CITATION:	*Lantjin v Phipps* [2017] NTSC 39
PARTIES:	LANTJIN, Margaret
	v
	PHIPPS, Ainsley
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA 20 of 2016 (21522455)
DELIVERED ON:	26 May 2017
DELIVERED AT:	Darwin
HEARING DATE:	31 August 2016
JUDGMENT OF:	GRANT CJ

CATCHWORDS:

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – JUDGMENT AND PUNISHMENT

Appeal against sentence – appellant convicted in the Local Court of damage to property and aggravated assault –sentence of imprisonment of nine months, to be suspended after the appellant served three months – no prior convictions – asserted vulnerability due to various medical conditions and poor emotional regulation – manifest excess not established – error of principle in the assessment of rehabilitative purpose – appeal allowed and appellant resentenced having regard to present circumstances.

Criminal Code (NT) s 188, s 241
Local Court (Criminal Procedure) Act (NT) s 163, s 177, s 214

Sentencing Act (NT) s 5, s 78B

Dinsdale v R (2000) 202 CLR 321, *DPP v Terrick; DPP v Marks; DPP v Stewart* (2009) 24 VR 457, *Elliot v Harris (No 2)* (1976) 13 SASR 516, *Emitja v The Queen* [2016] NTCCA 4, *Hanks v The Queen* [2011] VSCA 7, *Johnson v The Queen* [2012] NTCCA 14, *Liddy v R* [2005] NTCCA 4, *Mawson v Nayda* (1995) 5 NTLR 56, *Namala v Whittington* [2016] NTSC 71, *Noakes v The Queen* [2015] NTCCA 7, *Peach v Bird* (2006) 17 NTLR 230, *R v Horstmann* [2010] SASC 103, *R v Lutze* (2014) 121 SASR 144, *R v Meschede* [2016] SASCFC 49, *R v Peterson* [1984] WAR 329, *R v Valentini* (1980) 48 FLR 416, *The Queen v Bloomfield* [1999] NTCCA 137, *The Queen v Goodwin* [2003] NTCCA 9, *Truong v The Queen* (2015) 35 NTLR 186, *Vartzokas v Zanker* (1989) 51 SASR 277, referred to.

Fox & Freiberg's sentencing: state and federal law in Victoria (Third Edition), Law Book Company, 2014.

REPRESENTATION:

Counsel:

Appellant:	R Pettit
Respondent:	I Rowbottam

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 DARWIN

Lantjin v Phipps [2017] NTSC 39
No. 21522455

BETWEEN:

MARGARET LANTJIN
Appellant

AND:

AINSLEY PHIPPS
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 26 May 2017)

[1] This is an appeal brought pursuant to s 163 of the *Justices Act* (NT).[1]

[2] On 9 February 2016, the appellant pleaded guilty to causing damage to property belonging to another person contrary to s 241(1) of the *Criminal Code* (NT); and to assault contrary to s 188 of the *Criminal Code*, aggravated by the use of a dangerous weapon and the victim's inability to defend herself.

[3] The first offence attracted a maximum penalty of imprisonment for 14 years. It was also an "aggravated property offence" within the meaning of s 78B of the *Sentencing Act* (NT). This required the court on

1 Now renamed the *Local Court (Criminal Procedure) Act* (NT).

recording a conviction to order the offender to serve a term of imprisonment[2] or to participate in an approved project under a community work order. That mandatory provision has application unless the court was of the view that there were "exceptional circumstances" in relation to the offence or the offender.[3]

[4] The second offence attracted a maximum penalty of imprisonment for five years.[4]

[5] On 9 February 2016, the Court of Summary Jurisdiction (as it then was) sentenced the appellant to imprisonment for nine months in respect of the assault and imprisonment for one day in respect of the damage to property. The court ordered that those sentences be served concurrently, and made an order suspending the term of imprisonment after the appellant had served three months in gaol.

[6] A Notice of Appeal contending that the sentence was manifestly excessive was filed on 18 February 2016.[5] The appellant served 15

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2 A court which orders the offender to serve a term of imprisonment in those circumstances may only wholly suspend the sentence on the offender entering into a home detention order: *Sentencing Act*, s 78B(3).

3 *Sentencing Act*, s 78B(2).

4 The Court of Summary Jurisdiction was limited, at the time of sentencing, to the imposition of a period of imprisonment for two years. However, that period does not represent the maximum penalty prescribed for offences against that section, intended for cases falling within the worst category for which the penalty is prescribed. It is well established that the appropriate approach to sentencing for offences under s 188(2) of the *Criminal Code* is to measure the circumstances of the offending against the maximum penalty of five years, and to sentence accordingly: see *Wheeler v Eaton* [2012] NTSC 80 at [17] referring to *Taylor v Malagorski* [2011] NTSC 98 at [24] and *C v Gokel* [1999] NTSC 93 at [14]-[15]. The jurisdictional limit of imprisonment for two years "upon being found guilty summarily" has since been removed from s 188 of the *Criminal Code*. See, generally, *Emitja v The Queen* [2016] NTCCA 4 at [48]-[49].

days of actual imprisonment before being granted bail on 24 February 2016 in anticipation of the appeal.

[7] The appellant's contention in broad terms is that the magistrate placed excessive weight on the purpose of general deterrence and gave insufficient consideration to the appellant's subjective circumstances, resulting in a manifestly excessive disposition.

Objective circumstances of the offending and subjective circumstances of the offender

[8] The agreed facts on which the matter proceeded to a plea may be summarised as follows.

