction. He gave credit to the appellant for his contrition and remorse, evidenced by his immediate confession to the police and his early plea of guilty. His Honour noted that the appellant's prior convictions – largely drug related and not resulting in any custodial sentences – barred him from claiming any leniency as a first offender, but the learned judge expressly declined to treat the appellant's record as an aggravating factor. His Honour accepted that to some degree the appellant's moral culpability in the offence was reduced by reason of the appellant being affected by drugs at the time of its commission.

In arriving at the head sentence of seven-and-one-half years, the learned judge emphasised the violence perpetrated on Mrs Mackay and the planning which had been undertaken before the appellant and the co-accused embarked upon the robbery.

In considering an appropriate non-parole period, Mildren J had regard to the appellant's previous steady work record, previous good standing in the community, his willingness to seek treatment for his drug addiction and what was termed his "guardedly positive" prospects for rehabilitation.

Manifestly excessive?

The original grounds of appeal in substance amount to a submission that the head sentence and non-parole period were manifestly excessive. Mr Grace QC on behalf of the appellant made submissions under a number of distinct headings, but in essence the core of his argument was that Mildren J had given insufficient weight to the mitigation which had been advanced on behalf of the appellant. In Mr Grace's submission the

learned sentencing judge must have adopted too high a starting point in relation to the head sentence and compounded this error by giving no or insufficient weight to some matters of mitigation in arriving at the head sentence.

The particular matters of mitigation to which Mr Grace pointed are the appellant's drug addiction, his prospects for rehabilitation, his plea of guilty, co-operation, remorse and contrition. Further, in Mr Grace's submission, armed robberies are not prevalent in the Alice Springs region and the learned sentencing judge's failure to take this into account led him to give undue weight to the principle of general deterrence.

I hope that counsel will not think me discourteous if I do not address in detail all their submissions. While Mr Grace presented his submissions in an attractive and persuasive manner, an obvious – and in my view – insurmountable difficulty he faced was an inability to identify any matter of mitigation which was not canvassed and considered by Mildren J. In the final analysis, Mr Grace's submission is a complaint **not** that Mildren J failed to take into account any material consideration, acted on a wrong principle or was influenced by irrelevant or extraneous matters – rather it is said that the learned sentencing judge did not give sufficient credit for the various mitigating factors.

I would, with respect, adopt the words of Hunt CJ at CL in *R v Ellis* (1993) 68 A Crim R 449 at 460 as the correct approach of an appellate court in matters of sentence:

> "This Court does not embark upon the task of sentencing the offender afresh and substitute its own view as to what is appropriate for that of the judge at first instance. Nor does it substitute its own view as to what is appropriate simply because it considers that the sentence imposed at first instance is excessive or inadequate. What must be shown is an error on the part of the sentencing judge in the exercise of his or her wide and substantial discretion, or the absence of any legitimate basis for some particular finding of fact which has been made. What must be emphasised is that it is never a sufficient basis for interfering with a sentence that the members of the Court would have imposed a sentence which is different to that which is the subject of the appeal: *Allpass* (unreported, Court of Criminal Appeal, NSW, 5 May 1993) at pp 1-2; *Dodd* (1991) 57 A Crim R 349 at 353. Such an error by the sentencing judge may not always be apparent on the face of his or her remarks on sentence, but the sentence itself may be so manifestly excessive or inadequate as to demonstrate that error must nevertheless have occurred: *Allpass* (at p 2); *Tait and Bartley*

(1979) 46 FLR 386 at 388.

> The restraint shown by this Court is a result of the width of the discretion which is necessarily given to sentencing judges. Sentencing is largely an intuitive process; it does not lend itself to the application of rigid formulas, and the influences of the different factors to be taken into account in each case are infinitely various: *Beaven* (unreported, Court of Criminal Appeal, 22 August 1991) at p 14. The imposition of a sentence is acknowledged to be an inescapably personal decision. Care must be taken not to make the error of assuming that there are readily available rules which have only to be applied in order automatically to produce the "correct" sentence; cases vary infinitely – just as human experience does: *Hayes* (1987) 29 A Crim R 452 at 466. Those views, although expressed in a dissenting judgment in a Crown appeal, are of universal application.
>
> The sentencing judge is nevertheless required to give full weight to the collective wisdom of other sentencing judges in interpreting and carrying into effect the policy of the legislature; that collective wisdom is manifested in the general pattern of sentences currently being passed in cases which can be recognised judicially as relevant to the case in hand: *Oliver* (1980) 7 A Crim R 174 at 177, quoted in *Visconti* [1982] 2 NSWLR 104 at 107.
>
> It is therefore not to the point to say that, merely because one judge has imposed a sentence which is more severe or more lenient than that imposed by another judge (or even by this Court) in similar circumstances, error has been established in relation to one or the other. What must be looked at is whether the particular sentence which is challenged is outside the general pattern of sentencing by the criminal courts (both at first instance and on appeal)."

