CITATION:	*Forrest v The Queen* [2017] NTCCA 5
PARTIES:	FORREST, Amos v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	CA (AS) 1 of 2016 (21549310)
DELIVERED ON:	14 July 2017
DELIVERED AT:	Darwin
HEARING DATES:	2 December 2016
JUDGMENT OF:	Grant CJ, Blokland & Barr JJ
APPEAL FROM:	Mildren AJ

CATCHWORDS:

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – JUDGMENT AND PUNISHMENT

Whether applicant's intoxication was properly taken into account as an aggravating circumstance – information before the sentencing court not sufficient to establish applicant had foreknowledge of how he was likely to behave when affected by alcohol – nothing to indicate applicant presented as more violent, fierce or implacable than an assailant ordinarily would – sentencing court may draw inferences from the agreed facts and materials – inferential finding not available on the materials – if specific error

established Court of Criminal Appeal may proceed to resentence if it reaches the further conclusion that a less severe sentence is warranted and should have been passed – less severe sentence warranted given applicant's relative youth, antecedents and prior criminal history, and objective circumstances of offending in terms of inception, duration and nature of the violence perpetrated on the victim – leave granted, appeal allowed and appellant resentenced.

Criminal Code (NT) s 411(4)

Birch v Fitzgerald (1975) 11 SASR 114, *Hasan v The Queen* (2010) 31 VR 28, *Pappin v The Queen* [2005] NTCCA 2, *R v Coleman* (1990) 47 A Crim R 306, *R v King* [2013] NSWSC 801, *R v Sewell and Walsh* (1981) 29 SASR 12, *Rogers and Murray v The Queen* (1989) 44 A Crim R 301, referred to.

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – JUDGMENT AND PUNISHMENT

Alleged failure to accord procedural fairness in relation to the finding that intoxication was an aggravating circumstance – no agreed position between the parties on matter of law – no failure to give the parties notification of departure from agreed position – sentencing judge had no general duty to advise counsel how to present the case – the court’s duty was to give both the applicant and the Crown a reasonable opportunity to present their respective cases – a finding by a sentencing judge in relation to an aggravating or mitigating circumstance will not constitute a breach of procedural fairness by reason only that the matter was not the subject of express treatment in the course of sentencing submissions – sentencing court was entitled to assume that counsel would address intoxication to the extent considered necessary and appropriate – leave to appeal refused.

Pantorno v The Queen (1989) 166 CLR 466, referred to.

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – JUDGMENT AND PUNISHMENT

Whether sentence manifestly excessive – difficult to conclude sentence was unreasonable or plainly unjust in the relevant sense – unnecessary to decide given re-sentence on the basis of specific error.

Criminal Code (NT) s 192(3)

Barbaro v R; *Zirilli v R* (2014) 253 CLR 58, *Daniels v The Queen* (2007) 20 NTLR 147, *Dinsdale v The Queen* (2000) 202 CLR 321, *Emitja v The Queen* [2016] NTCCA 4, *Gilligan v The Queen* [2007] NTCCA 8, *Hanks v The Queen* [2011] VSCA 7, *House v The King* (1936) 55 CLR 499, *JF v The Queen* [2017] NTCCA 1, *Kelly v The Queen* (2000) 10 NTLR 39, *Noakes v The Queen* [2015] NTCCA 7, *Melham v The Queen* [2011] NSWCCA 121, *Melpi v The Queen* [2009] NTCCA 13, *R v Tennyson* [2013] NTCCA 2, *The Queen v Bloomfield* [1999] NTCCA 137, *The Queen v Goodwin* [2003] NTCCA 9, *The Queen v Kilic* (2016) 339 ALR 229, *The Queen v Nabegeyo* (2014) 34 NTLR 154, *Truong v The Queen* (2015) 35 NTLR 186, *Whitehurst v The Queen* [2011] NTCCA 11, *Wong v The Queen* (2001) 207 CLR 584, referred to.

Fox and Freiberg's Sentencing: State and Federal Law in Victoria, (Thomson Reuters, 3rd ed, 2014).

REPRESENTATION:

Counsel:

Appellant:	J B Lawrence SC
Respondent:	S Robson

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	A
Number of pages:	52

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

Forrest v The Queen [2017] NTCCA 5
No. CA (AS) 1 of 2016 (21549310)

BETWEEN:

AMOS FORREST
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BLOKLAND AND BARR JJ

REASONS FOR JUDGMENT

(Delivered 14 July 2017)

THE COURT:

[1] The applicant seeks leave to appeal and an extension of time within which to make application for leave to appeal.[1] The leave is sought in respect of an appeal against the severity of a sentence imposed by the Supreme Court on 10 February 2016. The submissions in relation to the application for leave and the substantive appeal were heard together. The application to extend time was not opposed by the respondent and the Court did not require submissions in relation to that matter.

