CITATION:	*Kenny v Tencate* [2026] NTSC 1
PARTIES:	KENNY, Malcolm v TENCATE, Christopher
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 3 of 2025 (22430962)
DELIVERED:	9 January 2026
HEARING DATE:	18 November 2025
JUDGMENT OF:	Burns J

CATCHWORDS

APPEAL – LOCAL COURT SENTENCE – Sentencing judge failed to take into account relevant consideration – onerous time in custody – poor conditions, heat, lack of air conditioning and lockdowns – appeal dismissed

APPEAL – LOCAL COURT SENTENCE – Sentencing judge failed to give adequate reasons – unclear treatment of offender's ''dead time''– time in custody on an unrelated matter that was discontinued or resulted in an acquittal – case law history of New South Wales and Victoria – part of the instinctive synthesis – appeal dismissed

APPEAL – LOCAL COURT SENTENCE – total effective sentence manifestly excessive – appeal dismissed

Criminal Appeal Act 1912 (NSW), s 6AA (1); *Sentencing Act 1995* (NT), s 5 (2), s (3), s 62(1), s 63(5); *Sentencing Act 1991* (Vic), s 18(1).

Bugmy v The Queen (2013) 249 CLR 571; *R v Chimirri* [2003] VSCA 45; *R v Daryl Martin* (unreported, 29 August 2018); *Dib v Rex* [2023] NSWCCA 243; *R v Evans* (unreported, Court of Criminal Appeal, NSW, 21 May 1992)*; R v Giakoumogianaki*s [2005] VSCA 156; *Hampton v The Queen* [2014] NSWCCA 131; (2014) 243 A Crim R 193; *R v Heaney* (unreported, Victorian Court of Appeal, 27 March 1996); *R v John David* (unreported, Court of Criminal Appeal (NSW) 20 April 1995); *Karpinski v The Queen* [2011] VSCA 94; *R v Kotzmann* [1999] 2 VR 123; *Markarian v The Queen* [2005] HCA 25; *Millar v Brown* [2012] NTSC 23 ; *R v Niass* (unreported, New South Wales Court of Criminal Appeal, 16 November 1988); *Nicholas Hampton v The Queen* [2015] HCASL 76; *R v Renzella* [1997] 2 VR 88*Dib v Rex* [2023] NSWCCA 243; *R v Rosenow* [2007] VSCA 265; *R v Stares* [2002] VSCA 70, (2002) 4 VR 314; *R v Solovastru and Evans* [2005] VSCA 254; *SY v R* [2020] NSWCCA 320; *R v Wade* [2005] VSCA 271; *Warwick v The Queen* [2010] VSCA 166, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Bourke
Respondent:	T McKinney

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Kenny v Tencate [2026] NTSC 1
No. LCA 3 of 2025 (22430962)

BETWEEN:

MALCOLM KENNY
Appellant

AND:

CHRISTOPHER TENCATE
Respondent

CORAM: BURNS J

REASONS FOR DECISION

(Delivered 9 January 2026)

Introduction

[1] On 22 July 2025, the appellant pleaded guilty to 5 charges in the Local Court. He was sentenced to an effective sentence of 1 year, 11 months and 3 week's imprisonment. A non-parole period of 1 year was fixed. The offences for which the appellant was sentenced, and the sentences imposed, are set out in the following table:

	Offence	Maximum Penalty	Sentence	Cumulation
Information for an Indictable Offence (22430962)				
1.	Aggravated assault	5 years	3 months	3 months
2.	Contravention of a DVO by defendant	5 years	3 weeks	**Base**
3.	Aggravated assault	5 years	12 months	9 months
4.	Contravention of a DVO by defendant	5 years	2 months	2 months
5.	Aggravated assault	5 years	1 year 3 months	9 months
Total Effective Sentence			1 year, 11 months and 3 weeks	
Non-Parole Period Fixed			1 year	
Backdate			10 November 2024	

[2] By a Notice of Appeal dated 21 September 2025, the appellant appeals from the sentences imposed in the Local Court. The grounds of appeal pleaded by the appellant are:

1. The Local Court erred by failing to take into account a relevant consideration, namely, the onerousness of the appellant's experience of custody.
2. The Local Court erred in failing to give adequate reasons. The particulars of this ground pleaded by the appellant are that the Local Court's reasons lead the reader to speculate as to whether, and if so how, the court considered and weighed the time the appellant had spent on remand for offences of which he was later acquitted.

3. The individual sentences imposed, with respect to the accumulation imposed, resulted in the total effective sentence, and the non-parole period fixed, each being manifestly excessive.

The facts

[3] The appellant was sentenced on an agreed Statement of Facts. The two victims of his offending were identified as TK, a 17-year-old female, and MC. TK is the former partner of the appellant and MC is his mother-in-law. The appellant and TK have a child, JK, who was 2 years old at the time of these events.

[4] On 21 March 2023 the appellant was served with a Court Confirmed Domestic Violence Order made by the Alice Springs Local Court. The order was served for the protection of TK. The order included the following conditions:

- The appellant was restrained from approaching, contacting or remaining in the company of TK when consuming alcohol or another drug; or
- When under the influence of such a substance, the appellant was restrained from approaching, entering or remaining at any place where TK was living, working, staying, located; or
- The appellant was restrained from visiting TK if consuming alcohol or other drugs or when under the influence of such substances; and

- The appellant was prohibited from causing harm or attempting or threatening to cause harm to TK or intimidating, harassing or verbally abusing her; and

- The appellant was prohibited from exposing any child of the parties to domestic violence.

[5] That order remained in force at all relevant times.

[6] On 18 October 2024, the appellant attended an address in Alice Springs with TK and JK (the residence). He continued to reside at that address until the early morning of 9 November 2024. On multiple occasions over that period the appellant engaged in arguments with TK due to him being jealous which caused TK and MC to feel scared.

[7] During the night of 8 November 2024, the appellant was in the company of TK inside the residence. The appellant engaged TK in a verbal argument and became angry. He struck TK once with a closed fist to her left eye, causing her to feel immediate pain. JK was present at the time of that assault. The appellant walked away from TK and went to sleep in an upstairs bedroom in the residence. TK went to sleep in the downstairs area.

[8] MC became aware of the assault and returned home, having been with family. She also went to sleep.

[9] At about 8 AM on 9 November 2024, the appellant, TK and MC awoke. The appellant became angry with TK and engaged her in a verbal argument. The

appellant approached her and grabbed her with both hands, dragging her outside the residence into the backyard. MC followed him outside. In the backyard, the appellant raised his left arm and swung towards TK. TK called out to MC, who followed the appellant and TK into the backyard while holding JK.

