Orsto v Grotherr [2015] NTSC 18

PARTIES:	**ORSTO, Kristelle**
	v
	GROTHERR, Christopher Paul
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 30 of 2014 (21341612)
DELIVERED:	31 MARCH 2015
HEARING DATES:	24 OCTOBER 2014
APPEAL FROM:	COURT OF SUMMARY JURISDICTION
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – Sentencing – Mandatory minimum sentence – exceptional circumstances – Relevance of Magistrate's comments – Proportionality – Instinctual synthesis approach to exceptional circumstances – Appeal allowed – Appellant re-sentenced

Criminal Code (NT) ss 188(1), 188(2)(a)

Domestic and Family Violence Act (NT)

Sentencing Act (NT) ss 5(1), 5(1)(a), 78, 78D, 78BA, 78DI, 78DI(1), 78DI(3)(b) and Division 6A Part 3

Sentencing Amendment (Mandatory Minimum Sentences) Act 2012 (NT)

The Queen v Duncan [2015] NTCCA 2, applied

Dhamarrandji v Curtis [2014] NTSC 39; *Fergusson v Setter and Gokel* (1997) 7 NTLR 118; *Hasim and Ors v Attorney General* (Cth) (2013) 218 FCR 25; *House v The King* (1936) 55 CLR 499; *Karim v The Queen* (2013) 83 NSWLR 268; *Magaming v The Queen* (2013) 87 ALJR 1060; *Olsen v Sims* (2010) 28 NTLR 116; *Reid v Rowbottam* (2005) 15 NTLR 1 and *Rory v Sanderson* [2012] NTSC 6, referred to

REPRESENTATION:

Counsel:

Appellant:	J Hunyor
Respondent:	D Dalrymple

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Blo1506
Number of pages:	29

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

Orsto v Grotherr [2015] NTSC 18
No. JA 30 of 2014 (21341612)

BETWEEN:

KRISTELLE ORSTO
Plaintiff

AND:

CHRISTOPHER PAUL GROTHERR
Defendant

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 31 March 2015)

Introduction

[1] This is an appeal from a sentence imposed by a Magistrate in the Court of Summary Jurisdiction sitting at Wurrumiyanga, Bathurst Island.[1]

[2] The appellant pleaded guilty to one count of unlawful assault with a circumstance of aggravation that the victim suffered harm.[2]

[3] The maximum penalty is five years imprisonment. It is common ground that a mandatory minimum term of three months actual imprisonment applied, pursuant to s 78D of the *Sentencing Act*. The

[1] The first instance proceedings took place in the Court of Summary Jurisdiction on 20 May 2014 before his Honour, Maley SM. Wurrumiyanga was formerly known as Nguiu.
[2] Section 188(1), 188(2)(a) *Criminal Code*.

appellant was convicted and sentenced to the minimum three month term of imprisonment. The appellant served a short period of time in custody before being released on appeal bail by the Magistrate on the day she was sentenced.

[4] The single ground of appeal is: "that the learned Magistrate was wrong in finding that the circumstances of the case were not exceptional for the purposes of s 78DI of the *Sentencing Act* (NT)".

Material Before the Court of Summary Jurisdiction

(i) Facts of the Offending

[5] On 20 June 2013, the appellant was served with a court confirmed domestic violence order that contained a condition not to harm the protected person/victim. The order was to be in force until 17 June 2014. On 20 September 2013, the day of the offending, the appellant was at home in her bedroom asleep with her four year old daughter. At that time the victim returned home from work for lunch. The appellant became upset with him because he woke her up. A heated discussion followed. On behalf of the appellant, further facts that were not disputed were added, namely, that when the victim returned, he slammed the door and was yelling loudly because he did not get a ride home from the appellant's auntie. This woke not only the appellant up, but also woke up their young child. It was said the appellant and the

victim had earlier had a discussion and the appellant asked the victim to stay at work and not wake them up over lunch time.

[6] The facts stated the victim sat down in the bedroom to eat his lunch. The appellant was annoyed that he appeared to be ignoring her and she struck him to the back of his head with force. She then left the house.

[7] A short time later, she was spoken to by police and made spontaneous admissions. She was advised she would be summonsed.

[8] The agreed facts did not refer to the nature of the harm suffered by the victim.

