Lines v Norris [2008] NTSC 27

PARTIES:	LINES, Sean Gareth v NORRIS, Steven Paul
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 15 of 2007 (20632820)
DELIVERED:	10 July 2008
HEARING DATES:	5 October 2007
JUDGMENT OF:	SOUTHWOOD J
APPEAL FROM:	D Bamber SM

CATCHWORDS:

CRIMINAL LAW – Appeal against conviction – whether the accomplice warning from the trial magistrate was sufficient to accommodate the potential unreliability of a witness – whether the trial magistrate erred by treating the evidence of one witness as capable of corroborating another witness – unsafe and unsatisfactory - appeal dismissed

CRIMINAL LAW – Appeal against sentence – whether the trial magistrate erred in sentencing the appellant on the basis of an uncharged offence – whether the trial magistrate properly considered the principle of parity – whether sentencing process miscarried due to error in sentencing of appellant's co-offenders – appeal allowed – appellant re-sentenced

Criminal Code s 210; s 213; 251
Justices Act s 176A
Sentencing Act s 40(6)

R v Gallagher (1991) 23 NSWLR 220; *M v The Queen* (1994) 181 CLR 487, applied

R v Austin (1985) 121 LSJS 181; *R v De Simoni* (1981) 147 CLR 383; *R v Ismunandar* (2002) 136 A Crim R 206; *Lowe v The Queen* (1984) 154 CLR 606; *The Queen v MacGowan* (1986) 42 SASR 580; *R v Taudevin* [1996] 2 VR 402, referred to

The Queen v Syrch and Burns (2006) 18 NTLR 160, followed

Browne v Dunn (1893) 6 R 67, cited

REPRESENTATION:

Counsel:

Appellant:	S Barlow
Respondent:	G McMaster

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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

Lines v Norris [2008] NTSC 27
No. 15 of 2007 (20632820)

BETWEEN:

SEAN GARETH LINES
Appellant:

AND:

STEVEN PAUL NORRIS
Respondent:

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 10 July 2008)

Introduction

[1] On 14 February 2007, following a trial in the Court of Summary Jurisdiction at Katherine, the appellant was found guilty of the offences of unlawful entry of Diggers Den Tavern in Katherine at night on 25 December 2006 with intent to commit the crime of stealing contrary to s 213 of the Criminal Code and of stealing alcohol from those premises contrary to s 210 of the Criminal Code.

[2] On 15 February 2007 the appellant was sentenced for both offences by the Court of Summary Jurisdiction. He was convicted of each offence. For the offence of unlawful entry of a building with intent to steal the appellant was sentenced to 12 weeks imprisonment commencing on 14 February 2007,

which was to be suspended after the appellant had served three weeks in prison. The sentence of imprisonment was suspended on conditions that during the operational period of the suspended sentence of imprisonment, which was specified to be a period 12 months, the appellant was to place himself under the supervision of a delegate of the Director of Correctional Services and he was to obey all reasonable directions as to education, training, employment, residence, associates, education, counselling, treatment for alcohol abuse and reporting. For the offence of stealing the appellant was sentenced to 80 hours community work.

[3] The appellant appeals against both his conviction and sentence. Leave was granted to the appellant to amend the grounds of appeal against conviction and sentence. The grounds of the appeal against conviction are as follows:

1. The trial magistrate erred in his treatment of the evidence of the witness Cyril Mow by failing to record or adhere to an accomplice direction.

2. The trial magistrate erred by treating the evidence of the witness Cyril Mow as evidence capable of corroborating the evidence of Brenda Mow.

3. The verdicts were unsafe and unsatisfactory.

[4] The grounds of the appeal against sentence are as follows:

1. The trial magistrate erred by punishing the appellant for an offence uncharged, namely criminal damage.

2. The trial magistrate failed to properly consider the principle of parity.

3. The sentencing process miscarried due to manifest error in the sentencing of both of the appellant's co-offenders.

Fresh evidence

[5] During the course of the appeal counsel for the appellant sought to tender the prior criminal histories of Brenda Jessica Mow and Cyril Charles Mow. He sought to do so under s 176A of the Justices Act. The section states as follows:

> (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 that 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;
>
> (b) it is satisfied that that 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.
>
> (2) An appellant shall not, under subsection (1), tender evidence to the Supreme Court unless he has, not less than 7 days before the hearing of the appeal to which the evidence relates is

> commenced by that Court, given, subject to subsection (3), written notice to the other party to the proceedings of the evidence to be so tendered including, where such evidence is to be given by a person, irrespective of whether it is to be given orally or by affidavit, the name, address and occupation of the person.
>
> (3) For the purposes of subsection (2), an appellant shall give a notice referred to in that subsection by delivering or leaving it at, or by sending it by registered post service to, the last known residential or business address of –
>
> (a) the other party to the proceedings; or
>
> (b) the solicitor, if any, of the other party to the proceedings.

[6] The evidence was said to be relevant on two grounds. First, it was said that the evidence was relevant to the appeal against sentence. Counsel for the appellant argued that the evidence demonstrated that the appellant's alleged co-offenders, Brenda Mow and Cyril Mow, had been sentenced on an incorrect factual basis and this supported the appellant's argument that the sentences imposed on the appellant were grossly disparate when compared to the sentences that were imposed on Ms Mow and Mr Mow. They were sentenced on the basis that they were first offenders when their criminal histories showed that they both had criminal records.

[7] Secondly, it was said that the evidence was relevant to the third ground of appeal against conviction because Brenda Mow was not only an accomplice but an accomplice who was sentenced on an incorrect factual basis which afforded her greater leniency when she was sentenced than she would otherwise have been entitled. Counsel for the appellant argued that the

incorrect factual basis on which she was sentenced increased her unreliability as a witness.

[8] Counsel for the respondent did not object to the evidence of the prior criminal histories of Brenda Mow and Cyril Mow being received provisionally by the Court on the basis that counsel for the respondent would be allowed a further two weeks in which to provide written submissions in response to the proposed tender and I received the evidence provisionally on that basis.

[9] As no further written submissions were delivered by counsel for the respondent I have decided to admit the criminal histories of Brenda Mow and Cyril Mow into evidence. If the evidence was available to the appellant prior to his trial it would have been admissible in the Court of Summary Jurisdiction. The criminal histories are also relevant to the second ground of appeal against sentence. The evidence was unavailable to the appellant until shortly before the appeal was heard by this Court.

