CITATION:	*Nicholson v Andreou* [2018] NTSC 40
PARTIES:	NICHOLSON, Shaun Ashley v ANDREOU, Andreas
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 19 of 2017 (21718955)
DELIVERED ON:	15 June 2018
DELIVERED AT:	Darwin
HEARING DATE:	17 October 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – PROPERTY OFFENCES – JUDGMENT AND PUNISHMENT

Adequacy of reasons for sentence – whether error in ordering full cumulation of the sentences – whether failure to apply principle of totality – whether failure to take into account cooperation with police, remorse and early pleas – whether sentence was manifestly excessive – absence of reasons may support a conclusion relevant matters not taken into account – appeal allowed – in circumstances involving single episode of offending full cumulation failed to recognise extent to which criminality of one offence reflected in sentence imposed for another – whether failure to apply principle of totality considered underground of manifest excess – error in cumulation required Court to consider appropriate sentence regardless whether manifestly excessive – appeal allowed – appellant resentenced.

Local Court (Criminal Procedure) Act (NT) s 163
Sentencing Act (NT) s 5

Attorney-General (SA) v Tichy (1982) 30 SASR 84, *Bara v The Queen* [2016] NTCCA 5, *Cahyadi v R* [2007] NSWCCA 1, *Carroll v The Queen* [2011] NTCCA 6, *Emitja v The Queen* [2016] NTCCA 4, *JKL v The Queen* [2011] NTCCA 7, *Johnson v The Queen* [2004] HCA 15, *Johnson v The Queen* [2012] NTCCA 14, *Lade v Mamarika* (1986) 83 FLR 312, *Mill v The Queen* (1988) 166 CLR 59, *Morrow v The Queen* [2013] NTCCA 7, *Noakes v The Queen* [2015] NTCCA 7, *Nona v The Queen* [2012] NTCCA 3, *Nguyen v The Queen* [2007] NSWCCA 14, *Pearce v The Queen* (1998) 194 CLR 610, *R v Dunn* (2004) 144 A Crim R1 80, *R v Ellis* (1986) 6 NSWLR 603, *R v KM* [2004] NSWCCA 65, *R v McNaughton* (2006) 163 A Crim R 381, *R v Scanlon* (1987) 89 FLR 77, *R v Wilson* [2005] NSWCCA 219, *R v XX* (2009) 195 A Crim R 38, *Weininger v The Queen* (2003) 212 CLR 629, *Wright v The Queen* (2007) 19 NTLR 123, referred to.

REPRESENTATION:

Counsel:

Appellant:	A Abayasekara
Respondent:	SIJ Ledek

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	GRA1817
Number of pages:	26

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

Nicholson v Andreou [2018] NTSC 40
LCA 19 of 2017 (21718955)

BETWEEN:

SHAUN ASHLEY NICHOLSON
Appellant

AND:

ANDREAS ANDREOU
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 15 June 2018)

[1] This is an appeal against sentence brought pursuant to s 163 of the *Local Court (Criminal Procedure) Act* (NT).

[2] On 21 April 2017, the appellant was convicted by the Local Court of one count of unlawful entry with intent to steal, two counts of stealing and one count of damaging property. The maximum penalty for the property damage offence was imprisonment for 14 years. The maximum penalty for the other offences was imprisonment for seven years.

[3] The Local Court sentenced the appellant to imprisonment for 12 months for the unlawful entry, 12 months for one of the stealing

counts, six months for the other stealing count and six months for the property damage. Those sentences were ordered to be served in full cumulation, giving a total effective sentence of imprisonment for three years. A non-parole period of two years was fixed.

Grounds of appeal

[4] The grounds of appeal are:

1. That the sentence was manifestly excessive in all the circumstances of the offending and the appellant.
2. That the sentencing judge erred in cumulating the sentences.
3. That the sentencing judge erred in failing properly to apply the principle of totality.
4. That the sentencing judge erred in failing to take into account the appellant's cooperation with police, remorse and early plea of guilty.

The circumstances of the offending and the appellant's personal circumstances

[5] The appellant pleaded guilty to the charges. The agreed facts for the purposes of the guilty pleas may be summarised as follows.

(a) On 8 April 2017, the appellant unlawfully entered the premises of an engineering company in Berrimah with the intent to steal from those premises. That conduct constituted the offence of unlawful entry.

