

*The Queen v Lange* [2007] NTCCA 3

PARTIES: THE QUEEN

v

RICKY MARTIN LANGE

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF  
THE NORTHERN TERRITORY

JURISDICTION: CRIMINAL APPEAL FROM THE  
SUPREME COURT EXERCISING  
TERRITORY JURISDICTION

FILE NO: CA 21 of 2006 (20509936)

DELIVERED: 2 March 2007

HEARING DATES: 2 March 2007

JUDGMENT OF: MARTIN (BR) CJ, THOMAS &  
RILEY JJ

**CATCHWORDS:**

**CRIMINAL LAW – APPEAL**

Crown appeal against sentence - punishment and general deterrence -  
whether gravity of offending outweighed personal circumstances -  
suspension of entire sentence resulted in sentence manifestly inadequate -  
appeal allowed – re-sentenced.

*R v Osenkowski* (1992) 30 SASR 212; *R v Riley* (2006) 161 A Crim R 414,  
applied

*Massie v R* [2006] NTCCA 15; *R v Bara* (2006) 17 NTLR 220, referred to.

**REPRESENTATION:**

*Counsel:*

Appellant: N Rogers  
Respondent: R Goldflam

*Solicitors:*

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

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

*The Queen v Lange* [2007] NTCCA 3  
No. CA 21 of 2006 (20509936)

BETWEEN:

**THE QUEEN**  
Appellant

AND:

**RICKY MARTIN LANGE**  
Respondent

CORAM: MARTIN (BR) CJ, THOMAS & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 2 March 2007)

**Martin (BR) CJ:**

**Introduction**

- [1] The respondent pleaded guilty to unlawfully causing grievous harm to his five and a half year old son. The learned Sentencing Judge imposed a sentence of three years imprisonment. The respondent having been in custody for five days awaiting sentence and for one or two days following arrest, his Honour directed that the sentence be suspended immediately. The Director of Public Prosecutions appeals against the sentence on the sole ground that the sentence is manifestly inadequate.

## **Facts**

- [2] The offence occurred on 25 April 2005. At that time the respondent lived in Alice Springs with his partner and four children, two of whom were born of that relationship. The eldest child was the partner's child from a previous relationship.
- [3] The victim was born on 29 October 1999 as a result of the respondent's previous relationship with the victim's mother. The victim and his mother lived in South Australia. In January 2005 when the victim was aged five years, the victim's mother sent the victim to visit the respondent in Alice Springs. The victim was enrolled at primary school in Alice Springs and lived with the respondent, his partner and the other three children. The respondent extended the victim's stay in Alice Springs and, after a disagreement between the respondent and the victim's mother, a booking was made for the victim to return to South Australia on 5 May 2005.
- [4] According to the Crown facts, the victim experienced difficulties in fitting into his new school and his new family environment. At the respondent's house, the victim was smacked and hot chilli was put in his mouth as a punishment for swearing. The victim also got into trouble for wetting his bed. In addition, counsel for the respondent put to the sentencing Judge that the victim had deliberately urinated and defecated in his bedroom, but his Honour did not make any reference to that submission.

- [5] During the morning of 25 April 2005 the respondent's partner reported to the respondent that the victim had again wet his bed during the night and she had smacked him. The victim had been told to stay in his bedroom facing the wall.
- [6] That afternoon the respondent went to the RSL Club where he consumed beer and bourbon. He returned home at about 4pm and, in the words of the sentencing Judge, the respondent was "somewhat affected by alcohol".
- [7] Upon his return home the respondent was informed by his partner that the victim had been misbehaving. The respondent entered the victim's bedroom where he grabbed the victim, forcefully, and held the victim while he kicked the victim with "full force" to the buttocks and lower back area. The expression "full force" was the expression used by the respondent when describing the incident to the police.
- [8] The victim cried out in pain, but the respondent repeated the process of kicking the victim with full force on at least two more occasions. The respondent then slipped and fell while holding the victim with the consequence that both the respondent and the victim fell to the ground. The respondent struck his shoulder on a nearby table and told the police that the victim's head may have hit the ground or some object causing significant bruising to the forehead of the victim. The respondent then left the room leaving the victim in the bedroom.

