CITATION:	*Gare v Firth* [2019] NTSC 24
PARTIES:	GARE, Joel Richard v FIRTH, Justin Anthony
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 4 of 2019 (21851361)
DELIVERED ON:	12 April 2019
HEARING DATE:	2 April 2019
JUDGMENT OF:	Mildren AJ

CATCHWORDS:

Appeal - Local Court appeal against head sentence imposed - Whether sentence was manifestly excessive - Where no specific error is established appellant must show sentence was not only excessive but manifestly so - Sentencing range for offences under s213 of the *Criminal Code (NT)* very broad -Consideration given to reasonable proportionality between the sentence passed and circumstances of the crime - held looking at the head sentence overall unable to conclude sentencing discretion miscarried because sentence imposed were manifestly excessive - Ground of appeal on excessive sentence dismissed.

Appeal - Local Court appeal against head sentence imposed - Local Court erred in imposing a non-parole period rather than a partially suspended sentence - whether a suspended sentence can be imposed for longer than half of the total head sentence - Imposing a partly suspended sentence is discretion of the judge imposing the sentence and not of any statutory constraints - Appeal against discretion only allowed if discretion miscarried - Judge below had not given any weight to relevant factors - Held discretion miscarried – Appeal allowed on this ground.

Appeal - Local Court appeal against head sentence imposed - non-parole period in excess of statutory minimum -Whether discretion miscarried in fixing of the non-

parole period - held non-parole period fixed manifestly excessive - Appeal allowed in part - Order fixing non-parole period set aside.

Bara v The Queen [2016] NTCCA 5; *Bugmy v The Queen* [1990] HCA 18; 169 CLR 525; *Emitja v The Queen* [2016] NTCCA 4; *Flynn v Apuatimi* [2019] NTSC 1; *House v The King* [1936] HCA 40; 55 CLR 499; *JF v The Queen* [2017] NTCCA 1; *Johnson v The Queen* [2012] NTCCA 14; *Power v The Queen* [1974] HCA 26; 131 CLR 623; *R v Shrestha* [1991] HCA 26; 173 CLR 48, referred to

Criminal Code s 213,
Sentencing Act, s 40 (1), s 40 (4), s 103

REPRESENTATION:

Counsel:

Appellant:	J Ker
Respondent:	L Hopkinson

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Mil19553
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gare v Firth [2019] NTSC 24
LCA 4 of 2019 (21851361)

BETWEEN:

JOEL RICHARD GARE
Appellant

AND:

JUSTIN ANTHONY FIRTH
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 12 April 2019)

[1] This is an appeal against sentences imposed by a Judge of the Local Court.

[2] The appellant pleaded guilty to one count of property damage, one count of unlawful entry of a dwelling house with intent to steal and to one count of stealing. The offences all occurred on the same occasion and would have been charged as a single count of burglary before the *Criminal Code* came into force. The maximum penalties for the property damage was 14 years; for the unlawful entry, 10 years; and for the stealing, 7 years.

The circumstances of the offending

[3] At 10am on Wednesday, 12 December 2018, the appellant rode his bicycle along Coconut Grove and entered Montgomerie Street. He stopped and approached the front door of 1 Montgomerie Street, the home of a 52 year old woman and two 17 year old females. He knocked on the front door. There was no answer. He had noticed previously that there were no cars in the driveway and no air-

conditioners running. He believed that the house was unoccupied. He then forced a hole in the flyscreen of the security door enabling him to open that door. This gave him access to a wooden door with a glass panel in its centre. He smashed the glass panel with an unknown object, reached inside and opened the door with the keys which were inside the internal lock. He took the keys and entered the house, searching for items of value to steal. He located an iPhone valued at $200 in the lounge room. He located a HP laptop valued at $900 and a charger in a spare room. In the meantime, the two young females who were in fact at home, having heard the glass smashing, locked themselves into their separate bedrooms. One of the girls called the police. The appellant went to the bedroom doors and tried to enter them unsuccessfully. He left the house a short time later. He rode his bicycle to De Latour Street, where he stashed[1] the laptop under a banyan tree. He then rode back toward the victims' house. He saw police there and did a U-turn to avoid them. He proceeded to ride towards Bagot Road. A police officer saw him throw the iPhone under a parked car. The police officer positioned his vehicle in front of the appellant, blocking his escape. He was then arrested. The police recovered the iPhone and the appellant told the police where the laptop was located. It was also recovered. The keys were recovered when he was searched. He was taken to the Darwin watch-house. He exercised his right of silence.