The police case against the appellant

[10] The police case against the appellant was that on 24 December 2006 the appellant and Brenda Mow had been drinking at Kirby's Hotel in Katherine. After they left Kirby's Hotel, Ms Mow decided that she wanted something more to drink. She and the appellant went to Diggers Den Tavern and Ms Mow kicked in a window of the tavern. Ms Mow then opened the door to the tavern and she let the appellant and her brother, Cyril Mow, and one

Jack Stephenson into the tavern. All four people then removed containers of alcohol from the tavern. It is unclear whether Mr Mow and Mr Stephenson joined the appellant and Ms Mow while they were making their way to Diggers Den Tavern or just before Ms Mow kicked in the window of the tavern.

[11] Two men, Ryan Francis Rowbottom and Beau Randell, who were seated on the front lawn of premises in Shepherd Street Katherine, heard the window of the tavern smash and Mr Randell called the police. During his evidence in the Court of Summary Jurisdiction Mr Rowbottom said that he saw the police arrive at the tavern and he saw some people moving inside the beer garden of the tavern. He then saw three people jumping over the fence and Mr Rowbottom and Mr Randell gave chase. However, they were unable to catch them.

[12] During his evidence in the Court of Summary Jurisdiction, Mr Rowbottom described the first person who he saw as being a bit shorter than the other two people. He described the second person as a part Aboriginal male who was slightly taller than the first person. He said that the second person had short hair, maybe a one or two shaved head, and he was wearing a maroon or red metallic sleeveless sports singlet. He described the third person as being the tallest of the three men and he said that he had shoulder length black hair and was of a skinnier build. He said that the third person was wearing a light coloured shirt. The description that Mr Rowbottom gave of the second man was consistent with the appearance of the appellant at that time.

[13] Mr Rowbottom told the Court of Summary Jurisdiction that at some point Mr Randell gave up the chase and he returned to tell the police about the three men that they had been chasing. Constable Ben Robert Rossiter gave evidence in the Court of Summary Jurisdiction. He said that he heard someone yelling from the corner of Shepherd Street and the Victoria Highway, "Over here! Over here!" He then started running towards the Victoria Highway and about 30 or 40 metres in front of him he could clearly see two people who were sprinting. He could not give an accurate description of what they looked like. They ran into a block of units beside the pawn shop on the Victoria Highway. He went into the units and he met the appellant who was sitting on a chair in front of one of the units. The appellant was not wearing a shirt. His shirt was down beside him. He described the appellant as a half caste Aboriginal man who was 185 centimetres tall with a number one or a number two haircut. He said that the appellant was not quite clean shaven and he was not sweating as if he had been in a quick sprint. The appellant was located about 20 metres from the Diggers Den Tavern. Constable Rossiter spoke to the appellant and shortly thereafter the appellant left. He then saw the appellant walking along the footpath that runs parallel with the Diggers Den Tavern. By that stage the appellant had put his shirt back on. During cross examination Constable Rossiter said that the appellant was wearing shoes and blue three quarter length pants.

[14] The police case against the appellant relied heavily on the evidence of Brenda Mow. During her examination in chief Ms Mow gave the following evidence. On Christmas Eve in 2006 she went and had a couple of drinks at Kirby's Hotel in Katherine. She went with the appellant. They had known each other for six months. At some stage she and the appellant left Kirby's Hotel and went to Victoria Park on the Victoria Highway. She was a bit intoxicated at this time. After they left Kirby's Hotel she wanted more to drink. She went to Diggers Den Tavern to get some more to drink. Diggers Den Tavern was not open at this time. She kicked in a window of the tavern. As a result, she now has scars on her leg and ankle. The appellant and Cyril, her younger brother, were with her. There was also a young fellow whose name she could not remember. After she kicked in the window of Diggers Den Tavern she opened the door of the premises. All the others then entered and took some of the bottles of alcohol that were in the tavern. She was helping Cyril and them. They all entered the premises, then left and then the police came. She knew the police were there because she could see their lights.

[15] She does not know what happened to the appellant. He took off. They went their own way. She does not know where the others went. The police picked her up and locked her in the police vehicle and then they took her to the Katherine Hospital. On Christmas Eve 2006 the appellant had short hair. He looked like a skin head.

[16] When asked by counsel for the police what her brother, Cyril, did, she said she just called him and he came and helped her. Then he just took off. She did not know where he went. They just went. She did not know where they went because she was a bit intoxicated. She does not remember how much she had to drink.

[17] When asked by the trial magistrate what they did to help, Brenda Mow said they just grabbed bottles of alcohol. She did not know where the bottles of alcohol ended up.

[18] During cross examination, prior to the luncheon adjournment on 14 February 2007, Brenda Mow gave the following evidence. She had been in a relationship with the appellant for six months. She was asked if the relationship had been a good relationship. She answered, "[The appellant] is alright. But since that incident now what with (inaudible) but no good, but we still get along good and we are just trying to keep our nose clean and get all of this stuff sorted out." She said that she could not remember how much she had to drink. They were at Kirby's Hotel for about two hours. They were drinking one drink after the other. There would be about 10 or 15 minutes between drinks and then she would have another one from a jug. They were drinking jugs that day. They were drinking beer and mixed drinks. She was getting a bit "charged up" and they were running out of money. She said that they needed some more to drink. She was asked by counsel for the appellant if she was able to remember clearly who she was with at that time. Ms Mow stated that all she remembers is herself, the

appellant and Cyril Mow and one young fellow. That is all she was able to remember. She could not remember the name of the young fellow. She was asked by counsel for the appellant if it was possible that she had so much to drink that she was not sure who was with her when she left Kirby's. She answered, "Me and Sean was together, that's all I can think of. Me and him was together." She then gave evidence that she saw her brother and the young fellow out walking and they just came and helped.

[19] Brenda Mow said that she and the appellant were at Kirby's Hotel. When they left Kirby's Hotel they were still together. She is sure about that. She and the appellant walked off together. The appellant was still with her when she walked out of Kirby's Hotel. She is sure about that. They walked off down a back street. She could not say for how long she was walking down the back street. Only the appellant was with her when she was walking down the back street. Her brother, Cyril Mow, was not there at that time.

[20] Her evidence was that, Cyril Mow, had not been drinking with her at Kirby's Hotel. The first time she saw Mr Mow that night was when he was just passing through. That is the only time she saw him. He was just passing through and she sang out to him to come over. She wanted to see what he was doing. The young boy was with her brother at that time. After they had been walking in the back street they met up with Mr Mow and the young boy. She does not know how they came to meet them. They just met. She said that she and the appellant were together all that night. They were together at the Diggers Den Tavern and then it happened and then she saw

Mr Mow. Cyril and Jack were walking together. She sang out to them to see what they were doing and they were also hanging out for a drink so they joined in. That was all she could say. When the police arrived she was outside and everybody just "cut" from there. She did not know what happened from there. She was locked up for a couple days. She was sent to Darwin.