- [9] After a sleep, the respondent awoke at about 8.30pm and went to work. He spoke by telephone with his partner and she advised him to look in on the victim when he came home. At about 2am on 26 April 2005 the respondent returned home and looked in on the victim who appeared to be asleep. The respondent then went to bed.
- [10] At about 9am, the victim called out asking permission to go to the toilet. The respondent gave permission and prepared a cereal breakfast for the victim to eat alone in his bedroom. The respondent's partner dropped a child at school and returned home. The respondent then left the house to deliver pamphlets on his bicycle.
- [11] While the respondent was absent from the home, the victim suffered convulsions in the kitchen and lost consciousness. The respondent's partner put the victim under running water and then placed him in her car with her other children after which she drove around endeavouring to find the respondent. In the meantime, the respondent arrived home. Finding no one in the house the respondent went looking for his partner and they met in the street. The respondent's partner asked the respondent to take the victim to the hospital.
- [12] The respondent arrived at the Alice Springs Hospital with the victim at about 10.30am. An initial examination revealed extensive bruising, scratches and cuts over most of the victim's body. The victim was in a semiconscious state. The respondent told staff that the victim had suffered a

fit. The victim was placed in an induced coma and the next day was transferred to the Women and Children's Hospital in Adelaide with an extremely serious prognosis. The victim was maintained in an induced coma to assist his recovery.

[13] The victim was found to be suffering from severe and extensive injuries, but as explained later in these reasons not all of the injuries were caused by the respondent. The injuries were summarised by a medical practitioner in the following terms:

“4. **Physical Examination**

4.1 [The victim] had multiple bruises, abrasions and lacerations over his face and body. The following is a list of his injuries as recorded by myself while [the victim] was on the intensive care unit at Alice Springs Hospital. Please refer to attached body chart.

5. **Face & Head**

- 5.1 Triangular puncture lesion approximately 0.5cm x 0.5cm, 3cm above the lateral aspect of his right eye brow,
- 5.2 Four circular pale purple bruises on his forehead each approximately 1cm x 1cm in diameter
- 5.3 Deep purple bruising around both eyes
- 5.4 Light purple bruise 3cm x 3cm on his right cheek. Some evidence of old abrasions within this bruise
- 5.5 1cm linear red abrasion on the tip of his nose
- 5.6 Light purple bruise 3cm x 3cm on left cheek
- 5.7 There was no bruising behind the ears. The eardrums were intact. The frenulum was intact. His teeth were not damaged. There were some ulcers present on the left side of his mouth.

6. **Neck**

- 6.1 Red bruise under chin (not marked on body chart).

7. **Right Arm & Shoulder**

- 7.1 Multiple deep purple bruises present on upper limb
- 7.2 Abrasion 1cm long on the posterior aspect of right shoulder
- 7.3 Five round circular bruises, darkish purple each approximately 1.5cm x 1.5cm in diameter on the anterior aspect of right shoulder
- 7.4 Purple bruise 1cm below 1.5cm x 1cm in diameter
- 7.5 Further conglomeration of bruises right lateral aspect of mid arm. These are reddish purple in colour. One bruise is 1cm x 1cm and the more medial bruise is 2cm x 2cm. At the base of this group of bruises there is a more defined red bruise which is 1.5cm x 1cm in diameter.

His right hand was swollen. He had numerous abrasions on the right hand including some punched out lesions; one of these was over the proximal phalanx of the middle finger. This was 0.3cm in length. There was another lesion proximal to his forth finger again 0.3cm in length. These lesions were both read and appeared to be granulating (not marked on diagram).

8. **Torso – Anterior**

- 8.1 Multiple bruises and lacerations were noted on [the victim's] chest
- 8.2 Cluster of bruises medial to his left nipple. The main one is greyish purple, 2cm x 1cm
- 8.3 Medial to 8.2 there is a further bruise which is 1.5cm x 0.5cm, this is brownish in colour
- 8.4 Over the sternum there is red punctate lesions consistent with an abrasion
- 8.5 Below this is a 5cm linear lesion consisting of 4 lines of red dots, running vertically
- 8.6 Immediately below this in the middle of his chest lies a set of four horizontal lines measuring 4cm in length and again defined by red punctate dots
- 8.7 Lateral to this is a deep red linear abrasion 2cm in length
- 8.8 Below this, several small scratches
- 8.9 There is a further abrasion 5cm above his umbilicus. This consists of punctate dots and is approximately 1cm in length.

