CITATION	*DP v Rigby & Ors* [2018] NTSC 11
PARTIES:	DP
	v
	RIGBY, Kerry
AND:	DP
	v
	RIGBY, Kerry
AND:	DP
	v
	HEGYI, Bronte
AND:	DP
	v
	FIRTH, Justin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from the YOUTH JUSTICE COURT exercising Territory jurisdiction
FILE NO:	LCA 28 of 2017 (21700583); LCA 29 of 2017 (21651228); LCA 30 of 2017 (21708779); and LCA 31 of 2017 (21714970)
DELIVERED ON:	21 February 2018
DELIVERED AT:	Darwin

HEARING DATES:	29 September 2017, 27 October 2017, 31 October 2017 and 6 November 2017
JUDGMENT OF:	KELLY J
APPEAL FROM:	YOUTH JUSTICE COURT

CATCHWORDS:

APPEAL AND NEW TRIAL – Appeal – General principles – Admission of fresh evidence – Whether leave should be granted for adducing fresh evidence – Reasonable explanation for failure to adduce fresh evidence – Evidence adduced in the court below – Leave granted – *Local Court (Criminal Procedure) Act* (NT) s 176A

APPEAL AND NEW TRIAL – Appeal – General principles – In general and right of appeal – Appeal against sentence – Misunderstanding of salient feature of evidence – Principles and factors to be taken into account in relation to young offenders – Failure to attribute adequate weight to rehabilitation – Youth being dealt with by a court for the first time – Appeal allowed

APPEAL AND NEW TRIAL – Appeal – Error in imposing aggregate sentences – *Youth Justice Act 2005* (NT) s 125 – Appeal allowed

Local Court (Criminal Procedure) Act (NT) s 176A
Sentencing Act 1995 (NT) s 52(3), 78C
Youth Justice Act 2005 (NT) s 125

Edmond and Moreen v The Queen [2017] NTCCA 9, *TM v The Queen* [2017] NTCCA 3, applied

Bean v Considine [1965] SASR 351, *Woods v Eaton* [2009] NTSC 49, *Edmond and Moreen v The Queen* [2017] NTCCA 9, referred to

REPRESENTATION:

Counsel:

Appellant:	P Bellach with C Triggs
Respondents:	L Hopkinson

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Kel1805
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

DP v Rigby & Ors [2018] NTSC 11
No. LCA 28 of 2017 (21700583), LCA 29 of 2017 (21651228);
LCA 30 of 2017 (21708779); and LCA 31 of 2017 (21714970)

BETWEEN:
DP
Appellant

AND:
KERRY RIGBY
Respondent

AND BETWEEN:
DP
Appellant

AND:
KERRY RIGBY
Respondent

AND BETWEEN:
DP
Appellant

AND:
BRONTE HEGYI
Respondent

AND BETWEEN:
DP
Appellant

AND:
JUSTIN FIRTH
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 21 February 2018)

[1] The appellant is now 15 years old. To the age of 12, he grew up in a home marred by domestic violence. He and his mother were both victims of domestic violence perpetrated by his father. Between 2006 and 2014, when the appellant was aged between 4 and 12, there were five substantiated reports of domestic violence inflicted on the appellant or on his mother which the appellant witnessed.

[2] Notwithstanding this, the appellant was well behaved and had an excellent school attendance record up until he was 12 years old.

[3] Then, in early 2014, when the appellant was 12, he and his mother found his father deceased at home. He had had a heart attack and this was unexpected: the family was not aware that he had a heart condition.

[4] Apparently the appellant's mother could not cope. She went to Darwin, abandoning the 12 year old appellant on the Tiwi Islands, and took to drinking and living in the long grass.

[5] From this point, the appellant did not have a stable home. He was living between the households of members of his extended family and no-one took responsibility for his care. He began missing school and abusing cannabis.

[6] This sorry state of affairs continued for over two years. Then, over a period of about five months, from October 2016 to May 2017, when he was 14 and 15 years old, the appellant committed a number of violent offences, mostly

in the context of asking members of his extended family for food or for money to buy food and being refused.