[4] It was put on the appellant's behalf that the appellant had a long-standing drug addiction which began when he was about 16 years of age. His parents had a zero-tolerance attitude towards drugs and in 2016 they obtained non-contact orders against him. (He was then aged about 28 or 29, according to his stated age at the time of the current offending). The appellant's record of prior convictions shows that he breached these orders on a number of occasions between January and April 2016. His parents eventually assisted him to attend Banyan House in Darwin where he successfully completed a five month rehabilitation course by the end of 2016. His only offending since then was a conviction for driving in

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1 The agreed facts, Ext. P1 uses the word "stashed". The transcript uses the word "smashed". The context suggests that "stashed" is what was meant.

excess of .05% (the reading was .071%) and possession of methyl amphetamine. These offences occurred in 2018 and resulted in fines. He began taking drugs again and returned to Darwin to commence at Banyan House but was discharged after a few months for breaching the strict smoking rules. At the time of this offending he was unemployed and living off Centrelink benefits. He spent most of his benefits on drugs. He explained that at the time of the offending he was "broke and starving" and was missing his family. He rode his bike to Casuarina to use a computer at the library. He wanted to book flights but he needed more time to do this as the computer at the library was accessible for only an hour. He then rode to Nightcliff shops to rest in the air-conditioning, when he decided to break into a house and steal a device to contact his family.

[5] The prosecutor sought restitution for the damage caused, although the amount of the damage was not referred to in the agreed facts. The prosecutor tendered, without objection, a bundle of receipts and quotes which purported to demonstrate that the cost to repair the doors and the cost of replacing the laptop, which it is alleged was damaged beyond repair, amounted in total to $2,924.87. No submission was made by the appellant's counsel that the amount claimed was excessive.[2]

Appellant's personal circumstances

[6] The appellant had a number of prior convictions in Western Australia for traffic offences, possession of a prohibited drug, common assault, breach of community based orders, breach of bail, breach of violence restraining orders, and obstructing a public officer. These offences were met with fines and in some cases, community based orders. He had not received a prison sentence before. He had no prior convictions for property offences.

[7] The appellant was 32 years of age. He was born in Bunbury, Western Australia. He has a sister and two brothers, one of whom is in a wheelchair with spinal

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2 The exhibits show that both doors were replaced rather than repaired. There is no explanation why one would have thought that this was unnecessary. Nothing turns on this as no order for restitution was made.

muscular atrophy. His mother was a carer for his younger brother. His father was a factory worker. He had a good childhood. He had worked in Darwin for a transport company in the mechanical section and doing work on trucks. He had worked in Western Australia as a mechanic for 10 years and also more recently as a tree lopper. It was put that if he could overcome his addiction, he would be able to find employment. He had been assessed as acceptable again into Banyan House in January 2019 and the letter from Banyan House indicated that they would like to admit him into their residential program on 22 January. However, he would need to meet certain induction requirements including paying $550 for a two week bond and an administration fee. It was not clear how he could manage to find this money given his straightened circumstances. Presumably this would have depended on whether he had access to his Centrelink benefit of $650 per fortnight.

Submissions on the appellant's behalf in the court below

[8] It was accepted that offending of this nature in the Darwin area is prevalent and that the main considerations are general and special deterrence. His Honour was referred to the judgment of the Chief Justice in *Flynn v Apuatimi*[3] observing that a sentence which reflects the objective seriousness of the offence is required. However, as the appellant had pleaded guilty at a very early stage and had indicated his remorse in the letter D1 tendered on his behalf. He did not believe that the house was occupied at the time. Given that he had been accepted into Banyan House and was willing to undergo drug rehabilitation, the court was asked to find that he had reasonable prospects of rehabilitation given his past employment history if he could overcome his drug habit. The court was asked to consider a partly suspended sentence and to order a s103 report to see if he was suitable for supervision for that purpose.