[21] Brenda Mow then gave evidence that she and the appellant had a close relationship. He looked after her. He was the only one who has looked after her. He is really good. There had been problems with jealousy between them. They "bitched about each other" but that was all. They would talk it through. She had not been angry with the appellant in the past and the jealousy problems that they had experienced did not really bother her. The cross examination of Ms Mow ended just before the luncheon adjournment.

[22] At no stage before the luncheon adjournment did the counsel who was appearing for the appellant directly suggest to Brenda Mow that the appellant had not been with her on the evening in question. She was simply asked if she was so drunk that she could have been mistaken about the appellant's involvement in the unlawful entry of Diggers Den Tavern.

[23] After lunch on 14 February 2007 counsel for the appellant asked if Brenda Mow could be recalled so that he could ask her another question in order to comply with the rule in *Browne v Dunn* (1893) 6 R 67. He was given leave to do so. For the first time counsel for the appellant then

suggested to Ms Mow that the appellant was not at the Diggers Den Tavern when she was there. Ms Mow answered, "Mmm, hard question." Counsel for the prosecution then objected to another question that counsel for the appellant asked the witness and the trial magistrate intervened. His Honour said to Ms Mow, "The lawyer is putting to you that in fact [the appellant] was not with you at Diggers Den. What do you say about that?" Ms Mow answered, "Yeah, he was not. So I done it myself. Me and the boys, that's all I can say." Counsel for the appellant then asked a number of questions which were not answered by Ms Mow. The trial magistrate then told the witness, "You are on oath now. You have got to answer this with the truth. Was he with you or not at Diggers Den?" To which Ms Mow answered, "Um, yes we was together." Ms Mow was then excused. Ms Mow was not asked to give an explanation as to why she had given contradictory evidence after the luncheon adjournment.

The Reasons for Decision of the trial magistrate

[24] The trial magistrate gave the following reasons for finding the appellant guilty of the two crimes with which he was charged:

> The defendant in this matter has pleaded not guilty to a charge of unlawful entry and stealing. There are quite a number of witnesses that were police witnesses and civilian witnesses that gave evidence of surrounding circumstances relating to the events that occurred in the early hours of 25 December [2006].
>
> Principally the Crown case depended on the evidence of Brenda Mow. Brenda Mow was found by police at the scene where the Diggers Den [Restaurant] had been broken into. The venue had been substantially damaged by [a] number of windows or glass doors

having been broken. There was some blood at the scene and a large number of bottles of alcohol and […] other alcohol, quite a bit of what we would call top shelf alcohol, taken [from the restaurant].

Ms Mow gave evidence that she had, on the day in question, or the night in question, prior to the incident, been drinking with the defendant who was a person she had been in a relationship with for six months prior to this offence and it would appear that [the defendant] was someone who she has an ongoing interest in.

Also called to give evidence was her brother, Cyril Mow.

Brenda Mow [gave] evidence that she had been with Sean Lines, […] all […] evening. [She had] been drinking with him at the hotel and then [she] came across her brother and another young person who was the friend of [her] brother and that all four [of them] had been involved in the break-in and that she had cut her leg in effecting the break of one of the doors [to the premises]. Everyone had run off in different directions and she had been taken into custody.

She gave clear evidence that the persons involved […] with her were the defendant, […], her younger brother, and a friend of [her] younger brother. It was put to her that she had been drunk on the night and she may have been mistaken [about whether Sean Lines was with her]. She was quite clear in saying that the defendant was with her and with her in entering the building.

[Ms Mow's evidence] was supported to some extent by the evidence of Cyril Mow. Cyril Mow was not a convincing witness. He seemed to be an extremely reluctant witness but he did support the evidence of Brenda Mow to the extent that he did say [that] he was with the person that Brenda Mow said he was with, the other young fellow, his friend who was […] involved and that he also came across the defendant with Ms Mow. So he clearly supports Ms Mow in the fact that the defendant was together with Brenda Mow at the relevant place, Diggers Den [Restaurant].

There was evidence [given] by police [officers]. [There was the] [e]vidence of Constable Rossiter that he saw two persons leaving the scene. [There was the] [e]vidence of a civilian witness who saw three persons leaving the scene. One of the persons was a person who had a short hair cut and something of the appearance and build of the defendant.

Rossiter, shortly after Ms Mow was taken into custody, chased after two persons. He believed he heard two persons take off over a fence. At that time he saw the defendant sitting down on a chair at some flats, very close by to where the Diggers Den [Restaurant] was [located] and at the time that he had chased two persons the defendant gave evidence that he was there at those flats but he had been at those flats for ten minutes and had just not happened to go to those flats because he was there knocking on doors looking for cigarettes.

[The defendant] gave evidence that he had not been with Ms Mow at all that evening since after sunset. And in fact accounts for his time on those hours from sunset to the early hours of the morning when the offences took place and he was found sitting on a chair nearby as wandering around various parts of Katherine South, bringing Christmas cheer to others.

Who those others were and what Christmas cheer he brought I haven't heard. It was not put to Ms Mow that she was either lying about or being mistaken about the fact she had not been with the defendant earlier in the evening at the hotel or walking back with him.

Although she did appear to me to be a somewhat reluctant witness, that reluctance I ascertain[ed] to be reluctance to give evidence against Mr Lines who she still clearly has, had a relation with and would certainly appear from what she says is still fond of and holds no axe to grind, obviously given evidence as she did would get someone she has positive feelings for in trouble.

Despite that she has given evidence that clearly does put Mr Lines in trouble as being with her and being a part of the break in and the stealing of the bottles.

I find Ms Mow to be an honest and credible witness who was giving evidence under some difficulty. But despite that difficulty she did, when the crunch came, give true and credible evidence that Mr Lines was with her and he did take part in the entry and stealing.

I have come to that conclusion, I warn myself that she is an accomplice and that the accomplice evidence on its own is dangerous to convict on, accomplice evidence on its own without corroboration. I do believe there is evidence of sufficient amount to [amount to] corroboration.

> I believe the evidence of Mr Lines, being close by at [the] relevant time, that a person fitting his description had been seen leaving the scene and [that] evidence […] in effect fits [in] clearly and in no way derogates from the evidence. The surrounding circumstantial evidence fits in with the story that Ms Mow tells, and doesn't derogate from it.
>
> I find the evidence given by Mr Lines was most unconvincing. His story although convenient that he was sitting there for ten minutes and had walked to that place from the other direction doesn't seem either particularly credible and as I say it is a case where I have clear evidence which is supported by the surrounding circumstantial case.
>
> In spite of having given myself a warning, I am satisfied that the evidence of Brenda Mow is correct. It is corroborated and as such I am satisfied beyond reasonable doubt that both charges are made out.

