CITATION:	*Pilakui v Appo* [2024] NTSC 86
PARTIES:	PILAKUI, Leila v APPO, Jacqueline
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 15 of 2024 (22322249)
DELIVERED:	18 October 2024
HEARING DATE:	14 October 2024
JUDGMENT OF:	Huntingford J

CATCHWORDS:

APPEAL – Appeal against sentence in Local Court – Breach of Domestic Violence Order – Whether Local Court Judge erred by having regard to incorrect maximum penalty – Error found to materially affect sentence – Appeal allowed.

APPEAL - Considerations on re-sentence – Objective Seriousness – Consideration of harm suffered by victim – Offender victim of domestic violence – Appellant re-sentenced to community correction order – Conviction recorded.

Domestic and Family Violence Act (NT), s 120(1), 65; *Sentencing Act 1995* (NT), s121(a), 123A(2), 40(3), 32, 8(1); *Local Court (Criminal Procedure) Act 1928* (NT), S 175a; *Criminal Code Act 1983* (NT), s 43BD.

Benfell v Rigby [2020] NTCA; *Bush v Lyons* [2018] NTSC 2; *Hales v Adams* [2005] NTSC 86; *Lorenzetti v Brennan* [2021] NTSC 64; *Manakgu v Russell*

[2013] NTSC 48; *Midjumbani v Moore* [2009] NTSC 27; *Ritchie v R* [2016] VSCA 27; *Ryan v Malogorski* [2012] NTSC 55; *Vickers v R* [2020] NSWCCA 297, *Andalong v Jones* (2019) 91 MVR 1, referred to.

REPRESENTATION:

Counsel:

Appellant:	D Thomas
Respondent:	R Everitt

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Hun2407
Number of pages:	15

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

Pilakui v Appo [2024] NTSC 86
No. LCA 15 of 2024 (22322249)

BETWEEN:

LEILA PILAKUI
Appellant

AND:

JACQUELINE APPO
Respondent

CORAM: HUNTINGFORD J

REASONS FOR JUDGMENT

(Delivered 18 October 2024)

Introduction

[1] On 12 June 2024 the appellant was found guilty and convicted in the Local Court at Wurrumiyanga of the offence of engaging in conduct that resulted in a contravention of a domestic violence order (DVO), contrary to s 120(1) of the *Domestic and Family Violence Act* (NT). The appellant was sentenced to a term of imprisonment of six months, suspended immediately for an operative period of six months.

[2] The charge arose out of events which occurred on 14 July 2023. Those events, as set out in the agreed facts tendered at the sentencing hearing, may be summarised as follows:

a. On 23 January 2023 the appellant was served with a DVO in which the victim, her husband, was named as the protected person. The terms of the order were that the appellant was restrained from, directly or indirectly:

   i. Causing harm or attempting or threatening to cause harm to the protected person;

   ii. Causing damage to property, or attempting or threating to cause damage to property of the protected person; and

   iii. Intimidating or harassing or verbally abusing the protected person.

b. The order was in force for 12 months from 23 January 2023.

c. On 14 July 2023 the victim had been drinking at the Wurrumiyanga Club, where he consumed approximately 20 cans of beer before walking home to the house he shared with the appellant.

d. On entering the house the victim went with the appellant to the kitchen and asked her to make him a cup of tea. The appellant told him to make his own tea. In response, the victim became angry and pushed and punched the appellant.

e. Immediately after the victim punched the appellant, she grabbed a jug of boiling water from the kitchen counter and threw the water over the victim, covering his right bicep and shoulder, and the right side of his

chest and face with boiling water. The victim felt immediate pain. He immediately left the house and sought help from police.

f. As a result of the appellant's action the victim received severe burns to his right bicep causing the skin to burn away on an area approximately 18cm by 6cm. He also suffered blistering on the shoulder and chest area and reddening to the forehead.

