CITATION:	*ML v The Queen* [2018] NTCCA 18
PARTIES:	ML v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 10 of 2018 (21709440)
DELIVERED:	27 November 2018
HEARING DATES:	5 September 2018
JUDGMENT OF:	Grant CJ, Southwood and Blokland JJ

CATCHWORDS:

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT

Whether sentence for aggravated robbery manifestly excessive – youths should only be sentenced to custody for the shortest appropriate period – sentence of 33 months manifestly excessive having regard to the objective circumstances and moral culpability – appeal allowed – whether sentencing court erred by purporting to resentence the appellant for breaches of good behaviour orders imposed by the Youth Justice Court – strong inference that sentencing court resentenced under s 15 of the *Sentencing Act* – that section has no application to orders to be of good behaviour made by the Youth Justice Court – error of principle disclosed – appeal allowed – Supreme Court had power to resentence under s 121(6) of the *Youth Justice Act* (NT) – less severe sentences warranted and should have been passed – appellant resentenced.

Anderson v The Queen [2014] NTCCA 18; *Braun v The Queen; Ebatarintja v The Queen* (1997) 6 NTLR 94, *House v The King* (1936) 55 CLR 499, *R v Gurruwiwi* (2008) 22 NTLR 68, *TB v The Queen* [2018] NTCCA 8, referred to.

Criminal Code (NT) s 3, s 188, s 211, s 213
Sentencing Act (NT) s 11, s 13, s 15
Youth Justice Act (NT) s 5, s 52, s 54, s 54A, s 55, s 56, s 56A, s 82, s 83, s 85, s 121

REPRESENTATION:

Counsel:

Appellant:	A Abayasekara
Respondent:	D Morters

Solicitors:

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

Judgment category classification:	B
Number of pages:	36

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

ML v The Queen [2018] NTCCA 18
No. CA 10 of 2018 (21709440)

BETWEEN:

ML
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, SOUTHWOOD AND BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 27 November 2018)

THE COURT:

Introduction

[1] On 30 November 2017 the appellant, who is a youth, pleaded guilty to counts 1 and 3 on the indictment dated 29 November 2017. Count 1 charges that contrary to s 213(1), (4), (5) and (6) of the *Criminal Code* (NT) on 20 February 2017 at Alyangula the appellant unlawfully entered the Groote Eylandt Lodge ("the lodge") in company and at night with intent to commit the offence of stealing. One of the appellant's co-offenders, Edmond Wurramara, was armed with a tomahawk. The maximum penalty for this offence is imprisonment for 20 years. Count 3 on the indictment charges that contrary to s 211(1) and (2) of the *Criminal Code* on 20 February 2017 at

Alyangula the offender robbed Nishantha Gunathilake of assorted alcohol being the property of Groote Eylandt Lodge Pty Ltd. He did so in the company of Edmond Wurramara, who was armed with a tomahawk, and Alex Lalara. The maximum penalty for this offence is imprisonment for life.

[2] At the time the appellant committed the offences charged on the indictment he was subject to two good behaviour bonds which were imposed on him by the Youth Justice Court for three aggravated assaults he committed in 2016. Also, on 13 February 2018, the appellant pleaded guilty to breaching his bail on 8 February 2018 by failing to appear before the Supreme Court by audio-visual link.

[3] On 13 February 2018, his Honour the sentencing Judge passed the following sentences on the appellant. For the offence of robbery in count 3 on the indictment, his Honour sentenced the appellant to 33 months' detention. For the offence of unlawful entry of a building with intent to commit an offence therein in count 1 on the indictment, the appellant was sentenced to 15 months' detention. Three months of the latter sentence of detention was ordered to be served cumulatively on the sentence of 33 months' detention imposed for the robbery offence, giving an aggregate sentence of three years' detention. For breaching his bail, the appellant was sentenced to three days' detention which was ordered to be served wholly concurrently with the sentences of detention imposed for counts 1 and 3 on the indictment.

[4] For breaching the two good behaviour bonds, the appellant was resentenced to six months' detention for each of the three aggravated assaults he committed on 19 August 2016, 2 October 2016 and 14 October respectively. Those sentences of detention were also ordered to be served concurrently with the sentences of detention imposed for counts 1 and 3 on the indictment. That gave a total sentence of three years' detention commencing on 2 December 2017. A non-parole period of six months was fixed and was also backdated to 2 December 2017.

[5] The appellant appeals against the sentences of detention that were imposed on him. First, he appeals against the sentences of detention that were imposed on him for counts 1 and 3 on the indictment. Second, he appeals against the three sentences of six months' detention that were imposed on him when he was resentenced for the three aggravated assaults he committed in 2016.

Ground 1: The sentences imposed for counts 1 and 3 on the indictment were manifestly excessive

[6] The appellant appeals against the sentences of detention imposed on him for counts 1 and 3 on the indictment on the ground that both sentences of detention are manifestly excessive. However, counsel for the appellant acknowledged that the appellant's main complaint was about the sentence of 33 months detention imposed for count 3 on the indictment, the offence of aggravated robbery.

The facts of the counts on the indictment

[7] The facts of the offending for counts 1 and 3 on the indictment are as follows.

[8] The appellant and his four co-offenders are all from the Angurugu Community on Groote Eylandt. At 3:30 am on 20 February 2017, Ian Mamarika, Raymoss Lalara, Edmond Wurramara, Alex Lalara, and the appellant decided to unlawfully enter the lodge and steal alcohol.

[9] The five offenders travelled to the lodge in a motor vehicle that had been stolen from GEMCO. The driver parked the motor vehicle in bushland a short distance from the lodge. Edmond Wurramara, Alex Lalara and the appellant got out of the motor vehicle and walked to the kitchen unloading bay of the lodge. Edmond Wurramara was armed with a tomahawk ostensibly for the purpose of breaking into the lodge if entry proved difficult. The three of them pushed on the door that connects the unloading bay to the kitchen. The noise of them doing so alerted the victim of the robbery, Mr Gunathilake, who opened the door and saw the three offenders in the unloading bay. He saw Edmond Wurramara waving the tomahawk at him. This caused him to fear for his safety. He closed and secured the door and walked through the kitchen into the Seagrass Restaurant.

