Mamarika v Murphy & Anor[2007] NTSC 58

PARTIES:	MAMARIKA, EZEKIEL v MURPHY, RAYMOND CHAMBERS, KIM
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 23/07 (20621295, 20631104, 20631106, 20711182)
DELIVERED:	9 November 2007
HEARING DATES:	27 September 2007
JUDGMENT OF:	OLSSON AJ
ON APPEAL:	Sentence imposed by Court of Summary Jurisdiction on 16 May 2007

CATCHWORDS:

Justices Appeal -- Appeal against sentences -- Appellant involved in a series of offences, mostly of a serious nature, as a member of a group seeking to exact payback retribution -- Serious and sustained offending involving substantial property damage -- Offences committed whilst on bail -- Whether learned magistrate erred as to his approach to the sequence of events -- Whether insufficient weight given to the appellant's relatively young age, lack of prior convictions, personal mitigatory factors and rehabilitation -- Whether learned magistrate erred by failing to consider gaol as a sentence of last resort and in not suspending sentences forthwith -- Whether parity principles not observed -- Whether sentences manifestly excessive -- Appeals dismissed.

REPRESENTATION:

Counsel:

Appellant:	C McGorey
Respondent:	G McMaster

Solicitors:

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

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

Mamarika v Murphy & Anor [2007] NTSC 58
No.JA23/07 (20621295, 20631104, 20631106, 20711182)

BETWEEN:

MAMARIKA, EZEKIEL
Appellant

AND:

MURPHY, RAYMOND
Respondent

AND:

CHAMBERS, KIM
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 9 November 2007)

Introduction

[1] This is an appeal against sentences imposed by a stipendiary magistrate upon the appellant on 16 May 2007 on the basis that they were, both individually and in aggregate, manifestly excessive.

[2] As I understand it, the notice of appeal originally related to four files that were before the learned magistrate, sitting as the Court of Summary Jurisdiction at Groote Eylandt.

[3] On File 20621295 the appellant was initially charged with 5 offences, all said to have been committed at Alyangula on 12 August 2006. Three counts were withdrawn by the prosecution when the matter was called on.

[4] The appellant then pleaded guilty to one count of having consumed liquor in a restricted area and one count of having received a quantity of liquor to an approximate value of $200 which had been obtained by means of crime, namely stealing, knowing it to have been so obtained.

[5] It was common ground that the appellant and a co-offender (Logan Mamarika) attended the Alyangula Oval on the day in question and were watching the fireworks at the Picnic Day celebrations. The learned magistrate was told that, whilst there, the offenders were approached by two other persons who told them that they had already broken into the Alyangula Golf Club and asked them to come with them to give them a hand. The two offenders went back with the other two persons to the Golf Club premises and stood outside its fence. The other two men then passed the offenders several bottles of stolen liquor over the fence, following which all four persons went down to the beach and commenced drinking the liquor.

[6] It was said that the two offenders were arrested on 24 August 2006 at their family residence and subsequently participated in an electronic record of interview. They both admitted having received the liquor knowing that it was stolen and that they had, in fact, consumed it in a restricted area. They were both charged and granted bail.

[7] As to the charge of having consumed liquor in a restricted area the appellant was convicted and fined $300. He was fined $400 with $40 levies in relation to a conviction on the receiving count. Those penalties are not now in issue.

[8] On File 20631104 the appellant pleaded guilty to one count of having unlawfully used a Toyota LandCruiser at Emerald River on 4 December 2006, which unlawful use involved the circumstance of aggravation that the vehicle was damaged, necessitating repairs at a cost of $5,000. He further pleaded guilty to four other offences, namely that, on the same date and at the same place:

(1) he unlawfully damaged a Toyota Troop Carrier to the value of $2500;

(2) he unlawfully damaged a Toyota 80 series to the value of $2500;

(3) he unlawfully damaged a Toyota LandCruiser to the value of $270; and

(4) he did, without lawful excuse, carry and use an offensive weapon, namely a wooden pole.