Grounds of appeal

[3] The appellant appeals against the sentence imposed on the grounds that:

a. The sentence imposed was manifestly excessive;

b. The learned Local Court Judge failed to consider and exclude alternatives to actual imprisonment as viable sentencing options or alternatively did not determine that actual imprisonment was the appropriate sentence prior to imposing a suspended sentence; and

c. The learned Local Court Judge erred by having regard to a maximum penalty of five years imprisonment when the applicable maximum penalty was two years imprisonment or a fine of 400 penalty units.

[4] The third ground of appeal was conceded by the respondent. At the time of the offending, the maximum penalty for an offence against s 120(1) of the *Domestic and Family Violence Act* (NT) was two years imprisonment. The *Justice Legislation Amendment (Domestic and Family Violence) Act 2023* (NT), which commenced on 25 March 2024, increased the maximum penalty

to five years in circumstances where the conduct constituting the breach involves harm or a threat to commit harm to the protected person. There are no relevant transitional provisions in the amending Act. Therefore, section 121(a) of the *Sentencing Act 1995* (NT) provides that where an Act increases the penalty for an offence the increase applies only to offences committed after the commencement of the provision effecting the increase.

[5] It is clear from the transcript of the Local Court proceeding that the prosecutor led the sentencing Judge into error when he submitted that the maximum penalty for the offence to which the appellant had entered a plea of guilty was five years.[1] The prosecutor made the following submission:

> We say that the maximum penalty for the breach of domestic violence order, noting the provisions, is 5 years, and this – whilst we concede that the principle of *De Simoni* apply and that your Honour can't take into account the circumstances of aggravation which would warrant a conviction for a more serious offence, we'd say that, with that maximum penalty, is aligned with an aggravated assault, maximum penalty-wise, and that your Honour can take harm clause [sic caused] into account.

[6] The judge responded that she thought that the offence was "mid-range". Neither the judge nor counsel for the defence made any statement correcting the prosecutor's submission as to maximum penalty at any stage during the hearing. Making due allowance for the summary nature of the proceeding, and the busy list in a bush circuit court such as this, I am satisfied that the judge took into account the wrong maximum penalty in relation to the sentence.

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1 *Police v Leia Pilakui*, Transcript of proceedings, Local Court, 12 June 2024, 7.

[7] Such an error will often, but does not always, lead to an appeal being allowed and the appellant resentenced.[2] In this case there was a very significant disparity between the applicable maximum penalty and the erroneous maximum penalty (two and a half times). Further, the prosecutor referred to a correlation with the five year maximum penalty for the offence of aggravated assault, a more serious charge which the appellant was not facing and which could not be taken into account. For those reasons, I am satisfied that the error could have materially affected the sentence. The sentencing discretion has miscarried and therefore the appeal must be allowed and the sentence set aside.

[8] As a result if is unnecessary to further consider grounds one and two.

Re-sentence

[9] In view of the above it is necessary to re-sentence the appellant. The submissions of the appellant and respondent in relation to grounds one and two were relied upon in relation to the question of re-sentence, and I have considered them in that context, together with the oral submissions made at the hearing. I have also considered the documents exhibited in accordance with s 175A of the *Local Court (Criminal Procedure) Act 1928* (NT).

Objective Seriousness of the Offending

[10] The gravamen of the offence of engaging in conduct constituting a breach of a DVO is the failure to comply with the court's order. Offences involving

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2 *Vickers v R* [2020] NSWCCA 297, [104] – [106] per Wright J and the cases referred to there; *Ritchie v R* [2016] VSCA 27, [10] per Bongiorno and Beach JJA.

conduct of the offender which results in harm to the victim are often, but not always, objectively more serious than those where no harm is caused.[3] That is because, as Barr J explained in *Manakgu v Russell*[4] the objective seriousness of the offending is assessed by reference to the behaviours which were the object of restraint under the DVO, and relative to the serious kinds of conduct which could constitute a DVO contravention.