[7] The first incident occurred on the morning of 26 October 2016. The appellant approached his grandmother and his aunt to ask for money. His grandmother asked him why he was not at school and told him that she was not going to give him any money. The appellant swore at his grandmother and aunty saying, “Mother fucker. Fuck you mob. You are not my family.” Then he walked away. He returned about half an hour later, again asked for money, and again swore at his grandmother. He picked up stones and threw them at his grandmother. Then he hit her on the head and ran off into the bush. As a result of the assault, the grandmother suffered a cut to her head which required three stitches.

[8] The next occurred on the evening of 3 January 2017. The appellant left the house where he had been staying and went next door to his aunts’ house. His aunts, Bertha and Natasha, were eating dinner with several children. The appellant asked if he could have some food, and Natasha told him there was not enough for him. He saw some stew on the table and asked if he could have some of that. His aunt told him that was for his uncle. The appellant went to the back of the house and shouted, “Fuck you mob. You’re not my aunties. You’re not my family,” and threw something at the house. Bertha went outside and she and the appellant argued. In the course of the argument, the appellant picked up a baseball bat and hit Bertha on the torso. Bertha’s partner tackled the appellant and took the bat from him. Then

Bertha picked up the bat and hit the appellant on the leg with it causing him to fall to the ground. A neighbour took the bat off Bertha but Bertha kept yelling at the appellant. Natasha came outside and told the appellant off for assaulting Bertha. The appellant armed himself with a stick and shouted at Natasha, "You two want a hiding? I'll flog the lot of you. I got no aunty!" The appellant threw the stick at Natasha. Natasha was holding her small child at the time. The stick hit Natasha on the hand and the child on the head causing a small lump. The appellant was arrested later that evening.

[9] The appellant was granted bail by the Youth Justice Court on these two matters on 14 February 2017. One of the conditions of the grant of bail was that the appellant was to attend school each and every day that school is open for attendance. On 16 February 2017, two female police officers went to the house where the appellant was staying to check whether he was at school. They found the appellant sleeping inside and asked him why he was not at school. He told them he had a sore arm. The police officers told him to go to the clinic to get a medical certificate or to go to school within the hour. The police officers later checked the clinic and were told that the appellant had not been there; nor could they find him at his residence. Later, while they were patrolling the community, the two police officers found the appellant out walking on the streets. They told him he was under arrest for breaching his bail conditions. One officer held him by each elbow. The appellant resisted. He struggled and during the struggle he tripped over. He also kicked and head butted the police officers causing them harm. Three

civilians intervened to help the police officers put the appellant into the police vehicle. One of them told him, “Stop [DP]. Stop it and calm down. Do this good way.” The appellant kicked two of the civilians and head butted the other one. Eventually they got the appellant into the police vehicle, and took him to the Watch house cells. While he was in the cells he was kicking the glass Perspex door, yelling and screaming.

[10] The fourth incident occurred in Darwin on the evening of 24 March 2017. The appellant was at his grandmother’s house in Moulden. He had a verbal argument with his grandmother and she went to the front of the house and yelled out for help. A neighbour came and told the appellant that he had called the police. The appellant reached behind his back and pulled out a steak knife and made threats to the neighbour. Then he went inside the house. The neighbour used his foot to hold the door closed to stop the appellant from coming back outside. The appellant ran towards the door and thrust a bigger kitchen knife into the security screen door. The blade of the knife stabbed the neighbour in the sole of his foot. The neighbour suffered a laceration to his foot which required stitches. The appellant left the house by the back door as police arrived. Police came back the next morning and arrested him.

[11] He was ultimately charged with the following offences.

(a) On file 21651228, for the incident on 26 October 2016, the appellant was charged with one count of aggravated assault.

(b) On file 21700583, for the events on 3 January 2017, the appellant was charged with:

(i) one count of unlawfully causing harm; and

(ii) two counts of aggravated assault.