[9] The learned magistrate was informed that, on 4 December 2006, the appellant and members of his family had become involved in a dispute with another family at the Angurugu community. Some fighting broke out at the oval, with about 50-60 persons involved from each side. The police intervened to prevent the fracas from escalating.

[10] On the same afternoon, at about 4:30 pm, various persons including the appellant attended Emerald River outstation to continue fighting. They approached the first house in the community there, armed with sticks. They then commenced to damage a Toyota Troop Carrier that was the property of one of the residents. They picked up rocks and smashed all the windows of the vehicle. Most of the members of the community feared for their safety and fled.

[11] Whilst at Emerald River the group also deliberately damaged the other vehicles referred to. They then approached another Toyota Troop Carrier, smashed its rear window and hot-wired it. Some of them, including the appellant, travelled back in the vehicle to Angurugu, where further damage was deliberately caused to it.

[12] The appellant was sentenced to an aggregate sentence of four months imprisonment in respect of his participation in all of the vehicle offences, backdated to 23 April 2007. He was fined $300 for the offensive weapon offence.

[13] File 20631106 also relates to the events of 4 December 2006. On that file the appellant pleaded guilty to having unlawfully damaged property, namely speakers and an amplifier to the value of $1599 at Angurugu.

[14] The learned magistrate was told that, about an hour before the appellant and his co-offenders went to Emerald River, he and co-offenders Josiah Bara and Logan Amagula entered the house of Jason Untunga and his family. They

walked onto the verandah, picked up large stereo speakers and an amplifier that were the property of Lee Untunga and threw them on to the ground with such force that they were destroyed.

[15] The appellant was sentenced to two months imprisonment in respect of his participation in the commission of that offence, to be concurrent with the sentence imposed on File 20631104.

[16] I here pause to record that it seems apparent from the transcript at first instance that the learned magistrate misunderstood the sequence in which this offence was committed in relation to the Emerald River offences. That situation founds one of the amended grounds of appeal now relied upon.

[17] File 20711182 relates to an incident that occurred at Umbakumba on 21 April 2007. The appellant pleaded guilty to a charge that, on that occasion, he unlawfully caused damage amounting to $3000 to a Toyota LandCruiser owned by Albert Lalara.

[18] The Court was informed that, at about 12:30 pm on 12 April 2007, the appellant and three co-offenders travelled to Umbakumba community in a brown Toyota LandCruiser with the intention of fighting the residents at a house there.

[19] On arrival, the group got out of the vehicle and approached the house. As it transpired, no one was at home. After their arrival, the appellant was given an axe that was found in the house.

[20] The group walked over to where a white Toyota LandCruiser belonging to Albert Lalara was parked. They deliberately caused damage to it to the value of $3000 and then drove from the area. The appellant in particular used the axe to smash the rear tail light lens of the vehicle, the glass of its two rear windows and the glass of its two side windows.

[21] The learned magistrate sentenced the appellant to two months imprisonment in respect of the commission of that offence, cumulative upon the other custodial sentences to which reference has already been made.

[22] In the final result, the aggregate custodial sentence imposed on the appellant was a total of six months imprisonment, to run from when the appellant was arrested on 23 April 2007. This was suspended after service of six weeks to run from the same date, with an operative period of 18 months.

Grounds of appeal

[23] In essence, the appellant asserts that the aggregate sentence imposed on him was manifestly excessive. By his amended grounds of appeal, he specifically complains that:

(1) the sentences imposed were manifestly excessive;

(2) the learned magistrate erred in the approach to the sequence of the offences committed;

(3) the learned magistrate erred in giving insufficient weight to the appellant's personal mitigatory factors and rehabilitation;

(4) the learned magistrate erred by failing to properly consider gaol as a sentence of last resort and whether to suspend the sentences forthwith; and

(5) the learned magistrate erred in not properly applying the principle of parity.