- At approximately noon on Tuesday, 19 May 2015 the appellant was present outside the Wadeye Clinic with her partner. They were arguing.
- The victim was a remote nurse employed at the clinic, and who was 33 weeks pregnant at the time. She came out of the clinic, got into one of the clinic vehicles, and reversed it out of the car park and onto a street in front of the clinic. She then started to drive away.
- The appellant was standing approximately two metres away from the vehicle as it started to move forward. She threw a rock at the

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5 The appeal was brought pursuant to s 163(1) of the *Justices Act*. As already noted, the *Justices Act* was renamed the *Local Court (Criminal Procedure) Act* with effect from 1 May 2016. Section 214 of the *Local Court (Criminal Procedure) Act* provides that s 177, as in force immediately before 1 May 2016, continues to apply to the appeal. Nothing in this appeal turns on that savings provision.

vehicle. It struck the driver's side door centre pillar of the vehicle at about head height. The force was such that it dented the pillar. The victim continued to drive down the road for approximately 20 metres before turning into the clinic car park. She remained in the vehicle.

- The appellant walked to the vehicle, walked around the vehicle to the driver's side, picked up another rock (or perhaps the same rock), and threw it at the victim. The victim saw the appellant approach the vehicle and pick up the rock.[6] She ducked down in the vehicle, put her arms over her head and turned her body to the side in an attempt to protect herself. The rock broke the front passenger side window and hit the victim in the lower left side, causing her pain and showering her with glass. The victim suffered bruising and minor lacerations as a result.

- The appellant yelled the words "mother fucker" at the victim and walked away. Before launching the attack the appellant knew the victim was driving the vehicle, and also knew the victim was pregnant.

[9] A pre-sentence report dated 3 December 2015, which had been ordered by the magistrate and prepared by the Department of Correctional

6 The rock in question weighed approximately 800 g and was described by the magistrate as "a most fearsome weapon in the hands of an angry person": see Transcript of Proceedings, 9 February 2016, p 17.9.

Services, provided the following relevant information concerning the appellant's subjective and personal circumstances.

- The appellant was 28 years of age at the time of the offending.
- The appellant had no prior criminal record.
- The appellant does not use alcohol or illicit drugs.
- The appellant's first language is Murrinh-patha and she has little written or spoken English.
- The appellant was born in Darwin and raised in Wadeye. Her mother was employed at a community aged care facility and her father was employed at the local school. The appellant describes her childhood as happy and settled. Her parents did not fight or abuse substances. Her parents had no negative interactions with the criminal justice system. Household discipline was described as consistent and fair. The family's financial circumstances were comfortable.
- The appellant attended the local Catholic school to Year 12 level.
- The appellant has never engaged in paid employment and has no desire to do so. The appellant and her partner are in receipt of social security benefits. (The appellant's partner had, perhaps understandably, left his employment at the clinic following the offending.)

- The appellant enjoys fishing, hunting and cooking in the traditional Aboriginal way. The appellant does not participate in ceremony, because she says there are no elders in the community.
- The appellant lives in a stable home environment with extended family in close proximity. At the time of the offending, the appellant had a 10-year-old daughter. Medical reports indicate the appellant has taken good care of the daughter.
- There have been no reports of domestic violence within the appellant's relationship with her partner. The appellant identifies her partner as a positive support.
- A medical report prepared in March 2014 disclosed accounts by the appellant's partner and family of the ideation and planning of self-harm on the part of the appellant, and three attempts at self-harm. One apparently involved an attempt to hang herself. At the time of the assessment in March 2014 the appellant denied any attempts at self-harm. It was recommended at that time that the appellant be admitted to the Royal Darwin Hospital for review and treatment. The appellant did not present to the flight arranged for that purpose. (As shall be seen, at the time of a subsequent psychological assessment in November 2015 the appellant did not present any ideation or plan of self-harm, and previous threats or attempts of that nature were considered to be impulsive.)

- The appellant was diagnosed as an infant with congenital hypothyroidism. She takes medication prescribed to control the condition (thyroxine) only sporadically.
- The appellant has been diagnosed with chronic kidney disease.
- Those medical conditions notwithstanding, the appellant does not present with any intellectual or physical disability.
- The appellant and her partner had been arguing for some months prior to the offence. The principal cause and subject of the disputation in the week leading up to the commission of the offence was that the appellant did not want her partner to work at the clinic.
- At the time of the commission of the offence, the subject of the argument between the appellant and her partner was money. When asked by police following the offending why she had thrown the rocks at the car, the appellant stated she had not intended to hurt anyone and said, "I was just releasing my anger". When asked by Correctional Services for the purpose of preparing the pre-sentence report why she had attacked the victim's vehicle, the appellant stated, "[t]his is normal sometimes when you are angry to smash a car". It may be observed parenthetically that these reasons would seem to be inconsistent with the agreed facts, which

suggest that the offender went out of her way to target the driver's side of the vehicle and thus the victim.

- In response to a direct question the appellant indicated that she was sorry for her actions and hurting the victim, but the authors of the pre-sentence report concluded that she failed to appreciate or acknowledge the gravity of the offence or its impact on the victim.
- The appellant was found to be suitable for supervision by Community Corrections, subject to various conditions in relation to residence, contact with the victim or her family, and participation in counselling and/or treatment.

[10] The appellant was interviewed and assessed by Dr Diane Szarkowicz, a psychologist, for the purposes of that same pre-sentencing investigation. Dr Szarkowicz prepared a report of that assessment dated 25 November 2015. That report disclosed the following additional and relevant matters.

- Medical records provided to Dr Szarkowicz for the purpose of the assessment indicated that the appellant had persistently expressed sexual jealousy concerning her partner, and that this was the cause of regular arguments between them.
- In late 2013 the appellant engaged in three attempts at self-harm. The last and most serious of those occurred on 22 December 2013, when the appellant hung a rope from a tree and was preparing to

hang herself before being intercepted by police. The medical notes suggested that this attempt was precipitated by her sister's suicide and concerns her partner was having an affair.

