CITATION:	*Douglas v Dole & Ors* [2019] NTSC 80
PARTIES:	DOUGLAS, Charlene v DOLE, Trent WHITTINGTON, Robert HARLAND, Maurice
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NOS:	LCA 17 of 2019 (21845764); LCA 18 of 2019 (21845766); LCA 19 of 2019 (21901564); LCA 20 of 2019 (21904177); LCA 21 of 2019 (21914588)
DELIVERED:	15 October 2019
HEARING DATES:	2 September 2019
JUDGMENT OF:	Southwood J

CATCHWORDS:

CRIMINAL LAW – SENTENCING APPEAL – AGGRAVATED ASSAULT – EXCEPTIONAL CIRCUMSTANCES

Appeal against Local Court sentence for aggravated assault – Whether the sentencing Judge failed to properly exercise discretion to find exceptional circumstances under section 78DI(1) of the *Sentencing Act* – Exceptional circumstances means individual factors, when considered in combination, form an exception which is out of the ordinary course, or unusual, or uncommon – Sentencing Judge accepted the appellant had suffered domestic violence by the victim – Sentencing Judge found that information provided

lacked particulars to establish exceptional circumstances consistent with reasoning in *Orsto v Grotherr* [2015] NTSC 18 – Sentencing Judge erred by failing to consider whether appellant's subjective circumstances amounted to exceptional circumstances – Subjective circumstances included youth, lack of prior convictions, low level range of offending, good prospects of rehabilitation – When considered in combination subjective circumstances amounted to exceptional circumstances consistent with reasoning in *Orsto v Grotherr* [2015] NTSC 18 – Appeal allowed – Appellant re-sentenced

CRIMINAL LAW – SENTENCING APPEAL – AGGRAVATED ASSAULT AND CRIMINAL DAMAGE – MANIFEST EXCESS

Appeal against Local Court sentence – Whether sentence for aggravated assault and criminal damage and breach of bail are manifestly excessive – Whether sentencing judge failed to subjective factors – Neither possible nor necessary for an appeal court to reach any particular consideration concerning allocation of weight to a factor – Sentences of one month imprisonment imposed for aggravated assault and criminal damage not unreasonable or plainly unjust – Sentences imposed do not quash prospects of rehabilitation – Appeal dismissed

CRIMINAL LAW – SENTENCING APPEAL – Appellant applied to amend Notice of Appeal to add third ground of appeal that the sentencing Judge erred in finding that the appellant's background did not explain offending – leave to amend Notice of Appeal refused

Sentencing Act 1995 (NT) s 78CA(1), s 78DI, s 78DI(1), s 78DI(3)

AB v R [1999] HCA 46; *Azzopardi v R* (2011) 35 VR 43; 198 CLR 11; *Baker v The Queen* (2004) 223 CLR 513; *Bugmy v The Queen* (2013) 249 CLR 571; *Dhamarrandji v Curtis* [2014] NTSC 39; *Forrest v The Queen* [2017] NTCCA; *Griffiths v The Queen* (1989) 167 CLR 372; *House v The King* [1936] HCA 40; 55 CLR 499; *Noakes v The Queen* [2015] NTCCA 7; *Ortso v Grotherr* [2015] NTSC 18; *R v Mills* (1998) 4 VR 235; *R v Tootell* [2012] QCA 273; *Smiler v The Queen* [2018] NTCCA 2; *The Queen v Duncan* [2015] NTCCA 2; *Wong v The Queen* [2001] HCA 64; 207 CLR 584

D Mildren, *The Appellate Jurisdiction of the Australian Courts* (Federation Press, 2015)

REPRESENTATION:

Counsel:

Appellant:	F Kepert
Respondents:	D Jones

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Sou1909
Number of pages:	24

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

Douglas v Dole & Ors [2019] NTSC 80
No. LCA 17 of 2019 (21845764); LCA 18 of 2019 (21845766); LCA 19 of 2019 (21901564); LCA 20 of 2019 (21904177); LCA 21 of 2019 (21914588)

BETWEEN:

CHARLENE DOUGLAS
Appellant

AND:

TRENT DOLE
ROBERT WHITTINGTON
MAURICE HARLAND
Respondents

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 15 October 2019)

Introduction

[1] On 28 May 2019 the appellant, Charlene Douglas, was sentenced in the Darwin Local Court to the following terms of imprisonment for the following offences.