(c) On file 21708779, for the events on 16 February, the appellant was charged with:

(i) one count of engaging in conduct that resulted in a breach of bail;

(ii) two counts of aggravated assault on a police officer;

(iii) one count of aggravated assault;

(iv) two counts of common assault; and

(v) one count of behaving in a disorderly manner in a police station.

(d) On file 21714970, for the incident on 24 March 2017, the appellant was charged with:

(i) one count of aggravated assault; and

(ii) one count of engaging in conduct that resulted in a breach of bail.

[12] On 21 April 2017, he pleaded guilty in the Youth Justice Court to the two offences on file 21714970 (the 24 March offences).

[13] On 17 May 2017, the appellant pleaded guilty to the offence on file 21651228 (the aggravated assault on 26 October 2016) and to the three offences on 21700583 (committed on 3 January 2017).

[14] On 14 June 2017, the appellant pleaded guilty to the breach of bail, the two offences of aggravated assault on a police officer and the offence of behaving in a disorderly manner in a police station on file 21708779.

[15] Following a hearing on 14 June, on 21 June 2017 the sentencing judge found the remaining offences (the aggravated assault and the two assaults) on file 21708779 proven. The appellant was convicted on all charges and sentenced to:

(a) one month detention commencing 11 May 2017 on file 21651228;

(b) an aggregate sentence of three months detention on file 21700583 (two months to be served cumulatively on file 21651228);

(c) an effective sentence of five months detention on file 21708779 (two months to be served cumulatively on file 21700583); and

(d) an effective sentence of five months detention on file 21714970 (to be served wholly cumulatively on file 21708779);

bringing the sentence to a total of ten months detention suspended from 21 July 2017 (ie after serving just under three months).

[16] The appellant has appealed against these sentences on the following grounds:

1. The learned judge failed to correctly apply the principles relating to sentencing youth offenders, in particular the principle of rehabilitative purpose, when sentencing the appellant.

2. The learned judge attributed inadequate weight to rehabilitative purpose when sentencing the appellant.

3. The learned judge failed to correctly apply the principle that detention is a sentence of last resort.

4. The learned judge erred in recording convictions when sentencing the appellant.

5. The learned judge erred in assessing the pleas of guilty on files 21651228 and 21700583 as 'late'.

6. The learned judge erred by imposing aggregate sentences in contravention of s 125 of the *Youth Justice Act 2005* (NT).

Application to adduce evidence on the appeal

[17] In addition, the appellant has sought leave to adduce evidence on the hearing of the appeal from psychologist Kerry Williams. Ms Williams prepared a report dated 24 May 2017 for the court below. In it she quoted the appellant as having said that his father had passed away last year.

[18] At paragraph [5] of her report, Ms Williams said:

> [DP] stated that his father passed away last year. He stated this was a very sad time as it was not expected. He reported that his father suffered heart failure and it was some time before the family knew the reason for his sudden death.

[19] At paragraph [20], Ms Williams said:

> [DP] advised he lost his father in unexpected circumstances last year and it is highly possible that issues of loss and grief have impacted on how he controls his emotions, including how he reacts when angry. On that basis, it is highly likely that there is a correlation between his loss and grief and anger issues, and his subsequent offending behaviour.

[20] In fact the appellant's father died in 2014. All of the offences for which the appellant was sentenced occurred during a five month period between 26 October 2016 and 24 March 2017. After that, the appellant spent some time (approximately four months) in custody and then was released on bail. He did not commit any fresh offences while on bail.

[21] In sentencing the appellant the sentencing Judge said:

> … I received no explanation as to why he suddenly started to offend. The psychologist's report, at first blush, appears to provide an explanation, because the psychologist wrongly understood that the youth's father had died only in 2016. And if so that would have had a nexus with the commencement of the offending which would have been logically satisfying at first blush. That turned out to be incorrect. The death of the father occurred in early 2014.[1]

[22] The appellant sought leave to adduce in evidence a fresh report by Ms Williams addressing (inter alia):

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1 This was an error. In fact the father died in August 2014.