(ii) Victim Impact Statement

[9] The victim impact statement of 20 September 2013 refers to the victim's medical treatment including the application of three staples, and that the victim felt head pain. The victim said he felt angry and sad as a result of what had happened and did not like being in [this] situation because of their daughter. Under the heading "Sentence", the victim stated, "I really don't want her to go to gaol for this, cause she having another baby. I just want her to do some community work and attend an anger management programme".

(iii) Information for Courts

[10] The appellant had a prior conviction for aggravated assault (harm-weapon) with respect to the same victim. The date of that offence was

3 June 2013. She was dealt with for that offending in the Court of Summary Jurisdiction on 21 August 2013 by way of a fine of $500 and a good behaviour bond for 12 months. The appellant was in breach of the good behaviour bond by virtue of this offending.

(iv) Character Reference

[11] A character reference was tendered to the Court of Summary Jurisdiction. It was signed by numerous community members,[3] a number of whom signed as "Night Patrol" (or "NP"), another as a "Tiwi Leader", others as "Strong Women" and another as "Ponki Mediator and Strong Women". Addressed to the presiding Magistrate, the letter read:

> "We know that Kristelle is charged with assaulting her partner and breaching DVO.
>
> She has one child and expecting another child on the way. She is a good mother and has a job working at the shop. She is a traditional owner. She has lived here all her life.
>
> We do not know about this trouble but know that before she has had trouble with her boyfriend.
>
> We are sad that she did this. She has had a hard life. She tried to take her life last year. We think she needs special counselling from Catholic Care to help her sadness and anger.
>
> Theresita Purantatameri is the right person to talk to her and can teach her the right way. Theresita has said she will try to find Kristelle this week to growl at her in the right way and teach her the right way.

[3] It appears from the copy on file, that 14 persons signed the letter.

> We know this is serious trouble and that Murantawi Law often puts people in gaol. We don't know if that law mean she will have to go to gaol but if it does we want her to go to gaol for a very short time, because she has a small child, a 5 years old daughter Rashani and it would be difficult for Rashani if her mother goes to gaol.
>
> She is a quiet lady. She goes home after work to look after her daughter. Her mother is a teacher at the school and it would also be difficult for her mother Concepta Orsto to look after Rashani in the day time because she is teaching. Thankyou for reading this letter".

(v) Subjective Circumstances and Submissions Made on the Defendant's (Appellant's) Behalf

[12] The learned Magistrate was told the appellant was 33 years of age; that she had previously been the victim of domestic violence in the course of the relationship with the victim; that she was raised in Wurrumiyanga by her parents who had "domestic issues" and were now separated; that she attended school until year 10, and that her reading, writing and English was "strong". Her employment history was outlined to the Court. It included reception work at the "old clinic", working as a teacher's assistant and working at the NUA shop.

[13] In terms of her particular personal circumstances, the Court was told she had "struggled over the last couple of years" and attempted suicide earlier the year before when the relationship between herself and the victim was "particularly bad". The proceedings had been delayed a number of times because the appellant's difficult pregnancy

necessitated her travel to Darwin for treatment. Her baby was born prematurely and died two months prior to the plea hearing. The Court was told the appellant was still in mourning. She had been attending Catholic Care on a regular basis, a factor her counsel indicated had been verified with an employee of Catholic Care and through a compliance report from Correctional Services.

[14] Shortly after the commencement of submissions made on behalf of the appellant, his Honour remarked "why shouldn't she go to prison for three months? She's on a DVO, she's committed an aggravated assault on a bond for that. Whilst her personal circumstances regarding the loss of a child is genuinely heart wrenching for any human being, you need to explain why this court isn't compelled at law to send her to prison today". In answer to the question from the learned Magistrate on why the Court was not "compelled at law to send her to prison today", counsel submitted that the combination of the following factors amounted to "exceptional circumstances":

- The views of the victim, Mr Orsto, who did not want her to go to gaol;

- The appellant had sought help from Catholic Care to deal with issues surrounding her relationship and making efforts to address her underlying problems;

- The difficult time the appellant was experiencing, having just lost a child; that in those circumstances gaol would involve significant hardship as it would remove her from the support network that was assisting her with dealing with her grief;

- The importance in this regard of the older females in her family;

- The appellant had previously been the victim of domestic violence herself, perpetrated by the victim;

- Correctional Services continued their support of the appellant;

- The appellant had ongoing employment within the community.

(vi) The Prosecution (Respondent's) Submissions on Sentence

[15] The prosecutor addressed the question of "exceptional circumstances", adopting the Magistrate's earlier description of the appellant's circumstances as "tragic" but submitting that "they do not get over that threshold ... they need to be out of the ordinary, not rare but out of the ordinary of them to be exceptional circumstances. And unfortunately these aren't out of the ordinary circumstances".