Grounds one and two of the appeal against conviction

[25] Counsel for the appellant, Mr Barlow, argued that the trial magistrate had erred because his Honour failed to give himself an accomplice direction about the evidence of Cyril Mow and his Honour had relied on the evidence of Mr Mow as evidence which corroborated the evidence of Brenda Mow. He also argued that the evidence of Mr Mow was incomprehensible and lacked credibility.

[26] In my opinion grounds one and two of the appeal against conviction cannot be sustained. These grounds of appeal are misconceived. While I accept that it would have been appropriate for the trial magistrate to give himself a further accomplice warning if he was to rely on the evidence of Cyril Mow as corroborating the evidence of Brenda Mow, it was unnecessary for him to do so in this case as his Honour did not rely on the evidence of Mr Mow as corroboration of the evidence of Ms Mow. Instead the trial magistrate relied

on the circumstantial evidence given by Mr Rowbottom and Constable Rossiter as corroboration of the evidence of Ms Mow.

[27] The trial magistrate found that the evidence of Cyril Mow merely supported the evidence of Brenda Mow. In reality the trial magistrate did not place a great deal of weight at all on the evidence of Mr Mow. There is a difference between a finding that the evidence of a witness supports the evidence of another witness and a finding that the evidence of a witness corroborates the evidence of another witness.

[28] As to the evidence of Cyril Mow, the trial magistrate stated:

> [Ms Mow's evidence] was supported to some extent by the evidence of Cyril Mow. Cyril Mow was not a convincing witness. He seemed to be an extremely reluctant witness but he did support the evidence of Brenda Mow to the extent that he did say [that] he was with the person that Brenda Mow said he was with, the other young fellow, his friend who was […] involved and that he also came across the defendant with Ms Mow. So he clearly supports Ms Mow in the fact that the defendant was together with Brenda Mow at the relevant place, Diggers Den [Restaurant].

[29] As to the corroboration of the evidence of Brenda Mow, the trial magistrate stated:

> I find Ms Mow to be an honest and credible witness who was giving evidence under some difficulty. But despite that difficulty she did, when the crunch came, give true and credible evidence that Mr Lines was with her and he did take part in the entry and stealing.
>
> I have come to that conclusion, I warn myself that she is an accomplice and that the accomplice evidence on its own is dangerous to convict on, accomplice evidence on its own without corroboration. I do believe there is evidence of sufficient amount to [amount to] corroboration.

> I believe the evidence of Mr Lines, being close by at [the] relevant time, that a person fitting his description had been seen leaving the scene and [that] evidence […] in effect fits [in] clearly and in no way derogates from the evidence. The surrounding circumstantial evidence fits in with the story that Ms Mow tells, and doesn't derogate from it.
>
> …
>
> In spite of having given myself a warning, I am satisfied that the evidence of Brenda Mow is correct. It is corroborated and as such I am satisfied beyond reasonable doubt that both charges are made out.

[30] A plain reading of the transcript of the trial magistrate's reasons for decision reveals that his Honour did not rely on the evidence of Cyril Mow as corroboration of the evidence of Brenda Mow.

Ground three of the appeal against conviction

[31] Mr Barlow argued that the verdicts of the trial magistrate were unsafe and unsatisfactory for the following reasons. First, the evidence of Brenda Mow should have been rejected by the trial magistrate because she gave contradictory versions of what occurred. Secondly, the identification evidence of Mr Rowbottom was elevated beyond its real probative value. Thirdly, the evidence of Constable Rossiter did not support the police case against the accused. Fourthly, the trial magistrate wrongly rejected the evidence of the appellant. Finally, there was no forensic evidence connecting the appellant with the crimes with which he was charged.

[32] In my opinion this ground of appeal cannot be sustained.

[33] As to the assessment of the evidence in the Court of Summary Jurisdiction, by an appellate court, the principles enunciated by the majority of the High Court in *M v The Queen* (1994) 181 CLR 487 at 494 – 495 must be applied. Those principles are as follows:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence (40). In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (41). Although the propositions stated in the four preceding sentences have been variously expressed in judgments of members of the Court in previous cases, we have put aside those differences in expression in order to provide authoritative guidance to courts of criminal appeal by stating the propositions in the form in which they are set out above.

[34] I have reviewed the whole of the evidence in accordance with the above principles and in my opinion, upon the whole of the evidence, it was open to the trial magistrate to be satisfied beyond reasonable doubt that the appellant was guilty of each of the two offences with which he was charged.

[35] As to the evidence of Brenda Mow, the trial magistrate gave himself the appropriate accomplice warning. The warning was a sufficient warning to accommodate the whole of the witness's potential unreliability. His Honour adhered to the warning and he found the evidence of Ms Mow to be reliable and credible evidence which was corroborated by other circumstantial evidence that was contained in the testimony of Constable Rossiter and Mr Rowbottom. His Honour was entitled to so find.

[36] Counsel for the appellant relied on the following evidence in order to demonstrate Brenda Mow's unreliability:

Mr Lenn:	Ms Mow, sorry to have to put you back in this position. I have just one or two questions.
His Honour:	I thought you just said one question?
Mr Lenn:	One single question to ask you, or a question to put to you. Sean Lines was not at Diggers Den with you was he?
Ms Mow:	*Mm, hard question.*
Mr Lee:	This has been raised. How long does it take?
His Honour:	Yes you said this before, asking the same question.
Mr Lenn:	You Honour I understand that before my line of questioning from Kirby's and in the back streets but your Honour I understand …
His Honour:	Yeah but did you just explain that question before?
Mr Lenn:	I am simply putting it to you that …
His Honour:	You put to her that she could be mistaken about him being with her leaving?

Mr Lenn: Yes.

His Honour: Alright, so you are putting to her now that, alright.

His Honour: The lawyer is putting to you that in fact he was not with you at Diggers Den. What do you say about that?

Ms Mow: *Yeah, he was not. So I done it myself, me and the boys. That is all I can say.*

Mr Lee: Sorry?

Mr Lenn: So you could repeat that please?

Ms Mow: *When you keep asking me this question, he asked me that question before didn't you?*

Mr Lenn: No, I said I did want to ask you the question as to whether or not Sean Lines was with you at Diggers Den, and I am saying to you that he was not with you at Diggers Den. What do you have to say about that?