Issues arising on the appeal

[24] In advancing his submissions on the appeal, counsel for the appellant took as his commencement point that his client was 19 years of age and a first offender. He and his co-appellant Logan Amagula (who was also a young first offender) had become involved in the offending conduct with a group of older male offenders who had significant antecedent records. The primary submission made was that, taking into account all the circumstances of the case, especially time already served, the learned magistrate ought to have either made community work orders or imposed wholly suspended sentences of short duration.

[25] That submission was made in the context that the appellant had, at time of sentence, already been in custody for 23 days and was thus required to serve a further 17 days in custody.

[26] It is to be noted that the offending on 4 December 2006 occurred over an afternoon and was by way of retribution against opposing clan members said to have behaved in an inappropriate manner towards the appellant's family.

The full details do not readily appear, but it seems that the conduct involved the unlawful taking and use of a motor vehicle.

[27] The total damage caused at Emerald River outstation extended across the four separate vehicles already referred to.

[28] Although the offenders were armed with weapons, the members of the community had fled and it is unclear whether they witnessed what occurred. It is not suggested that they, personally, had directly been subjected to physical attack by the raiding party. Nevertheless, the clear inference was that, had they not fled, the risk of that occurring was ever present.

[29] At the hearing before the learned magistrate, the prosecutor described the actions of the offenders as "*violent acts where these young men are arming themselves with weapons with the intent of causing substantial damage to the property of other people in occasions of retribution*" and submitted that the "*reality is that this Court needs to be sending a message to both these young men in terms of specific deterrence and also other offenders that it is not an appropriate way to respond to other acts of violence and spark violence themselves and by arming themselves with weapons which clearly happened with respect to the damage of those vehicles*". The learned magistrate was reminded that some of the offending had taken place whilst the appellant had been on bail.

[30] The prosecutor conceded that there had been no further trouble involving the clans since 4 December 2006 and that the families concerned were then apparently on good terms.

[31] Counsel made what were, in effect, common submissions on behalf of both this appellant and the co-offender Logan Amagula. They were to the effect that:

(1) both were youthful first offenders with no criminal history;

(2) the most serious offending arose out of unique circumstances;

(3) the offending occurred in company with other men who had considerable criminal histories, including periods of incarceration;

(4) both had pleaded guilty and already spent time in custody; and

(5) both were said to have excellent prospects of rehabilitation.

[32] It was specifically put to the learned magistrate that the fact that both appellants had already spent some time in custody was an important consideration and that, in the circumstances, community work orders or fully suspended sentences were an appropriate sentencing strategy.

[33] The learned magistrate was not persuaded that he was justified in adopting such a course. In dealing with the present appellant he had this to say:

> "In my view on the facts of this offending, especially on the criminal damage files, reveal serious and sustained criminal activity and I accept that as an explanation there is some mitigation in them occurring. That is to say the matter on 4/12/2006 as a result of family pressure and cultural imperatives to do with his clan, however

> the rule of law has been existing on Groote Eylandt for decades and decades and this kind of offending has not been tolerated for decades and decades and police and the justice system have intervened and will continue to intervene and the wider community including the peaceful citizens of Groote Eylandt, but the wider community do have a say and will insist on a say and that say is this; that such activity is not to be tolerated.
>
> The main thing going for this young man is his age, his lack of relevant prior convictions and his pleas of guilty, most of them at a fairly early opportunity. The facts themselves, in my view, do not provide much in the way of mitigation especially when it comes to the last offence. Here he is with warrants out for his arrest and he goes to Umbakumba and in a sustained attack of vandalism, damages that Toyota LandCruiser in a similar fashion to what happened at Emerald River three months before.
>
> I have regard to totality principles. I have regard to what was put to me by Mr Bellach and principles and guidelines of the Sentencing Act. I am pleased that there is a job he might be able to go to when he is released and I encourage him to do that for there's going to be a fair swag of prisoner[sic] hanging over his head for the next 18 months and it is sad that a first offender goes to gaol, but it must be said every offender that's in gaol was a first offender at one stage or another and is not often that you send a totally first offender to gaol but some cases call for it and in this case it's called for in my view".

