CITATION:	*Jaragba v Siebert* [2024] NTSC 80
PARTIES:	JARAGBA, Mervyn v SIEBERT, Kelly Marie
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 2 of 2024 (22337557) and LCA 3 of 2024 (22337563)
DELIVERED:	25 September 2024
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JUDGMENT OF:	Reeves J

CATCHWORDS:

SENTENCING – Appeal against sentence – Severity – Whether total sentence manifestly excessive – Judicial discretion – Treatment of concurrency by the primary judge – s 121(7) *Domestic and Family Violence Act 2007* (NT) – Totality principle – No error made – Appeal dismissed.

SENTENCING – Appeal against sentence – Severity – Whether individual sentences manifestly excessive – Offending concerned domestic violence – Legislative and judicial treatment of domestic violence – Comparative sentences – Sentences imposed within acceptable range for similar offending – Appeal dismissed.

SENTENCING – Mitigating factors – Plea of guilty – Quantum of discount for plea – General principles – Primary judge made appropriate reduction in sentence.

Domestic and Family Violence Act 2007 (NT), s 121(7)

AB v R [2023] NTCCA 8; *Bara v Blackwell* [2022] NTCCA 17; *Emitja v R* [2016] NTCCA 4; *Forrest v R* [2017] NTCCA 5; *JKL v R* [2011] NTCCA 7; *Hili v R* (2010) 242 CLR 520; *Lorenzetti v Brennan* [2021] NTSCFC 3; *Markarian v R* (2005) 228 CLR 357; [2005] HCA 25; *R v Bonney* [2022] NTCCA 3; *R v Kilic* [2016] HCA 48; *R v Wurramara* (1999) 105 A Crim R 512; *Richards v R* [2024] NTCCA 4; *SE v R* [2022] NTCCA 9; *Truong v R* (2015) NTLR 186, referred to.

REPRESENTATION:

Counsel:

Appellant:	F Kepert with J Henderson
Respondent:	S McMaster

Solicitors:

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

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

Jaragba v Siebert [2024] NTSC 80
No. LCA 2 of 2024 (22337557) and
No. LCA 3 of 2024 (22337563)

BETWEEN:

MERVYN JARAGBA
Appellant

AND:

KELLY MARIE SIEBERT
Respondent

CORAM: REEVES J

REASONS FOR JUDGMENT

(Delivered 25 September 2024)

Introduction

[1] This appeal concerns the following sentences imposed on the appellant by a Local Court judge on 28 February 2024 (adopting the order in which the five counts were dealt with by the sentencing judge):

a. Count 3 – choking, strangling or suffocating, RM, the appellant's erstwhile domestic partner: one year and 10 months imprisonment;

b. Count 5 – aggravated assault on RM where the circumstances of aggravation were that she was a female and that she suffered harm: two

years and six months imprisonment, two years of which was to be served cumulatively with the sentence imposed on count 3;

c. Count 4 – contravening a domestic violence order issued for the protection of RM: six months imprisonment, all of which was to be served cumulatively with the sentence imposed on count 3;

d. Count 1 – aggravated assault on NM, RM's then current partner, where the circumstances of aggravation were that he suffered harm: four months imprisonment, three months of which was to be served cumulatively with the sentence imposed on count 3; and

e. Count 6 (described as further Count 1 before the sentencing judge) – contravening a domestic violence order issued for the protection of RM: five months imprisonment all of which was to be served cumulatively with the sentence imposed on count 3.

[2] The total cumulative period of imprisonment imposed was five years. Eleven months of that period, namely the terms of imprisonment imposed for counts 4 and 6, was made cumulative in compliance with s 121(7) of the *Domestic and Family Violence Act 2007* (NT).

[3] In brief summary, the appellant's primary contention in this appeal is that the total penalty imposed for all five counts and that imposed for two individual counts (counts 3 and 5) were manifestly excessive. For the reasons that follow he has failed to establish that criterion both in respect of

the total penalty and the two individual penalties. His appeal will therefore be dismissed.