- Aggravated assault on David Hoppner on file 21845764 for which the appellant was convicted and sentenced to three months actual imprisonment which was backdated to 26 May 2019.

- Aggravated assault on Simone Blutcher on file 21845766 for which the appellant was convicted and sentenced to one month imprisonment, two weeks of which was to be served cumulatively on the sentence of three months' imprisonment imposed for the assault on David Hoppner.

- Criminal damage for which the appellant was convicted and sentenced to one month imprisonment, two weeks of which was to be served cumulatively on the sentence of imprisonment imposed for the aggravated assault upon Simone Blutcher.

- Three breaches of bail on files 21901564, 21904177 and 21914588, for which the appellant was sentenced to seven days imprisonment for each breach, all of which were to be served concurrently with the sentence of imprisonment imposed for the aggravated assault on Simone Blutcher.

[2] That gave a total sentence of four months actual imprisonment commencing on 26 May 2019.

[3] The appellant appeals against the sentences of imprisonment that were imposed on her on the following grounds:

1. The learned sentencing Judge failed to properly exercise his discretion to find exceptional circumstances.

2. The sentence in all of the circumstances was manifestly excessive.

[4] During the hearing the appellant sought leave to amend the Notice of Appeal in respect of file 21845764, being the aggravated assault on David Hoppner and add a third ground of appeal, namely that the learned sentencing Judge erred in finding that the appellant's background did not explain the offending of 2 October 2018.

[5] On 2 September 2019 I refused the application to add the third ground of appeal as it was a particular of the first ground of appeal, allowed the appeal against the sentence of imprisonment of three months imposed on the appellant for the assault on David Hoppner, and dismissed the appeal against the sentences imposed for the assault on Simone Blutcher and the criminal damage. In addition, I ordered a presentence report as the appellant must be resentenced.

[6] Following are my reasons for doing so.

The facts

[7] The facts of the aggravated assault on David Hoppner on file 21845764 are as follows.

[8] The appellant and David Hoppner were in a domestic relationship for six years. They lived together at Pearce Street, Katherine.

[9] On Tuesday, 2 October 2018 the appellant consumed an unknown quantity of alcohol. She and the victim were in their bedroom at Pearce Street. At

10:00pm the victim was awoken by the appellant swearing at him and calling him a “mother fucker”.

[10] The appellant continued to verbally abuse the victim for about an hour before the victim told the appellant to: “Shut up and stop talking or I’ll leave you for good.” The victim then left the room. He returned shortly after to get his wallet. When he returned the appellant had his wallet in her lap and she was cutting up his driver’s licence with a pair of scissors. The scissors were about 15 cm long with a pink handle.

[11] The victim retrieved his wallet from the appellant and began to walk away. As he did so, the appellant stabbed the victim behind his left knee. This caused a small laceration to the back of the victim’s leg and he was unable to walk properly.

[12] The victim left his residence and went to a family member’s residence on the Victoria Highway. He saw the police at that location and told them what had happened. St John’s ambulance arrived and the victim was taken to the Katherine Hospital where he received treatment for his injuries.

[13] At 12:05pm on Thursday, 4 October 2018 the appellant was arrested and taken to the Katherine Watch House. She participated in an electronic record of interview and made full admissions to the offending.

[14] The victim sustained a small puncture wound as a result of the assault and was in pain for days after. He had to use crutches in order to get around. In

his victim impact statement made on 2 October 2018 the victim stated that his squatting was limited and he was limited when going up and down steps and slopes. He suffered a loss of confidence in the weight bearing capacity of his knee. He was upset for three days after the injury.

[15] The offending is serious offending because it involved the use of a pair of scissors which were adapted to be used as a dangerous weapon. The victim was stabbed from behind. He did not have an opportunity to defend himself and he sustained a significant wound. His wound had to be treated at the Katherine Hospital and involved the use of scarce medical resources.

