CITATION:	*Arnott v Harland & Ors* [2025] NTSC 10
PARTIES:	ARNOTT, Rhys v HARLAND, Maurice and SIEBERT, Kelly Marie and KIRKBY, Paul Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 17 of 2024 (22037173); LCA 18 of 2024 (22321100); and LCA 19 of 2024 (22318066)
DELIVERED:	27 February 2025
HEARING DATE:	5 December 2024
JUDGMENT OF:	Kelly J

Sentencing Act 1995 (NT), s 12, s 45, s 53(4)(b), s 53(2)

DPP v Reynolds (a pseudonym) (2022) 71 VR 336; [2022] VSCA 263; *DS v R* [2022] NSWCCA 156; *Edmond and Moreen v The Queen* [2017] NTCCA 9; *Markarian v The Queen* (2005) 79 ALJR 1048; *Phan v Western Australia* [2014] WASCA 144; *Sabitovic v The King* [2024] VSCA 66, referred to

REPRESENTATION:

Counsel:

Appellant:	I Read SC with N Goodfellow
Respondents:	P Williams with L Auld

Solicitors:

Appellant:	Bryson Kelly Barristers & Solicitors
Respondents:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Arnott v Harland & Ors [2025] NTSC 10

No. LCA 17 of 2024 (22037173);
LCA 18 of 2024 (22321100); and
LCA 19 of 2024 (22318066)

BETWEEN:

RHYS ARNOTT
Appellant

AND:

MAURICE HARLAND
First Respondent

AND:

KELLY MARIE SIEBERT
Second Respondent

AND:

PAUL MICHAEL KIRKBY
Third Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 27 February 2025)

[1] This is an appeal against an order of a Local Court judge sentencing the appellant to four years imprisonment for a range of offences and ordering the appellant to serve the outstanding balance of 12 months of a suspended

sentence with six months of that sentence to be cumulative on the sentence for the fresh offending. The grounds of appeal are as follows.

(1) The learned sentencing judge erred by imposing a sentence that was manifestly excessive in all of the circumstances.

(2) The learned sentencing judge erred by making the following incorrect statement of principle: "One principle that must be stated at the outset is that the subjective factors cannot outweigh the objective seriousness of the offences." Accordingly, the judge misunderstood the central relevant consideration, causing the sentencing discretion to miscarry.

[2] The appellant was subsequently granted leave to add a third ground of appeal: that the sentencing judge was in error in fixing a single aggregate sentence for both the Territory offences and count 6, the Commonwealth offence of using a carriage service to send menacing, threatening and harassing text messages.

[3] On 19 April 2024, the appellant was found guilty, following a contested hearing, of five domestic violence offences against WC: two charges of assaulting WC; one charge of choking WC; one charge of property damage and one charge of using a carriage service to menace WC. Thereafter, he pleaded guilty to two more charges: an aggravated assault against a stranger, DB which involved the threatened use of a knife in public and driving unlicensed. These offences were all committed in breach of an earlier partly

suspended sentence for serious domestic violence against his former wife OP and their eight year old son on 19 November 2020.

[4] On 6 August 2024, the appellant was sentenced in the Darwin Local Court. The 12 months outstanding balance of the suspended sentence was restored in full and directed to commence on 20 October 2023 to take into account the appellant's presentence custody. For the offences against WC and DP, the appellant was sentenced to an aggregate term of imprisonment for four years with a non-parole period of two years and eight months. This sentence was directed to commence on 20 April 2024, to allow six months of the 12 months restored sentence to be served concurrently with the sentence for the fresh offending.

[5] The offending against WC took place in the context of a domestic relationship characterised by abuse, violence, threats, manipulation and jealousy on the part of the appellant, especially when intoxicated. WC remained in the relationship notwithstanding assaults committed on her by the appellant on 12 November 2022 (count 1) and 28 December 2022 (count 2). After the serious domestic violence offending against her on 28 April 2023 (counts 3 to 5), WC ended the relationship. After that, the appellant sent WC a series of menacing, threatening and harassing text messages (count 6). The appellant pleaded not guilty to all six charges. He gave evidence at the trial denying the charges but was found guilty on all six.