- The appellant was punctual in her attendance and presented during the interview as neat and clean with appropriate eye contact and tone of voice.
- The appellant was unable to provide insight into her offending.
- The appellant had not previously been diagnosed with any specific mental health disorder. On the basis of the interview and the medical history, the appellant did not satisfy any of the criteria in the latest edition of the *Diagnostic and Statistical Manual of Mental Disorders*, but presented with "poor emotion regulation and limited stress management". There was no evidence for a diagnosis of depression.
- The appellant's impulsivity and poor stress control operated such that during the argument with her partner her anger increased in intensity very quickly with limited means of control.
- The appellant was non-compliant with her medication for hypothyroidism in the period from early 2015 to late-May 2015.
- It is suggested that the appellant's "poor emotion regulation and stress management" were exacerbated by her poor compliance with medication during that period. This followed on from the

appellant's report that she was more susceptible to stress when she did not take her medication (and also when fighting, in noisy places, or when out of cigarettes); and from the proposition that poor compliance made her fatigued and irritable and thus less capable of recognising incipient anger.

- The author expressed the view that with appropriate treatment and compliance with her medication regime the appellant presented a low risk of recidivism. This prognostication was based on the findings that the appellant did not have a mental health disorder; had no history of prior offending; had a supportive family; did not have difficulties with substance abuse; was caring well for her child; and had an emotional lability which could be addressed through treatment.

- Appropriate treatment for the appellant would include counselling to provide strategies for managing stress or coping with anger, and "couples' therapy" to address the source of contention with her partner.

[11] Any assessment of the opinions expressed in that report must be undertaken on the understanding that they are based on an interview conducted by the psychologist with the appellant which was of approximately one hour in duration, was conducted by way of videoconference, and proceeded through the medium of an interpreter.

As the author of the report observed, "[n]aturally these conditions make it more challenging to gather information and make interpretations about an individual's behaviour".

Grounds of appeal

[12] As already noted, the sole ground in the Notice of Appeal is expressed to be that the sentence imposed in respect of the assault charge was manifestly excessive. That assertion is not directed to the head sentence imposed in respect of the assault charge. Rather, it is directed to the order suspending the term of imprisonment after the appellant had served three months.

[13] When pressed during the course of the hearing of the appeal, counsel for the appellant adopted the position that any sentence which involved the appellant serving a period of actual imprisonment upon conviction would have been manifestly excessive having regard to her subjective circumstances. In other words, the appellant does not contend that the sentence would or may have been within range had the magistrate made an order suspending the term of imprisonment after some period less than three months had been served. The contention is that the failure to suspend the sentence in whole involved error.

[14] The appeal against the imposition of a sentence to actual imprisonment resolves essentially to three contentions which, for reasons that will

become apparent, are not strictly limited to an assertion that the sentence was manifestly excessive.

[15] The first contention is that the sentencing magistrate placed excessive weight on the principle of general deterrence.

[16] The second contention is that even in the absence of some demonstrable error of principle in the sentencing process, the sentence to a period of actual imprisonment is clearly and obviously excessive on its face.

[17] The third contention is that the sentencing magistrate acted on a wrong principle by failing to give adequate consideration to, and mischaracterising some aspects of, the appellant's subjective circumstances. In the appellant's Outline of Submissions, the error asserted by this contention is further particularised as:[7]

(a) insufficient consideration of the appellant's "clear vulnerability"; and/or

(b) inaccurate characterisation of the appellant's prospects of rehabilitation.

[18] Counsel for the respondent engaged with those contentions both in the written outline of submissions and during the course of oral argument at the hearing of the appeal.

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7 Appellant's Outline of Submissions, paragraph [18].

[19] A number of preliminary points need to be made concerning those contentions.

[20] As the Northern Territory Court of Criminal Appeal has previously observed, any contention that the sentencing court has accorded inadequate or excessive weight to a factor is properly viewed as a particular of the ground asserting manifest excess.[8] Beyond any inferences that might be drawn from the ultimate determination of whether the sentence fell either within or without the available range, it is neither possible nor necessary for an appeal court to reach any particular conclusion concerning the allocation of weight to a factor. Accordingly, the contention that the sentencing magistrate placed excessive weight on the principle of general deterrence necessarily forms part of the contention that the sentence was manifestly excessive.

[21] Different considerations may apply to the contention that the sentencing magistrate failed to consider or mischaracterised aspects of the appellant's subjective circumstances. Where the contention is not that the sentencing court accorded inadequate or excessive weight to a particular factor, but that the court failed to take into account a relevant factor or had regard to an irrelevant factor or otherwise acted on a wrong principle, the appeal court may substitute its own

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

sentence.[9] If the magistrate's approach to the appellant's subjective circumstances demonstrated error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence, it may be incumbent on the appeal court to impose its own determination or assessment in that respect, and to resentence accordingly.[10]

[22] The distinction was described by Kourakis J (as he then was) in the following terms:[11]

> [36] On an appeal against sentence, the Court of Criminal Appeal has no power to set aside or vary that sentence unless it is satisfied that the sentence is affected by an error of the type identified in *House v The King* [footnote: [1936] HCA 40; (1936) 55 CLR 499 at 504-5]: a failure to take into account relevant matters; having regard to irrelevant matters; or unreasonableness (manifest excess or inadequacy). [Footnote: It needs to be emphasised that a failure to give adequate weight to a relevant matter is not in itself an appellable error; only a failure to have regard to it at all is an error which justifies interference with the discretion. On an appeal against the exercise of the sentencing discretion, a failure to give adequate weight to a matter is only of any significance if it has resulted in an outcome error.] I shall refer to the first two errors as process errors and the last as an outcome error. Where either a process error or an outcome error has been made, the Court of Criminal Appeal may interfere.
>
> [37] Plainly enough, in the case of an outcome error it is implicit in a finding of manifest excess or inadequacy that the Court of Criminal Appeal has formed the view that a different sentence should have been passed and it will vary the sentence accordingly.
>
> [38] In the case of a process error, the Court of Criminal Appeal may yet refrain from interfering with the sentence if it thinks that the resulting penalty was appropriate notwithstanding the demonstrated error. In such a case, the Court of Criminal Appeal will not vary the sentence if

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9 *Johnson v The Queen* [2012] NTCCA 14 at [25].

