Brown v Guerin & Ors [2016] NTSC 53

PARTIES:	BROWN, Renita v GUERIN, Malcolm and LYONS, Richard Mark
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 4/16 (21532819); JA 5/16 (21532814); JA 6/16 (21521761)
DELIVERED:	14 October 2016
HEARING DATES:	26 May 2016
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	LOCAL COURT

CATCHWORDS:

CRIMINAL LAW – Justices Appeal- Sentence – Manifestly excessive- Totality- Provocation – Background of Domestic Violence – Appeal Allowed – Appellant resentenced

CRIMINAL LAW- Justices Appeal- Breach of Domestic Violence Orders- Mandatory Cumulation- Application of totality principle-Appeal Allowed – Appellant resentenced

Bail Act (NT) s 37 B
Criminal Code (NT) s 174 D, s 188 (2)
Domestic and Family Violence Act 2001 (NT) s121, s 121(6) (b), s 121 (7)
Local Court Act s 84, s87

Sentencing Act 1995 (NT) s 50, s 103

R v ADJ (2005) 153 A Crim R 324; *Hili v The Queen (2010) 242 CLR 520; House v King* (1936) 55 CLR 499; *Whitehurst v The Queen* [2011] NTCCA 11, applied

Attorney General v Tichy (1982) 30 SASR 84; Blitner v Ganley [2015] NTSC 84; Carroll v The Queen [2011] NTCCA 6; Cranssen v The King (1936) 55 CLR 509 at 519 – 520.; DPP v Terrick; DPP v Marks; DPP v Stewart (2009) 24 VR 457; Dinsdale v The Queen (2000) 202 CLR 321; Hili v The Queen (2010) 242 CLR 520; Idai v Malogorski [2011] NTSC 102]; *Noakes v The Queen* [2015] NTCCA 7; *Blitner v Ganley* [2015] NTSC 84; *Orsto v Grother* [2015] NTSC 18; *R v ADJ* (2005) 153 A Crim R 324; *R v Hester* [2007] VSCA 298; *Smith v The Queen* [2011] NSWCCA 209*; The Queen v Christie Long & Ors* SCC 21534701, 21534699, 21535321, 21564003, 21548133, 17 February 2016, Mildren AJ; *The Queen v Connie Riley & Ors* SCC 21601312, 21555580, 21604055, 5 May 2016, Blokland J*; The Queen v Delray Inkamala* SCC 21530284, 17 August 2016, Southwood J*; The Queen v Jesser* SCC 20719298, 8 April 2008, Martin (BR) CJ; *The Queen v Mattiske* SCC 20527791, 23 October 2006, Martin (BR) CJ; *Wayne v Cornford* [2013] NTSC 01; *Williams v The Queen* [2013] NTCCA 12*; Wong v The Queen* (2001) 207 CLR 584, referred to.

REPRESENTATION:

Counsel:

Appellant:	S Tasneem
Respondent:	J O'Brien

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director Public Prosecutions

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

Brown v Guerin & Ors [2016] NTSC 53
Nos: JA 4/16 (21532819); JA 5/16 (21532814); JA 6/16 (21521761)

BETWEEN:

RENITA BROWN
Appellant

AND:

MALCOLM GUERIN
First Respondent

AND:

RICHARD MARK LYONS
Second Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 14 October 2016)

Background

[1] This is an appeal against sentences imposed by the Local Court,[1] at Alice Springs. On 2 February 2016, the Appellant pleaded guilty to one count of recklessly endangering serious harm committed on 15 May 2015 and one count of breaching bail on 16 June 2015. The Appellant also pleaded guilty to two offences committed on 4 July 2015, namely one count of

[1] The original sentences were passed in the Court of Summary Jurisdiction, now the Local Court: s 84 *Local Court Act*. Judgments and orders made by the Court of Summary Jurisdiction have ongoing effect and become judgments and orders of the Local Court: s 87 *Local Court Act*.

contravening a Domestic Violence Order ('DVO') and one count of aggravated assault.