[10] The appellant approached MC while she was holding JK on her right hip. The appellant pushed MC to the left side of her chest. MC pushed the appellant back and the appellant said, “I’m talking to [TK], not you.” MC got her phone out to call for assistance, at which time the appellant struck MC with a closed fist to the right side of her face. This caused MC immediate pain, and she placed JK on the ground.

[11] MC armed herself with a 1-metre-long steel pole in an attempt to protect herself. The appellant took the pole from MC, raised it above his head and swung downwards, striking MC to the outside of her left knee. MC lost her balance and fell to the ground, feeling immediate pain.

[12] The appellant raised the steel pole above his head again, swung downwards and struck MC to the same area. MC felt immediate pain. TK attempted to disarm the appellant, fearing for MC’s well-being.

[13] The appellant turned and pushed TK to the ground. TK braced her fall with her right wrist and fell on her left foot. The appellant raised the steel pole above his head and swung down, striking TK to her right shin. She felt immediate pain. The appellant then fled the residence. Police were called.

The two victims were conveyed to the Alice Springs Hospital for medical treatment.

[14] At about 7:30 AM on 10 November 2024, the appellant was located at a house at Little Sisters Camp in Alice Springs and was arrested. He was conveyed to the Alice Springs Watch House where he was processed and placed into custody. He declined to participate in an electronic interview with police.

[15] As a result of the assaults, TK sustained bruising and swelling to her left eye, a 3 cm full thickness laceration to her right mid shin that was closed with sutures, pain and swelling of her left foot, and tenderness and swelling to her right wrist. She was discharged from hospital with crutches, a wrist splint, a bandage to her left foot and analgesia.

[16] As a result of the assault on MC, she sustained a large 50 x 60 mm fluctuant swelling on her left knee just above and lateral to the knee joint, pain to her left knee and right cheek area and face. She was discharged with crutches and analgesia.

[17] TK provided a Victim Impact Statement dated 21 July 2025. She states that she has a scar on her right shin. She says that she is feeling scared and does not want the appellant to come out of jail and be around her. She wants a continuing Domestic Violence Order.

[18] MC also provided a Victim Impact Statement on the same day. She states that she has pain in her left leg from where the appellant hurt her with the pole. It hurts every night from her knee to her ankle. She takes pain killers. She states that she has been feeling stressed and afraid and explained that she was working for the night patrol when this incident occurred, and she had to leave her job because of her leg injury.

Submissions to the sentencing judge

[19] The appellant did not give evidence in the proceedings in the Local Court. As is customary in proceedings in that court, the appellant's lawyer provided information to the sentencing judge regarding the appellant's background and other matters relevant to sentencing without objection by the prosecution.

[20] The following matters regarding the offending itself were put to the sentencing judge by the appellant's lawyer:

a) the appellant was arrested on 10 November 2024 and had spent 8 months and 13 days in custody as at the date of the sentence hearing on 22 July 2025;

b) it was acknowledged that the appellant's actions were "a serious example of intimate partner violence and gender violence";

c) it was accepted that there were two separate incidents of offending which occurred some 12 hours apart;

d) it was accepted that there were aggravating features to the offending including the presence of a child, JK, at both incidents;

e) it was accepted that the second incident, on the morning of 9 November 2024, was relatively protracted;

f) it was accepted that the second incident involved the use of a weapon and injuries were caused to the victims;

g) it was accepted that both general and specific deterrence as well as denunciation and protection of the victims were relevant sentencing considerations; and

h) the offences which occurred on the morning of 9 November 2024 occurred as part of a single incident such that there should be substantial concurrency with respect to sentences imposed on those charges.

[21] Regarding the appellant's background, the sentencing judge was informed:

a) the appellant is a 29-year-old man, born in Alice Springs but raised by his mother and father in Docker River;

b) he attended both primary and high school but apparently did not complete his high school education;

c) he cannot read and write English;

d) he has strong cultural connections to the Docker River area;

e) he went through men's ceremony when he was 18 years old and has strong family connections to the community in Docker River;

f) he has assisted in men's ceremony multiple times and spent many years as a young person learning about cultural practices on country;

g) after concluding men's ceremony he travelled to Alice Springs where he began drinking alcohol and "got in with the wrong crowd";

h) while in his home community he was exposed to a significant amount of alcohol abuse and violence and his family were very heavy drinkers. He witnessed alcohol-fuelled violence including fights with machetes and iron poles;

i) his wife, who he married at about age 18, passed away when the appellant was in prison for offences of robbery;

j) some 3 weeks before the present offending the appellant was acquitted of charges in the Supreme Court for which he had been held on remand in custody for 362 days, although some two months of that time was attributable to a sentence imposed for escaping custody. The appellant's lawyer identified a period of approximately 300 days during which the appellant had been held in custody awaiting trial on the charge or charges on which he was acquitted.

[22] For convenience, this period of 300 days custody was referred to as "dead time". This term has been used in other jurisdictions to refer to periods of time in which a person is held in custody on charges which ultimately do not proceed to a conviction (including a finding of not guilty). As far as I have been able to ascertain, there is no authoritative decision in this Territory regarding the relevance of dead time in sentencing an offender for subsequent offending.

[23] Counsel representing the appellant in the proceedings before the sentencing judge referred to the sentencing remarks of Blokland J in *R v Daryl Martin*[1] as supporting the proposition that the period of "dead time" should be "taken into account" as part of the appellant's subjective circumstances.

1 Unreported, Northern Territory Supreme Court, 29 August 2018.

Submissions were made to the sentencing judge regarding how difficult that earlier 300-day period of remand had been for the appellant. It was submitted to the sentencing judge that the appellant could simply be sentenced to "time served".

[24] The prosecutor submitted that there were no decided cases in the Northern Territory regarding the relevance of "dead time" to sentencing for subsequent offences. The prosecutor accepted that Blokland J had taken into account "dead time" in sentencing in *Martin* but noted that her Honour had stated that "dead time" was not to be equated with "money in the bank".

[25] The prosecution tendered a set of facts in the sentence proceedings in relation to previous proceedings against the appellant to demonstrate that the appellant is "no stranger to offending in a similar nature against the same victim". It was submitted that TK was a particularly vulnerable young Aboriginal woman with a 2-year-old child to care for, who was subjected to unprovoked assaults in the presence of her child. It was submitted that there was no evidence of the appellant engaging in any form of rehabilitation while on remand or while in the community prior to this offending.