(b) Once inside the premises, the appellant located the keys to a company vehicle in one of the offices. That vehicle was a Toyota HiLux with a value of $15,000. The appellant also took a number of items from within the premises, placed them on a hand trolley, and loaded them into the vehicle. That other property had a value of $28,000.

(c) While searching the premises the appellant broke an internal door of the building and removed an internal glass window to gain access to an office. That conduct constituted the property damage offence.

(d) The appellant then used a set of bolt cutters to open the gate to the premises and drove the vehicle carrying the other stolen items away from the premises. That conduct constituted the two counts of stealing. The total value of the property taken at that time was $43,000.

(e) The appellant eventually drove the vehicle to an address in Moil, and arrived there at 2.50 in the morning. At 4.44 that same morning the appellant returned to the vehicle and drove it to a carpark at the Darwin Airport complex and left it there. It was recovered by police at 6.20 p.m. that day and returned to its owner.

(f) On the morning of 20 April 2013, police executed a search warrant at the appellant's residence. The appellant was found using a

grinder to remove serial numbers from various power tools in his possession. He admitted that he had unlawfully entered the building in Berrimah and had stolen the vehicle and the other property. The stolen items were found on the premises. The appellant was arrested and taken to the police station, where he participated in an electronic record of interview and repeated those admissions.

[6] The appellant was 49 years of age at the time these offences were committed. He had a regrettable criminal history in the Northern Territory dating from 2001 through to 2015. I summarise that prior offending for the purpose of drawing attention to both its scope and the similarity of much of it to the offending for which the appellant was sentenced by the Local Court on this occasion. That prior offending included:

(a) 33 convictions for stealing;

(b) 23 convictions for unlawful entry with intent to steal;

(c) 11 convictions for property damage, which would appear usually to have been committed in conjunction with unlawful entry offences;

(d) 15 convictions for obtaining property by deception;

(e) 11 motor vehicle related offences, including multiple counts of interfering with a motor vehicle;

(f) five convictions for the unlawful possession of property;

(g) two convictions for the unlawful use of a motor vehicle;

(h) one conviction for trespass;

(i) one conviction for resisting police; and

(j) various minor drug-related offences.

[7] In addition to those substantive offences, the appellant had five recorded breaches of orders suspending sentence and five recorded breaches of parole.

[8] The appellant appears to have been sentenced to imprisonment for two years in respect of the most recent previous episode of offending, which involved multiple counts of stealing and obtaining property by deception, and one count of unlawful entry. He had been released from prison five months before these further offences were committed.

[9] The appellant represented himself during the course of the plea, despite initially being encouraged by the sentencing judge to secure representation from legal aid. Perhaps as a result of that, the appellant's personal circumstances were not explored in any great detail during submissions. The appellant told the sentencing judge that although he had been offered legal representation he wanted to speak directly to the court in order to express his remorse. He stated that he had been released from prison in November 2016, and that in the

intervening five months he had been living at the Salvation Army Hostel in Berrimah. The circumstances of that accommodation afforded him a familiarity with the area in Berrimah, including the premises from which he stole the vehicle and other property.

[10] Despite that, the appellant submitted that his last stint in prison had a deterrent effect and he did not want to go back. He said that all his previous offending had been drug-related, whereas this offending was some form of cry for help. He described his offending on this occasion as "a big fuck the world". He was angry and his intention was to steal one power tool for a friend who had a flat tyre. Once inside the premises, he said his ambitions escalated. He said that once he returned home following the unlawful entry and theft he was struck by the awful prospect of being pursued by police and going back to gaol.

[11] The appellant said that he was nearly 50 years of age and that he had been institutionalised for most of his life without the familial and emotional support enjoyed by many. Despite that, the appellant claimed to have empathy for his victims and feelings of guilt and remorse for his conduct. He said he was glad to be caught. While acknowledging that he had squandered opportunities to turn his life around in the past, he said that he had reached the point where he wanted to make a real and lasting change. That submission culminated in a plea for what was effectively an order suspending sentence forthwith subject to supervision by Community Corrections.

The sentencing judge's reasons and decision

[12] The sentencing judge, if not unmoved by that submission, indicated that the inevitable result must be a sentence to actual imprisonment given the appellant's prior criminal record. The sentencing judge also remarked that it was serious offending, particularly having regard to the fact that the property stolen had a total value of $43,000. It was only a matter of good fortune that most of it was restored to the owner.