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3 [2019] NTSC 1.

Sentences imposed by the Local Court

[9] The learned Judge declined to order a s103 report. He convicted the appellant and imposed the following sentences:

1. For the property damage, 6 months backdated to 12 December 2018.

2. For the unlawful entry, 20 months of which 4 months was concurrent with and 2 months was cumulative on count 1.

3. For the stealing, 8 months totally concurrent with count 2.

This resulted in a total effective sentence of 22 months. His Honour fixed a non-parole period of 15 months backdated to 12 December 2018.

Grounds of appeal

[10] The appellant's grounds of appeal are as follows:

(1) That the Learned Sentencing Judge erred in imposing a sentence that was manifestly excessive.

(2) That the Learned Sentencing Judge erred in imposing a non-parole period rather than a partially suspended sentence.

(3) That the Learned Sentencing Judge erred in imposing a non-parole period in excess of the statutory minimum.

Ground 1- manifestly excessive head sentences

[11] Although this ground attacks the overall total effective sentence, the main complaint was directed towards the imposition of the sentence of 20 months for the unlawful entry. No specific complaint was made about the other individual sentences, nor of the manner in which the learned Judge made the sentence on count 2 partly cumulative on count 1. In order to succeed on this ground, as no specific error is identified, it is well established that the appellant must show that the sentence imposed was not only excessive, but manifestly so, in accordance with the well-known principles relating to appeals from discretionary judgments

as stated in *House v The King*[4].

[12] His Honour referred to the judgement of the Chief Justice in *Flynn v Apuatimi*[5], in which the Chief Justice discussed, amongst other things, the range of sentences imposed for offences of this kind in a general way. No complaint is made that his Honour misunderstood that decision. His Honour noted a passage in *Flynn* where the Chief Justice said that "mitigating subjective factors cannot lead to a sentence which is disproportionate to the crime" and "the sentence cannot be less than the objective gravity of the crime requires". The learned sentencing judge said that "that's the sentence after applying mitigating circumstances." I think it is clear when the whole of that passage is read that the Chief Justice was not suggesting that mitigating circumstances were irrelevant to the fixing of the head sentence, because in the same passage, the Chief Justice said that "the sentence imposed must ultimately reflect both subjective factors and the objective seriousness of the crime committed, and in striking the balance there must still be reasonable proportionality between the sentence passed and the circumstances of the crime" and "there will be circumstances in which a disproportionate emphasis on subjective considerations will cause inadequate weight to be given to objective circumstances and the achievement of reasonable proportionality between the sentence imposed and the circumstances of the crime." Thus, the head sentence for a crime committed by a youthful first offender, or for a child, will generally be less than the sentence for exactly the same crime committed by a mature adult. Depending on the crime, there may be other factors which make the objective circumstances of the crime more or less serious. So, in the case of an assault, if the accused had been provoked by the victim, this may be regarded as a factor which makes the objective circumstances of the crime less serious. If an unlawful entry relates to digging a tunnel in order to break into a bank vault with the intention of stealing, the offence might be regarded as more serious than breaking into an unoccupied warehouse with the intention of committing a crime where the offence carries a

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4 [1936] HCA 40; 55 CLR 499.

5 [2019] NTSC 1 at [32].

maximum of less than one year. Although his Honour discussed a range of sentences imposed by this Court for unlawful entry with intent to commit an offence, there is in truth no established tariff. Offences of this kind can be committed in a wide range of circumstances. The maximum penalties provided by s 213 of the *Code* range from 1 year to 2 years, 3 years, 5 years, 7 years and 10 years depending on the circumstances of aggravation, and those penalties are doubled if the offence is committed at night. If the offence is committed when armed, the maximum penalty is 20 years or if the building is a dwelling house, life imprisonment. As was said in *Bara v The Queen*[6]:

> …a review of comparative sentences imposed by the Supreme Court for the crime of unlawful entry in this general type of circumstance[7] reveals that it is not unusual for the Court to adopt a starting point of imprisonment for between two and four years before any discount for an early plea. Of course, that type of review is fraught with difficulty given the wide variances seen in matter such as the facts of the offending and the age and antecedents of the offender. It is useful for these purpose only to the extent that it does not flag any patent discrepancy between the head sentence imposed in this case and the general run of broadly analogous matters.