[16] The facts of the aggravated assault on Simone Blutcher and the criminal damage on file 21845766 are as follows.

[17] The appellant thought Simone Blutcher was getting too close to David Hoppner. The other victim in the matter is Anglicare Residential facility at Kirkpatrick Street, Katherine.

[18] On 9 October 2018 the appellant and her co-offender had consumed some alcohol and they were intoxicated. At around midnight the appellant and her co-offender located the victim at the Shell service station on Katherine Terrace. The two offenders and the victim engaged in a verbal argument. The co-offender then punched the victim once to the right side of her face. The appellant punched the victim once to her forehead causing immediate pain and a large haematoma.

[19] The victim then ran home to the Anglicare facility. The appellant and the co-offender followed her to Anglicare. They then threw rocks at the glass door of the Anglicare facility causing the glass panel to break. The appellant and the co-offender then left the area.

[20] One of the difficulties between the appellant and David Hoppner was that she believed he was getting too close to Simone Blutcher. She believed that Simone Blutcher knew about her relationship with David Hoppner and this made her angry. Apparently there was no sexual relationship between David Hoppner and Simone Blutcher but he would offer her cannabis and things of that nature.

Subjective circumstances

[21] The appellant was born on 17 March 1999. She is 20 years of age. At the time of the offending she was 19 years of age. The appellant was born in Katherine where she has lived all her life.

[22] Her parents separated when she was one or two years of age. From a very early age she lived with her grandmother and grandfather in Katherine. Her mother was an alcoholic. The appellant's grandparents taught her hunting, fishing and gathering bush food. She was sent to boarding school at Kormilda College when she was 10 or 11 years of age. She remained at Kormilda College until she completed year 11 of school. At the time of the offending she was living in Katherine in her grandmother's home.

[23] The appellant and David Hoppner were in a domestic relationship for some years. They met when the appellant was about 13 years old. The appellant stated that two or three months after their relationship started David Hoppner started hitting her. The appellant also complains that David Hoppner will engage in sex with her when she says no. The appellant has not complained to the police about this.

[24] The appellant states that early on in her relationship with David Hoppner he bashed her about once a week. He also ran off with other women. They have arguments about doing domestic chores around the house and they fight over other girls. The appellant has been to the police and made general complaints. The police have advised her she can take out a domestic violence order. [1] The appellant's counsel stated that 'she has been abused for some years, significantly abused; both physically and sexually'. [2]

[25] The appellant has had a problem with alcohol misuse. She started drinking alcohol from the age of 15 or 16 years. She used to get very drunk. As her breaches of bail reveal she still had a problem with alcohol misuse at the time she committed these offences. The appellant has sought assistance from Anglicare to deal with her alcohol misuse. At the time she was sentenced, she had been receiving assistance for her alcohol misuse from Mr Nixon, a case manager at Anglicare, for two months. Her alcohol consumption had reduced and she had been engaging well.

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1 *R v Charlene Douglas* (Local Court of the Northern Territory, Neill J, 28 May 2019) at 44.

2 Ibid.

[26] The appellant and David Hoppner have also been referred to Catholic Care for domestic violence counselling. They had not commenced counselling when the appellant was sentenced by the Local Court.

[27] The appellant and David Hoppner have a four-year-old daughter who at the time she was sentenced in the Local Court was cared for by David Hoppner. The child is now in the care of Territory Families and the appellant and David Hoppner have access to the child.

[28] The appellant has a minor criminal record. She has been found guilty of two property offences as a youth. They were low level property offences. She was dealt with by the Local Court without proceeding to conviction. The Information for Courts simply notes that both offences were proved. No penalty was imposed.

Mandatory Sentencing Provisions

[29] Under s 78CA(1) of the *Sentencing Act 1995* (NT) ('the Sentencing Act') the appellant's assault upon David Hoppner was a level 5 assault because it involved the use of an offensive weapon and the appellant caused harm to the victim. Consequently, unless the Local Court found that there was exceptional circumstances under s 78DI, the appellant had to be sentenced to 3 months actual imprisonment.