[2] The maximum penalty for the offence of aggravated recklessly endanger serious harm is 10 years imprisonment. The maximum penalty for aggravated assault is 5 years imprisonment. The maximum penalty for the breach DVO is 2 years imprisonment or 400 penalty units. The maximum penalty for the breach of bail is 2 years imprisonment or 200 penalty units. The following table sets out the date of the offence, the file number, the charge, the maximum penalty and the total sentence imposed:

Date of offence	**File**	**Charge**	**Maximum Penalty**	**Penalty imposed**
15/5/15	21521761	Count 1: aggravated recklessly endanger serious harm	10 years	3 years commencing 4/7/2015
16/6/15	21532814	Count 1: breach of bail	2 years or 200 penalty units	6 months commencing 4/7/2015
4/7/15	21532819	*Count 1: serious harm (withdrawn)*		N/A
		Count 2: breach domestic violence order	2 years or 400 penalty units	Count 2: 6 months cumulative on 21521761.
		Count 3: aggravated assault	5 years	Count 3: 2 years cumulative on 21521761 and concurrent on count 2
Total effective sentence				**5 years suspended after 12 months. Operational period of 5 years with supervision for 18 months**

[3] While the terms of imprisonment for the two Counts committed in May and June 2016,[2] were ordered to be served concurrently, Counts 1 and 3, committed on 4 July 2015,[3] were ordered to be served cumulatively, making the total term of imprisonment 5 years. It was ordered that the total term of imprisonment be suspended after 12 months. The operational period was set at 5 years. The Appellant was ordered to be subject to supervision in the terms of a number of significant conditions recommended in the s 103 *Sentencing Act* report for a period of 18 months after release. The sentence was ordered to commence on 4 July 2015.

[4] Section121(6)(b) and 121(7) of the *Domestic and Family Violence Act* provides that any sentence of imprisonment imposed for a breach of a DVO must be cumulative on any other term of imprisonment. For the breach of the DVO, a term of six months imprisonment was imposed, concurrent with the aggravated assault term,[4] but cumulative on the sentence for recklessly endanger serious harm.[5]

The grounds of appeal are as follows:

1. The sentence was manifestly excessive.

2. The learned Judge failed to give sufficient weight to factors in mitigation.

[2] File 2152176 & File 21532814.
[3] File 21532819.
[4] Ibid.
[5] File 21521761.

[5] The primary ground of appeal contends that the sentencing Judge imposed a sentence that was manifestly excessive in all of the circumstances. The second ground, related to the manifest excessive ground, complained that insufficient weight was given to particular factors in the exercise of the sentencing discretion. It is now established that such questions ought properly be viewed as particulars of the ground asserting manifest excess.[6] In *DPP v Terrick; DPP v Marks; DPP v Stewart,*[7] the Victorian Court of Appeal said:

> The proposition that too much – or too little – weight was given to a particular sentencing factor is almost always untestable. This is so because quantitative significance is not to be assigned to individual considerations. The question to be addressed when the ground of manifest inadequacy – or, in a prisoner's appeal, manifest excess – is advanced is whether the sentence arrived at was within the range reasonably open to the sentencing Judge in the circumstances, taking proper account of all relevant sentencing considerations (whether aggravating, or mitigating, or both). If the conclusion is that the sentence was outside the available range, then it may be inferred that too much or too little weight was given to one or other consideration. But rarely, if ever, will it be possible – or necessary – for the appeal court to reach a conclusion on that question.[8]

General principles concerning appeals against sentence

[6] The highly discretionary nature of the sentencing task necessitates a review of the proceedings in the Court below to ascertain whether the ground of manifestly excessive has been made out in the context of well-established

[6] *Noakes v The Queen* [2015] NTCCA 7 at par [15]; *Blitner v Ganley* [2015] NTSC 84 at [9].
[7] (2009) 24 VR 457 at 459-460.
[8] See also *Blitner v Ganley* [2015] NTSC 84.

principles regarding the restraint to be exercised on appeal.[9] The starting point is that there is no error in the sentence. Manifest excess cannot be made out unless it is shown that the sentence is "unreasonable or plainly unjust."[10] It is incumbent upon an Appellant to show that the sentence was clearly and obviously and not just arguably excessive.[11] In the present matter, the Appellant submitted that the individual sentences were excessive, additionally or in the alternative that the accumulation of the sentences, was unreasonable and plainly unjust.

[7] Intervention by a court on a ground of manifest excess is not warranted simply because the result arrived at below is markedly different to other sentences imposed for other cases.[12] Rather, some misapplication of principle must be clear, even though where and how cannot be determined from the reasons.[13] The appellate court interferes only if it is shown the sentencing Judge was in error in acting on a wrong principle or in misunderstanding or wrongly assessing a salient feature. The error may appear in what the sentencing Judge said or the sentence itself may be so excessive as to manifest such error.[14]

[8] These principles continue to apply in cases such as this; where the Respondent concedes this Court may consider error has occurred in the

