CITATION:	*Retchford v Rigby* [2024] NTSC 39
PARTIES:	RETCHFORD, Abednego v RIGBY, Kerry Leanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	LCA 26/23 (22203429); LCA 27/23 (22212756)
DELIVERED:	8 May 2024
HEARING DATES:	19 January 2024
JUDGMENT OF:	Blokland J

CATCHWORDS:
APPEAL – Local Court – whether sentence manifestly excessive – whether individual sentences or the sentence as a whole manifestly excessive – whether Local Court Judge erred in the application of the principle of totality – undiagnosed schizophrenia – comorbidities – community protection – rehabilitation – individual sentences held not to be manifestly excessive – error in accumulation/concurrency – totality – appeal allowed in part – Local Court sentence structure varied.

Statutes
Criminal Code 1983 (NT), s 188 (1) and (2)
Mental Health and Related Services Act 1998 (NT)
Sentencing Act 1995 (NT), ss 54, 57

Attorney General v Tichy, (1982) 30 SASR 84; *Bugmy v The Queen* [2013] HCA 27; *Carroll v The Queen* (2011) 29 NTLR 106; *Dinsdale v The Queen* (2000) 202 CLR 32; *Edmond & Moreen v The Queen* [2017] NTCCA 9; *Emitja v The Queen* [2016] NTCCA 4; *Forrest v The Queen* [2017] NTCCA 5; *Hili v The Queen* (2010) 242 CLR 520; *Johnson v The Queen* [2012] NTCCA 14; *Makarian v The Queen* (2005) 228 CLR 357; *R v MAK* [2006] NSWCCA 381; *R v Verdins* (2007) 16 VR 269; *Richards v The King* [2024] NTCCA 4; *Salmon v Chute* (1994) 94 NTLR; *The Queen v Bonney* [2022] NTCCA 3; *The Queen v Kilic* [2016] HCA 48; *The Queen v Morse* (1979) 23 SASR 98; *Thomas v The Queen* (2017) 40 NTLR 70; *Veen v The Queen* (No.2) (1988) 164 CLR 465; cases referred to.

REPRESENTATION:

Counsel:

Appellant:	A. Abayasekara
Respondent:	J. McLean

Solicitors:

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

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

Retchford v Rigby [2024] NTSC 39
No. LCA 26/23 (22203429; LCA 27/23 (22212756)

BETWEEN:

ABEDNEGO RETCHFORD
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 8 May 2024)

Introduction

[1] This is an appeal against sentences imposed by the Local Court on 28 June 2023. Following the entry of pleas of guilty the appellant was sentenced for offending covered by three charges of aggravated assault contrary to section 188(1) and (2) of the *Criminal Code 1983* (NT). The sentences were imposed across two Local Court files: File 22203429 (2 charges) and File 22212756 (1 charge).

[2] The Notice of Appeal contends that:

i. The total effective sentence is manifestly excessive;

ii. The learned sentencing Judge erred in the manner in which he cumulated the component sentences resulting in sentences that were not justly proportionate to the appellants criminal conduct.

[3] Counsel for the appellant, with the consent of counsel for the respondent clarified that the first ground of appeal would contend that the sentences imposed for both charges 1 and 2 were manifestly excessive. The global sentence also remained subject to appeal. Taking a fair approach, counsel for the respondent advised the Court the respondent was prepared to deal with the appeal on that basis.[1]

[4] On file 22203429 ('the Bulla offending') the appellant was sentenced to 14 months imprisonment on charge 1 and two years imprisonment on charge 2. The sentences were ordered to be served partially concurrently as to two months. This resulted in a total effective sentence of three years imprisonment on that file. On file 22212756 ('the Palmerston offending') the appellant was sentenced to 14 months imprisonment, which was made partially concurrent as to two months with the sentence on file 22203429.

[5] Across the two Local Court files, this resulted in a total sentence of four years imprisonment.

[6] Further, the total Local Court sentence of four years imprisonment was made partially concurrent as to two months with a recently imposed Supreme Court sentence for one count of aggravated assault and one count of

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1 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Supreme Court, 9 January 2024, 2-4.

stealing. The total Supreme Court sentence was three years and two months imprisonment on file 22203430 ('the Supreme Court sentence'). A non-parole period of 19 months (50 per cent of the head sentence on that file) was fixed by the Supreme Court for that sentence. The offences dealt with by the Supreme Court were committed one week before the commission of the Palmerston offence.

[7] The overall sentence imposed by the Local Court after ordering concurrency of two months with the Supreme Court sentence resulted in a total sentence of 7 years imprisonment. The Local Court Judge fixed a new non-parole period of 42 months, the minimum (50 per cent) which could be fixed at that time.