Ms Mow: Wasn't …

His Honour: You are on oath now. You have got to answer this question with the truth. Was he with you or not at Diggers Den?

Ms Mow: *Umm, yes we was together.*

His Honour: He was, yes, thank you.

Ms Mow: *You asked me that question before didn't you?*

His Honour: Yes, alright. Thank you for your evidence. You are now free to go.

[37] The above evidence, which was given by Ms Mow after leave was given for her to be recalled and further cross examined, does not give rise to a

substantial possibility that the trial magistrate was misled by the witness. Brenda Mow's contradiction of her earlier evidence was momentary and she immediately thereafter adhered to her original evidence. Counsel who appeared on behalf of the appellant in the Court of Summary Jurisdiction did not seek further leave to cross examine Ms Mow about the contradiction that had emerged during the course of her evidence. The contradiction may be explained by how the evidence came to be given, namely, the recall of the witness after she had been excused and the witness being questioned by the trial magistrate. The trial magistrate had the benefit of seeing and hearing the witness and he, personally, asked the witness both the question which gave rise to the contradictory answer and the question which resulted in the contradiction being corrected.

[38] The evidence of Mr Rowbottom strengthens the evidence of Brenda Mow. It independently connects the appellant with the two crimes with which he was charged. While appropriate caution should be exercised in considering any identification evidence, Mr Rowbottom's evidence of the description of the second person who he saw jump over the fence near the tavern is supported in turn by the evidence of Constable Rossiter. Constable Rossiter's description of the accused is consistent with the description of the second person who Mr Rowbottom saw jump over the fence near the Diggers Den Tavern shortly after he heard the window being smashed. The evidence of Mr Rowbottom is also supported by the evidence of Constable Rossiter that he was involved in the arrest of Brenda Mow, who was then the appellant's

girlfriend, at the Digger's Den Tavern and he located the appellant shortly thereafter in front of a block of flats only 20 metres away from the tavern. The evidence of Mr Rowbottom and Constable Rossiter rationally increases the probability that the evidence of Ms Mow against the appellant was truthful and reliable evidence.

[39] The fact that Mr Rowbottom could not identify the appellant in the dock does not undermine his evidence as the appellant's appearance had changed. His hair had since grown back.

[40] Constable Rossiter's evidence that when he arrived at the block of flats - the appellant was sitting still on a chair with his shirt on the ground beside him; he was neither puffing nor sweating; he was not breathing deeply; he had no bags in his possession; he had no alcohol in his possession; he did not appear to be surprised; he freely answered the questions asked by Constable Rossiter; and that Constable Rossiter did not see the appellant at any time prior to rounding the corner is, if anything, neutral and not exculpatory. Given the time that must have elapsed between Mr Rowbottom and Mr Randell giving chase to the three people they saw, and Mr Randell calling out to the police and the short distance between the Diggers Den Tavern, there would have been sufficient time for the appellant to compose himself in the position where he was found. Constable Rossiter considered the appellant either a suspect or a witness. He approached the appellant to ascertain his bona fides because he was of the belief that he had some knowledge of what had occurred. Constable Rossiter also found four bottles

of spirits and a blue bag containing UDL mixed drinks near the pawn shop which is located between Diggers Den Tavern and the block of units where the appellant was seated. This particular part of the evidence of Constable Rossiter does not diminish the high improbability of the extraordinary coincidence that the trial magistrate was otherwise asked to adopt as a reasonable possibility.

[41] Constable Rossiter also gave evidence that the police found some blood spots on the floor, took finger prints from the scene, photographed a large number of finger prints in situ and located other property which had been removed from Diggers Den Tavern. Despite Constable Rossiter's efforts, no forensic evidence was tendered against the accused. However, without further explanation, the lack of such evidence does not of itself exculpate the accused. The lack of such evidence simply means that the respondent's case against the accused had to be considered on the available evidence.

[42] Finally, I agree with the trial magistrate's rejection of the appellant's evidence. The appellant's evidence was vague, lacking in detail and dissembling. The appellant's evidence lacked the ring of truth and reality. The reason the appellant gave for being at the particular location in front of the flats where he was spoken to by Constable Rossiter at about 1.45 am or shortly thereafter on 25 December 2006 lacked credibility.

[43] During his evidence in chief the appellant stated that on Christmas Eve 2006 he had gone door knocking for mates and spreading good cheer. He said

that he had been sitting in the chair in front of the flats for about 10 minutes before the arrival of Constable Rossiter. During his cross examination the appellant gave the following evidence about how he came to be seated in front of the block of flats:

His Honour:	Why were you sitting at that seat at that place, why were you there?
The appellant:	I was door knocking for cigarettes and friends.
Not known:	Sorry?
Mr Lee:	That was a friends place was it?
The appellant:	Yeah I have got friends that live all around there.
Mr Lee:	Well where were your friends?
The appellant:	I was, I didn't think they were home.
Mr Lee:	So you just happened to wander up and just happened to be sat there when the police came?
The appellant:	I did not mean to knock on that until I there.
Mr Lee:	So you hadn't been there that night, you just happened to be just unfortunately sitting there at that time you were door knocking for cigarettes at what 1:00 in the morning?
The appellant:	Yeah.
…	
Mr Lee:	You didn't find your mates at this property two doors up the road from Diggers Den?
The appellant:	No. A lot of people were out having other parties elsewhere as well.

[44] I do not experience any reasonable doubt as to the guilt of the appellant. I do not consider that there is a significant possibility that an innocent person has been convicted. *M v The Queen* (supra) at 494.

Background to the appeal against sentence

[45] The appellant's co-offenders, Brenda Mow and Cyril Mow, pleaded guilty. Ms Mow was sentenced by the trial magistrate on 15 January 2007. For the crime of damage property contrary to s 251 of the Criminal Code, Ms Mow was sentenced to 40 hours of community work. For the crime of unlawful entry of a building at night with intent to commit a crime contrary to s 213 of the Criminal Code, Ms Mow was sentenced to 80 hours of community work. For the crime of stealing, Ms Mow was sentenced to 40 hours community work.

[46] For the crime of stealing contrary to s 210 of the Criminal Code, Cyril Mow was convicted and placed on a good behaviour bond for 12 months. For the crime of unlawful entry of a building at night with intent to commit a crime contrary to s 213 of the Criminal Code, Mr Mow was convicted and placed on a good behaviour bond for 12 months.

[47] Both Brenda Mow and Cyril Mow were sentenced in error on the basis that they were first offenders. In fact both of them had quite extensive criminal histories which included previous convictions for property offences and crimes of dishonesty.