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[9] *House v The King* (1936) 55 CLR 499 at 504, 507 – 508; *Cranssen v The King* (1936) 55 CLR 509 at 519 – 520.
[10] *R v ADJ* (2005) 153 A Crim R 324 at [51] per Batt JA.
[11] *Whitehurst v The Queen* [2011] NTCCA 11 at [2]; *Noakes v The Queen* [2015] NTCCA 7 at [23].
[12] *Hili v The Queen* (2010) 242 CLR 520 at [59], referring to *Dinsdale v The Queen* (2000) 202 CLR 321 at [6] and *Wong v The Queen* (2001) 207 CLR 584 at [58].
[13] *Hili v The Queen* (2010) 242 CLR 520 at [59].
[14] *Whitehurst v The Queen* [2011] NTCCA 11 at par [12].

sentencing process in relation to the sentences imposed for the breach of the DVO and the breach of bail.[15]

Procedural History

[9] The Appellant was granted police bail for the offence of aggravated recklessly endanger harm on 16 May 2015 to attend the Local Court for a mention of the matter on 16 June 2015.[16] The Appellant failed to appear. The Appellant was charged with a breach of bail offence.[17] Further, a warrant for her apprehension was issued and the bail recognizance in the sum of $500 was forfeited. On the same day, a DVO that had been issued by police was confirmed by the Local Court.[18]

[10] On 4 July 2016, the Appellant committed an assault with circumstances of aggravation,[19] and was arrested on 5 July 2015. In relation to the aggravated assault, counsel for the Respondent in the Local Court initially indicated he would proceed with the charge of aggravated assault and discontinue the charge of breach DVO, however the learned Local Court Judge pressed the Respondent to proceed with the breach of the DVO, as there was a condition not to consume alcohol or be under the influence of alcohol or another drug in the presence of the protected person. The facts comprising the aggravated assault also included references to the Appellant being intoxicated. That somewhat unusual aspect of the procedure arose in the following way:

[15] Summary of Submissions on behalf of the respondent, page 1, 3 at (viii), (ix)).
[16] File 21521761.
[17] File 21532814.
[18] Transcript, 17 February 2016, at 4.
[19] File 21532819.

MR ROBERTS: Yes, your Honour

The offender, Renita Brown and the victim Justin Thompson have been in a domestic relationship for the past 15 years and have six children between them. On 16 June 2015 at 1:22 the offender was served a s 41 Police Domestic Violence Order by Senior Constable Karl (inaudible) 3206 of the Tennant Creek Police Station with the following conditions:

Your Honour, want me to read out all of the conditions?

HIS HONOUR: You didn't read the breach DVO charge, so I'm just wondering about the relevance of it. I assume you stood charge 1 and 2 aside, because you only read charge 3.

MR ROBERTS: Yes, your Honour, because of condition 4, the Crown has elected to go with the aggravated assault and as such, I haven't sought to proceed with breach the DVO.

HIS HONOUR: Well, that would be fine if that was the only breach was the assault, but also, there's a non-alcohol condition that I see from the – there's a reference to consuming alcohol.

MR ROBERTS: Indeed, you Honour. Perhaps I'll just have a brief word with the learned friends. With the consent of my friend, your Honour. I propose now to seek leave to put the breach DVO to Ms Brown.

[11] The Appellant's first appearance before the Local Court was on 6 July 2015. She was in custody at that time and did not apply for bail. The offending on 4 July 2015 originally contained a charge of serious harm. [20] That charge and the charge of aggravated recklessly endanger serious harm charge,[21] initially proceeded as preliminary examination mention matters. The medical evidence on the question of serious harm was ambiguous and both

[20] File 21532819.
[21] File 21521761.

matters were set down for an oral examination of the treating doctor and the victim on 30 November 2015. On 30 November 2015, the victim had not been summoned to attend court. The Respondent obtained further information from the treating doctor who concluded that serious harm was not established.

[12] On 2 February 2016, all matters were resolved and the Appellant pleaded guilty to all remaining counts after the withdrawal of the serious harm charge. Submissions were made and all matters were adjourned for a s 103 *Sentencing Act* report on the suitability for supervision. On 17 February 2016, the s103 report was published and the Appellant was sentenced. The Appellant remained in custody throughout the proceedings from 5 July 2015.

Outline of the offending behaviour

[13] Although the offending behaviour was serious, there were powerful mitigating factors in relation to the offending. As background, the Appellant and the victim were wife and husband through Aboriginal tradition. The offending concerned primarily assaults perpetrated by the Appellant against her husband, Justin Thompson, that in each instance were immediately preceded by assaults by Mr Thompson on the Appellant. That this was occurring is illustrated with respect to the Appellant's offending on 15 May 2015. After that offending, the Appellant was taken to Alice Springs hospital by police because of the injuries she suffered that were inflicted on her by the victim Mr Thompson.