[8] The appellant in this matter does not argue generally about the findings made by the Local Court Judge, and acknowledges that throughout the proceedings the parties were largely agreed as to the relevant factors and principles and how they should be applied. Both counsel acknowledged community protection was a significant feature to be given weight within the sentencing calculus. However, the appellant effectively argued the relationship between rehabilitation and community protection was not fully appreciated in the Local Court proceedings.

[9] The appellant contends that overall the sentences were excessive once all of the factors, including factors relevant to mitigation were considered and that

either over-emphasis or under-emphasis was given to numerous matters when the sentence was imposed.[2]

[10] The appellant's contentions include:

a) Too much weight was given to specific deterrence and/or community protection;

b) That the learned sentencing Judge did not consider how community protection could be best achieved in the circumstances of this case;

c) That the learned sentencing Judge did not provide for sufficient concurrency when cumulating the sentences and did not properly apply the principle of totality, amounting to specific error.[3]

Proceedings in the Local Court

Facts and charges

[11] The sentencing proceedings took place over the course of three days: 17 May 2023, 16 June and 28 June 2023.

[12] The appellant entered pleas of guilty to each charge on 17 May 2023.

[13] The first episode of offending, the Bulla offending, on file 22203429 took place on 4 November 2021 in the Bulla Community. The first offence of aggravated assault was committed against the appellant's wife, and the second offence against his wife's sister. In both cases the offending was aggravated as both victims suffered harm, were female, were unable to

2 Outline of submissions on behalf of the appellant [4] and [5].

3 Ibid.

defend themselves due to their situation and both were threatened with an offensive weapon, a machete in one instance and a baseball bat in the other.

[14] The agreed facts were that the appellant had been drinking with both victims. An argument began between the appellant and his wife. The appellant accused his wife of being with another man, and obtained a machete from inside the house. He approached his wife. He raised the machete above his head and struck his wife across the back of her right hand with the flat part of the blade. This caused her immediate pain. The appellant then approached the second victim, his wife's sister and punched the left side of her jaw before following her into the house. He repeatedly struck her around the left leg, upper body and lower back with a baseball bat.[4] Both victims received medical treatment for their injuries at the Timber Creek Clinic, where photographs were taken and tendered on the relevant file.[5]

[15] The Palmerston offending took place on 8 January 2022, approximately two months after the Bulla offending. The single count of aggravated assault on this file was against a male victim. The circumstances of aggravation were that the victim suffered harm, was unable to defend himself and was threatened with an offensive weapon, namely a spanner. The facts were that the appellant had been consuming alcohol and without warning or provocation struck the victim to the top of the head with a spanner causing a

4 Exhibit 1: Agreed facts, Local Court file 22203429.

5 Exhibit 2: Photographs of Victims Injuries, Local Court file 22203429.

laceration, significant bleeding and pain.[6] While he was being treated by paramedics in the ambulance, the victim suffered multiple short seizures due to the head trauma. Photographs of the victim's injury were tendered,[7] along with a victim impact statement.[8]

[16] For both sets of offending, an Information For Courts was tendered.[9] Aside from breaches of orders of various kinds, traffic offences and some dated property offences, the appellant had 10 previous convictions which involved violence, principally for aggravated assault and one previous conviction for negligently cause serious harm. He had previously been sentenced to relatively moderate terms of imprisonment.

[17] Counsel for the appellant in the Local Court tendered documents to support submissions relevant to the appellant's personal circumstances: a psychiatric report of Dr Richard Furst dated 4 April 2023,[10] a letter of support from Misharna Retchford,[11] a letter of support from Beattie Retchford,[12] letter of

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6 Exhibit 1: Agreed facts, Local Court file 22212756.

7 Exhibit 2: Photographs of victim's injury, Local Court file 22212756.

8 Exhibit 3: Victim Impact Statement, Local Court file 22212756.

9 Exhibit: Information for Courts, Local Court file 22203429 and Exhibit 4: Information for Courts, Local Court file 22212756.

10 Exhibit D1: Psychiatric report of Dr Richard Furst, Local Court file 22212756.

11 Exhibit D2: Letter of support from Misharna Retchford, Local Court file 22212756.

12 Exhibit D3: Letter of support from Beattie Retchford, Local Court file 22212756.

support from Mr Kevin McMahon from the prison in reach program,[13] and a warrant of imprisonment dated 16 May 2023.[14]

[18] Based on those materials, counsel for the appellant made submissions to the sentencing Judge relevant to the appellant's moral culpability. Submissions included his prospects for rehabilitation, specifically given his psychiatric condition, how to address the need for community protection and the weight to be given to general and specific deterrence. The sentencing Judge was urged to apply the principles derived from *Bugmy* and *Verdins*.[15]

[19] Counsel for the prosecution in the Local Court emphasized the serious nature of the offending and told the Court that the prosecution accepted Dr Furst's report. That submission was somewhat qualified by the additional submission that the sentencing Judge should not take account of the impact of alcohol and other drugs when assessing the subjective features.[16]

Objective gravity of the offending

[20] In both the Local Court and this Court, counsel for the appellant conceded the offending was objectively serious. All offences involved the use of weapons. All offences were examples of unprovoked impulsive aggression.