(vii) The Learned Magistrate's Sentencing Remarks

[16] At the commencement of the hearing, the Magistrate indicated that a compliance report from Correctional Services had been filed, indicating the appellant was on a bond, had attended women's groups

as required, was mourning the loss of her baby and was suitable for further supervision.

[17] During an exchange with counsel about the merits of ordering a pre-sentence report (it appears it was concluded that unless it involved a psychiatric issue a report would not be ordered) his Honour remarked:

> "But hardship in Berrimah Prison, well that applies to every man and woman who goes into Berrimah prison. The deal with the victim, that's a factor, but regularly in domestic situations the victims often say I don't want my partner to go to prison, so that's only given some weight.
>
> On the support groups in a local community, that doesn't take it too far either, given that of course you would expect some of those support groups, at a time of loss and grieving, in their local community".
>
> "But on that material alone the initial response is there are not the exception circumstances and they are at common law, any civilised court would never send a woman in this particular situation to prison, actual prison. The law as it currently stands fetters that discretion".

[18] His Honour referred to the difficulties involved in sentencing in this matter "for a whole number of reasons" including those factors already noted,[4] and that the assault was committed when the appellant was subject to a domestic violence order and in breach of a bond for a previous assault.

[19] His Honour noted the assault took place in the context of a heated discussion, the victim was struck from behind and it was in the

[4] Above [14].

presence, or near the vicinity of, their four year old daughter. There was a cycle of violence and the victim wanted the appellant to have some counselling. His Honour then stated:

> "I can indicate this for the record, that having regard to the factors that will be considered at common law and our inherent system, a court not fettered by s 78 of the *Sentencing Act* would deal with your matter by a fully suspended sentence. However, the provisions of the Act are clear and in circumstances it's a matter which you will be convicted, you'll be in prison for three months".

Consideration of the Arguments on Appeal

[20] Detailed and thought provoking submissions were made on appeal, primarily directed to the question of whether or not his Honour was in error in relation to the question of "exceptional circumstances". More particularly, whether the "purposes for which sentences may be imposed" provided in s 5(1) of the *Sentencing Act* are relevant when a court is considering the "exceptional circumstances" exemption, especially the purpose provided in s 5(1)(a) of the *Sentencing Act*, "to punish the offender to an extent or in a way that is just in all the circumstances". The 'purpose' or 'guideline' in s 5(1)(a) of the *Sentencing Act* is broadly understood to reflect or at least include the principle of proportionality as that concept is recognized as part of the common law of the sentencing.[5]

[5] Although the sub-heading within s 5 of the *Sentencing Act* is "Sentencing guidelines", the text reads: "The only purposes for which sentences may be imposed on an offender are the following …".The text is taken to prevail over a heading for interpretation purposes.

[21] Counsel for the respondent argued the assessment of factors to be taken into account in determining "exceptional circumstances" should be regarded as analogous to the taking into account of "considerations" by an administrative decision maker when required to exercise a discretion in a judicial manner. In support of this approach the Court was referred to *Hasim and Ors v Attorney-General* (Cth)[6] and the "organising principles" Greenwood J stated were relevant to the grounds challenging the exercise of a discretion, itself reliant on a finding of "exceptional circumstances" to justify its exercise. Greenwood J, for example set out the following items:

> 6. The meaning however, to be attributed to the term "exceptional circumstances" is a question of law.
>
> 7. Similarly, where the ground relied upon is a failure to take into account a relevant consideration and the discretion is conferred in an unconfined way, a decision-maker is not *bound* to take a **particular matter** into account unless an implication can be drawn from the subject matter, scope and purpose of the conferring Act that such a consideration is to be taken into account.[7]

[22] In my view, the meaning attributed to the term "exceptional circumstances" within the context of the *Sentencing Act* is a question of mixed fact and law, dependent on the factors relied on, said to constitute "exceptional circumstances" that are consistent with the meaning attributed to that term discussed recently in *The Queen v*

[6] (2013) 218 FCR 25, involving the application of the discretion by reference to the phrase "exceptional circumstances".
[7] Ibid, 49.