[10] After the three offenders saw Mr Gunathilake go inside the building they continued to try to enter the building. One or more of them pushed on the door until it gave way and opened. The force that was applied to the door

was strong enough to bend a steel padbolt. After the door was opened they walked through the kitchen and behind the bar of the Seagrass Restaurant. At that stage, Ian Mamarika and Raymoss Lalara got out of the motor vehicle and entered the restaurant through the same door.

[11] Edmond Wurramara saw Mr Gunathilake standing on the opposite side of the bar. He raised the tomahawk in a threatening manner and said to Mr Gunathilake, "Don't call anyone. Don't go anywhere." Edmond Wurramara then grabbed the telephone line which was nearby, placed it on the bar and cut it with the tomahawk so that the telephone could not be used. The appellant also threatened Mr Gunathilake. He raised his fist and shook it at him.

[12] Alex Lalara opened the roller shutter at the bar. Ian Mamarika, Raymoss Lalara and Alex Lalara took possession of a large quantity of alcohol which the five offenders carried outside and put in the stolen motor vehicle. They then drove back to Angurugu and began consuming the alcohol. The total value of the stolen alcohol was $2,382.88.

[13] The appellant was the youngest of the five offenders. He was 16 years of age. Ian Mamarika was 28 years of age. Raymoss Lalara was 21 years of age. Edmond Wurramara was 20 years of age. Alex Lalara was 18 years of age. It may be inferred that there was a strong bond between the offenders.

[14] The appellant engaged in the following specific acts. He accompanied his co-offenders to the lodge in the stolen motor vehicle. He supported the two

co-offenders who left the motor vehicle first and tried to open the door between the unloading bay and the kitchen. The appellant pushed on the door between the unloading bay and the kitchen until Mr Gunathilake appeared. It was not proven that he pushed the door and caused it to give way after Mr Gunathilake retreated inside. However, he was at the very least standing by when that occurred. He threatened Mr Gunathilake with his fist after the victim was threatened with the tomahawk and he carried some of the alcohol from the bar to the motor vehicle.

[15] A fair inference is that the appellant was engaging in little more than a show of bravado and support when he shook his fist at Mr Gunathilake. There was no evidence about how close the appellant was to Mr Gunathilake when he shook his fist, or about whether or not there were any obstacles between the appellant and the victim. Robbery is stealing accompanied by the use or threat of violence. On this occasion there was the threat of violence to ensure the victim did not interfere with the offenders taking possession of the alcohol which was stolen and no one was harmed.

[16] There is also a fair inference that Ian Mamarika and Raymoss Lalara were the two offenders who were in control of the unlawful entry and theft of the alcohol. They were the oldest of the five offenders. Mr Mamarika was considerably older than the others. It was his idea to steal the alcohol. He drove the stolen motor vehicle and remained in the motor vehicle until the door between the unloading bay and the kitchen was opened and entry had been gained.

The appellant's moral culpability

[17] The seriousness of the appellant's conduct is qualified by the following factors. The appellant was 16 years old. The other offenders were all adults. The appellant did not come up with the idea to steal the alcohol. He was drinking alcohol with the offenders when the others decided that they would break into the lodge and steal alcohol and he joined in. He was not involved in any planning but fell in with his co-offenders. Because of his age, the appellant was easily led. He was susceptible to suggestions from his peers and family, and succumbed to that pressure. The appellant was unarmed. He did not engage in any actual violence. The threat that he made during the course of the robbery occurred on the spur of the moment and was a low level threat that was not capable of being immediately implemented. The appellant was not involved in stealing the utility.

[18] A fair assessment is that the appellant was a callow youth who willingly tagged along with Ian Mamarika and older family members and friends, with whom he had a strong bond, and assisted in the manner described above without fully appreciating the consequences or seriousness of his actions. All of these factors considerably reduce the offender's moral culpability.

[19] A number of victim impact statements were tendered in evidence. In his first statement Mr Gunathilake said that he was now scared to work as a security person because of what the five offenders did that night. He said he felt scared for his life. He said he has a family with two young children and

when he finishes work each night, he still gets worried that he might be attacked while walking home.

[20] The offending was objectively serious. Such offences are prevalent. Even after the offenders saw Mr Gunathilake, they persisted in completing the crime they had planned to commit. It involved five offenders in company. It occurred during the early hours of the morning. The offending involved low level threats of violence. Each of the offenders is responsible for the acts of the other offenders. A significant amount of alcohol was stolen. However, it cannot be said that the appellant's moral culpability was high. Nor can it be said that his participation was truly adult-like offending.

Subjective factors

[21] The appellant was born in Darwin on 16 February 2001. He is 17 years of age. He had just turned 16 when he committed the offences charged on the indictment. The offender was raised by his extended family, and in particular his maternal aunt, Janice, until he was 11 or 12 years of age. He was raised at the remote community Baniyala in North East Arnhem Land near Blue Mud Bay. He got on well with his extended family and was well behaved. In 2013 when he was 11 or 12 years of age the appellant moved to be with his parents at Angurugu because his aunt was unwell.

[22] He went to school at Baniyala but did not attend regularly. His truant behaviour became worse when he moved to Angurugu. The appellant has never been in paid employment. He was unemployed at the time of the

offending. He is currently supported by his mother and extended family. His mother is a known artist.

[23] The appellant completed a men's ceremony in 2016. His father died in October 2017.