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13 Exhibit D4: Letter from Mr Kevin McMahon from the prison in reach program, Local Court file 22212756.

14 Exhibit D5: Warrant of imprisonment, Local Court file 22212756 in relation to Supreme Court sentence on file 22203430.

15 *Bugmy v The Queen* [2013] HCA 27; 249 CLR 571; *R v Verdins* (2007) 16 VR 269 at [32].

16 *Abednego Retchford v Kerry Leanne Rugby*, Transcript, Local Court, 17 May 2023 at 20-21.

[21] Counsel for the respondent emphasized that the Bulla offending was domestic violence offending against women, separate weapons were used, the victims sought refuge in Katherine and were too terrified to return to the property.[17] In relation to the Palmerston offending, it was pointed out that the victim was attacked for no reason, he suffered bleeding and later experienced seizures.

[22] A number of matters were raised on behalf of the appellant going towards moderating the assessment of the objective gravity of the offending. For example, while charge 1 was an impulsive act in the context of domestic violence, it was a single strike. The sentencing Judge noted the weapon was not used in the typical, more dangerous way.[18] There was immediate injury in the form of pain and swelling without ongoing physical injury; of course the impact of the assault was still serious given it took place within a domestic relationship and led to the victim fearing to return to the community. Counsel for the appellant accepted those observations.[19] In any event it is plain the nature of the weapon elevated the gravity of the offending.

[23] It was acknowledged that charge 2 could also be characterised as a domestic violence matter and may be seen as a continuation of the conduct constituting charge 1. Once again, the assault was impulsive with no

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17 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Local Court, 17 May 2023 at 20.

18 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Local Court, 16 June 2023 at 4.

19 Appellant's written submissions at [27].

explanation, and while it was persistent, apparently there were no lasting injuries which, the appellant submitted, may inform the level of force used.[20] Counsel for the respondent emphasised that charge 2 represented a repeated assault to the victim's leg and lower back which caused severe pain and injury. The victim had also just witnessed her sister being assaulted.[21]

[24] In both in the Local Court and this Court, counsel for the appellant acknowledged the Palmerston offending was particularly random. It involved the use of an offensive weapon to a vulnerable part of the victim's body which had caused bleeding and a seizure. Counsel for the respondent emphasised the obvious seriousness of such offending, and referred to the assessment of the gravity of the offending in the sentencing remarks.[22] As mentioned, the sentence for the Palmerston offending is not the subject of a specific ground of appeal, however it has some relevance to the appeal against the severity of the global sentence.

[25] Offending of this kind will inevitably result in significant sentences of imprisonment for reasons courts[23] and members of the community concerned with the issue of domestic violence have explained. The sheer prevalence of violence especially violence against women in the Territory, and generally violence within the community, with its attendant harms both seen and

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20 Outline of submissions on behalf of the appellant at [28].

21 Respondent's outline of submissions at [26].

22 Respondent's outline of submissions at [18].

23 See example, *The Queen v Bonney* [2022] NTCCA 3 at [42]; *Emitja v The Queen* [2016] NTCCA 4; 39 NTLR 59.

unseen is unacceptably high. The perpetration of violence continues to wreak havoc and degrade the community as a whole. That is not to say that if appropriate measures can be put in place to reduce the risks of re-offending those measures may be considered for the longer term protection of the community. Sentences of some significance are to be expected for offending of this kind. Imprisonment meets the objective of community protection in the short term. Beyond the term of imprisonment actually to be served, if rehabilitation can be achieved, the longer term objective of community protection may also be realised. A Court cannot impose a sentence beyond what is proportional to the actual offending. A court cannot use imprisonment for preventive detention.

The subjective features

[26] As above, among the materials tendered in the Local Court was a report from the psychiatrist Dr Furst.