(a) whether Ms Williams in fact knew the date of the father's death when she wrote the report and, if so, the reason for referring to the death the way she did in the report;

(b) whether her conclusions, particularly those in paragraph [20] would be any different given the true date of the death of the appellant's father;

(c) whether there is likely to be a connection between the domestic violence witnessed/experienced by the appellant prior to his father's death and his offending;

(d) Ms Williams' knowledge of the circumstances experienced by the appellant after his father's death, in particular his living circumstances and any reasons why he did not receive a greater level of care and support from his family following his father's death; whether these experiences have affected his well-being and family relationships; and whether there is a connection between the appellant's acts of impulsiveness towards family members and his experiences of lack of support/rejection by his family following his father's death; and

(e) a more detailed explanation of the likely correlation between the appellant's loss and grief, his anger issues and his subsequent offending referred to at paragraph [20] of the report.

[23] In substance, that report confirmed the psychologist's opinion that there was a causal connection between the death of the appellant's father, and the subsequent neglect by his family and the offending behaviour. In relation to timing, the report stated:

> Given [the appellant's] age and ability to manage extreme emotions it is not unreasonable to assume that these feelings could have festered for some time before he embarked on expressing himself in a violent and inappropriate manner.

[24] The appellant also sought leave to adduce evidence of plea negotiations between the appellant and the prosecution to show that the learned sentencing judge was wrong to characterise the appellant's pleas to charges on two of the files as late pleas.

Legislative requirements for adducing evidence on appeal

[25] Under s 176A of the *Local Court (Criminal Procedure) Act* (NT), subject to the notice requirements in s 176A(2) and (3), the Court must admit evidence tendered on the hearing of an appeal if:

(a) that evidence is likely to be credible and would have been admissible in the proceedings below on an issue which is the subject of the appeal;

(b) the evidence was not adduced in those proceedings; and

(c) there is a reasonable explanation for the failure to adduce it;

unless the Court is satisfied that the evidence would not afford a ground for allowing the appeal.[2]

Further psychological report

[26] While not formally consenting to the tender of the fresh report, the respondent offered no serious objection to its reception. The additional report was not adduced in the proceedings below, it would have been admissible and its credibility was not in question. It has been held that the Court should be liberal in its interpretation of what amounts to a reasonable explanation for a failure to adduce the evidence in the proceedings below.[3] In this case the appellant was a minor and counsel for the appellant was not aware of the error in the date of the father's death in the first report. Accordingly, at the hearing of the appeal I gave leave to adduce in evidence the further report from Ms Williams.

Evidence of plea negotiations

[27] I did not give leave to the appellant to tender evidence as to plea negotiations which occurred on files 21651228 and 21700583 in order to demonstrate that these were early pleas and not, as his Honour the sentencing judge characterised them "late pleas", as in my view it was not necessary. It also, probably, failed to comply with one of the pre-conditions in s 176A, namely that the evidence was not adduced in the court below.

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2 Section 176A(1)

3 *Bean v Considine* [1965] SASR 351 cited with approval by Reeves J in *Woods v Eaton* [2009] NTSC 49 at [25]

[28] The times when plea indications were given and offers made and rejected or accepted were all matters within the knowledge of counsel who appeared for the appellant in the Court below and communicated to the sentencing judge in written submissions. At paragraph 71 of those written submissions, counsel for the appellant wrote:

> In relation to files 21700583 and 21651228 the youth first appeared in Darwin court on 17 February 2017 and instructions were taken and representations were made on 1 March 2017. The matters eventually resolved on the basis of those representations. These matters were always going to be pleas to the charges that the matters resolved to and we submit that this is an early plea and the relevant sentencing principles apply.

[29] In sentencing the appellant for the charges on file 21651228,[4] the sentencing judge said:

> The youth entered a plea of guilty to this offence, only on the day it was listed for hearing. Prior to that, the matter was firmly contested all the way. The late plea of guilty entitles the youth to some consideration for the utilitarian value of the plea and that will be taken into account by me but nothing else. It does not disclose any remorse on his part for his conduct.