[24] The appellant lived a transient lifestyle for about two years prior to his incarceration. He has a problem with the misuse of cannabis. His first experience of cannabis was as a 13 year old, when he tried it with his brother. The appellant enjoyed using cannabis. He had not made any effort to stop using the dangerous drug. His behaviour deteriorates rapidly if he is unable to obtain cannabis. His dependence on cannabis affects his ability to live a prosocial life.

[25] The appellant has a criminal record which extends for two pages. He has been found guilty of three aggravated assaults, two counts of trespass on enclosed premises, receiving stolen property, property damage, aggravated entry of a building with intent to commit an offence, and stealing. The appellant's record with Community Corrections indicates he is hard to engage and shows little motivation for change.

[26] In accordance with s 136 of the *Youth Justice Act* the Court cannot take into account the trespass on enclosed premises committed on 16 March 2015, the receiving stolen property charge committed on 26 January 2016, the trespass on enclosed premises committed on 26 January 2016, and the breach of bail committed on 9 February 2016. Evidence about those offences was tendered

because it had been mistakenly recorded that the Youth Justice Court had recorded convictions for those offences when it had not done so.

Manifest excess

[27] A detailed schedule of 36 comparative sentences passed on youths for the offence of aggravated robbery and related offences was provided to the Court by counsel for the appellant. The sentences in the schedule ranged from good behaviour bonds with no conviction up to a sentence of four years and six months' detention with a non-parole period of 12 months. About half of the sentences in the schedule were less than a sentence of 18 months' detention. Twelve of the sentences in the schedule were for a sentence of detention of two years and six months or more. The latter category constitutes sentences that were imposed on youths by the Supreme Court for offences of aggravated robbery falling in the upper range of seriousness.

[28] Sentences of detention that fell within the upper range had the following characteristics: the offender was usually the main offender; the offences were committed in company; the offender was armed with a weapon such as a knife; there was a level of physical contact between the offender and the victim, or the offender rushed at the victim while armed with a weapon, so there was actual violence; in eight of the cases the victim suffered physical harm as a result of being stabbed or assaulted; the victim was in a very vulnerable or exposed situation, such as walking by themselves, or being console operators of one kind or another, or having their home invaded; in a number of cases the youths disguised themselves by placing garments over

their heads and faces; and in most cases the youths had significant criminal histories so they had lost the right to leniency to some degree.

[29] By way of example, in the cases of *R v KAR*, *R v EG*, *R v SG* and *R v SS*, all of whom were co-offenders, the facts were as follows. All of the youths were intoxicated when they arrived at the victim's home. KAR, who was the main offender, requested the victim to allow her entry to the premises so she could have some water to drink. The victim said no but then relented. KAR and SS entered the premises and drank some water. The victim then asked them to leave. KAR told the victim she was being rude and asked that EG and SG be permitted entry to the premises. The victim said no. SS then pushed, slapped and swore at the victim. KAR called for EG and SG to enter the premises and locked the door preventing the victim from leaving.

[30] The victim again asked the youths to leave and walked toward her bedroom. SS blocked her path. KAR, SG and EG entered the victim's bedroom and emerged with her property. SS forced the victim to move to the lounge area of her house by jostling her, verbally abusing her, and slapping her face. SS then pulled the victim's hair and kneed her in the cheek. KAR, EG and SG watched and laughed while the victim was being assaulted by SS. The victim tried to go to her room and the offenders followed her. SS picked up a fire extinguisher and threw it into the victim's back. The other offenders followed and continued to laugh at the victim.

[31] The victim entered her bedroom, locked the door and tried to escape through her bedroom window. However, the offenders entered the room by opening the door with the use of the fire extinguisher. SS then kneed the victim in the head three times while one of the other offenders struck her to the head with the fire extinguisher. KAR left the room and returned with a knife. SS and SG struck the victim with two hair appliances and whipped her with their cords. The offenders then packed up the victim's belongings to take them with them. The victim screamed for help and SS confronted her with a curtain rod, KAR stood behind SS with a knife, and SG stood nearby with the fire extinguisher. The victim was told to leave the room and as she attempted to run out of the room, SS struck her with the curtain rod, KAR raised the knife as if to stab her and EG poured cordial over her head. Eventually the victim was able to escape and the offenders ransacked her room.

[32] KAR was sentenced to three years and seven months' detention suspended after 12 months. Each of the other offenders were sentenced to a head sentence of two years and six months detention with various release dates.

[33] While the unlawful entry of the lodge in the present case was persistent and sustained, and the appellant and his two co-offenders must have been aware that the victim of the aggravated robbery had not left the building, the robbery occurred on the spur of the moment and was towards the lower end of the range of seriousness for such offences. There was no actual violence. The victim was on the other side of the bar and he was not injured. For the

reasons already described, the appellant’s moral culpability was relatively low, and considerably lower than that of his co-offenders. From a review of the various sentences placed before the Court and the objective seriousness of the appellant’s conduct it is clear that his offending falls into the mid to lower range of such offences.

[34] The leading authority about whether a sentence on appeal is manifestly excessive remains *House v The King* in which the following is stated:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, *but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance*. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[1]

[35] In our opinion, the appeal against the sentence imposed for count 3 on the indictment should be allowed. It is a well-established principle in sentencing youths that a youth should only be kept in custody for the shortest appropriate period. A starting point of 44 months’ imprisonment for this particular offending does not comply with that fundamental principle of

1 (1936) 55 CLR 499 at 503.

sentencing youths who have committed criminal offences. The sentence of 33 months imposed for count 3, the crime of aggravated robbery, is manifestly excessive.

[36] As a consequence of the sentence for count 3 being manifestly excessive, we also find that the total sentence was manifestly excessive. However, in making that finding we do not consider that the sentence of 15 months' detention imposed on the appellant for count 1, the offence unlawful entry, was manifestly excessive. The appellant (and his co-offenders) persisted in unlawfully entering the lodge at night even after he knew the lodge was occupied. He did so in company in order to steal a significant quantity of alcohol, and such offences are prevalent.