[34] As will be seen, the transcript of the sentencing remarks is somewhat garbled. However, I take the learned magistrate to have adopted the view that the total offending on the part of the appellant was so inherently serious that, despite such mitigating circumstances as had been identified, the factors of personal and general deterrence required actual service of a modest portion of an appropriate aggregate custodial sentence.

[35] Mr McGorey, of counsel for the appellant, took as the linchpin of his argument that it is a well-established principle that, in the case of young first offenders in particular, the imposition of a term of actual imprisonment

ought to be very much a strategy of last resort, reserved only for the most serious cases that plainly demand it (cf *Turner v Trennery* reproduced at [1997] 1 NTSC 21 at 38). He referred to my acceptance of that proposition in *Gumurdul v Reinke* (2006) 161 A Crim R 87.

[36] He directed attention to the fact that, although the offending took place on three separate occasions, the worst incident was on one occasion only and in concert with older male recidivists. Moreover, he said, there were genuine prospects of rehabilitation under the supervision of a more mature family member, including potential employment for the appellant.

[37] It was at least implied that the learned magistrate should have called for a pre-sentence report and contended that he did not address significant subjective factors before imposing sentence.

[38] Mr McGorey submitted that, if the only appropriate sentencing dispositions were custodial sentences, the aggregate head sentence was crushing in relation to this young offender. It was, he said, not in accord with proper sentencing principle to primarily focus on what proportion of the sentence imposed ought to be suspended, as he said the learned magistrate did, by way of contrast with moderating the head sentence in the first place.

[39] He further submitted that, if it be considered that the imposition of a custodial sentence was warranted having regard to all the relevant circumstances, then a full suspension of that sentence was indicated.

[40] He based that contention on what he described as the compelling subjective circumstances of the appellant -- his youth, lack of prior criminal history, what he asserted was a lack of parity with the other co-offenders and the time already spent in custody. He argued that a requirement to serve more time than that already served would achieve no useful sentencing purpose in the case of an offender who had not previously served a custodial sentence but had now had the salutary experience of hearing the clang of the prison door.

[41] As to this, he drew attention to the well-known dictum of Muirhead J in *R v William Davey* (1980) 2 A Crim R 254 at 261-262, to the effect that it is erroneous to treat the suspension of a sentence of imprisonment as merely an exercise of leniency. Such an order is made in the community interest and is generally designed to prevent re-offending -- which a prison sentence, standing alone, seldom does -- a person so released has an obvious incentive not to re-offend and should have no misconception as to what will occur if it does.

[42] As a separate strand of his submissions, Mr McGorey contended that the learned magistrate failed to attribute sufficient weight to the appellant's status as a youthful first offender.

[43] He said that this was the first time that the appellant had been before a criminal court and had been formally found guilty, convicted and punished. Whilst he said that he did not seek to run away from the undoubted fact that,

although a first offender, the appellant was being sentenced in respect of several incidents, he argued that the learned magistrate had committed an appealable error by classifying the appellant and dealing with him as not being a first offender, in the relevant sense.

[44] This was, he submitted, a fundamental error because it led to the ignoring of the important concept that reformation was usually the dominant consideration in determining the appropriate punishment in the case of youthful first offenders (*Lahey v Sanderson* [1959] Tas SR 17 at 21, *Martin v Ruehland* [1984] 3 NTJ 672 at 681-685 and *Jambajimba v Seears* [1984] 2 NTJ 439). In reality, Mr McGorey coupled that ground of appeal with what, he submitted, was an important issue arising out of the learned magistrate's misapprehension as to the sequence of the offending behaviour.

[45] I do not consider that, in imposing sentence, the learned magistrate did, in substance, incorrectly classify the appellant, despite what he may have said on 17 May 2007, when dealing with appeal bail.

[46] As appears from his actual sentencing remarks, the learned magistrate specifically referred to the appellant's "*lack of relevant prior convictions*".

[47] Is true that, as recorded in the transcript of 17 May 2007 relating to an application for appeal bail, the learned magistrate commented that it was nonsense to call the appellant a first offender --" *he was a repeat offender after the events that he pleaded guilty to on 12 August 2006. By the time he*

came to be sentenced, he was a repeat offender and its nonsense to pretend otherwise".