[27] An outline of the appellant's personal history follows. He was 34 and grew up in Bulla community. He left school in year nine and is functionally illiterate. The appellant's father was a heavy drinker and throughout his childhood was exposed to significant violence, alcohol and drug abuse. He witnessed his parents fighting, at times with weapons. His grandmother became his primary carer. The household was overcrowded. The family were

poor. When he grew up he was exposed to violence between rival families in both the Bulla Community and Timber Creek.[24]

[28] Dr Furst reported on the appellant's drug and alcohol history.[25] He was sniffing petrol daily over several months when he was 12-13 years old. He smoked cannabis from 12 years old, ongoing into his teens and into his 20s. He also began drinking alcohol as a young teenager, at around 14 years, and was a regular drinker, often binge drinking and displaying other problematic drinking patterns. His alcohol dependence had been noted previously (2019) by a medical practitioner.[26] From a young age he had smoked cannabis and drank alcohol heavily to cope with the experience of symptoms of schizophrenia.[27]

[29] A further part of the appellant's medical and social history was that at about the age of 20, he was diagnosed with Systemic Lupus Erythematosus ('SLE'), an autoimmune inflammatory condition which is largely inherited. His brother died from the condition. The symptoms include pain, bruising, joint swelling and at times, difficulty breathing. The appellant was treated with anti-inflammatory and analgesic medication.[28] The appellant told Dr Furst that as a child he was hit in the head with a shovel. In 2019, as a result of being stabbed, he suffered a brain injury which required decompressive

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24 Exhibit D1, Report of Dr Richard Furst P2; Outline of Submissions on behalf of the appellant at [32]-[33].

25 Ex D1, Report of Dr Richard Furst p3.

26 Exhibit D1, Report of Dr Richard Furst p6.

27 Exhibit D1, Report of Dr Richard Furst p3.

28 Exhibit D1, Report of Dr Richard Furst p3.

neurosurgery. He was previously under the care of a neurologist at Darwin hospital. Dr Furst also referred to a number of other medical episodes contained in the medical and hospital records.[29] It was noted he has a lengthy history of severe headaches.

[30] Dr Furst reviewed the appellant's mental health history in detail. Much of the history was drawn from or confirmed by hospital and other medical records. The material relied upon was not solely from statements made by the appellant. The appellant started hearing voices at around 15-16 years old which was first disclosed to health professionals during a custody episode in 2018 at the age of 30. He was prescribed oral psychotic medication at that time. He stopped taking the medication, apparently due to the side effect of weight gain and because he thought he could improve his security rating while in prison if he did not take medication.[30] This latter point could not be objectively confirmed.

[31] The appellant experienced a relapse in the form of a return to auditory hallucinations which may be characterised as derogatory and commanding. He also saw shadows and exhibited paranoid thinking.[31] These symptoms were present when he was arrested in January 2022. He was noted to be suffering from voices telling him to hurt others. When he was assessed upon entry into custody he said he had been isolating himself to avoid acting on

29 Exhibit D1, Report of Dr Richard Furst p3-5.

30 Exhibit D1, Report of Dr Richard Furst p3.

31 Exhibit D1, Report of Dr Richard Furst p3-6.

the voices. While still in custody in late 2022 it was recommended he commence anti-psychotic medication.

[32] Dr Furst made a diagnosis of schizophrenia and of alcohol abuse disorder.[32] The onset of the schizophrenic illness was most likely in the appellant's early 20s and was more prominent in 2018 – 2019 during a previous period in custody. He experienced further psychotic symptoms over recent years. The onset of the alcohol abuse disorder was in the appellant's teenage years. Of the relationship between the two conditions Dr Furst said 'alcohol dependence and psychosis can co-occur in individuals, generally referred to as comorbidity. Research suggests that individuals with alcohol dependence are at increased risk of developing psychosis/psychotic illness than the general population. The exact nature of the relationship between alcohol dependence and psychosis is complex and not fully understood. It is believed that alcohol use may trigger psychotic symptoms in susceptible individuals or exacerbate pre-existing psychotic symptoms in those with a history of psychosis.'[33] Additionally, Dr Furst commented on the phenomenon of an organic or medical component in terms of the schizophrenia which included the long-term effects of sniffing petrol in childhood, the long-term effects of drinking, the inflammatory nature of SLE and the head injury which caused acute brain compression. He also remarked that exposure to petrol fumes can lead to brain damage which can

32 Exhibit D1, Report of Dr Richard Furst p6.

33 Exhibit D1, Report of Dr Richard Furst p6.

result in cognitive impairment, memory loss, and difficulty with long-term decision-making which can also impact on the development of psychiatric disorders.