Grounds 2, 3 and 4: The resentence of six months' detention for each of the three assaults and the operation of s 121(6) of the *Youth Justice Act*

[37] The appellant appeals against the sentences of six months' detention imposed for each of the three aggravated assaults on the following grounds.

> 2. That the learned sentencing Judge erred in resentencing the [appellant] in respect to the [three] offences in the Supreme Court.
> 3. That the sentences of six months' detention in respect to each of the breaches of the good behaviour bonds was, in all the circumstances of the offending and the [appellant], manifestly excessive.
> 4. That the learned sentencing Judge erred in resentencing the [appellant] on a statement of facts which were substantially different to the facts to which he had pleaded guilty in the Youth Justice Court.[2]

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2 Appeal Book 178.

[38] Ground 4 is pleaded in circumstances where the parties provided the sentencing Judge with the wrong facts for each of the three assaults committed by the youth in 2016, and conducted the plea on the basis that those facts were the basis on which the Youth Justice Court had dealt with the matters.

The source of the power to resentence

[39] The principal ground relied on by the appellant was that his Honour erred by purporting to resentence the appellant under s 121(6) of the *Youth Justice Act* (NT) because that section does not confer any power on the Supreme Court to deal with a breach of an order of the Youth Justice Court. There are two aspects to this submission. First, did the sentencing Judge resentence the appellant for the three assaults under s 121(6) of the *Youth Justice Act*? Second, if so, did his Honour have jurisdiction to do so?

[40] In our opinion, there is nothing to indicate that his Honour resentenced the appellant under s 121(6) of the *Youth Justice Act*. His Honour expressly stated in his sentencing remarks that he was sentencing the youth under the *Sentencing Act* (NT)[3] and he made no mention of either s 121 or s 83 of the *Youth Justice Act*. The two references his Honour makes to the *Youth Justice Act* (one express, the other implicit) tend to confirm that he only relied on that Act in two particular respects.

3 Appeal Book 163.

[41] First, his Honour states he would be taking into account the sentencing principles contained in the *Youth Justice Act* and the fact the appellant was still a "relatively young man" (sic).[4] The relatively clear import is that the Court would be taking those important principles of youth sentencing into account, but would be sentencing (including resentencing) the appellant in accordance with the *Sentencing Act*.

[42] Second, his Honour states that because the offender is a youth, he could fix a non-parole period that is lower than the minimum set under the *Sentencing Act*.[5] This is a reference to s 85 of the *Youth Justice Act* and indicates that his Honour acted in accordance with *Anderson v The Queen*.[6]

[43] It is reasonable to presume that if the sentencing Judge was going to resentence the appellant for the three assaults in accordance with s 121(6) of the *Youth Justice Act*, the matter would have been made express in the sentencing remarks. Further, if a good behaviour bond is revoked under s 121(6), the Court is required to deal with the youth under s 83 of the *Youth Justice Act*. So it is to be expected that his Honour would have referred to both of those sections in that event. The conclusion that his Honour did not resentence the appellant under s 121(6) is further supported by the fact that under the *Sentencing Act* too, a sentencing Judge must deal with an offender

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4 Appeal Book 163.

5 Appeal Book 165.

6 [2014] NTCCA 18.

who breaches a good behaviour bond by either confirming or varying the order imposing the bond, or by resentencing the offender *ab initio*.[7]

[44] The stronger inference is that the learned sentencing Judge resentenced the appellant in accordance with what he understood were his powers under the *Sentencing Act*. In so doing, his Honour erred in law by misapprehending his powers under the *Sentencing Act*. Section 15 of the *Sentencing Act* confers the power of the Supreme Court to deal with a person for breach of a good behaviour bond. Section 15 only applies to orders for release on bond made under ss 11 and 13 of the *Sentencing Act*. It has no application to orders to be of good behaviour made by the Youth Justice Court under s 83(1)(f) of the *Youth Justice Act*.

[45] While s 51 of the *Justice Portfolio (Miscellaneous Amendments) Act 2005* inserted s 15(3C) of the *Sentencing Act*, and that subsection grants the Supreme Court power to deal with orders made by the Local Court under s 11 and s 13 of the *Sentencing Act*, no such power has been granted to the Supreme Court under the *Sentencing Act* for orders made by the Youth Justice Court under s 83(1)(f) of the *Youth Justice Act*. An order purporting to exercise the power conferred by s 15 of the *Sentencing Act* in relation to the breach of a good behaviour order made by the Youth Justice Court gives

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7 *Sentencing Act*, s 15(4).

rise to error similar to that considered by the Court in *R v Gurruwiwi*[8], except that the section misapplied appears in the *Sentencing Act*.

Jurisdiction under s 121(6) of the *Youth Justice Act*

[46] For reasons which will become apparent, it is necessary to go on to consider whether the Supreme Court had jurisdiction to deal with the appellant under s 121(6) of the *Youth Justice Act* for breaches of the sentencing orders made by the Youth Justice Court.

[47] The jurisdiction of the Youth Justice Court is dealt with in Division 1 of Part 5 of the *Youth Justice Act*. The starting point when considering the jurisdiction of the Youth Justice Court is s 52 of the Act, which states:

> (1) The following must be dealt with in accordance with this Act by the Youth Justice Court:
>
> (a) all charges in respect of summary offences or indictable offences allegedly committed by a youth;
>
> (b) all applications in the Territory relating to unlawful activity, or alleged unlawful activity, of youths, whether or not that activity took place, or is alleged to have taken place, in the Territory.
>
> (2) The jurisdiction of the Youth Justice Court in relation to an offence allegedly committed by a youth is not affected only because the alleged offender subsequently turned 18 years of age.
>
> (3) Subsection (1) does not limit the jurisdiction of the Supreme Court to deal with a matter involving a youth where an ex officio indictment has been presented to that Court.
>
> (Emphasis added)

8 (2008) 22 NTLR 68.