[48] Quite apart from the fact that these were *ex cathedra* remarks made subsequent to sentencing, it is apparent that the learned magistrate did not exhibit the error attributed to him at the time of sentencing.

[49] Whatever may have been the semantics of the situation, to the extent to which he drew attention to the fact that the relevant offences had occurred on four different, successive occasions and, in the last three instances, whilst charges were pending against the appellant and he was on bail, that was a scenario that could scarcely be ignored. The fact that *convictions* had not earlier been recorded did not gainsay the fact that the appellant continued to offend whilst on bail and, eventually, when there were warrants extant for his arrest. Moreover, the offences so committed were all of a serious nature.

[50] I remain unpersuaded that the learned magistrate allowed his attention to be deflected away from proper sentencing considerations by incorrectly categorising the appellant. The sentencing remarks do not indicate such a situation. His references were to the appellant's de facto conduct and not his formal legal status.

[51] In the course of his submissions, counsel for the appellant, having suggested that inadequate regard had been shown for the appellant's previous good character, drew attention to the dictum of McHugh J in *Ryan v R* (2001) 179

ALR 193 to the effect that, in considering the issue of good character, it is not proper to consider the offences for which the prisoner is being sentenced, although His Honour went on to say that the weight that must be given to the prisoner's otherwise good character will vary according to all the circumstances of the case. One of those circumstances is the course of conduct of which each of the offences formed a portion.

[52] Mr McGorey went on to submit that the appellant could not be categorised as a persistent offender in the sense adverted to in *Lahey v Sanderson* (*supra*) and the appellant had not been shown to be unamenable to disciplinary methods short of gaol. He had never been given the opportunity of displaying compliance with any disciplinary methods.

[53] The point made by Burbury CJ in *Lahey v Sanderson* was that, as he put it, "*the court rarely sends a youth to gaol except in the case of crime of considerable gravity (such as a crime involving violence), or in the case of a persistent offender who has shown himself not amenable to disciplinary methods short of gaol*".

[54] The essential problem with Mr McGorey's submissions is that they tend to ignore what is the real gravamen of the appellant's conduct. As to this, these features are critical:

(1) The offending behaviour extended over three separate dates, each separated by a significant time interval. The first was on 12 August 2006, the second on 4 December 2006 and the third on 21 April

2007. On the second date there were, in fact, two quite separate incidents in two different locations.

(2) The appellant was charged on complaint as to the first incident on the 18 September 2006 and admitted to bail. He first appeared before the court on the following day.

(3) He was charged in relation to both the stereo offence and the Emerald River offences on 7 December 2006 and granted bail in respect of them. He first appeared before the court on 19 December 2006, but failed to appear on 18 April 2007. Warrants were issued. He was subsequently taken into custody on 26 April 2007, apparently when arrested in respect of the incident at Umbakumba that had occurred on 21 April 2007.

(4) He was charged in relation to the Umbakumba offence on 26 April 2007 and first appeared before the court the same day. He remained in custody until sentenced in respect of all offences on 16 May 2007. I infer that the remand in custody occurred by reason of both the breach of bail and also the appellant's continuing offending behaviour whilst on bail.

(5) All of the offences referred to were serious.

(6) Certainly, the first two offences of receiving and consuming liquor were properly dealt with by imposition of fines, but the serious

feature of them, for present purposes, was that the appellant had participated in the asportation of liquor that he well knew had been stolen. The consumption offence was the end product of that scenario.

(7) He then participated in the other offences whilst on bail in each instance. Each of the other offences occurred in a context in which a group of men (including the appellant), expressly bent on trouble, deliberately set out to destroy, damage or unlawfully use valuable property of other persons.

(8) The stereo equipment was actually destroyed and substantial damage was caused to the vehicles concerned. In one instance $5000 damage was caused to a vehicle, in two others the damage was $2500 and in the final incident the damage amounted to $3000.