[13] In *Flynn v Apuatimi* the Chief Justice said:[8]

> In the matter of *R v Grant Moore*, Martin J observed that "the individual unlawful entries with intent to steal would attract sentences ranging from nine months to two and a half years, depending upon the circumstances of aggravation". That observation was made in relation to less serious unlawful entries,[9] and was not directed to offences attended by more grave types of aggravating circumstance. An examination of the sentences imposed by this Court bears out those observations in terms of range, if not standard. The bulk of matters involving unlawful entry in this jurisdiction also involve relatively young offenders. Most of those offenders are dealt with leniently for reason of their youth, and the range described by Martin J reflects that matter.

It is not clear if the sentencing pattern referred to relates to the head sentence before any deduction is given for the value of a plea of guilty or not. Assuming that it is speaking of the range before deduction for a plea, what this means is

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6 [2016] NTCCA 5 at [81].

7 The maximum penalty in that case was 20 years

8 [2019] NTSC 1 at [35].

9 The maximum penalty in *Flynn's* case was 14 years

that the sentence of 20 months imposed by the learned Judge is not so far outside of the range as to demonstrate that the sentence imposed was such as to "flag any patent discrepancy between the head sentence imposed and the general run of broadly analogous matters", to quote the Court of Appeal in the passage from *Bara's* case referred to in paragraph [12] above.

[14] Nevertheless, the range is a very broad one and is of limited utility. As the Court of Criminal Appeal noted in *Emitja v The Queen*[10], whilst some guidance can be obtained from comparative sentences imposed:

> Each case must be dealt with on its own merits having regard to the objective gravity of the particular offence, and to the subjective circumstances of the offending and the offender. In undertaking that assessment "[i]t is not this Court's task to see whether the sentencing under consideration is more severe or lenient than a particular sentence within the range imposed on a person not a co-offender in the particular crime". Nor is it the task of this Court to "tinker" with sentences imposed…
>
> What must be focussed upon is the whole of the individual circumstances of this particular case. That is very much a matter of impression and generally incapable of sustained argument. The sentence is either manifestly excessive or it is not.

[15] In this case, the learned sentencing judge did not indicate the extent of the discount he gave to reflect the value of the plea of guilty. His Honour was not obliged to do this, but it is to be encouraged. His Honour accepted that the plea was a very early plea and also that the appellant regretted that the house was in fact occupied at the time. It was submitted that his Honour must have had in mind a discount in the area of 20 to 25 percent. Counsel for the respondent submitted that the value of the plea of guilty and the regret shown was reflected in the decision to impose a non-parole period. No doubt that is so, but in my opinion if that is all the learned Judge did, he was in error. Some allowance ought to have been made to reflect the value of the plea and regret in fixing the head sentence. I am not prepared to assume that the learned Judge overlooked

10 [2016] NTCCA 4 at [45].

this. I expect that his Honour allowed a discount in the range of about 20% for the value of the pleas. That means that in relation to the head sentence for the unlawful entry, his Honour must have had in mind a starting point in the order of 2 years 4 months.

[16] The factors relevant to the total offending in this case referred to by the learned Judge were the fact that the building was a dwelling, unknown to the appellant it was occupied by two relatively defenceless teenage girls, that it must have been a terrifying experience for them[11], that people whose homes are broken into feel violated and unsafe, that the appellant was a mature man of 32 who is not a person of good character given his previous criminal history, that he had no prior convictions for burglary, that he had a drug habit, that his previous breaches of community based orders related to problems with his parents and his relationship with them due to his drug habit, and that the offending was fuelled by anger, by the desire to be able to access communication with home and the fact that he had spent all of his social security money on drugs and didn't have many options. It is not suggested that his Honour failed to take into account a relevant factor. His Honour did not mention specifically what he found in relation to the appellant's prospects of rehabilitation, other than to comment that at aged 32, "one becomes more pessimistic about rehabilitation prospects when it comes to a man of that age who is still offending in this manner", but it is fairly clear that he thought they were poor because he declined to consider a partly suspended sentence.