The offending conduct

[4] The offences to which Counts 1, 3, 4 and 5 related were committed in Darwin on Tuesday, 7 November 2023. The offence to which Count 6 related was committed in Darwin on Saturday, 18 November 2023.

[5] Before setting out the details of the appellant's offending conduct, three contextual matters are worth noting. First between 2010 and 2023 the appellant and RM were in a domestic relationship. That relationship broke down in late 2022 and on 10 January 2023 a Domestic Violence Order was issued against the appellant designating RM as the protected person. That order is due to expire on 9 January 2025.

[6] Secondly, in about September 2023, RM formed a new domestic relationship with NM. At the time of his offending the subject of this appeal, the appellant was jealous about that relationship.

[7] Thirdly, the appellant was re-released from prison on the day of his offending on counts 1, 3, 4 and 5. He was rearrested 11 days later on the evening of his offending on count 6.

[8] With respect to count 1 the offending conduct was as follows. On the afternoon of Tuesday 7 November 2023, RM and NM were drinking alcohol together in the park opposite the Fannie Bay shops in Darwin. At

approximately 4:00pm the appellant approached them and began yelling and swearing at NM. When NM walked up to the appellant to remonstrate with him, he punched him. They began fighting. In the course of their fight the appellant threw NM to the ground, sat on him and began punching his face repeatedly. As a result, NM suffered a 3 cm cut underneath his left eye which was bleeding.

[9] With respect to counts 3, 4 and 5 the offending conduct was as follows. Following his assault on NM, the appellant forced RM to go with him to Mindil Beach. She did not want to go with him but because he was drunk and was threatening her, she was too scared to say "no". Once they arrived at that location, the appellant said that he wanted RM to resume their relationship. She said "no". In response the appellant began to choke her. His grip was so tight that she could not breathe. Thereafter he kicked her twice in the stomach and either punched, or kicked, her right eye.

[10] RM began experiencing severe pain around that eye. On 9 November 2023, she attended at the Royal Darwin Hospital and x-rays were taken of her skull. She was subsequently diagnosed as having a fractured right eye socket. She also had bruising around that eye and soft tissue injuries to her abdomen.

[11] Finally, with respect to count 6 the offending conduct was as follows. Between the hours of 9:05 pm and 9:40 pm on Saturday, 18 November 2023 the appellant made five telephone calls to RM. During one of those calls he

threatened to assault her and put her in the ICU. These threats contravened the Domestic Violence Order mentioned earlier. Later that evening, the appellant was arrested and conveyed to the Palmerston Watch house.

The sentencing remarks

[12] At the outset it is important to note that, before the sentencing judge, the appellant's lawyer put no matters in mitigation of penalty and, in doing so, he acknowledged that he was taking an "unorthodox" approach. It is also important to note that the sentencing judge prefaced his remarks with a statement that he had "paused overnight to reconsider this matter, to look at the objective seriousness, take into account the mitigating factors and make sure that individually and collectively the sentence is just in all circumstances".

[13] At the beginning of his sentencing remarks, the primary judge described the appellant's history of prior offending as including "numerous serious offences against the person". He identified five such incidents and said that that history "gave rise to a real need for specific deterrence".

[14] Then his Honour noted the domestic violence context to the appellant's offending and observed "… after breaking the victim's eye socket, he continued to harass and threaten her in breach of the Domestic Violence Order. And only the intervening act of being arrested appears to have stopped his predation of the victim".

[15] Thereafter his Honour considered, first, the three domestic violence related offences separately, clearly assessing them to be more serious than the assault the subject of Count 1, which he observed was "a lesser assault in terms of seriousness".