(9) It is not known to what extent the residents at Emerald River observed the rampage that occurred there, but it is clear that what took place on the initial arrival of the offenders was sufficiently frightening to cause them to flee the locality.

(10) What was therefore under consideration was a scenario in which the appellant was involved in an escalating sequence of serious offences in which, as to at least four of them he wielded sticks and rocks and an axe respectively. The fact that no one was physically injured and that the damage to the vehicles may have been largely external by no

means indicates that the offending conduct was other than very serious.

(11) Although the learned magistrate may have employed somewhat colourful language in the course of exchanges with counsel during submissions as to penalty, he certainly did not, in his ultimate sentencing remarks, use various of the words ascribed to him. In sentencing, he did express the view that the charges arose in the context of serious and sustained criminal activity, but I do not consider that this was an over florid description of what had occurred. In that regard, it must be recalled that the Emerald River offences committed by the appellant personally did not occur in isolation. They had to be seen as part and parcel of an overall rampage on that occasion, during which no less than five vehicles and the stereo equipment were deliberately damaged by the raiding group.

[55] By the time that the appellant came before the learned magistrate, he had, in fact, shown himself to be a serial offender who was not even prepared to fulfil his bail obligations, and was continuing to offend in a serious manner despite prior appearances before the court. It was small wonder that, in the course of sentencing submissions, the learned magistrate was constrained to comment "*Whilst on bail for all that mayhem* [a reference to the Emerald River offences] *he's committed another criminal damage on 21 April*". The appellant's cumulative, inherently serious offending plainly called for

severe punishment, despite his young age and lack of actual prior convictions. The nature of the offending was such that considerations of personal and general deterrence and the protection of the public demanded no less. Relatively little weight could properly be given, at least as to the later offences, to any technical "*good character*" status possessed by him.

[56] Having made that point, I by no means ignore Mr McGorey's submission concerning the significance of the misapprehension by the learned magistrate of the sequence of events on 12 August 2006.

[57] He argued that the misapprehension necessarily invalidated the sentence imposed on the appellant in respect of the stereo incident, because it gave rise to the erroneous view that the relevant conduct was an extension on and continuation of what had already taken place at Emerald River. In fact, until the stereo offence had been committed, the only prior offending conduct had been the relatively minor liquor related offences and the appellant's "*good character*" status was largely intact.

[58] There is some *prima facie* force in that contention. However, when considering the relevant circumstances in the sense adverted to by McHugh J in *Ryan* (*supra*), it is important to take a realistic view of the events as they actually unfolded on 12 August 2006. The inescapable conclusion is that both the stereo incident and what occurred shortly thereafter at Emerald River were the product and merely particular assets of what was essentially

a single, continuing payback enterprise embarked on by the offenders on the afternoon in question.

[59] It really mattered little in what order the offences were committed. It is unreal to view them other than as a single, interconnected series of events that the learned magistrate quite appropriately characterised as a serious. So serious was the conduct in its totality that the weight properly to be attributed to a lack of prior convictions before the commencement of the enterprise was necessarily modest.

[60] Mr McGorey complained that the learned magistrate failed to correctly recognise and apply the parity principle apropos the appellant, having regard to the manner in which other co-offenders had been dealt with. They had also pleaded guilty to various offences arising from the narrative circumstances, as I have outlined them in relation to the events at Emerald River and Umbakumba. Three other offenders were relevantly involved, apart from the co-appellant Logan Amagula.

[61] The stereo destruction incident involved the present appellant, the co-appellant Logan Amagula and Josiah Bara. Bara was 21 years of age at the time. He received a sentence of two months imprisonment in relation to the destruction of the stereo, three months imprisonment for the unlawful use of a motor vehicle and an aggregate sentence of six months imprisonment for three criminal damage charges and carrying an offensive weapon. The last

two sentences were directed to be served concurrently. He was also sentenced for an assault matter unrelated to the appellant.

[62] This offender had a substantial history of prior convictions, including 16 convictions of offences involving violence and eight convictions for property offences. He had served substantial prior custodial sentences.