Exceptional circumstances

[30] Section 78DI(1) of the *Sentencing Act* provides as follows:

(1) This section applies if:

(a) A court is required to impose a minimum sentence of a specified period of actual imprisonment for an offence; and

(b) The court is satisfied that the circumstances of the case are exceptional

[31] Section 78DI(3) provides as follows:

(3) In deciding whether it is satisfied as mentioned in subsection (1)(b), the court may have regard to:

(a) any victim impact statement or victim report presented to the court under section 106B; and

(b) any other matter the court considers relevant.

[32] General sentencing principles, including proportionality, can be relevant when assessing whether or not exceptional circumstances apply.[3] However, a mere disparity between the mandatory minimum term and the sentence the Court would impose in the absence of such a regime is alone not sufficient to amount to exceptional circumstances. The mandatory minimum terms "must be given their full effect, however, this includes giving full effect to the broadly based "exceptional circumstances" provision."[4]

3 *Dhamarrandji v Curtis* [2014] NTSC 39; *Orsto v Grotherr* [2015] NTSC 18.

4 *Dhamarrandji v Curtis* [2014] NTSC 39 at [26].

[33] The Court of Criminal Appeal in *The Queen v Duncan* [2015] NTCCA 2 held it was important to appreciate the regime of mandatory minimum terms has application:

> [o]nly where the sentence which would otherwise have been imposed is less than the legislatively prescribed mandatory minimum. If having regard to all of the surrounding circumstances, including: the circumstances of the offending; the circumstances of the offender; the maximum penalty and the terms of any other statutory requirement, the appropriate sentence exceeds the mandatory minimum sentence, then the need to consider exceptional circumstances does not arise.[5]

[34] In *Orsto v Grotherr* [2015] NTSC 18 Blokland J provided the following interpretation of exceptional circumstances.

> As held in *The Queen v Duncan*, "exceptional circumstances" do not come into play unless the minimum term is greater than the term that would be imposed in the ordinary course…. The Court of Criminal Appeal in *Duncan* held that "apart from the matters specifically excluded, a sentencing court may take into account any matter it considers relevant".[6] The "very wide scope" (as it was described in *Duncan*) of the circumstances that may be considered by a court was made plain by the observations of the Attorney-General in the second reading speech when he said:
>
> > "The exceptional circumstances exemption is intended to be broad and the court may consider any matters it considers relevant. The bill provides that the court may take into account a victim impact statement or a victim report presented to the court before sentencing, which the court is required to take into account when sentencing an offender".[7]
>
> In *Duncan*, the Court of Criminal Appeal noted the expression "exceptional circumstances" is not further defined in the *Sentencing Act*, however, the Court referred to a number of authorities that attribute meaning to that term:

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5 *The Queen v Duncan* [2015] NTCCA 2.

6 Ibid, [24].

7 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 November 2012. This part of the second reading speech was also central to the reasoning in *Dhamarrandji v Curtis* [2014] NTSC 39 at [23].

> "The expression is not further defined in the legislation. However it has been discussed in the authorities, including in the following familiar passage from *R v Kelly*:[8]
>
> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.[9]

In *Yacoub v Pilkington (Aust) Ltd*,[10] Campbell JA (with whom Tobias JA and Handley AJA agreed) said:

> "Another question of construction concerned "*exceptional circumstances*" in r 31.18(4). In *San v Rumble (No 2)* (2007) NSWCA 259 at [59]–[69], I gave consideration to the expression "exceptional circumstances" in a different statutory context to the present. Without repeating that discussion in full, I shall state such of the conclusions as seem to me applicable in the construction of r 31.18(4).
>
> (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).
>
> (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912–913).
>
> (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).
>
> (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912–913).

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8 *R v Kelly* [2000]1 QB 198, 208 (Lord Bingham of Cornhill CJ).

9 See also *Baker v The Queen* [2004] 233 CLR 513, 573 (Callinan J).

10 [2007] NSWCA 290 at [66].