- 8.10 Over the region of the anterior superior iliac spine is a small puncture wound approximately 0.5cm in diameter and red in colour
- 8.11 In the region of his right hip, further lesions there is a pinkish abrasion 2cm in length with darker red dots within it. This is triangular in shape with a base of approximately 0.5cm.
- 8.12 Above this there is a brownish abrasion 2cm in length. There is a further abrasion on the right lateral aspect of his torso in line with the umbilicus. This is 4cm in size, dark red in colour and made up of red punctate lesions
- 8.13 Below the pink triangular lesion there is a further abrasion, which is 4cm in length consisting with reddish dots. This lesion is wider approximately going to a more linear lesion distally.

[The victim's] external genitalia were normal on examination.

## 9. **Right Leg**

- 9.1 There is an abrasion on the outer aspect of his right thigh, 2cm long, 1cm wide and again made up of red punctate lesions
- 9.2 Lower down there is a 1cm linear laceration
- 9.3 Slightly medial to this there is a 2cm laceration with 2 linear components made up of brownish punctate lesions
- 9.4 Over the lower aspect of his right shin are some old abrasions. The largest is just below the knee. This is a triangular lesion 4cm x 3cm.
- 9.5 There are 2 lesions superior to this approximately 1cm and 0.5cm in diameter
- 9.6 Below this there are 3 healed abrasions.

His right foot was generally swollen with a small punctate laceration above the nail on his big toe approximately 0.3cm.

## 10. **Left Leg**

- 10.1 The left foot was swollen in comparison to the right foot
- 10.2 There is a linear abrasion 1.5cm in length over the medial aspect of the foot arch. There was an old round bruise on the mid shin, this was dark grey in colour and was 1cm x 1cm in diameter.
- 10.3 There were numerous abrasions present on his left lateral thigh. There were 2 main lesions; The superior lesion is 3cm x

1cm in diameter with surrounding pinkish erythema. The lesion is brownish in colour, irregular in outline and appeared to be granulated

- 10.4 Below this was a 5cm x 1cm light pink elliptoid shaped abrasion with dark brown surround
- 10.5 There are several linear scratches above and below the knee
- 10.6 Over the centre of the thigh was a further bruise 3cm in length, 1cm in depth and a greyish colour
- 10.7 Anterior to this was a grey linear mark 3cm in length.

## 11. **Left Hip**

- 11.1 Over his left hip on the lateral aspect there is an arrow shaped lesion. The superior arm of the arrow is 3cm in length and triangular in shape. There are 3 distinct areas within this, each approximately 0.5cm in diameter connected by linear scratch marks. This lesion is dark red in colour and has some petechial lesions within it. The inferior arm of the arrow is 2cm in length. This contains small round brown lesions within it.

## 12. **Left Arm & Shoulder**

- 12.1 There is a round grey/purple bruise 2cm x 2cm over the anterior aspect of the left shoulder. Slightly posterior to this there are 2 pale grey round bruises 1cm in diameter and 1.5cm in diameter (not shown in diagram).

## 13. **Posterior Aspect of Right Upper Arm**

- 13.1 Several large purple bruises were present in this area.
- 13.2 Purple bruise 3cm x 3cm
- 13.3 Small purple bruise
- 13.4 Two round grey bruises 1cm x 1cm

## 14. **Posterior Aspect of Torso**

- 14.1 Again multiple bruising and lacerations were noted over the posterior aspect of his torso.
- 14.2 There is purplish discolouration extending from the right shoulder across the mid line to the back. This area is 10cm by 8cm in diameter. Within this discolouration are 2 distinct bruises; these are grey/purple in colour. One is 2cm x 2cm and

the other more lateral is light grey in colour and is 2cm x 1cm in diameter

- 14.3 In the middle of his lower back is a linear abrasion. This consists of three red lines, and a circular abrasion superior to this
- 14.4 In his mid left torso is a line of puncture wounds. There are six in total; 0.2cm in diameter. The lowest lesion is round and yellow in colour. The superior lesions are reddish, brown in colour.