[26] The prosecution accepted that there was utilitarian value to the appellant's pleas of guilty, but did not accept that his pleas were indicative of remorse. The pleas were late in coming and summonses had been prepared to require the witnesses to appear at the hearing. It was accepted that the pleas of guilty were based upon amended facts.

[27] In reply, counsel for the appellant referred to rehabilitation programs in which the appellant had participated in the past including a CAAPU program and a rehabilitation program in Tennant Creek in 2023.

[28] Amongst the material tendered at the sentence hearing was a copy of the appellant's criminal history. That history reveals prior offending by the appellant between 2015, when the appellant was 19 years old, and August 2023. The appellant had two prior convictions for aggravated assault, a conviction for aggravated robbery, a conviction for assaulting police, convictions for being armed with an offensive weapon and possessing or using a controlled weapon, as well as offences of stealing and unlawful entry of a building. The appellant is also heavily recorded for offences of breaching bail, breaching a Domestic Violence Order and breaching suspended sentence orders.

The decision

[29] The sentencing judge summarised the facts. No objection could be taken to his Honour's summary. The sentencing judge noted that the offending for which the appellant was being sentenced involved two separate breaches of the Domestic Violence Order some hours apart. His Honour noted that the appellant had an extensive history of violence including prior offences of violence against the victim TK. His Honour considered that fact to be relevant to the appellant's prospects for rehabilitation.

[30] The sentencing judge stated that the appellant had sought to contest all of the charges, and the matter resolved only shortly before the hearing date. His Honour stated that the appellant was not entitled to any discount for his pleas given their lateness, albeit the victims were spared having to give evidence.

[31] The sentencing judge, after referring to the period which the appellant spent in custody on charges on which he was subsequently acquitted, went on to say regarding the issue of "dead time":

> I have been provided with the sentencing remarks of *The Queen v Daryl Martin* concerning the issue of "dead time". It can be taken into account in relation to a variety of ways but is not to be treated as day for day or to undermined the deterrent elements of sentencing.

[32] The sentencing judge stated that the appellant's offending calls for "denunciation, general and specific deterrence and particularly around the need for the protection of Aboriginal women and young girls and the integrity of domestic violence orders". His Honour also specifically said that he took into account the principle of totality.

[33] His Honour went on to say:

> You are now 29. You are becoming entrenched in patterns of violence and domestic violence and have been in and out of prison. Your prospects of rehabilitation are very guarded and I have only heard of past engagement in therapeutic programs of counselling in respect of alcohol, but there (sic) does not appear that you have had the opportunity either in prison or out of prison to deal with counselling to change your attitudes and behaviours underpinning your domestic violence.

> I note your domestic violence in respect of this matter related to your emotion issues or emotional jealousy about the time previously in custody.
>
> You have had an upbringing in a remote traditional community, been through law and respect for culture. You have also been, from a young age, exposed to alcohol and moving closer to town and also witnessing community violence.
>
> I do, and consider I can take that into account in assessing a (sic) moral culpability but you have also been a significant perpetrator of violence and there is greater weight given to the issue of protection of the community but I take into account your personal background.

[34] His Honour then proceeded to impose sentences.

Submissions on appeal

[35] Counsel for the appellant submitted that the first two grounds of appeal allege specific errors. It became clear from the written submissions of the appellant as well as during oral submissions that the complaint made by the appellant in the first two grounds of appeal primarily related to the manner in which the sentencing judge had addressed the question of what has been referred to as "dead time" in sentencing the appellant. In the present case, the term refers to a period of custody that has been served by an offender for separate alleged offending prior to sentencing for an offence but in respect of which no conviction or finding of guilt occurred. A common example of "dead time" is a period spent on remand awaiting trial on charges on which an accused is ultimately acquitted.

[36] In written submissions, counsel for the appellant referred to submissions made on behalf of the appellant before the sentencing judge in the Local Court. Those submissions were:

> [The appellant] has spent the last two summers on remand. He tells me that he spent both Christmas last year and the year before in G Block. He was subject to scorching heat for many periods – much time during those periods with air-conditioning issues, he was subject to lockdowns, they are extremely – as your Honour is well aware, the circumstances in the Alice Springs Correctional facility have been extremely onerous for some time and he spent a significant amount of time in custody. Over the last two years he has pretty much spent nearly all of that time in jail, and I do ask your Honour to take all of that into account in assessing orders for totality.

[37] The appellant also referred to the following exchange between the sentencing judge and of the appellant's counsel:

> His Honour: So it's not been a reform – I can take into account the conditions and the time and the totality of this offending but it wasn't a reformative process for him, was it?
>
> Defence Counsel: Certainly not, your Honour, and unfortunately perhaps it's a reflection upon the nature of custodial sentences, it hasn't allowed for his rehabilitation of anything.

[38] The appellant submitted that the onerous nature of the conditions under which the appellant was held on remand only emphasised the weight to be given to the "dead time".

[39] The appellant further submitted that the sentencing remarks by the sentencing judge were limited to recognition that the appellant had actually served "dead time", and that this fact could be taken into account in "a variety of ways". The appellant submitted that it is entirely unclear whether the "dead time" was taken into account and, if so, how it was weighed.

[40] Regarding the third ground of appeal, the appellant submitted that the sentences imposed were "unreasonable or plainly unjust". It was submitted

that the sentences were manifestly too long given the combination of the application of the principles in *Bugmy v The Queen*[2], the appellant's "dead time", his prospects for rehabilitation (given the lack of prior community-based interventions), the onerous conditions under which he had previously been held on remand, and the principles of totality and parsimony.

[41] In the respondent's written submissions, it is accepted that onerous conditions experienced by a person in custody can be taken into account by a sentencing court. The respondent submitted that whilst the sentencing judge did not make specific reference to the conditions under which the appellant was held on remand awaiting sentence, the appellant's lawyer made specific submissions to that effect. The issue was therefore before the sentencing judge prior to sentencing.

[42] The respondent referred to the decision of Kelly J in *Millar v Brown*[3], where on an appeal from the then Court of Summary Jurisdiction, her Honour said, at [19] (footnotes omitted):

> It is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked. In particular, magistrates are working under pressures which means that they are simply unable to give the kind of detailed reasons which might be expected of a court delivering a reserved judgment, and sentencing remarks delivered in such circumstances should not be subjected to the same degree of critical analysis as the words in a considered reserved judgment. An appellate court is entitled to assume that the Magistrate has considered all matters which are necessarily implicit in any conclusions which he has reached.

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2 (2013) 249 CLR 571.