[48] It is significant that all charges and applications under s 52(1)(a) and (b) are to be dealt with in accordance with the *Youth Justice Act*. The Act then goes on to provide that:

(1) The Youth Justice Court must deal by way of preliminary examination with a charge against a youth that would be punishable by imprisonment for life if it was committed by an adult.[9]

(2) Subject to exceptions concerning offences punishable by life imprisonment and certain indictable property offences which may be dealt with summarily[10], a youth may consent or not to a charge of an indictable offence being heard and determined summarily and if the youth consents the Youth Justice Court must hear and determine the charge summarily.[11]

(3) If the youth does not consent to a charge for an indictable offence being determined summarily the Youth Justice Court must deal with the charge by way of preliminary examination, although the youth may subsequently elect to have the charge heard and determined summarily at any time before or during the preliminary examination.[12]

(4) The Youth Justice Court may decline to hear a charge against a youth for an indictable offence summarily if it considers it is not appropriate

9 *Youth Justice Act*, s 54A.

10 *Local Court (Criminal Procedure) Act*, s 120.

11 *Youth Justice Act*, s 55(3).

12 *Youth Justice Act*, s 55(4), s 56A.

to do so, and must in those circumstances proceed by way of preliminary examination.[13]

[49] By virtue of the *Supreme Court Act* (NT), the Supreme Court has general criminal jurisdiction to try offences charged on indictment.[14] There is no general ouster of that jurisdiction in relation to youths charged with indictable offences. The effect of the provisions in Division 1 of Part 5 of the *Youth Justice Act*, together with ss 82, 83 and 121 of the *Youth Justice Act*, is that the Supreme Court retains its jurisdiction over youths charged with indictable offences unless the youth elects (consents) to have the charge tried summarily in the Youth Justice Court. However, the situation in relation to applications for breach of orders is not quite so clear, and the resolution of any jurisdictional issues remains to be resolved by considering the relevant statutory provisions on a case by case basis.

[50] The relevant statutory provisions for the purposes of this ground of appeal are in ss 121 and 82(1)(a) of the *Youth Justice Act*. Subsections 121(1)(c), (2) and (6) of the *Youth Justice Act* state:

> (1) A youth breaches an order if the youth:
>
> […]
>
> (c) commits an offence against a law in force in the Territory or elsewhere […]
>
> (2) The Court may, on application by the appropriate authority or prosecutor or of its own motion, make an order under this section.
>
> […]

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13 *Youth Justice Act*, s 56.

14 *Braun v The Queen; Ebatarintja v The Queen* (1997) 6 NTLR 94 at 100.

> (6) If the Court is satisfied by evidence on oath or by affidavit, or by the admission of a youth, that the youth has breached an order, the Court may:
>
> (a) if the order is still in force:
>
> (i) confirm or vary the order; or
>
> (ii) revoke the order and deal with the youth under section 83 as if it had just found him or her guilty of the relevant offence or offences; and
>
> (b) if the order is no longer in force - deal with the youth under section 83 as if it had just found him or her guilty of the relevant offence or offences.

[51] The term "Court" is defined in s 5 of the *Youth Justice Act* to mean:

> … the Youth Justice Court as mentioned in section 45 and, if the context requires, includes the Supreme Court exercising its jurisdiction under this Act. (Emphasis added)

[52] For the reasons already given, the only power to resentence a youth for the breach of a sentencing order of the Youth Justice Court made under s 83(1)(f) of the *Youth Justice Act* is that provided by s 121 of that Act. Counsel for the appellant submitted that the power conferred by s 121 is exclusive to the Youth Justice Court. It was said that so far as s 121 of the *Youth Justice Act* is concerned, there is no reason why "*the context requires*" the word Court used in that section to include "*the Supreme Court exercising its jurisdiction under* [*the*] *Act*". For that reason, the three assault charges fell within the jurisdiction of the Youth Justice Court, not the Supreme Court.

[53] Counsel for the appellant submitted that conclusion was supported by two contextual propositions. The first was the legislative intention apparent in

the *Youth Justice Act* that the Youth Justice Court should deal with the majority of offences committed by youths. The second was said to be that in the absence of any express enabling provision, such as that contained in s 15(3C) of the *Sentencing Act*, it would be anomalous for s 121 of the Act to be interpreted in a way that allows the Supreme Court to have jurisdiction to deal with breaches of orders of the Youth Justice Court if there was no jurisdiction for the Supreme Court to sentence the youth in the first place. The first proposition may be accepted, but the second should not.

[54] There are three matters which must be taken into account in determining whether the Supreme Court has jurisdiction to deal with a breach of a sentencing order of the Youth Justice Court when sentencing a youth for an offence which constitutes a breach of an order of the Youth Justice Court. First, the text of s 121 of the *Youth Justice Act* read in the context of the whole of the Act. Second, the operation of s 82(1)(a) of the Act. Third, what the Court of Criminal Appeal has already said about the operation of s 121 of the Act.

[55] There are a number of matters arising from the text of s 121 of the *Youth Justice Act* and the structure of the Act as a whole which must be considered when interpreting s 121 and deciding whether "Court" may include the Supreme Court. First, the provisions of s 121 form part of the sentencing regime established for youths under the Act. Second, s 121 deals solely with breaches of sentencing dispositions made under s 83 of the Act, which contains all of the sentencing dispositions which may be made by the Youth

Justice Court. Third, both the Supreme Court and the Youth Justice Court may make sentencing orders under s 83 of the Act. Fourth, not infrequently, breaches of sentencing orders are constituted by further offending. When that occurs, as it did in this case, it is common practice for the court sentencing a youth for the most recent offence to deal with breaches of any previous sentencing dispositions that are constituted by the most recent offending. Fifth, the offences referred to in s 121(1)(c), which constitute the breach, include offences that fall to be dealt with under the jurisdiction of the Supreme Court, as was the case in this matter. Sixth, if the Court makes a decision to revoke a sentencing order under s 121 of the Act, the youth is to be dealt with under s 83 of the Act as if the Court had just found the youth guilty of the relevant offence or offences. Seventh, breach proceedings may be brought before the Court either by the appropriate authority, the prosecution or *by the Court of its own motion*. Eighth, the Court in s 121 is a court which has jurisdiction to sentence a youth and that includes the Supreme Court.