(e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186)".[11]

Importantly, in the context of the current appeal it may be observed that in *The Queen v Duncan*, the Court of Criminal Appeal determined that when considering whether "exceptional circumstances" arise:

> "[T]he whole of the circumstances of the particular case must be considered. The "mitigating circumstances must be considered against a background of matters such as the egregiousness of the offending and the need for deterrence in determining whether they can be said to amount to exceptional circumstances"[12] for the purpose of the legislation. Although individual factors may not be exceptional, the relevant factors, considered in combination, may amount to exceptional circumstances.[13] Whilst reasons should be given for the exercise of the discretion, the exercise remains part of the overall instinctual synthesis that is undertaken by the sentencing Judge".[14]

[35] For the purposes of the present case, exceptional circumstances means individual factors which, when considered in combination, are such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon.

The remarks of the sentencing judge

[36] In the Local Court the appellant's counsel submitted that the appellant had been the victim of significant and continued domestic violence at the hands of David Hoppner for an extended period of time. It was said that her treatment at the hands of David Hoppner amounted to exceptional circumstances. In essence it was submitted that on the night the appellant

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11 *The Queen v Duncan* [2015] NTCCA 2, [24]-[26].

12 *R v Tootell* [2012] QCA 273 at [25].

13 *Griffiths v The Queen* (1989) 167 CLR 372, 379; *Baker v The Queen* (2004) 223 CLR 513, 574.

14 *The Queen v Duncan* [2015] NTCCA 2, [27].

attacked David Hoppner her emotions which had been built up over an extended period of time overflowed and she could not control herself.

[1] During submissions, the learned sentencing Judge asked counsel for the appellant what made the night of offending different from any other night. Counsel for the appellant replied that there was 'nothing in particular… They had disputes between themselves for a long time.'[15] Counsel for the appellant submitted that the 'the net result... of her abuse is that [the appellant] had lashed out in anger' which resulted in the offending conduct. Counsel for the appellant stated that 'the background of this [offending] is… truly exceptional in the sense that [the significant abuse] is the rationale of what was going through her head at the time'.[16] However, the Court was not provided with any information of a particularised nature regarding the alleged abuse perpetrated by the victim against the appellant, such as criminal records of domestic violence-related offences committed by the victim.

[37] The learned sentencing Judge appears to have generally accepted that the appellant had been subject to significant domestic violence since the age of 13 years. In his sentencing remarks, he states the following.

> [The appellant] entered into a relationship which I'm told has been on foot for 6 years at the time of the offending so she, …, started at the age of 13, an interesting matter which perhaps should have been addressed by somebody at some time, but it is now well past.

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15 *R v Charlene Douglas* (Local Court of the Northern Territory, Neill J, 28 May 2019) at 44.

16 Ibid.

> I'm told that she has been the victim of violence, I'm told she has been the victim of sexual violence; however, it appears that no complaints of such were made to police. Although I'm told that she had once consulted police about how one went about taking out a domestic violence order. It went no further than that.[17]

[38] However, his Honour came to the conclusion that the information he had been provided with was too vague and insufficient to establish that the above factors were operative at the time of the offending. Therefore, it could not be said that exceptional circumstances had been established for the assault upon David Hoppner. His Honour noted that during the plea on sentence in the Local Court, counsel for the appellant had expressly submitted that the plea was not put on the basis of battered wives syndrome. His Honour stated the following.

> It is difficult for me to accept the extent of whatever abuse has been meted out to [the appellant] by her partner with such a vague, albeit passionate history laid out before me.
>
> I emphasise that I'm not rejecting what I've been told, I'm simply unable to deal with it in the sort of detail and the sort of focus that would be required if I were to accept it as explaining the behaviour of 2 October 2018. That's because on that night the victim, who has presented before me with – he of course not being present before me because he is caring for the parties' 4-year old daughter – was fast asleep. He was woken by the defendant before the court.
>
> It has not been put to me that she was a battered wife syndrome survivor who took the opportunity to stab him as he slept, which would have been more consistent with such history. No, she woke him and subjected him to a tirade – she was intoxicated – of abuse for an hour, according to the agreed facts.
>
> So, it's not at all clear to me that the purpose on that night was anything other than paying out on him. He eventually said, "I've had this. I'm going," and he went to look for his wallet, but she had it and she was cutting up his drivers' licence. This is to punish him. Clearly it