[48] At the time that she was sentenced Ms Mow also pleaded guilty to a number of driving offences. She was 25 years of age. She was born in Cairns in Queensland on 9 October 1981. Ms Mow had from time to time engaged in meaningful employment. She had worked in an aged care facility as a cleaner and as a mango picker and packer. She pleaded guilty at an early opportunity and she co-operated with the authorities. She ultimately gave evidence against the appellant although she had not done so at the time that she was sentenced by the trial magistrate. She had already spent a number of days in prison for the offences for which she was sentenced. The trial magistrate was not informed of Ms Mow's criminal history.

[49] At the time that he was sentenced Cyril Mow was 21 years of age. He was born on 1 January 1986 in Queensland which is where he grew up. His parents were unable to care for him from when he was a very young age and he lived in a children's home on a mission and then with foster parents. He was molested as a young child. It was not said that he had an employment history. He also suffered from a disability, the details of which were not revealed to the court. Mr Mow had also spent a number of days in prison for the offences for which he was sentenced. The trial magistrate was not informed of Mr Mow's criminal history.

[50] When he sentenced Cyril Mow the trial magistrate made the following remarks:

> These are both serious offences having occurred at night time. [You entered] a business premises with some other co-accused. [The

> offences] occurred when the defendant and the others were apparently very intoxicated, which is not an excuse but it does indicate the sorts of risk factors that might be operative with this defendant. I am told another co-offender has received community work. Given this defendant is young it would have been good to I think give him community work, but he doesn't appear to be suitable. I have got some concerns about this defendant. I am not sure that he is in a stable situation. It does not sound like it at all and I note the comments on the community work order assessment and it would appear that he is not amenable to many of the forms of supervision and things like that that are available.
>
> He has pleaded guilty and he has been in custody since 18 January [2007] and I consider that to be quite significant given his age and the first time that he has been in the adult jurisdiction and I understand that he has also had the other odd period of time in custody over bail issues and that would seem to accord with the court file. So I think that it is appropriate that today I deal with him by way of a good behaviour bond.
>
> So Counts 2 and 3 convicted on both Counts. I order that he be released upon giving his security in the sum of $500, promising to be of good behaviour for 12 months and to appear before the court to do so during the period of this order, if he does not comply with one or all of those conditions he may be ordered to pay some or all of the $500. There are also two victim's levies totalling $80.

[51] At the time that he was sentenced the appellant was 28 years of age. He was born on 10 March 1978. He has a child with a woman with whom he was in a relationship before he entered into a relationship with Brenda Mow. The appellant had engaged in meaningful employment. He had worked as an apprentice baker at the Daly River Bakery for three years and two months. He then obtained further employment with the same employer when his employer moved to Brumby's Bakery. Otherwise the appellant's employment history was intermittent. The appellant suffered from a physical disability as a result of being stabbed in the neck. The trial magistrate was informed of the appellant's criminal history. Of relevance,

the appellant had a conviction for the crime of unlawfully damage property for an offence he committed on 28 August 2006; a conviction for unlawfully damage property for an offence he committed on 31 December 2003; convictions on 27 February 1992 for two counts of stealing for offences that he committed while he was a juvenile; and convictions on 27 February 1992 for two counts of stealing for offences that he committed as a juvenile. The trial magistrate was also told that Brenda Mow had no criminal history. The appellant had been in custody from 25 December 2006 to 29 December 2006 and overnight on 14 February 2007 for the offences for which he was sentenced by the trial magistrate.

[52] When he sentenced the appellant the trial magistrate made the following remarks:

> The defendant has pleaded not guilty to unlawfully enter commercial premises, Diggers Den Restaurant, with intent to commit the crime of stealing that was aggravated by the fact that it occurred at night-time. He also pleaded not guilty to did steal alcohol. A substantial amount [of alcohol valued] at about $1200 […] was taken by himself and co-accused. The instance occurred on Christmas morning. Clearly, the persons involved, including the defendant, had been drinking. According to Brenda Mow, she had been drinking with the defendant and got drunk and wanted more grog. [They] decided to go to Diggers Den. They got in by smashing glass doors, a number of windows or doors were smashed creating quite a lot of damage. As I have already stated quite a large amount of alcohol, particularly what one would call top shelf alcohol, was taken.
>
> Brenda Mow was caught at the scene, the others took off. Brenda Mow pleaded guilty at an early opportunity as did her brother Cyril. The defendant, as I say, pleaded not guilty. The matter went to trial yesterday. [The defendant] maintained that he was not involved and he gave evidence to that effect.

Besides numerous […] police, the owner of the premises, a person who was visiting private premises nearby, Ms Mow and Mr Mow were called to give evidence. As I stated yesterday I found Ms Mow to be a witness of truth. She was clearly under some stress having to give evidence against the defendant who she is in a relationship with. So the defendant certainly [gets] no credit whatsoever for the attitude he has taken to this matter, fighting it all the way, forcing the owner and others to have to come and give evidence, even Ms Mow, who he is in a relationship with and I am told wishes to keep the relationship going, having in effect put her in an awkward position shows that he has no remorse for his offending whatsoever.

On the other hand he has not committed like offences other than as a juvenile [when he was convicted] of unlawful entry. He has a mixed bag of offending but nothing quite as serious as this. So clearly he is someone, who given the fact that he does work when he can, […] who obviously is or can be rehabilitated. He is not as I say someone who has a history of like offending. [His] most recent offence was somewhat different, being criminal damage.

It would appear that he has a problem with lifestyle issues and drinking and I have decided that a partially suspended sentence may address those.

I am taking into account those matters put on his behalf by his counsel. I am imposing a sentence taking into account the dispositions that have been given to his co-accused. They obviously are in different positions in that there were no priors alleged against either of the co-accused and they pleaded guilty at an early opportunity. Certainly the position of the defendant is distinguishable from them.

Taking all of those matters into account, and those matters that I have to under the Sentencing Act, particularly s 78B, I have determined that in relation to Count one, which is the unlawful entry and which was quite a serious example of it, particularly as it involved quite a bit of damage to the premises, the defendant is found guilty, convicted and sentenced to be imprisoned for 12 weeks commencing on 14 February [2007]. I order the sentence to be suspended after he serves three weeks. I order the operational period be 12 months and during those 12 months he is to place himself under the supervision of a delegate of the Director of Correctional Services, and obey all reasonable directions as to education, training, employment, residence, associates and reporting, education and counselling and treatment for alcohol abuse.

> In relation to Count two he is convicted. He is ordered to perform 80 hours unpaid community work, that is, on a community work order which he is to commence immediately on his release from prison and is to be completed within eight weeks there from.