3 [2012] NTSC 23 (*Millar*).

[43] Regarding the issue of "dead time", the respondent submitted that there is no principle that allows for "dead time" to be considered in this case. The respondent submitted that in cases in Victoria, courts have recognised that they have a "common law discretion" in certain circumstances to give credit for "dead time" as recognising a grave injustice to an accused wrongly imprisoned.[4] The respondent submitted, however, that this approach had not been adopted in New South Wales.[5] It was submitted that there was an apparent difference in approach between Victoria and New South Wales revealed in the decided cases from those jurisdictions.

[44] The respondent accepted that it was not clear if the sentencing judge actually took "dead time" into account in sentencing the appellant. The respondent submitted that this was not significant because the sentencing judge was not required to take it into account.

[45] Regarding the third ground of appeal, the respondent submitted that neither the individual sentences nor the total sentence had been demonstrated to be manifestly excessive.

Consideration

[46] Any analysis of the first two grounds of appeal must begin with the relevant statutory provisions. Section 5 (2) of the *Sentencing Act 1995* (NT) provides sentencing guidelines in the following terms:

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4 See *R v Renzella* [1997] 2 VR 88 (*Renzella*).

5 *Dib v Rex* [2023] NSWCCA 243 (*Dib*).

(2) In sentencing an offender, a court must have regard to:

(a) the maximum and any minimum penalty prescribed for the offence; and

(b) the nature of the offence and how serious the offence was, including any physical, psychological or emotional harm done to a victim; and

(ba) if the offence is a sexual offence:

(i) whether the victim contracted a sexually transmissible medical condition as a result of the offence; and

(ii) whether the offender was aware at the time of the offence that he or she had a medical condition that could be sexually transmitted; and

(c) the extent to which the offender is to blame for the offence; and

(d) any damage, injury or loss caused by the offender; and

(da) any harm done to a community as a result of the offence (whether directly or indirectly); and

(e) the offender's character, age and intellectual capacity; and

(f) the presence of any aggravating or mitigating factor concerning the offender; and

(g) the prevalence of the offence; and

(h) how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences; and

(ha) the conduct of the offender during the proceedings, including the extent to which the offender complied with a requirement imposed on the offender under Part IV, Division 2A of the *Local Court (Criminal Procedure) Act 1928*; and

(j) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and

(k) time spent in custody by the offender for the offence before being sentenced, including time the offender resided at a specified place in accordance with a conduct agreement under the *Bail Act 1982* that contained a provision mentioned in s 27A(1)(iaa), (iab) or (ia) of that Act; and

(m) sentences imposed on, and served by, the offender in a State or another Territory of the Commonwealth for an offence committed at, or about the same time, as the offence with which the court is dealing; and

(n) sentences already imposed on the offender that have not been served; and

(p) sentences that the offender is liable to serve because of the revocation of orders made under this or any other Act for contraventions of conditions by the offender; and

(q) if the offender is the subject of a community correction order or an intensive community correction order, the offender's compliance with the order; and

(r) anything else prescribed by this Act to which the court is required to have regard; and

(s) any other relevant circumstance.

[47] The appellant submitted that consideration of "dead time" in sentencing for later offending was permitted, or even required, by s 5 (2)(s) as a "relevant circumstance" not otherwise set out in the section.

[48] Cases which have addressed the issue of "dead time" have typically done so in the context of determining whether, and how, it is to be taken into account on sentencing for later offending. In the chapeau of s 5 (2), the term employed is "have regard to". For present purposes these terms may be regarded as synonymous. Before considering previous cases that have addressed this issue it is helpful to consider what "take into account" may mean in this context. There are at least three ways in which, theoretically speaking, time spent in custody for unrelated matters on which an offender was not convicted may be taken into account.

[49] The first is to backdate the commencement of the sentence in which the matter is taken into account in order to give the offender day-for-day credit for the actual period of "dead time" served.

[50] Secondly, the head sentence and/or any non-parole period for any offence on which it is taken into account may be reduced by the actual period of "dead time" served on a day-for-day basis, or a specified (quantified) part thereof.

[51] Thirdly, it may be taken into account as part of the subjective background of the offender. In this third approach, no specific or quantified reduction is stated.

[52] The ordinary rule regarding the commencement of a sentence of imprisonment in this Territory is that it commences on the day it is imposed.[6] An exception is found in s 63 (5), which provides:

> (5) Subject to s 45(5), if an offender has been in custody on account of the offender's arrest for an offence and the offender is convicted of that offence and sentenced to imprisonment it may be ordered that such imprisonment must be regarded as having commenced on the day on which the offender was arrested or on any other day between that day and the day on which the court passes sentence.

[53] The provisions of s 45 (5) are not presently relevant.

[54] The terms of s 63 (5) are incompatible with any proposition that "dead time" may be taken into account on sentencing for a subsequent offence by backdating the commencement date of the sentence to a date before the

6 S 62(1).

offender was arrested for the offence for which a sentence of imprisonment is imposed.

[55] The appellant relied heavily on the case of *Renzella*. In that case Renzella was convicted on one count of conspiracy to cheat and defraud and was sentenced to a term of imprisonment. He appealed against his conviction and the Crown appealed against the sentence imposed. The Crown submitted that the trial judge had wrongly taken into account when sentencing the appellant, time that he had spent in custody prior to trial. The appellant succeeded on his appeal and a new trial was ordered.

[56] In those circumstances it was strictly unnecessary for the Crown appeal to be determined. The Court of Appeal (Winneke P, Charles and Callaway JJA) nevertheless made some observations which are relevant to the present appeal.

[57] In *Renzella*, the appellant had been held in custody on remand for various periods with regard to the conspiracy charge and for other periods with regard to the conspiracy charge and other charges. There was a period of 314 days that Renzella spent in custody attributable to both the conspiracy charge and the unrelated charges. In sentencing Renzella, the judge deducted 45 weeks from the head sentence and non-parole period that would otherwise have been imposed. This period of 45 weeks comprised periods when Renzella was held on remand for both the conspiracy charge and the other charges. This deduction was the basis for the Crown appeal.

[58] The Crown appeal focused on the operation of specific statutory provisions. Section 18(1) of the *Sentencing Act 1991* (Vic) at that time provided that where an offender is sentenced to a term of imprisonment in respect of any offence, any period of time during which they were held in custody in relation to proceedings for that offence "*and for no other reason*" must be reckoned as a period of imprisonment already served under the sentence. The Crown submitted that this precluded the sentencing judge making the deductions which he did.