17 Ibid 48-49.

> is a small-minded, nasty little act. He took a wallet from her and began to leave, and she stabbed him from behind in the back of the knee.
>
> The consequences of the stabbing were such that he had to be treated at hospital, he had to use crutches to get around for a period, and there's a victim impact statement before me [that is dated] 11 October, which is 9 days after the stabbing.
>
> At that time, he was unable to squat, to go up and down stairs, and negotiate slopes, and initially had to use crutches.[18]

[39] His Honour was of the opinion that the appellant had chosen to behave in a malicious way by waking the appellant up, abusing him for an hour, cutting up his driver's licence and then stabbing him in the back of the leg when he took his wallet and was leaving the premises. Arguably the motive for her behaviour was jealousy of Simone Blutcher. The appellant had simply decided to "pay out" on the victim.

[40] His Honour's determination is consistent with the principles considered by Blokland J in *Orsto v Grothher*.[19] After reviewing a number of authorities dealing with violent assaults by women in a domestic context her Honour came to the conclusion that in order for exceptional circumstances to be established there must be specific evidence which establishes that the offending was attributable to a background of abuse. In reaching her conclusion on this issue Blokland J stated:

> In both cases discussed, the Court had detailed information about previous violence perpetrated by the victim. This must be distinguished from here, as although previous violence perpetrated by the victim was drawn to his Honour's attention, it was information of a generalised kind. *It was not specific enough by itself to allow a firm conclusion to*

18 Ibid 48.

19 *Ortso v Grotherr* [2015] NTSC 18.

be drawn that it was operative on the appellant at, or generally around, the time of offending.[20]

[41] In my opinion, his Honour the sentencing Judge was correct in coming to the conclusion that the material placed before him was not sufficiently specific to allow a firm conclusion to be drawn that the appellant's background of domestic violence was operative on the appellant at, or generally around, the time of offending. However, his Honour failed to consider whether the appellant's other subjective circumstances amounted to exceptional circumstances.

Ground 1

[42] The appellant argued ground 1 of the appeal in relation to file 21845764 only; being the aggravated assault on David Hoppner.

[43] The appellant submitted that his Honour erred by failing to draw a nexus between the normalisation of violence that occurs in the kind of domestic relationship experienced by the appellant from a young age and the offending conduct. The appellant submitted that the effect of the trauma experienced by the appellant was a contributing factor not only to her using violence against the victim which constituted the offending conduct, but also to her resorting to violence in general. The normalisation of violence within the relationship should have been considered by the learned sentencing Judge, even if on the particular night of this offending the victim was not abusive towards the appellant.

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20 Ibid at [45].

[44] The appellant submitted this is consistent with the reasoning in *Bugmy v The Queen*[21] ('*Bugmy*') which found that "An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced."[22]

[45] Counsel for the appellant submitted that the background is relevant to the appellant's moral culpability, both in terms of the general principles set out in *Bugmy* as well as how the particular behaviour of the victim on previous occasions resulted in normalisation of violence within that relationship and can be a contributing factor to offending.

[46] The difficulty with this submission of the appellant is that once again there was no evidence before the Local Court or this Court that violence had become normalised for the appellant. To the contrary, the facts of the offending and the appellant's criminal record established that violence was out of character for the appellant and the main criminogenic factors in her offending were the consumption of alcohol and jealousy.

[47] What was exceptional about this case was the appellant's personal circumstances at the time of sentencing. Her circumstances were as follows.

- The appellant was only 19 at the time she committed the assault against David Hoppner.

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21 (2013) 249 CLR 571.

22 Ibid at [44].

- The appellant's parents separated when she was very young, she was raised by her grandparents due to her mother being an alcoholic.

- The appellant started drinking alcohol at the age of 15 years.