[33] As to the causal connection with the offending, Dr Furst said the command auditory hallucinations were likely to have been present around the time of the offending between November 2021 and January 2022.[34] He reasoned that alcohol intoxication and schizophrenia, especially in the more acute stages, were associated with increased rates of aggression or violence. Those factors, together with the various historical medical incidents and history of sniffing were relevant given their relationship with decreased cognitive function, disinhibition and poor judgment, magnifying the difficulty of managing command auditory hallucinations. The risks of aggression were still present without the appellant being intoxicated.[35]

[34] In terms of the risk of future of offending, Dr Furst observed that the appellant is more at risk of impulsive aggression, assault and/or disorderly behaviour in public than serious violence. Dr Furst said the main risk factors to address were the appellant's drinking and ensuring adequate control of his psychotic symptoms, in line with the treatments he recommended. If when released from custody the appellant was reluctant to take medication,

34 Exhibit D1, Report of Dr Richard Furst p9.

35 Exhibit D1, Report of Dr Richard Furst, p9.

Dr Furst suggested a community treatment mental health order would be appropriate.[36]

[35] Dr Furst's recommendations for treatment of the schizophrenia were envisaged to involve ongoing treatment with a psychiatrist, mental health nurse and allied health professionals and continuation of medication, potentially working with the appellant to improve his insight on the need to continue medication if he becomes non-compliant with respect to depot injections. He also recommended counselling for alcohol dependency and follow up for his chronic medical conditions, especially the SLE and chronic headaches.[37]

[36] At the time of the sentence being passed in the Local Court (28 June 2023) the appellant had been taking anti-psychotic medication for about six months (from late December 2022). He was also receiving treatment for the chronic medical conditions. His psychotic symptoms were under adequate control after the treatment he had been receiving since late December 2022. Although the main barrier to future treatment was likely to be non-compliance with medication or returning to heavy drinking, with adequate treatment of his psychotic illness, Dr Furst said that treatment would likely improve the alcohol issues as the appellant seemed to have been drinking to some extent, as a means of coping with intrusive negative hallucinations.[38]

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36 Exhibit D1, Report of Dr Richard Furst, p11.

37 Exhibit D1, Report of Dr Richard Furst, p10-11.

38 Exhibit D1, Report of Dr Richard Furst, p10.

[37] On the question of remorse Dr Furst noted the appellant 'has taken responsibility for his offending and regrets his actions, realising that what he did was wrong and feels bad about his actions. He claims to have little or no memory of those events because he was too intoxicated'.[39]

[38] On the issue of whether the condition suffered by the appellant was likely to adversely affect the ability of the appellant to cope with imprisonment, Dr Furst stated the appellant had already been more vulnerable to the effects of paranoid thinking and hallucinations in relation to other prison inmates, which led to an altercation stemming from hallucinations. Dr Furst went on to say the appellant was likely to experience the prison environment as more stressful than the average inmate and was likely to misinterpret events in the future unless adequately treated.[40]

[39] In his remarks the sentencing Judge gave a detailed summary of the facts. He acknowledged the appellant's previous criminal history, although erroneously stated the appellant had 11 previous convictions for aggravated assault, instead of nine. He also referred to the appellant having a previous conviction for cause serious harm, rather than the lesser negligently cause serious harm. He referred to the appellant having one previous conviction for being armed with an offensive weapon when he had three such convictions.[41] These minor errors would have been unlikely to have made

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39 Exhibit D1, Report of Dr Richard Furst, p10.

40 Exhibit D1, Report of Dr Richard Furst, p9.

41 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Local Court, 16 June 2023 at 6.

any significant difference to the sentence. It is not known whether the Judge included the aggravated assault the appellant was convicted of in the Supreme Court on 16 May 2023, which was committed before the Palmerston offending, but not dealt with until after all of the offending.

[40] Understandably, the sentencing Judge said the criminal history was "a cause for concern", noting that "normally" with such a background general and specific deterrence and denunciation would be the dominant sentencing considerations.[42] The sentencing Judge specifically found that at the time of the offending, the appellant's mental state was "symptomatic of your diagnosed condition of schizophrenia".[43] The sentencing remarks clearly show the Judge accepted the appellant's moral culpability was reduced as a consequence. The Judge took into account Dr Furst's report and other material relevant to the appellant's subjective state.[44] Although the sentencing Judge had indicated some lesser reliance on deterrence, he also remarked the offending was so serious as to mandate an actual term of imprisonment "necessary for the community protection. It is necessary for specific deterrence."[45]

[41] Other parts of the sentencing remarks are referred to below in the discussion of the grounds of appeal.

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42 Ibid.

43 Ibid.

44 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Local Court, 16 June 2023 at 6-8.

45 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Local Court, 16 June 2023 at 8.

Consideration of the grounds of appeal

[42] The grounds of appeal contend the individual sentences (on file 22203429) and the global sentence are manifestly excessive, the global sentence also demonstrative of specific error given the final sentence structure and the contended misapplication of the totality principle.

[43] As to manifestly excessive, the principles are that a sentence is not to be disturbed on appeal unless error is demonstrated. The presumption is that there is no error. Appellate intervention is warranted only where the sentence is such that in all the circumstances the appellate court concludes error must have occurred or there must have been some misapplication of principle even though it is not apparent from the reasons or remarks on sentence.[46] Manifest excess may be identified if the sentence imposed is out of the range of sentences that could have been imposed to such an extent that there must have been error even though it is impossible to identify.