## 15. **Buttocks & Lower Back**

- 15.1 There is extensive bruising over the lower back and buttock area
- 15.2 At the right side of the lower back there is some purplish bruising extending down into the right buttock. The total area of this bruise is approximately 10cm x 8cm and involves the whole of the right buttock. Within this area there is a more defined purple region
- 15.3 There are also several abrasions over his lower back and buttocks as listed below:
- 15.4 Dark purple bruise over left buttock 8cm x 8cm. The left buttock and thigh were swollen and tense with haematoma (see CT scan result).
- 15.5 Linear scratch marks over lateral outer thigh and buttock
- 15.6 Raw pink abrasion 2.5cm in length, 0.5cm in width in the posterior mid thigh
- 15.7 Small puncture wound below the knee crease, 1cm in length
- 15.8 Linear abrasions consisting of petechial lesions
- 15.9 Abrasion 2cm in length, brown in colour
- 15.10 Faint light brown abrasion running in a horizontal direction

## 16. **Summary of Imaging Studies Performed in Alice Springs**

- 16.1 CT scan brain – performed on presentation
- 16.2 Soft tissue swelling over right parietal region in scalp. Soft tissue swelling over left temporal region. There was no skull fracture.
- 16.3 Thin layer of subdural blood in the left frontotemporal region. Subdural blood present in the interhemispheric fissure to the

left of the falx. A small amount of blood present around the occipital pole on the right.

16.4 There were no parenchymal lesions noted in the cerebral hemispheres, and good preservation of grey-white matter distinction.

**17. CT Scan Chest and Abdomen Performed on Presentation**

17.1 Fracture 6<sup>th</sup> rib anteriorly

17.2 Free fluid around lower margin of liver and around porta hepatis and above head of the pancreas. Liver, kidneys and spleen intact.

17.3 Distension around fascial planes of left buttock and thigh, presumably haematoma

**18. CT Scan Cervical Spine Performed on Presentation**

18.1 No abnormality detected

**19. Skeletal Survey Performed on Presentation**

19.1 Upper limbs, thoracic and lumbar spine, lower limbs, hands and feet – no fractures seen

19.2 Ophthalmology examination performed at 1600 on performed by Consultant Ophthalmologist showed extensive bilateral retinal haemorrhages”

[14] The injuries directly attributable to the attack by the respondent can be summarised as follows:

- Facial bruising, including bruising around both eyes, on the forehead and on each cheek.
- Thin layer of subdural blood in the left frontotemporal region; subdural blood present in the interhemispheric fissure to the left of the falx; a small amount of blood present around the occipital pole on the right.

- Fracture of the sixth rib anteriorly.
- Fracture of the pelvic bone.
- Free fluid around lower margin of liver and around porta hepatis and above head of the pancreas.
- Extensive bilateral retinal haemorrhages.
- Soft tissue swelling over the right parietal region in the scalp and soft tissue swelling over the left temporal region.
- Bruising on the right arm, including the upper and lower limb as well as near the shoulder.
- Distension around fascial plains of left buttock and thigh.
- Bruising to the back and buttocks.
- Bruising to the thighs including two lesions, an abrasion, a bruise and a linear mark.
- Bruising to a large area of the torso, both front and back, including multiple bruises to the chest and bruising extending from the right shoulder across the mid line to the back.
- A loss of consciousness and convulsions.

[15] Although the summary by the medical practitioner does not mention a fractured pelvis, other evidence refers to such a fracture. It appears that the

pelvic fracture was first identified at the Women and Children's Hospital in Adelaide.

- [16] The consultant paediatrician at the Women and Children's Hospital reviewed the victim on 27 April 2005 and, after noting the results of medical investigations, reached the following conclusions:

“The incident described by [the victim's] father, ..., when he kicked [the victim] accounts for the buttock and thigh bruising and haematoma and pelvic fracture. The subsequent fall would account for the forehead bruising and possibly the rib fracture. The other widespread cutaneous injuries of bruising and abrasions is not accounted for.”

- [17] During cross-examination at the committal proceedings, the paediatrician accepted that the fit and loss of consciousness on the morning of 26 April 2005 could have been due to the head injury sustained in the fall on the previous day. The paediatrician described the victim as quite deeply unconscious at the time of presentation to the Alice Springs Hospital and explained that being so deeply unconscious can cause difficulty in breathing which, in turn, can result in lack of oxygen to the brain and either death or permanent brain damage. The paediatrician was of the view that the pelvic and rib fractures did not require specific management and would heal well on their own. She expressed the opinion that the victim would have experienced severe physical pain and distress associated with the injuries which would result in emotional trauma, but it was unlikely that there would be any permanent neurological or physical sequelae from the injuries.

[18] In considering the adequacy of the sentence, it is important to bear in mind that the respondent was to be sentenced for a single crime of assault, comprised of three kicking incidents occurring in a short period, and only the injuries caused by that assault. As was put to the sentencing Judge, the head injuries were caused when the child fell and caught his head on the side of a table and then hit the floor. The serious bruising extending down the buttocks and the backs of the legs and bruising to the back and over a large area of the torso could also have been caused in that single incident. The bruising visible to the parts of the head and face was attributable to the single incident.