[30] In sentencing the appellant for the charges on file 21700583, the sentencing judge said:

> Once again, the youth contested these charges and he pleaded guilty on the day of the hearing. The late guilty plea, once again, entitles him to some consideration for the utilitarian value of the plea if nothing else. It does not disclose any remorse on his part for his conduct, to his aunts or his infant cousin.

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[4] mistakenly referred to by his Honour as file 21651882 and 2165882

[31] That statement reveals a factual error on the part of the sentencing judge. In each case, the appellant had originally been facing additional and more serious charges. Through his counsel he made an early offer to plead to the charges to which he eventually pleaded guilty and made representations about the facts. The Crown eventually accepted that offer on the day of the trial and the plea proceeded on the basis of the representations that had been made. That is to say, it was not a late plea, but a late acceptance by the Crown of an early plea offer. This was, properly, conceded by the respondent on the appeal.

[32] Further, in the same quite comprehensive written submissions, counsel for the appellant drew the sentencing judge's attention to evidence that the appellant was indeed remorseful and had shown insight into his offending.

The appeal

[33] An appeal court will not interfere in the exercise of a sentencing discretion unless it is shown that the sentencing judge committed error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error.[5]

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5 *Edmond and Moreen v The Queen* [2017] NTCCA 9 at [4] and the cases cited therein

[34] In this case, it is apparent from what the sentencing judge said, that he misunderstood a feature of the evidence which was material to his assessment of the appellant's remorse, and hence to the appropriate sentencing disposition in the circumstances. He mistakenly believed that, on the two files in question, the appellant had pleaded guilty only at the last minute, that he had otherwise "firmly contested" the charges "all the way" and that his guilty pleas were not indicative of remorse.

[35] The appeal should be allowed on that ground.

[36] The sentencing judge's remarks also reveal another error of principle. His Honour quoted the following passages from the judgment of the Court of Criminal Appeal in *TM v The Queen*:[6]

> Rehabilitative purpose
>
> It is necessary first to give some consideration to the proper place of rehabilitative purpose when sentencing youth offenders. It is no doubt correct to say, as was observed in *R v Mills*, that in the case of youthful offenders, and particularly first offenders, rehabilitation is usually far more important than general deterrence. This recognises both that youthful offending is often the product of immaturity and that imprisonment has significant limitations as a rehabilitative tool. However, it is not correct to say that rehabilitation will necessarily be the "paramount" sentencing consideration in all cases, or that rehabilitation will necessarily be more important than other sentencing purposes.
>
> The focus on rehabilitation over deterrence in the case of youthful offenders is directed to the offender's capacity to alter his or her behaviour so as not to reoffend, and to ensure the youth is dealt with in a way that acknowledges his or her needs and will provide him or her with the opportunity to develop in socially responsible ways.

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6 [2017] NTCCA 3 at [25]-[27]

> Rehabilitation may carry far less weight in respect of a repeat offender who has previously been afforded a number of opportunities to modify his or her behaviours through the imposition of non-custodial dispositions, but has failed to do so and has committed a very serious criminal offence. In such cases the prospects of rehabilitation may be considered as diminished, and the weight properly attributed to rehabilitative purpose in the sentencing process lessened as a result. The youth must be held accountable and made aware of his or her obligations under the law and the consequences of contravening the law. The court must maintain a proper balance between the needs of the youth, the rights of the victim and the interests of the community.
>
> This is not to say that the prospects of rehabilitation will necessarily be considered as extinguished in cases of serious offending. It is only to say that the manner in which the balance is to be struck between rehabilitation and the other sentencing purposes will be guided by a consideration of both the seriousness of behaviour and the prior criminal history. That balance will be reflected in such matters as whether the sentence is custodial or non -custodial; and, if custodial, the length of the head sentence, whether a non-parole period or an order suspending sentence is imposed, and the minimum time to be served. By way of example, the purposes of punishment, denunciation and deterrence may be primarily served by the imposition of a stern head sentence, while at the same time the purpose of rehabilitation may be primarily served by an order suspending sentence after a period of incarceration of lesser duration than would otherwise have been required but for the offender's youth.
>
> (*citations omitted)*