10 *Emitja v The Queen* [2016] NTCCA 4 at [25], citing *Liddy v R* [2005] NTCCA 4 at [12].

11 *R v Horstmann* [2010] SASC 103 at [36]-[38]; subsequently endorsed in *R v Meschede* [2016] SASCFC 49 at [3]. See also *R v Lutze* [2014] SASCFC 134; 121 SASR 144 at [47].

> it thinks that the same or a higher sentence would be passed if it were to exercise the discretion itself. However, where a process error is demonstrated, the Court of Criminal Appeal may reduce the sentence if in the exercise of its own discretion it considers that a lesser sentence is appropriate, even though the sentence under appeal is not manifestly excessive.

[23] Those same principles govern the determination of this appeal.

Manifest excess and general deterrence

[24] In *Truong v The Queen*[12], the Court of Criminal Appeal referred with approval to the following statement in relation to manifest excess made by Bongiorno JA in *Hanks v The Queen*:[13]

> The term "manifest excess" is usually used when a ground of appeal alleges that a sentence is so egregiously erroneous that the sentencing judge must have made a sentencing error although that error cannot be identified. To succeed on this ground the excess must be obvious, plain, apparent, easily perceived or understood and unmistakable. It must be so far outside the range of a reasonable discretionary judgment as to itself bespeak error.

[25] For the reasons already described, the appellant's contention that the magistrate accorded excessive weight to general deterrence is properly viewed as a particular of the ground asserting manifest excess. The appellant's primary assertion concerning general deterrence is that in the sentencing calculus the magistrate focused on the purpose of

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12 [2015] NTCCA 5; 35 NTLR 186 at [37].

13 [2011] VSCA 7 per Bongiorno JA at [22], Redlich JA agreeing. Also cited in *Namala v Whittington* [2016] NTSC 71 at [25].

general deterrence to the exclusion of other relevant purposes and principles.[14]

[26] In making that criticism the appellant accepts that *ex tempore* reasons delivered in the course of a busy circuit court listing cannot be assessed in accordance with the counsel of perfection, and that it is "inappropriate to attempt to dismember *ex tempore* reasons and subject to a vigorous analysis".[15]

[27] During the course of submissions, and in his sentencing remarks, the magistrate addressed the following observations to the question of general deterrence.

> General deterrence looms large. I mean, it's hard to get professional people out here.[16]
>
> ….
>
> What can't be put aside and what is inescapable here is that this is an act of gross violence. The victim knew that the – sorry, the defendant knew the victim was 33 weeks pregnant. She was enraged about something her partner did, it was not particularly bad, the provocation is miniscule. Certainly this, in the scheme of things compared to the conduct. It was an unprovoked attack on a vulnerable lady, heavily pregnant, a remote area nurse, valued professionals, in a remote place. It was grossly violent, it was persistent, it was done with a fearsome weapon by a person using a high degree of force, though thankfully the injury was minimal but outstandingly extreme danger it posed.
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> The mitigation is powerful but unfortunately the facts are so serious that imprisonment, **notwithstanding this being a first offender and a young first offender**, youngish, given the lack of priors, imprisonment is the only appropriate punishment. **I would abrogate my obligation to the**

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14 The legitimate purposes for the imposition of a sentence on an offender are just punishment, rehabilitation, personal and general deterrence, the expression of community disapproval, and the protection of the Territory community from the offender: see *Sentencing Act*, s 5(1).

15 See, for example, *Peach v Bird* (2006) 17 NTLR 230 at [13].

16 Transcript of Proceedings, 9 February 2016, p 15.3.

> **community in terms of protecting it and deterring others** if I was to do otherwise.[17]

[28] Counsel for the appellant relies in particular on the passages highlighted in the remarks extracted above as demonstrating that the magistrate elevated general deterrence over the other sentencing purposes; ignored the principle that a rehabilitative approach may operate in the community interest by reducing the prospect of re-offending; and erroneously concluded that only a period of actual imprisonment could serve to deter others.

[29] In that last respect, attention was drawn to s 40(8) of the *Sentencing Act*[18] in support of the proposition that a partially suspended sentence has the same deterrent effect as would service of the whole term. By extension, so the argument followed, a term of actual imprisonment of less than three months would have the same deterrent effect as the sentence that was imposed. As the appellant's argument unfolded, that necessarily reduced to the proposition that a wholly suspended sentence carried with it the same level of general deterrence as would both a sentence that was suspended after three months and one under which the whole term was required to be served in prison. That proposition should be approached with a great deal of caution.

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17 Transcript of Proceedings, 9 February 2016, p 19.7-20.2.

18 The section provides: "A partly suspended sentence of imprisonment is taken, for all purposes, to be a sentence of imprisonment for the whole term stated by the court.

[30] Section 40(8) of the *Sentencing Act* operates only to provide that a partly suspended sentence of imprisonment is to be taken for all statutory purposes as a sentence to imprisonment for the whole term. Section 40 must be read as a whole. It may be noted that s 40(5) of the *Sentencing Act* provides that a wholly suspended sentence is treated as one of immediate imprisonment for the whole term for all statutory purposes except disqualification for or loss of office, or forfeiture or suspension of pensions or other benefits. Under s 40(7) of the *Sentencing Act* that exception ceases to have effect where an offender is subsequently ordered to serve the whole or part of the wholly suspended sentence of imprisonment. Those provisions, including s 40(8) of the *Sentencing Act*, are directed to statutory purposes and consequences of that general nature. They do not operate such that a wholly or partly suspended sentence of imprisonment is taken to serve precisely the same purposes in the sentencing calculus – including the purpose of general deterrence – as would a sentence of imprisonment not subject to any order for suspension.

