CITATION:	*Bianamu v Rigby* [2021] NTCA 4
PARTIES:	BIANAMU, Bronwyn
	v
	RIGBY, Kerry Anne
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 6 of 2020 (21844124)
DELIVERED:	30 September 2021
HEARING DATE:	23 November 2020
JUDGMENT OF:	Southwood, Kelly and Hiley JJ

CATCHWORDS:

CRIME – Appeals – Appeal against judgment of the Supreme Court dismissing appeal against sentence imposed by the Local Court – new ground of appeal – fresh evidence raising disparity for the first time – co-offender sentenced after judgment of the Supreme Court perfected – any disparity justified – Appeal dismissed

JURISDICTION – jurisdiction of the Court of Appeal to decide new ground of appeal – original jurisdiction of the Court of Appeal – jurisdiction found – new ground of appeal considered – Appeal dismissed

EVIDENCE and PROCEDURE – power of Court of Appeal to receive fresh evidence – s 176A of *Local Court (Criminal Procedure) Act 1928* (NT) – s 54 *Supreme Court Act 1979* (NT) – fresh evidence admitted

Criminal Code 1983 (NT), s 186, s 213

Local Court (Criminal Procedure) Act 1928 (NT), s 163, s 176A, s 177
Supreme Court Act 1979 (NT), s 51, s 54, s 55

Mirko Bagaric, Ross on Crime (8th ed. Thomson Reuters)

Allesch v Maunz (2000) 203 CLR 172; *Anderson v R* (1997) 92 A Crim R 348; *Atkinson v R* [2013] NRCCA 5; *Bara v The Queen* [2016] NTCCA 5; *Bianamu v Rigby* [2020] NTSC 43; *Brennan v New South Wales Land and Housing Corporation* [2011] NSWCA 298; *CDJ v VAJ* [1998] HCA 67; 197 CLR 172; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; *Connell v Kelly* [1951-56] NTJ 407; *Dooley v The Queen* [2003] NTCCA 6; *Eastman v The Queen* (2000) 203 CLR 1; *Foody v Horewood* [2007] VSCA 130; *Gallagher v R* (1986) 160 CLR 392; *Green v The Queen* (2011) 244 CLR 462; *Gronow v Gronow* (1979) 144 CLR 513; *House v The King* (1936) 55 CLR 499; *JK v Waldron* (1998) 93 FLR 451; *Kelly v The Queen* (1991) 33 FCR 536; *Leach v The Queen* [2005] NTCCA 18; *Leaney v Bell* (1992) 108 FLR 360; *Lee v McMahon Contractors Pty Ltd* (2018) 335 FLR 350; *Lo Castro v The Queen* [2011] NTCCA 1 *Lowe v The Queen* (1984) 154 CLR 606; *McCarthy v Trenery* [1999] NTSC 29; *Many* (1990) 51 A Crim R 54; *Marshall v Court* [2013] NTSC 75; *Mason v Pryce* (1988) 53 NTR; *McCarthy v Trenery* [1999] NTSC 29; *Mickelberg v The Queen* (1989) 167 CLR 259; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566; *Payne v The Queen* [2007] NTCCA 10; *Postiglione v The Queen* (1997) 189 CLR 295; *Quilter v Mapleson* (1882) 9 QBD 672; *R v Babic* [1998] 2 VR 79; *R v C* [2004] SASC 244; *R v Clark* [2017] QCA 318; *R v Fordham* (1997) 98 A Crim R 359; *R v Mills* [1998] 4 VR 235; *R v WEF* (1998) 2 VR 385; *Smith v R* (1987) 44 SASR 587; *Re Coldham; Ex parte Brideson* (1990) 170 CLR 267 *The Queen v MacGowan* [1986] 42 SASR 580; *The Queen v Nguyen* [2006] VSCA 184; *Tilbury v The Queen* [2015] NTCCA 4; *Tiver Constructions Pty Ltd v Clair* (1992) 110 CLR 339; *Sears v McNulty* (1987) 89 FLR 154; *Veness v The Queen* [2020] NTCCA 13; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *Warren v Coombs* (1979) 142 CLR 531; *Wilson v Lowery* (1993) 4 NTLR 79, referred to.

REPRESENTATION:

Counsel:

Appellant:	M Thomas with K Roussos
Respondent:	M Nathan SC with D Castor

Solicitors:

Appellant:	Darwin Family Law
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Bianamu v Rigby [2021] NTCA 4
No. AP 6 of 2020 (21844124)

BETWEEN:

BRONWYN BIANAMU
Appellant

AND:

KERRY ANNE RIGBY
Respondent

CORAM: SOUTHWOOD, KELLY and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 30 September 2021)

SOUTHWOOD J

Introduction

[1] This is an appeal against a judgment of the Supreme Court dismissing an appeal against two sentences of imprisonment imposed on the appellant by the Local Court.

[2] On 9 October 2019 the appellant pleaded guilty in the Local Court to unlawfully entering a building at night with intent to commit an assault contrary to s 213(1), (2) and (5) of the *Criminal Code 1983* (NT), and unlawfully causing harm contrary to s 186 of the *Criminal Code*. She was sentenced to imprisonment for 12 months for each offence. Six months of

the sentence imposed for the second offence was ordered to be served cumulatively on the sentence imposed for the first offence giving a total sentence of 18 months' imprisonment. The sentence was ordered to be suspended after the appellant has served six months in prison, and an operational period of 12 months from the date of the appellant's release from prison was fixed under s 40(6) of the *Sentencing Act 1995* (NT).

[3] Under s 163(1)(a) of the *Local Court (Criminal Procedure) Act 1928* (NT), the appellant appealed to the Supreme Court on the following grounds:

1. The learned sentencing Judge erred in law in imposing a sentence which was manifestly excessive in all the circumstances of the case.

   Particulars

   The sentence reflects that the learned sentencing Judge:

   a. Improperly categorised by way of analogy, count 6 as a level 5, s 78CA(1) and s 78DA *Sentencing Act* offence in his sentencing deliberations.

   b. Departed from s 50 of the *Sentencing Act* and made an order for partial concurrency in circumstances where two technically different offences amounted to a single course of conduct.

   c. Failed to properly apply the principle of totality.

   d. Failed to order the Commissioner of Corrections to prepare and provide to the court a report about the matters referred to in s 45(1)(a)(i)(ii)(iii) [home detention] of the *Sentencing Act*.

   e. Failed to consider whether it would be appropriate to order supervision as a condition of a suspended sentence, and thus order a s 103 *Sentencing Act* assessment report [assessment for supervision].

   f. Failed to make enquiries of the prosecutor about any penalty imposed on the co-offenders jointly charged on the information before the Court.

   g. Departed from the principle that a term of imprisonment should only be imposed as a sentence of last resort.

2. The sentence was manifestly excessive in all the circumstances of the case.
3. The appellant was represented by counsel whose competence fell short of the standard which a court should be entitled to expect, which gave rise to a miscarriage of justice.

[4] On 17 July 2020 Grant CJ dismissed the appeal. His Honour gave detailed written reasons for doing so.[1]

[5] On 30 July 2020 the appellant filed a notice of appeal against the judgment of Grant CJ. The grounds of appeal were as follows.

1. The learned Chief Justice erred in law in rejecting the appellant's contention that the sentence imposed by the learned sentencing Judge was, in all the circumstances, manifestly excessive.
2. The learned Chief Justice erred in law in rejecting the appellant's contention that the appellant's legal representation during the course of the sentencing proceeding was so inadequate that the appellant was denied procedural fairness and, consequently, the right to be sentenced according to law.
3. The learned Chief Justice erred in law in rejecting the appellant's contention that the learned sentencing Judge failed to apply the principle that a sentence of actual imprisonment should only be imposed as a sentence of last resort.

[6] At the hearing of the appeal in this Court, the appellant was granted leave to incorporate ground 3 into ground 1, and add a new ground 3:

> The principle of parity ought to have resulted in the appellant receiving a sentence that was less severe than actual imprisonment, namely, at least, to engage in a home detention order.

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1 *Bianamu v Rigby* [2020] NTSC 43.

[7] On 1 December 2020 the appellant filed an amended notice of appeal. The amended notice of appeal consolidated ground 1 and old ground 3 and further amended new ground 3 as follows:

> 1. That the learned Chief Justice erred in law in rejecting the appellant's contention that the sentence imposed by the learned sentencing Judge was, in all the circumstances, manifestly excessive (this includes what had been ground 3 of the original Notice of Appeal, namely failing to apply the principle that a sentence of actual imprisonment should only be imposed as a sentence of last resort).
> 2. [...]
> 3. That the sentence imposed on the appellant compared with the sentence imposed on her co-offender (Sing) produced a disparity between the sentences that was, regarding the appellant's sentence, manifestly excessive, which gave rise to a justifiable sense of grievance on behalf of the appellant that justice had not been done.

Grounds 1 and 2 dismissed

[8] Grounds 1 and 2 of the appeal are dismissed. No error was shown in Grant CJ's reasons for decision.[2] For the reasons his Honour gave, he correctly dismissed the appeal from the Local Court on those grounds. The sentences imposed on the appellant were not manifestly excessive and the quality of the appellant's legal representation at first instance did not amount to a denial of procedural fairness that caused a miscarriage of justice.

[9] I deal with new ground 3 below.

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2 *Bianamu v Rigby* [2020] NTSC 43.

The facts

[10] The facts of the appellant's offending may be summarised as follows.

[11] On the evening of 26 July 2018 victims Jocelyn Gordon and Rosalie Singh *were inside their home* which was House 282 Belyuen Aboriginal Community. Also inside the house were Ms Singh's daughter, who was 12 years old, and Ms Gordon's younger brother, Thomas Moreen, who was 15 years old. They were all in bed and the front door of the house was locked.

[12] At 10.30 pm the appellant made her way to House 282 in company with six other people – four males (Claude Yarrowin, Gavin Bianamu, Reggie Bigfoot, and Shannon Sing) and two females (Melissa Jorrock and Jocelyn Yarrowin).

[13] When the appellant's group reached the house they used force to break the sliding bolt lock on the front door. Once inside, they upended the furniture in the main living area of the house and smashed a flat screen television. In an attempt to prevent the appellant and her co-offenders entering the bedroom, the occupants of the house closed the bedroom door and pressed their weight against it. They were unsuccessful, and *the appellant and her co-offenders entered the bedroom.*

[14] Ms Singh placed her daughter behind her in a corner of the bedroom and used her body to shield the child from the offenders. Some of the appellant's co-offenders attacked Ms Singh. At the same time, the appellant and other

co-offenders attacked Ms Gordon, punching her to the head and body an unknown number of times. They then left the house.

[15] A neighbour called the police and ambulance service. Ms Gordon, who was attacked by the appellant, suffered *facial injuries and a broken arm*. She made a Victim Impact Statement in which she described the pain in her face and right arm. She said that she was too scared to go back to the community and was worried for her family.

[16] On 27 September 2018 the appellant approached police in Belyuen Community and participated in a recorded interview during which, she said:

a. *I was bashing Jocelyn up.*

b. I wasn't bashing Roselyn, just Jocelyn.

c. *I wanted my revenge at her for pointing that machete at me earlier*.

d. I don't do these things I am not a violent person.

e. It started from other people coming into the community threatening them with machetes earlier in the day.

f. I was part of the group that went to the house, I didn't see what happened to Brendan.

g. *Some people tried to stop us, Deborah tried to stop us.*

h. Terrance bashed the TV.

i. Melissa was bashing Jocelyn.

j. *Gavin and Reggie bashed Jocelyn before me, she was already bleeding before I hit her. I only punched her, no one had any weapons.*

k. Thomas wasn't bashed, he wasn't involved, but was there in the room. Kiera wasn't even in that room.

l. Didn't really see what happened to Roselyn because [I] was *bashing* Jocelyn.

[17] The appellant's offending is objectively serious. Her moral culpability is high. The offending involved a premeditated home invasion, at night, in the company of six other adults, for the purpose of exacting revenge by assaulting the adult occupants of the house who were incapable of defending themselves. The appellant was motivated by revenge. There was no evidence that those people who were said to be involved in an earlier exchange were a continuing threat to the safety of the appellant. She and her group could not be stopped by those who attempted to intervene. She assaulted Jocelyn Gordon after Ms Gordon had been assaulted by two males and was bleeding. The appellant punched her an unknown number of times. The victim sustained facial injuries and a broken arm. The offending was committed in the presence of children and it is well established that exposing children to such violence may cause considerable emotional and psychological harm to them. It is the experience of this Court that such incidents are prevalent in a number of remote Aboriginal communities. They are the kind of incident

which leads to ongoing feuds that may make the lives of victims and their families in those communities almost unbearable. Such violent responses are not customary and do not have restorative outcomes.

[18] The appellant served 33 days in prison from 9 October to 11 November 2019 when she was granted appeal bail. After her appeal was dismissed by the Supreme Court, she served further time in prison from 17 July to 4 August 2020. On 4 August 2020 she was granted appeal bail again.

The appellant's subjective circumstances

[19] The appellant was 29 years of age at the time of the offending. She is a Wadigan woman and was 31 years of age when she pleaded guilty on 9 October 2019. She had no prior convictions and was a first offender. She was of prior good character. She had lived her whole life in Belyuen Community.

[20] The appellant can read and write. She went to school to year 11 and spent some time at a private school, Kormilda College, during her high school years. After she left school, the appellant worked intermittently and has worked at the Belyuen Store.