[16] Prior to stating the periods of imprisonment that he fixed for each offence, his Honour specifically referenced the objective seriousness of the offence, the maximum term of imprisonment prescribed and the sole mitigating factor, namely the appellant's guilty plea, as follows:

a. Count 3 – "I assess it to be mid-tier in terms of seriousness. Maximum term of imprisonment of 5 years allowance for the early plea, 1 year and 10 months".

b. Count 5 – "I assess it to be upper mid-range … giving the full allowance for the plea, ... given the maximum term of imprisonment is 5 years, in all the circumstances, … 2 years and 6 months. And given his plea, I'll make … 6 months concurrent and 2 years cumulative".

c. Count 4 – "… that's a serious example of the breach … But nonetheless, it's a plea and I need to take into account the fact that it must be served entirely cumulatively ... the maximum term of imprisonment 2 years, 6 months, which must be cumulative".

d. Count 1 – "…That's a lesser assault in terms of seriousness. Given his plea, 4 months. Plea and totality, 4 months. 3 months cumulative". ...

e. Count 6 – "… must be considered mid-range of seriousness of an offence that carries 2 years... I'll make allowance for the plea. Not as much because of the late plea… I need to take into account that it can only be served concurrently [cumulatively]. It's reduced again, and proportionality and totality. 5 months imprisonment, cumulative. …"

[17] As can be seen, in each case, his Honour said that he had made allowance for the appellant's guilty plea and in respect of counts 4 and 6 he said that he took account of the fact that the periods of imprisonment imposed must be served cumulatively with those imposed for the other counts.

The grounds of appeal

[18] The appellant's amended Notices of Appeal set out three grounds of appeal. Ground 1, as follows, applies to all five counts: "that the total effective sentence was manifestly excessive".

[19] Ground 2, as follows, applies to counts 3 and 5: "that the sentence was manifestly excessive".

[20] Finally Ground 3, as follows, applies solely to count 5: "in ordering that the sentence on count 5 be served concurrently only as to 6 months with the sentence on count 3, the court failed to take into account the extent to which the sentences imposed on each charge included in part the criminality of the other offence".

The parties' contentions

[21] The appellant's main complaint underpinning all three of his grounds of appeal, but particularly ground 3, was the "limited order as to concurrency of terms of imprisonment" allowed for by the sentencing judge having regard to the principle of totality. The appellant contended that was particularly so where his Honour was dealing with a single course of criminal conduct with several overlapping or common factors.

[22] He contended that those factors included the timing and location of the offending conduct, the domestic violence setting in which it occurred and the nature of the criminality involved. In particular, he contended that the contravention of the domestic violence order (count 4), the choking offence (count 3) and the aggravated assault (count 5) were "highly interdependent" and represented a single course of criminal conduct all of which occurred within a domestic relationship.

[23] As well, given the requirement for cumulation imposed by s 121(7) of the *Domestic and Family Violence Act* in relation to the two contraventions of the Domestic Violence Order (counts 4 and 6), he contended that the totality principle required the sentencing judge to either reduce the sentences imposed for those two counts, or increase the extent of concurrency allowed in respect of the sentences imposed for the other counts, relying on the observations in *Lorenzetti v Brennan*.[1]

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1 [2021] NTSCFC 3 at [22] (*Lorenzetti*).

[24] While ground 2 was limited to counts 3 and 5, he pointed to the following factors which, he contended, made each of the individual sentences manifestly excessive. On count 1: that the offending began with a "consensual fight"; that no weapon was used and no kicking occurred; that it was not of lengthy duration; and that NM's injury did not require treatment or medical intervention.

[25] On count 3: while acknowledging that the sentences for choking offences will generally be substantial, that the offending did not involve the use of a ligature; that there was no loss of consciousness; and that there was no indication of any injury being sustained.

[26] On count 5: while conceding that, with his history, a term of imprisonment was warranted and that the injury was appropriately classified as serious, a starting point of "almost 3 years imprisonment before the discount for a plea indicates a risk that the severity of the injury was mischaracterised".[2]

[27] Lastly, on counts 4 and 6, while accepting that the individual sentences themselves were not manifestly excessive, he contended that the sentencing judge's failure to have due regard to the principles of totality and concurrency had the effect of placing them in that category.