Duncan.[8] The sentencer must be satisfied "exceptional circumstances" are made out before the discretion can be exercised; however, if the question of whether the sentencer was correctly "satisfied" (or not) is subject to appeal, the question is to be dealt with within the usual confines of sentencing appeals. That includes the well-known principles as set out in *House v The King*.[9] The decision is presumed to be correct. It is not a question of whether another sentencer, including an appellate court, would take a different course. It must appear that some error has been made in exercising the direction.

[23] The recent Court of Criminal Appeal decision of *The Queen v Duncan*[10] emphasizes that the question of satisfaction of "exceptional circumstances" in the sentencing context involves the intuitive synthesis process. This approach, in the context of the *Sentencing Act* broadly accords with the items set at by Greenwood J noted above, in relation to discretions conferred in an unconfined way.

[24] Counsel for the respondent argued that the expressions used by the learned Magistrate that may have indicated antipathy towards the current mandatory sentencing regime should not be elevated to a conclusion of "exceptional circumstances" for the purposes of s 78DI of the *Sentencing Act*. Neither, it was argued, should an expression indicating a preference for a lighter sentence be held to be sufficient to

[8] [2015] NTCCA 2.
[9] (1936) 55 CLR 499.
[10] [2015] NTCCA 2.

illustrate that "exceptional circumstances" were made out. As noted, his Honour remarked "any civilised court would never send a woman in this particular situation to prison, actual prison" and later "a court not fettered by s 78 of the *Sentencing Act* would deal with your matter by a fully suspended sentence". It was submitted these matters contained in his Honour's remarks fall outside of the scope of factors which can properly be taken into account for the purposes of s 78DI(3)(b) of the *Sentencing Act*. Alternatively, that these are not matters which a sentencing judge or magistrate is bound to take into account when assessing the question of the exemption for "exceptional circumstances". While I agree that those statements as such should not be elevated to the point of self-evidently making out the exemption, if those statements represent an expression of a matter or matters that are exceptional about the circumstances, the factors provoking them are of some relevance.

[25] Counsel for the respondent submitted that while judicial criticism of mandatory sentencing legislation may be considered an important reflection of the role of the judiciary in a democratic society, as has previously taken place with respect to an earlier (now repealed) mandatory sentencing regime with respect to property offences,[11] such considerations or comments are beyond the scope of the current "exceptional circumstances" exemption.

[11] *Trenerry v Bradley* (1997) 6 NTLR 175, 185 (Angel J), 187 (Mildren J).

[26] Section 78DI(1) of the *Sentencing Act* provides as follows:

> (1) This section applies if:
>
> (a) A court is required to impose a minimum sentence of a specified period of actual imprisonment for an offence; and
>
> (b) The court is satisfied that the circumstances of the case are exceptional

[27] It was argued that what flows from an exercise of the paramount power of Parliament to enact mandatory sentencing laws,[12] such as the enactment of Division 6A Part 3 of the *Sentencing Act*, is that Parliament is taken to have determined a particular disposition as a minimum. Attention was drawn to the comments of Keane J in *Magaming v The Queen*[13] as follows:

> "The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a view that condign punishment is called for to supress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor".

[28] It was also submitted that the harshness of a sentencing outcome provided for in relevant mandatory sentencing legislation does not

[12] *Wynbyne v Marshall* (1997) 7 NTLR 97, relying on previous High Court authority and more recently *Magaming v The Queen* (2013) 87 ALJR 1060.
[13] *Magaming v The Queen* (2013) 87 ALJR 1060, [105].

provide a basis for judicial intervention. Reliance was placed on *Karim v The Queen*,[14] a case involving sentencing appeals in the context of mandatory minimum sentencing provisions for "people smuggling" offences that also involved questions of constitutional validity. His Honour Allsop P (as he then was) accepted this reasoning applied even if the sentence could be characterized as arbitrary, grossly disproportionate, or cruel.[15] His Honour summarized the position as follows:

> "For mandatory minimum sentences to be unconstitutional, a Constitutional constraint upon Parliament must be recognised that the assessment of a just and appropriate sentence is ultimately a judicial task, by the deployment of judicial method. The reconciliation of such a proposition with the authority of the Parliament to set societal norms involves deep questions of the relationship between Parliament's power and the inhering essence of law and judicial power. The source of an affirmative answer to the question of the existence of such constraint may lie in the rooted strength of the conception of equal justice and of the rejection of any power in Parliament to require courts to make orders that are arbitrary, grossly disproportionate or cruel by reference to inhering norms of fairness, justice and equality.
>
> Here, in relation to these offences, an illiterate and indigent deckhand having little or no knowledge of, or contact with, the organisers of the smuggling, and knowing little about the voyage in respect of which he or she was charged, pondering his or her incarceration for 5 years for a first offence, could legitimately conclude that, at a human level, he or she had been treated arbitrarily or grossly disproportionately or cruelly.
>
> Once again, existing authority precludes such notions informing reasoning to a relevant legal consequence".