[44] To determine whether a sentence is manifestly excessive or manifestly inadequate requires consideration of all of the matters relevant to fixing a sentence.[47] A sentencing Judge is bound to consider where the facts of a particular offence and those relevant to the offender lie on the spectrum that extends from the least serious instances to the worst category.[48] There is no one correct sentence. Sentencing judges are to be afforded as much

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46 *Forrest v The Queen* [2017] NTCCA 5 at [63]-[64]; *Edmond & Moreen v The Queen* [2017] NTCCA 9 at [4]; *Richards v The King* [2024] NTCCA 4 at [35], [36].

47 *Hili v The Queen* (2010) 242 CLR 520 at 60; *Richards v The King* [2024] NTCCA 4 at [35]-[36].

48 *The Queen v Kilic* [2016] HCA 48; 259 CLR 256 at [19].

flexibility when sentencing as is consonant with consistency of approach as accords with the particular statutory regime.[49]

Ground 1: Charges 1 and 2 of file 22203429 – manifest excess

[45] Bearing in mind the relevant principles, for the reasons that follow, the conclusion here is that the individual sentences cannot be characterised as manifestly excessive. Both sentences may be seen to be at or towards the outer limits of the sentencing discretion for cases of this kind. The reason for that observation is that the subjective features of the case, particularly the previously undiagnosed schizophrenia and other health and background were significant issues. It was likely the schizophrenia was operative although undiagnosed when at least some of the previous offences were committed. Some modification may be expected, bearing in mind *Verdins* principles, especially with respect to the modified weight to be given to moral culpability and general and specific deterrence.[50] The extent to which specific deterrence should be modified depends upon the same factors relevant to the moderation of general deterrence. That is, the nature and severity of the symptoms of the condition and the effect of the condition on the mental capacity of the offender at both the time of offending and at the time of sentence. As above, the sentencing Judge for understandable reasons remarked that denunciation, specific and general deterrence would normally be the dominant sentencing considerations, given the appellant's previous

49 *Makarian v The Queen* (2005) 228 CLR 357 at 371.

50 (2007) 16 VR 269 at [32].

convictions and that the Court was dealing with multiple offences of violence. He reasoned specific deterrence was still important given the need for community protection. While there was a case made which may justify further modification of specific deterrence, the sentencing Judge was not bound to disregard specific deterrence altogether. It was a matter of weight.

[46] It is accepted that the deep and substantial contribution of the mental illness, the other medical conditions and comorbidities allowed for modification of the application of both general and specific deterrence and served to lessen the appellant's moral culpability. The sentencing Judge weighed those factors against the need for community protection. He was entitled to do so, even if he did not expressly acknowledge the link between treatment, rehabilitation and community protection. The remarks expressed on specific deterrence were somewhat inconsistent. He did accept that the appellant's condition had improved and stated that the treatment received had allowed him "to find some kind of equilibrium with his mental health issues".[51]

[47] In terms of the individual sentences, the sentencing Judge did not stray into increasing the sentences for the purpose of preventative detention which is prohibited by general sentencing principles as confirmed in *Veen v The Queen (No 2)*.[52] Community protection remained an important consideration.

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51 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Local Court, 16 June 2023 at 8. He found that to be in the appellant's favour.

52 (1988) 164 CLR 465.

However, the individual sentences were not of such a length as to demonstrate error.

[48] The appellant's once very poor prospects had improved by the time of sentence due to treatment and no doubt lack of access to alcohol while in custody. The expert opinion was that if the appellant later failed to comply with treatment, an order of the type that may be made under the *Mental Health and Related Services Act* 1998 (NT) could effectively manage him. Seen in that light, the community protection objective was able to be progressed at some stage through treatment and management in the community. There was some recognition of this by the Judge, however the focus was on the immediate shorter term view of community protection and that factor was weighed accordingly.

[49] As counsel for the respondent pointed out, the sentencing Judge canvassed the facts in detail.[53] He also had substantial regard for the subjective case. The Judge expressly had regard to the entry of pleas of guilty and made appropriate reductions; recognition of some remorse; recognition of some insight on the part of the appellant into his behaviour; acknowledgement that the appellant was not a good vehicle for general deterrence due to his mental state at the time of the offending; the diagnosis and opinions of Dr Furst including the appellant's treatment; acknowledgment of some reduction of moral culpability, however correctly noting this was not to the extent that

53 Respondent's outline of submissions at [17].

the appellant was exculpated. The Judge also noted the appellant's participation in prison programs; his early life disadvantages and the positive change his family members observed and conveyed to the Court since he had undertaken treatment in prison.[54]

[50] Across all Local Court matters, there was a strong subjective case. There can be no doubt that this was taken into account, at least in terms of setting the individual sentences. Beyond what has already been summarised, rehabilitation was not specifically addressed in the remarks. It may be observed that while the appellant's prospects had undoubtedly improved since he commenced treatment, the pathway ahead, as is often the case, was not capable of being tested, save that Dr Furst had provided recommendations and pointers towards improved treatment and management of the appellant in the community. There was room for the sentencing Judge to be somewhat guarded about rehabilitation in all of the circumstances.