[63] Other offences also involved Jackson Bara and Neville Wurramara.

[64] The former was 20 years of age and was dealt with by a different magistrate on a different occasion. He received six months imprisonment in respect of the unlawful use offence, two months imprisonment on each of three criminal damage charges and a conviction without further penalty for carrying an offensive weapon.

[65] All terms were directed to be served concurrently and the aggregate head sentence was suspended after four months, with an operative period of 18 months. This offender had an 11 page antecedent history and had served lengthy periods of imprisonment for offences of violence, criminal damage, property offences, unlawful entry, stealing and trespass and unlawful use of motor vehicles.

[66] Neville Wurramara was 30 years of age at the time of offending and was only involved in the Emerald River incident. He received three months imprisonment for the unlawful use of the motor vehicle, an aggregate of four months imprisonment for three criminal damage charges and two months

imprisonment for carrying an offensive weapon. All sentences were directed to be concurrent and suspended after service of two months. This offender had a four page antecedent record, including three convictions for property damage and three convictions for unlawful use of motor vehicles. He had served prior custodial sentences.

[67] The appellant points to the bad prior record of Jackson Bara and seeks to contrast the six-month effective sentence imposed on him with a four-month sentence imposed on the former for the Emerald River offences and the cumulative two months imprisonment imposed for the stereo incident.

[68] The fallacy inherent in that contention is that, in terms of subject matter of sentence, the appellant does not seek to compare like with like.

[69] Jackson Bara was not involved in the stereo offence. Nor does it appear that he was involved in the Umbakumba incident. The true comparison is between a four-month head sentence in respect of that offence *plus* custodial sentences for two other offences (associated with an ultimate suspension after six weeks) and a six-month sentence, of which four months actually had to be served. There was, in fact, no breach of the parity principle.

[70] The appellant further sought to contrast his sentences with those imposed on Neville Wurramara, saying that, despite the latter's older age and poor antecedent record, both received the same head sentence for the events at Emerald River.

[71] True it is that the effective head sentences were the same, but Neville Wurramara was required to actually serve a longer period of actual imprisonment than the appellant and had not committed precisely the same range of offences as the latter.

[72] Where groups of multiple and to some extent disparate offences are involved, there is often a juggling process (evident in the cases under review) that has to be carried out to give effect to the totality principle. This can readily distort potential comparisons and needs to be a consideration carefully factored into any comparative exercise when considering the parity principle.

[73] When the above matters are taken into account it is impossible to perceive any significant parity problem of the nature referred to in *Lowe v The Queen* (1984) 154 CLR 606 and sought to be relied upon by the appellant. As Ms McMaster, of counsel for the respondent, pointed out, the parity principle essentially directs its attention to situations of substantial, if not gross, disparity, especially where it is considered that a comparative sentence is manifestly low (see discussion of relevant authorities in *Capper* (1993) 68 A Crim R 64 at 68-73).

[74] In this case the learned magistrate specifically expressed the opinion, with which I concur, that the sentences imposed by another magistrate on Jackson Bara in particular were very low, having regard to the seriousness of his offending. I do not see any disparity of such significant magnitude as to

warrant interference by this Court. As was indicated by Moffitt P in *Tisalandis* [1982] 2 NSWLR 430, it is not appropriate to reduce a proper sentence to an improper sentence merely because there may have been an error made in relation to the co-offender.

[75] I next turn to the appellant's assertion that the learned magistrate gave excessive weight to the factor of general deterrence.

[76] Counsel for the appellant contended that that the learned magistrate overstated the appellant's criminality, did not place the appropriate weight upon the subjective circumstances of the appellant and gave excessive weight to notions of general deterrence. He sought to criticise the reference by the learned magistrate to the attitude of the wider community and its imputed attitude that such activity is not to be tolerated.

[77] While counsel accepted that a deterrent message was properly directed to the members of the Groote Eylandt community, it was, he argued, "*too overarching*" to include people outside Groote Eylandt as constituting the pool to which the deterrent message is sent.