[6] The facts of the offending are as follows:

Count 1 (aggravated assault on 12 November 2022)

The appellant and WC had been drinking at Tumbling Waters. The appellant was intoxicated. He got into the car intending to drive and WC tried to stop him. She reached into the car and took the keys out of the ignition. Then the appellant used the electronic widow button to repeatedly close the window on her arm ten times. Eventually she managed to get her arm out of the car and the appellant drove off and left her there. WC suffered substantial bruising and pain.

Count 2 (aggravated assault on 28 December 2022)

The appellant and WC were in the appellant's vehicle. They had both been drinking and the appellant was very drunk. The vehicle got bogged. The appellant drove backwards and forwards trying to get out but that made it worse. The appellant became impatient and aggressive, abusing WC, calling her things like "a fucking cunt" and "a fucking slut".

The appellant and WC went to get some equipment to dig out the vehicle and when they got back the appellant said to her, "Go away cunt! Fuck off!" Then he kicked her on her outside left thigh and told her, "Fuck off and get off my block." WC did not leave as they were too far away from anywhere to walk.

The appellant kicked her again in the same place in a roundhouse kick.

They then drove to a bottle shop and bought a bottle of wine. They had another argument in the car during which the appellant kicked WC out of the car and drove off.

WC suffered bruising from the kicks.

Counts 3, 4 and 5 (assault, choking and property damage on 28 April 2023)

During the afternoon of 28 April the appellant sent WC a text asking her to pick him up. She couldn't but sent him a text inviting him to come to her place to watch a movie. He came over and was drinking long necked bottles of beer and port from the bottle. He had a bath – continuing to drink – and came out wearing a towel and they started watching a movie.

The appellant then started arguing about texts WC had sent to another man. He became angry and aggressive and called her "a slut", "a whore", "an open-legged whore" and "a trailer park cunt".

The next WC knew, she was on the floor of the verandah, the appellant was on top of her, straddling her. (She could not recall how she got there but thought the appellant had dragged her.) The appellant had both his hands around her neck, choking her. Then, while continuing to choke her with his right hand, he punched her in the side of the head with his left fist.

She tried to get him off her by grabbing his testicles but that didn't work and she let go. The appellant kept on punching and strangling her. He

punched her in the face, eyes and nose. She blacked out a number of times from the strangulation. At some point he also kicked her in the side.

Eventually he stopped. WC armed herself with a "bootpuller" and told him she would hit him if he touched her again.

The appellant put some of his belongings in his car and drove off. He drove through WC's closed gate smashing the gate and three fence panels. He did a burn out before leaving.

WC suffered bruising to her face, neck, leg and elbow.

Count 6 (using a carriage service to menace/harass)

During the period following 28 May until June 2023, the appellant sent a series of abusive, threatening and menacing texts to WC some of which implied that he was nearby and watching her and her children. He also left a voice message on her phone: "I'll fucking take you out. Do not fuck around. Do you understand that cunt?"

Assault on DB on 28 May 2023

At about 7.30 pm on 28 May 2023, the appellant drove his truck to the Darwin River Tavern. He stopped in the car park on an angle that partly blocked the entrance to the Tavern. DB asked him to move the truck. The appellant said he wasn't parking there, drove to the end of the car park and then drove back.

The appellant got out of his truck holding a knife with a 20 cm blade and walked towards DB.

DB said, “That’s not very smart mate, there’s cameras over there. You’re already on camera. If you keep coming this way it’s only going to get worse for you.”

The appellant said, “I don’t give a fuck,” and kept walking towards DB with the knife. He called out, “Do you want a go?” and raised the knife pointing it towards DB. He kept walking towards DB pointing the knife at him.

DB stepped back, afraid of being stabbed. The appellant stood within two metres of DB with the knife pointing in front of him. Then he walked to a grassed area near the Tavern and, still holding the knife, yelled out, “Come on cunt, let’s have ago.”