[51] The sentences were fixed at the outer limits of the exercise of the sentencing discretion but the discretion was still exercised judicially in accordance with well-known principles.

[52] Ground one is not made out.

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54 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Local Court, 16 June 2023 at 6-8; 14, 16, 22. Respondent's outline of submissions at [17].

Ground 2: the global sentence – manifest excess or specific error

[53] Although the individual sentences are within the limits of the appropriate range, for the reasons that follow, ground 2, relevant to the global sentence will be allowed. Given the individual sentences were in the higher range and given the underlying common features and connections between the incidents of offending, a greater adjustment through ordering reasonable concurrency or through the application of the principle of totality would be expected than that which was ordered in the Local Court. It is not clear whether the final sentence was calculated having sufficient regard to the need to consider reasonable concurrency, the totality principle or whether there was difficulty structuring the sentence in accordance with the *Sentencing Act*, particularly given the difficulties evident in the remarks relevant to setting a new non-parole period in the light of the Supreme Court sentence.

[54] The sentencing remarks were not delivered *ex tempore*. That is of course understandable. The remarks were considered. This was not a straightforward matter. The sentencing Judge took the pleas, facts and submissions on 17 May 2023. He adjourned and commenced the sentencing remarks on 16 June 2023 but ran into difficulty expressing the structure of the sentence. The case was adjourned to 28 June 2023 where over two sessions on that day some of the same difficulties continued. Further submissions were made.

[55] After having regard to the sentencing factors relevant to each charge and the sentencing principles to be applied,[55] the Judge set out the reduction (25 percent) on account of the pleas of guilty, then referred to the need to set a single non-parole period. When he read out the sentences to be imposed on file 22203429, he indicated there would be seven months concurrent (rather than the two months which was ultimately fixed) as between charges one and two.[56] At another point in the remarks the Judge indicated he was constrained by statute and if not so constrained he would have made the sentences for the Bulla offending wholly concurrent. The sentencing Judge was not so constrained as he may have thought.

[56] One can sympathise generally over some of the confusion given the need to fix a fresh non-parole period over multiple offences including a very recent Supreme Court sentence. There did also seem to be some confusion expressed about whether non-parole periods were required to be fixed on individual sentences or from the commencement of the Supreme Court sentence.[57] Ultimately, after the breaks in the remarks on sentence and a series of helpful submissions and exchanges with counsel, the sentences were passed on the 28 June 2023, although the substantive sentencing remarks were delivered on 16 June 2023. In the confusion there was little if anything said on the question of concurrency, accumulation and totality, and

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55 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Local Court, 16 June 2023 at 8.

56 Ibid.

57 *Abednego Retchford v Kerry Leanne Rigby*, Transcript, Local Court, 16 June 2023 at 8-14.

the sentencing Judge's expressed intention with respect to charges 1 and 2 differed from the actual sentence fixed.

[57] Counsel for the respondent correctly pointed out the sentencing Judge emphasized the need for community protection in circumstances where domestic violence is prevalent, as is alcohol-related harm which were relevant factors to all matters.[58] The Local Court sentences involved three separate victims. It is of course accepted that there were three victims in the Local Court matters and one in the Supreme Court, the latter sentence was relevant to the new non-parole period being fixed. Counsel for the respondent also emphasized the need to protect the community and specifically deter the appellant. That is understood. At the same time, the operative schizophrenia was a feature of all of the offending dealt with in the Local Court. On the evidence treatment would be important to address rehabilitation and reduce the risk of re-offending with a view to protection of the community beyond the prison term actually served. Alcohol consumption was also a feature but the medical opinion was that treatment of the schizophrenia would also assist with the alcohol abuse disorder.

[58] In the ordinary course of the sentencing exercise for multiple counts, it would be expected that first an appropriate term for each charge, taking the applicable sentencing considerations into account be determined. That took place here. Secondly there should be a determination of the extent to which

58 Respondent's outline of submissions at [37].

there should be cumulation or concurrency regarding each charge.[59] There is little in the remarks about this step and as above there appeared to be some confusion. Thirdly, the sentencer would then 'stand back' and consider, in light of the totality principle, what is an appropriate total effective sentence.[60]

[59] As was said in *Carroll v The Queen*,[61] 'Concurrency may be appropriate because the crimes which give rise to the offender's convictions are so closely related and interdependent. What is necessarily required in every case is a sound discretionary judgement as to whether there should be cumulation or concurrency'. Two months concurrency as between each of the sentences is low given the substantial common features as between each offence, accepting of course that each offence here represents a separate harm to a separate individual and mindful of what Wells J said in *Attorney General v Tichy*:[62] 'Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate'.