[14] I will summarise the sentencing facts.[22] In relation to the offence of aggravated recklessly endanger serious harm,[23] at around midday on Friday 15 May 2015, the Appellant and the victim went to the Fay Lewis bar in Tennant Creek, where they consumed alcohol. They subsequently purchased more alcohol from a bottle shop before going to a house at Karguru Camp to continue drinking. Both became heavily intoxicated and began to argue. Justin Thompson started to shout and swear at the Appellant and dragged her into the bedroom. He then commenced kicking her, striking her with a crutch and punching her face multiple times. The Appellant ran from him into the kitchen and took hold of a knife from the cupboard, returned to the bedroom and stabbed Mr Thompson once in each thigh. As a consequence, he fell to the ground and started bleeding. The Appellant ran from the house and used her mobile phone to call an ambulance for Mr Thompson. Police attended and took Mr Thompson to hospital where he was treated for his injuries. The Appellant stayed away from the house for some time. When police attended the house again, the Appellant was hiding in the bedroom. She was taken to hospital by police to determine whether she was fit for custody. Upon arrest, she had tenderness and bruising on her arm and leg, bruising to her scalp and small abrasions to her skin. She received wound cleaning and pain medication at the hospital.

[15] In relation to that offending, the Appellant was granted bail on 16 May 2015 to appear in the Alice Springs Court of Summary Jurisdiction on 16 June

[22] Exhibit P1 in the Local Court files.
[23] Count 1, 21521761.

2015. On 16 June, because she was “out bush”, the Appellant failed to appear and a warrant was issued for her arrest. The Appellant was also served with a s 41 Police DVO.

[16] In relation to the aggravated assault and breach DVO, on 4 July 2015, the facts were that at about 3:24pm the victim, Mr Thompson and the Appellant were intoxicated and with family in the front yard of House 45 Hoppy’s Town Camp in Alice Springs. At some point in the evening, the Appellant and Mr Thompson began arguing about buying more alcohol. The Appellant told him they should go to sleep, however the argument continued. As the Appellant was talking, Mr Thompson told her to stop and threatened to wet her with water. He then obtained a bottle of water and threw the water at the Appellant, wetting her shirt. The Appellant became upset, out of breath and was crying, however the victim said she “was just faking it”. The Appellant started to swear at Mr Thompson, angering him, and he struck her on the head with a jug of iced water causing her to fall to the ground. The Appellant then ran away and grabbed a knife that was on the ground and came back towards Mr Thompson, who punched her. The Appellant then used the knife to cut the victim on the hand and the abdomen. Mr Thompson turned around to get the jug so the Appellant stabbed him in the back. The Appellant then ran from Mr Thompson, who chased her to the gate, before he fell to the ground due to his injuries. An ambulance was called by family members who were nearby and assisted him.

[17] On 5 July 2015, the Appellant was arrested by police, and remained in custody.

Appellant's Previous Convictions

[18] The "Information for Courts" showed the Appellant's prior criminal history was limited to traffic offences and breaches of bail. There were no prior convictions for offences of violence.

Medical Reports – Injuries Sustained by the Victim and the Appellant

[19] A statutory declaration by Dr Dan Harris of the Tennant Creek hospital outlined the victim, Mr Thompson's injuries in relation to the assault of 16 May 2015.[24] The wound to his left thigh measured 30 millimetres long and 80 millimetres deep, and to his right thigh 12 millimetres long and 20 millimetres deep. During treatment he became hypotensive, likely as a result of blood loss. According to Dr Harris, while the injuries constituted harm, they were not such that would amount to serious harm.

[20] Dr Radhakrishnan Nair of the Alice Springs Hospital provided a statutory declaration in relation to the injuries of 4 July 2015. Dr Radhakrishnan Nair stated the victim sustained cuts to his left shoulder, right abdomen wall, left wrist and index finder and a small rectus sheath haematoma. These injuries constituted harm.[25]

[21] Clinical notes from Tennant Creek Hospital were also tendered in the Local Court, which indicated the Appellant sustained injuries after the first

[24] Statutory Declaration of Dr Dan Harris, dated 11 November 2015.
[25] Statutory Declaration of Dr Radhakrishnan Nair, dated 24 September 2015.

assault, including broad tender swelling to her right temple, a small abrasion and contusion to her lateral left shin and a tender swollen lump on her left forearm.[26]

Evidence of Previous Domestic Violence Perpetrated By the Victim Against the Appellant