[21] When the appellant was sentenced by the Local Court, the appellant had one child, who was 10 years old and was being cared for by relatives, and she was pregnant with her second child. She became pregnant after she committed the offences which are the subject of this appeal. When she

pleaded guilty she was due to give birth on 11 November 2019. As matters transpired, the appellant was taken into custody on 9 October 2019 and the child was born in custody on 31 October 2019. The appellant was released on appeal bail on 11 November 2019.

New ground 3

[22] New ground 3 raises the issue of disparity for the first time. The disparity relied on is the difference between the appellant's sentences and the sentences imposed on co-offender Shannon Sing.

[23] Originally, co-offender Sing was charged with six counts arising out of the home invasion on 26 July 2018. However, his pleas of guilty to counts 2, 3 and 6 were accepted in full satisfaction of all counts on the Information for an Indictable Offence. Count 2 charges that contrary to s 213(1)(4) and (5) of the *Criminal Code*, on 26 July 2018, he unlawfully entered House 282 of the Belyuen Aboriginal Community *with intent to commit an indictable offence*. The unlawful entry involved the following circumstances of aggravation: (i) the house was a dwelling house; and (ii) the unlawful entry occurred at night time. Count 3 charges that contrary to s 241(1) of the *Criminal Code* he did at House 282 intentionally or recklessly cause damage to property, namely: door locks, a television, and furniture belonging to Rosalie Singh. Count 6 charges that contrary to s 186 of the *Criminal Code* at Belyuen he unlawfully caused harm to Jocelyn Gordon.

[24] Shannon Sing was sentenced in the Local Court on 14 August 2020. For counts 2 and 3, the Local Court judge sentenced him to an aggregate sentence of nine months' imprisonment. For count 6, the Local Court judge sentenced him to nine months' imprisonment. Six months of the sentence of imprisonment for counts 2 and 3 were made *concurrent* with the sentence imposed for count 6. That gave a total sentence of 12 months' imprisonment. The Local Court suspended the sentence upon the offender agreeing to a period of eight months' home detention on conditions and under the supervision of a Probation and Parole Officer.

[25] The new ground of appeal does not allege any error by the sentencing Judge or Grant CJ. When the appellant was sentenced in the Local Court on 9 October 2019, none of her co-offenders had been sentenced. On 17 July 2020 when Grant CJ dismissed the appellant's appeal, only co-offender Gavin Bianamu had been sentenced.[3] The new ground 3 is based solely on the disparity that is said to arise from the sentences imposed on Shannon Sing on 4 August 2020. It is based on fresh evidence about Shannon Sing's role in the home invasion, his age and subjective circumstances, and the sentences that he received. Key aspects of the evidence about Shannon Sing's sentences did not exist when the Local Court sentenced the appellant and when the Supreme Court dismissed the appellant's appeal.

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3 On 21 February 2020 Gavin Bianamu was sentenced to a total sentence of 17 months' imprisonment which was suspended after he served nine months.

The Court's jurisdiction to hear and determine new ground 3

[26] An offender may appeal against sentence on the ground of disparity regardless of whether the offender was sentenced before, or after, his or her co-offender.[4] This Court has the power to consider the question of disparity irrespective of the sequence of the sentences imposed on the offenders.[5] However, *jurisdictional problems* may arise in this Court when the right of appeal from the court at first instance to the Supreme Court is a limited right of appeal.

[27] Jurisdictional issues may arise in this appeal for two reasons. *First*, the Supreme Court did not commit any error by not considering the disparity between the appellant's sentences and the sentences imposed on Shannon Sing. The issue never arose. The Local Court sentenced Shannon Sing after the Supreme Court dismissed the appellant's appeal. An appellant cannot demonstrate an error in sentencing by establishing facts that have occurred after the passing of the sentence that, if taken into account, would make it appropriate to pass a lesser sentence if the sentencing discretion were exercised afresh.[6] *Second*, the appellant seeks to rely on fresh evidence that was not before either the Local Court or the Supreme Court because some of the evidence did not exist then and there is potentially a difference between the Supreme Court's power to receive fresh evidence in an appeal from the

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4 *Kelly v The Queen* (1991) 33 FCR 536; *R v McGowan* (1986) 42 SASR 580.

5 Ibid at pp 538-539.

6 *R v C* [2004] SASC 244 per Doyle CJ at [13].

Local Court, and this Court's power to do so in an appeal from the Supreme Court as an intermediate court of appeal.

[28] As to the first reason mentioned above, it is important to note the following. An appeal to the Court of Appeal from the Supreme Court is from the judgment of the Supreme Court not the judgment of the court at first instance. The Court of Appeal's task is to determine whether the Supreme Court got it right or wrong. It is not to rehear or review the proceeding at first instance. The Court of Appeal's powers under Part III the *Supreme Court Act 1979* do not operate to alter the nature of the appeal from the Local Court to the Supreme Court as an intermediate court of appeal under Part VI of the *Local Court (Criminal Procedure) Act 1928*.

[29] On at least three occasions, this Court has held that the wide powers granted to it under s 51, s 52, s 54 and s 55 of the *Supreme Court Act 1979* do not operate to grant this Court greater jurisdiction and powers than the Supreme Court sitting as an intermediate court of appeal. The institution of an appeal from the Supreme Court, as an intermediate court of appeal, to the Court of Appeal, does not change the nature or alter the limits of the original appeal from the Local Court to the Supreme Court.

[30] *Tiver Constructions Pty Ltd v Clair*[7] concerned an appeal to the Court of Appeal from the Supreme Court exercising its intermediate appellate jurisdiction. The appeal to the Supreme Court was from a magistrate in the

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7 (1992) 110 FLR 239 per Gallop J at p 241.

Workers Compensation Court under s 26 of the *Workers Compensation Act 1949* (NT) and was confined to questions of law. The Court of Appeal held that an appeal to the Supreme Court is restricted to a question of law and on appeal from the Supreme Court to the Court of Appeal cannot be on any other question, particularly one involving a question of fact. Gallop J stated:

> The appeal from the Supreme Court to this Court is not confined to a question of law. The right of appeal is given by s 51(1) of the *Supreme Court Act 1979* (NT), which reads:
>
> RIGHT OF APPEAL
>
> (1) Where the jurisdiction of the Court in a proceeding or part of a proceeding was exercised otherwise than by the Full Court, the Master or a referee, a party to that proceeding may, subject to this Act, appeal to the Court from a judgment given in that proceeding or part, as the case may be.
>
> Section 54 provides that the Court shall have regard to the evidence given in the proceeding out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence. [The powers on appeal are set out in s 55 of the Act] and are quite extensive, and include the power to grant a new trial.
>
> Those provisions, in my opinion, grant a right of appeal not confined to questions of law and really amount to an appeal by way of rehearing. The nature of the appeal so provided certainly appears to provide for an appeal other than an appeal in the strict sense.
>
> *It is important to identify the nature of the appeal from the Supreme Court to this Court because that is the appeal under consideration*. In other words, *this court is required to review the decision of the Supreme Court, not to entertain a rehearing of the case before the magistrate*. The distinction is important. An appeal by way of rehearing is generally speaking, a trial over again on the evidence used in the court below (per Dixon J, as he then was, in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*, citing Jessel MR in *Quilter v Mapleson*). The reason it is important to identify the nature of the appeal by way of review of the decision of the Supreme Court is that even though some of the magistrate's findings of fact were challenged before the Supreme Court, they were accepted and acted upon by the

> Supreme Court, because there is evidence to support them. This Court should not review them.[8]
>
> […]
>
> *On the appeal to this Court from the Supreme Court, the exercise is the review of the Supreme Court's decision as an intermediate court of appeal. The appeal to the Supreme Court was on a question of law. The appeal from the Supreme Court to this Court ought to be similarly confined. It would be inappropriate, in my opinion, to do otherwise.* This Court's function should be more akin to hearing a case stated. *Our jurisdiction should be confined to whether the Supreme Court was right or wrong. It is difficult to conceive of a situation where the extensive powers of this court under the above appellate provisions of the Supreme Court Act would call to be exercised in an appeal from a decision of the Supreme Court as the intermediate Court of Appeal.*[9]

[31] In the same case, Martin and Mildren JJ stated:

> An appeal to the Supreme Court is restricted to a question of law (s 26(1)) an appeal from that court to this obviously cannot be on any other question, particularly, one involving a question of fact. *No more than did his Honour, this Court has no jurisdiction to control findings of fact of the Workers Compensation Court.*[10]

[32] *Wilson v Lowery*[11] involved another appeal from the Supreme Court exercising intermediate appellate jurisdiction under the *Workers Compensation Act 1949*. The Court of Appeal applied *Tiver Constructions Pty Ltd v Clair*. Once again, it held that the jurisdiction of the Court of Appeal when reviewing a judgment of the Supreme Court itself reviewing a determination of the Workers Compensation Court is limited to questions of

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8 Ibid per Gallop J at p 241; applied *Wilson v Lowery* (1993) 4 NTLR 79 at p 83.

9 Ibid per Gallop J at p 242.

10 Ibid per Martin and Mildren JJ at p 255.

11 (1993) 4 NTLR 79.

law notwithstanding the breadth of jurisdiction otherwise given to the Court of Appeal by the *Supreme Court Act 1979*. The Court stated:[12]

> The nature of an appeal from the Workers Compensation Court to the Supreme Court is limited to appeal "on question of law" (*Workers Compensation Act*, s 26). An appeal from the Supreme Court to this Court is not [in terms] confined to a question of law. The right of appeal is given by s 51(1) of the *Supreme Court Act 1979* (NT) which reads: [...].
>
> Section 54 provides that this Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence. The powers on appeal are prescribed by s 55 and are quite extensive and include the power to grant a new trial.
>
> In *Tiver Constructions Pty Ltd v Clair*, Gallop J expressed the opinion that those provisions granted a right of appeal not confined to questions of law and really amount to an appeal by way of rehearing. His Honour went on to say that this Court's function on the hearing of an appeal from the Supreme Court ought to be confined in the same way as the appeal from the Workers Compensation Court to the Supreme Court. He expressed the opinion that it would be inappropriate to do otherwise and this court's function should be more akin to hearing a case stated. This court's jurisdiction should be confined to whether the Supreme Court was right or wrong.
>
> In their separate judgment Martin and Mildren JJ expressed a similar opinion. They said that an appeal to the Supreme Court from the Workers Compensation Court is restricted to a question of law and an appeal from that court to this Court obviously cannot be on any other question, particularly, one involving a question of fact. They said that this court has no jurisdiction to control findings of fact of the Workers Compensation Court.
>
> Confining ourselves to deciding whether the Supreme Court was right or wrong, we turn to the substance of this appeal.

[33] *Lee v McMahon Contractors Pty Ltd*[13] involved another appeal from the Supreme Court exercising intermediate appellate jurisdiction, this time from the Work Health Court (now the Local Court) under the *Return to Work Act*

12 Ibid at p 83

13 (2018) 335 FLR 350.

1986 (NT). Under s 116 of that Act an appeal to the Supreme Court was again restricted to a question of law. The Court once again stated:

> In *Wilson v Lowery* this Court considered the nature of an appeal from the Supreme Court to the Court of Appeal in a workers compensation matter. The Court observed that although s 51 of the *Supreme Court Act* governs such appeals *in a general sense*, and does not restrict appeals to questions of law, this Court's function on the hearing of an appeal from the Supreme Court in a workers compensation matter should be confined in the same way as an appeal from the Local Court to the Supreme Court. In other words, this Court is confined to determining whether the Supreme Court was right or wrong. This Court does not enter into its own fact finding process, or revisit findings of fact made by the Local Court except to the extent they may be infected by error of law.[14]

[34] *NB and Ors v SB and Ors*[15] concerned another appeal from the Supreme Court exercising intermediate appellate jurisdiction. The appeal to the Supreme Court was from the Local Court exercising its Family Matters jurisdiction under the *Care and Protection of Children Act 2007* (NT) and was brought under s 140 of that Act. Such an appeal is not confined to an error of law. Relevantly, s 142(2) of the *Care and Protection of Children Act 2007* provided that:

> Except as the Supreme Court otherwise directs, an appeal against any other order or decision must be decided on the evidence before the Court when the order or decision was made.

14 Ibid at p 357.

15 [2020] NTCA 2.

[35] As to the function of the Court of Appeal in an appeal such as that, in *NB and Ors v SB and Ors*, Grant CJ stated:[16]

> The appeal to this Court is brought pursuant to s 51 of the *Supreme Court Act 1979*. *As the right of appeal from the Local Court to the Supreme Court was not limited to a question of law, the appeal to this court is similarly not confined to a question of law*. In those circumstances, the section confers a right of appeal on fact and law on the evidence received in the proceedings out of which the appeal arose, with power to receive further evidence. *The dispositive powers of the Court are at least as wide as the powers of the Supreme Court on the appeal to it*.
>
> However, the right of appeal is subject to 2 qualifications. First, when considering an appeal from the decision of the Supreme Court, *this Court is concerned with whether the Supreme Court committed error. It is not concerned with whether the Local Court committed error*, although a failure by the Supreme Court to rectify an error committed by the Local Court may constitute error on the part of the Supreme Court. This will depend upon whether the original error vitiated the determination at first instance and, if so, whether there was error on the part of the Supreme Court in determining to confirm the original decision. Secondly, s 51 of the *Supreme Court Act* does not permit an appeal against the reasons for the decision of the Supreme Court. *It permits an appeal against the correctness of the order or judgment made by the Supreme Court*, although that challenge may involve attacking the reasons given for the order or judgment. The order made by the Supreme Court in this case was to dismiss the appeal and confirm the decision of the Local Court. *In order to succeed in this appeal the appellant must establish that the order was wrong*.