[19] Other injuries, sustained on other occasions, cannot be taken into account. The respondent was not charged with any offences causing other injuries and he cannot be punished in respect of any other injury. Nevertheless, it is readily apparent that the respondent's offence was responsible for very serious injuries to the child.

[20] In the victim impact statement, the victim's mother said it was difficult to estimate the harm caused. She said that the victim has experienced an emotionally difficult time involving both sadness and hatred. The victim demonstrated quite difficult behaviours with nightmares and tantrums. He was aggressive towards his mother. He kept saying that his mother did not love him. There were problems at school which, by October 2006, had been resolved. The victim attended counselling for months after he was released from hospital in order to address these difficulties. The victim's mother

stated that as at October 2006 the victim talked reasonably frequently about the events in Alice Springs and in doing so appeared to be sad and angry. She said the victim missed his father as well as his brother and sister in Alice Springs. She concluded that the victim was settling very well. He was getting on well with his mother's new partner and loved his little brother.

[21] As the sentencing Judge observed, the comments of the victim's mother are encouraging. His Honour added that it appeared that the victim "seems to have made a full recovery". However, given the observation of the victim's mother that as at October 2006 when the victim talked about the events in Alice Springs he seemed to be sad and angry, in my view it cannot be said that the victim has made a full emotional recovery. It is too early to make a determination as to the long term psychological impact of the respondent's criminal conduct.

[22] When police spoke to the respondent, he made admissions to the kicking incident. He maintained that his partner had only ever administered the occasional disciplinary slap and spoke of the punishment for swearing as a spoonful of hot chilli in the mouth. The respondent told police that the victim had been kept away from school recently because he had a cold. When asked about the bruising all over the victim's body, the respondent said he could not explain the extent of the bruising except that it might be due to the kicking incident. Although the sentencing Judge did not refer to the inability of the respondent to account for all the injuries nor to the

medical evidence demonstrating that the kicking incident could not account for all the injuries, his Honour made the following observations concerning the respondent's cooperation with the police:

“In the present case, unlike some cases of this nature, there was no covering up of what occurred. You, [the respondent], sought medical help as soon as you appreciated [the victim's] condition and his need. You were fully cooperative with police.”

[23] As I have said, the respondent is not to be punished for any injuries other than those proven by the evidence to have been caused by his assault on the child. Nevertheless, the respondent could not explain all of the other injuries and it is obvious from the nature and extent of the other injuries that not all of them could have occurred accidentally. It is difficult to avoid a clear impression that the respondent was not entirely frank with the police and could have assisted them to a greater degree with respect to the possible causes of other injuries. It may be that the Judge was too generous in his view of the respondent's cooperation, but if his Honour was too generous that generosity could not provide a basis for interfering with the sentence.

### **Respondent's Personal Circumstances**

[24] As to the personal circumstances of the respondent, at the time of sentence he was 29 years of age. He grew up in country South Australia and completed year 11 at Gladstone High School. The respondent did not receive any further training or obtain any additional qualification, but had managed to remain almost constantly in employment.

[25] Of significance to the question of sentence was the respondent's experience as a child. His father was an alcoholic and given to violence when intoxicated. The respondent told a psychiatrist that he has vivid memories of his father's violence such as being thrown against walls, but there are also good memories. This history led the psychiatrist to a view that there has been "some blighting of personality development, in particular, due to the violence dispensed by [the respondent's] alcoholic father, and thus it is not especially surprising that when confronted with parental challenges himself, [the respondent] has resorted to violence as an attempt to resolve issues with his own child".

[26] The psychiatrist reported that the respondent is a man of normal intelligence who has a history of depressed mood reaching back to his childhood. According to the psychiatrist, the respondent has "some insight into the fact that he is prone to rage reactions 'over nothing' and [the respondent] believes he does require some professional assistance in that regard, especially because he is aware that his current partner is now afraid of him". The psychiatrist reported that the respondent is "refreshingly free from shifting blame to the victim by way of excusing himself" and he is strongly remorseful, recognising that he has "utterly failed to protect his son". In the opinion of the psychiatrist, bearing in mind that the respondent does not have a history of behaving aggressively towards other people, particularly children, and in view of the fact that the respondent has no prior convictions

whatsoever, there is every prospect that the respondent will resume his usual responsible and law abiding lifestyle.

