CITATION:	*Bush v Lyons* [2018] NTSC 20
PARTIES:	BUSH, Ernest
	v
	LYONS, Richard
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 2 of 2017 (21656772)
DELIVERED ON:	27 March 2018
DELIVERED AT:	Alice Springs
HEARING DATE:	28 April 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – JUDGMENT AND PUNISHMENT

Appeal against sentence – appellant convicted in the Local Court of contravening domestic violence order – sentence of imprisonment for four months – previous recent breaches of domestic violence order – whether sentencing judge misused previous convictions – whether sentencing judge failed to take into account purpose of rehabilitation – whether error in not partially suspending sentence – whether sentence manifestly excessive – no misuse of prior convictions – no error of principle in the assessment of rehabilitative purpose – unnecessary for sentencing court to state expressly that consideration given to suspending sentence – no error of principle by not making an order suspending sentence – appeal allowed on ground of manifest excess – appellant resentenced having regard to present circumstances.

Alcohol Protection Orders Act (NT) s 5, s 23(1)
Domestic and Family Violence Act (NT) s 120(1)

Dinsdale v The Queen (2000) 202 CLR 321, *Emitja v The Queen* [2016] NTCCA 4, *Forrest v The Queen* [2017] NTCCA 5, *Lantjin v Phipps* [2017] NTSC 39, *Manakgu v Russell* [2013] NTSC 48, *Markarian v The Queen* (2005) 79 ALJR 1048, *R v Anzac* (1987) 50 NTR 6, *R v Jabaltjari* (1989) 46 NTR 47, *R v Zamagias* [2002] NSWCCA 17, *Ryan v The Queen* (2001) 206 CLR 267, *The Queen* v *JO* [2009] NTCCA 4, referred to.

REPRESENTATION:

Counsel:

Appellant:	S Lapinski
Respondent:	S Tasneem

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	GRA1804
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Bush v Lyons [2018] NTSC 20
LCA 2 of 2017 (21656772)

BETWEEN:

ERNEST BUSH
Appellant

AND:

RICHARD LYONS
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 27 March 2018)

[1] On 12 December 2016 the appellant was found guilty and convicted in the Local Court at Tennant Creek of the following offences:

(a) one count of engaging in conduct that resulted in a contravention of a domestic violence order, contrary to s 120(1) of the *Domestic and Family Violence Act* (NT); and

(b) one count of intentionally engaging in conduct resulting in the contravention of an alcohol protection order, contrary to s 23(1) of the *Alcohol Protection Orders Act* (NT).

[2] The charges arose out of conduct which took place on 10 December 2016. The agreed facts may be summarised as follows.

(a) On 2 July 2016 the appellant was served with an alcohol protection order pursuant to s 5 of the *Alcohol Protection Orders Act* requiring that he not possess or consume alcohol; not receive alcohol from a third party; and not enter into will be on licensed premises unless for the purpose of employment or residence. The order had force until 1 January 2017.

(b) On 16 December 2015 the appellant was made subject to a domestic violence order which named his partner Keomi Dawson and his daughter Jodi Anna Daniels as protected persons.[1] The order contained the usual restraints on the appellant approaching the protected persons when consuming alcohol or another intoxicating drug or substance, or when under the influence of alcohol or another intoxicating drug or substance.[2] The order had force until 15 December 2016.

(c) On the afternoon of 10 December 2016 the appellant consumed alcohol to the point of intoxication. He went to the house where his wife and daughter were residing and caused a disturbance there. Police were called and they located the appellant in the

1 The order was served on the appellant on 8 April 2016.

2 The terms of the order also restrained the defendant from causing harm or exposing the protected persons to domestic violence, and required the appellant to submit to breath testing and/or breath analysis for the purpose of detecting the presence of alcohol in his system.

backyard of the residence. Police observed that he was slurring his speech, had bloodshot eyes, and smelled strongly of alcohol.

(d) The appellant was placed under arrest for the suspected breach of both the alcohol protection order and the domestic violence order. He was taken to the police station and on breath testing returned a reading of 0.307 percent blood alcohol content. He refused to participate in breath analysis.