[14] *Karim v The Queen* (2013) 83 NSWLR 268.
[15] Ibid, [120] – [122].

[29] While there is considerable force in the arguments put on behalf of the respondent, it needs to be appreciated that the regime considered by the High Court in *Magaming* and Allsop P in *Karim v The Queen*, did not include an exemption for "exceptional circumstances" or a similar provision clearly capable of ameliorating a harsh result in an exceptional case.

[30] It was also submitted that where the pre-existing sentencing law involved the application of principles that might be at odds with the current mandatory sentencing provision, those principles must be regarded as having been "overridden" to the extent of any inconsistency. For example in *Rory v Sanderson*,[16] the conventional principle of "imprisonment as a last resort" with respect to young persons was held to have become inapplicable upon the enactment of a statutory provision expressly or impliedly negating such an approach.

[31] In line with that reasoning, counsel for the respondent pointed out that prior to amendments to the *Sentencing Act* resulting in Division 6A of Part 3 in its present form, the applicable mandatory sentencing regime for violent offending was set out in s 78BA. The intent of that provision has been held to be that an offender found guilty of and penalised for a violent offence would know that for the commission of a subsequent violent offence, an actual term of imprisonment to be

[16] *Rory v Sanderson* [2012] NTSC 6, [80] (Olsen J). See also *Fergusson v Setter and Gokel* (1997) 7 NTLR 118, 126, 127.

served was mandated.[17] The particular length of the term was not mandated by s 78BA. It was submitted the purpose of the current regime introduced by the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2012* was to further increase the protection of the community by means of the imposition of the mandatory minimum prison sentences in the terms set. It was argued that the current provisions should not be applied in a manner by reference to the criterion of whether the resulting sentence was "unjust". Such an approach was said to run completely counter to the purpose of Division 6A of Part 3 of the *Sentencing Act*. The following passage from the Attorney-General's second reading speech, introducing the relevant bill, was said to provide the context for s 78DI, the exceptional circumstances exemption:

> "The purpose of this bill is to insert new mandatory minimum sentences of imprisonment for assaults into the *Sentencing Act* and to remove the ability of the court to suspend the sentence for that minimum period of time. The mandatory periods apply to serious assaults and repeat offenders of aggravated assault. The bill does not intend to remove the effect of the current mandatory imprisonment provisions for violent offences in section 78BA of the *Sentencing Act*. It retains the effect of those provisions and supplements them with new mandatory minimum sentences for specified offences.
>
> In the campaign for the general election in August this year the Country Liberals promised that if elected the Country Liberals would introduce a bill to amend the *Sentencing Act* to make it clear that offenders convicted of serious assault would not be eligible for a suspended sentence. We promised also to introduce new mandatory minimum sentencing guidelines for

[17] *Reid v Rowbottam* (2005) 15 NTLR 1, [40].

> repeat offenders, namely, a genuine gaol time will be imposed for repeat offenders.
>
> The purpose of setting the mandatory minimum sentences in this bill is to maintain a consistent standard of sentencing for violent offences. It is intended to send a clear message to serious and repeat violent offenders that if they commit a violent offence they will serve genuine gaol time and that there is a mandated bottom line to the sentence that they will receive".[18]

[32] It was argued that previous obiter comments in *Dhamarrandji v Curtis*[19] that relied in part on the discussion of proportionality by Southwood J in *Olsen v Sims*[20] should not apply in such a manner that a disproportionate sentence will mean that "exceptional circumstances" have been made out. It was pointed out (and is accepted here) Southwood J in *Olsen v Sims* was analysing the effect of a change of penalty provisions in the *Domestic and Family Violence Act* and their application to the appellant in that case. The legislation considered in *Olsen v Sims* was introduced to ameliorate the harshness of the mandatory sentencing provision which had previously been in force. This should be contrasted, it was submitted, with the legislative intention underlying Division 6A of Part 3 of the *Sentencing Act* and the replacement of s 78BA with the current mandatory sentencing regime that is not directed to a reduction in severity. It was said it would undermine the purpose of the regime as set out in the Attorney-

[18] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 November 2012 (Johan Elferink).
[19] [2014] NTSC 39.
[20] (2010) 28 NTLR 116, [50], [54] – [63].