- The appellant had been in a domestic relationship since she was 13 years of age. She had fallen pregnant at a young age. Her child was born when she was 16 years of age.

- Although she had committed two low level property offences when she was a youth, she had no prior convictions for criminal offences.

- She had not previously committed any crimes of violence.

- She had not committed any criminal offences for about four years. Her last criminal offence was a very low level property offence committed when she was a youth aged 15 years old. This offence was dealt with by the Court not proceeding to conviction.

- The level 5 offence committed against David Hoppner was at the bottom of the range of that category of offences.

- The appellant had good prospects of rehabilitation and had already taken steps to try and overcome her problem with alcohol misuse by engaging with Anglicare for drug and alcohol and family

violence counselling. The appellant and Mr Hoppner had also been referred to Catholic Care for family violence counselling.

- Rehabilitation is the primary sentencing objective when dealing with offenders of the appellant's age.[23]

[48] In my opinion, the learned sentencing Judge fell into error by failing to find the appellant's personal circumstances were exceptional circumstances. When considered in combination these factors amount to exceptional circumstances. The sentence imposed by the learned sentencing Judge of three months actual imprisonment is plainly unjust.

Ground 2 - the aggravated assault on Simone Blutcher and criminal damage (file 21845766) and three breaches of bail (21901564, 21904177, 219114588)

[49] Counsel for the appellant submitted that the sentences of actual imprisonment for the assault on Simone Blutcher and the criminal damage are manifestly excessive resulting from a failure to give sufficient weight to the appellant's youth, her lack of prior offending, prospects of rehabilitation, the potentially negative impact of imprisonment[24] and the appellant's reduced moral culpability arising from her background. For the same reason it was also submitted that the cumulation of two weeks of the sentences of one month for the aggravated assault and the criminal damage was also manifestly excessive.

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23 *R v Mills* (1998) 4 VR 235 at 242.

24 *Azzopardi v R* (2011) 35 VR 43 at [36]

[50] As the Northern Territory Court of Criminal Appeal has previously observed, any contention that the sentencing court has accorded inadequate weight to a factor is properly viewed as a particular of the ground of manifest excess.[25] Beyond any inferences which might be drawn from the ultimate determination of whether the sentence fell either within or outside the available range, it is neither possible or necessary for an appeal court to reach any particular conclusion concerning the allocation of weight to a factor.

[51] The exercise of the sentencing discretion in relation to the sentences for the aggravated assault on Simone Blutcher and the criminal damage is not to be disturbed on appeal unless the outcome leads necessarily to the conclusion that there must have been some misapplication of principle which is not apparent from the statement of reasons.[26]

[52] The principles applying to the manifestly excessive ground of appeal have been well settled since the High Court's decision in *House v The King*.[27] The principles were referred by the Northern Territory Court of Criminal Appeal in *Smiler v The Queen*,[28] and restated by this Court in *Forrest v The Queen*.[29] They are (footnotes omitted):

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25 *Noakes v The Queen* [2015] NTCCA 7 at [15] citing *DPP v Terrick; DPP v Marks; DPP v Stewart* [2009] VSCA 220; 24 VR 457 at 459-460.

26 *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [58] per Gaudron, Gummow and Hayne JJ.

27 [1936] HCA 40; 55 CLR 499 at 504-505. See also *Cranssen v The King* [1936] HCA 42; 55 CLR 509.

28 [2018] NTCCA 2.

29 [2017] NTCCA 5.

> The exercise of the sentencing discretion is not to be disturbed on appeal unless error is shown. The presumption is that there is no error. Appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that in all the circumstances the appellate court concludes there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.
>
> Manifest excess is a conclusion which does not depend upon attribution of specific error in the reasoning of the sentencing judge. The relevant test is whether the sentence is unreasonable or plainly unjust. It must be shown that the sentence was clearly and not just arguably excessive. In approaching the task of determining whether a sentence is unreasonable or plainly unjust, the appeal court does so within the context that there is no one single correct sentence. The process of sentencing comprehends that there may have been compliance with the appropriate sentencing principles at first instance notwithstanding that there may also be differences of judicial opinion concerning the result.