[36] The appeal provisions under Division 2 Part VI the *Local Court (Criminal Procedure) Act 1928* (NT) which govern an appeal from the Local Court to the Supreme Court are narrower than the appeal provisions under Part III of the *Supreme Court Act 1979* which govern an appeal from the Supreme Court to the Court of Appeal. At least since 1983[17] an appeal against

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16 Ibid at [63]–[64]

17 Section 16 of the *Justices Amendment Act 1983* (NT) inserted s 163(1) in the *Justices Act* (NT). The same provisions are in s 163(1) of the *Local Court (Criminal Procedure) Act 1928* (NT).

sentence to the Supreme Court from the Local Court has been an appeal in the strict sense,[18] while an appeal to the Court of Appeal from the Supreme Court is ordinarily a rehearing.

[37] In an appeal *stricto sensu*, the court of appeal can only be give such judgment as ought to have been given at first instance.[19] In such an appeal, error by the judge appealed from must be shown. The gravamen of a sentencing appeal is an error of the kind identified in *House v The King*.[20] The Supreme Court does not interfere by substituting its own decision unless it is first satisfied that the Local Court judge was plainly wrong and improperly exercised his or her sentencing discretion.[21] However, both the Supreme Court, under s 163 of the *Local Court (Criminal Procedure) Act 1928*, and this Court under s 51 and s 55 of the Supreme Court Act have jurisdiction and power to correct a sentence where there has been a miscarriage of justice such as denial of procedural fairness or a breach of some other fundamental principle of criminal justice.

[38] The issues raised by the second reason referred to at [27] above, are to be resolved by comparing the Court of Appeal's power to receive fresh evidence under s 54 of the *Supreme Court Act 1979* with the Supreme Court's power to receive fresh evidence under s 176A of the *Local Court*

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18 *Mason v Pryce* (1988) 53 NTR 1 at pp 5-8; *JK v Waldron* (1998) 93 FLR 451 at pp 455-456; *Leaney v Bell* (1992) 108 FLR 360 at p 368.

19 *Quilter v Mapleson* (1882) 9 QBD 672 at p 676; *Connell v Kelly* [1951-56] NTJ 407 at pp 410-13.

20 (1936) 55 CLR 499.

21 *Gronow v Gronow* (1979) 144 CLR 513 at p 519.

(Criminal Procedure) Act 1928. The Supreme Court's power to receive further evidence under s 176A of the *Local Court (Criminal Procedure) Act 1928* is arguably more limited than the Court of Appeal's power to do so under s 54 of the *Supreme Court Act 1979*. However, the decided cases reveal that similar principles have been applied to the exercise of the discretion to receive fresh evidence in an appeal against sentence under both s 176A and s 54.

[39] Section 176 of the *Local Court (Criminal Procedure) Act 1928* states:

> Subject to section 176A, no evidence shall be received on the hearing of an appeal other than such documents or exhibits as are mentioned in sections 174 and 175 and a record, made by means of sound-recording apparatus or shorthand, of the depositions of a witness in the relevant proceedings produced out of the custody of the relevant registrar, except by consent of the parties.

[40] Section 176A of the *Local Court (Criminal Procedure) Act 1928* was enacted in 1983 by the commencement of the *Justices Amendment Act 1983* (NT). The purpose of the amendment was to achieve greater finality in summary proceedings in the Court of Summary Jurisdiction (now the Local Court). Section 176A states:

> (1) Where evidence is tendered to the Supreme Court, that Court shall, unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal, admit that evidence if:
>
> (a) it appears to it that the evidence *is likely to be credible and would have been admissible in the proceedings from which the appeal lies* on an issue which is the subject of the appeal; and

(b) it is satisfied that the evidence was not adduced in those proceedings and there is a reasonable explanation for the failure to adduce it; and

(c) it is satisfied that the appellant has complied with the requirements of subsections (2) and (3) in respect of that evidence.

[41] Before fresh evidence can be admitted under s 176A, the Supreme Court must be satisfied that:

(i) the evidence may afford a ground for allowing the appeal;

(ii) the evidence is credible;

(iii) the evidence would have been admissible in the Local Court in the proceeding from which the appeal lies;

(iv) there is a reasonable explanation for the failure to adduce the evidence at first instance; and

(v) the appellant has complied with procedural requirements of s 176A(2) and (3).

[42] On the other hand, s 54 of the *Supreme Court Act 1979* states:

> The Court of Appeal shall have regard to the evidence given in the proceedings out of which the appeal arose, and *has power* to draw inferences of fact and, *in its discretion, to receive further evidence,* which may be taken on affidavit, by oral examination before the Court of Appeal or a Judge or otherwise as the Court of Appeal directs.

[43] The Court of Appeal's discretion to receive further evidence under s 54 is arguably wide. However, the Court must exercise the discretion judicially.

With respect to the receipt of fresh evidence (evidence which did not exist at the time of sentence, or could not then have been discovered with reasonable diligence) in sentencing appeals, Courts of Criminal Appeal have established practices about the receipt of such evidence. In accordance with those practices, it is necessary for this Court to have regard to certain factors that are relevant to the exercise of the discretion.

[44] In the Northern Territory, the leading cases on the receipt of fresh evidence in sentencing appeals are decisions of the Court of Criminal Appeal under s 410(c) and s 419(1) of the *Criminal Code 1983*. So far, as is relevant, s 419(1) of the *Criminal Code 1983* states:

> The Court may, if it thinks it necessary or expedient in the interests of justice:
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings;
>
> (b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order any such persons to be examined before any person appointed by the Court for the purpose and admit any depositions so taken as evidence;
>
> (c) receive evidence, if tendered, of any witness (including the appellant) who is a competent, but not compellable, witness;
>
> (d) [...]
>
> (e) [...]
>
> and exercise in relation to the proceedings of the Court any other powers that may for the time being be *exercised by the Supreme Court on appeals or applications in civil matters* and issue any warrant or other process necessary for enforcing the orders or sentences of the Court.

[45] The powers granted to the Court of Criminal Appeal under s 419(1) of the *Criminal Code 1983* include the power to make specific orders about the

receipt of documents and the examination of witnesses and the power to receive fresh evidence under s 54 of the *Supreme Court Act 1979*. Consequently, the decisions of the Court of Criminal Appeal about the receipt of fresh evidence in sentencing appeals from the Supreme Court are relevant to the receipt of fresh evidence under s 54 of the *Supreme Court Act 1979* in sentencing appeals from the Supreme Court as an intermediate appellate court from the Local Court.

[46] The leading case on the receipt of fresh evidence by the Court of Criminal Appeal in a sentencing appeal is *Dooley v The Queen*.[22] In that case, the appellant made an application to tender fresh evidence about the assistance he provided to the police after sentence. The Court of Criminal Appeal ruled that the evidence was inadmissible. During the course of his reasons Riley J (as his Honour then was), with whom Angel and Mildren JJ agreed, approved the following statements of principle by Winneke P, Malcolm CJ, and King CJ.[23]

> In normal circumstances, if it is suggested that subsequent events have made or made to appear a sentence, appropriate when passed, manifestly excessive, then that is a matter for the consideration of the Executive in the exercise of prerogative of mercy and not a matter for the appellate court.
>
> However, this Court has recognised that there is a rare exception to this otherwise fundamental rule. The Court will receive evidence of events occurring after sentence, in appropriate circumstances, if those events can be said to be relevant, not so much per se, but because they throw light on circumstances which existed at the time of sentence.[24]

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22 [2003] NTCCA 6.

23 Ibid per Riley J at [25] to [37].

24 *R v WEF* (1998) 2 VR 385 per Winneke P at pp 388-9.

> It is plain that the power should be used only to rectify a miscarriage of justice and that, save in the most exceptional cases, any question of review of a sentence in the lights of subsequent events or changed circumstances which go beyond casting new light on the facts as they were before the sentencing Judge should be a matter for the Executive.[25]
>
> The proper purpose of fresh evidence on appeal against sentence is to bring before the court facts which were in existence at the time of sentence but which were not known to the sentencing judge or to explain facts which were before the sentencing judge so as to put them in a new light. It is not to open the Court of Criminal Appeal to intervene upon the basis of events which have occurred since the imposition of sentence ...and fresh evidence is therefore not receivable to establish the occurrence of such events. A clear distinction is necessary between fresh evidence as to events occurring before sentence and evidence as to events occurring after sentence.[26]

[47] Riley J stated:

> *Once the evidence is admitted, the question becomes whether, on the material then before the Court, a different and, if so, what sentence should be substituted for that imposed by the sentencing judge*. This is so even though the sentencing judge has not erred in the exercise of the sentencing discretion.
>
> As Crockett J observed in *Eliasen*:
>
> > It must follow that, if the Court does think that the additional evidence should lead to the imposition of a sentence different from that imposed by the sentencing Judge, then even where the Judge's sentencing discretion has not miscarried, the case must be treated as one for appellate intervention.

[48] It is to be noted that in *Dooley* there was no issue about the credibility of the fresh evidence, and the explanation for the fresh evidence not being tendered during the sentencing hearing was that the evidence did not exist then and therefore was unavailable at that time. *Dooley* was applied by the

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25 *Anderson* (1997) 92 A Crim R 348 per Malcolm CJ at p 350.

26 *Smith* (1987) 44 SASR 587 per King CJ at 588.

Court of Criminal Appeal in *Leach v The Queen*,[27] *Payne v The Queen*[28] and *Atkinson v R*.[29]

[49] *Leach* concerned an appeal against orders of the Supreme Court revoking a non-parole period of 25 years fixed by s 18 of the *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT), and refusing to fix a non-parole period. The fresh evidence was a psychological report of Professor Ogloff who examined the appellant and prepared the report after the appellant's non-parole period was revoked. During the course of his reasons for decision Riley J (as his Honour then was) stated:

> The Court is entitled to receive additional evidence "if it thinks it necessary or expedient in the interests of justice": s 419 of the *Criminal Code*. *Of course, the fundamental consideration in an appeal of this kind is whether the admission of the evidence is necessary to rectify a miscarriage of justice*: *R v Kucma*. For the evidence to be admissible, it would need to demonstrate the true significance of factors in existence at the time of sentence: *Dooley v The Queen*; *R v Rostom*; *Babic v R*. To be admissible, fresh evidence would need to shed a new light on matters considered by the learned [sentencing] judge which would "very probably have altered the sentence imposed": *Anderson v R*; *Gallagher v R*. In *Craig v R*, Rich and Dixon JJ observed, in relation to an application to set aside a conviction:
>
> > *It cannot be said that a miscarriage of justice has occurred unless the fresh evidence has cogency and plausibility as well as relevancy*. The fresh evidence must, we think, be of such character that, if considered in combination with the evidence already given upon the trial, the result ought, in the minds of reasonable men, be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced. But in judging the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance.

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27 [2005] NTCCA 18.

28 [2007] NTCCA 10.

29 [2013] NTCCA 5.

> The evidence of Professor Ogloff does not meet the normal requirements for the reception of such evidence. It was evidence that was available at the time in the sense that it was capable of being obtained. […] There was no apparent reason why an approach may not have been made to Professor Ogloff. [...] For the reasons addressed above, the evidence of Professor Ogloff […] does not derogate from the conclusions reached by the sentencing judge [...]
>
> In my view the application to receive the evidence of Professor Ogloff should be rejected.

[50] *Payne* was concerned with an application to tender fresh evidence that the appellant had given birth to a child after sentence. At the time she was sentenced, unbeknown to her, she was pregnant. The Court of Criminal Appeal received the fresh evidence. The Court stated:

> The Crown concedes that the fact of pregnancy which existed at the time of sentencing is fresh evidence relevant to the exercise of the sentencing discretion. The circumstances in which Courts of Appeal will permit fresh evidence to be led on appeal where there is no error by the sentencing judge in determining the sentence were discussed in the judgment of Riley J, with whom Angel and Mildren JJ agreed, in *Dooley v The Queen*. As Riley J explained in *Dooley, "[t]he basis for receiving the new evidence is to be found in demonstrating the true significance of facts in existence at the time of sentence". In particular, if the fresh evidence would probably have altered the sentence imposed had it been before the sentencing Judge, it is in the interests of justice that appellate courts receive such evidence and reconsider the sentence*.
>
> […]
>
> Fresh evidence as to sentence having been admitted, this Court is required to consider the question of sentence afresh. [...]

[51] In *Atkinson* the issue for determination was the impact upon the sentence of an offender of a forfeiture of property order under the *Criminal Property Forfeiture Act 2002* (NT), where the forfeiture took place after the sentencing process has been completed. Could the Court rely on the

forfeiture as a basis for reopening the sentencing discretion in an appeal against sentence? The Court received the evidence and resentenced the appellant. In the course of the reasons for decision, the Court of Criminal Appeal stated:

> As the respondent acknowledged, the approach taken by the courts in Victoria in relation to the acceptance of fresh evidence is consistent with the approach taken by this Court in a series of decisions commencing with *Dooley v R* and followed in *Leach v R* and *Payne v R*. *In those cases, it was noted that the basis for receiving the new evidence was that it demonstrates the true significance of facts in existence at the time of sentence. If the fresh evidence "would probably have altered the sentence imposed had it been before the sentencing Judge, it is in the interests of justice that appellate courts receive such evidence and reconsider the sentence"*. The information is admissible as fresh evidence.
>
> In the circumstances, *this Court must determine whether, on the entirety of the material now available, a sentence different from that imposed by the sentencing Judge is appropriate*. All of the matters that were before the sentencing Judge are before this Court, along with the additional information that, as a consequence of his actions, the appellant has forfeited his unit valued at $445,000.