[28] Finally, with respect to ground 1, he contended that the total of five years imprisonment imposed by the sentencing judge was so "clearly and obviously" excessive, in the circumstances, as to manifest error. In

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2 Referring to the calculation set out at [28] below.

particular, he contended, that error arose from his Honour's failure to allow a proper discount for his pleas of guilty and take account of the commonality of factors in his offending when applying the principles of totality mentioned above. With respect to the former he contended that, even allowing for a relatively low discount of 15%, the starting point for counts 3, 4 and 5 would have been 26 months, seven months and 35 months respectively. The quantum of these relatively high starting points demonstrated, so he contended, that a proper discount had not been made.

[29] In response, the respondent emphasised the wide discretion available to the sentencing judge and contended that, to succeed in this appeal, the appellant must show that the sentence imposed is "so egregiously erroneous", or that it is "so far outside the range of a reasonable discretionary judgment as to itself to bespeak error".[3]

[30] As well the respondent contended that the sentencing judge was an experienced Local Court judge who worked in a court that routinely dealt with offences involving male against female domestic violence. She contended that, with that background his Honour was well aware of the prevalence of such offending in the Northern Territory. In this regard she emphasised the "significant public attention and opprobrium" that such offending had attracted and the resultant community expectation that the sentences imposed on offenders would ensure the protection of their female

3 Citing *Truong v R* [2015] NTCCA 5 at [37]; (2015) NTLR 186 at [37] and *Forrest v R* [2017] NTCCA 5 at [104] respectively.

victims. She also pointed to the statement the sentencing judge made immediately prior to sentencing the appellant that he had paused to consider the matter overnight before proceeding to sentence.[4]

[31] Additionally the respondent sought to underscore the absence of any material before the court as to the appellant's subjective circumstance and the lack of any evidence of remorse. She also submitted that there was no evidence of any attempt on the appellant's part to address his obvious alcohol abuse issues. On the other hand, she contended, there was material before the sentencing judge to show that the appellant had a disturbing history of similar offending. In this respect she contended that the appellant had offended almost every year since 2006 and that this offending included four prior convictions for aggravated assault, three of which were against females and involved the use of weapons.

[32] As for the appellant's contentions with respect to the discount afforded for his guilty plea, the respondent contended that there is no prescribed quantum for such a discount, that it is therefore entirely within the discretion of the sentencing judge and that it is not always possible in a busy court for a sentencing judge to nominate the amount of the discount allowed.

[33] With respect to the appellant's appeal ground that the overall sentence was manifestly excessive, the respondent contended that proposition should be rejected once regard is had to the facts that: apart from count 1, the

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4 See at [12] above.

offending on all counts was characterised by the sentencing judge as either "serious" (count 4), at the "upper mid-range" (count 5), or at "the mid-range" (counts 3 and 6); the total maximum penalty set across all five counts was 19 years imprisonment i.e. five years imprisonment for each of counts 1, 3 and 5 and two years imprisonment for each of counts 4 and 6; and the total effective sentence imposed across those five counts was five years imprisonment, or less than 20% of the maximum penalty.

[34] The respondent drew similar comparisons in response to the appellant's appeal ground that the sentences imposed in relation to counts 3 and 5 were manifestly excessive. First, with respect to count 5, she pointed to: the "significant injury of a fractured eye socket" that RM sustained; the sentencing judge's characterisation of the seriousness of the offending as "upper mid-range"; the maximum penalty fixed of five years imprisonment; and the sentence imposed of two years and six months imprisonment, noting that this was approximately 50% of the maximum penalty.