[31] It may be accepted that the courts regard a suspended sentence of imprisonment as a significant punishment given its consequences for the defendant's record and future, and given the liability for restoration in the event of breach.[19] It may also be accepted that a suspended sentence has a deterrent effect, both general and personal. As a matter

19 *Elliot v Harris (No 2)* (1976) 13 SASR 516 at 527.

of practicality and common sense, however, a sentence to immediate imprisonment for the whole term is necessarily a more severe disposition. For that reason, a sentence which is unsuspended or suspended after some longer period of incarceration must be seen to have a greater deterrent effect that a sentence which is wholly suspended or suspended after some shorter period of incarceration. That is why a specific need for general deterrence in a particular case is generally considered to point away from suspension, and why a partially suspended sentence is generally considered to have a greater deterrent effect than a wholly suspended sentence.

[32] Against that background, it was entirely orthodox and appropriate for the sentencing magistrate to draw attention to the fact that the victim was a healthcare professional working in a remote community, and to the particular role of general deterrence in such circumstances. As Riley CJ observed in *The Queen v DD* concerning an attack on a teacher in a remote community:[20]

> Crimes like this are always serious. In addition, this crime was committed in the remote community of Borroloola. This and offending of its kind in remote communities makes it hard to encourage qualified people such as your victim and such as teachers, nurses and others, to work in this community and similar communities.
>
> The impact of such offending reaches well beyond those immediately involved. The court needs to send a strong message that it will give whatever protection it can to vulnerable people working in remote communities for the good of those communities.

20 *The Queen v DD* (SCC 21519146, Sentencing Remarks, 26 November 2015).

[33] In giving effect to that purpose it is well accepted that the courts are required to exercise caution in order to ensure that the relative weight accorded to general deterrence does not result in the imposition of a sentence disproportionate to the objective circumstances of the offending. As Burt CJ observed in *R v Peterson*:[21]

> That is not done by imposing an 'exemplary' sentence, so-called, which is more severe than the nature of the offence and the circumstances of its commission in justice calls for, but by giving less weight to – which is not to ignore – mitigating factors which may be found within the antecedents of the prisoner. That results in a 'firming up' of the sentence for such an offence and results in a sentence which more closely fits the crime and a sentence which, if the offender thinks about it in advance, is in reason, predictable and certain, each of those qualities being central to the idea of deterrence.

[34] It is clear from the sentencing remarks that the magistrate gave consideration to the purposes of rehabilitation, personal and general deterrence, and the protection of the Territory community from the offender. There is nothing in that approach which suggests his Honour wrongly considered the need for general deterrence as the dominant purpose in the sentencing calculus, or imposed an "exemplary" sentence. While it is true that the magistrate elevated the need for community protection and general deterrence above rehabilitation in the sentencing calculus, that is properly characterised as a question of weight and forms part of the balancing exercise that characterises the sentencing process. In that calculus, the protection of the community

21 [1984] WAR 329 at 332.

must take precedence over offender rehabilitation unless those two purposes are mutually achievable.

[35] The fact that the magistrate gave primacy to certain purposes does not suggest that he ignored the principle that a rehabilitative approach may operate in the community interest by reducing the prospect of re-offending. That understanding informs the conduct of every sentencing exercise and it is unnecessary for the sentencing remarks to give it voice. In some cases, the accused's profile and history will be such that a sentence involving incarceration will best reduce the risk of re-offending. In other cases, the sentencing court may determine that although the accused's prospects of rehabilitation might well be best served by a sentence which does not involve incarceration, the objective seriousness of the offending is nevertheless such that a sentence to a term of actual imprisonment is necessary, justified and appropriate. That is so even with youthful offenders. As the seriousness of the criminality increases there will be "a corresponding reduction in the mitigating effects of the offender's youth".[22]

[36] Similarly, the fact the magistrate considered the circumstances of this particular offending required the appellant to serve a period of actual imprisonment does not suggest that he erroneously concluded that only a period of actual imprisonment could serve to deter others. Rather, it

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22 *Fox & Freiberg's sentencing: state and federal law in Victoria* (Third Edition), Law Book Company, 2014, p 355. See also *The Queen v Bloomfield* [1999] NTCCA 137 at [21], [34]; *The Queen v Goodwin* [2003] NTCCA 9 at [10]-[11].

suggests that his Honour considered it was not appropriate to wholly suspend the term of imprisonment having regard to the objective circumstances of the offending and the principal purposes of the sentencing process in this case.

[37] The only manner in which error in the magistrate's approach to the consideration of general deterrence might be made out is if the appellant establishes that the penalty imposed was manifestly more severe than called for by the nature of the offence and the circumstances of its commission. In other words, it would be necessary for the appellant to establish that the sentence imposed was plainly and obviously excessive on its face.

[38] Given the manner in which the appellant has framed her appeal she accepts by implication that there was no appropriate alternative to imposing a sentence of imprisonment, and that the head sentence of imprisonment that was imposed on her was the proper term of imprisonment to be imposed – or at least was not manifestly excessive. Those matters being so, the appellant must make good the complaint that it was manifestly excessive to order that the term of imprisonment be suspended only after three months had been served.

[39] Having regard to the objective circumstances of the offending catalogued above, even in balance with the appellant's personal

circumstances, the sentencing disposition is not one so far outside the range of a reasonable discretionary judgment as to itself bespeak error.

[40] For these reasons, the ground of appeal involving manifest excess and general deterrence must be dismissed.

Insufficient consideration of the appellant's "clear vulnerability"

[41] As already described, counsel for appellant's next contention was that the sentencing magistrate acted on a wrong principle by mischaracterising and/or failing to give adequate consideration to the appellant's "clear vulnerability" in determining whether she was appropriately placed in the custodial setting. That vulnerability was said to arise from the hypothyroidism the appellant has suffered since childhood, her chronic kidney disease, her poor emotional regulation resulting in attempts at self-harm in 2013, and her extreme social isolation. Advertence was also made to the appellant's caring responsibilities for her 10-year-old daughter as another basis on which incarceration might have been expected to bear disproportionately on the appellant's well-being.