General's second reading speech if the interpretation of the current Division 6A of Part 3 of the *Sentencing Act* were such as to simply permit the sentencing judge or magistrate to be satisfied of the existence of "exceptional circumstances" in any case where a more lenient sentence than the statutory minimum would be imposed.

[33] As the exemption applies to the circumstances of a particular case that are exceptional, it was argued those circumstances are more properly reflected in facts and circumstances relating to the offending and the offender, rather than the general purposes of sentencing reflected in s 5 of *Sentencing Act*, such as the imposition of a just sentence, assistance with rehabilitation, deterrence and protection of the community. On the respondent's argument, those principles would ordinarily be reflected overall in the sentence, or in the head sentence, rather than forming the basis of a finding that the exemption was made out.

[34] Although I appreciate the force of a number of the arguments raised on behalf of the respondent, particularly those directed to ensuring that the application of the exemption does not operate to undermine the legislative regime of mandatory minimum penalties, I am not convinced that general principles or purposes of sentencing such as proportionality have no role in the assessment of the "exceptional circumstances" exemption. I see no reason why an exceptional disparity between the impugned conduct and the minimum penalty provided would necessarily be excluded from consideration. As

pointed out by counsel for the appellant, and I agree, the current *Sentencing Act* regime for mandatory minimum sentences differs significantly from those regimes of mandatory sentencing that provide no exemption.

[35] I am somewhat fortified in this view given the recent Court of Criminal Appeal decision of *The Queen v Duncan*,[21] following a successful Crown appeal against the inadequacy of a sentence for one count of cause serious harm. At first instance "exceptional circumstances" were held to have been made out. The Court of Criminal Appeal held the original sentence was manifestly inadequate. At first instance the Court should not have entertained exceptional circumstances. Although the Court of Criminal Appeal found there were circumstances entitling considerable leniency, it was concluded those factors "cannot result in a sentence which is not justly proportionate to the respondent's offending".[22]

[36] As there was extensive argument on "exceptional circumstances" in relation to s 78DI of the *Sentencing Act*, the Court of Criminal Appeal made some significant observations in relation to the regime. The Court held it was important to appreciate the regime of mandatory minimum terms has application:

[21] [2015] NTCCA 2.
[22] Ibid, [19].

> "[o]nly where the sentence which would otherwise have been imposed is less than the legislatively prescribed mandatory minimum. If having regard to all of the surrounding circumstances, including: the circumstances of the offending; the circumstances of the offender; the maximum penalty and the terms of any other statutory requirement, the appropriate sentence exceeds the mandatory minimum sentence, then the need to consider exceptional circumstances does not arise".[23]

[37] As may be appreciated from the summary above, the Court below assessed that a term of imprisonment, actually to be served was not warranted. His Honour was clear that he would not have imposed an actual term of imprisonment, but would have suspended it, if not for the mandatory minimum term. As held in *The Queen v Duncan*, "exceptional circumstances" do not come into play unless the minimum term is greater than the term that would be imposed in the ordinary course. That was the stage that appears to have been reached by his Honour. I will not here set out the full provisions of s 78DI of the *Sentencing Act*, but clearly the exemption, as the Court of Criminal Appeal held, must be read in its statutory context. The Court of Criminal Appeal in *Duncan* held that "apart from the matters specifically excluded, a sentencing court may take into account any matter it considers relevant".[24] The "very wide scope" (as it was described in *Duncan*) of the circumstances that may be considered by a court was made plain by the observations of the Attorney-General in the second reading speech when he said:

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[23] *The Queen v Duncan* [2015] NTCCA 2.
[24] Ibid, [24]

> "The exceptional circumstances exemption is intended to be broad and the court may consider any matters it considers relevant. The bill provides that the court may take into account a victim impact statement or a victim report presented to the court before sentencing, which the court is required to take into account when sentencing an offender.
>
> I note that a victim impact statement or victim report may include a statement about the victim's wishes with respect to the sentence the offender should receive, and that may include that the victim wishes for the court to sentence the offender more leniently. … Whether a victim's wishes are taken into account as exceptional circumstances will be a matter entirely for the court".[25]

[38] In *Duncan*, the Court of Criminal Appeal noted the expression "exceptional circumstances" is not further defined in the *Sentencing Act*, however, the Court referred to a number of authorities that attribute meaning to that term:

> "The expression is not further defined in the legislation. However it has been discussed in the authorities, including in the following familiar passage from *R v Kelly*:[26]
>
> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.[27]

[25] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 November 2012. This part of the second reading speech was also central to the reasoning in *Dhamarrandji v Curtis* [2014] NTSC 39 at [23].
[26] *R v Kelly* [2000]1 QB 198, 208 (Lord Bingham of Cornhill CJ).
[27] See also *Baker v The Queen* [2004] 233 CLR 513, 573 (Callinan J).