[35] Secondly with respect to count 3, she pointed to: the fact that the appellant had strangled RM to the extent that she "could not breathe"; the sentencing judge's description of the seriousness of the offending as "mid-tier"; the prescribed maximum penalty of five years imprisonment; and the sentence imposed of one year and 10 months imprisonment, noting that this was eight months less than "the actual mid-range of the maximum penalty".

[36] After the hearing of this appeal the parties were asked to provide submissions on two tables of comparative sentences imposed by this Court for offences similar to those in count 3 (choking or strangulating) and count 5 (aggravated assault on a domestic partner) and to advance any other comparative sentences that they believed were relevant. Those tables indicated a broad range of comparative sentences of between nine months and four years imprisonment on count 3; and between six months and four years imprisonment on count 5, after having regard to the relevant starting point, in the event that a defendant had pleaded guilty.

[37] In response the appellant submitted that violent offending covered a vast array of circumstances and therefore resulted in sentences within a significant range. Nonetheless, he advanced several comparative sentences with respect to each count that essentially confirmed the range described above. In her response the respondent submitted that the sentence of one year and 10 months imposed on count 3 was "entirely within an appropriate sentencing range for an offence of that type".

Consideration

[38] The principles concerning an appellate determination that a sentence is manifestly excessive are well-established. One begins from the presumption that there is no error. The appellant is then required to show that an error exists, either arising from some identifiable misapplication of principle, or by inference from an assessment that the sentence is "unreasonable or

plainly unjust". To be "manifestly excessive" the sentence must be "clearly and obviously excessive", not just arguably so. That determination is made in a context where sentencing judges, in the exercise of their sentencing discretion, are "allowed as much flexibility … as is consonant with consistency of approach and application of principle". Accordingly, an appellate court is not to substitute its opinion for the discretionary judgment of the sentencing judge merely because it would have exercised that discretion differently.[5]

[39] With these principles in mind it is convenient to deal with the appellant's three grounds of appeal in reverse order. As the appellant's contentions above show,[6] ground 3 raises the principle of totality in two respects. First as to the overlaps, or common factors, that are said to exist in the offending on counts 3, 4 and 5. Secondly as to the interaction between the statutorily imposed accumulation with respect to the sentences imposed on counts 4 and 6 and those imposed for the other three counts.

[40] As for the first, I do not accept the appellant's contention that there was, relevantly, a high degree of interdependence, or overlap, between the offending conduct involved in those counts. In the first place, grouping them all under a broad domestic violence heading fails to have regard to the distinct forms of criminality involved in the choking offence (count 3) and

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5 See *Markarian v R* (2005) 228 CLR 357; [2005] HCA 25 at [25] to [28], *Hili v R* (2010) 242 CLR 520 at [60], *Forrest v R* [2017] NTCCA 5 at [63] to [64] and *Richards v R* [2024] NTCCA 4 at [35] to [36].

6 See at [21] to [23] above.

the aggravated assault offence (count 5). It also ignores the peculiar sentencing considerations that emerge from their legislative and jurisprudential history.

[41] Dealing first with count 3, the offence under s 186AA of choking, strangulating, or suffocating a person's domestic partner was introduced to the Criminal Code quite recently i.e. in 2020. As the Minister explained in her Second Reading speech below, its introduction was intended to create a new and separate offence to "ensure greater recognition of this type of domestic violence":

> Domestic violence in which a perpetrator chokes, strangles or suffocates their partner has been identified as a high-risk factor for serious harm and subsequent lethal outcomes in domestic violence situations. However this conduct has often not been taken seriously enough in the investigation and prosecution of domestic violence incidents… This type of conduct would otherwise be captured as assault under section 188(2) of the Criminal Code. The creation of a new separate offence will ensure greater recognition of this type of domestic violence and its increased risk of serious harm and lethal outcomes.[7]

It follows that, to treat the offending conduct in counts 3 and 5 as merely different forms of domestic violence would fail to have regard to this clear Legislative intention.