[3] The matter came before the Local Court on 12 December 2016, at which time the court restored a sentence to imprisonment held in suspense pursuant to s 43 of the *Sentencing Act* backdated to the time of the appellant's arrest on 10 December 2016; sentenced the appellant to imprisonment for four months for the breach of the domestic violence order, to be served cumulatively on the restored sentence; and sentenced the appellant to imprisonment for five days for the breach of the alcohol protection order, to be served cumulatively on the other sentences.

[4] The sentence held in suspense had been imposed by the court on 28 November 2016 in respect of offences committed on 24 November 2016 involving the contravention of the same domestic violence order and the breach of the same alcohol protection order.

[5] Leaving those matters aside, the appellant had three prior convictions for engaging in conduct that contravened a domestic violence order and

one conviction for breaching an alcohol protection order. Those offences were all committed during the course of 2016 and all related to the same orders with which the subject offending was concerned.

[6] The appellant served 89 days in prison before being released by the Local Court on bail on 9 March 2017 pending the outcome in this appeal.

[7] The appellant appeals against the sentence imposed in respect of the breach of the domestic violence order on the following grounds:

(a) that the sentencing judge erred by misusing the appellant's previous convictions in the sentencing process;

(b) that the sentencing judge erred by failing to apply the principle of rehabilitation and to impose a sentence with a rehabilitative component;

(c) that the sentencing judge erred by failing to partially suspend the sentence imposed when the circumstances of the offence and of the appellant warranted that course; and

(d) the sentencing judge erred by imposing a sentence that was manifestly excessive in all the circumstances.

Ground 1: misuse of prior convictions

[8] The substance of the appellant's complaint in this ground is that the sentencing judge imposed a sentence which was disproportionate to the objective circumstances of this offending because of an overemphasis

on the appellant's prior offending. That is said to be demonstrated by four references made by the sentencing judge to the appellant's previous breaches of the domestic violence order, and the fact that the sentence imposed "was 15 times larger than the appellant's previous convictions for breaching a domestic violence order".

[9] As the Court of Criminal Appeal observed in *Emitja v The Queen*:[3]

> While there can be no doubt that the principle of proportionality precludes the imposition of a sentence beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender, or merely to educate possible offenders in the penalties attached to proscribed conduct, this is not to say that the protection of society is not a material factor in fixing an appropriate sentence. [Footnote: *Veen v The Queen* (1979) 143 CLR 458 at 467,468,482-483,495; *Walden v Hensler* (1987) 61 ALJR 646 at 650; *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477; *Channon v The Queen* (1978) 20 ALR 1 at 10.] The exercise of the sentencing discretion having regard to the protection of society, among other factors including retribution and deterrence, is clearly permissible provided that the purpose is not simply preventative detention and provided that the sentence does not go beyond what is proportionate to the crime in order to protect society from the risk of recidivism on the part of an offender. [Footnote: Subject to statutory exceptions such as that found in the *Serious Sex Offenders Act* (NT).]

[10] The four references in the sentencing remarks to the appellant's previous breaches were made in the following terms:

> You have been convicted four times of breaching a domestic violence order.
>
> …

3 [2016] NTCCA 4 at [36].

> In dealing with you today, taking into account you don't seem to have much regard for these orders, specific deterrence is a relevant sentencing factor.
>
> …
>
> But, of course, if you keep up with that humbug, no doubt the police will have to intervene on your partner's behalf again and you might have another order.
>
> …
>
> … obviously your troubles are aggravated by the fact that the court gave you an opportunity only in November and put you on a suspended sentence.

[11] These observations are unremarkable. Moreover, they are considerations the court might be both expected and required to take into account for the purposes of this sentencing process.

[12] It is also misguided to suggest that an error in principle may be discerned from the fact that a sentence imposed is "15 times larger" than the sentence imposed for a previous conviction for the same offence. As the courts have repeatedly observed, the sentencing process does not resolve to a matter of mathematical or mechanical comparison.[4] Reference to sentences previously imposed on an offender for the purpose of mathematical comparison cannot obscure the consideration of factors going to the objective seriousness of the offending, the subjective circumstances of the offender, and the sentencing purposes of punishment, deterrence and community protection.

---

4 See, for example, *Ryan v The Queen* (2001) 206 CLR 267 at [33] per McHugh J.

[13] In the absence of anything in the sentencing remarks demonstrating error of principle in this respect, the only manner in which error in the sentencing judge's approach to the appellant's prior convictions might be made out is if the appellant establishes that the penalty imposed was manifestly more severe than called for by the nature of the offence and the circumstances of its commission. In other words, it is necessary for the appellant to establish that the sentence imposed was plainly and obviously excessive on its face.