[22] In the Local Court, counsel for the Appellant tendered the criminal history of Mr Thompson and sentencing facts relevant to a number of the convictions on his record. These highlighted a lengthy history of domestic violence perpetrated by My Thompson against the Appellant. In July 2008, the précis before the Court outlined the facts constituting an aggravated assault where Mr Thompson picked up a broken rake and struck the Appellant across the back causing her to fall to the ground in pain.[27] On 2 August 2014, another précis outlined the facts of another aggravated assault where Mr Thompson followed the Appellant outside of their home, grabbed her shirt from behind and punched her to both sides of the back of her head causing her to fall to the ground. He then took off his boot and used it to strike the Appellant to the head. As she attempted to stand up she was pushed back down. On 26 August 2014, a DVO was served on Mr Thompson due to a previous incident where after consuming alcohol he returned home heavily intoxicated and began arguing with the Appellant. He then punched the Appellant twice to the head causing her to fall backwards and fall on top of a metal fan. The Appellant sustained pain and tenderness as a result of

[26] Clinical Notes of Renita Brown dated 15 May 2015.
[27] Précis for Justin Thompson file number 20819209.

falling. Mr Thompson then kicked the Appellant once to her body, picked up a plastic jar of honey and poured the contents over her head and face.[28]

[23] It was clear from the agreed facts before the Local Court in this matter, that in both of the substantive charges, the victim had engaged in provocative and assaultive conduct immediately prior to the assaults perpetrated by the Appellant.

[24] As would be expected, the focus of the sentencing process in the Local Court was on the Appellant's offending. Clearly however the Appellant had been subject to the type of violence often perpetrated against women in similar circumstances to the Appellant. As is often observed in the unfortunately many sentencing cases of this kind, women in the same circumstances as the Appellant live in an environment which makes them particularly vulnerable to violence by partners or husbands within the context of their relationship. It is an environment, for example, that most likely lacks the necessary access to support mechanisms that may have assisted the Appellant with meaningful protective measures or to leave the relationship, prior to commencing offending of this kind.

Appellant's Subjective Circumstances and the Submissions Made on Her Behalf

[25] The Appellant's counsel told his Honour the Appellant was a 31 year old Luritja woman from Papunya with limited schooling at the primary school level. The Court was told she worked as a cashier at the Papunya School for

[28] Agreed Facts File 21458594 (Defendant Justin Thompson).

about 7 months in 2013 however had devoted most of her time to raising her six children. Her plans upon the finalisation of her sentence were to return to Papunya to live with her family at an outstation and to perhaps obtain employment at the childcare centre. The s 103 report advised the Appellant was suitable for supervision on conditions.

[26] In terms of the Appellant's relationship with her partner, the history of violence at the hands of the victim was described to the Court and while it was "accepted that the actions were not in self-defence" it was submitted "they were provoked…did not come out of the blue".[29] Counsel for the Appellant submitted she should not be viewed as someone who habitually and repeatedly engages in violence, but someone who has had enough of the violence she has suffered in the past in the context of the relationship with the victim.

[27] As already mentioned, to illustrate the long history of violence inflicted upon the Appellant by the victim, the Appellant tendered the facts in relation to three prior convictions of aggravated assault against the Appellant by the victim.[30] Medical notes were also tendered in support of the injuries sustained by the Appellant on the 15 May 2015.[31]

[28] In relation to rehabilitation, his Honour was told the Appellant recognised the relationship could no longer go on the way that it had and that the cycle

[29] Transcript 2 February 2016, at 10.
[30] Exhibit D2.
[31] Exhibit D1 on file 21521761.

of violence must be broken. The Local Court was told the Appellant wished to do what she could to achieve that including obtaining assistance for her alcohol problem,[32] and acknowledged that some anger management counselling may assist to address future conflict.

The Respondent's Submissions on Appeal

[29] In both written and oral submissions the Respondent conceded that error had occurred in the sentencing process in relation to the sentences imposed for the breaches of the DVO and bail. In the light of this it was conceded by the Respondent that it may be necessary to embark on a fresh sentencing exercise irrespective of the manifest excess argument.

[30] In relation to manifest excess the Respondent submitted the offences were objectively serious as a whole particularly due to:

(a) the nature and extent of the injuries;

(b) the weapon used;

(c) the fact that "the danger of serious harm was not minimised";

(d) that the second offence was committed whilst on bail; and

(e) that the Appellant was not in a position of immediate danger in the sense that she had an opportunity to leave and obtain a weapon.

[32] Exhibit D3: Letter from DASA outlining the appellant's suitability for the program.

[31] While it was acknowledged the sentences for the offences on 15 May 2015 and 4 July 2015 were towards the upper level of sentences that could be imposed, ultimately it was submitted they still fell well within the sentencing discretion, and were not in themselves manifestly excessive.