[53] As Hayne J stated in *AB v R*:[30]

> The difference between cases of specific error and manifest excess is not merely a matter of convenient classification. It reflects a fundamental difference in what the appellate court does. In the former case, once an appellate court identifies an error, the sentence imposed below must be set aside and the appellate court is then required to exercise the sentencing discretion afresh. The offender must be re-sentenced unless, of course, in the separate and independent exercise of its discretion the appellate court concludes that no different sentence should be passed. By contrast, in the case of manifest excess, the error in reasoning of the sentencing judge is not discernible; all that can be seen is that the sentence imposed is too heavy and thus lies outside the permissible range of dispositions. Only then may the appellate court intervene and, in the exercise of its discretion, consider what sentence is to be imposed.

[54] In order to determine whether a sentence is manifestly excessive regard must be had to all of the relevant circumstances, including the objective seriousness of the offence and where it sits in the range of seriousness, the

30 [1999] HCA 46; 198 CLR 11 at [130].

offender and the offending, whether there are any aggravating factors, and whether there were any mitigating features.[31]

[55] In my opinion, the sentences imposed for the aggravated assault on Simone Blutcher and the criminal damage were not unreasonable nor plainly unjust. The aggravated assault on Simone Blutcher involved some forethought. The appellant and her co-offender had been looking for the victim with an intent to assault her. The assault was committed in public, at night, and in company. The appellant's conduct was fuelled by alcohol and motivated by jealousy. The offenders pursued the victim, who was only 16 years old, when she ran away from them. The appellant was on bail for the aggravated assault upon David Hoppner when she committed this offence and the criminal damage. The maximum penalty for such an assault is imprisonment for five years.

[56] The property damage to the Anglicare facility would have caused significant inconvenience to Anglicare, a service which provides assistance to disadvantaged Aboriginal people and others. It also would have caused some cost to Anglicare to have the door repaired.

[57] Such criminal acts are prevalent.

[58] The sentence of one month imprisonment for each offence gives necessary and appropriate consideration to the principles of denunciation and general

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31 D Mildren, *The Appellate Jurisdiction of the Australian Courts* (Federation Press, 2015) at 10.16.

deterrence. Neither the individual sentences nor the cumulated sentence of six weeks imprisonment is likely to crush the appellant's prospects of rehabilitation. The length of the sentences are consistent with the principles enunciated in *R v Mills*.[32]

[59] During submissions counsel for the appellant conceded that seven days imprisonment concurrent with the 1 month imprisonment for the aggravated assault on Simone Blutcher was appropriate.

Orders

[60] Consequently I make the following orders.

1. Leave to add a third ground of appeal is refused.

2. The appeal against LCA 17 of 2019 (21845764) being the assault on David Hoppner is allowed and the sentence of three months actual imprisonment is set aside.

3. The appeals against LCA 18 of 2019 (21845766), 19 of 2019 (21901546), 20 of 2019 (21904177) and 21 of 2019 (21914588) are dismissed.

[61] As I have ordered a presentence report, I will hear the parties further as to the sentence to be imposed for the assault on David Hoppner.

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32 (1998) 4VR 235 at 242.

Addendum

[62] The appellant was resentenced as follows.

1. The offence of one months imprisonment for the assault on Simone Blutcher imposed by the sentencing judge is confirmed.

2. The Sentence of one months imprisonment imposed by the sentencing judge for the criminal damage is confirmed, as is the order that two weeks of that sentence be served cumulatively on the sentence imposed for the assault on Simone Blutcher.

3. A sentence of three months imprisonment is imposed for the assault on David Hoppner. Two weeks of that sentence is ordered to be served concurrently with the sentence for the offence of criminal damage

4. That gives a total sentence of four months imprisonment.

5. The sentence of imprisonment is backdated by six weeks to reflect the time the appellant had spent in custody and to take into account the time she has spent on supervised bail with electronic monitoring in accordance with the principles in *Lovegrove v The Queen* [2018] NTCCA 3.

6. The Sentence is suspended forthwith on conditions.