[52] *Lo Castro v The Queen*[30] was an appeal to the Court of Criminal Appeal of the Northern Territory from a sentence passed on the appellant by the Supreme Court. A ground of appeal was that: "evidence of real significance was not brought to the attention of the sentencing Judge as a result of which a miscarriage of justice occurred". It was argued that the fresh evidence demonstrated that the relationship between the appellant and the victim did not cease for any significant period after the offending. It was submitted that the fact that the relationship continued was evidence that the trauma the

30 [2011] NTCCA 1.

victim suffered was less severe than she described in her victim impact statement; accordingly, a material factor to the sentencing exercise was not brought to the attention of the sentencing Judge. The Court stated:

> Generally, before fresh evidence will be received it must be shown that the sentencing of the appellant in the absence of that evidence resulted in a miscarriage of justice. *It may be admitted where the "evidence has real significance to the sentencing proceeding*. The Court may receive fresh or new evidence where the interests of justice require that course.

[53] The Northern Territory cases about the admissibility of fresh evidence in sentencing appeals are consistent with the leading decisions in South Australia, Victoria and Western Australia.

[54] *Smith v R*[31] was an appeal to the Court of Criminal Appeal of South Australia from a sentence passed by the Supreme Court of South Australia. The appellant in that case suffered from AIDS. During the hearing of the appeal, the appellant sought to tender further evidence of his condition and the impact of imprisonment on it. The evidence was admitted. In the course of his reasons for decision, King CJ stated:[32]

> The task of the Court of Criminal Appeal, speaking generally, is to see whether the trial judge went wrong on the material before him, *The Queen v Dorning* (1981) 27 SASR 481 esp. at 488. There is power to receive fresh evidence subject to certain conditions which are summarized in *Dorning's* case at p.485. *The proper purpose of fresh evidence on an appeal against sentence is to bring before the Court facts which were in existence at the time of the imposition of sentence but were not known to the sentencing judge or to explain facts which were before the sentencing judge so as to put them in a new light. It is not open to the Court of Criminal Appeal to intervene upon the basis of*

31 (1987) 27 A Crim R 315.

32 Ibid at p 316.

> *events which have occurred since the imposition of sentence: The Queen v O'Shea* (1982) 31 SASR 129, *and fresh evidence is therefore not receivable to establish the occurrence of such events.* A clear distinction is necessary between fresh evidence as to events occurring before sentence and evidence as to events occurring after sentence.
>
> *While the evidence sought to be admitted on this appeal in a sense establishes the occurrence of events occurring after the passing of sentence, it does so for the purpose of explaining the full extent and implications of the appellant's condition of health which existed at the time of sentence. I think that the authorities show that it is permissible to have regard to events occurring after sentence for the purpose of showing the true significance of facts which were in existence at the time of sentence.* In *R v Green* (1918) 13 Cr App R 200 evidence was admitted on appeal to show the true character and value of information given by the appellant to the police before sentence, as disclosed by subsequent events. In *R v Ferrua* (1919) 14 Cr App R 39 the evidence admitted on the appeal revealed how serious the appellant's state of health had been when he was sentenced. I think that the events occurring since sentence are admissible to show the extent and implications of the condition of health which the appellant was in when he was sentenced. The evidence which proves the occurrence of those events and which bears generally upon the extent and implications of the AIDS condition from which the appellant was suffering at the time of sentence, meets the tests referred to above for the admission of fresh evidence on appeal. We therefore admitted the evidence.

[55] *R v C*[33] is a decision of the Court of Criminal Appeal in South Australia. The appellant sought to tender evidence that shortly after he was sentenced, he passed onto the police certain admissions made to him by a fellow inmate who confessed to a rape and two murders. The information was a significant factor in securing the convictions of his fellow inmate. The majority of the Court of Criminal Appeal ruled that the court should not intervene. Doyle CJ stated:[34]

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33 [2004] SASC 244.

34 Ibid at [32] – [35].

That survey of the case law indicates that usually evidence of events occurring after sentence is passed is incapable of demonstrating an error by the sentencing judge that would enliven the power to set aside a sentence as erroneous in exercise of the power conferred by s 353(4) of the CLCA. However, such evidence may establish that a matter that the sentencing court treated as material is now to be seen in a new light, or has a new significance, as a result of events occurring after sentence that were not anticipated and, usually, could not reasonably have been anticipated. In such cases because the evidence of matters occurring after the passing of sentence will throw new and significant light on a matter relied on by the sentencing court, the evidence will be admitted and can be acted on. *For present purposes it is not necessary to decide whether, in a case in which evidence of facts occurring after sentence is admitted, the court must be satisfied in the light of that evidence that the sentence passed can be said to be erroneous, or whether, having admitted the evidence, the court simply reconsiders the sentence in the light of all of the circumstances including the further information*: [...]

If the evidence of matters occurring after sentence is merely evidence of a new fact or event, not bearing upon a matter that was material at the time of sentence, and being significant only because it would be material were sentence to be passed at the time of the appeal on the basis of all material then available, the evidence will not be admitted, or if admitted will not provide a basis for interference on appeal.

The distinction which is drawn by the cases is one based on practice rather than on logic, but in my opinion the practice reflects a sound distinction of principle. As well, there are solid practical justifications for the cautious approach that has been taken. The case of the appellant now before the Court is, in principle, no different from the case of an appellant who says that after being sentenced he or she has undergone a religious conversion and is now changed person, or who says that since being sentenced he or she has reflected on the past, is now genuinely remorseful and is now intent upon rehabilitation. If circumstances of that kind provided a basis for interference on appeal, in particular circumstances that are the result of a conscious decision or choice by the appellant, it would be difficult to put an end to the sentencing process.

For those reasons I conclude that in the present case the appeal must be dismissed. The appellant relies upon evidence of events occurring after the passing of sentence, being events that do not throw any new light on any matter considered by the court when passing sentence, and of significance to the sentence imposed. [...]

For those reasons, I would dismiss the appeal. [...]

[56] During the course of his reasons for decision, Doyle CJ also stated the following:[35]

> It is not uncommon for an appeal to be based on an apparent disparity between the sentence imposed on the appellant, and a sentence imposed on a co-offender. In some cases, reliance has been placed on a sentence imposed on a co-offender after the passing of the sentence under challenge of appeal. I doubt whether such cases are regulated or affected by the power of the court to receive evidence of facts occurring after the sentence has been passed. *I consider that an appeal on the basis of disparity is one that raises an issue of sentencing principle, not depending upon the demonstration of error by showing that in the light of relevant facts and circumstances the sentence in question is manifestly excessive or otherwise erroneous.* The sentencing principle which is brought into play in such an appeal is the principle of parity which is that equal offences should be treated alike, and that in the case of co-offenders, differences in sentences should reflect differing degrees of culpability or differing circumstances: see *Postiglione v The Queen* at 301.

At page 301 of *Postiglione v The Queen,* Dawson and Gaudron JJ stated:

> On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of the error will result in there being a due proportion between the sentences and there will then be equal justice. However, the parity principle, as identified and expounded in *Lowe v The Queen*, recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to a justifiable sense of grievance. If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options.

[57] The comment by Doyle CJ at [56] above is *obiter dictum*. In my opinion, the resolution of a question of disparity, in the circumstances considered by his Honour, often involve the admission of fresh evidence in order to determine whether any disparity is justified. There is no reason why the principles

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35 Ibid at [23].

about the admission of fresh evidence should not apply. If the fresh evidence is admitted, the Court of Appeal in the Northern Territory is to decide whether on all of the information before the Court a different sentence should be passed. The reasons for decision of Dawson and Gaudron JJ do not suggest otherwise.

[58] *R v Babic*[36] was an appeal against a sentence passed by the County Court of Victoria to the Court of Appeal in Victoria. A ground of appeal was that: "The physical condition of the applicant is such that the burden of prison is harsh upon him and accordingly the Court of Appeal should sentence him to a different sentence than that imposed on him". The applicant relied on three affidavits that contained further evidence. The substance of those affidavits was that, about two months after being sentenced, the applicant was working in the prison garden and injured his back while moving a heavy sprinkler. As a result, the applicant claimed he was in such pain as to be unable to cope with the everyday rigours of prison life. The application to tender the fresh evidence was made under s 574 of the *Crimes Act 1958* (Vic). During the course of his reasons for dismissing this ground of appeal, Brooking JA stated:

> The present case does not concern evidence of events occurring prior to sentence, as to which it has been held by courts of criminal appeal that, even though the new evidence is not fresh evidence, *it may be received on appeal in order to avoid a miscarriage of justice*: [...]. The present case concerns evidence of events after sentence. Evidence of an event occurring after sentence which is said to make the sentence passed

36 [1998] 2 VR 79.

excessive will not be received, the correct analysis being, in my view, not that the evidence will not be received as a matter of discretion, but that it will not be received because it is not admissible.

The suggestion that some subsequent event has made a sentence, appropriate when passed, excessive is a matter for consideration by the Executive in the exercise of the prerogative of mercy, not by an appellate court: [...]

[...] *where it is sought to establish that the sentence was excessive evidence of events occurring after sentence may be received by an appellate court in the exercise of its discretion in appropriate circumstances if those events may be said to be relevant, not, so to speak, in themselves, but for the light which they throw on the circumstances which existed at the time of sentence.* So in *Ferrua* evidence from a warder of what had taken place after sentence showed how infirm the prisoner had already been at the time of sentence and in *Smith* the fresh evidence showed the extent and implications of the AIDS condition from which the appellant was already suffering at the time of sentence. A similar case is *R v Bailey* (1988) 35 A Crim R 458.

The decision most often cited in Victoria on the reception of evidence of events occurring after sentence in support of an application for leave to appeal is that of the Court of Criminal Appeal in *R v Eliasen* (1991) 53 A Crim R 391. That too was a case of AIDS, where the applicant was sentenced before the results of testing for AIDS were known and after sentence those results showed that at the time of sentence he was suffering from the disease. Crockett, J, speaking in effect for the Court, endorsed the view taken by the Court of Criminal Appeal of South Australia in *Smith* that when a sentence is attacked as excessive *it is permissible to have regard to events occurring after sentencing for the purpose of showing the true significance of facts which were in existence at the time of sentence.* [...]

[...]

In the present case the applicant does not say that he suffered from a bad back at the time of sentence and that the severity of the condition has been revealed only by subsequent events. [...] This is an attempt to rely on an event after sentence as itself showing the sentence turned out to be excessive. This court cannot (on the basis that the point is one of admissibility, not one of practice in relation to the exercise of discretion) receive evidence of subsequent events sought to be led for this purpose.

[59] In *The Queen v Nguyen*[37] the Court of Appeal of Victoria re-stated the principles applying to the admission of fresh evidence. Redlich JA (with whom Maxwell P and Neave JA agreed) stated:

> Based upon the new material, counsel for the applicant contended that it constituted "fresh" evidence throwing a different light upon circumstances that existed at the time of the applicant's sentence. The material disclosed that Ms Vu had been diagnosed with hepatitis C in 2001 but that the symptoms of the disease had worsened in recent months necessitating medical treatment. Her health now significantly reduced her ability to care for herself and her children. This now caused the applicant concern for Ms Vu and their children which made his imprisonment more onerous, particularly because of his mental condition.
>
> It is common ground that this Court may, in limited circumstances — sometimes described as "rare and exceptional" — permit evidence to be led of matters or events that have occurred since the sentence was imposed to enable this Court to reconsider the sentence in the light of that additional evidence. The following principles apply to the admission of such evidence:
>
> (i) the new evidence must relate to events which have occurred since the sentence was imposed;
>
> (ii) the evidence must demonstrate the true significance of facts in existence at the time of the sentence;
>
> (iii) the evidence will not be admitted if it relates only to events which have occurred after sentence and which show that the sentence has turned out to be excessive;
>
> (iv) the new evidence may be admissible even though the applicant did not refer to the pre-existing state of affairs in the course of the plea;
>
> (v) upon the admission of the new evidence, *it is unnecessary* to determine whether the original sentence was vitiated by error, or whether it was manifestly excessive; and
>
> (vi) the question is whether, on all of the material now before the Court, any different sentence should be substituted to avoid a miscarriage of justice.
>
> The consistent approach of this Court has been to treat the sentencing discretion as reopened once it has been concluded that the fresh

37 [2006] VSCA 184.

evidence throws significant new light on the pre-existing facts. The Court must determine what is the appropriate sentence on the basis of all of the material then before it.

[60] In *Anderson*,[38] a decision of the Court of Criminal Appeal of Western Australia, Malcolm CJ, with whom Steytler J largely agreed, held that evidence of subsequent events should only be received by the Court of Criminal Appeal if:

(i) the strength of the new evidence is such as to justify interference with the decision below;

(ii) to rectify a miscarriage of justice; and

(iii) in the most exceptional circumstances.

[61] His Honour stated:[39]

> [...] *The question to be asked is whether the strength of the new evidence is such as to justify interference with the verdict: see Gallagher (at 395), per Gibbs CJ. The approach to the matter is first to ask whether the evidence is apparently credible and whether, if believed, it might reasonably have led the jury to return a different verdict. The primary consideration in an appeal against conviction is to rectify a miscarriage of justice. This should also be the primary consideration in an appeal against sentence, although there are considerations applicable in the case of sentencing which may justify restricting the admissibility of new evidence of events subsequent to the passing of sentence.*
>
> The decisions in *R v Prior*; *R v Tutchell*; *R v Bailey*; *R v Eliasen* and *R v Jones* can all be justified on the basis that the fresh or new evidence admitted cast new light on the facts as they existed at the time the sentence was imposed. In these cases the court was prepared to interfere even though there was no error in the exercise of the

38 (1997) 92 A Crim R 348.