[42] A number of observations may be made in relation to this contention.

[43] First, it was said that the appellant's removal from the community would cause significant hardship by reason of her maternal obligations, in the manner discussed in *R v Nagas*.[23]

[44] As the Court of Criminal Appeal observed in that case, family hardship is not ordinarily a circumstance taken into account in the sentencing calculus, subject to three recognisable exceptions. The first is that family hardship may be a ground for mitigation where the particular circumstances of the family are such that the degree of hardship is exceptional and considerably more severe than the deprivation that would be suffered by a family in normal circumstances as a result of imprisonment. The second exception is where the offender is a mother of a very young child or children. The third exception is where both parents are imprisoned simultaneously, or where the imprisonment of one parent effectively deprives the children of parental care altogether.

[45] While it may be accepted that the appellant had caring responsibilities for her child, it could not be said that her particular circumstances were such that the degree of hardship that would be suffered by the family would be exceptional and considerably more severe than the deprivation suffered by a family in normal circumstances. Moreover, counsel for the respondent pointed to the fact that to establish one of the exceptions set out in *Nagas* it is necessary that a defendant produce

23 (1995) 5 NTLR 45.

"cogent evidence" of those matters[24]; and that no adequate evidence directed to those matters was placed before the sentencing court or this court.

[46] It is also the case that the sentencing magistrate gave express, if somewhat cursory, attention to the question.[25] He noted that he was given no details about the circumstances of her caring responsibilities for the child. He was aware that the appellant remained with her partner, that the child was undertaking schooling, and that the appellant had been described as a "good mother". Against that background, the magistrate indicated that he would take that matter into account and give it consideration. That was all that was required given the dearth of any further evidence in relation to the matter, and it cannot be said there was a failure to take the matter into account.

[47] The second observation relates to the appellant's medical condition. During the course of the pre-sentencing investigation she presented with "poor emotion regulation and limited stress management", and demonstrated poor compliance with her medication regime. She did not present with any ideation or plan of self-harm at the time of the pre-sentencing investigation, although her history in that respect was recorded in the psychological report (as already described above). Dr

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24 *Mawson v Nayda* (1995) 5 NTLR 56 at 57.

25 Transcript of Proceedings, 9 February 2016, p 19.5.

Szarkowicz went on to observe in her report that "a custodial setting is not ideal for managing somebody with [the appellant's] presentation".[26]

[48] It may be accepted that the appellant's medical condition was a relevant consideration in determining the kind of sentence that was imposed and the conditions in which it would be served. It was also relevant to give consideration to the question whether that condition was such that a sentence to imprisonment would have weighed more heavily on the appellant than it would on a person in normal health.

[49] These matters were subject to consideration by the sentencing magistrate. The magistrate noted the appellant's chronic kidney disease and her history of self-harming ideation and behaviour.[27] The magistrate noted "the difficulties in relation to imprisoning a person who has suicidal ideation" [28]; and went on to say "she is a person who's previously endeavoured to kill herself, that is a weighty matter and I really do take that into account".[29]

[50] The sentencing magistrate then went on to consider the structure of the sentence. The magistrate noted in that respect that the appellant was a "vulnerable person"[30] and, at the prompting of counsel on the plea, marked the file "at risk" on the basis that the appellant was at risk of

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26 Psychological report prepared by Dr Szarkowicz, 25 November 2015, p 6.

27 Transcript of Proceedings, 9 February 2016, p 18.2.

28 Transcript of Proceedings, 9 February 2016, p 19.2.

29 Transcript of Proceedings, 9 February 2016, p 19.5.

30 Transcript of Proceedings, 9 February 2016, p 20.3.

harming herself and was also a person who required medication for her various medical conditions.[31]

[51] It is no doubt the case that the appellant would have wished the sentencing magistrate to have given more extensive consideration and attributed different weight to those factors said to constitute vulnerability, and to have reached a different outcome in the sentencing process by reason of that weighting. As already observed, however, a failure to give adequate weight to a relevant matter is not in itself an appellable error. An appellable error will only arise in the process (as opposed to the outcome) where the sentencing court fails to have regard to a relevant consideration at all, wrongly assesses some salient feature of the evidence, or acts upon an error of principle. Only then is there an error which justifies interference with the sentencing discretion. The appellant's contention in this respect must be dismissed for that reason.

Inadequate characterisation of prospects of rehabilitation

[52] As already described, counsel for the appellant's final contention is that the sentencing magistrate mischaracterised the appellant's prospects of rehabilitation, and/or failed to take into account evidence concerning a treatment and management plan directed to facilitating her rehabilitation.

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31 Transcript of Proceedings, 9 February 2016, p 21.

[53] Counsel for the appellant contends at the outset that as a 28-year-old with no prior criminal history she was entitled to be dealt with as a person with very good prospects of rehabilitation notwithstanding her poor emotional regulation and stress management. In that respect, counsel for the appellant points specifically to the opinion of Dr Szarkowicz to the effect that "with appropriate treatment and compliance to medication Ms Lantjin will be a low recidivism risk", and any risk attributable to poor emotional regulation and stress management "can be addressed through treatment".[32]

[54] On the basis of that assessment, Dr Szarkowicz went on to opine that the appellant "should be a low risk for re-offending and would be suited to a community-based sentence".[33] As already described, the treatment plan proposed by Dr Szarkowicz involved counselling to provide strategies for managing stress or coping with anger, and "couples' therapy" to address the source of contention with her partner.[34]

[55] Counsel for the appellant pointed to two observations made by the magistrate during the course of the sentencing hearing which, against the background of that medical opinion, were said to be made without or against expert evidence.

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32 Psychological report prepared by Dr Szarkowicz, 25 November 2015, p 5.