[27] The sentencing Judge accepted that the respondent was deeply ashamed of what he had done. His Honour found, consistent with the view of the psychiatrist, that the respondent is unlikely to offend again. In the course of his remarks, his Honour made the following observations:

“I am impressed by the fact that you are willing to undergo professional counselling for anger management and depression. The present case as I have said is serious. However, it is very important to keep it in context. It is significant that this is not a case of repeated and calculated neglect of a child. It is not a case of serial violence. It is a case, both the Crown and the defence counsel were very clear about this, which is to be treated and sentence is to be passed on the basis that it is an isolated assault of relatively short duration, committed in a state of anger and frustration with the intent of chastisement and the unintended consequence of serious physical injury from which [the victim] has fortunately apparently fully recovered.”

[28] Two references were tendered from persons who had known the respondent for up to seven years and who had found the respondent to be an honest and reliable worker. It was the view of the referees, and the view reached by the sentencing Judge, that the respondent’s actions were out of character. Given the material before the Judge and the fact that the respondent was a first offender, that view was open to his Honour and the Crown does not challenge that view on the appeal.

## **Other Punishment**

[29] During submissions, a front page article in the local newspaper was presented to the Judge as evidence that the respondent had suffered the consequences of very prominent publicity. The headline of the article was in large bold print and read “Boy, 5, bashed for wetting bed”. The respondent and his partner were identified by name as having been charged. Counsel informed his Honour that the respondent had suffered significantly as a consequence of the publicity. Patrons at work ostracised him and he had received threatening and anonymous notes. His employer had asked the respondent not to socialise at the work place.

[30] Against that background, the Judge made the observation that the respondent had “already been punished to quite some extent”, not only by his guilt and deep remorse, but also by the adverse publicity. Commenting on the Crown submission that condign punishment was required, his Honour said “I think you have been punished enough. And in my view, a fully suspended sentence from today is what is required”.

## **Principles**

[31] On a Crown appeal against the adequacy of a sentence, it is not enough that the Appeal Court is of the view that the sentence is too light. In the absence of a specific error by the sentencing Judge, the sentence must be so manifestly inadequate as to demonstrate that error of principle must have occurred. To put it another way, the sentence must be so low as to “shock

the public conscience”: *R v Osenkowski* (1992) 30 SASR 212 per King CJ at 213. The principles governing Crown appeals were discussed by this Court in *R v Riley* (2006) 161 A Crim R 414 at 419 [18] – [20] and 421-422 [34] and it is unnecessary to repeat that discussion.

### **Competing Considerations**

[32] The Crown highlighted the gravity of the appellant’s criminal conduct being a violent attack upon a defenceless and vulnerable five and a half year old child in the care of the respondent. Severe injuries were caused. Counsel urged that particular regard must be had to the age of the child and the breach of trust involved. Accepting the finding of the trial Judge that the respondent is deeply ashamed and his actions were out of character, nevertheless the Crown contended that the sentence of three years imprisonment itself, and in particular the suspension of that entire sentence, conveys the wrong message to perpetrators of violence against vulnerable victims such as children and general deterrence requires both a longer sentence and that the respondent serve part of that sentence. In the Crown submission, it is incorrect to say that by reason of his shame and the publicity the respondent has been “punished enough”.

[33] The respondent did not shy away from the gravity of the criminal offending, but highlighted the spontaneous nature of the offending and the respondent’s prior good character. Counsel emphasised that the respondent has already been punished by his shame and the adverse publicity. Counsel also

emphasised that the sentencing Judge had given careful consideration to a wide range of sentencing factors and had taken time to carefully consider the question of the appropriate sentence. The merciful approach of the sentencing Judge was, counsel contended, within the proper range of the Judge's sentencing discretion.

[34] Counsel for the respondent also drew attention to the conduct of the Crown before the sentencing Judge. It was contended that the Crown had not done everything reasonably required of the Crown to avoid judicial error.

[35] I do not agree. The Crown drew the Judge's attention to the serious nature of the offending and referred to the authorities of *Massie v R* [2006] NTCCA 15 and *R v Bara* (2006) 17 NTLR 220. Reference was made to the requirement for condign punishment. The submissions preceded the submissions of counsel for the respondent who did not seek immediate suspension. Nor did counsel for the respondent contend that the respondent had been punished enough. The whole flavour of the submissions, as can be gained from the transcript, is that counsel for the respondent was expecting a sentence of imprisonment to be imposed and was seeking partial suspension of that sentence after service of a period considerably longer than about seven days. In my view there is no substance in this complaint.