39 Ibid at pp 349-350.

sentencing discretion by the sentencing judge on the facts as originally presented. The basis on which the court interferes in such a case was stated by Crockett J (with whom McGarvie and Phillips JJ agreed) in *Eliasen* (at 394) as being:

> If the court does think that the additional evidence should lead to the imposition of a sentence different from that imposed by the judge, then even where the judge's sentencing discretion has not miscarried the case must be treated as one calling for appellate intervention.

In other words, if the additional evidence shows that there has been a miscarriage of justice, even though there was no error on the part of the sentencing judge on the facts as originally presented, the Court of Criminal Appeal should be prepared to interfere. In this context, in *R v Smith*, King CJ (with whom Cox and O'Loughlin JJ were in agreement) drew a distinction between cases in which fresh evidence was given of facts which were in existence at the time of sentencing or which put facts which were before the sentencing judge in a new light, on the one hand, and fresh evidence of subsequent events, on the other. Evidence of the latter was said to be not receivable.

On an appeal against sentence under s 689(3) of the *Criminal Code* the question for the Court of Criminal Appeal is whether "they think a different sentence should have been passed". If that question is answered in the affirmative the court is required to substitute the sentence "they think ought to have been passed". [...] *As a matter of logic and justice the principles to be applied should be those which would apply to the admission of fresh or new evidence on an appeal against conviction, particularly where, in the light of subsequent events, the sentence imposed may result in injustice, even where on the facts originally presented there was no error in the exercise of the sentencing discretion. The power conferred by s 697 of the Criminal Code enables the Court of Criminal Appeal to reconsider evidence whenever it is "thought necessary or expedient in the interests of justice". This power is subject to a proviso to the effect that sentences may not be increased "by reason of or in consideration of any evidence that was not given at the trial"*. As Steytler J rightly points out, it is implicit in the proviso that a sentence might be reduced by reason of or in consideration of evidence that was not given in the court below. *It is plain that the power should be used only to rectify a miscarriage of justice and that, save in the most exceptional cases, any question of the review of a sentence in the light of subsequent events or changed circumstances which go beyond casting new light on the facts as they were before the sentencing judge should be a matter for the Executive*.

The present case was one which in some respects was similar to *Eliasen* in that, at the time of sentencing, the illness of the applicant's son had been diagnosed and the condition determined, but it

> was uncertain in the sense that there was then concern regarding the possibility of a relapse. The relapse was not confirmed until after sentencing. In this sense the subsequent events cast new light on facts which were before the sentencing judge. It was this aspect of the case (as was conceded by the Crown) which brought it within the context of an extreme case where the sentence of imprisonment would subject the offender and his family to such a degree of hardship as warranted the court to extend mercy. This is one of those exceptional cases where it "would be, in effect, inhuman to refuse to do so": see *R v Wirth* at 296, per Wells J; *H v The Queen*.

[62] The Court of Criminal Appeal in New South Wales takes a stricter approach to the admission of fresh evidence. *R v Fordham*[40] was a sentencing appeal that concerned an application to tender a psychologist's report as fresh evidence. The appellant obtained the report after sentencing by the trial judge. Howie AJ (with whom the other members of the Court agreed) stated:

> Generally before fresh or new evidence will be received by this Court, it must be shown that the sentencing of the appellant in the absence of that evidence resulted in a miscarriage of justice. As a general rule, where that evidence was available to the defence at the time of sentencing, a miscarriage of justice would rarely result simply from the fact that the evidence was not before the sentencing judge, even if the evidence may possibly have had an impact upon the sentence passed.
>
> However, fresh evidence has been received by this court where a miscarriage of justice may have occurred because there has been incompetent legal representation at the hearing before the sentencing court: *Abbott,* or where there has been negligence or carelessness in the presentation of the defence: *McKenna*. It has been held that new evidence may be admitted where the evidence has real significance to the sentencing proceedings, and where the significance of the evidence was unknown to the appellant and the existence of that evidence was not made known to the legal representatives at the time of sentencing: *Godwin* cf *Demarco*. There is also a general power in the court to receive fresh or new evidence where the interests of justice require that course: *Many*.
>
> [...]

40 (1997) 98 A Crim R 359.

> There is nothing in the report which in my view either requires this court to set aside any of the findings of the trial judge or justify doing so: *C*. Although Judge Ducker may not have appreciated the full extent of the appellant's disabilities in verbal skills and verbal reasoning, I cannot see that this had any impact upon the way his Honour found the facts he did, upon the relevant sentencing principles to be applied or upon the final determination of the appropriate sentence. There is nothing in the report to indicate that his Honour's findings that the appellant was not unintelligent or that he possessed quite a high degree of cunning were not open to him or that those findings are based on a false assumption as to the appellant's mental condition.

[63] In Queensland, fresh evidence, in the sense that the evidence did not exist at the time of sentence, or could not then have been discovered with reasonable diligence, may be admitted where not to do so would result in a miscarriage of justice. *R v Clark*[41] was a sentencing appeal that concerned the tender of a report of a psychologist, Mr Zemaitis, who diagnosed the applicant's psychological state at the time of sentence and at the time of commission of the offence. It was his opinion that the applicant suffered Post-Traumatic Stress Disorder because of his service in East Timor in 2007. The applicant obtained the report after sentence. Philippides JA (with whom the other members of the Court of Appeal agreed) stated:

> It was not entirely clear that the evidence was fresh evidence. However, as recognised in *R v Spina*, even where the evidence is not fresh evidence [...], this Court retains a residual discretion in exceptional cases to admit new or further evidence where refusal to do would result in a miscarriage of justice. That position confirms the view stated in *R v Maniadis*[42] that:
>
> > ... a court of appeal will admit new evidence on such an appeal, notwithstanding that it is not fresh ... if its admission shows that

41 [2017] QCA 318.

42 (1997) 1 Qd R 593.

> some other sentence, whether more [?][43] or less severe, is warranted in law; in this case, that the sentence in fact imposed was unwarranted in the sense that it was manifestly excessive.
>
> […]
>
> On the basis of the applicant's submissions, it was appropriate for leave to be granted to adduce the further evidence.
>
> On the basis of the further evidence adduced and admitted, this Court is entitled to re-exercise the sentencing discretion afresh, it not being necessary to find that the original sentence was manifestly excessive.

[64] My review of the decisions of Northern Territory Court of Criminal Appeal, and the Courts of Appeal which have taken a similar approach to the Northern Territory, to the admission of fresh evidence in sentencing appeals reveal that the following principles are relevant to the exercise of the Court's discretion to admit such evidence.

1. The evidence should only be received in rare and exceptional circumstances.

2. A fundamental consideration in a sentencing appeal of this kind is whether the admission of the evidence is necessary to rectify a miscarriage of justice.

3. It cannot be said that a miscarriage of justice has occurred unless the fresh evidence has cogency and plausibility as well as relevancy.

4. If the additional evidence shows that there has been a miscarriage of justice, even though there was no error on the part of the sentencing

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43 In most jurisdictions Courts of Appeal will not increase a sentence passed by the court below in consideration of evidence that was not before the sentencing court.

judge on the facts originally presented, the Court of Criminal Appeal should be prepared to interfere. It is unnecessary to determine if the original sentence was vitiated by error.

5. Fresh evidence must be of such character that if considered with the evidence already given the result ought in the minds of reasonable men be affected.

6. The basis for receiving the evidence is to be found in demonstrating the true significance of facts in existence at the time of sentence.

7. The fresh evidence needs to shed light on matters considered by the sentencing judge which would very probably have altered the sentence imposed.

8. Such evidence may establish that a matter that the sentencing court treated as material is now to be seen in a new light, or has a new significance, as a result of events occurring after the sentence that were not anticipated and, usually could not reasonably have been anticipated.

9. If the evidence of matters occurring after sentence is merely evidence of a new fact or event, not bearing upon a matter that was material at the time of sentence, the evidence will not provide a basis for interference on appeal and the evidence will not be admitted.

10. Any question of review of sentence in the light of post sentence events or changed circumstances that go beyond casting new light on the facts

as they were before the sentencing judge should be a matter for the Executive.

11. If the fresh evidence would probably have altered the sentence imposed had it been before the sentencing judge it is in the interests of justice that appellate courts receive the evidence and reconsider the sentence.

12. Once the evidence is admitted, the question becomes whether on the material before the Court of Appeal a different sentence should be imposed.

13. The Court must determine whether on the entirety of the evidence now available a sentence different from that imposed by the sentencing judge is appropriate.

[65] The same or similar principles to those enunciated by the Court of Criminal Appeal in *Dooley* (and the Territory cases following), and those enunciated by the Courts of Criminal Appeal in South Australia, Victoria and Western Australia, and summarised at [64] above, apply to the receipt of fresh evidence under s 176 and s 176A of the *Local Court (Criminal Procedure) Act 1928*. It is well established that s 176A only permits the introduction of evidence of subsequent events if the evidence is "related to the time when the sentence was passed, either to make up for deficiency, in that the

evidence could have been brought forward at that time, or to better explain the evidence which was before the court."[44]

[66] In *McCarthy v Trenerry*[45] the appellant sought to introduce fresh evidence in an appeal before Martin J in the Supreme Court under s 176A of the *Justices Act 1928* (NT). The appellant was pregnant when sentenced. During the hearing of her appeal, she sought to place before the Supreme Court evidence from a doctor that her baby was born, somewhat prematurely, after her sentence. The baby was doing well. It was breast-fed. At the time of the hearing of the appeal, the child was about eight and a half months old. It was the doctor's opinion that it is not ideal to separate a baby from its mother, and the prison environment would not be an ideal one for the baby.

[67] Martin J set out the provisions of s 176A of the *Justices Act 1928*. His Honour found that the evidence of the doctor:

(i) was likely to be credible;

(ii) would have been admissible in the Local Court if the child was born before the appellant was sentenced;

(iii) would go to an issue the subject of appeal, that is, the severity of the sentence; and

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44 *McCarthy v Trenery* [1999] NTSC 29 at [20]; *Marshall v Court & Ors* [2013] NTSC 75 at [12].

45 [1999] NTSC 29.

(iv) the evidence was not adduced in the Local Court because the child had not been born when the appellant was sentenced.

[68] His Honour then stated:

> This is not a case such as *Smith v Torney* or *Bates v Haymon* where the evidence sought to be introduced upon appeal was evidence which could have been placed before the court at first instance. Here the evidence is of an event after the appellant was before that court, but I do not consider that, of itself, is fatal to the appellant's tender of the proposed evidence. It provides a reasonable explanation as to why the evidence was not adduced before the Court of Summary Jurisdiction.
>
> *There is extensive authority to support the proposition that it is permissible for a court on appeal to have regard to events occurring after sentencing. Although the decisions to which reference will be made did not arise upon statutory provisions such as s 176A what has been decided in relation to those provisions falls within the scope of the Territory Statute*.
>
> *Most of the cases have to do with events occurring after sentencing which show the true significance of facts which were in existence at the time of sentencing*, for example, *Smith*, a decision of the Court of Criminal Appeal of South Australia, where King CJ at 316 said:
>
> > The proper purpose of fresh evidence on appeal against sentence is to bring before the court facts which were in existence at the time of the imposition of sentence, but were not known to the sentencing judge or to explain facts which were before the sentencing judge so as to put them in a new light.
>
> That was a case to do with the appellant's ill-health, a matter to which reference was made in *McDonald* in the Court of Criminal Appeal, New South Wales. In a similar vein, *Jones*, another decision of the Court and in the Victorian Court of Appeal see *Morgan* and *R v WEF*.
>
> The limitation on the evidence of post sentence events which can be received was demonstrated in *Babic*. The appellant had injured his back about two months after being sentenced and asserted that as a result he had been in such pain as to be unable to cope with the everyday rigours of prison life. At p257 Brooking JA with whom Winneke P and Ashley AJA agreed, said that was:
>
> > an attempt to rely on an event after sentence as in itself showing that the sentence had turned out to be excessive. The court cannot (on the basis that the point is one of admissibility, not one of

practice in relation to the exercise of discretion) receive evidence of subsequent events sought to be led for this purpose.

For cases in which evidence of events occurring after sentence are not restricted to "ill-health" matters see *Rostom*.

In Queensland the Court of Appeal has held in *R v Maniadis* at 597 that evidence of events occurring after the date of sentence are generally unlikely to show that the sentence imposed was unwarranted, *unless that evidence shows what the state of affairs was at the time the sentence was imposed*.

I have referred to what fell from King CJ in Smith as to the distinction between cases in which fresh evidence was given of facts which were in existence at the time of sentencing or which put facts which were before a sentencing judge in a new light, on the one hand, and fresh evidence of subsequent events, on the other. Malcolm CJ referred to that distinction in Anderson at 350 as did Steytler J at 360. With respect, with that I agree. (Anderson is a particularly poignant case in which the court took into account the fact of serious illness suffered by member of the offender's family.)

The purpose of an appeal [from the Local Court] is to review the decision of the court at first instance in the light of the evidence before the court. *The qualified provisions enabling evidence to be introduced on appeal must be related to the time when sentence was passed, either to make up for a deficiency in that evidence which could have been brought forward at that time, or to better explain the evidence which was before that court. That is the judicial function upon appeal*.

The evidence sought to be admitted in this case does not fall within the rules. It is of a subsequent event, one that was anticipated, but not one which puts the facts before his worship in a new light. The fact before his worship was that the appellant was then pregnant. That matter was taken into account by his Worship. It has now come to an end.