[11] There is no doubt that the conduct of the appellant in throwing boiling water over the victim was a serious breach of the DVO which restrained her from causing or threatening harm to the protected person. The impact upon the victim as a result of the injury was significant, as is shown in the description in the agreed facts and the photographs tendered in the Local Court. The victim impact statement says, not surprisingly, that the burns were very painful, although it was accepted that, by the date of the plea, the injuries had healed well. There was no suggestion of any lasting disability. Nonetheless, it is the sort of conduct which, in the ordinary course, indicates serious disregard of the court's order and for which a sentence of imprisonment will often be within range.

[12] The seriousness of the breach must, however, be seen in the context of the circumstances as a whole. The appellant was at home when the victim arrived having consumed around 20 cans of beer at the local club. He demanded that the appellant make him a cup of tea and, when she

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3 *Lorenzetti v Brennan* [2021] NTSC 64, [43].

4 [2013] NTSC 48, [13] – [14].

refused, pushed and punched her. It was immediately in response to that use of force that the appellant threw the boiling water over her husband.

[13] The wider context of the offending was that the appellant and the victim have been in a relationship as husband and wife for many years. They have three children together. It was conceded by the prosecution[5] that there is a longstanding history of the appellant being a victim of domestic violence at the hand of her husband. It was agreed that the appellant has been a protected person in six court confirmed DVOs since 2009, and that between 24 March 2010 and 20 November 2020 the appellant had been assaulted by the victim five times, on some occasions with weapons. The victim was imprisoned for assaulting the appellant on each of the five previous occasions.

[14] It is not to be suggested that the appellant had a right to respond as she did because of her previous experience as a victim of domestic violence. Nor was it suggested that the prosecution could not prove that the appellant's conduct on this occasion was not a reasonable response in the circumstances.[6] The appellant does not seek to set aside her plea of guilty.

[15] However, the conduct of the appellant was reactive. She had just been assaulted. The Local Court found that at the time of the offending the appellant was scared of her partner and I am also satisfied that that was the case.

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5 *Police v Leia Pilakui*, Transcript of proceedings, Local Court, 12 June 2024, 4.

6 *Criminal Code Act 1983* (NT), s 43BD.

[16] The respondent argued that the force of the submission that the appellant was scared, and that that affected her decision to breach the order, is reduced by the interval between the victim's last conviction for assault of the appellant and the date of this incident. However, there are two factors which cause me to reject that submission. First, there were five previous assaults which occurred over a period of ten years. That extended history continues to be relevant in my view, even in circumstances where the last conviction was approximately three years before the incident. Second, and most importantly, on the agreed facts the appellant was being assaulted by the victim immediately before she threw the boiling water.

[17] This was not a case of a pre-mediated or 'revenge' attack for old wrongs. The past assaults are relevant because they contributed to the fear which the appellant felt on this occasion. She was being assaulted by a person who had drunk 20 beers, and who had assaulted her five times before. Her conduct in throwing the boiling water at her husband in breach of the DVO should be seen in that context. That is not to minimise the seriousness of the harm he suffered, or to fail to acknowledge that boiling water is inherently dangerous.

[18] Other relevant factors as to the seriousness of the offending are that the DVO had been in place for about six months of its 12 month term at the time it was breached, and that there had been no previous breaches. The conduct of the appellant was a single application of force, using a weapon.

[19] There was no evidence before the court that the appellant had engaged in any violent conduct towards the victim in the past, except that she was the subject to the DVO. There was no evidence that the appellant had previously been the respondent to any other DVO. Given the varied circumstances in which DVOs are made, including that they may be made by consent without admissions,[7] and the lack of evidence as to the circumstances in which the particular order was made, there is nothing about the making of the DVO which aggravates the seriousness of the offending or increases the appellant's moral culpability.

[20] Overall, the circumstances call for a significant reduction in the assessment of both the objective seriousness of the offending and the moral culpability of the appellant.