[56] As to the powers of the Supreme Court in sentencing a youth, s 82(1)(a) of the *Youth Justice Act* provides that:

> If a youth is found guilty before the Supreme Court of an offence, the Supreme Court <u>may do any of the following</u>:
>
> (a) exercise, in addition to its powers, the powers of the Youth Justice Court;
>
> (Emphasis added)

[57] Subsection 82(1)(a) had application in this case as the appellant had been found guilty of two offences before the Supreme Court. As the offences constituted breaches of orders of the Youth Justice Court, a power of the Youth Justice Court which may be exercised by the Supreme Court, in addition to its powers, is the power under s 121(6) of the *Youth Justice Act*. That conclusion is reinforced by the fact that the power under s 121(6) of the *Youth Justice Act* may be exercised of a court's own motion, including at the time of sentencing a youth for the further offending which constitutes the breach.

[58] It does not matter that the Supreme Court did not find the appellant guilty of the three assaults because the Supreme Court had jurisdiction over the youth for the counts on the indictment. A consequence of the convictions on the indictment was that the appellant became amenable to be dealt with under s 83 of the *Youth Justice Act* "as if [the Court] had just found him guilty of the relevant offence or offences"[15]. In similar circumstances, the Youth Justice Court may exercise the power under s 121(6) of the Act. In the same way that s 82(1)(a) enables the Supreme Court to exercise the powers under s 85 of the *Youth Justice Act*, the subsection also makes the powers of the Youth Justice Court under s 121(6) of the Act available to the Supreme Court.

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15 *Sentencing Act*, s 121(6)(a)(ii).

[59] Counsel for the appellant submitted further that the Supreme Court does not have jurisdiction to deal with a youth for an offence contrary to s 188 of the *Criminal Code*, with the consequence that the power under s 121(6) of the *Youth Justice Act* was unavailable in this case. The three assaults in respect of which the good behaviour orders were made were aggravated in nature, and a charge contrary to s 188(2) of the *Criminal Code* is an indictable offence as it carries a maximum penalty of imprisonment for five years.[16] Even if those good behaviour orders had been made in relation to summary offences, for the reasons already described the finding of guilt on the offences on the indictment would have enlivened the operation of s 82(1)(a) of the *Youth Justice Act* to enable the Supreme Court to exercise the powers under s 121(6) of the Act.

[60] Although this particular issue has not previously been considered by the Court of Criminal Appeal, that result is consistent with broad statements of principle made in two previous decisions which have considered the interaction between the sentencing provisions in the *Sentencing Act* and the *Youth Justice Act*.

[61] In *R v Gurruwiwi*[17], Martin (BR) CJ observed:

> […] the primary source of the sentencing powers of the Supreme Court is the *Sentencing Act 1995* (NT): *Braun v The Queen* (1997) 6 NTLR 94 at 100. However, s 82(1)(a) of the *Youth Justice Act 2005* (NT) provides that if a youth is found guilty before the Supreme Court the

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16 *Criminal Code,* s 3.

17 (2008) 22 NTLR 68.

> court may, in addition to its powers, exercise the powers of the Youth Justice Court. Speaking generally, therefore, when sentencing a youth, in addition to the powers found in the *Sentencing Act*, the Supreme Court may call upon the powers of the Youth Justice Court contained in the *Youth Justice Act*. [18]

[62] Similarly, Riley J observed:

> Section 82 of the *Youth Justice Act* provides the powers of the Supreme Court in sentencing a youth who is found guilty before that court of an offence […]
>
> […]
>
> In addition to the sentencing options available to the Supreme Court under the *Sentencing Act* it has available to it the powers of the Youth Justice Court which are found in Pt 6 of the *Youth Justice Act*.[19]

[63] Although that case involved a consideration of the powers available to the Supreme Court under s 85 of the *Youth Justice Act* when sentencing, it may be noticed that s 121 also appears in Part 6 of that Act.

[64] In the later case of *TB v The Queen*[20], the Court of Criminal Appeal held that s 121 of the *Youth Justice Act* contains the mechanism for dealing with all breaches of orders made by either the Youth Justice Court or the Supreme Court under s 83 of the *Youth Justice Act*. In that case the sentencing Judge had expressly exercised the powers under the *Youth Justice Act* when sentencing the youth, with the result that the youth had been sentenced exclusively under that Act. A sentence of two years' detention to be wholly suspended was imposed. The youth subsequently breached the sentencing

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18 (2008) 22 NTLR 68 at [2].

19 (2008) 22 NTLR 68 at [48]-[49].

20 [2018] NTCCA 8 at [26]-[30].

order by committing further offences. When the sentencing Judge dealt with the youth for the further offences, the sentence of two years' detention was purportedly revoked under s 43 of the *Sentencing Act* and the youth ordered to serve that time in prison.

[65] The Court of Criminal Appeal held that having elected to impose the sentence of two years' imprisonment and exercise the powers of the Youth Justice Court under s 83 of the *Youth Justice Act*, the sentencing Judge could not rely on the powers granted to the Supreme Court under s 43 of the *Sentencing Act* but was bound by the provisions of the sentencing regime adopted at the time of sentencing the youth. However, in making that finding the Court cited the following passage from the reasons of Martin (BR) CJ in the earlier decision in *R v Gurruwiwi*:

> It is common ground that the legislative scheme of the *Youth Justice Act* is designed to provide the Supreme Court with flexibility and a range of powers wider than those contained in the *Sentencing Act* when dealing with youths. Hence the ability of the Court to draw upon the powers found in both the *Sentencing Act* and the *Youth Justice Act*.[21]

[66] In summary, there are two compelling reasons why the context requires the reference to "Court" in s 121 of the *Youth Justice Act* to include the Supreme Court exercising its jurisdiction under that Act.