Ground one of the appeal against sentence

[53] The first ground of appeal against sentence is that the trial magistrate erred by punishing the appellant for an offence uncharged, namely criminal damage. In support of the first ground of appeal counsel for the appellant relied on the principles enunciated by the High Court in *R v De Simoni* (1981) 147 CLR 383 and the following remarks that were made by the trial magistrate:

> They got in by smashing glass doors, a number of windows or doors were smashed creating quite a lot of damage.
>
> …
>
> I have determined that in relation to Count one, which is the unlawful entry and which was quite a serious example of it, particularly as it involved quite a bit of damage to the premises, the defendant is found guilty, convicted and sentenced to be imprisoned for 12 weeks commencing on 14 February [2007].

[54] Counsel for the respondent submitted in reply that the trial magistrate was simply summarising the whole of the facts and that his Honour was not placing the blame for the property damage at the foot of the appellant. The trial magistrate was obviously aware that it was Ms Mow who caused the property damage to the tavern.

[55] In considering this ground of appeal, it is important to note that at the trial of the appellant the licensee of Diggers Den Tavern gave evidence. During

the course of his evidence he stated that as soon as he pulled up in the car park of the tavern he noticed the smashed window to the main entrance of the tavern. He also gave evidence that he went inside the tavern and he saw that there was glass throughout the place and that two double glass doors had been totally smashed and the frame was buckled as if it had been shoulder charged to get out in a hurry. In all, five windows of the tavern had been smashed. However, at no stage was it alleged that the appellant had done any of this damage. The evidence of Brenda Mow was that she had smashed a window of the tavern in order to gain entry and she had then opened the door of the tavern to let the others into the tavern.

[56] The principles governing a determination as to whether circumstances which amount to a crime other than the crime or crimes for which an offender has been convicted can be taken into account as part of the circumstances surrounding the commission of the crime for which the sentence is to be imposed, have been dealt with by the Court of Criminal Appeal in *The Queen v Syrch and Burns* (2006) 18 NTLR 160 per Martin CJ at 163 - 171. In that case the Court of Criminal Appeal applied the principles which were enunciated in the High Court in *R v De Simoni* (supra) per Gibbs CJ at 389, namely, that the general sentencing principle that the sentence imposed on an offender should take into account all of the circumstances of the offence is subject to the more fundamental principle that no one should be punished for an offence of which he has not been convicted; and, subject to that

principle, approved the following statement of King CJ in *R v Austin* (1985) 121 LSJS 181 at 183 that:

> It is true that in imposing sentence for a crime, a judge should take into account not only the conduct which actually constitutes the crime, but also such of the surrounding circumstances as are directly related to that crime and are properly to be regarded as circumstances of aggravation or circumstances of mitigation.
>
> Just what surrounding circumstances are properly to be taken into account in a particular case is a matter of degree. The courts have to be particularly cautious when the circumstances relied upon themselves may constitute crimes. Often the circumstances amount to crimes of a similar character to that charged and can more readily be taken into account as circumstances of aggravation. Likewise where the criminality of the aggravating circumstances is clearly subsidiary to as well as related to the criminality involved in the conduct constituting the crime charged. Special care, however, is required when the circumstances relied upon as circumstances of aggravation themselves constitute crimes or may constitute crimes of a different character or crimes against different victims.
>
> If a person is to be punished for conduct which is said to be criminal, generally speaking justice requires that he be charged with it and have the opportunity of defending himself. If he is not charged with it, generally speaking it should not be relied upon as a circumstance of aggravation of some other crime. This, of course, is not a hard and fast rule; everything must depend upon the particular circumstances and, as I have said, it is very much a matter of degree.

[57] The Court of Criminal Appeal in *The Queen v Syrch and Burns* (supra) also approved the following principles. A sentencing judge should take into account all of the circumstances of the offence of which the person to be sentenced has been convicted, either on a plea of guilty or after a trial, whether those circumstances increase or decrease the culpability of the offender. Commonsense and fairness determine what acts, omissions and matters constitute the offence and the attendant circumstances for sentencing

purposes. An act, omission, matter or circumstance which might itself technically constitute a separate offence is not, for that reason, necessarily excluded from consideration. An act that may technically constitute another offence may form part of the attendant circumstances if it is closely and directly connected with the offence of which the offender has been convicted and is subsidiary to it. For example, steps that are directly related to the offence or offences of which the offender has been convicted and which were undertaken for the subsidiary purpose of avoiding detection or apprehension may form part of the attendant circumstances. It is the conduct of the offender himself that is the relevant conduct when the sentencing judge is making an assessment of the offender's level of culpability.

[58] The trial magistrate in this proceeding was in error because he failed to apply the above principles when assessing the level of culpability of the appellant and when assessing the objective seriousness of the appellant's offending. There was no evidence before the trial magistrate that the appellant unlawfully damaged any property. There is no evidence that the appellant damaged any property to gain entry to Diggers Den Tavern. Nor is there any evidence that he damaged any property either to obtain the alcohol which he stole or to avoid being apprehended by the police or to leave the premises. Nor is there any evidence that the appellant was present when the damage was done to any property other than the front window of the premises. The only evidence in relation to the appellant is that he took

advantage of the fact that Brenda Mow had broken the front window of the premises to let him and the other co-offenders into the tavern. There was, therefore, no basis for the trial magistrate's remarks that they got in by smashing glass doors and that a number of windows or doors were smashed creating quite a lot of damage. Nor was there any basis for his Honour's remark that the appellant's unlawful entry was quite a serious example of unlawful entry, particularly as it involved quite a bit of damage to the premises.

[59] Nonetheless, in my opinion, the crime of unlawful entry of a building committed at night by the appellant was still a serious crime and, subject to what I have stated below, the sentence imposed on the appellant by the trial magistrate was a sentence that was proportionate to the offender's level of culpability, the objective seriousness of his offending and the subjective circumstances of the appellant. While there was an error in the application of the relevant sentencing principles I would not allow the appeal on this ground alone.

Ground two of the appeal against sentence

[60] The second ground of appeal is that the trial magistrate erred because the sentences his Honour imposed on the appellant are manifestly disparate when compared to the sentences that were imposed on his co-offenders, Brenda Mow and Cyril Mow. I have considered this ground of appeal on the basis that Ms Mow and Mr Mow were first offenders, which, of course, has

now been shown to be factually incorrect. However, there has been no appeal against the sentences imposed on the co-offenders on this ground. In my opinion ground two of the appeal against sentence is made out. The appeal against sentence should be allowed and the appellant should be re-sentenced.