[59] The Court of Appeal said, at [98]:

> Where [s 18] applies, presentence detention is to be reckoned as a period of imprisonment already served under the sentence, and a declaration made to that effect, unless the sentencing court or the court fixing a non-parole period in respect of the sentence otherwise orders. Presentence detention to which s. 18 does not apply is to be taken into account in the exercise of the court's discretion. It should ordinarily be taken into account at the first opportunity…and not left to the Court imposing a later sentence…

[60] The pre-sentence custody in *Renzella* was what has been referred to as "double-warranted" custody. That is, there were two separate warrants for separate offending by virtue of which Renzella was held in custody. In *Renzella*, the sentencing court was precluded by the terms of s 18 from declaring the "double-warranted" period of presentence custody as a period already served under the sentence.

[61] The decision of the Court of Appeal, however, confirmed that the sentencing court could still take that period of presentence custody into account in the exercise of the court's discretion. In the context of the facts in *Renzella*, this

could only be an endorsement of the approach taken by the sentencing judge to reduce both the head sentence and non-parole period by a specified period to take into account pre-sentence custody. This was said to be consistent with the approach taken in the earlier case of *R v Heaney*.[7]

[62] *Renzella* is therefore a case falling within the second category of examples set out above as to how time spent in custody for unrelated offending may be taken into account in sentencing. An important feature of *Renzella* was that the 314 days Renzella spent in custody was "double-warranted", that is, it was custodial time during the entirety of which he was liable to be held in custody for both the offending on which he was sentenced as well as other alleged offending. It was not a case where the custody was entirely unrelated to the offending on which sentence was passed.

[63] Where a period of "double-warranted" custodial time existed in Victoria at the time of *Renzella* and the offender came to be sentenced on one of the charges (or sets of charges) that was the basis of the "double-warranting", but not the other or others, practical difficulties arose if the entirety of the "double-warranted" custody was not taken into account (in the first or second sense referred to above) at the earliest opportunity. Issues of accumulation of sentences could become problematic and there was a danger of unfairness to the offender if, for example, the remaining charges did not proceed to conviction. This was the basis of the direction by the Court of

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7 Unreported, Victorian Court of Appeal, 27 March 1996.

Appeal in the extracted passage at [58] above regarding when the "double-warranted" period of custody should be taken into account.

[64] In *R v Kotzmann*,[8] the appellant Kotzmann was convicted of armed robbery after trial on one indictment and pleaded guilty to two other counts of armed robbery and three other offences on a second indictment. He was sentenced to imprisonment. The appellant sought leave to appeal against conviction on the charge of armed robbery on the first indictment and against sentences imposed for the offending on both indictments.

[65] The Court of Appeal (Phillips CJ, Callaway and Batt JJA) upheld the appeal against conviction and ordered a new trial. It nevertheless remained necessary to determine the appellant's appeal against sentence regarding the sentences imposed for the offences on the second indictment. Kotzmann had, prior to being arrested for the offences on the second indictment, spent a period of 12 months on remand for unrelated charges which ultimately were not pursued by the prosecution. He was also held in custody on other charges upon which he was acquitted. *Kotzmann* was not a case of "double-warranted" custody.

[66] Callaway JA, with whom Phillips CJ agreed, said regarding the relevance of these prior periods of remand to sentencing the appellant, at [42]:

> There can be no question of a person on remand who is subsequently acquitted acquiring a kind of bank balance on which to draw in relation to subsequent

8 [1999] 2 VR 123 (*Kotzmann*).

> offences unconnected with the reason for custody: see *R v Arts and Briggs* [1998] 2 VR 261 at 264; but sentencing involves a very wide discretion and the matters to which I have just referred are important parts of the applicant's background. We are entitled to take them into account and to temper the sense of injustice that he entertains. Exceptionally, I would therefore allow the five sentences to be served concurrently, making a total effective sentence of five years imprisonment.

[67] In *Kotzmann*, the approach taken by the Court of Appeal was not to take into account the earlier, unrelated period of custody as *entitling* Kotzmann to a specific reduction in sentence referable to the period spent in prior, unrelated custody. The earlier period of unrelated custody was taken into account as an important part of Kotzmann's background in arriving at a sentence in the exercise of the court's discretion. In the exercise of that discretion, it was ordered that the sentences imposed on the second indictment be served concurrently. The approach taken in *Kotzmann* does not neatly fit into any of the three categories I set out above of possible ways in which "dead time" may be taken into account in later sentencing. It seems clear, however, that it was not simply taken into account as part of a process of instinctive synthesis.

[68] A similar approach was adopted by the Court of Appeal of Victoria in *Karpinski v The Queen*.[9] That was a case where the "dead time" was a period of custody relating to a charge which did not proceed to conviction, and which was unconnected with the offending on which he was sentenced. This period of custody did not overlap with any period of presentence custody

9 [2011] VSCA 94 (*Karpinski*).

relating to the offending for which Karpinski was being sentenced. The period of custody was therefore not "double-warranted". In *Karpinski*, Weinberg JA said, at [5]-[7] (footnotes omitted):

> Since *Renzella*, there has been a steady growth in reliance upon so-called 'dead time' as a mitigating factor. In my view, however, *Renzella* 'dead time' is often now invoked in circumstances where its application is difficult to justify, either as a matter of logic, or in principle.
>
> In *Warwick v The Queen* the Court noted that the circumstances of that case, and many others like it, were entirely different from those which obtained in *Renzella*. Now, in many cases, the period of detention which is sought to be brought to account concerns conduct that is not only unrelated to the matters for which the accused stands to be sentenced, but also involves time that has been wrongly served in the past, and sometimes even the distant past.
>
> Any accused who has been wrongly imprisoned is, of course, the victim of a grave injustice. It does not follow, however, that it is society's duty to ameliorate that injustice by giving the accused credit for the time spent in custody when he is sentenced at a later time for entirely unrelated offending.

[69] In a separate judgment, Tate JA, with whom Weinberg JA agreed, reviewed a line of Victorian authorities following *Renzella* including *R v Stares*;[10] *R v Chimirri*;[11] *R v Wade*;[12] *R v Solovastru and Evans*;[13] *R v Giakoumogianakis*;[14] and *R v Rosenow*.[15] His Honour then said, at [60] (footnotes omitted, emphasis per original):

> The line of authority following *Renzella* in Victoria does not appear to support the view expressed in *Brockhill Prison* that custody wholly unrelated to the offences for which sentence is passed will not count against the period of the sentence to be served. The authorities which focus upon the exercise of the

10 [2002] VSCA 70, (2002) 4 VR 314.