[67] First, in circumstances such as were present in *TB v The Queen*[22] the sentencing Judge in the Supreme Court must deal with any breaches of its

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21 (2008) 22 NTLR 68 at [8].

22 [2018] NTCCA 8 at [26]-[30].

orders under s 121 of the Act. The jurisdiction is not foreign or alien to the Supreme Court, and forms part of its ordinary sentencing functions.

[68] Second, in circumstances where the Supreme Court is sentencing a youth for an offence which constitutes a breach of an order of the Youth Justice Court, s 82(1)(a) of the *Youth Justice Act* enables the power of the Youth Justice Court under s 121(6) of the Act to be exercised by the Supreme Court. That avoids a fragmentation of proceedings and the requirement that the youth be subjected to two processes for dealing with the breach and the offence constituting breach, and permits the Supreme Court to give a unitary consideration to totality and cumulation.[23] Justice is best served by an interpretation which accords that operation to the *Youth Justice Act*.

Determination of Ground 2

[69] As described at the outset, this ground of appeal contends that the learned sentencing Judge erred in resentencing the appellant for the breach of the good behaviour bonds. As we have found, the learned sentencing Judge fell into error by purporting to resentence the appellant under the provisions of the *Sentencing Act*. As the Court of Criminal Appeal observed in *Gilligan v The Queen*[24], and again in *TB v The Queen*[25], if error of principle is

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23 This is consistent the sentencing principles stated in s 4(m) and (q) of the *Youth Justice Act*, which provide that decisions affecting a youth should be made as timely as possible and criminal proceedings should not be instituted against a youth if there is an alternative means of dealing with the matter.

24 *Gilligan v The Queen* [2007] NTCCA 8 at [12].

25 [2018] NTCCA 8 at [31]-[32].

disclosed in sentencing the Court must consider for itself what the appropriate disposition should have been.

[70] The adoption of that approach assumes that the Supreme Court had jurisdiction and power to make the orders under review. As we have also found, contrary to the appellant's principal submission on this ground, the Supreme Court in this case had power under s 121(6) of the *Youth Justice Act* to deal with the appellant for the breach of the orders made by the Youth Justice Court, and by extension so does this Court on appeal. The question whether some other resentencing disposition was warranted in law is best addressed in the context of the third and fourth grounds of appeal, which are that the sentences of six months' detention for each of the breaches of the good behaviour bonds was manifestly excessive and based on a statement of facts substantially different to the facts to which the appellant had pleaded guilty.

<u>Manifest excess and the facts of the three assaults</u>

[71] The facts of the two assaults on file No 21645763 which were before the learned sentencing Judge are set out below. The facts which did not form part of the basis on which the appellant pleaded guilty, and which should not have been before the sentencing Judge, are underlined.

1. The defendant (ML) is a 15 year old youth. The victim (KS) is also a 15 year old youth. The defendant and the victim have been in a domestic relationship for nine months and are both living together at H602 Angurugu Community with the defendant's parents.
2. Sometime prior to 19 August 2016, the youth and the victim travelled to Darwin together in the company of the youth's parents.

3. At about 8 pm on the evening of Friday 19 August 2016, the youth, the victim, witness Alfred Lalara and witness Alice Durilla went to visit family members at Royal Darwin Hospital.
4. Whilst at the hospital, the youth had become upset with the victim over jealousy concerns in their relationship and the youth left the area on foot.
5. Witness Lalara who was driving the family car, pulled the vehicle over onto the road beside the youth and encouraged him into the car.
6. The youth opened the rear car door and sat down next to the victim. The youth unexpectedly punched out at the victim with a closed fist striking the victim in the left eye with such force causing lacerations to the eye socket above and below the eye.
7. The youth exited the vehicle and fled the area on foot.
8. Witness Durilla escorted the victim to the hospital's emergency room to be treated.
9. As a result of the assault, the victim suffered lacerations, swelling, bruising and pain to her left eye socket and cheek. The treatment received included six stitches to the top of her left eye and five stitches below the eye.

INCIDENT TWO

1. During the afternoon of Sunday 2 October 2016, the youth and the victim were together at H603 Angurugu Community. The youth was sitting on the front porch of the property with witness Yantarrnga and the victim was standing nearby.
2. A vehicle containing other youths from Angurugu drove past the area and for reasons unknown to the victim, the youth immediately became jealous. The youth was holding a boning knife at the time which he threw at the victim in a backhanded 'flick' motion. The victim attempted to avoid the knife however it struck her on her right foot.
3. The victim went to the adjoining duplex H603 Angurugu and sought refuge with witness Lalara and witness Durilla however the youth armed himself with a broomstick and followed the victim. He struck the victim once across her lower back before leaving the area on foot.
4. Witness Lalara notified police.
5. As a result of the assault, the victim suffered a small laceration to the inside of her right foot as well as tenderness to her lower back.
6. At 6:50 pm on 2 October 2016, senior Constable Ray Stedman and Constable Gemma Day located the youth at H605 Angurugu

Community where he was arrested. <u>During his arrest the youth attempted to discard the knife which was concealed on his person.</u> The youth was conveyed to the Alyangula police station where he was processed into custody and held pursuant to sections 137 and 138 of the Northern Territory *Police Administration Act*.

7. The youth declined the opportunity to participate in an electronic record of interview.
8. The youth was charged and bail considered.