Appellant's personal circumstances

[21] The appellant was 44 years old at the time of the offending. She has lived her whole life at Wurrumiyanga Community. She is a grandmother with caring responsibilities for her only grandchild. She suffers from diabetes. At the time of the offending the appellant was employed as a cleaner, and she had held that employment for nine years. The appellant had no criminal history. It may be accepted therefore that the appellant was a person of good character. Indeed it appears she had led a blameless life, including in somewhat difficult circumstances given her experiences of domestic

7 *Domestic and Family Violence Act 2007* (NT), s 65.

violence. The appellant has not been involved in any offending since the date of this offence and her rehabilitation prospects appear excellent.

Recording a conviction

[22] The appellant submitted that no conviction should be recorded. A decision to record a conviction is a component of the sentence, and relevant to whether the sentence overall is proportionate to the offending.[8]

[23] Section 8(1) of the *Sentencing Act* provides that:

> (1) In deciding whether or not to record a conviction, a court must have regard to the circumstances of the case including:
>
> (a) the character, antecedents, age, health or mental condition of the offender; and
>
> (b) the extent, if any, to which the offence is of a trivial nature; and
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances.

A decision as to whether to record a conviction requires consideration of all three limbs of the section, which operate disjunctively. In addition, the court must consider any other relevant circumstances.[9]

[24] On behalf of the appellant it was argued that the appellant's prior good character, her age and health, and the extenuating circumstances under which the offence was committed, were sufficient reason to not record a conviction in this case. It was not argued that the offence was trivial.

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8 *Hales v Adams* [2005] NTSC 86, [17].

9 *Benfell v Rigby* [2020] NTCA 9, [14] – [15].

[25] The respondent submitted that, even allowing for those matters, the seriousness of the offending necessitates the recording of a conviction. The respondent points out that, as discussed by Riley J in *Midjumbani v Moore*,[10] the paramount consideration in the making of a DVO is the safety and protection of the protected person. The enforcement provisions function to ensure compliance with the terms of a DVO in order to maintain the integrity of the scheme.

[26] As the Court of Appeal stated in *Benfell v Rigby*, the recording of a conviction is a significant act of legal and social censure, and is a substantial part of the sentence for that reason.[11] Further, it is accepted that recording a conviction may have a general impact upon the offender's future economic and social well-being.[12] However, in this case there was no evidence that the appellant's employment, employment prospects, or other activities would be particularly affected by the recording of a conviction.

[27] In my view a conviction is appropriate. Recording a conviction reflects the seriousness of the breach, denounces the behaviour and reflects the need for general deterrence. Although the weight given to general deterrence is reduced due to the circumstances of the offending, it remains a relevant consideration in view of the need to maintain the integrity of the DVO scheme.

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10 [2009] NTSC 27, [12].

11 *Benfell* [14].

12 Ibid, [29].

Sentence

[28] The appellant submits that a non-custodial penalty is appropriate. This submission is made on the basis that the seriousness of the offending and the moral culpability of the appellant are reduced, as I have found above, due to the unusual circumstances of the offending. The appellant submits that notwithstanding the harm caused to the protected person as a result of her conduct, the breach of the order was not contumelious. It occurred in the moment, was preceded by significant provocation, and in a context where she had been a victim of domestic violence at the hands of the protected person in the past. There is little need to give weight to specific deterrence, and a reduction in the need for general deterrence as noted above.

[29] The appellant further submits that her subjective circumstances, in particular her prior good character and excellent prospects of rehabilitation also weigh in favour of a non-custodial penalty.