In the case of armed robberies, this Court has repeatedly emphasised the very serious nature of the offence. In recent years, the Court has also repeatedly warned that armed robbers can expect much heavier sentences than previously – see, for example, *R v Lilliebridge* (unreported, Court of Criminal Appeal (NT), 7 April 1994); *R v Spicer Tartaglia and Fotiades* (unreported, Court of Criminal Appeal (NT), 7 April 1994); *R v Serra* (unreported, Court of Criminal Appeal (NT), 24 February 1997).

The facts of the present case show that the appellant made substantial plans, including the use of actual violence, and preparations for the robbery. The execution of the robbery involved a savage and cowardly attack on a woman unable to defend herself.

She was hit with a piece of concrete and kicked in the head several times when she lay on the ground.

In the present case, and subject to a matter dealt with below, I do not consider it necessary to address in detail all the submissions advanced by Mr Grace on behalf of the appellant. The sentence is within the limits of a sound discretionary judgment having regard to all relevant matters. No error in the learned trial judge's sentencing discretion or in his findings of fact has been established. The learned sentencing judge has not been shown to have acted upon a wrong principle, allowed extraneous or irrelevant matters to affect the result or failed to take into account some material consideration. The sentence imposed cannot be said to be either unreasonable or plainly unjust. In short, the sentence imposed is not manifestly excessive.

In my view, it is quite impossible to say that the sentence of seven-and-a-half years imprisonment with a non-parole period of two years and nine months, having regard to the mitigation advanced on behalf of the appellant, is "manifestly excessive".

On the contrary, I would venture to suggest that the sentence, and in particular the non-parole period, exhibits a large measure of leniency in the hope that the appellant can reform and lead a law abiding life in the future.

Before turning to the additional ground of appeal, for which leave was granted during the hearing of the appeal, I feel bound to comment on one submission advanced on behalf of the appellant.

It was submitted by Mr Grace that the fact that the offence was committed under the influence of drug addiction was a powerful mitigating factor. In Mr Grace's submission, the magnitude of the sentence did not reflect the mitigatory effect of this factor.

Mildren J in his remarks on sentencing the appellant said:

> "I bear in mind that the offence was committed at a time of sleep deprivation due to drug use and at a time when you were addicted to and taking drugs at a heavy level which impeded your moral judgment and promoted the use of violence in this case. This to some degree makes you less morally culpable than if this robbery had been planned by you in full possession of your faculties."

The appellant's willingness to seek professional help with his drug addiction also played a significant role in the learned sentencing judge's consideration of the non-parole period.

Mr Grace relied on *R v Nagy* [1992] 1 VR 637 (Court of Appeal, Victoria), a drug trafficking case, as authority for his submission that Mildren J should have paid greater regard to the appellant's drug problem in sentencing the appellant. In particular, Mr Grace relied on the following passage from the judgment of McGarvie J at p. 640:

> "It was submitted that the learned judge had erred by failing to give any or any sufficient weight to a factor personal to the applicant, namely that he was a heroin addict at all material times. The learned judge said in his reasons for sentence: "The law makes it clear that little regard can be had of the fact that you were addicted to heroin, particularly is that so in your case, where you received not insignificant cash payments, over and above your share of the heroin which you imported."
>
> Mr Coghlan, who appeared for the respondent, told the court that he could not contest that the learned judge had fallen into error in this regard. I consider that this error in the exercise of the sentencing discretion has been established. The law does not preclude a court in sentencing this applicant from regarding it as an important factor that he and his *de facto* wife were heroin addicts and that the crimes were committed with a view to obtaining heroin and money to enable their addiction to be satisfied. Such a factor has been regarded as important in the determination of a person's criminality: *R v Voegeler* (1988) 36 A Crim R 174, at p. 175. The regard that is to be paid to this factor depends on the circumstances but there is no legal restriction on the extent of the allowance which can be made for it in determining a sentence. See generally, Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, pp. 562-3; *R v Krinelos* (unreported, Full Court, 12 July 1985), at pp. 4-5; *R v Sorby* [1986] VR 753, at p. 796; *R v Voegeler* and *R v Perrier (No. 2)* [1991] 1 VR 717, at pp. 720-2."