The evidence sought to be put forward under s 176A of the *Justices Act* will not be received.[46]

[69] As is apparent from the above decision, the principles that apply to the admission of fresh evidence in an appeal from the Local Court to the Supreme Court are the same as those that apply in the Court of Appeal. Consequently, no issue as to jurisdiction arises in this regard. Subject to the

46 Ibid at [14] – [22].

principles applicable to the exercise of the discretion to admit fresh evidence, this Court has the power to receive the evidence about the sentences imposed on Shannon Sing. If the Court receives the evidence, then under s 55(1) of the *Supreme Court Act* the Court may resentence the appellant, if it thinks the fresh evidence justifies a different sentence. That is, the Court has jurisdiction to hear the appeal on new ground 3 and power to resentence the appellant if it considers that there has been a miscarriage of justice. When so doing, this Court is exercising its original jurisdiction and is to exercise the sentencing discretion afresh.[47] The duty of the Court is to determine the rights of the parties by reference to the circumstances that exist at the conclusion of the appeal, and is to give judgment as if it were sitting as a court of first instance.[48]

[70] The purpose of the power to receive further evidence is to ensure that proceedings do not miscarry. The power exists to serve the demands of justice.[49]

[71] There is a distinction between fresh or further evidence about:

(i) events or matters which were in existence at the time of the hearing before the court at first instance;

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47 *Brennan v New South Wales Land and Housing Corporation* [2011] NSWCA 298 at [128]; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at p 110; *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1.

48 *Sears v McNulty* (1987) 89 FLR 154 at p 160.

49 *CDJ v VAJ* [1998] HCA 67; 197 CLR 172 at p 202.

(ii) events or matters which occurred after the hearing at first instance but which better explain the evidence which was before the court at first instance or put the facts in a new light; and

(iii) events or matters which simply occurred after the hearing at first instance.

Where an appellant seeks to establish that a sentence was manifestly excessive, the Court may receive evidence of events, occurring after sentence, if the events are relevant for the light they throw on the circumstances that existed at the time of sentence. Evidence of events falling into category (iii) above, which are relevant in themselves only, is inadmissible.[50] Consideration of such matters falls to the Executive.

[72] In this appeal, the information about Shannon Sing's role in the offending was in existence when the Local Court sentenced the appellant, as was most of the evidence about Shannon Sing's subjective circumstances. However, it is unclear if it was reasonably available to the appellant until after the Local Court sentenced Shannon Sing. All of that evidence throws light on the circumstances that existed at the time of the appellant's offending. The information about Shannon Sing's convictions for the offences he committed during the incident that occurred on 26 July 2018 and the sentences imposed on him is evidence about events that occurred after the Local Court sentenced the appellant. However, it is evidence that throws some light on

50 *R v Babic* (1998) 2 VR 79 per Brooking JA at p 81.

the comparative, or relative, seriousness of the appellant's offending. The evidence is credible and would have been admissible in the Local Court if it was available when the Local Court sentenced the appellant. There is a clear explanation why the Local Court did not receive the evidence. The only remaining issues are: (i) has there been a miscarriage of justice; and (ii) does the fresh evidence require different sentences to be imposed on the appellant.

The parity principle

[73] In *Lowe v The Queen*,[51] Mason J stated:

> Just as consistency in punishment – a reflection of the notion of equal justice – 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 the community.

And:

> The authorities do not speak with one voice on the question whether marked disparity in sentences imposed on co-offenders whose circumstances are comparable is itself a ground for reducing the more severe sentence or whether such marked disparity is merely indicative of the presence of an undisclosed error in the process of sentencing. *As a matter of general principle it is important that this Court should declare unequivocally that marked disparity is itself the ground*.

51 (1984) 154 CLR 606 at pp 610-611.

[74] Mason J's statement in the second paragraph of the above quote was approved by the plurality of the High Court in *Green v The Queen*. Their Honours stated:

> Where there is a marked disparity between sentences giving rise to an appearance of injustice, it is not a necessary condition of a court of criminal appeal's discretion to intervene that the sentence under appeal is otherwise excessive. Disparity can be an indicator of appealable error. It is also correct as Mason J said in *Lowe*, that logic and reality combine to favour the proposition that [disparity] is a ground for intervention in itself. Unjustifiable disparity is an infringement of the equal justice norm. It is an appealable error, although it may not always lead to an appeal being allowed.[52]

[75] In *Bara v The Queen*[53] this Court observed:

> The principle of parity operates to ensure that sentences are proportionate and just as between co-offenders. It is an aspect of "equal justice" in sentencing, which *requires identity of outcome in cases that are relevantly identical and different outcomes in cases that are different in some relevant respect* [*Wong v The Queen* (2001) 207 CLR 584 at 608 per Gaudron, Gummow and Hayne JJ; *Green v R* (2011) 244 CLR 462 at [28] per French CJ, Crennan and Kiefel JJ].

[76] As to the degree of disparity which is required for appellate intervention, McHugh J stated the following in *Postiglione v The Queen*.[54]

> In *Lowe v The Queen* Gibbs CJ, with whom Wilson J agreed, said that an appellate Court should intervene where "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". Mason J stated that an appellate court is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance. Dawson J with whom Wilson J also agreed, was of the view that "[t]he

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52 (2011) 244 CLR 462 at [32] per French CJ, Crennan and Kiefel JJ.

53 [2016] NTCCA 5 at [31].

54 (1997) 189 CLR 295 at p 309.

> difference between the sentences must be manifestly excessive and call for the intervention of the appellate court in the interests of justice.

[77] Further, the plurality of the High Court in *Green v The Queen* stated:[55]

> The sense of grievance necessary to attract appellate intervention with respect to disparate sentences is to be assessed by *objective criteria*. The application of the parity principle does not involve a judgment about the feelings of the person complaining of disparity.

[78] A sentence which offends the above principle should be reduced if other things are equal, but other things are not always equal. Such matters as the age, background, prior criminal history, the general character of each offender, and the part which she or he played in the commission of the offence must be taken into account, i.e. the degrees of criminality of each offender must be considered.[56] The court will refuse to intervene where disparity is justified by differences between co-offenders in the matters to which we have just referred.[57]

[79] The following points about the parity principle emerge from the decision of *Green v The Queen*.[58]

1. Parity is the principle that, *all things being equal*, offenders should receive the same penalty.
2. The law requires that the application of the principle be governed by consideration of substance rather than form.
3. The effect to be given to the principle will vary according to the circumstances of the case.

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55 (2011) 244 CLR 462 at [31] per French CJ, Crennan and Kiefel JJ.

56 *Lowe v The Queen* (1984) 154 CLR 606 at p 609 per Gibbs CJ.

57 (2011) 244 CLR 462 at [31] per French CJ, Crennan and Kiefel JJ.

58 Ibid at [28] - [34].

4. In determining the application and weight to be given to the principle, it is necessary to determine: (i) the respective role of each of the offenders; (ii) any aggravating factors that apply to the respective offenders; and (iii) the mitigating factors that apply to each of the offenders.[59]

5. The greater the dissimilarity between each of the above factors, the less powerful is the argument for the same penalties.[60]

6. *Parity applies to not only support the same or similar penalties for offenders, but also to justify significantly different penalties where the factors referred to in point four above are considerably different.*[61]

7. A court will not apply the principle where disparity is justified by differences between co-offenders such as age, background, criminal history, general character and the part each has played in the relevant criminal conduct.

8. The existence of a discretion where disparity is shown to reduce a sentence to one which is inadequate does not amount to an obligation to do so. Certainly, the discretion of a court to reduce a sentence to a less than adequate level would not require the court to consider reducing the sentence to a level which would be an affront to the proper administration of justice. *Marked and unjustified disparity may be mitigated by reduction of the sentence appealed against to a level which although lower is still within the range of appropriate sentences.*

[80] The discretion referred to in point 8 at [79] above was considered by this Court in *Tilbury v The Queen*.[62] After referring to the remarks of French CJ, Crennan and Kiefel JJ at [34] in *Green v The Queen,* Riley CJ made the following remarks.[63]

> In relation to circumstances where the sentence imposed [on] a co-offender is manifestly inadequate it was observed in *Saraya v Regina* that "the discretion to mitigate disparity should not be exercised to

59 Mirko Bagaric, Ross on Crime (8th ed. Thomson Reuters) at [19.1920].

60 Ibid.

61 Ibid.

62 [2015] NTCCA 4.

63 Ibid at [20] – [22].

reduce an otherwise adequate sentence to a level which would be an affront to the proper administration of justice". The Court adopted the following observations in *Youkhana v R*:

> ... the Court has a discretion and is not bound to interfere if a sentence offends the parity principle. A reason for not interfering is if the sentence imposed upon the co-offender is manifestly inadequate *and* intervention would produce a sentence disproportionate to the objective and subjective criminality involved.

Whilst inconsistency in punishment may lead to an erosion of public confidence in the administration of justice so will "the multiplication of manifest errors".

Further, the inadequacy of a sentence imposed upon a co-offender may be of such a degree that any sense of grievance engendered in the offender sentenced to a more severe sentence can no longer be regarded as legitimate. Whilst disparity may give rise to a sense of grievance, the grievance would not be a justifiable one.

The sentencing of Shannon Sing

[81] Shannon Sing's role in the offending was limited. His co-offenders used force to break the lock on the front door of the dwelling, smash the flat screen television after they entered the dwelling, open the bedroom door, and damage the door handle. Shannon Sing pleaded guilty to the property damage charge, count 3, on the basis of aiding and abetting his co-offenders in that he was ready willing and able to assist those who committed the property damage. Further, after the offenders entered the bedroom, Shannon Sing punched Jocelyn Gordon *once only* to the cheek. *The extent of his offending was being present and punching Jocelyn Singh once to the cheek.*

[82] The sentencing Judge made the following remarks when passing sentence on Shannon Sing.

The facts of the matter are very serious. There was a group of you. There had been some trouble in the community. There had been trouble between people who had arrived at the community and various members of your family, and a group of you decided to try and resolve the matter and take the matter into your own hands.

You did that by going to a house where you thought some people were located, who you thought were the people who were causing trouble in the community. *It turned out that those people weren't there at all,* but there were women and children in that home. And you and the others went to that home. *Other people in the group broke the lock of the front door and you all entered the home*.

The women and children in the home were very frightened and they went into the bedroom. *Other people in your group broke things in the home and forced open the bedroom door. On the facts you were not one of those people who broke things or broke the door*, but because you were there with the group, you are accepting that you were part of the group that were involved in that.

Then even more seriously, once you entered that room, there were two people in there who were subject to some violence from the group. [...]

On the facts you punched [Jocelyn Gordon] once in the cheek but were not involved in any further violence on her. But co-offenders continued to assault her, and she suffered very significant injuries as a result of that *continued assault*. But *your personal involvement was at the lower end of seriousness*; however, because you were there with the group, you were also part of that group, involved in being there as involved in the additional harm.

You did not assault the second victim but co-offenders also assaulted the second victim as well.

The seriousness of this matter comes from breaking into a private residence. It was an occupied residence. It was at night-time. There were women and children there, and one of those women suffered very significant injuries as a result of the violence that was inflicted on her.

[...] It is more serious because you were part of a group.

[...]

I have also read about you and your family and that is very supportive information. *It's consistent with the fact that you have no prior criminal history, effectively. There is one minor matter of some date now. But effectively no relevant prior criminal history*. That you are part of a family group that is involved in the production of films. You are involved in their production. You appear in those films. You represent the production company and you travel regularly overseas in relation to the company that your family is involved in.

> I am also told that you have prospects of employment here in Darwin. It seems to me that this offending is entirely out of your usual character. I note that you are still a young man. You are 22 years of age. While general deterrence and denunciation are very important sentencing factors, *the fact that this is out of character and your young age also makes your rehabilitation an important consideration in this sentence*.
>
> I also note that some co-offenders have been dealt with, and I note the sentences of imprisonment, and I take those matters into account, *particularly in relation to parity*.
>
> […]
>
> In my view, taking into account your age and very, very good prospects of rehabilitation, it is appropriate to suspend the sentence to allow you to serve your time by way of home detention. It is not a light option. It is a serious option.

[83] Prior to sentencing Shannon Sing, Judge Armitage had given the parties an indicative sentence which was lower than the sentence ultimately imposed. However, prior to sentencing Shannon Sing the decision of Grant CJ in *Bianamu v Rigby*[64] was brought to her Honour's attention and she withdrew the remarks she made when pronouncing the indicative sentence, and stated she was likely to pass a higher sentence than indicated. The sentencing Judge also made the following remarks about parity.

> Can I just say that, in my view, they [the reasons for decision in *Bianamu v Rigby*] *are relevant on the question of parity*. My initial – and I am going to hear from you if you want to go further. My initial response is that the outcome in relation to what I had proposed and what was accepted on the sentence indication is the same.
>
> However, in the – *because I think parity applies*, and I need to take that into account, *the actual sentence that I am proposing to impose in relation to each charge is higher than what I indicated before*, but with concurrency and the structure of the sentence, it doesn't change the actual outcome.
>
> […]

64 [2020] NTSC 43.

> And I can also point to the fact that, whilst I'm talking about parity in relation to the head sentence, there is the element of parity in relation to the fact that neither of the co-offenders that we are talking about have --- effectively prior records or any records since. *But there is also an age difference between the two offenders. I am dealing with a person who is in his early twenties, and in my view, a greater – for a younger person with no prior record, with employment prospects and a history of employment. A sentence which has a greater element of rehabilitation or a greater weight given to rehabilitation in how the sentence is to be served is appropriate for a young person.*

[84] In other words, the Local Court Judge who sentenced Shannon Sing: (i) had regard to the sentence passed on the appellant which was upheld in *Bianamu v Rigby*;[65] (ii) took the principle of parity into account; (iii) determined that the discrete head sentences imposed on the two co-offenders were not markedly disparate, there being only a difference of three months in each of them; and (iv) determined the disparity which otherwise existed in the total sentences was justifiable given Shannon Sing's level of culpability, his relatively young age and his prospects of rehabilitation.