[13] The sentencing judge then went directly into the disposition in the following terms:

> You've got a long lengthy record of the same thing.
>
> What I'm going to do is, you will be convicted and sentenced to 12 months' imprisonment on the unlawful entry.
>
> You're convicted and sentenced to 12 months' imprisonment on the stealing of all the tools. That will be cumulative on the first 12 months.
>
> On count 3, the stealing of the vehicle – convicted and sentenced to 6 months. That'll be cumulative upon the second count and on the final count – sorry the damage to property that was six months, and the stealing of the vehicle, convicted and sentenced to 6 months.
>
> They're all cumulative upon each other so it's a total of three years. You will get supervision at the end of the first year. You will be a non-parole period of two years. After that you will be in the hands of the Parole Board.

[14] Those reasons are remarkable for their economy. Despite that, counsel for the appellant properly concedes that insufficiency of reasons does not, of itself, provide a ground for review of the sentence. At most, the absence of reasons in relation to a particular factor which properly

weighed in the sentencing exercise may support a conclusion that the matter was not taken into account. As counsel for the appellant submitted, that will ordinarily depend on whether it can be said that a markedly different sentence should have followed if the matter was in fact taken into account.

[15] As the Northern Territory Court of Criminal Appeal has observed, any contention that the sentencing court has accorded inadequate or excessive weight to a factor is best viewed as a particular of the ground asserting manifest excess.[1] Beyond any inferences that might be drawn from the ultimate determination of whether the sentence fell either within or without the available range, it is neither possible nor necessary for an appeal court to reach any particular conclusion concerning the allocation of weight to a factor. Accordingly, the contention that the sentencing judge placed insufficient or excessive weight on a particular consideration forms part of the ground that the sentence was manifestly excessive.

[16] Different considerations may apply to a contention that the sentencing judge failed entirely to consider a relevant factor or principle. Where the contention is not that the sentencing court accorded inadequate or excessive weight to a particular factor, but that the court failed to take into account a relevant factor or had regard to an irrelevant factor or

---

1 *Noakes v The Queen* [2015] NTCCA 7 at [15] citing *DPP v Terrick; DPP v Marks; DPP v Stewart* [2009] VSCA 220; 24 VR 457 at 459-460.

otherwise acted on a wrong principle, the appeal court may substitute its own sentence.[2] So, for example, if the sentencing judge's approach to the objective circumstances of the offending and/or the appellant's subjective circumstances demonstrated error by acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence, it may be incumbent on the appeal court to impose its own determination or assessment in that respect, and to resentence accordingly.[3]

[17] It is convenient to deal first with those grounds of appeal asserting errors concerning cumulation, the principle of totality, and the appellant's cooperation with police, remorse and early guilty plea.

Cumulation

[18] As described at the outset, the sentencing judge ordered full cumulation of the sentences across all counts. In *Carroll v The Queen*[4], the Court of Criminal Appeal made the following broad statement of principle in relation to cumulation and concurrency in sentencing (footnotes omitted):

> The following principles are well established. First, s 50 of the *Sentencing Act* creates a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders". There is no fetter on the discretion exercised by the Court and the *prima facie* rule can be displaced by a

2 *Johnson v The Queen* [2012] NTCCA 14 at [25].

3 *Emitja v The Queen* [2016] NTCCA 4 at [25], citing *Liddy v R* [2005] NTCCA 4 at [12].

4 [2011] NTCCA 6; 29 NTLR 106.

> positive decision. Secondly, it is both impractical and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively. The assessment is always a matter of fact and degree. Reasonable minds might differ as to the need for cumulation. Often there will be no clearly correct answer. Thirdly, an offender should not be sentenced simply and indiscriminately for each crime he is convicted of but for what can be characterised as his criminal conduct. The sentences for the individual offences and the total sentence imposed must be proportionate to the criminality in each case.
>
> ....
>
> However, the overriding concern is that the sentences for the individual offences and the total sentence imposed be proportionate to the criminality of each case. Concurrency may be appropriate because the crimes which gave rise to the offender's convictions are so closely related and interdependent. What is necessarily required in every case is a sound discretionary judgment as to whether there should be cumulation or concurrency.[5]

[19] A number of general observations may be made concerning nexus, interdependency and sentence for these purposes. It would appear that the imposition of an aggregate sentence was permissible in the circumstances of this case. Although the failure to impose an aggregate sentence cannot be characterised as an error, no apparent consideration was given to that matter by the sentencing judge. Whether to impose an aggregate sentence or separate sentences is a discretionary determination, as is the determination of the extent to which a term of imprisonment imposed for one offence should be