DB tried to walk to his car but the appellant turned his attention back to DB walking towards him again, holding the knife.

DB put his hands up in fear and the appellant again said, “Do you want to go cunt?”

DB said, “No cunt. I’m just going to my car. I’m leaving,” but the appellant said, “No you’re not,” and kept walking towards DB.

Eventually the appellant walked away from the area, got back in his truck and left.

The sentence in the Local Court

[7] In sentencing the appellant on 6 August 2024, the sentencing judge observed that each of the offences against WC was aggravated because they were committed in breach of a DVO.

[8] His Honour assessed count 1 as lower to mid-range of seriousness. He assessed count 2 as below the mid-range, though noting the attack was unprovoked and totally unjustified.

[9] The sentencing judge found counts 3 and 4 to be particularly concerning noting that the offending arose "once again" out of suspicions of infidelity and jealousy on the part of the appellant in the context of consumption of alcohol. The attack was "vicious and prolonged" and occurred in the victim's own home. His Honour assessed these offences (count 4 in particular) as at the higher end of objective seriousness.

[10] The sentencing judge found count 5 (the damage to the gate and fence) to be at the lower end of the scale of seriousness.

[11] Likewise, his Honour assessed count 6 as below the mid-range of seriousness.

[12] His Honour assessed the offence against DB as falling toward the lower range of objective seriousness, despite the use of the knife and noting that

the threatened use of a knife in public no doubt caused a great amount of anxiety and fear to DB and to others in the vicinity.

[13] The sentencing judge referred to the harm suffered by the victim WC who had provided a victim impact statement. That harm included physical pain and scarring as well as nightmares and anxiety and constant fear that the appellant would harm her or her children.

[14] The sentencing judge observed that the appellant had not displayed any remorse or contrition in relation to the offences against WC and that during the interview with the author of the pre-sentence report he had made allegations against WC in an effort to minimise the offending or to give the impression that he had been acting in self-defence or had conducted himself appropriately.

[15] His Honour referred to alcohol as a risk factor and, notwithstanding that the appellant had completed a Banyan House course while on bail, described his prospects of rehabilitation as "guarded at best". The sentencing judge referred to a report prepared for the purposes of sentencing the appellant for his earlier offending against his former partner and son in which the report writer said that the appellant had reflected on and taken responsibility for his behaviour; that he had maintained his sobriety and indicated that he would continue to be alcohol free for the rest of his life. This turns out not to have been the case.

[16] The sentencing judge determined that emphasis needed to be given to the need for community protection, denunciation and general deterrence.

[17] His Honour sentenced the appellant to an aggregate term of imprisonment for four years with expressly taking into account the principle of totality and the early pleas on the Tavern offences;[1] fixed a non-parole period of 32 months and directed that the sentence commence on 20 April 2024 to take into account presentence custody and half the time spent in residential rehabilitation. This also had the effect of making six months of the restored 12 month sentence (which was to commence on 20 October 2023) concurrent with the sentence for the index offending.

[18] I note that s 53(2) of the *Sentencing Act* requires a sentencing court sentencing an offender to be imprisoned in respect of more than one offence, to fix a non-parole period in respect of the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed. The sentencing judge in this case fixed a non-parole period of 32 months beginning on the date of commencement of the four year sentence for the index offending, not the total sentence including the restored sentence. That 32 months is more that 50% of the four year aggregate sentence, and slightly more than 50% of the total effective sentence imposed of four years and six

1 In relation to the second Tavern offence – driving unlicensed – his Honour recorded a conviction and discharged the appellant unconditionally pursuant to s 12 of the *Sentencing Act 1995* (NT).

months. However, no separate complaint is made about the length of the non-parole period.