[42] Turning then to count 5, judges in this Court and in the Northern Territory Court of Criminal Appeal have, for well over two decades, repeatedly expressed concerns about the subsistence of domestic violence as a form of

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7 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 28 November 2019, 7691-7692 (Nicole Manison, on behalf of Attorney-General and Justice).

offending in this community. In the course of doing so they have identified its myriad peculiar features including: a high recidivism rate among offenders; the death and disability it causes to its victims, most commonly vulnerable women and children; the stress it places on frontline workers in the police, ambulance and health services; the strain it places on the correctional system through, among other things, overcrowded prisons; the enormous costs it imposes on all these services and, therefore, the public purse and the Northern Territory economy more broadly; and the consequent corrosive effect that all these consequences have on the wellbeing of the community at large.[8]

[43] To address these concerns the Courts have repeatedly emphasised the need for general deterrence and denunciation when sentencing domestic violence offenders. The following is a recent example emanating from the Northern Territory Court of Criminal Appeal:

> We … wish to emphasise the importance of sentencing judges sending a strong and consistent message that crimes of violence against Aboriginal women and children and other vulnerable members of the community are not to be tolerated — a strong message of denunciation — and the importance of including in such sentences a strong and consistent component of general deterrence.[9]

[44] As an experienced Local Court judge, the sentencing judge can be taken to have been well aware of these sentiments when he was assessing an appropriate penalty for the appellant's domestic violence offending as

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8 See, for example, *R v Wurramara* (1999) 105 A Crim R 512 per Kearney J, *Emitja v R* [2016] NTCCA 4 at [31] to [34] and *R v Bonney* [2022] NTCCA 3 (*Bonney*) at [42].

9 See *Bonney* supra.

described in counts 3 and 5. In addition to these matters it is to be noted that the appellant's offending on those two counts had different and unique consequences for RM. On count 3 she was unable to breathe and feared for her life and on count 5 she suffered a serious fracture to her right eye socket and bruising. Having regard to all these factors I consider it would have been well within the sentencing judge's discretion to make no allowance for the totality principle when making that assessment. I will return to this matter below.

[45] The second respect in which the appellant claims the sentencing judge failed to have proper regard to the totality principle concerns the mandatory accumulation required with respect to the sentences imposed for counts 4 and 6. He contends that requirement should have been, but was not, addressed by either reducing the sentences imposed for those counts or increasing the extent of concurrency in respect of the sentences imposed on the other three counts.[10] In making this contention he relied on the NT Court of Criminal Appeal's judgment in *Lorenzetti*. In that matter the Court held that s 121(7) of the Domestic and Family Violence Act did not entirely abrogate the principle of totality. The Court said:

> … in cases where there are, for example, more than one assault charge, there is nothing to stop the principle from being applied by means of concurrency of the sentences for the assaults.[11]

10 See at [23] above.

11 *Lorenzetti* at [17].

However it went on to identify an important limitation to that approach as follows:

> There is scope for the application of the totality principle by ordering concurrency of other sentences imposed at the same time (e.g. sentences for assault) and by reducing the sentence imposed for breaches of DVO's and other sentences imposed at the same time to the lower end of the range of appropriate sentences available given the objective seriousness of the breaches. However, to impose inadequate individual sentences to give effect to the totality principle in the face of the legislative prohibition on concurrency aimed at ensuring offenders serve the sentences imposed and are "locked up for longer" because of their contraventions would, in our view, constitute and illegitimate attempt to subvert the legislative intention of the subsection.[12]

[46] Contrary to the appellant's contentions above, it is apparent from a fair reading of the sentencing judge's remarks[13] that his Honour did make allowance for the mandatory accumulation required with respect to counts 4 and 6 when fixing the sentences for those counts. He did that by making specific mention of the fact that "I need to take into account …" that each of those sentences had to be served cumulatively before fixing the penalties of six months and five months, respectively. Lest there be any doubt, he added with respect to count 6 "it's reduced again and [for] proportionality and totality." I interpose to note that this fair reading is supported by the matter noted earlier,[14] that he had paused overnight to "make sure that individually and collectively the sentence is just in all circumstances". In other words, his Honour adopted the second option described in *Lorenzetti* and reduced

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12 *Lorenzetti* at [22].