5 *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106 at [42] and [44].

served cumulatively on or concurrently with a term of imprisonment imposed for another offence.[6]

[20] Where the offences are part of a single episode of criminality with common factors it is more likely that the sentence imposed for one of the offences will reflect the criminality of both, particularly where the circumstances in which each offence was committed were "highly interdependent".[7] However, the fact that the offences form part of what might be described as a single episode does not of itself necessitate or warrant concurrency. The operative question is whether the sentence imposed for one offence encompasses in whole or in part the criminality of the other offence or offences.[8]

[21] There will be circumstances where two or more offences take place in a single episode in which there are discernible two or more courses of criminal conduct constituting "separate invasions of the community's right to peace and order".[9] That principle would encompass an unlawful entry involving both stealing and property damage. It is also the case that temporal proximity is not conclusive[10], although that principle will operate with greater strength in relation to offences of

---

6 *Sentencing Act*, s 51.

7 *Cahyadi v R* [2007] NSWCCA 1; 168 A Crim R 41 at [27]; *Nguyen v R* [2007] NSWCCA 14 at [12]; *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106 at [40].

8 *Nguyen v R* [2007] NSWCCA 14 at [12].

9 *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 at 92-93; *Johnson v The Queen* [2004] HCA 15; 205 ALR 346 at [4].

10 *R v Scanlon* (1987) 89 FLR 77 at 85; *Lade v Mamarika* (1986) 83 FLR 312 at 315-316.

violence involving separate attacks and/or separate victims.[11] Even so, a failure to identify and evaluate the nature and seriousness of each offence, and to cumulate the individual sentences appropriately, may amount to a failure to accord appropriate weight to the criminality inherent in each act.

[22] Against that background, and having regard to the circumstances of this offending, it is difficult to see why full cumulation was ordered across all sentences. These were not properly characterised as separate and independent courses of criminal conduct which simply occurred together. Although each of the offences had separate legal and factual elements, there was a substantial interrelationship between them in terms of circumstance and temporality. The irresistible inference is that the sentencing judge fell into error in making the orders for cumulation. It is open to this Court to resentence the appellant in those circumstances. Whether it should do so, and in what configuration, is best addressed in the consideration of the ground of manifest excess.

Totality

[23] Totality is concerned with the overall appropriateness of the penalty to be served for a number of different criminal events which may or may not be connected. It must be considered where the sentences to be imposed by a court will overlap or operate cumulatively. The

---

11 *R v XX* (2009) 195 A Crim R 38 at [52]; *R v Dunn* (2004) 144 A Crim R1 80 at [50]; *R v Wilson* [2005] NSWCCA 219 at [38]; *R v KM* [2004] NSWCCA 65.

overriding consideration is that the total sentence must not exceed the total criminality.[12]

[24] In imposing the sentences and making the orders for cumulation the sentencing judge gave no express consideration to the principle of totality. By that cumulation, the appellant was subjected to a total period of imprisonment for three years. Imprisonment for that length of time and in these circumstances required some consideration of totality.

[25] In the circumstances of this case, the question of whether the total sentence exceeded the total criminality is largely subsumed by the issue of cumulation, and for that reason the appropriate response is also best considered in the context of manifest excess.

Cooperation with police, remorse and early plea of guilty

[26] Section 5(2)(h) of the *Sentencing Act* (NT) requires that in sentencing an offender a court must have regard to "how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences". The principles which apply to the extension of leniency for this reason, and to appeals on this ground, are set out at length by the Court of Criminal Appeal in *Nona v The Queen*.[13] They include that additional leniency may be allowed in sentencing an offender over and above that allowed for the plea of

12 *Mill v The Queen* (1988) 166 CLR 59 at 63.

13 [2012] NTCCA 3; (2012) 31 NTLR 84 at [26]-[44].

guilty where there has been a voluntary disclosure of guilt by the offender. However, that leniency is properly extended "[w]here it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence".[14]

[27] That was obviously not the case in the present circumstances. As described above, the offender was caught "red-handed" at his premises in the act of grinding serial numbers off the power tools he had stolen. The fact that police had a search warrant for the appellant's premises indicated they had already identified him as a primary suspect in the offending. This was clearly not a case in which it was unlikely that the appellant's guilt would be discovered and established were it not for his cooperation and disclosure.