Principles

[19] The principles governing appeals of this nature are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it is shown that the sentencing judge committed error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive.[2]

[20] In determining whether a sentence is manifestly excessive, an appeal court must consider all factors relevant to the sentencing exercise including the maximum penalty for the offence, the objective seriousness of the offence on the scale of seriousness for that particular offence, the standards of

2 *Edmond and Moreen v The Queen* [2017] NTCCA 9 at [4] ("*Edmond*") and the cases cited therein

sentencing customarily imposed for the offence and the personal circumstances of the offender.[3]

The appellant's submissions

Ground 2

[21] The appellant argued Ground 2 first and I will deal with them in the same order. The passage in the sentencing remarks objected to by the appellant is as follows:

> One principle that must be stated at the outset is that the subjective factors cannot outweigh the objective seriousness of offences. This is particularly important where there have been attempts to rehabilitate. Rehabilitation is indeed an important factor to consider; however, the overall seriousness of the offence must always be considered.[4]

[22] Mr Read SC for the appellant contended that this remark reflects a fundamental error in approach in the sentencing process suggesting a hierarchy of considerations with the objective seriousness (as assessed by the learned sentencing judge) standing as the primary consideration in the sentencing exercise. This, it is submitted, is inconsistent with the instinctive synthesis approach mandated by the High Court in *Markarian v The Queen*,[5] emphasising that what is required is that the sentencer must

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3 Supra at [30]; *Phan v Western Australia* [2014] WASCA 144 at [19]

4 Local Court Transcript of Proceedings 6 August 2024 at p 5

5 (2005) 79 ALJR 1048 ("*Markarian*")

take into account all relevant considerations in forming the conclusions reached.[6]

[23] The appellant also relied on this statement of principle by the New South Wales Court of Criminal Appeal in *DS v R*:[7]

> The discussion of [objective seriousness and moral culpability] is not meant to burden sentencing judges but to assist them by inviting, and to a certain extent requiring, them to determine the seriousness of the offence and how much moral blame the offender bears, but only as part of the a consideration of the weight to be attached to the various sentencing factors and for the purpose of undertaking the instinctive synthesis described in *Markarion*.

[24] If the sentencing judge had indeed stated (or implied) that there was a hierarchy of considerations with the objective seriousness of the offending standing as the primary consideration in the sentencing exercise, then that would be in error. However, I do not think that, on a fair reading of the sentencing judge's sentencing remarks, the impugned passage can be said to bear that meaning. It seems to me that all his Honour was saying, in context, was that the appellant's efforts at rehabilitation should not be over-emphasised and that all relevant considerations, including the objective seriousness of the offending must be taken into consideration. Nor does it seem to me that, looking at the sentencing remarks as a whole, his Honour erred by placing too much weight on the objective seriousness of the offending at the expense of other relevant matters.

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6 *Markarian* at [27]

7 [2022] NSWCCA 156 at [92]

Ground 1

[25] In this ground the appellant argues that the sentencing judge gave insufficient weight to what counsel for the appellant described as "the remarkable progress at rehabilitation undertaken by the appellant" and imposed a sentence that failed to provide conditions that will help the appellant to rehabilitate. The appellant contended that there were a range of sentencing options including the imposition of an Intensive Community Corrections Order pursuant to s 45 of the *Sentencing Act* which would serve to punish and deter while facilitating the appellant's rehabilitation.

[26] The appellant complains that while the sentencing judge recognised that alcohol played a major part in the appellant's offending, his Honour "failed to have proper regard to the successful participation in residential rehabilitation at Banyan House from 15 January 2024 to 8 July 2924. That contention cannot be accepted. The sentencing judge did have due regard to the appellant's participation in the Banyan House program, his Honour said this:

> … Alcohol played or plays a great part in the life of the offender. It would appear that in 2010, the offender engaged with a psychologist to address alcohol misuse, and he was then referred to a psychiatrist where he was prescribed medication. But he relapsed into alcohol use and abuse within three to six months.
>
> On 11 January 2024, I granted the offender bail to attend Banyan House residential and rehabilitation program. He was transitioned through Stage 1, and when the pre-sentence report was prepared, he was in Phase 2 of the program to commence outings independently in the transition period. I have a certificate of completion of Phase 2 from Banyan House. During his stay at Banyan House there was one issue of