[30] It was also submitted by the appellant that some allowance should be made in sentencing for the plea of guilty. The plea came at the hearing. Section 123A(2) of the *Sentencing Act* provides that where a plea of guilty is made within seven days of the date set for hearing the court must not have regard to the plea and the stage in the proceedings at which that occurred, or impose a sentence which is less severe than the sentence that would have been imposed but for the plea of guilty.[13] However, s 123A(3) provides that

13 *Sentencing Act 1995* (NT), s 123A(2).

the restriction does not apply if the court is satisfied that the offender could not have pleaded guilty any earlier.

[31] The appellant points out that the plea she entered at the hearing was to one charge, the more serious charge of aggravated assault having been withdrawn on the hearing date. Importantly, the agreed facts relied on at the plea differed significantly from the original police facts. The police facts made no reference to the assault upon the appellant by the protected person, giving the impression that the conduct was unprovoked. A copy of the police facts are in the Local Court file. Further, the appellant lives in a remote area which is more likely than not to have impacted her access to legal advice. There are significant delays between bush court sittings and legal advice is not routinely available at Wurrumiyanga. In my view the procedural history of the file supports that conclusion.[14]

[32] In the circumstances, I find that the appellant could not have pleaded guilty any earlier than the date of the hearing. She was therefore entitled to have her guilty plea taken into account on sentence in accordance with s 5(2)(j) of the *Sentencing Act*. A plea can result in a percentage reduction in sentence, for example a reduction in a fine or term of imprisonment, but can also be

14 The Local Court file shows that the matter was listed for hearing on 14 February 2024 but could not go ahead on that day because there were insufficient lawyers available to assist the appellant due to the one lawyer available having a conflict. Therefore, this delay was not the fault of the appellant. The matter was immediately listed for hearing on 12 June 2024 and went ahead at the circuit on that day. There was a case management inquiry on 23 January 2024 in Darwin, but the appellant was excused, presumably because she was living at Wurrumiyanga.

reflected by the imposition of a lesser sentencing option.[15] That is the approach I consider is appropriate in this case.

[33] There is no tariff or settled range of sentences for this offence.[16] The appellant submitted that a fine is the correct disposition. I do not agree, due to the seriousness of the breach as discussed above. However, I also consider that a gaol term is not required. It is well established that imprisonment should be imposed only as a last resort.[17] The *Sentencing Act* provides that a suspended sentence of imprisonment should not be imposed unless the sentence of imprisonment if unsuspended would be appropriate.[18]

[34] In my view the appellant should be sentenced to a community correction order with the statutory conditions contained in s 33 of the *Sentencing Act*. I do not consider that the appellant has any criminogenic needs which would require the imposition of additional conditions, such as rehabilitation programs. I also note that the appellant continues to be subject to a DVO in accordance with the order of the Local Court. The imposition of a community correction order will give the appellant the opportunity to demonstrate that this was a one-off incident.

[35] The appellant has been subject to a sentence of imprisonment suspended, pursuant to the order of the Local Court, for more than four months. She has

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15 *Andalong v Jones* (2019) 91 MVR 11, [5].

16 *Bush v Lyons* [2018] NTSC 20, [33].

17 *Ryan v Malogorski* [2012] NTSC 55, [11] – [12].

18 *Sentencing Act 1995* (NT), s 40(3).

therefore served two thirds of the operative period. There is no suggestion that there has been any breach of the order.

[36] A community correction order must date from the day that it is made.[19] Had I been sentencing the appellant at first instance I would have imposed a community correction order for a period of 12 months. However, in view of the time already elapsed, during which the appellant has been subject to the suspended term of imprisonment, I will impose a community correction order for a period of six months.

Orders

[37] The orders are as follows:

a. The appeal is allowed;

b. The conviction and sentence imposed by the Local Court at Wurrumiyanga is set aside;

c. The appellant is convicted of the offence of engaging in conduct in breach of a domestic violence order on 14 July 2023;

d. The appellant is sentenced to a community correction order for a period of 6 months with the statutory conditions that she must be of good behaviour, and not commit any offence punishable on conviction by imprisonment, during that period.

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19 *Ibid.*, s 32.