11 [2003] VSCA 45.

12 [2005] VSCA 271.

13 [2005] VSCA 254.

14 [2005] VSCA 156.

15 [2007] VSCA 265.

> *Renzella* discretion do not appear to treat as a relevant question the issue of whether the offences before the judge imposing the sentence are related to the offences for which a discount is sought. Although, as Maxwell P and Weinberg JA remarked in *Warwick*, the detention discounted in *Renzella* ''*did* relate to the offences for which the offender was being sentenced'', the line of authority applying *Renzella* has taken as its starting point that the offending, the detention for which a discount is sought, is *unrelated* to the offending for which the offender is being sentenced. However, this is not to deny the force of the limitation recognised by Callaway JA on the exercise of the *Renzella* discretion, namely, that a period spent in detention on a charge for which an offender is ultimately acquitted, or in relation to which charges are withdrawn, cannot be regarded as credit in a bank to be called upon to reduce a sentence for unrelated offending. There is no *entitlement* to a discount.

[70] The appellant in the present case submitted that the rationale behind recognising "dead time" is to make reparation for "the obvious injustice where a person has served a term of imprisonment which he or she should not have served".[16]

[71] In a joint judgment in *Warwick*, Maxwell P and Weinberg JA, referred to the sentencing comments of the primary judge who said that having read the decisions of the Supreme Court quashing and overturning the appellant's convictions in three previous trials, her Honour was satisfied that the appellant "suffered a considerable injustice in that entire process".

[72] In that context, and after discussing the decision in *Renzella* and the cases referred to therein, the Court in *Karpinski* said at [10] – [11]:

> What emerges very clearly from these cases is that it is a matter for the individual judge, in his or her discretion, to decide what weight should be given to the dead time, or - more accurately - what sentencing discount is appropriate, having regard to the quantum of dead time. Counsel for the appellant, in his written submission, properly concedes that the exercise is not a 'mathematical' one.

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16 *Warwick v The Queen* [2010] VSCA 166 at [18] (*Warwick*).

> Indeed, the cases provide a variety of examples of different proportions of the ‘’dead time’’ being brought to account.
>
> In our view, once it is appreciated that the allowance to be made is a discretionary judgment, the appellant in a case such as this faces the same hurdle as any appellant making an attack on an exercise of the sentencing discretion. That is to say, this Court will not intervene unless the discretionary judgment was not reasonably open to the sentencing judge in the circumstances. This is simply a reflection of the basic concept that there is scope for individual judges to take different views of particular matters. So long as the decision arrived at falls within the range within which minds might reasonably differ, there is no room for this Court to intervene, whatever view the individual members of the appellate bench might have on the question.

[73] Later at [17]-[18], their Honour’s said:

> In the present case and others like it, the period of detention (‘‘dead time’’, as we have called it) sought to be brought to account concerns other conduct, quite unrelated to the matters for which the person stands for sentence. It is a period which, viewed with the benefit of hindsight at the date of sentencing, should not have been served. In the present case, as we have explained, this was so because the charges to which the earlier detention related were subsequently dismissed.
>
> It does seem to us, as we raised in the course of argument, that there may be a question for investigation as to the basis on which detention of that kind is thought to be relevant when the person comes to be sentenced for quite unrelated matters. In so saying, we recognise that there is obvious injustice where a person has served a term of imprisonment which he or she should not have served. In other jurisdictions, that injustice is addressed by formal procedures for compensation for such periods. No such system exists in this State.

[74] What emerges from the Victorian authorities are the following propositions:

- a period of custody served by a person with regard to charges that do not proceed to conviction (“dead time”) is a relevant matter to take into account in sentencing that person for later and unrelated offending;

- this is so notwithstanding that the dead time was not related to any period the person spent in custody on the charge on which sentence is imposed (double-warranting not required);

- the manner in which the "dead time" is taken into account, and any sentencing "discount" thus afforded to an offender, is a matter for the discretion of the sentencing judge, subject to any statutory provisions limiting that discretion; and

- while a quantified discount is appropriate, an offender is not entitled in later sentencing to have day-for-day credit for "dead time".

[75] I now turn to the New South Wales cases which have addressed this issue. A convenient starting point is the decision of *R v Niass*[17]. The appellant in *Niass* was convicted on a charge of supplying Indian hemp and sentenced to a term of imprisonment. He had previously been held in custody for about 12 months on unconnected charges on which he was acquitted. It was put to the sentencing judge that his Honour should, in fixing a sentence and non-parole period on the charge of supplying Indian hemp, take into account that the appellant had been held in custody in those circumstances and for that period of time. The sentencing judge refused to do so.

[76] In his judgment in *Niass*, Lee CJ at CL noted that counsel for Niass had submitted that the appellant could have a "legitimate grievance" by being held in custody and ultimately acquitted and that this was a legitimate matter to take into account "in fixing a sentence". His Honour said:

> One can understand that a person, who, in regard to an offence of which he is subsequently acquitted, could in some circumstances feel that he had been unjustly dealt with by being kept in custody awaiting trial for that offence. But whether that grievance was justified would depend on the facts of the particular

17 Unreported, New South Wales Court of Criminal Appeal, 16 November 1988 (*Niass*).

> case. Many persons are acquitted for all sorts of reasons which have little to do with the question of actual innocence of that person. When persons are acquitted whether on a first trial or on a re-trial it by no means follows that the State, the Executive, would offer compensation. The matter, if it is considered by the State, is viewed by reference to the circumstances of the particular case. The proposition which is put forward here is one which would require the court, in every case where a person was acquitted of the charge, to take into account when sentencing him on a wholly unrelated offence the period spent in custody; and in the absence of any authority that such a court should be taken, I would not be disposed to initiate it now. It seems to me that there is good reason to keep intact the division between the functioning of the court dealing with a particular offender in respect of the offence of which he comes before the court and taking into account periods spent in custody in respect of that offence, and the function which the State has undertaken on occasions to recompense persons who, when the justice system has miscarried, may seek solatium.

[77] Lee CJ at CL stated that "The courts recognise that in dealing with a particular offence it is always appropriate to take into account periods during which the appellant has been held in custody in respect of that offence. But, to my knowledge, it goes no further than that."

[78] The next case to consider is *Hampton v The Queen*.[18] In that case the Court of Criminal Appeal was invited to depart from the decision in *Niass*, and a bench of five judges heard the appeal (Gleeson JA, Johnson, Price, Garling and Bellew JJ).