[14] This ground of appeal is dismissed.

Ground 2: failing to impose a sentence with a rehabilitative component

[15] The substance of the appellant's complaint in this ground is that the sentencing judge was aware of the appellant's alcohol abuse problem and his otherwise good prospects for rehabilitation, but failed to give effect to that purpose in the sentence imposed.

[16] As this court has previously observed, the fact that a sentencing court gives primacy to certain sentencing purposes does not suggest that the court has ignored the principle that a rehabilitative approach may operate in the community interest by reducing the prospect of re-offending.[5] That understanding informs the conduct of every sentencing exercise and it is unnecessary for the sentencing remarks to give the principle express voice. In some cases, the accused's profile

5 *Lantjin v Phipps* [2017] NTSC 39 at [35].

and history will be such that a sentence involving incarceration will best reduce the risk of re-offending and serve the purposes of punishment, deterrence and community protection. In other cases, the sentencing court may determine that although the accused's prospects of rehabilitation might well be best served by a sentence which does not involve incarceration, or which involves an order suspending sentence in whole or in part, the objective seriousness of the offending is nevertheless such that a sentence to a term of actual imprisonment is necessary, justified and appropriate.

[17] Counsel for the appellant does not identify with any specificity the means by which the sentencing court should have incorporated "a rehabilitative component" into the sentence. The argument cannot be simply that the sentence should have been shorter in order to enhance the prospects of rehabilitation. Again, that is an argument which can only be prosecuted in the context of the ground asserting that the sentence imposed was manifestly excessive.

[18] To the extent that the appellant contends here that the sentencing judge should have made a disposition which involved an order suspending sentence, or a condition requiring participation in a rehabilitation program, or some combination of those matters, that contention would involve some reformulation of the position put at first instance. In an appeal of this nature this court is not rehearing a plea of mitigation. It is reviewing the exercise of a discretionary judgement having regard to

the manner in which the case was run below. During the course of the sentencing proceedings counsel for the appellant made the following submission:

> I further take into account that on perusal of his history, this will be his first actual term of imprisonment and I asked the court to take that into account and impose a short, sharp term of imprisonment based on those factors.
>
> …
>
> As I have said, your Honour, it is conceded from the outset my client is looking at a short, sharp term of imprisonment. I'd asked that term of imprisonment be short and sharp given the factors before the court today.

[19] There was no suggestion in those submissions that an order suspending sentence would be appropriate in the circumstances. There was no request for a condition requiring the appellant to participate in a rehabilitation program. It is not now open to the appellant to assert a failure to give effect to rehabilitative purpose in order to obscure what is essentially a complaint that the sentence imposed was not as "short and sharp" as was hoped.

[20] This ground of appeal is dismissed.

Ground 3: failure to suspend sentence

[21] The substance of the appellant's complaint in this ground is that the sentencing judge fell into error by either not considering an order partially suspending the sentence imposed, or by not making an order partially suspending sentence when it was warranted having regard to all the circumstances.

[22] For the reasons given by Kirby J in *Dinsdale v The Queen*,[6] it is no doubt correct to say that imprisonment is a penalty of last resort; the court must give careful consideration to whether that disposition is the appropriate penalty in the circumstances; if imprisonment is the appropriate penalty the court must give consideration to the question of suspension; and in determining whether the sentence of imprisonment should be suspended the court must consider all of the objective and subjective features of the matter.

[23] But it is also correct to say that it was not incumbent on the sentencing judge to state explicitly that he had given consideration to an order suspending sentence, and to describe why he chose not to adopt that course. As the New South Wales Court of Criminal Appeal observed in relation to the New South Wales sentencing legislation:[7]

> So in the second step, where, for example, the term chosen is one of 18 months or less the alternatives generally available would be, in escalating order of severity: an order suspending the sentence; a home detention order; a periodic detention order; full-time custody: *R v LRS* [2001] NSWCCA 338 per Sully J at [65]. Of course the court has a discretion as to which of the available alternatives is chosen, but that discretion must be exercised according to established sentencing principles.
>
> Having determined the appropriate sentence, the court must explain the sentence imposed and this may require in an appropriate case some discussion of the alternatives available and why a particular alternative has been chosen: *JCE* at [19]. But it is unnecessary that a sentencing court expressly state that it has applied these two steps in arriving at the sentence imposed: *R v Foster* at [33]. In particular, merely because a court has not expressly indicated that it has taken the two-step approach to the

---

6 (2000) 202 CLR 321.