[85] In my opinion, no error is demonstrated in the approach taken by the Local Court Judge who sentenced Shannon Sing.

[86] Judge Armitage's approach to sentencing Shannon Sing was consistent with the following well recognised sentencing principles which were enunciated by the Victorian Court of Appeal in *R v Mills*.[66]

> (i) Youth of an offender, particularly a first offender, *should be a primary consideration* for a sentencing court where the matter properly arises.

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65 [2020] NTSC 43.

66 [1998] 4 VR 235.

(ii) In the case of a youthful offender rehabilitation is usually far more important than general deterrence. *This is because punishment may in fact lead to further offending.* Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender.)

(iii) A youthful offender is not to be sent to an adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. *The benchmark for what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender*; and, where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified.

[87] Rehabilitation of a youthful offender involves two considerations. First, it is accepted that punishment of a youth by imprisonment may lead to further offending. As a result of their lack of maturity and emotional vulnerability young people are prone to being further corrupted by hardened inmates. Second, consideration is to be given to sentencing dispositions which are structured to promote the rehabilitation of young offenders. A young person's character is not fully formed, and it is recognised that young people have the capacity to change their ways quite quickly with appropriately structured support. Further, the benchmark for what justifies incarceration in an adult correctional facility may be quite high.

The appellant's submissions on parity

[88] When considering the appellant's submissions on parity I have had regard to the following matters. Grant CJ rejected the tender of all of the fresh or further evidence the appellant sought to tender in the Supreme Court, including the report of the psychologist dated 14 April 2020. The appellant has not appealed against the rejection of that evidence and, in any event, we

consider that Grant CJ's rejection of that evidence under s 176A of the *Local Court (Criminal Procedure) Act* was correct. Further, the appellant did not seek to tender any of that evidence under s 54 of the *Supreme Court Act* for the purposes of the parity argument under the new ground 3. To the extent counsel for the appellant referred to the appellant's youngest child, it was for the purposes of supporting the appellant's submission that she had good prospects of rehabilitation and was most unlikely to reoffend because she was caring for a young child. At no stage was it submitted that the appellant and her child would suffer exceptional hardship if she was incarcerated. Nor was it submitted that considerable weight should be given to the interest of the child.[67] Nor was it submitted that exceptional hardship was of itself a mitigatory factor in this case.[68]

[89] The fresh or further evidence which was rejected by the Supreme Court, and is not before this Court, was summarised by Grant CJ in the court below as follows.[69]

(a) A letter from the Knucky Women's Centre dated 19 February 2020 states that while the appellant was residing in the Belyuen community she engaged in Work for the Dole obligations at the Centre, and that the appellant had abstained from alcohol through the course of the pregnancy. The author states that she has never witnessed the appellant to be verbally or physically violent towards anyone at the Centre.

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67 For a recent consideration of these matters by the Court of Criminal Appeal see *Veness v The Queen* [2020] NTCCA 13.

68 This is consistent with the fact that under s 57 of the *Correctional Services Act* and related directions a child may remain with its mother in the Northern Territory correctional centres until the child is two years old: *Veness v The Queen* [202] NTCCA 13 at [43] n 62.

69 *Bianamu v Rigby* [2020] NTSC 43.

(b) A letter from the Belyuen Community Health Centre dated 30 January 2020 states, so far as is relevant for these purposes, that during an attendance on 29 January 2020 the appellant denied further alcohol consumption and said she had not drunk since early pregnancy. The Centre's records showed she had experienced problems with alcohol in the past.

(c) A letter from the Danila Dilba Health Service dated 12 March 2020 states, so far as is relevant for these purposes, that during an antenatal attendance on 17 April 2019 the appellant said she had not engaged in alcohol and drug use during pregnancy.

(d) A further letter from the Danila Dilba Health Service dated 3 April 2020 states that the appellant attended for one antenatal visit on 17 March 2019 and it was recorded that she was not using any drugs or alcohol at that time.

(e) A clinical psychology report dated 14 April 2020 deals principally with the impact which a return to gaol at this time would have on the emotional and psychological health and well-being of the appellant and her child in the event of separation. While that opinion might be relevant in any resentencing exercise, it is not evidence relating to the time when the sentence was passed.

The only material relevant to that time is the report that the appellant had abstained from alcohol and smoking during the course of her pregnancy; *that the appellant had been drunk on the night of the assault*; that the appellant accepted full responsibility for her part in the offending; and that the appellant demonstrated some insight into the cause of her offending.

[90] In counsel's outline of written submissions, the appellant submitted that the following matters were pertinent to the question of parity. Both offenders had no prior convictions. Both pleaded guilty. Shannon Sing pleaded guilty to one more charge than the appellant, namely the property damage charge. While Shannon Sing was younger, the appellant had spent all of her twenties without conviction. Shannon Sing's involvement was more serious. He physically harmed the victim. The appellant did not. Shannon Sing was convicted of more serious types of offending. Both offenders had very good prospects of rehabilitation. While Shannon Sing had opportunities to engage

in work overseas the appellant had her baby to look after. Sing spent no time in custody. The appellant had spent 36 days in custody.

[91] The appellant made three broad submissions on the question of disparity. First, Mr Sing was more culpable than the appellant. He was charged with one more count than the appellant and two of the counts he was charged with were more serious counts than the charge of unlawful entry against the appellant. Second, the subjective circumstances of the two offenders were virtually equivalent. Third, there is a marked disparity between a sentence of home detention for eight months and a sentence of imprisonment which is suspended after the offender has served six months in prison.

[92] There are a number of errors in the submissions of counsel for the appellant. I deal with each of them below.

[93] It is correct to say that two of the charges against Shannon Sing were more serious than the charges against the appellant and that he faced one extra charge, the charge of property damage. The maximum penalties for the offences committed by Shannon Sing are as follows. For count 2, an offence contrary to s 213(1), (4), (5) and (6) of the *Criminal Code*, which was originally pleaded against him, carries a maximum penalty of imprisonment for life. However, although it is a little unclear, it seems the circumstance of aggravation that Shannon Sing was armed with an offensive weapon was withdrawn.[70] If that circumstance of aggravation was withdrawn the

70 Local Court transcript, *Police v Shannon Sing*, 16 July 2020 at p 4.

maximum penalty for the unlawful entry committed by Shannon Sing was imprisonment for 20 years. In effect, the charge contrary to s 213 of the *Criminal Code* pleaded that Shannon Sing entered the dwelling house at night time with the intention to commit an *indictable* offence, presumably the offence contrary to s 186 of the *Criminal Code*. By way of contrast, the appellant was charged with unlawful entry with the intention to commit a summary offence that carried a maximum penalty of four years' imprisonment. For count 3, the count of property damage contrary to s 241 of the *Criminal Code*, the maximum penalty is imprisonment for 14 years. As we have stated, for count 6, an offence contrary to s 186 of the *Criminal Code*, the maximum penalty is imprisonment for five years. If regard is had to the maximum penalties only, it may be said that the sentences imposed on Shannon Sing for counts 2 and 3 were very lenient. However, s 213 and s 241 of the *Criminal Code* cover a very wide range of offences.

[94] The submissions by counsel for the appellant that Shannon Sing's conduct was more serious than the appellant's and that he directly caused physical harm to Jocelyn Gordon are incorrect. As is set out above at [82], the Local Court Judge, who sentenced Shannon Sing, found that:

> On the facts you punched [Jocelyn Gordon] once in the cheek *but were not involved in any further violence on her*. But co-offenders continued to assault her, and she suffered very significant injuries as a result of that *continued assault*. But *your personal involvement was at the lower end of seriousness*; however, because you were there with the group, you were also part of that group, involved in being there as involved in the additional harm.

[95] Further, the sentencing Judge found that the basis of Shannon Sing's conviction for the property damage count was as follows.

> Other people in your group broke things in the home and forced open the bedroom door. On the facts you were not one of those people who broke things or broke the door, but because you were there with the group, you are accepting that you were part of the group that were involved in that.

[96] Counsel for the appellant's submissions that the charges to which Shannon Sing pleaded guilty contained two victims whereas the charges against the appellant only contained one victim, and the related submissions were also incorrect. The charge of unlawful entry against both offenders was laid on the basis of common purpose and the unlawful entry involved a dwelling house which was occupied by two adults and two children. It was not alleged that either of the two offenders actually forced entry into the house or the bedroom. Nor was it alleged that Mr Sing actually smashed the flat screen television. The charge of unlawfully caused harm which was laid against both offenders was expressly pleaded against both offenders as "unlawfully caused harm to Jocelyn Gordon"; that is, to one victim only.

[97] Counsel for the appellant's submission that the appellant was "not much older" than Shannon Sing is not correct. The appellant is nine years older than Mr Sing. The age difference is significant because it means that different sentencing principles apply to Mr Sing.

[98] There was no evidence before this Court that the appellant had done something for the treatment of alcohol misuse or had addressed any other

criminogenic needs. Nor was there any evidence before this Court that the appellant had a problem with the misuse of alcohol or was affected by alcohol when she committed the offences which are the subject of this appeal. The evidence about alcohol is contained in the fresh or further evidence the tender of which was rejected by the Supreme Court. The consumption of alcohol was not raised at all in the Local Court and the plea on sentence proceeded on that basis, and in the Supreme Court counsel for the appellant conceded that the consumption of alcohol was neither an aggravating factor nor a mitigating factor in this case. As we have stated above, there was no ground of appeal pleaded that Grant CJ erred in rejecting the tender of that evidence, and no attempt was made to tender that evidence in this Court.

[99] In any event, the additional evidence would not have established the disparity contended for by the appellant was unjust or excessive. Both offenders were remorseful and both had good prospects of rehabilitation.

[100] In this case, mercy is an irrelevant consideration with regard to the parity ground. The submission about mercy amounts to an attempt to re-argue the plea in mitigation. Sentencing appeals are not an occasion for the revision and reformulation of the case presented in the courts below. A submission in mitigation which was not made during the sentencing proceeding at first instance will ordinarily only be entertained on appeal where fresh evidence is adduced, or where it can be shown there was most compelling material available which was not used or understood and a miscarriage of justice may

be demonstrated by its omission.[71] Mercy would have been a relevant consideration if the appellant had submitted that she and her youngest child would suffer exceptional hardship as a result of her incarceration.[72] However, no such issue has arisen.

Was the disparity in the sentences imposed on the appellant and Shannon Sing justified?

[101] As stated above, the sense of grievance necessary to attract appellate intervention is to be assessed by objective criteria. A sentence may only be reduced if all other things are equal. Such matters as the age, background, prior criminal history, the general character of each offender, and the part he or she played in the commission of the offence must be taken into account, i.e. the degrees of criminality of each offender must be considered. In determining the degree of weight to be given to the principle of parity, it is necessary to determine: (i) the respective role of each offender; (ii) any aggravating factors that apply to each offender; and (iii) the mitigating factors that apply to each of the offenders.

[102] In my opinion, having had regard to the above principles, the sentences imposed on the appellant and Shannon Sing are not markedly disparate and what disparity exists is justified. This is not a case in which this Court should intervene because the parity principle was not taken into account.

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71 *Veness v The Queen* [2020] NTCCA 13 at [33].

72 Reliance on family hardship created by imprisonment is an appeal for mercy and the purpose and effect of the "exceptional circumstances" test is to limit the availability of the court's discretion to exercise mercy on that ground: *Veness v The Queen* [2020] NTCCA 13 at [62].

The parity principle was taken into account by the Local Court judge when her Honour sentenced Shannon Sing.

[103] The comparison is between a sentence of 18 months' imprisonment, suspended after six months without conditions, imposed on an adult who was 29 years of age when the offence was committed, and a sentence of 12 months' imprisonment, suspended on eight months' home detention on supervised conditions, imposed on a 20-year-old person. There was only three months difference in the individual head sentences imposed on the two co-offenders. While it is not equivalent to six months actual imprisonment, eight months' home detention under strict conditions, including electronic monitoring, is also a significant sentence.

[104] While the charge of unlawful entry to which Mr Sing pleaded guilty is a more serious charge than the equivalent charge against the appellant because of the circumstance of aggravation that he intended to commit an indictable offence, the gravamen of both their offending was their respective assaults on Jocelyn Gordon. Looked at objectively, the appellant's offending was significantly more serious than Shannon Sing's offending. Her crimes constituted serious examples of this type of offending. Her motive in invading the victims' home was revenge. Her offending was premeditated. She had a clear personal reason to commit the crimes. She was not deterred despite the attempts of others to stop her and her group. She was an active member of the group until the end of the incident. She had an active and ongoing involvement in the assault upon Jocelyn Gordon which she

described as a ‘bashing’. As a result of the continuing assault which the appellant and others committed the victim sustained significant injuries including a broken arm.

[105] In contrast, as is set out in the sentencing remarks at [82] above, Shannon Sing’s involvement in the home invasion was at a much lower level than that of the appellant. His culpability is significantly less than the appellant’s. He simply joined in what occurred and he did not persist in assaulting Jocelyn Gordon. He was of a suggestible age and was not fully mature. A number of the other offenders were older than him and he did not have a personal motive for attacking the victim.

[106] A person of 29 years of age is much more mature than someone who is 20 years of age. Different sentencing principles apply to a person of Shannon Sing’s relative youth than to an adult of 29 years of age. A primary sentencing objective in his case was rehabilitation. Shannon Sing had very good prospects of rehabilitation. A period of six months imprisonment would most likely have a detrimental impact on his prospects of rehabilitation because of his relatively young age. The sentence of eight months’ home detention is a significant penalty that holds him accountable for his criminal conduct but will nonetheless enable him to develop in the community in a socially responsible way by, among other things, facilitating his ongoing employment in meaningful work.