[28] The fact that the appellant made spontaneous admissions to the offending in those circumstances does not weigh in the sentencing exercise beyond any reduction which might be afforded for the guilty plea and any expression of remorse accepted by the sentencing court. Neither does the assertion that "the appellant showed police where all the stolen property was". The stolen property, with the exception of the vehicle which had been left at the airport carpark and already

14 *R v Ellis* (1986) 6 NSWLR 603 at 604. The principle was applied in *Nona* because the admissions were made in circumstances in which law enforcement authorities had not been able to obtain sufficient evidence to charge the offender for those offences and were unlikely to do so: see *Nona v The Queen* (2012) 31 NTLR 84 at [29].

recovered by police, was at the offender's premises for which a search warrant had already issued.

[29] This aspect of this ground of appeal is without merit.

[30] So far as the question of the guilty pleas and remorse is concerned, a number of well-settled principles have application to those matters.

[31] First, any reduction in sentence to take into account a plea of guilty and remorse is a discretionary determination which has no set value and which does not require a reduction of 25 percent.[15] Although that will ordinarily be the extent of the reduction where a guilty plea is indicated at the earliest opportunity such that it may be considered both facilitative to the administration of justice and indicative of true remorse, it remains a matter for the exercise of the discretion.[16]

[32] Second, a guilty plea is not necessarily indicative of true remorse in the sense of resipiscence. It may simply reflect the fact that, as in this case, the Crown case was overwhelming. Nor is it the case that an offender's direct expression of remorse must be accepted on its face. That is also a matter for determination by the sentencing court having regard to all the surrounding circumstances. A reading of the transcript, the manner in which the appellant framed his claim of genuine remorse, the fact that he had been released from prison for

---

15 *Wright v The Queen* (2007) 19 NTLR 123 at [32].

16 *JKL v The Queen* [2011] NTCCA 7 at [28], [31].

similar offending only five months previously, and the fact that he was caught in the act of obscuring the provenance of the stolen property might well have led the sentencing judge to reject his claim of genuine remorse.

[33] Third, while there are good reasons for a sentencing court to identify the reduction extended for a guilty plea in order to encourage the facilitation of the course of justice, a failure to identify expressly the reduction or credit given for that matter will not provide a ground for appeal.

[34] The only means of testing the assertion that the sentencing judge failed to apply an adequate (or any) discount in recognition of the early guilty pleas is to examine the sentence imposed in the context of manifest excess.

Manifest excess

[35] The principles which govern appeals on the ground that a sentence is manifestly excessive are well known.[17] The presumption is that there is no error. An appellate court interferes only if it is shown that the sentencing judge committed error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or

17 See, for example, *Bara v The Queen* [2016] NTCCA 5 at [75]-[76]; *Emitja v The Queen* [2016] NTCCA 4 at [39]-[40]; and *Morrow v The Queen* [2013] NTCCA 7 at [36].

inadequate as to manifest such error. It is incumbent upon the appellant to show that the sentence was clearly and obviously, and not just arguably, excessive.

[36] Although the property damage offence attracted the highest maximum penalty in this case, the unlawful entry appears to have been treated by the sentencing judge as the principal offence. That is understandable in the circumstances of this case. There is a wide range of sentencing outcomes for this type of offending. In *Bara v The Queen*[18], the Court of Criminal Appeal observed that a review of comparative sentences imposed by the Supreme Court for the crime of unlawful entry not involving offensive weapons reveals that it is not unusual for the Court to adopt a starting point of imprisonment for between two and four years before any discount for an early plea of guilty.

[37] The Court of Criminal Appeal was dealing specifically in that case with an unlawful entry which involved the circumstance of aggravation that the offence intended to be committed was the crime of stealing. As here, the appellant in that case was not charged with the further aggravating circumstance of being armed with an offensive weapon. Unlike the present case, the unlawful entry there under consideration was attended by the aggravating circumstances of entry to a dwelling house at night time.

---

18 [2016] NTCCA 5.

[38] In the matter of *R v Grant Moore*[19], Martin AJ observed that "the individual unlawful entries with intent to steal would attract sentences ranging from nine months to two and a half years, depending upon the circumstances of aggravation". That observation in context was directed to less serious types of unlawful entries, and was not directed to offences with a complex of aggravating circumstances. An examination of the sentences imposed by this Court bears out those observations in terms of range, if not standard. The bulk of matters involving unlawful entry in this jurisdiction involve entry to dwelling houses by relatively young offenders. Many such offenders are dealt with leniently for reason of their youth.