7 *R v Zamagias* [2002] NSWCCA 17 at [29]-[30].

> determination of a sentence of imprisonment it does not follow that it has failed to carry out the sentencing exercise in this manner: *R v Saldaneri* [2001] NSWCCA 480 at [14]. However, the nature of the sentence imposed and the failure to record that a two-step approach has been taken may lead this Court to examine carefully the findings made by the sentencing judge to determine whether the sentence is erroneous: *R v Foster* at [35].

[24] It may and should be assumed that the sentencing judge was aware that option was open to him and gave consideration to it.

[25] The contention that an order suspending sentence was warranted in all the circumstances sits more comfortably under the ground that the sentence was manifestly excessive. If it is accepted that it was unnecessary for the sentencing court to state expressly that it had given consideration to the alternative of suspending the sentence in whole or in part, there is nothing in the sentencing remarks to indicate that the sentencing judge committed an error of principle by not making an order suspending sentence.

[26] This ground of appeal is dismissed.

Ground 4: manifest excess

[27] The substance of the appellant's complaint in this ground is that the sentence imposed was manifestly excessive having regard to the maximum penalty of imprisonment for two years, the objective seriousness of the offending, the sentencing range for this category of offence, the early plea of guilty, and the fact that the appellant has no

record of violent offending against the protected persons or any other person.

[28] The principles which govern the determination of appeals on this ground were recently restated by the Court of Criminal Appeal in *Forrest v The Queen.*[8] They are (footnotes omitted):

> [63] The exercise of the sentencing discretion is not to be disturbed on appeal unless error is shown. The presumption is that there is no error. Appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that in all the circumstances the appellate court concludes there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.
>
> [64] Manifest excess is a conclusion which does not depend upon attribution of specific error in the reasoning of the sentencing judge. The relevant test is whether the sentence is unreasonable or plainly unjust. It must be shown that the sentence was clearly and not just arguably excessive. In approaching the task of determining whether a sentence is unreasonable or plainly unjust, the appeal court does so within the context that there is no one single correct sentence. The process of sentencing comprehends that there may have been compliance with the appropriate sentencing principles at first instance notwithstanding that there may also be differences of judicial opinion concerning the result.

[29] As already noted, the maximum custodial penalty that may be imposed for the principal offence under consideration here is imprisonment for

8 [2017] NTCCA 5.

two years. The significance of the maximum penalty prescribed for an offence was described in *Markarian v The Queen*[9] in the following terms:

> Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance ...
>
> It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick ...

[30] The significance of the maximum penalty when dealing with an offence of engaging in conduct that contravenes a domestic violence order was described by Barr J in *Manakgu v Russell*[10] in the following terms (footnotes omitted):

> I agree with [counsel for the appellant] that, consistent with *R v Di Simoni*, a magistrate assessing the objective seriousness (including the relative seriousness) of the offending conduct should take into account, by way of comparison, not only conduct constituting a DVO breach which falls short of establishing a separate offence, for example: offensive, intimidating, threatening, harassing and demeaning conduct, but also conduct which establishes a criminal offence, albeit less serious, such as common assault or threatening violence. [Counsel for the respondent] does not contest [the appellant's] submission in this respect. In my opinion, a magistrate may properly reason that the maximum penalty and indeed the higher range of penalties would apply in the case of physical assaults as well as the more serious instances of offensive, intimidating, threatening, harassing and demeaning conduct.
>
> …

---

9 [2005] HCA 25; (2005) 79 ALJR 1048 at [30]-[31] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

10 [2013] NTSC 48 at [14], [18].