### **Manifestly Inadequate**

[36] Viewed objectively, the respondent's crime was particularly serious. The victim was aged only five and a half years and was in the care of the

respondent. Holding the child, the respondent kicked the victim with what the respondent described was “full force”. Notwithstanding that the victim was crying out in pain, on at least two more occasions the respondent repeated the process of kicking the victim in the buttocks and lower back area. The victim sustained severe injuries. Although it can be said that the attack upon the child was spontaneous, there were no mitigating circumstances attending the commission of the crime. Crimes of the type committed by the respondent are frequently committed in moments of anger by offenders who are affected by alcohol. Commonly, offenders express regret and are ashamed of their actions.

[37] General deterrence was of particular importance. Crimes of violence against vulnerable members of our community are prevalent. Children are particularly vulnerable to attacks of violence in domestic circumstances. Such crimes are usually committed in the privacy of the family home. Young children are totally reliant on those responsible for their care. They are defenceless. They lack support mechanisms available to older victims. Notwithstanding the presence of personal circumstances of mitigation, those features of sentencing centred upon punishment and deterrence must often prevail in the face of serious offending such as that committed by the respondent.

[38] In arriving at the sentence of three years imprisonment, the Judge properly took into account the respondent’s plea of guilty. If the reduction to reflect the plea was of the order of 25 percent, his Honour’s starting point would

have been in the vicinity of four years imprisonment. The question for this Court is whether that starting point was not just low, but manifestly inadequate.

[39] It is to be remembered that a range of head sentence was available to the trial Judge and it is only if the starting point of four years was so low as to be outside that range that it can be said that the sentence is manifestly inadequate. In considering this question, regard must be had not only to the objective seriousness of the crime, but also to the personal circumstances of the respondent, particularly the fact that he was a first offender whose conduct was out of character.

[40] If the respondent had previously offended against the law in a significant way, particularly if he had previously committed any offences of violence, I would have regarded the starting point of four years as outside the proper range of the sentencing discretion. However, in all the circumstances, although the starting point of four years is at the lower end of the proper range of the sentencing discretion, in my opinion it cannot be said that it is outside that range. It follows that after allowance for the plea of guilty the sentence of three years is not outside the proper range of the sentencing discretion.

[41] That brings me to the suspension of the sentence in its entirety, that is, other than the approximate seven days spent in custody. The question to be

considered is whether the suspension resulted in a sentence that is manifestly inadequate.

[42] The sentencing Judge faced a difficult decision. The objective circumstances of the offending were particularly serious, but the respondent was a first offender whose personal circumstances attracted considerable sympathy.

[43] Notwithstanding the matters personal to the respondent, in my opinion the gravity of the offending was such that the suspension of the entire sentence has resulted in a sentence that is manifestly inadequate. This was one of those cases in which the gravity of the offending far outweighed the personal circumstances such that considerations of punishment and general deterrence prevailed and required that some part of the sentence be served.

[44] I have reached the view that suspension of the sentence resulted in a sentence that is manifestly inadequate independent of any consideration of whether a specific error by the sentencing Judge can be identified. In my view, for the reasons that follow, his Honour erred in respect of the question of punishment.

[45] As mentioned, immediately before suspending the sentence his Honour referred to the adverse publicity. In his Honour's view that publicity, coupled with guilt and deep remorse, had resulted in the respondent being "punished to quite some extent". His Honour then referred to the delay which meant that the matter had been hanging over the respondent's head

for approximately 18 months and to the five days during which the respondent had been in custody awaiting sentence. Having referred to those matters, his Honour made the observation that he thought the respondent had been “punished enough”.

[46] It is not difficult to understand why the Judge reached the view that the respondent had been punished by the adverse publicity but, with respect, in my opinion his Honour was in error in concluding from that fact and the other matters to which I have referred that the respondent had been “punished enough”. Generally speaking, it is appropriate for a sentencing court to have regard to the effects of adverse publicity, particularly if the publicity has resulted in significant consequences such as the failure of a business or the loss of employment. However, each case must be assessed according to its particular circumstances. Persons who commit a serious crime, particularly a crime of great concern to the community such as a violent crime against a very young child causing serious injuries, can hardly complain if they are the subject of adverse publicity with attendant consequences such as being shunned by friends and acquaintances. In my view, the consequences to the respondent of the publicity were not such that it could reasonably be said that by reason of that publicity, even considered in conjunction with the other matters to which I have referred, the respondent had been “punished enough”. The sentencing Judge erred in respect of an important aspect of the sentencing discretion.