[39] When an unlawful entry is attended by property damage, as is frequently the case, an aggregate penalty is sometimes imposed. That aggregation may often have the effect of full concurrency, even though the sentence is not structured in that manner.

[40] In *R v McNaughton*[20], the New South Wales Court of Criminal Appeal noted that the principle of proportionality requires the upper boundary of a proportionate sentence to be set by reference to the objective circumstances of the offence, which do not encompass prior convictions.[21] This is not to say that an offender's prior convictions

---

19 Transcript of Proceedings, *R v Grant Moore* (Supreme Court of the Northern Territory, 21605492 and 21605497, Martin J, 3 June 2016).

20 (2006) 163 A Crim R 381.

21 At [24] per Spigelman CJ.

are not properly taken into account when fixing a sentence. This is reflected in s 5(2)(e) of the *Sentencing Act* (NT), which requires a court to have regard to an offender's character when sentencing that offender. Section 6 of the Act provides expressly that in determining the character of an offender a court may consider "the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender". As the plurality in *Weininger v The Queen*[22] observed in relation to a similar provision in the *Crimes Act 1914* (Cth):

> A person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative, of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration.[23]

[41] The appellant is a man of settled criminal habits and poor character. He is a recidivist burglar of mature age who entered commercial premises with the intention of stealing from those premises for

---

22 (2003) 212 CLR 629.

23 *Weininger v The Queen* (2003) 212 CLR 629 at [32]; cited by Angel J in *The Queen v Haji-Noor* [2007] NTCCA 7 at [39].

commercial gain. Despite his protestations during the course of the sentencing proceedings that his initial intention was only to take one tool to assist a friend, he remained in the premises for an extended period of time and stole 76 items. It was open to the sentencing judge to reject the appellant's assertions as to the extent of his intention at the time of the unlawful entry.

[42] Having regard to those personal circumstances and the objective circumstances of this offending, the sentence to imprisonment for 12 months imposed for the offence of unlawful entry could not be seen as manifestly excessive. Viewed in isolation, it borders on the manifestly inadequate. However, as noted above, the courts frequently aggregate the penalty for unlawful entry attended by property damage caused in the course of that entry; or order the sentences imposed to be served wholly concurrently. In this case, the sentence to imprisonment for six months for the property damage offence was wholly cumulated on the unlawful entry offence. That yielded what was effectively a sentence of imprisonment for 18 months for those two offences. Even allowing a reduction of 25 percent to take account of the guilty plea, that sentence was well within the range for those two offences.

[43] I turn then to consider the sentences imposed for the stealing offences. The total value of the property stolen in this case was $43,000. That is a relatively large amount for the purpose of assessing the objective seriousness of the offending. However, there are two matters which

contextualise the objective seriousness of the conduct. First, although the appellant deprived the owner of the vehicle in the relevant sense, shortly after that act of deprivation the vehicle was recovered by police. As already stated, the appellant had abandoned it at the airport carpark.[24] Second, this is not a matter which involved the breach of trust considerations which inform the sentences imposed in some stealing cases.

[44] The sentences imposed for stealing offences vary widely according to the circumstances and the value of the property stolen. Even where the property stolen is trifling in monetary value, and has no sentimental value, a sentence to imprisonment is almost invariably imposed in recognition of the inherent criminality of the conduct. By way of example, the theft of property worth less than $100 can attract a sentence of imprisonment for anything up to six months. Leaving aside embezzlement cases, the theft of property with lesser monetary value than the property stolen in this particular case can attract sentences of imprisonment for anything up to 2 years.

[45] Against that background, the sentence imposed in respect of the theft of the tools was imprisonment for six months. The sentence imposed for the theft of the vehicle was imprisonment for six months. That

24 It is unclear what the appellant's intention in this respect was, however it cannot be assumed it was in the expectation that the vehicle would be found and returned. As counsel for the respondent has observed, the appellant was unaware the vehicle was equipped with a GPS tracking device and could be located by that means.

result was no doubt influenced by the manner in which the appellant subsequently dealt with the vehicle. It cannot be said that either of those sentences was excessive when viewed in isolation. As with the sentences imposed for the unlawful entry and the property damage, they might be considered to be overly moderate in nature even allowing for a full discount in recognition of the guilty pleas.