[60] In *Thomas v The Queen*,[63] notwithstanding there were separate victims, the Court of Criminal Appeal determined that the common features of the offending and the totality of the criminality required significant concurrency. The Court reasoned this should be more than the sentencing

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59 *Carroll v The Queen* (2011) 29 NTLR 106 at [42].

60 *Thomas v The Queen* (2017) 40 NTLR 70 at [42].

61 (2011) 29 NTLR 106.

62 (1982) 30 SASR 84 at 93.

63 (2017) 40 NTLR 70.

Judge had allowed. On re-sentencing in *Thomas* the sentence relevant to one victim was made fully concurrent with the sentence passed in relation to another. The appellant in *Thomas* had a substantial record of previous offending. The offences the subject of that appeal took place during principally one episode, but the Court noted the features of impulsivity, the opportunistic and the unsophisticated nature of the offending and the appellant's psychological profile which informed the cause of the offending with respect to all offences.

[61] The psychiatric condition of the appellant with its attendant comorbidities, was a relevant feature of all of the offending here. It was a common causal element. It might be expected that the factors common to all of the offences would be reflected in some reasonable concurrency which still acknowledges the gravity of the offending and the harm to and impacts on each individual victim. That is not to say an offender is rewarded in some way for committing multiple offences.[64] Commonalities between offences give rise to reasonable concurrency followed by a final look to ensure the final sentence reflects the total criminality.

[62] As above, the charges emanating from the Bulla offending are closely connected. They arise in the same sequence of events. The Supreme Court offending took place just under two months after the Bulla offending. The aggravated assault in that matter was again a random style attack, that time

64 *R v MAK* [2006] NSWCCA 381 at [18].

against a male victim. The appellant struck the victim with a metal bar across the chest and left leg which caused immediate pain. The appellant also took the victim's bag which had been left on the ground. The Supreme Court acknowledged that the appellant was at risk of impulsive aggression and the main factors to be addressed were his drinking and psychotic illness. The sentencing Judge emphasised the possibility of a community management order after release.[65] The Supreme Court was not required to consider accumulation or concurrency with other sentences.

[63] The final offending in time was the Palmerston offending. As above, that offending, took place on 8 January 2022 and was a separate assault on a separate victim. It possessed similar features to all of the other offending.

[64] This ground is made out on a similar basis as the Court of Criminal Appeal determined in *Thomas v The Queen*.[66] It is made out on the basis of the manifestly excessive ground. It could also be viewed as a case of specific error or a failure to properly consider concurrency and the totality principle. However, this is a situation where those potential errors and the confusion when structuring the sentence has contributed to an overall manifestly excessive sentence in any event.

[65] The sentence imposed by the Local Court will be varied in terms of the amount of concurrency and accumulation.

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65 *The King v Abednego Retchford*, SCC 22203430, 16 May 2023.

66 (2017) 40 NTLR 70.

[66] Although the Local Court fixed a non-parole period of fifty percent of the original sentence, after taking all of the matters into account and giving weight to the subjective case and the minimum that must be served before release is considered, a new non-parole period of three years will be fixed. It is of course not known if the appellant will obtain parole but in my view that is the earliest he should be permitted to be released on parole even having regard to all of the important subjective factors which modify the more punitive elements of sentencing. The parole board and correctional authorities will need to consider the recommendations for treatment and monitoring made by Dr Furst which ideally should be included in any parole conditions.

Orders

1. The appeal is allowed in part on ground two.

2. The sentence imposed by the Local Court on 28 June is varied as follows:

File 22203429

Charge 1, aggravated assault. Convicted and sentenced to 14 months imprisonment.

Charge 2, aggravated assault. Convicted and sentenced to 24 months imprisonment to commence after eight months of the sentence imposed on charge 1. (Interim total of 32 months imprisonment).

File 22212756

Aggravated assault. Convicted and sentenced to 14 months imprisonment, to commence after 20 months of the sentences imposed on file 22203429. Total on Local Court matters: 34 months imprisonment.

The 34 months imprisonment on Local Court files 22203492 and 22212756 is to commence after serving 26 months of the sentence on the Supreme Court file 22203430 which commenced on 29 January 2022.

The total effective sentence is 60 months imprisonment to commence on 29 January 2022. A non-parole period of three years is fixed.