[79] The appellant in *Hampton* was sentenced to terms of imprisonment for offences that occurred in August 2012. In the sentencing hearing before the sentencing judge, it was submitted that the appellant should be given credit (in some form) for a period of custody which was not referable to any sentence imposed on him. That period preceded the August 2012 offending,

18 [2014] NSWCCA 131; (2014) 243 A Crim R 193 (*Hampton*).

such that the period in custody was not referable to the charges before the sentencing judge.

[80] In a joint judgment, Johnson and Bellew JJ, with whom the other members of the Court agreed, stated that the decision in *Niass* stood for the proposition that "where what is sought to be done is to invite a sentencing court to take into account, as a relevant matter, a period in custody for an unrelated matter leading to acquittal or discharge, that fact is not, in and of itself, relevant to the sentencing exercise". Their Honours stated that relevant statutory provisions confirm that time for which an offender has been held in custody in relation to the offence for which sentence is to be passed is a mandatory factor to be taken into account on sentence, but there is no provision supporting the appellant's submission.

[81] Their Honours referred to a large number of cases in the Court of Criminal Appeal decided after *Niass* which tended to confirm that approach. Regarding decisions from other jurisdictions cited in argument, including *Renzella*, their Honours said that "caution should be exercised where matters of practice and procedure in one jurisdiction are relied upon in support of arguments in this jurisdiction". The Court concluded that the New South Wales decisions should be applied. No error had been demonstrated on the part of the sentencing judge by refusing to take into account the earlier, unrelated period of detention in sentencing the appellant.

[82] Their Honours did, however, accepted that if events occurred during the period of dead time custody which could be called in aid of the offender's subjective case on sentence, such as marital breakdown, loss of employment, development of illness or other aspects which could bear upon their subjective circumstances relevant to the offender, those matters may be relevant to sentence.[19]

[83] An application for special leave to appeal to the High Court was refused.[20]

[84] It is against this background that the decision in *Dib* comes to be considered. The applicant Dib pleaded guilty in the District Court to a charge of conspiracy to import a commercial quantity of a border-controlled drug. Prior to the commission of that offence, he had served in excess of 3 years and 8 months in custody following an entirely unrelated conviction for an offence of murder of which he was subsequently, on appeal, acquitted.

[85] The applicant contended before the sentencing judge in the District Court that his sentence for this conspiracy offence should be backdated or reduced by a quantified period to recognise the time that he had wrongly spent in custody in relation to the unrelated charge of murder. The sentencing judge refused to do so. The sentencing judge, nevertheless, took that time into account as part of the applicant's subjective circumstances.

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19 See *R v Evans* (unreported, Court of Criminal Appeal, NSW, 21 May 1992).

20 *Nicholas Hampton v The Queen* [2015] HCASL 76.

[86] The applicant applied for leave to appeal. One of the proposed grounds of appeal, Ground 1, was, "the learned sentencing judge erred in not backdating the applicant's sentence to take into account uncredited time in custody".

[87] In *Dib*, it was made clear by the applicant that his complaint was the failure by the sentencing judge to make a specific or quantified reduction in sentence based on a period served in custody on unrelated charges which ultimately did not result in a conviction. The decision of the Court is to be understood in that context.

[88] Simpson AJA, with whom Garling and Ierace JJ agreed, noted that the sentencing judge had taken the earlier sentence of imprisonment into account as part of the applicant's personal circumstances, but declined to go further and identify a discrete reduction in sentence, or to backdate the sentence by that or some other period of time as she had been asked to do. The sentencing judge considered herself bound by a line of authority commencing with *Niass* which was confirmed by the bench of five judges in *Hampton*.

[89] Her Honour noted that in *R v John David*[21] the Court rejected an argument that Lee CJ at CL in *Hampton* had not intended to lay down a general rule to be applied inflexibly that a period of custody in respect of an unrelated offence of which the prisoner had not been validly convicted, is never to be

21 Unreported, Court of Criminal Appeal NSW, 20 April 1995 (*David*).

taken into account. The Court rejected the proposition that such a period of custody could be taken into account as in the circumstances of the particular case the prisoner would be justified in feeling that he or she had been unjustly dealt with if the period of custody for the unrelated offence was not taken into account.

[90] In *David*, James J expressed the opinion that Lee CJ at CL should be taken to have laid down a general principle in *Niass* that a period of custody in respect of an unrelated offence should not be taken into account in subsequently sentencing for a particular offence.

[91] Simpson AJA noted that the Court in *David* was constituted by two judges as permitted by s 6AA (1) of the *Criminal Appeal Act 1912* (NSW) and that it was not the intention of the legislature that the Court so constituted would resolve disputed issues of general principle. However, consideration of other cases such as *Hampton*, and *SY v R*[22] , led her Honour to say, at [52]:

> It is thus well – and consistently – established that, in this State, offenders will not be given quantified reductions in sentence to take account of periods spent in custody other than those referable to the offence or offences for which sentence is to be imposed and neither will sentences be backdated to achieve the same result.

[92] Simpson AJA rejected the proposition that the decisions from other jurisdictions (principally Victoria) cited by the appellant established a "common law principle" contrary to the *Niass* line of authority. Her Honour said the most that the appellant could show was that, in some cases, some

22 [2020] NSWCCA 320.

recognition had been given to periods of custody entirely unrelated to the offence or offences for which sentence was to be passed.

[93] After a review of the Victorian cases, her Honour went on to say, at [81]:

> These cases do not establish a "common law principle" which this Court would be obliged to, or should, follow. As the survey above indicates, there is no firm or clear principle which justifies the extension of the discretion identified in *Heaney* and *Renzella* beyond the statutory and factual context in which it was developed. As Johnson and Bellew JJ commented in *Hampton*, the practice in Victoria developed out of a statutory provision that may have been seen to restrict (and was argued by the Director of Public prosecutions in *Renzella* to have restricted) the ability of the court to take into account pre-sentence custody other than that directly referable to the offence for which sentence was to be passed. In subsequent cases, that practice was sometimes expanded without explanation of why that expansion was justified. The applicant's argument did not address why those authorities in Victoria or other States that deviate from the position adopted in NSW following the decision in *Niass* should prevail over *Niass* and those decisions that follow it. In this respect, it is notable that the decisions in Victoria appear to have proceeded without any reference to *Niass* or its successor cases.

Conclusion

[94] In my opinion, the approach taken in the New South Wales authorities should be followed in this Territory and that taken in the Victorian cases should not, for the following reasons.