In *Yacoub v Pilkington (Aust) Ltd*,[28] Campbell JA (with whom Tobias JA and Handley AJA agreed) said:

[66] Another question of construction concerned "*exceptional circumstances*" in r 31.18(4). In *San v Rumble (No 2)* (2007) NSWCA 259 at [59]–[69], I gave consideration to the expression "exceptional circumstances" in a different statutory context to the present. Without repeating that discussion in full, I shall state such of the conclusions as seem to me applicable in the construction of r 31.18(4).

(a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).

(b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912–913).

(c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).

(d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912–913).

(e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the

[28] [2007] NSWCA 290 at [66].

> facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186)".[29]

[39] Importantly, in the context of the current appeal it may be observed that in *The Queen v Duncan*, the Court of Criminal Appeal determined that when considering whether "exceptional circumstances" arise:

> "[T]he whole of the circumstances of the particular case must be considered. The "mitigating circumstances must be considered against a background of matters such as the egregiousness of the offending and the need for deterrence in determining whether they can be said to amount to exceptional circumstances"[30] for the purpose of the legislation. Although individual factors may not be exceptional, the relevant factors, considered in combination, may amount to exceptional circumstances.[31] Whilst reasons should be given for the exercise of the discretion, the exercise remains part of the overall instinctual synthesis that is undertaken by the sentencing Judge".[32]

[40] The instinctual synthesis approach does not exclude general principles of sentencing. It does not in my view exclude consideration of the purposes of sentencing enumerated in s 5 of the *Sentencing Act* when the question of the exemption falls for consideration. As pointed out by counsel for the appellant, in a given case, it is for a defendant to establish that an exception should be made to the minimum specified term. The minimum term would be imposed in the ordinary course if the exemption was not made out.

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[29] *The Queen v Duncan* [2015] NTCCA 2, [24]-[26].
[30] *R v Tootell* [2012] QCA 273 at [25].
[31] *Griffiths v The Queen* (1989) 167 CLR 372, 379; *Baker v The Queen* (2004) 223 CLR 513, 574.
[32] *The Queen v Duncan* [2015] NTCCA 2, [27].

[41] I have set out the relevant comments of the learned Magistrate already. Notwithstanding the very recent offending just prior to the subject offending being dealt with, his Honour concluded, because of the appellant's very particular circumstances, that a sentence of imprisonment, albeit suspended, was the appropriate disposition. While I agree those sentiments expressed are not indicative of "exceptional circumstances" and should not by themselves elevate the factors to a case of "exceptional circumstances", in this particular case I am drawn to the conclusion his Honour unnecessarily restricted the approach to be taken to the exemption. Consistent with the instinctual synthesis approach, as outlined in *The Queen v Duncan*,[33] a number of the circumstances noted by his Honour as sufficient to suspend a sentence were also circumstances open for consideration and sufficient to exempt the appellant from the operation of the minimum term. In my opinion, the tenor of his Honour's remarks overall indicate his Honour felt unnecessarily constrained in relation to factors that may amount to assessing "exceptional circumstances". As indicated, it is appreciated that the process of determining satisfaction on whether "exceptional circumstances" exist is judicial in character and the principles of *House v The King* apply. However, those principles do not prevent the establishment of error if there has been a failure to properly regard or assess relevant facts or considerations. On my

[33] [2015] NTCCA 2.

reading, his Honour did not consider that a number of the matters of mitigation taken account of generally, could simultaneously inform the question of "exceptional circumstances".