[46] That leaves the question of cumulation. For the reasons of circumstance and temporality already identified in the discussion of that ground of appeal, some degree of concurrency would ordinarily have been expected for the sentences imposed for the stealing offences, both *inter se* and with the sentences imposed for the unlawful entry and property damage. That is particularly so given that the each of the stealing offences and the unlawful entry offence had an element which in a sense overlapped, even allowing for the fact that the elements were not identical.[25] The former offences required a specific intent to steal particular articles, whereas the latter offence involved the general intention to commit the indictable offence of stealing in effecting the unlawful entry. Accepting that this was not a case in which a single act was an element of each of the offences[26], that commonality still strengthened the call for at least some degree of concurrency.

---

25 See, for example, *Pearce v R* (1998) 194 CLR 610 at [7] per McHugh, Hayne and Callinan JJ.

26 Cf *Pearce v R* (1998) 194 CLR 610 (1998) 194 CLR 610 at [40]-[42] per McHugh, Hayne and Callinan JJ.

[47] However, and leaving aside final considerations of totality, this is not a case which called for concurrency in whole. The sentences imposed for the unlawful entry and property damage did not wholly reflect or subsume the criminality of the stealing offences; and neither did the sentence imposed for one stealing offence wholly reflect or subsume the criminality of the other stealing offence. This was a case in which partial cumulation was called for.

[48] Having said that, the impression gleaned from the sentencing remarks, however brief, is that the sentencing judge had a total sentence of three years in mind, and worked back from that point in fixing the individual sentences and ordering cumulation in whole in order to achieve the desired result. That would explain both the very moderate sentences imposed in respect of each individual offence and the cumulation in whole. However, that final result is reflective of a starting point of imprisonment for three years and nine months assuming a discount of 20 percent, and a starting point of imprisonment for four years assuming a discount of 25 percent. Even allowing for the appellant's regrettable criminal record, and the high level of objective seriousness of this offending, that suggests manifest excess having regard to the total criminality of the appellant's conduct.

[49] In the circumstances of this case, however, it is unnecessary to make any finding in that respect. I have found error in the manner in which the sentencing judge ordered full cumulation of each of the sentences.

Once error is disclosed, this Court must consider the appropriate sentence. If some other and lesser sentence is warranted, this Court must impose it.

[50] Counsel for the appellant identified the following matters in mitigation: the early pleas of guilty, the expression of remorse, the spontaneous admissions, the appellant's state of mind at the time he determined to break into the premises, and the appellant's advertence to the unfortunate circumstances of his upbringing. So far as the objective seriousness of the offending is concerned, counsel for the appellant drew attention to the fact that these were business premises and that the unlawful entry after hours did not give rise to substantial risk of contact with another person. It was also said that the offending was unsophisticated, opportunistic, did not involve significant planning, constituted a single episode, and did not ultimately result in the loss of any of the property.

[51] Ranged against those factors, counsel for the respondent drew attention to the appellant's lengthy and highly relevant criminal history, and to the fact that the appellant had been released from imprisonment for similar offending a relatively short time before the subject offending. Contrary to the appellant's submissions, counsel for the respondent says that the offending was planned, organised and deliberate in that the appellant had familiarised himself with the area and understood the premises would be unoccupied at the time. The appellant's conduct in

appropriating the vehicle to carry away the other goods stolen suggested a high degree of application to and determination in the task. All those matters should be accepted.

Disposition

[52] I make the following orders:

1. The appeal is allowed and the sentence imposed by the Local Court on 21 April 2017 is set aside.
2. For the offence of unlawful entry of a building with intent to commit the crime of stealing, the appellant is sentenced to imprisonment for 18 months.
3. For the offence of damaging property, the appellant is sentenced to imprisonment for six months to be served concurrently with the sentence imposed for the unlawful entry.
4. For the offence of stealing the tools to the value of $28,563, the appellant is sentenced to imprisonment for 12 months, six months of which is to be served cumulatively on the sentence imposed for the unlawful entry.
5. For the offence of stealing the vehicle to the value of $15,000, the appellant is sentenced to imprisonment for 12 months, six months of which is to be served cumulatively on the other sentences.
6. The total effective period of imprisonment is two years and six months, backdated to 20 April 2017.

7. A non-parole period of 18 months is fixed, also backdated to 20 April 2017.