[95] First, the most recent decision of an intermediate court of appeal is *Dib*, which adopts the approach taken in *Hampton*, which itself was a decision of a five-member bench of the Court of Criminal Appeal specially constituted to consider the issue of the relevance of "dead time" to sentencing for later offences. It is not without relevance that an application for leave to appeal to the High Court from the decision in *Hampton* was refused.

[96] Secondly, as noted by Simpson AJA in *Dib*, the decision in *Renzella* must be seen in the light of the provisions of s 18 of the *Sentencing Act* as it applied in Victoria at that time. The cases subsequent to *Renzella* in Victoria expanded the practice from "double-warranted" instances of custody to other cases where the "dead-time" was completely unconnected with the offending on which the offender was to be sentenced or with any custody referable to that offending. This was done without any principled explanation for the expansion.

[97] A number of the Victorian cases explain the rationale for the *Renzella* approach by reference to the offender having been the subject of "unfairness" or "injustice" by having served the earlier period of "dead time" custody. For my part, I would hesitate to characterise the fact that an accused person was lawfully held in custody pending trial as "unfair" or "an injustice", even where the charges ultimately do not proceed to a conviction, without something more being demonstrated.

[98] A decision made to remand an accused without bail pending trial based on the proper application of relevant statutes and principles should not, without more being demonstrated, be described as unfair or an injustice. Doubtless, it is a circumstance detrimental to the accused. It is a case where a decision made under the laws put in place by the legislature result in an outcome adverse to the accused.

[99] It is also understandable that an individual accused who is held without bail on charges that do not proceed or are ultimately the subject of verdicts of not guilty may *perceive* that they have been the subject of an injustice, but without more that is not objectively the fact. The court in *Kotzmann* saw an individual's perception of injustice as a rationale for taking "dead time" into account in sentencing for an unrelated offence.[23] This also appears to be the rationale adopted by their Honours in *Warwick*.

[100] As Lee CJ at CL observed in *Niass*, this rationale for taking dead time into account begs the question: was the earlier period of dead time custody in truth unjust or unfair? Is any grievance on the part of the offender a justifiable grievance? Any exploration of these issues at a later point in time cannot result in a satisfactory outcome. A sentencing court cannot be expected to analyse the evidence on the charges on which the offender served the dead time and the decision-making processes of the prosecuting authorities and determine for itself whether any sense of grievance held by the offender is justified.

[101] In my opinion, these are issues best left to other forums. Where the offender served dead time by reason of malicious prosecution, they may seek redress in tort. In other cases, an application may be made for an ex gratia payment by the State.

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23 See [56] above.

[102] The approach taken in *Niass* and *Hampton* has the advantage of consistency with long-standing practice regarding sentencing courts taking into account an offender's background in the process of instinctive synthesis from which a sentence is derived.[24]

[103] The fact that an offender has served dead time in the past is, of itself, irrelevant to sentencing for an unrelated offence. What is relevant is any effect the serving of the dead time had on the offender. Did the offender lose their employment, or their home or relationships? Were they assaulted or in some other way injured while serving the dead time? Many other examples may be found. These are relevant subjective matters which can be taken into account as "part of the mix" in the process of instinctive synthesis.

[104] A more difficult question is whether any particularly onerous conditions under which the offender served the dead time is relevant in the manner I have described. On balance, I accept that it is. It will, of course, be a matter of degree and judgment as to whether conditions were particularly onerous and as to the weight to be given to that circumstance in sentencing. It is inappropriate for a sentencing court engaged in such an exercise to adopt a multi-stage process of reasoning in which the weight to be attributed to this individual circumstance is identified and revealed. It simply becomes part of the material upon which a sentence is determined by the process of instinctive synthesis.

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24 *Markarian v The Queen* [2005] HCA 25.

[105] In the present case, counsel appearing for the appellant at the sentence hearing tended in his submissions to elide the circumstances under which the appellant served both the dead time and the period on which he was remanded for the offences upon which he came to be sentenced. The points made by counsel were:

a) The time spent on remand was "not easy" for the appellant;

b) He spent two summers in custody and was subject to "scorching heat" for many periods due to breakdowns of air conditioning units;

c) He was subject to lockdowns and spent a considerable amount of time "in custody" (presumably, in his cell).

[106] Time spent on remand will rarely be considered "easy" by an inmate. It should be accepted, however, that circumstances which make custody unusually onerous, such as frequent lockdowns due to lack of staff, or particularly difficult environmental conditions, are circumstances which are relevant to an assessment of the offender's subjective circumstances and as such may, where established, be taken into account as part of the offender's background. This is so whether the period is dead time or a remand for the particular offending before the sentencing court.

[107] Where proven with regard to "dead time", such circumstances are available to the court sentencing for later offending for use both for and against the offender. It may be argued that such material may be relevant to an assessment of the offender's prospects for rehabilitation where previous

incarceration under such circumstances has not acted to deter the offender from further offending. No such submission was made in the present case so I will not dwell on this further.

[108] While the sentencing judge did not specifically refer to the appellant's submissions regarding the conditions under which he was held on remand for the offending on which he was sentenced, his Honour was clearly aware of the submissions made on behalf of the appellant on that issue. This was a case where, as stated in *Millar*, it may be inferred that the sentencing judge took those submissions into account.

[109] A fortiori, it is clear that the sentencing judge took the appellant's submissions concerning the period of "dead time" into account as part of the appellant's subjective circumstances. This was the way the appellant's counsel submitted to the sentencing judge that it should be taken into account. The fact that the sentencing judge acknowledged in his sentencing remarks that it could be taken into account can only indicate that it was being taken into account in the manner suggested by the appellant. It was unnecessary, and inappropriate, for his Honour to have stated how that material affected the final sentence.

[110] I will add two further points. First, the material placed before the sentencing judge provided little assistance to the sentencing judge in determining the significance of the conditions under which the appellant served the dead

time. What was put to his Honour did not warrant a considerable reduction in sentence.

[111] Secondly, if there was any doubt in the mind of counsel appearing for the appellant on sentence whether the conditions under which the appellant was remanded in custody, either as “dead time” or otherwise, was taken into account it was incumbent on counsel to make that enquiry of the sentencing judge immediately after sentence was passed. If it had been taken into account, the sentencing judge could say so. If it had been overlooked by the sentencing judge, the sentence could be amended if necessary.

[112] The ground of appeal alleging that the sentences passed, individually and in total, were manifestly excessive can be dealt with briefly. There can be no merit in that suggestion. If anything, the appellant was treated rather leniently.

[113] None of the appellant’s grounds of appeal have merit. The appeal is dismissed.