[42] Not all the factors raised before the Court below point to the existence of "exceptional circumstances". In relation to the assessment of the objective seriousness of the offending, there is nothing remarkable that might attract the exemption. Despite some suggestion on behalf of the appellant to the contrary, it was not a case of provocation on the part of the victim. It was however, an assault of short duration, not protracted, relatively spontaneous, without a weapon, and the harm alleged was not the more significant form of "physical harm". It was however, an assault within the context of a relationship, committed in the vicinity of a young child. General deterrence has a significant role in sentencing for such offending as does specific deterrence given the previous offending by the appellant. The attitude of the victim, although a matter a court may have regard to, does not necessarily have significant weight, as was noted by his Honour in cases of assaults of this kind. Nevertheless, the victim impact statement gave specific reasons why the victim did not want the appellant to go to gaol. The victim impact statement was more particular than many that are seen in cases of this kind that in other cases, may well be supportive of an offender against the victim's own best interests for reasons of intimidation, learned helplessness or misplaced loyalties. That was not

apparent here, however overall the attitude of the victim does not appear to be a significant factor.

[43] The fact that the appellant had been a victim herself of violence perpetrated by the victim, without additional information, could not be given significant weight. It is acknowledged there have been cases of far more serious violent offending where previous offending by the relevant victim has been given significant weight. For example, in *The Queen v Mattiske,*[34] when releasing an offender on a fully suspended sentence in respect of a charge of a dangerous act causing grievous harm while intoxicated by stabbing her partner in the chest and nearly killing him, Martin (BR) CJ had particular regard to the offender having endured a period of some years of violence in a domestic situation which built up to a point where his Honour considered the offending was a spontaneous reaction to the abuse.[35]

[44] Similarly, in *The Queen v Jesser,*[36] the offender was being dealt with for unlawfully causing serious harm to her former partner. She attended with another to the victim's house with a knife. When the victim opened the door she lunged forward and stabbed him in the chest twice and cut him to the left side of his head in the temple region. Surgery was required and it was said to be fortunate that the injuries were not fatal. Martin (BR) CJ took into account the history of general

[34] SCC 20527791, 23 October 2006, Martin (BR) CJ.
[35] Ibid, [7].
[36] SCC 20719298, 8 April 2008, Martin (BR) CJ.

abuse perpetrated by the victim to the offender. In that case the material before the Court indicated the offending was attributable to a background of abuse. It was one of the factors given weight in determining to fully suspend the sentence.

[45] In both cases discussed, the Court had detailed information about previous violence perpetrated by the victim. This must be distinguished from here, as although previous violence perpetrated by the victim was drawn to his Honour's attention, it was information of a generalised kind. It was not specific enough by itself to allow a firm conclusion to be drawn that it was operative on the appellant at, or generally around, the time of the offending.

[46] What was exceptional about this case, was the appellant's personal circumstances at the time of sentencing. She had attempted suicide the year before the offence at a time of particular difficulty in her relationship with the victim *and* more particularly, at the time of sentencing, was mourning the death of the baby that had taken place only two months previously. The latter of these, on any meaning given to the term, is exceptional, particularly in the appellant's circumstances. The submissions on this point were supported by the character reference set out above and by the note from Correctional Services. At a time of grief, prison in Darwin must be regarded as having a particularly harsh impact upon the appellant as she would be removed from her family and community who could assist her in

dealing with the grief. It would also mean the appellant would be removed from her young child. It is acknowledged the learned Magistrate referred to the appellant's circumstances as "heart wrenching" but the question of hardship to and of the appellant's circumstances was assimilated to the harshness that all persons are subject to when imprisoned. Although the appellant was in a serious position from a sentencing point of view, particularly given her previous offending, her personal circumstances were such that being away from community support while experiencing obvious grief, meant that prison would be more burdensome on her than other persons. The offending, even given the previous assault, which does not in itself increase the objective seriousness of the offence, was not so grave as to outweigh the mitigation that was genuinely of an exceptional character. In my opinion, this is the very type of situation for which the exemption is designed. In conjunction with this factor was the verified information that the appellant was attending counselling with Catholic Care, was under supervision, had a history of employment, cooperated with police, made spontaneous admissions and pleaded guilty.

[47] In all of the circumstances, the ends of general and specific deterrence were well met by a sentence of imprisonment that was suspended. The factors relevant to a finding of exceptional circumstances are part of the overall instinctual synthesis in the sense described in *Duncan*.

Orders

[48] The order will be that the appeal against sentence will be allowed. The sentence of three months imprisonment to actually be served will be quashed. Instead the appellant will be sentenced to three months imprisonment suspended at the rising of the court. I note time in custody was served at the time the original sentence was imposed. The time has already been served. Given the effluxion of time, the operational period will be reduced from what might ordinarily be expected. There will be an operational period of six months from today during which the appellant is not to commit another offence punishable by imprisonment and is to continue under the supervision of Correctional Services as previously set or she may be called upon to serve some or all of the three month term.

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