[72] As to the first incident, the facts tendered before the sentencing Judge included references to an injury to the eye socket and cheek and swelling and bruising, which were not admitted by the appellant in the Youth Justice Court. As to the second incident, the facts tendered before the sentencing Judge included a second assault upon the victim with a broomstick, an injury to the lower back of the victim and the youth concealing a knife which he attempted to discard, which were not admitted by the appellant in the Youth Justice Court.

[73] The facts of the assault on file No 21647726 which were before the learned sentencing Judge are set out below. The facts which did not form part of the basis on which the appellant pleaded guilty, and which should not have been before the sentencing Judge, are underlined.

1. The defendant in this matter ML is a youth. The victim is KS. Both the defendant and the victim are partners.
2. On 4 October 2016 a s 41 police domestic violence order was taken out naming the defendant as ML and the protected person as KS with non-harm conditions involved. This order is due in court on 19 October 2016 (…).
3. On 14 October 2016 the defendant and victim were at Lot 603 Angurugu inside the bedroom when both engaged in an argument.

4. The victim left the room and walked next door to the adjoining unit to ask for [a] smoke. On her return the defendant became enraged with jealousy, accusing the victim of "looking" at his brother.
5. The defendant and victim stood at the back of Lot 603 in the laundry area when the defendant punched the victim hard on the back.
6. The defendant then pulled <u>hard on</u> the victim's hair and dragged her to the ground. He <u>continued to</u> punch[ed] the victim on her back [3 times] <u>and body</u> causing the victim to scream in pain.
7. Police arrived at the location inside the bedroom of the unit next door. The defendant was arrested, cautioned and placed in the police caged vehicle.
8. The defendant was conveyed back to the Alyangula Watch house where [he was] processed and placed on S137PAA.
9. The defendant declined to participate in an electronic record of interview.
10. The defendant was later charged and bail considered.
11. At the time of the offence the victim did not give permission for the defendant to assault her in any way.
12. As a result of the assault the victim sustained bruising and tenderness to the right side of her back.
13. The defendant declined to participate in an interview.

[74] As to the third assault, the facts before the sentencing Judge included the victim's hair being pulled hard, the victim being struck to parts of the body other than her back and the appellant continuing to punch the victim (rather than punching her four times in total), which were not admitted by the appellant in the Youth Justice Court.

[75] Each of the three assaults committed by the appellant have their own serious features. The first assault involved a vicious blow to the head near one of the victim's eyes and the victim received 11 stitches to repair the lacerations to her face. Blows to the head are particularly dangerous. The second assault

involved the use of a knife and the third assault was a sustained assault. Each of the three assaults was aggravated by the fact that the victim was a female who was unable to defend herself. However, at no stage was the victim significantly injured.

[76] At the time he committed the three assaults in 2016 the appellant was 15 years of age and had no prior convictions for offences of violence. He had been convicted of a number of property offences but had not been sentenced to a term of imprisonment. He was either given a good behaviour bond or no further action was taken. A primary criminogenic factor in the appellant's offending was the consumption of cannabis and his reliance upon the dangerous drug.

[77] For the reasons already given, it is unnecessary to make any finding of manifest excess as the resentencing exercise was vitiated by error and in those circumstances this Court must exercise its own discretion in fixing the appropriate sentence. In our opinion, less severe sentences than six months' detention for each of the three assaults were warranted and should have been passed in the resentencing exercise. The fact that the sentencing Judge was provided with the wrong facts may have contributed to that result.

Resentence

[78] In resentencing the appellant we take into account the following matters in addition to those to which reference has already been made.

[79] The appellant was released on parole with conditions on 14 August 2018, which was almost two months after the expiry of the non-parole period fixed by the sentencing Judge. The appellant is now 17 years of age. He is currently residing with his father and aunt. They are aware of his offending and are prepared to support him. The appellant's parole order includes conditions that he shall: not consume any dangerous drugs; submit himself to testing for the consumption of dangerous drugs; participate in assessment counselling and/or treatment as directed by a Community Youth Justice Officer; and not associate with persons specified in a direction by his Community Youth Justice Officer.

[80] The appellant is currently enrolled with the Multi Media Program as part of the Community Development Program run by Groote Eylandt and Bickerton Island Enterprises, and is enrolled to receive the Newstart Allowance. The appellant has been referred to Alcohol and Drug Counsellor, Mr Gregory Sheldon of Angurugu Health, and a Community Youth Justice Officer is supporting him to attend required appointments. To date the appellant has been compliant with his conditions of parole.

[81] The term of the appellant's sentence of imprisonment will be reduced in accordance with the sentences we impose on him. The sentence we impose in respect of count 3 on the indictment has been reduced by six months in recognition of the offender's plea of guilty. The sentences we impose are intended to, and do, leave the appellant's grant of parole unaffected. He remains on parole unless it is otherwise revoked.

[82] Accordingly, we make the following orders:-

1. The sentences of detention imposed for count 3 on the indictment and for the three assaults committed by the appellant in 2016 are set aside.

2. For count 3 on the indictment we sentence the appellant to 18 months' detention. That sentence of detention is backdated to 2 December 2017.

3. Three months of the sentence of 15 months' detention imposed for count 1 on the indictment are to be served cumulatively on the sentence of detention imposed for count 3.

4. Under ss 121(6) and 83(1)(l) of the *Youth Justice Act* we sentence the appellant without conviction to 3 months' detention for each of the three assaults he committed in 2016. Each of those sentences of 3 months' detention is to commence on 2 December 2017.

5. The sentence of 3 days' detention imposed by the Supreme Court for the breach of parole is also to be served wholly concurrently with the sentence of detention imposed for count 3 on the indictment.

6. The total effective period of detention is 21 months which is to commence on 2 December 2017.

7. Under s 85 of the *Youth Justice Act*, we fix a non-parole period of 6 months detention which is also to commence on 2 December 2017.