Mr Grace was not able to cite Northern Territory authorities (or indeed authorities other than from Victoria) which have adopted and applied the approach suggested by McGarvie J. There is, however, a more recent case in the Court of Appeal, Victoria, which has commented upon the approach of McGarvie J. In *R v Bouchard* (1996) 84 A Crim R 499, an armed robbery case, Callaway JA (with whom Winneke P and Hampel AJA agreed) said (at p. 501):

> "It was contended that the applicant could be likened to the offenders in *Voegeler* (1988) 36 A Crim R 174, who had committed armed robberies to fund their heroin habit, but counsel relied with greater emphasis on the well known passage in the judgment of McGarvie J in *Nagy* [1992] 1 VR 637 at 640; (1991) 57 A Crim R 64 at 66-67. That was a case of drug trafficking. It may be conceded that it is a relevant and sometimes very significant factor in sentencing that an offender engaged in trafficking, especially at "street level", in order to gain the wherewithal to satisfy his own craving, rather than as a non-user acting purely for reasons of greed and in callous disregard of the grave harm that offence does to its victims. But it is quite unsafe, in my opinion, to reason from cases concerning narcotics to a case of armed robbery. More pertinent guidance in that regard is to be found in the judgment of Young CJ in *Halewyn* (1984) 12 A Crim R 202 at 203. In that case, when he was apprehended by the police, the applicant revealed, among other things, that he was a heroin addict and said in answer to questions that he committed the armed robbery to support his habit. The learned Chief Justice, in whose judgment Kaye and Beach JJ concurred, referred to the seriousness of the offence and its prevalence in the community and continued:
>
> > 'The offence thus committed was a very serious one which, as I have said, is all too prevalent in this community. It is an offence which the courts are bound to deal with by imposing substantial sentences, and it has been said a number of times in this Court that the fact that an armed robbery is committed to support a drug habit is of little consequence in mitigating the sentence to be imposed.'"

I respectfully agree with the views expressed by Callaway JA. I consider that it is necessary to record my agreement with such views as I would not wish it thought in any way that armed robbers who act under the influence of drugs or who commit the offence to support their addiction will be able to rely on that as a substantial mitigating factor.

Disparity?

The additional ground of appeal, for which leave was granted during the course of the hearing focuses upon the sentence of five years imprisonment (with a non-parole period of two years) imposed upon the appellant's co-offender, Sean Young. As I have noted, this sentence was imposed by Martin CJ on 30 May 1996.

Mr Grace notes that Mildren J found the appellant and Young to be "equally responsible" for the offence. In his submission, the disparity in sentence between the co-offender is manifestly excessive. While Mr Grace accepts that there may be justification for some difference in treatment between the offenders, it should not be of the magnitude reflected in the respective sentences of the appellant and Young.

The applicable principles under the additional ground of appeal are set out in the High Court case of *R v Lowe* (1984) 154 CLR 606. Gibbs CJ at p. 609 held:

> "The true position in my opinion may be briefly stated as follows. It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account. The fact that one co-offender has received a sentence which is more severe than that imposed on a co-offender whose circumstances are comparable would provide no reason in logic for reducing the former sentence, if the only question were whether that sentence, viewed in isolation, was manifestly excessive. However, the Court of Criminal Appeal in Queensland, on an appeal against a sentence, may quash the sentence imposed and substitute another "if it is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed": s 668E of the *Criminal Code* (Q.). The same or similar words appear in the statutes of the other Australian States, and they are wide enough to empower the court in its discretion to reduce a sentence not in itself manifestly excessive in order to avoid a marked disparity with a sentence imposed on a co-offender. It may be said that the very existence of the disparity reveals that an error must have been committed, but I would prefer frankly to acknowledge that the reason why the court interferes in such a case is that it considers that the disparity is such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done. The decision whether

> the existence of a disparity calls for intervention is a matter which lies very much within the discretion of the Court of Criminal Appeal."

In sentencing Young, Martin CJ relied upon what he described as two significant factors to distinguish Young from the appellant. These were, firstly, that Young was 20 at the time of the offence, i.e. seven years younger than the appellant and secondly, that Young had no previous convictions. Martin CJ noted that while the appellant did not have a previous record of violence, Mildren J had not been able to treat him as a first offender.

In addition to these matters, the Chief Justice considered that Young's prospects for rehabilitation were excellent (in contrast to the "guardedly positive prospects" found by Mildren J to exist in this regard for the appellant).

In the light of these distinctions between the appellant and his co-offender, the question is whether the difference in their treatment is such as to give rise to a "justifiable sense of grievance".

In my view, the answer is clearly "no".

Youth and a clear record are matters given very much less weight in the case of armed robbery than other less serious offences (see *VU* CCA (NSW) 11 November 1993, unreported; *Pham and Ly* (1991) 55 A Crim R 128 at 135; *R v Spicer* et al, supra). However, such subjective factors are still of some significance. Here the difference in ages between the offenders is substantial, the co-offender had a clear record and also excellent prospects for rehabilitation. The appellant is a man with a long-standing drug problem which had led to convictions and his prospects for rehabilitation were less sure. Clearly some difference in treatment was to be expected and is justified. In my view the actual difference in treatment is within the acceptable range having regard to the backgrounds and future prospects of the respective offenders. In my view, the appellant can have no justifiable sense of grievance with the difference in sentences imposed upon him and his co-offender.

Accordingly, I would grant leave to appeal but dismiss the appeal and affirm the sentence imposed.

PRIESTLEY J: I agree with the reasons of Bailey J and with the orders he proposes.