[17] Looking at the head sentences overall, whilst they are severe and whilst I might have myself imposed lesser sentences and a lesser total sentence, I am unable to conclude that the sentencing discretion miscarried because the sentences imposed are manifestly excessive.

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11 No victim impact statement was tendered. Nevertheless it was not suggested that his Honour erred in drawing that inference.

Ground 2- Failure to partly suspend

[18] The power of a Court to impose a partly suspended sentence is open in any case where the total head sentence imposed is not more than five years imprisonment where the court is satisfied that it is desirable to do so in the circumstances: see *Sentencing Act*, s 40 (1) and (4). The only other constraint is that before imposing a suspended sentence which requires an offender to be under the supervision of a probation and parole officer, the court must have regard to a report of the Commissioner as to the suitability of the offender to be under supervision: s. 103 of the *Sentencing Act*. Whether or not to impose a partly suspended sentence is a matter of discretion left to the sentencing court. Like any other discretion, it can only be interfered with on appeal if the discretion has miscarried in some way. In this case it was submitted that his Honour erred because he proceeded on the basis that, if the minimum period of imprisonment considered appropriate exceeded one-half of the total sentence, an order for suspension, even in part, was impermissible.

[19] Ms Ker for the appellant referred to a passage in the transcript of his Honour's judgment where he said that he would not consider suspending the sentence immediately because of the seriousness of the offence, although he said that he might consider doing this "at a later stage of a sentence", by which I think he was indicating that he might consider the possibility of a partly suspended sentence after the appellant had served some more actual time in prison beyond the period of his pre-sentence custody on remand. After imposing the head sentences, his Honour said:[12]

> Now, I either suspend everything from a time slightly below 12 months or I must- if I don't do that, I must impose a non-parole period. I am not prepared to suspend the sentence, given the history of Mr. Gare and the seriousness of the offending.

[20] If his Honour had in mind that he could not impose a suspended sentence for longer than half of the total head sentences, he was clearly wrong. The length of

12 Transcript of proceedings in Local Court in Police v Joel Richard Gare 17 January 2019.

time of actual imprisonment before a sentence is able to be suspended is not the subject of any statutory constraints and is left entirely to the discretion of the sentencer.

[21] The relevant question of whether or not to suspend a sentence is to consider whether the sentencer is in a position to determine the minimum period of time which the appellant must serve before being released into the community. That will depend on the seriousness of the offence, any matters put in mitigation and the personal circumstances of the offender. Considerably more weight may be put on the offender's prospects of rehabilitation if they are able to be assessed. In this respect, the position is to be contrasted from that of the sentencer considering a non-parole period. In the former case, considerably more latitude is given to the sentencer. In the case where the sentencer is considering fixing a non-parole period, the sentencer is required to consider the minimum period of time as might be seen as condign punishment for the offender[13]. Or, as it was put is *Power v The Queen* [14], "the minimum time that a judge determines justice requires that [the offender] must serve having regard to all of the circumstances of the offence". It may be that the sentencer considers that on the information presently available to the Court, the Parole Board will be in a much better position to determine whether and when a prisoner ought to be released on parole than a judge at the time when the original sentence is imposed.[15] It may be that a prisoner needs incentives to enter into rehabilitation programs, including incentives to enter into rehabilitation programs whilst in prison. On the other hand, it may be that a prisoner is genuinely interested in rehabilitation and that, at the time of sentencing, an appropriate rehabilitation program has been not only identified but is willing and able to accept him or her. In such a case, this might tend towards a suspended sentence on appropriate conditions to assist in his or her rehabilitation rather than a non-parole period. Another factor is whether, if the prisoner is released, what conditions ought to be imposed to

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13 *R v Shrestha* [1991] HCA 26; 173 CLR 48; *Bugmy v The Queen* [1990] HCA 18; 169 CLR 525.