> non-compliance due to breaching what is said to be a cardinal rule, by engaging in a close relationship with another peer. This resulted in a consequence of failing to (inaudible) Phase 2, back to Phase 1, on 22 April 2024.
>
> On 8 July 2024, Banyan House contacted Community Corrections to advise that the offender was exited from the program under a "mutual agreement" for concerns with the offender's transparency and honesty, as he was seen in public with a former resident on an independent outing which was not associated with the prior planning. It appears that even at this stage, he's unable to maintain a trouble free existence, even with people or associations who are attempting to assist in a positive progression in his life.
>
> On 24 July 2024, Banyan House informed Community Corrections that despite this incident, the offender had successfully completed the program. The author of the presentence report had attended Banyan House regularly to conduct testing and all results provided negative readings for the presence of alcohol and illicit substances. Mr Arnott should be proud of those results. Mr Arnott should be proud of his participation in the program. He was assessed, however, to be in the high-risk category in relation to the risk of relapsing. …[8]

His Honour then referred to a report prepared by Mr Kwiatkowski in 2021 for the purpose of the appellant's earlier sentencing exercise for offences of serious domestic violence against his former partner and their eight year old son.

> It was also noted in the report of Mr Kwiatkowski that as a result of his reflections on his behaviour and taking responsibility for his behaviour at the time, "Mr Arnott has maintained his sobriety and indicates that he will continue to be alcohol free for the rest of his life." Obviously these undertakings are unable to be honoured by the offender. I note this issue as the offender is now still relying on the court to accept that rehabilitation through a similar process is (sic) a short time before reoffending. I find that his prospects of rehabilitation in reality are guarded at best.[9]

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8 Local Court Transcript of Proceedings 6 August 2024 p 6-7

9 Local Court Transcript of Proceedings 6 August 2024 p 7

[27] Given the facts before his Honour this would seem to be a fair assessment and, with respect, it would be an over-statement to describe the appellant's efforts as "remarkable progress at rehabilitation". (His Honour also referred to the fact that the appellant had been provided with a referral to engage in the men's behaviour program run by CatholicCare, but noted that he had already engaged with that program in 2021 and 2022.)

[28] Counsel for the appellant also contends that the sentencing judge had "no regard for the opinion or recommendations expressed by Community Corrections" who assessed the appellant as suitable for supervision as part of an ICCO and expressed the opinion that he would benefit from a supervised order supported by Community Corrections.

[29] The report was before the sentencing judge and it cannot be inferred that he had "no regard" to it. However, determining an appropriate sentence is a matter for the sentencing judge, taking into account all relevant considerations; it is not a matter for Community Corrections and there can be no legitimate expectation on the part of an offender that a non-custodial sentence or a partly suspended sentence will be imposed simply because the offender has been found suitable by Community Corrections.

Respondent's submissions

[30] In relation to Ground 2, the respondent contended that the impugned remarks by the sentencing judge were unexceptional and relied on the

following statements of principle by the Victorian Court of Appeal (and others to similar effect):

> Section 5(1) of the *Sentencing Act 1991* provides that the only purposes for which sentences may be imposed are punishment which is just in all the circumstances; deterrence; to establish conditions within which rehabilitation may be facilitated; denunciation; protection of the community; or a combination of two or more of any of those purposes. While it may be accepted that, where an offender has demonstrated rehabilitation and that a sentence should be tailored as much as possible to allow the offender to complete the process of rehabilitation, as has been said before, the sentencing purpose of rehabilitation cannot be allowed to overwhelm the sentencing exercise — especially in a case involving serious and violent offending.[10]
>
> …
>
> Further, as her Honour noted, where an offender has demonstrated rehabilitation, a sentence should be tailored, as much as possible, to allow the offender to complete the process of rehabilitation.
>
> As much may be accepted, however the sentencing purpose of rehabilitation cannot be allowed to overwhelm the sentencing exercise, especially in a case involving serious and violent offending in the context of family violence where deterrent and punitive considerations loom so large. That is so even where there is impressive evidence of rehabilitation (as there was the case here).
>
> As much was recognised by the learned sentencing judge herself, by her observation that insofar as the sentencing exercise was informed by evidence of rehabilitation, remorse, reconciliation and forgiveness, this needed to be balanced by the need to punish the respondent for this serious offending, express denunciation and achieve general deterrence. Indeed, her Honour accepted, correctly, that these deterrent or punitive matters were the pre-eminent sentencing considerations in this case.[11]