33 Psychological report prepared by Dr Szarkowicz, 25 November 2015, p 6.

34 Psychological report prepared by Dr Szarkowicz, 25 November 2015, p 6.

[56] In the first passage the magistrate rejected the psychologist's opinion that the appellant presented a low risk of recidivism, with particular reference to her failure to accept responsibility for her criminal conduct and her refusal to engage effectively in anger management counselling and treatment.[35] In the second passage the magistrate came back to the question of recidivism and expressed the view that the risk could only be said to be reduced in circumstances where the offender in question is engaged with and responding to treatment.[36]

[57] Counsel for the appellant contends that these observations demonstrated a failure to consider the material presented on the plea, and particularly the pre-sentence report which proposed a treatment and management plan including participation in anger management and counselling, and which assessed the appellant as suitable for supervision by Community Corrections.[37] It is said that, at the very least, the finding that the appellant did not present with a low risk of re-offending was made without any clear basis.

[58] In addition, counsel for the appellant drew attention to the magistrate's finding that the appellant had good prospects for rehabilitation given her age, plea of guilty and clean record, despite rejecting the

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35 Transcript of Proceedings, 9 February 2016, p 7-8.

36 Transcript of Proceedings, 9 February 2016, p 19.

37 Pre-Sentence Report, 3 December 2015, p 8.

proposition that she presented a low risk of recidivism.[38] It is said that this reasoning was internally inconsistent, and that a finding that the prospects for rehabilitation were good must necessarily have comprehended that the risk of recidivism was low.

[59] In those premises it is said that the magistrate must necessarily have failed to give consideration to all of the relevant factors in fixing sentence. In that respect counsel for the appellant relies on what was said by Kirby J in *Dinsdale v R*[39] as the basis for the uncontentious propositions that imprisonment is a penalty of last resort; the court must give careful consideration to whether that disposition is the appropriate penalty in the circumstances; if imprisonment is the appropriate penalty the court must give consideration to the question of suspension; and in determining whether the sentence of imprisonment should be suspended the court must consider all of the objective and subjective features of the matter.

[60] It is instructive to consider those passages to which the appellant has drawn attention.

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38 Transcript of Proceedings, 9 February 2016, p 19.

39 (2000) 202 CLR 321.

[61] The first passage appears during the course of submissions.[40] The sentencing magistrate made the following observations concerning various opinions expressed in the psychological report:

> Under the heading, "Behaviour during the Assessment":
>
> > [Yawned] frequently during the assessment. Multiple times she did not respond to questions asked by the interpreter. Even when questions were repeated there was no response. Many answers of "don't remember" or "don't know" were given. Physically Ms Lantjin presented neat, (inaudible) is unremarkable.
>
> Under the heading, "Assessment":
>
> > What she does present with is poor emotion regulation and limited stress management.
>
> Further down on page 4:
>
> > Thoughts such as these "he doesn't care about me" are common triggers. Subsequently, these physical sensations can be very uncomfortable for someone who is prone to impulsivity such as Ms Ms Lantjin is reported to be. Will increase in intensity very quickly and often not be noticed until they are at a point where an individual has [limited] appropriate ways of reducing their anger or they are able to use strategies to keep the anger at manageable levels.
>
> Examples are given. Then on page 5:
>
> > When the interpreter prompted her with strategies such as taking a walk or listening to music, Ms Lantjin did not identify these as ways to help manage emotions. She was not even able to identify smoking cigarettes as a way to reducing stress. Ms Lantjin understandably has a number stressors in her life particularly [from] her health presentation. It is appreciated that hypothyroidism can be associated with depressed states and a depressed state, albeit more commonly in children and adolescents, can present as irritability.
>
> And further along:
>
> > Rather, some characteristics of poor emotion regulation and stress management are more likely [the] key concerns which are then exacerbated by poor medication compliance in the period prior to the offending.
>
> And so this is a statement of general fact. She is a person who has continuously understated her involvement and not accepted the true

40 Transcript of Proceedings, 9 February 2016, p 7-8.

> criminality of her conduct. She is not engaged, she is not engaged in any anger management, she doesn't present as someone who is going to or is open to such treatment. I do not accept what the psychologist has said that she is a low risk.
>
> It's a general statement, if people are treated, if they are open to being treated and they are properly treated and they respond to that treatment, then the risk of recidivism is reduced or even minimal. That is not this person. She is at risk of recidivism given the conduct, given her presentation, given her attitude.

[62] The second passage to which counsel for the appellant drew attention appears in the sentencing remarks, and is again directed to the question whether the risk of re-offending could only be said to be reduced in circumstances where the offender in question is engaged with and responding to treatment. The sentencing magistrate made the following observations in that respect:[41]

> It seems that [the appellant's depression and irritability due to hypothyroidism] was exacerbated by poor medication compliance. She has poor management of stress. She does not meet the characteristics of a mental health disability. I have already made my remarks about the generalised comments with appropriate treatment and compliance to medication …"[the appellant] will be a low recidivism risk", it seems to me [is] a general statement that people that are treated because they are engaged and do respond to treatment, reduce the risk of recidivism.
>
> It cannot be said in relation to this person. Although I must say, and I am pre-empting myself a bit here, she is 28, she pleads guilty, she has no criminal history. She must have good prospects for rehabilitation notwithstanding her lack of engagement. Risk areas are set out on the final page and I have already read out the difficulties in relation to imprisoning a person who has suicidal ideation.

41 Transcript of Proceedings, 9 February 2016, p 18.9-19.2.

[63] These passages are said to demonstrate that the magistrate misunderstood or wrongly assessed those features of the evidence relating to the appellant's risk of re-offending having regard to the treatment and management available to her, and the relationship between that matter and her prospects for rehabilitation.