[37] His Honour then said:

> These observations by the Court of Criminal Appeal have particular applicability in the case of [the appellant]. We are seeing increasing severity of offending, from swearing and throwing stones at, and then striking once in the head, his elderly grandmother – elderly compared to him – he was less than 15 and she was 58.
>
> You see then swearing at, striking one arm with a baseball bat, throwing a stick at another aunt while she was holding an infant in

her arms, and then waving a knife at an aunt and then cutting her hand with that knife.[7]

We then move on to the third occurrence which involved the two female police officers with a male defendant, the serious resistance he put up to being properly arrested, the number of blows he struck to them, the injuries sustained by the police officers and the lesser injuries sustained by the three civilian witnesses who attempted to intervene and assist the police.

And then the most serious offending of all, the deliberate stabbing through a wire screen door into the foot of a man who'd come to assist.

...

The offending in stabbing [the victim] in that matter, in those circumstances is of most extraordinary seriousness.

…

I am satisfied, on those factors were considered with the breaches of bail and the complete lack of remorse or insight – which I'm satisfied the offences which have – were the subject of not guilty pleas reveal about this young man, taken together mean the purposes of punishment, denunciation and deterrence assume a much larger significance than is ordinarily the case when dealing with youthful offenders. This is a case where the prospects of rehabilitation may be considered as diminished, although far from extinguished.

[38] It is apparent from these remarks that the sentencing judge was equating the appellant's situation with that of a repeat offender who had been dealt with in the past and afforded leniency by a court and had not learned his lesson; whereas this was the first time the appellant had been dealt with by a court for any offending. This too was in my view an error of principle.

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7 This description of the offending does not seem to accord with the agreed facts which are summarised in paragraphs [7] to [10] above.

[39] It was conceded by the respondent that a further error of a technical nature occurred in that the sentencing judge imposed aggregate sentences which was not permissible when one or more of the offences was a violent offence.[8]

[40] The appeal is allowed. The sentence of the sentencing judge is set aside and the following sentences imposed.

1. On file no 21651228 (the aggravated assault on the grandmother on 26 October 2016), without proceeding to conviction, the appellant is placed on a bond to be of good behaviour for a period of three months.

2. On file no 21700583 (the two aggravated assaults on his aunty and unlawfully causing harm on 3 January 2017):

   (a) on count 2, without proceeding to conviction, the appellant is placed on a bond to be of good behaviour for a period of four months;

   (b) on count 4, without proceeding to conviction, the appellant is placed on a bond to be of good behaviour for a period of four months;

   (c) on count 5, without proceeding to conviction, the appellant is placed on a bond to be of good behaviour for a period of four months.

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[8] *Sentencing Act 1995* (NT) s 52(3) and s 78C; *Youth Justice Act 2005* (NT) s 125(3)

The good behaviour bonds are all to be concurrent.

3. On file no 21708779 (aggravated assaults on two police officers in the course of their duties and three civilians who went to their aid):

(a) on count 2 (the assault on one of the female police officers), without proceeding to conviction, the appellant is sentenced to a term of detention for three months beginning on 4 September 2017, fully suspended;

(b) on count 3 (the assault on the other female police officer), without proceeding to conviction, the appellant is sentenced to a term of detention for three months fully suspended;

(c) on count 5 (the assault on one of the civilians), without proceeding to conviction, the appellant is sentenced to a term of detention for one month, fully suspended;

(d) on count 6 (the assault on the second civilian), without proceeding to conviction, the appellant is sentenced to a term of detention for one month, fully suspended; and

(e) on count 7 (the assault on the third civilian), without proceeding to conviction, the appellant is sentenced to a term of detention for one month, fully suspended.

The start date for all of these sentences is 4 September 2017 (that is, they are to all run concurrently.)

4. On file no 21714970 (stabbing the neighbour through the door), without proceeding to conviction, the appellant is sentenced to a term of detention for five months, fully suspended, commencing on 4 September 2017.

5. I fix an operational period of six months from 6 November 2017.