13 See at [16] above.

14 See at [12] above.

the sentences imposed for each of those counts to take account of the totality principle.

[47] Conversely he made no express mention of, nor allowance for, the totality principle in the sentences he imposed for counts 3 and 5. It may therefore be assumed that he heeded the Court's direction in *Lorenzetti* that he should not give effect to that principle by reducing those sentences and thereby imposing "inadequate individual sentences" for those offences. This assumption would also be consistent with the principle that each of those offences should attract a sentence that is commensurate with its peculiar character and objective seriousness. These conclusions are further reinforced by the fact that, while his Honour did not mention "totality" in fixing those sentences, he did, as I have pointed out above, refer to that expression when dealing with count 6 and he also made a specific mention of that principle when he came to impose the sentence for the last of the five counts, namely count 1. There he allowed one month concurrency because of "plea and totality".

[48] It follows from these conclusions that, contrary to the assumption present in the appellant's ground 3,[15] I do not consider the sentencing judge made any allowance for the totality principle when fixing the sentence for count 5. As will appear below, I consider the six months concurrency that he allowed in respect of that sentence was occasioned by the appellant's plea of guilty. For

15 See at [20] above.

the reasons expressed above I consider this approach was entirely consistent with principle and consistency in sentencing domestic violence offenders.

[49] For these reasons I consider that the sentencing judge had due regard to the principle of totality in imposing each of the sentences on the appellant. It follows that there is no merit in ground 3.

[50] Turning then to grounds 2 and 1, they both raise contentions that the sentences imposed in respect of counts 3 and 5 and the total of the sentences imposed for the five counts together are manifestly excessive.

[51] For the following reasons I do not consider the appellant has established that any of those sentences are "clearly and obviously excessive" or so "unreasonable or plainly unjust" that they reflect error on the part of the sentencing judge.

[52] First, I do not consider that the sentence of one year and 10 months imprisonment he imposed in respect of count 3 (choking) meets either of those criteria. In reaching this conclusion I have had regard, as a yardstick, to the comparative sentences to which I referred earlier, noting the limitations to that exercise expressed in the authorities.[16] I have also had regard to the fact that his Honour assessed the offending on this count to be "mid-tier in terms of seriousness" and that the maximum penalty that the

16 See *R v Kilic* [2016] HCA 48 at [22] and *AB v R* [2023] NTCCA 8 at [101].

Legislature has fixed for that offence is five years imprisonment.[17] When these two factors are compared I consider the eight months disparity mentioned by the respondent in her submissions is telling.[18]

[53] Finally I have had regard to the fact that the sentencing judge stated that, in assessing this sentence, he had made an allowance for "the early plea". This aspect raises an issue that was not expressly addressed in any of the appellant's grounds of appeal. Nonetheless, since it was raised in the appellant's submissions without objection from the respondent, I will deal with it.

[54] It is appropriate to begin by noting the following principles which emerge from the authorities. First, the quantum of the reduction to be given for an offender's plea of guilty is entirely a matter of discretion. Secondly, there is no tariff or set range for that reduction. Thirdly, the reduction is to be determined according to the particular circumstances of each case. Fourthly, while it is desirable for transparency reasons to do so, a failure to expressly quantify the quantum of the reduction does not constitute an error. Fifthly the matters that have been taken into account in assessing the reduction in the past include: the stage of the proceedings at which the offer to plead guilty was first made; the utilitarian value of the plea in that the community has been saved the expense of a trial, witnesses have been spared the

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17 As to the use of a maximum penalty as a yardstick see *Markarian v R* [2005] HCA 25 at [30] to [31] and *Bara v Blackwell* [2022] NTCCA 17 at [73].