[64] As already described, Dr Szarkowicz's view that the appellant presented a low risk of recidivism was based on the assumptions that the appellant would submit to appropriate treatment and would comply with her medication regime. It may first be noted that the magistrate was not obliged to accept that opinion. As the Court of Criminal Appeal observed in *Bara v The Queen* [2016] NTCCA 5 at [45]:

> For reasons of convenience and efficiency, criminal courts will ordinarily accept and act on statements advanced by defence counsel from the bar table, particularly where the statement is consistent with facts already in evidence and not disputed by the Crown [see, for example, the observations of Olsson AJ in *Gumurdul v Reinke* [2006] NTSC 27 at [47]-[49]]. However, even if a statement asserting mitigating circumstances put forward on behalf of the accused is not contested by the Crown, the court is not bound to adopt that matter in the sentencing calculus [A Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria*, 3rd edition, Lawbook Co, 2014, p 143 citing *R v Perre* (1986) 41 SASR 105 and *R v Boyle* (1996) 87 A Crim R 539]. The weight to be given to it is a matter for assessment by the sentencing judge.

[65] The same may also be said of reports and assessments received by the court for the purposes of the sentencing process. The court is not required to accept expert opinion in that process, even if that opinion is not challenged by the Crown. An error of principle in that respect will

only arise where the court misapprehends the nature of the expert evidence and acts on that misapprehension.

[66] It also cannot be said that the magistrate failed to consider the material presented on the plea in relation to the appellant's risk of re-offending. It is true to say that the sentencing remarks make no specific reference to that part of the pre-sentence report proposing a treatment and management plan and assessing the appellant as suitable for supervision.[42] However, it does not necessarily follow that the magistrate failed to take the available treatment and management options into account so as to neglect a relevant consideration. The magistrate expressly rejected the psychologist's opinion that the appellant presented a low risk of recidivism. In so doing his Honour found positively that the appellant would likely not participate in and comply with a treatment plan. Although the magistrate did not make any express finding in relation to the probability that the appellant would re-offend, it is implicit in his observations concerning her conduct, presentation and attitude that his Honour was suggesting that the risk was a significant and substantial one.

[67] Those findings notwithstanding, the magistrate went on to observe that the appellant nevertheless had good prospects of rehabilitation on the

42 Pre-Sentence Report, 3 December 2015, p 8.

basis of her age and previously unblemished record. That conclusion warrants some scrutiny.

[68] The appellant's medical conditions were of long-standing. The poor compliance with medication which the magistrate found to underlie her elevated risk of re-offending was of long-standing. Throughout her adult life the appellant had taken medication prescribed to control the thyroid condition only sporadically. The appellant's sometimes fractious relationship with her partner was also of long-standing, and commenced many years before the conduct the subject of the offending. The appellant had not previously offended despite the fact that these influences had been operating throughout her adult life.

[69] Against that background, there was an inherent tension between the conclusion that the appellant's prospects of rehabilitation were good because she had not previously offended despite the presence of those factors, and the finding that the appellant had a high risk of re-offending due to the presence of those factors. Those findings suggest an element of misapprehension.

[70] At a more conceptual level, the purpose of rehabilitation is directed to future offending.[43] There is a clear relationship between the risk of re-offending and the prospects of rehabilitation. A positive finding that an adult offender's prospects of rehabilitation are good will ordinarily

43 *R v Valentini* (1980) 48 FLR 416 at 420; *Vartzokas v Zanker* (1989) 51 SASR 277 at 279.

carry the implication that the offender's risks of re-offending are low. That finding will key into the sentencing calculus in a number of ways. First, a low risk of re-offending with consequent good prospects of rehabilitation will be a mitigating factor. Secondly, a low risk of re-offending will bear upon what allowance should be made in the sentence to take into account the purposes of specific deterrence and community protection. Thirdly, the express finding in this case that the appellant's prospects of rehabilitation were good required active consideration of whether her compliance issues and emotional lability were most effectively addressed in the context of a treatment and management plan under supervision. That consideration was confounded by the magistrate's variant finding concerning the high risk of recidivism.

[71] It may be concluded that the sentencing magistrate both acted on an error of principle in the assessment of rehabilitative purpose and wrongly assessed the evidence concerning the prospect of re-offending. Those errors had the potential to skew the sentencing process, and particularly in the assessment of mitigatory factors, specific deterrence and the disposition which would best serve the purpose of community protection. That is properly characterised as a process error. In those circumstances the appeal court may reduce the sentence if in the exercise of its own discretion it considers that a lesser sentence is

appropriate, even though the sentence under appeal is not manifestly excessive.

[72] For the reasons already given, the sentence under appeal was not manifestly excessive in either the head sentence or the order suspending sentence after service of three months. Nor is this a case in which the appeal court would necessarily have considered a lesser sentence was appropriate having regard to matters as they stood at the time the sentence was imposed. Those matters notwithstanding, it remains to consider whether a lesser sentence is appropriate having regard to matters as they presently stand and the appellant's present circumstances.

[73] The offences in question took place more than two years ago. A period of approximately nine months elapsed between the commission of the offences and the imposition of sentence. There was no further offending by the appellant during that period. A further period of approximately six months elapsed between the appellant's release on bail in contemplation of this appeal and the date on which the appeal was heard. There was also no further offending by the appellant during that period. A total period of approximately 15 months has now elapsed between the appellant's release on bail in contemplation of this appeal and the present time. The appellant has remained on bail throughout that period. There has also been no further offending or breach of bail by the appellant during that subsequent period.

[74] Having regard to those circumstances, the fact that prior to this offending the appellant had an unblemished record, and the fact that the appellant has already served 15 days of actual incarceration, it would be unjust in the present circumstances to require the appellant now to return to prison to serve the balance of the three months imposed by the sentencing magistrate.

Disposition

[75] The appeal is allowed. The sentence imposed by the Court of Summary Jurisdiction is varied only to provide that the sentence to imprisonment be suspended after the appellant has served 15 days. That reflects the period of imprisonment served by the appellant up to the time she was granted bail in anticipation of this appeal.