[107] While the appellant was also of positively good character prior to committing these offences and has good prospects of rehabilitation, her culpability is such that it required she be sentenced to a term of actual imprisonment even though she is a first offender. As a mature adult she made a deliberate decision to join a group of six offenders at night for the purpose of exacting revenge on the victim in her home. She "bashed" the victim after others had attacked her and she did so in front of children. The sentence imposed on her is by no means a severe or crushing sentence. It will not hinder her rehabilitation. The main sentencing objectives so far as the appellant is concerned are punishment, denunciation and general deterrence with appropriate allowance being made for her rehabilitation.

[108] I find that the disparity between the sentences imposed on the appellant and Shannon Sing is not manifestly excessive, and does not give rise to a justifiable sense of grievance. The disparity between the sentences is justified. The fresh evidence is incapable of leading to a conclusion that different sentences should be imposed on the appellant. There has been no miscarriage of justice.

Conclusion on new ground 3

[109] In conclusion, I would make the following findings and orders:

1. the Court has original jurisdiction to consider new ground 3 of the appeal;

2. the evidence contained at pages 248 to 275 of the appeal book is not admitted;

3. the appeal on new ground 3 is dismissed; and

4. the appeal is dismissed.

KELLY J and HILEY J:

[110] This is an appeal against a decision of the Supreme Court sitting as an intermediate court of appeal, in which the Supreme Court dismissed an appeal against a sentence imposed on the appellant by the Local Court. There were two charges: a charge of unlawful entry of a dwelling house at night, in company, with intent to commit an assault, and a charge of assault. The total sentence imposed was imprisonment for 18 months, suspended after six months with an operational period of 12 months and no further conditions. The procedural history is set out more fully in the judgment of Southwood J.

[111] We agree with the conclusion of Southwood J in paragraph [8] that grounds 1 and 2 of the appeal to this Court should be dismissed. There is no error in in the Supreme Court's decision.

Ground 3

[112] The appellant complains in Ground 3 that the sentence imposed on her, compared with the sentence imposed on her co-offender, Shannon Sing, produced a disparity between the sentences that was manifestly excessive,

giving rise to a justifiable sense of grievance on behalf of the appellant that justice had not been done.

[113] Both the appellant and Shannon Sing were part of a group of six men and women who forcefully broke the lock on the front door of a house in Belyuen Community in the middle of the night; upended furniture and smashed a flat screen television; forced their way into a bedroom where the householder, her adult daughter, and two children aged 12 and 15 were trying to bar the door; and assaulted the two women in the presence of the children. Both women were injured and one of the two suffered a broken arm during the assault. The co-offender, Shannon Sing, received a total sentence of 12 months imprisonment, suspended on condition that he enter into a home detention order for eight months on supervised conditions.

[114] The facts, including details of the charges, the background and personal circumstances of the appellant and Shannon Sing, are more fully set out in judgment of Southwood J.

[115] The sentence imposed on Shannon Sing in the Local Court was not handed down until after the appeal against sentence by the appellant had been heard and determined in the Supreme Court. It should be noted that Ground 3 does not (and could not) allege error by the Supreme Court (or the sentencing judge in the Local Court): the sentence now said to give rise to an unjustified disparity and, hence a justifiable sense of grievance on behalf

of the appellant, was not in existence when the appeal to the Supreme Court was dismissed.

[116] Section 51 of the *Supreme Court Act* provides that where the jurisdiction of the Supreme Court in a proceeding (or a part of a proceeding) was exercised otherwise than by the Full Court, a party to that proceeding may appeal to the Court of Appeal from a judgment given in that proceeding (or part). Section 52 provides that (subject to exceptions in procedural matters) the Court of Appeal is to be constituted by not less than three judges.

[117] Section 54 provides:

> The Court of Appeal shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence, which may be taken on affidavit, by oral examination before the Court of Appeal or a Judge or otherwise as the Court of Appeal directs.

[118] Section 55 provides:

> (1) Subject to any law in force in the Territory, the Court of Appeal:
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> (a) may exercise every power, jurisdiction and authority of the Court, whether at law or in equity or under any law in force in the Territory; and
>
> (b) shall give such judgment as, in all the circumstances, it thinks fit.
>
> (2) Without limiting the effect of subsection (1), the Court of Appeal:
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> (a) may affirm, reverse or vary the judgment appealed from, in whole or in part; and
>
> (b) may set aside the judgment appealed from, in whole or in part, and substitute its own judgment; and

(c) may remit the proceeding for further hearing and determination, subject to the directions the Court of Appeal considers appropriate, to:

(i) for an appeal from an Associate Judge or referee – an Associate Judge or referee (as the case may be); or

(ii) for an appeal from the Court – the Court consisting of the Judge who gave the judgment; and

(d) may set aside a verdict or finding of a jury in a civil proceeding and enter a judgment despite the verdict or finding; and

(e) may grant a new trial in any case in which there has been a trial, either with or without a jury, on any ground upon which it is appropriate to grant a new trial; and

(f) may award execution from the Court or remit the proceeding to another court for the execution of the judgment of the Court of Appeal.

(3) It is the duty of a court to which a proceeding is remitted in accordance with subsection (1)(f) to execute the judgment of the Court of Appeal in the same manner as if it were its own judgment.

(4) The Court of Appeal shall comply with subsection (1) notwithstanding that the notice of appeal asks that part only of the judgment may be reversed or varied, and it may give judgment in favour of all or any of the respondents or parties, including respondents or parties who have not appealed from or complained of the judgment.

(6) An interlocutory judgment from which there has been no appeal does not operate to prevent the Court of Appeal from giving such decision upon an appeal as it thinks just.

(7) The powers of the Court of Appeal under subsection (1) in an appeal (whether by the Crown or by the defendant) against a sentence include the power to increase or decrease the sentence or substitute a different sentence.

[119] The role of the Court of Appeal when hearing an appeal against a decision of the Supreme Court when the Supreme Court was sitting as an intermediate court of appeal, has been considered in a number of decisions

of this Court. *Tiver Constructions Pty Ltd v Clair*[73] was an appeal to the Court of Appeal from a decision of the Supreme Court as the intermediate appellate court hearing an appeal from the Workers Compensation Court. Under the relevant legislation, the appeal to the Supreme Court was confined to questions of law. In examining the nature of the appeal to the Court of Appeal, Gallop J referred to the provisions of the *Supreme Court Act* set out above and expressed the view that the extensive powers granted to the Court of Appeal by s 55 point to the right of appeal to the Court of Appeal being in the nature of a rehearing, and not confined to questions of law.[74] Nevertheless, Gallop J emphasised the undoubtedly correct fact that the appeal to the Court of Appeal involved a review of the decision of the Supreme Court as intermediate court of appeal, and not a rehearing of the case before the Workers Compensation Court. Hence, as the appeal to the Supreme Court was on a question of law only, the appeal from the Supreme Court to the Court of Appeal ought to be similarly confined.

[120] Similarly, in *Wilson v Lowery*,[75] for the same reason, it was held that the jurisdiction of the Court of Appeal reviewing a decision of the Supreme Court as an intermediate court of appeal hearing an appeal against a decision of the Workers Compensation Tribunal on a question of law, was limited to

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73 (1992) 110 FLR 239

74 That accords with the decision of the High Court construing a similar appeal provision in *Re Coldham; Ex parte Brideson* [1990] 170 CLR 267, in which the Court held that the power conferred by the relevant section to "make such order as it thinks fit" together with the power to "take further evidence for the purposes of an appeal under this section" were strong indications that the appeal given by the section was by way of a rehearing on the facts and the law as they stood at the time of hearing the appeal.

75 (1993) 4 NTLR 79

questions of law, notwithstanding the breadth of the jurisdiction otherwise given to the Court.

[121] However, the focus of each of those decisions, and also of the decision in *Lee v McMahon Contractors Pty Ltd*,[76] was the ability of the Court of Appeal to become involved in questions of fact that were in the domain of the primary court. Those decisions were not concerned with other kinds of miscarriages of justice that might fall within the jurisdiction of the Court of Appeal.

[122] As a matter of logic, it must be true that in the general run of appeals to the Court of Appeal from the Supreme Court, where the role of the Supreme Court as an intermediate court of appeal is limited by statute (eg to a question of law), the role of the Court of Appeal on appeal from the Supreme Court will be similarly limited. This is because, as pointed out in *Tiver Constructions Pty Ltd v Clair* and *Wilson v Lowery*, the role of the Court of Appeal will generally be to determine whether the Supreme Court was in error in its decision.

[123] This result will not always follow, however, even when the ground of appeal involves an assertion of error on the part of the Supreme Court. One can readily imagine a case in which a ground of appeal alleges a factual error on the part of the Supreme Court. For example, it might be asserted that the Supreme Court mistook the facts which were before the court at first

76 (2018) 335 FLR 350

instance, and thus wrongly concluded that there had (or had not) been an error of law in the decision of the court below. Another example might be where a serious procedural error has occurred or there was bias or apprehension of bias that could have amounted to a miscarriage of justice warranting the intervention of the Court of Appeal.

[124] Regard must be had to the wide nature of the powers granted to the Court of Appeal under the *Supreme Court Act*, in particular ss 51, 54 and 55(1). The role of a court of appeal with powers expressed in those terms is not limited to correcting error in the decision of the court below. Where there has been a miscarriage of justice, even though there was no error on the part of the sentencing judge (or the intermediate court of appeal), the Court of Appeal should be prepared to interfere.[77] In such cases, there is a general power in the Court of Appeal to receive fresh or new evidence where the interests of justice require it.[78] Gibbs CJ said in *Gallagher v R:*[79]

> The circumstances of cases may vary widely, and it is undesirable to fetter the power of Courts of Criminal Appeal to remedy a miscarriage of justice. I respectfully agree with the statement of King C.J. in *Reg. v. McIntee* (1985) 38 SASR 432, at p 435, that "appellate courts will always receive fresh evidence if it can be clearly shown that failure to

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77 *Anderson* (1997) 92 A Crim R 348 at 349-350 (Western Australian Court of Appeal). See too *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [14] – [15] and *Allesch v Maunz* (2000) 203 CLR 172 at [23].

78 *Supreme Court Act* s 54; *R v Fordham* (1997) 98 A Crim R 359 at 378 (New South Wales Court of Criminal Appeal); *Many* (1990) 51 A Crim R 54 at 61-62 (New South Wales Court of Criminal Appeal); *Gallagher v R* [1986] HCA 26; (1986) 160 CLR 392

79 at [3]; *Gallagher* was an application for special leave to appeal against a decision of the NSW Court of Criminal Appeal refusing to order a new trial on the basis of fresh evidence. That involves somewhat different considerations than the present case in which the question is whether the Court of Appeal should receive further evidence for the purpose of, itself, dealing with an appeal against sentence. Nevertheless, the statement of general principle by Gibbs CJ is apposite.

receive such evidence might have the result that an unjust conviction or an unjust sentence is permitted to stand".

[125] It is well established that one category of potential injustice which can and should be corrected on an appeal against sentence is an unjustified disparity in sentences between co-offenders. This is so whether the co-offender's sentence was handed down before or after the sentence the subject of the appeal – and hence whether or not it is alleged that there was error in the sentencing process.[80]

[126] In a case such as the present, where the co-offender's sentence was not handed down until after the determination of the appeal to the Supreme Court, it will be necessary for evidence of the co-offender's sentence to be received by the Court of Appeal before the Court of Appeal can determine whether there has been any such unjustified disparity.

[127] The Court of Appeal has power to receive such further evidence under s 54 of the *Supreme Court Act*. That power is properly used in the interests of justice where it appears that the Court of Appeal may be called upon to correct a miscarriage of justice, and the evidence is, or may be, necessary for that purpose.[81] The power to receive further evidence is not constrained by the express limitations on receiving such evidence in s 176A of the *Local*

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80 *Postiglione v The Queen* [1997] 189 CLR 295; The High Court held that the New South Wales Court of Criminal Appeal should have allowed an appeal against the severity of the appellant's sentence on the basis of an unjustified disparity between the sentence imposed and the sentence subsequently imposed on a co-offender. (The result was complicated by procedural issues not relevant to the present appeal.)

81 See cases cited in footnotes 74 and 75 above.

Court (Criminal Procedure) Act which applies only to appeals to the Supreme Court from the Local Court.

[128] The appellant has already been granted leave to add Ground 3 to his notice of appeal. Given that the appellant's claim under Ground 3 is that there has been a miscarriage of justice because of what is claimed to be an unjustified disparity between the sentence handed down to the appellant and the sentence subsequently handed down to the co-offender Shannon Sing, we consider that the evidence of Shannon Sing's sentence, and the sentencing remarks of the sentencing judge in the Local Court should be admitted to enable this Court to determine that ground of appeal.

[129] However, that evidence having been admitted and considered, we agree with the factual analysis of Southwood J. In all of the circumstances, there is no unjustified disparity between the two sentences: the two sentences are not markedly disparate and what disparity exists is justified, taking into account the differences in the moral culpability of the two offenders, their ages and personal circumstances. Further, the parity principle was in fact applied, and applied appropriately, by the sentencing judge in the Local Court in sentencing Shannon Sing. We would dismiss the appeal.

[130] The orders we would make are:

1. Evidence of the co-offender's sentence, and the sentencing remarks of the judge in the Local Court is admitted.

2. The appeal is dismissed.