[78] Such an argument cannot be accepted. Sadly, the type of conduct the subject of the offences is by no means unique to the Groote Eylandt locality and any element of general deterrence is properly applicable to the Territory community at large.

[79] Further, it is quite clear that the learned magistrate bore well in mind the young age of the appellant and his lack of antecedent record. However, he was properly preoccupied with the serious and continuing nature of the offending and the need, in the community interest, for the courts to adopt a firm stand and do what they can to suppress conduct of that nature.

[80] This was, in truth, a situation in which the considerations adverted to by Batt JA in *R v Mills* (1998) 4 VR 235 at 241 necessarily had to be balanced against the objective seriousness of the offending and the imperative need to make it clear to the community that conduct of the type in question would not be tolerated. The terms of imprisonment imposed and the period actually required to be served were, conformably with the concept referred to in *R v Mills*, quite modest having regard to the objective seriousness of the offending.

[81] No error of the type suggested has been demonstrated.

[82] The appellant next asserts that, despite acknowledging the timely pleas of guilty entered by the appellant, the learned magistrate did not indicate what discount he had allowed in that regard and does not appear to have actually allowed any substantial discount (cf *Kelly v R* (2000) 113 A Crim R 263).

[83] As was said by the High Court in *Siganto v The Queen* (1998) 194 CLR 656, a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the

offender, and, secondly, on the pragmatic ground that the community is spared the expense of a contested trial.

[84] In the instant case, one searches the transcript at first instance in vain for any expression of remorse by, or on behalf of, the appellant. On the contrary, the essential thrust of submissions was that the conduct of the appellant was provoked by the earlier stealing of Jackson Bara's car and what was said to have been the cultural "*imperative*" to effect retribution for that situation on the clan responsible.

[85] At best in this matter, the appellant was entitled to a modest allowance for what was, on the face of it, probably a concession of the inevitable.

[86] It is certainly not clear precisely what allowance was made by the learned magistrate for the pleas of guilty and that is to be regretted. On the other hand, it is apparent that, in imposing sentence, the learned magistrate had this aspect well in mind, together with the overarching totality principle. I see nothing to indicate that the head sentence imposed is outside the envelope of the possible range of reasonable sentencing outcomes that took due cognisance of the need to give a proper discount in respect of the pleas entered.

[87] It only remains to consider whether, viewed globally, the aggregate sentence imposed can be said to be manifestly excessive on the face of it.

[88] It is trite to say that this Court, in its appellate role, will not interfere with a sentence imposed merely because it is of the view that it would have imposed a less or different sentence, or that it is felt that the sentence imposed is over-severe. It interferes only if it be shown that the sentencing magistrate was in error, by acting on a wrong principle, or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the learned magistrate said in the proceedings, or the sentence itself may be so excessive, in the circumstances, as to manifest error. (*Salmon v Chute and Anor* (1994) 94 NTR 1 at 24, *Crannsen v The King* (1936) 55 CLR 509).

[89] No doubt, various minds may fairly differ as to what ought to have been the appropriate sentencing outcome in relation to the appellant. Nevertheless, no error of fact or principle is apparent. I find it impossible to say that the aggregate head sentence imposed was other than appropriate, given a realistic assessment of the gravity of the relevant course of criminal conduct, the detailed circumstances to which I have referred and the important considerations of personal and general deterrence -- even after making due allowance for all the relevant mitigating aspects, particularly the youth of the appellant and his lack of antecedent record.

[90] I have, in my consideration of this matter, vacillated somewhat in my thinking as to whether the requirement to actually serve time beyond that already served by the appellant was appropriate, having particular regard to his young age and lack of prior antecedents. However, at the end of the day,

I am simply unable to conclude that the sentence of the learned magistrate in that regard was so excessive as to manifest error. He was entitled to assess that the stage had been reached at which it was imperative, by means of a requirement to serve at least six weeks in custody, to bring home to the appellant the enormity of his conduct and the fact that it would not be tolerated by the community.

Conclusion

[91] It follows that this appeal must be dismissed. There will be an order accordingly.

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