> [Counsel for the appellant] submits that the magistrate erred in assessing the objective seriousness of this offence in that she failed to give appropriate weight to the following: the absence of aggravating features such as threats, harm, violence, damage to property, intimidation or humiliation; the fact that the conduct constituting the breach was otherwise lawful (picking up dinner); that the circumstances of the breach did not establish some other less serious offence, such being armed with an offensive weapon; that the breach was of short duration and was not sustained or repeated; and that the conduct constituting the breach did not cause fear or distress to the protected person (or any other person); and that the appellant pleaded guilty at the very earliest opportunity …

[31] As his Honour there observes, the more serious penalties are properly reserved for conduct which constitutes physical assault or serious intimidation and threats. On the facts read out during the course of the sentencing proceedings, the breach in this particular case was constituted by attending at the residence of the protected persons while intoxicated and causing a disturbance. The statement of alleged facts which was received into evidence did not provide any further material detail in that respect.

[32] The sentencing judge was no doubt influenced by the appellant's repeated breaches of this order, and rightly so. Those breaches demonstrated a disregard of the laws under which the domestic violence order and the alcohol protection order had been made. Despite that, these breaches were not contumelious in the sense of being scornful or insolent. The appellant was clearly a man with an alcohol abuse problem who was given to spontaneous (albeit repeated) breaches of the domestic violence order while intoxicated, rather than

engaging a course of premeditated and calculated defiance. As Barr J observed in *Manakgu v Russell*,[11] "[i]n general, the more egregious the conduct in terms of causing harm or fear of harm to the protected person, the greater the probable degree of contempt for the court's order or orders".

[33] Counsel for the appellant drew attention to a schedule containing details of a number of sentences imposed by the Supreme Court for the offence of engaging in conduct which contravenes a domestic violence order. The purpose was to compare and contrast the objective gravity of the subject offence with that of the offences contained in the schedule, and to compare the sentences imposed in light of that assessment. There is no tariff for this offence, and perhaps not even a sentencing range. As the Court of Criminal Appeal observed in *The Queen v JO*:[12]

> In the absence of a tariff for crimes of the type under consideration, a comparison with previous individual sentences is of limited assistance. However, some guidance can be obtained from previous decisions, particularly those of the Court of Criminal Appeal.

[34] That statement reflects observations to the effect that where the ground of appeal is that a sentence is manifestly excessive, reference to comparable sentencing cases can be useful, subject to those

---

11 [2013] NTSC 48 at [17].

12 [2009] NTCCA 4 at [88].

limitations.[13] The sentences to which attention is drawn by counsel for the appellant suggest that sentences to imprisonment for three months and more are generally imposed in cases involving aggravating factors such as abuse, threats and violent behaviours. That is the case even where the offender in question has a prior history of breaching domestic violence orders and/or convictions for violent offending.

[35] There was no call in the circumstances for the sentencing judge to make an order suspending the sentence imposed; and there were reasons why the adoption of that course would not have been productive. However, having regard to the objective gravity of the offending conduct in this case, and to the subjective circumstances of the offender including the very early plea of guilty and his limited criminal history, it must be concluded that the sentence to imprisonment for four months imposed in respect of the count of engaging in conduct that resulted in a contravention of a domestic violence order was manifestly excessive.

Disposition and re-sentence

[36] I allow the appeal on the basis of ground 4, and quash the sentence to imprisonment for four months imposed in respect of the count of engaging in conduct that resulted in a contravention of a domestic violence order.

---

13 See, for example, *R v Jabaltjari* (1989) 46 NTR 47 at 67; *R v Anzac* (1987) 50 NTR 6 at 15.

[37] The re-sentencing process is complicated by the same matters discussed in *Manakgu v Russell*.[14] I impose a sentence of imprisonment for two months in respect of the count of engaging in conduct that resulted in a contravention of a domestic violence order. The other sentences imposed by the sentencing judge remain undisturbed, as do the orders for cumulation. I note that the total effective period of imprisonment has now been served in full.

[38] As in *Manakgu*, the substituted sentence is not to be taken to be the sentence which should necessarily have been imposed by the sentencing judge in December 2016. It takes into account matters which have transpired since then, including the fact that the appellant has been on appeal bail for a period of 12 months during which period he has not committed any further breach of a domestic violence order or any offending against the protected persons.[15]

---

14 [2013] NTSC 48 at [21]-[23].

15 On 1 May 2017, the appellant committed the further offences of driving with a high range blood alcohol content, driving a motor vehicle while unlicensed, and breaching alcohol protection order, for which fines were imposed.