[47] Having reached the view that the Judge erred in respect of the impact of the publicity and that, independently of any error by the Judge, suspension of the sentence resulted in a sentence that was manifestly inadequate, the question remains whether this is one of those exceptional cases in which this Court should take the next step and allow the Crown appeal. There are a number of factors which must be considered in determining this question. As discussed by this Court in *Bara*, careful regard must be had to the principle of double jeopardy and to the individual circumstances of the offender who has been sentenced and left at large in the community.

[48] This is not a case in which it is necessary to require the respondent to serve part of the sentence of imprisonment in order to deter the respondent from offending again. The sentencing Judge found that the respondent is unlikely to offend again and that finding was justified by the evidence. In addition, the respondent has maintained his employment and is the breadwinner of a young family who since committing the offence on 25 April 2005 has got on with his life. The respondent has also undertaken anger management counselling and has continued to work with Family and Children's Services in reuniting his family. Sentence was imposed on 15 November 2006. Interrupting the life of the respondent and his family at this time by requiring him to serve a sentence of imprisonment will obviously have a severe impact.

[49] On one view, it might be said that having indicated that the sentence is low and should not have been suspended, this Court has achieved one of the

primary purposes of Crown appeals concerned with maintaining sentencing standards. It might also be said that in the same way the Court has addressed the question of general deterrence by sending the message to the community that cases involving violence against children causing injuries will result in significant sentences of imprisonment to be served and that strong personal circumstances, including the absence of prior offending, will not ordinarily entitle the offender to suspension of the entire sentence.

[50] On the other hand, crimes of the type committed by the respondent are far too common in our community and they are often difficult to detect. For the reasons discussed, the crime committed by the respondent was particularly serious. Young children generally, and particularly in domestic circumstances, require the full protection of the law. There is a strong public interest in maintaining sentencing standards which properly address the requirements of punishment and general deterrence.

[51] Notwithstanding the matters of mitigation to which I have referred, and giving full weight to the principle of double jeopardy and the exceptional nature of the remedy of Crown appeal, I have been driven to the conclusion that this is one of those exceptional cases in which the Crown appeal should be allowed and this Court should re-sentence the respondent.

[52] As I have said, the respondent has spent approximately seven days in custody. In addition, as explained in *Riley*, when a Court of Criminal Appeal re-sentences an offender following a successful Crown appeal, the

Court is required to give effect to the element of double jeopardy involved in requiring an offender to face the prospect of being sentenced twice for the same criminal behaviour. This principle is of particular relevance when an offender has been released at first instance and some months later is required to serve a sentence of imprisonment. Recognising this element of double jeopardy, this Court imposes a lesser sentence when re-sentencing than would have been imposed when sentencing at first instance. For that reason, sentences imposed by an appellate court following a successful Crown appeal often sit at the lower end of the range of appropriate sentences.

[53] If I had been sentencing at first instance, I would have regarded a starting point of five years imprisonment as appropriate. After allowing for the plea, I would have regarded a sentence of three years and nine months imprisonment as appropriate. However, applying the principle of double jeopardy, and before allowance is made for the plea of guilty, in my view the appropriate starting point will be four years. After allowance for the plea of guilty, I would impose a sentence of three years imprisonment.

[54] As to suspension of the sentence, this Court must again make appropriate allowance for the principle of double jeopardy. If I had been sentencing at first instance, I would have required the respondent to serve 10 months of the sentence. However, making proper allowance for the principle of double jeopardy, I would now suspend the sentence after the respondent has served six months of the sentence.

[55] For these reasons, in my opinion the appeal should be allowed and the sentence imposed by the Judge should be set aside. I would impose a sentence of three years imprisonment suspended after the respondent has served six months on condition that the respondent enter into a bond to be of good behaviour for a period of two years and six months from the date of his release. The operative period for the purposes of the Sentencing Act should be two years and six months from the date of release.

**Thomas J:**

[56] I agree with the orders of the Chief Justice and with his reasons. I would add that I agree with Dr Rogers, counsel for the appellant, that general deterrence is an important aspect of the sentence in this matter.

**Riley J:**

[57] I agree that the appeal should be allowed. I adopt, with respect, the reasons of the Chief Justice and I agree with the orders he proposes.

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