14 [1974] HCA 26; 131 CLR 623 at 629.

15 *Johnson v The Queen* [2012] NTCCA 14 at [21].

best ensure that he or she does not reoffend in the future in the same or a similar way. In some cases it might be clear that no supervision is necessary. In others, there might be a need for very stringent conditions including conditions forbidding the taking of alcohol or illicit drugs, and the requirement to wear a monitoring device for a period of time, for example. In many cases it may be necessary to place the prisoner under the supervision of a probation and parole officer on appropriate conditions. The objects of release under a partly suspended sentence is to protect the community whilst assisting the prisoner to reform and to become a law-abiding and responsible citizen. In cases involving drug related offending, it is important to identify first, whether or not the prisoner genuinely wishes to overcome his or her addiction. This may be identified by the fact that the prisoner has already successfully undergone a suitable rehabilitation course previously, or whilst on bail. If not, but the prisoner has been found suitable for supervision and has been accepted as being suitable to and accepted into a drug rehabilitation program, ordinarily that should be given appropriate weight. This court recognises that giving up drugs is a struggle for many addicts and there will often be failures on the road to success. That is why, in this Court, we sometimes suspend a sentence either wholly or partially upon supervised conditions which are subject to the COMMIT program. Consequently, failure to complete a program in the past is not necessarily determinative against imposing a suspended sentence. In other cases, a prisoner's past offending might show an inability to comply with court orders or a dangerous propensity to commit crimes which might make a partially suspended sentence inappropriate.

[22] In the present case, the learned Judge rejected a partially suspended sentence because of two factors. First, he considered that the offence was too serious. Although serious, I see nothing in the offending itself which would place the offending in that category, bearing in mind the head sentences imposed. Secondly, he considered that combined with the seriousness of the offence, the appellant's criminal history made such a sentence inappropriate. I presume that the learned Judge had regard to the number of occasions that the appellant

disobeyed court orders. But an analysis of the offender's history shows that apart from his problems with the community based orders and domestic violence orders, all of which related to his family problems which in turn related to his drug addiction, and all of which resulted in fines, there was no pattern of breaching court orders of a serious nature, such as might be the case of an offender who has breached the conditions of a suspended sentence. In fact, the appellant had not been sentenced to prison before let alone been given the benefit of a suspended sentence. He had no prior convictions for property offences. There was therefore nothing in the appellant's past history to show that he was likely to be a continuing danger to the public. Moreover, the learned Judge has not given any weight at all to relevant factors, particularly the fact that he had been accepted into Banyan House, that he was willing to undergo drug rehabilitation and had successfully completed a drug rehabilitation program in the past. The prosecutor in the court below did not oppose a partly suspended sentence. In my opinion the discretion has miscarried.

Ground 3 – the non-parole period

[23] As the Court of Criminal Appeal pointed out in *JF v The Queen*[16] there is no obligation to set the non-parole period to the statutory minimum but rather it must be set at the minimum which justice requires. The fixation of the period commonly involves allowance for purely personal factors which have less relevance to the head sentence. Consequently there is much more scope for the exercise of a wide discretion in the fixation of the non-parole period than there is in fixing the head sentence. Having regard to my conclusion that the discretion miscarried in not properly considering whether or not to partially suspend the sentence, it follows that the discretion also miscarried in relation to the fixing of the non-parole period. Even though the appellant was aged 32, having regard to the objective seriousness of the offence, his personal circumstances and willingness to reform, even if it had been appropriate to fix a non-parole period, I consider that the period fixed was manifestly excessive.

16 [2017] NTCCA 1 at [69].

Disposition

[24] The appeal is allowed in part. The order fixing a non-parole period is set aside. I order that a report be provided to the court as to the appellant's suitability for supervision, pursuant to s 103 of the *Sentencing Act*. Further consideration is adjourned pending receipt of that report.