[31] The respondent contended that given the objective seriousness of the offending, most of which occurred in a domestic violence context, the appellant's lack of responsibility, insight and remorse and his resort to placing the blame for the offending on the victim, the court necessarily

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10 *Sabitovic v The King* [2024] VSCA 66 at [51]

11 *DPP v Reynolds (a pseudonym)* (2022) 71 VR 336; [2022] VSCA 263 at [94] – [96]

needed to place significant weight on community protection and specific deterrence, and that given the nature of the offending the court likewise needed to place substantial weight on the objectives of denunciation, punishment and general deterrence. The respondent submitted that in all of the circumstances, the sentence imposed was appropriate.

Consideration

[32] I agree that the sentence imposed was not manifestly excessive, and indeed was appropriate in the circumstances. In addition to the matters emphasised by the respondent, his Honour the sentencing judge was entitled to take into account, when considering whether to partially suspend the sentence or fix a non-parole period, the guarded prospects of rehabilitation he found as a result of the report from Banyan House assessing the appellant as at high risk of relapsing; the fact that his earlier assurances that he would be alcohol free for life were inaccurate; and the important consideration that these offences were committed while the appellant was on a suspended sentence for serious domestic violence against a former partner also committed while under the influence of alcohol. So far as the appellant's personal circumstances are concerned, there is little information in either the sentencing judge's remarks or the appellant's submissions other than that he had children who were living with his former partner but whom he saw; had a good work history; had the offer of employment and had accommodation tentatively lined up in case of a non-custodial disposition. There was no

complaint by the appellant of the trial judge's treatment of the appellant's personal circumstances.

Ground 3

[33] It is conceded by the respondent that the learned sentencing judge erred by impermissibly imposing an aggregate sentence across the Territory offences and the Commonwealth offence.

[34] In accordance with s 52(4)(b) of the *Sentencing Act*, the sentencing judge indicated to the appellant the sentence that would have been imposed for each offence if separate sentences were imposed instead of an aggregate sentence. They were:

Count 1: 6 months

Count 2: 2 months

Count 3: 30 months

Count 4: 42 months

Count 5: 4 months

Count 6: 1 month

The total comes to 85 months so there would have been considerable concurrency if individual sentences had been imposed to bring the total to four years and six months (54 months).

[35] The appeal must be allowed on Ground 3. However, I am of the view that the sentence imposed was not only not manifestly excessive but entirely

appropriate and that there has been no miscarriage of justice, and accordingly, that Grounds 1 and 2 should be dismissed.

[36] I think the appropriate disposition is to set aside the sentence imposed by the sentencing judge and to re-sentence the appellant to effectively the same head sentence, restructured so as to avoid including the Commonwealth offence in the aggregate sentence for the Territory offences and to comply with the requirement of s 53(2) of the *Sentencing Act*. As I am exercising the sentencing discretion afresh, I propose reducing the non-parole period to half of the total effective sentence, noting that there is no longer a mandatory minimum non-parole period for these offences, but that in all of the circumstances, a non-parole period of half the sentence imposed seems to me to be appropriate.

[37] On the Commonwealth offence (count 6) the appellant is convicted and sentenced to a term of imprisonment for one month beginning on 20 October 2023. In relation to the Territory offences (counts 1 to 5 on File 22321100) and the Tavern offence of aggravated assault against DB (count 1 on File 22318066), the appellant is convicted of each offence and sentenced to an aggregate term of imprisonment for three years and 11 months beginning on 20 November 2023. The whole outstanding balance of the suspended sentence of 12 months (on File 22037173) is restored. Six months of that sentence is to be served cumulatively on the sentence on files 22321100 and 22318066. The total effective sentence is four years and six months from

20 October 2023. I fix a non-parole period of 27 months from 20 October 2023.