The Learned Judge's Sentencing Remarks

[32] In relation to the domestic relationship between the Appellant and the victim, the learned sentencing Judge remarked:

> "…the relationship has been one where there has been violence inflicted upon the defendant by the victim. And that appears to be the case over a number of years. I'm informed that the victim himself had gone to prison from time to time for his assaults and acts of violence upon the defendant. That is unfortunate. That a person should live in fear or be in a relationship where there is violence. She should have left the relationship. She deserved better and her children deserve better, but the relationship continued"[33]

[33] His Honour acknowledged that at the time of the offending "it was clear that the victim was the primary aggressor" stating "he was the one who started to assault her. He kicked her, punched her, and struck her with a crutch. It was I think clearly a nasty assault". His Honour went on to characterise the Appellant's offending as "retaliation" and to remark "this is two violent serious assaults with a knife on the same victim in a short space of time. Again wielded by a drunk angry person. The level of violence between the defendant and victim appears to be escalating. Sadly, it now appears to perhaps be a contest between them to see who can kill the other one first".[34]

[33] Transcript, 17 February 2016, at 3.
[34] Transcript, 17 February 2016, at 4.

[34] In sentencing the Appellant for the aggravated recklessly endangering serious harm his Honour stated it was a "serious incident. Significant deep wounds were caused".[35] In relation to the breach of bail, his Honour remarked "it is a serious example of a breach of bail. Not only did she not attend Court as required but she then (inaudible) out (sic) in breach of the domestic violence order continued the relationship in a drunken way and committed a further, almost identical offence to the first one; stabbing the same person".[36]

[35] In deciding to suspend part of the overall sentence his Honour stated: "given her age and lack of priors for violence apart from these very serious matters which occurred over a 2 month period, I order to be released after she has served one year".[37]

[36] No complaint is made about the minimum term of 12 months that would have been completed in early July on this year, rather the appeal is directed to the five year head sentence and its composition, as well as the lengthy operational and supervision periods.

Consideration of the Grounds of Appeal

[37] While the learned sentencing Judge was clearly aware of the long history of violence inflicted upon the Appellant by the victim, it appears to be the case, as submitted by the Appellant that the sentencing remarks do not reflect significant consideration was taken of those factors in setting the

[35] Transcript, 17 February 2016, at 5.
[36] Ibid.
[37] Ibid.

head sentences and the overall term. The Appellant's vulnerabilities were reflected primarily or solely in the setting of the minimum term. Although not characterised or sought to be established as "exceptional circumstances", the provocation the Appellant experienced on each occasion was clearly significant, especially given the background of violence perpetrated upon her.

[38] It is well established that, depending on the gravity of the provocation, provocation remains a strong factor in mitigation, reducing moral culpability.[38] Additionally, weight must be given to the fact that this is in the context of previous offending against the Appellant. The Appellant has been a victim of violence at the hands of her husband on many previous occasions. This was clearly the subject of submissions, not to excuse the Appellant becoming a perpetrator, particularly with the use of weapons, but to provide some context as to why she may have reacted with violence.

[39] The social deterioration victims of family violence suffer is acknowledged in many sentencing cases, including those where the victim commences offending.[39] A number of sentencing cases deal with issues involving serious acts of violence where the violence perpetrated by the victim had assumed an important role in mitigation. For example in

[38] See e.g. *Williams v The Queen* [2013] NTCCA 12 dealing with manslaughter on the basis of provocation; *Smith v The Queen* [2011] NSWCCA 209 at [26]
[39] *The Queen v Christie Long & Ors SCC 21534701, 21534699, 21535321, 21564003, 21548133, 17 February 2016, Mildren AJ; The Queen v Connie Riley & Ors SCC 21601312, 21555580, 21604055, 5 May 2016, Blokland J.*

The Queen v Mattiske,[40] when releasing an offender on a fully suspended sentence in respect of a charge of a dangerous act causing grievous harm while intoxicated (by stabbing her partner in the chest and nearly killing him) Martin (BR) CJ had particular regard to the offender having endured a period of some years of violence in a domestic situation which built up to a point where his Honour considered the offending was a spontaneous reaction to the abuse.[41]

[40] In *The Queen v Jesser,*[42] the offender was dealt with for unlawfully causing serious harm to her former partner. She attended with another person at the victim's house with a knife. When the victim opened the door the offender moved forward and stabbed him in the chest twice and cut him to the left side of his head in the temple region. Surgery was required and it was said to be fortunate that the injuries were not fatal. Martin (BR) CJ took into account the history of general abuse perpetrated by the victim on the offender. In that case the material before the Court indicated the offending was attributable to a background of abuse. It was one of the factors given weight in determining to fully suspend the sentence.