[61] It is a general principle of sentencing offenders that unjustified disparity in the sentence of a co-offender is a reviewable error even if the sentence which is the subject of the appeal is otherwise an appropriate sentence. Marked disparity itself is the ground of appeal. In *Lowe v The Queen* (1984) 154 CLR 606 at 611 and at 613 – 614 Mason J stated:

> The authorities do not speak with one voice on the question whether marked disparity in the 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 a ground.
>
> …
>
> A court of appeal is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance, by reducing a sentence, which is not excessive or inappropriate considered apart from the discrepancy, to the point where it might be regarded as inadequate.

[62] In *The Queen v MacGowan* (1986) 42 SASR 580 at 582 – 583 King CJ stated:

> Where two or more persons are sentenced by the same judge for the same crime or crimes the sentences imposed on them should be proportionate to their respective degrees of culpability and to the various personal factors of aggravation and mitigation. Any distinctions in the sentences imposed should fairly reflect differences in the respective degrees of culpability and the circumstances of the offenders and should be explained by the sentencing judge.

[63] In this regard the trial magistrate stated as follows:

> I am taking into account those matters put on his behalf by his counsel. I am imposing a sentence taking into account the dispositions that have been given to his co-accused. They obviously are in different positions in that there were no priors alleged against either of the co-accused and they pleaded guilty at an early opportunity. Certainly the position of the defendant is distinguishable from them.

[64] His Honour gave two reasons for the disparity in the sentences between the appellant and his co-offenders. First, the appellant's prior convictions and secondly, the co-offenders' guilty pleas. The existence of previous convictions is, of course, relevant in that it may negate the mitigatory factor of good rehabilitation prospects. It may also be a factor which calls for greater specific deterrence, and in some cases the protection of the community: *R v Taudevin* [1996] 2 VR 402 per Hampel J at 404. However, in this case the appellant's prior history revealed that he had not committed similar offences for more than 15 years and that the last such offences he committed were committed when he was a juvenile. Further, the appellant had a reasonable work history and his prospects of rehabilitation were quite sound. The appellant's offending was opportunistic and spontaneous and the predisposing factor for the commission of the offences was the same for

all of the offenders namely, the misuse of alcohol. All offenders came from disadvantaged backgrounds and had similar upbringings.

[65] As to the co-offenders' pleas of guilty, the usual discount is 25 percent. The discount of course may be higher in circumstances where an offender has fully co-operated with the authorities.

[66] Further, the remarks of the trial magistrate demonstrate that he failed to take into account that Brenda Mow's level of culpability was greater than the appellant's. She instigated the offending and she committed the crime of property damage which enabled the offenders to gain access to Diggers Den Tavern. The trial magistrate dealt with the appellant as if he was equally as culpable as Ms Mow. He did so in error.

[67] While there was a need to differentiate between the appellant and his co-offenders because of the good character of the co-offenders, at least as represented to the trial magistrate, and because of the guilty pleas of the co-offenders, the difference in sentencing was, in my opinion, manifestly too great. The difference between the sentences of the appellant and his co-offenders is so disparate as to engender in the appellant a justifiable sense of grievance. The difference in the sentences gives the appearance that justice was not done. It cannot be said that the sentences that were imposed on the co-offenders were manifestly too lenient nor was this point taken by the respondent.

Ground three of the appeal against sentence

[68] Ground three of the appeal is that the sentencing of the appellant miscarried because the co-offenders were sentenced as first offenders when, in fact, they both had quite extensive criminal histories. In my opinion this ground of appeal is misconceived and cannot be sustained. If the co-offenders were sentenced on the basis of their true criminal histories there may well have been very little disparity in the sentences that were imposed on all offenders and the second ground of the appeal against sentence may not have been available to the appellant.

[69] Further, it may have been argued that because the co-offenders were sentenced as first offenders their sentences were manifestly inadequate and the appellant's sense of grievance could not, therefore, be regarded as a legitimate sense of grievance: *R v Ismunandar* (2002) 136 A Crim R 206. However, this point was not taken by the respondent and I understand that there is to be no appeal against the sentences that were imposed on the co-offenders.

Orders

[70] I make the following orders:

1. The appeal against conviction is dismissed.

2. The appeal against sentence is allowed.

3. I confirm the convictions of the appellant for the crimes of unlawful entry of a building at night with intent to commit a crime and of stealing.

4. I set aside the sentence that was imposed by the Court of Summary Jurisdiction on the appellant for the crime of unlawful entry of a building at night with intent to commit a crime.

5. I set aside the sentence that was imposed by the Court of Summary Jurisdiction on the appellant for the crime of stealing.

6. The appellant is to be re-sentenced.

Re-sentence

[71] For the crime of unlawful entry of a building at night with intent to commit a crime contrary to s 213 of the Criminal Code I sentence the appellant to 12 weeks imprisonment. The sentence of imprisonment is back dated to 8 February 2007 to reflect the eight days that the appellant has already spent in prison for the offences.

[72] For the crime of stealing contrary to s 210 of the Criminal Code I sentence the appellant to 12 weeks imprisonment. The sentence of imprisonment is to be served wholly concurrently with the sentence of imprisonment that I have imposed on the appellant for the crime of unlawful entry of a building.

[73] That gives an aggregate sentence of imprisonment of 12 weeks. The sentence of imprisonment is to be suspended on 16 February 2007 on the following conditions:

1. For a period of one year from 10 July 2008 the offender is to be under the supervision of a delegate of the Director of Correctional Services.

2. During the period of supervision the appellant is to obey the reasonable directions of the delegate of the Director of Correctional Services as to training, employment, residence, associates, counselling, treatment for alcohol abuse and reporting.

[74] Under s 40(6) of the Sentencing Act I specify that for a period of one year from 10 July 2008 the offender is not to commit another offence punishable by a term of imprisonment.

[75] In re-sentencing the appellant I have given considerable weight to general deterrence and to denunciation and to the appellant's prospects of rehabilitation. I have given consideration to the principle of parity. While there is a need to differentiate between the appellant and his co-offenders because of his lack of remorse, the co-offenders' pleas of guilty and their cooperation with the authorities, any difference in sentencing must be qualified by the appellant's prospects of rehabilitation, the gap in his offending of a similar nature and the level of Brenda Mow's culpability. She was the principal offender.

[76] In arriving at the sentences that I have imposed on the appellant I have born in mind the principles stated in *R v Gallagher* (1991) 23 NSWLR 220 at 233 per Gleeson CJ and the fact that the trial magistrate was misinformed about the criminal histories of the appellant's co-offenders. In my opinion the sentences that I have imposed on the appellant are consistent with the principles of parity and community standards.