18 See at [35] above.

necessity to attend court and give evidence and the court's criminal list is disposed of more expeditiously; whether there is any separate evidence of remorse or contrition; the strength of the Crown's case; whether the plea demonstrates that the offender is prepared to change his ways; the extent to which the plea serves the self-interest of the accused; and whether it was accompanied by assistance to law enforcement and prosecution authorities.[19]

[55] Having regard to these principles I do not consider there is any merit in the appellant's contentions that the sentencing judge failed to make due allowance for his plea of guilty. First, the approach advanced by the appellant above[20] based on postulating a hypothetical discount to calculate the reduction that the sentencing judge may have made for his plea and, therefore, the undiscounted head sentence, was rejected by the NT Court of Criminal Appeal in *SE v R* as "wrong in principle".[21] Instead the Court held that the appropriate approach was to assess whether the sentence was manifestly excessive having regard to all the relevant considerations. Adopting that approach, the relevant considerations in this matter all tell against the appellant. They include that: the Crown's case on all counts was relatively strong; there was no evidence that he provided any assistance to relevant authorities; there was no evidence of remorse or contrition on his part; there was also no evidence that he had done anything to address his propensity to alcohol abuse; the lack of such evidence and his long history

19 See *JKL v R* [2011] NTCCA 7 at [23] to [30] and *SE v R* [2022] NTCCA 9 at [11] to [12].

20 See at [28] above.

21 See [2022] NTCCA 9 at [19].

of domestic violence offending did not suggest that he had changed his ways; and the fact that the plea on count 6 was described by the sentencing judge as “late”.

[56] Secondly, while the sentencing judge did not, with two important exceptions, quantify the reduction he made for the appellant’s plea of guilty, in addressing each count in turn he specifically noted that the appellant had entered a plea and, in respect of three counts, recorded that he had made either “allowance” (counts 3 and 6) or “full allowance” (count 5) for it. The important exceptions concern the latter and count 1. With respect to count 5, after indicating that he proposed to fix a term of imprisonment of two years and six months he added the words “and given his plea, I’ll make six months concurrent and two years cumulative”. Taking these words at face value this means that he effectively reduced the sentence to be served on that count by 20%. With respect to count 1, his Honour appears to have conducted a similar exercise in that he allowed one month’s concurrency for “plea and totality” thus effectively reducing the sentence to be served by 25%, for those factors. For these reasons I do not resile from my conclusion above concerning the integrity of the sentence imposed in respect of count 3.

[57] Turning next to count 5 (aggravated assault), without repeating them, when regard is had to the same matters and to the following additional factors, I do not consider the two years six months sentence that the sentencing judge

imposed in respect of that count meets either of the criteria set out above.[22] The additional factors are: first, that his Honour assessed that offending to be in the "upper mid-range" of seriousness; secondly the relatively serious injury that RM sustained, namely a fracture of the orbital of her right eye; and thirdly the six months concurrency his Honour allowed for his plea of guilty.[23]

[58] Finally, with respect to ground 1, I have reached the same conclusion for essentially the same reasons with respect to the total sentence of five years imprisonment imposed in respect of the five counts, noting four of them involved domestic violence. Having regard to all the matters set out above, I do not consider that total sentence was so far outside the range of a reasonable discretionary judgment by the sentencing judge as to reflect error on his part.

[59] It follows that I do not consider there is any merit in grounds 1 or 2 of the appellant's notice of appeal.

Disposition

[60] I therefore order that the appellant's four Notices of Appeal dated 8 March 2024 in matter number 22337557 relating to counts 1, 3, 4 and 5 and his Notice of Appeal dated 8 March 2024 in matter number 22337563 relating to count 6, be dismissed.

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22 See at [51] above.

23 See at [56] above.