[41] Recently in *The Queen v Delray Inkamala,*[43] in the context of a charge of recklessly causing death, Southwood J accepted a submission that because the offender's life had been ravaged by domestic violence and misuse of

[40] SCC 20527791, 23 October 2006, Martin (BR) CJ; summarised in *Orsto v Grother* [2015] NTSC 18.
[41] Ibid [7].
[42] SCC 20719298, 8 April 2008, Martin (BR) CJ.
[43] SCC 21530284 ,17 August 2016, Southwood J.

alcohol, she was less responsible than others because she lost her capacity to cope with situations of potential conflict without resort to violence.

[42] As in the present case, in these sentencing cases, the Court had detailed information about previous violence perpetrated by the victim. This can be distinguished from what occurred in *Orsto v Grother*,[44] where the previous violence perpetrated by the victim was information of a generalised kind and not specific enough by itself to allow a firm conclusion to be drawn that it was operative on the Appellant at the time, or generally around the time of the offending.

[43] In contrast, in the present case, provocation in the context of a history of violence perpetrated against the Appellant played a significant part in the commission of the substantive offences. While the sentencing Judge was clearly aware of this violence, identifying the victim as the "primary aggressor", the description given to the Appellant as a "drunk angry person" acting in "retaliation" with respect, diminished the mitigation appropriate in all of the circumstances. No issue was taken in the Local Court with the submissions made on behalf of the Appellant on the background to the offending which was submitted to be strongly mitigating. The Appellant may have been a "drunk angry person" at the time of the offending, however the description that she was acting in retaliation does not seem to accord with the overall circumstances of offending.

[44] [2015] NTSC 18.

[44] In terms of whether the Appellant should have left the relationship,[45] it has long been recognised that for a number of complex reasons many victims of family violence are assaulted on several occasions before they summon the courage to leave an abusive relationship. Often considerable support is required before leaving is a real option.[46]

[45] The subjective factors relevant to the Appellant should be reflected appropriately in the sentences. I am unable to agree with the Respondent that the overall sentence is at the higher end of the permissible scale but that the individual sentences are not manifestly excessive. Once the significance of the Appellant's personal circumstances were appreciated, albeit in the light of the objective seriousness of the offending, as a first time violent offender, there should have been some reflection of the Appellant's particular circumstances in the head sentences and the overall structure of sentence. In my opinion manifest excess is made out in respect of the offence of aggravated recklessly endanger serious harm. Given the aggravated assault was committed while on bail, it could not be said the sentence is manifestly excessive, but there should be some concurrency.

[46] It is also argued there was error in failing to adjust the overall sentence, having proper regard to the principle of totality, bearing in mind there were clear underlying mitigating factors relevant to both sets of offending.

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[45] Transcript Local Court, 17 February 2016 at 3.
[46] Fox and Freiburg, Sentencing, State and Federal Law in Victoria, Third Edition at 336 citing *R v Hester* [2007] VSCA 298 at [27] in the context of weight to be given to victims forgiving perpetrators.

[47] The question of totality requires a "last look" at the totality of the sentences when measured against the totality of the criminality. An offender is not to be sentenced simply and indiscriminately for each crime he or she is convicted of but for what can be characterised as their criminal conduct.[47] While the sentences for the individual offences must still be proportionate to the offending, the totality principle ensures an overall just outcome. Given the underlying features, common to both sets of offending, there should have been some adjustment to permit partial concurrency as between the substantive offences. Although the sentence must reflect the individual offences, the cumulative sentence should not exceed the overall culpability of the offender. In assessing overall culpability the commonality in the underlying facts and the circumstances of the offences should be the focus. While the two substantive charges were clearly sequential, the background was the Appellant herself being a long term domestic violence victim under significant provocation.

[48] The Respondent conceded that it is not apparent from the sentencing remarks whether or not the sentencing Judge considered the totality principle, however failure to mention a sentencing principle does not mean it was not intuitively part of the reasoning. There was some adjustment reflecting totality as the sentence for the breach DVO was ordered to be served concurrently with the sentence for the aggravated assault. As indicated however, the mitigating factors should have been reflected in the

[47] *Attorney General v Tichy* (1982) 30 SASR 84, Wells J at 92-93; *Carroll v The Queen* [2011] NTCCA 6.

sentences for the substantive matters or if not, at least in the overall structure of the sentence. In relation to the breach of the domestic violence order, I agree with His Honour Barr J's remarks in *Idai v Malogorski*,[48] that even in cases of mandatory accumulation of sentences, the principle of totality or its application is not displaced.

[49] In relation to the offence of breach DVO, it was the Appellant's first offence of this kind. It was not therefore subject to a mandatory term of imprisonment. Six months imprisonment was not proportionate to the breach alleged. The breach was constituted by the Appellant being intoxicated whilst in the company of the protected person, who was similarly intoxicated. In this case there was further offending, namely the aggravated assault that the Appellant was separately sentenced for. Part of those facts relevant to the aggravated assault was that she was intoxicated, which was taken into account when the Appellant was sentenced. Initially, as indicated the Respondent sought to withdraw this count. In any event, as conceded by the Respondent, there are no reasons given with respect to the unusually high term set, or whether totality was considered beyond concurrency with the aggravated assault.

[50] With respect to the breach of bail offence, the Appellant submitted that the learned sentencing Judge conflated the breach of bail (that is not attending court for a mention of the case) with the contravention of the DVO and the aggravated assault offences on 4 July 2016. It was submitted that by doing

[48] [2011] NTSC 102.

so, his Honour erred by taking into account irrelevant considerations and imposed an excessive sentence. The present breach of bail offence was particularised as failing to attend court on 16 June 2016. It was submitted by the Appellant to be in the lower range of offences of this kind in terms of objective seriousness. In contrast, the sentencing Judge characterised the breach as a "serious example" of this type of offence because "… Not only did she not attend court as required but she then (inaudible) out in a breach of the domestic violence order continued the relationship in a drunken way and committed a further, almost identical offence to the first one; stabbing the same person".[49]

[51] While the failure of a person to answer their bail is serious, often more serious than a failure to obey a particular condition,[50] I agree the characterisation of the breach of bail and the breach of the DVO has been magnified beyond the objective seriousness of the offending. The Respondent concedes there are no specific reasons expressed why the particular penalty was imposed. Clearly the offending while on bail was an aggravating feature of the substantive offending that took place. This in part informed the gravity of the aggravated assault.

[52] On behalf of the Appellant, submissions were also made in relation to the fact that the Judge made no mention of the Appellant's early pleas. While it is desirable that a sentence indicate the extent to which and the manner in

[49] Transcript 17 February 2016, at 5.
[50] *Wayne v Cornford* [2013] NTSC 01.

which a plea of guilty has been given weight as a mitigating factor, it is not compulsory. While unsure of the extent they were taken into account, it is accepted the pleas of guilty were considered by his Honour. This does not influence the ultimate decision here. In terms of re-sentencing an adjustment of 25 per cent will be made.

[53] In re-sentencing, broadly the considerations are that the substantive charges were reasonably serious examples of offending of their kind, especially as it involved weapons, however, having regard to the background of violence perpetrated on the Appellant and the violence offered at the time by the victim, the Appellant's moral culpability was reduced. In respect of the aggravated assault however, it was committed while the Appellant was on bail and therefore the mitigation that would otherwise be relevant is diminished. The penalty must be aggravated by the fact that it occurred on bail. Given the background to the offending, there should be some concurrency. General and specific deterrence continue to be the dominant sentencing objectives, however some allowance may be made given the Appellant's vulnerabilities.

[54] In the light of the overlap between the facts relevant to the breach DVO and the aggravated assault, it is not appropriate in this instance to impose a further penalty on the breach DVO, other than a conviction, as there is a danger of double punishment. The Appellant has still served the minimum term that well punishes the Appellant for the additional factor of being in breach of the DVO. The aggravating factor of offending while on bail is

reflected in the greater penalty for the aggravated assault. That term remains unchanged in re-sentencing the Appellant. It is also noted there was forfeiture of $500 upon the breach.

Orders

[55] The appeal is allowed. The sentences are quashed. The Appellant is re-sentenced as follows:

File 21521761 Count 1 Aggravated recklessly endanger serious harm: convicted and sentenced to two years imprisonment years commencing 4 July 2015.

File 21532813 Breach of bail: convicted. A Victim's levy of $150.00 is imposed.

File 21532819 Count 2: Breach of Domestic Violence Order: convicted. A victims Levy of $150.00 is imposed.

Count 3 Aggravated Assault: convicted and sentenced to two years imprisonment.

To have regard to totality, the term of two years on file 21532819 is to commence after 12 months of the term on File 21521761.

The total term is three years imprisonment.

[56] The total term of imprisonment of three years is to be suspended after 12 months commencing 4 July 2015. The operational period is set at two years

from the date of release. The supervision period is set at 12 months from the date of release and the Appellant is to continue under the supervision of Correctional Services on the conditions set in the original sentence.