1 *Supreme Court Rules* (NT), r 85.07.

[2] On 10 February 2016 the applicant pleaded guilty to one count of having sexual intercourse without the consent of the victim, contrary to s 192(3) of the *Criminal Code* (NT). He was sentenced to imprisonment for 10 years and six months. A non-parole period of seven years and six months was fixed. The sentence was ordered to commence on 7 October 2015, the date the applicant was first taken into custody.

[3] The grounds argued before this Court were: that the sentence imposed was manifestly excessive; that the sentencing judge was in error to find intoxication was an aggravating circumstance; and that the sentencing judge did not accord the applicant procedural fairness in relation to the finding that intoxication was an aggravating circumstance.

The sentencing facts

[4] The agreed facts may be summarised as follows.[2] The applicant was 18 years old at the time of the offending and the victim was 36 years of age. The applicant and the victim were unknown to each other. The offending took place in Alice Springs.

[5] The victim consumed alcohol in the bed of Charles Creek on the evening of 1 September 2015 and became intoxicated to the point of being "unsteady on her feet". She commenced walking through some vacant land between Charles Creek and business premises on Schwarz Crescent.

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2 Appeal Book (**AB**) 5-6.

[6] The applicant was sitting on concrete pipes situated on the vacant land and watching the victim's progress. He called out to her, "Hey, come over and join me for a drink". She replied, "I'm going home". The applicant said, "Just help me out for one drink".

[7] The applicant had two bottles of wine in his possession. The victim approached him and sat down on the pipes. Together they consumed the wine. The applicant said, "Sleep with me". The victim stood up and said, "I haven't got any blanket" and began walking away.

[8] The applicant chased the victim and forced her back to the pipes. He pushed her to the ground onto her back and removed her shorts. He pulled his shorts down and had rough, unprotected penile-vaginal sexual intercourse with her. The victim felt pain to her vagina and bottom. The applicant also touched the victim on her breasts with his hands and sucked her nipples.

[9] The victim tried to push him off, but he restrained her. She repeatedly screamed for help. The applicant held his left hand over her mouth to silence her. He ejaculated and withdrew his penis.

[10] The victim began walking away and the applicant again chased after her. He pushed her back against the pipes and inserted his penis into her mouth and had unprotected oral sexual intercourse. He again had rough, unprotected penile-vaginal sexual intercourse with her. She again felt pain to her vagina.

[11] On seeing the headlights of a car travelling along Schwarz Crescent, the applicant ran from the scene. The victim dressed herself, walked to the Alice Springs police station and reported the offending.

[12] A forensic examination of the victim at the Sexual Assault Referral Centre identified the following injuries constituting harm: a superficial linear abrasion to the right buttock; a bruise to the left scapula region; a swollen urethral opening with a split in the lower surface; five lacerations on the vaginal walls; and three red linear marks on the left vaginal wall and three red linear marks on the right vaginal wall consistent with superficial tears or lacerations.[3] A small amount of blood was present in the vaginal fornices.

[13] No victim impact statement was tendered during the course of the sentencing proceedings as the victim could not be located at that time,[4] however the sentencing judge was told and accepted the victim suffered from nightmares as a result of the offending.

[14] The applicant was arrested on 7 October 2015. Following the receipt of legal advice, he declined to participate in an interview with police. He remained in custody after his arrest. He first entered a plea of guilty in the Court of Summary Jurisdiction on 16 December 2015 and was committed to the Supreme Court for sentence rather than for trial.[5]

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3 AB 6.

4 AB 8.

5 AB 12.

The applicant's criminal history

[15] The applicant had previously been dealt with for offences of violence in the Youth Justice Court. After the offending the subject of this application, he committed further offences and was dealt with in the Court of Summary Jurisdiction.[6]

[16] With respect to the matters in the Youth Justice Court, on 20 May 2013 the applicant pleaded guilty to two counts of aggravated assault committed on 5 October 2012, and one count of unlawfully causing serious harm committed on 18 October 2012. He was convicted and sentenced to three months' detention for the offence of unlawfully causing serious harm, to be served cumulatively on an aggregate sentence of seven days' detention imposed without convictions being recorded for the aggravated assaults. All terms of detention were fully suspended for 18 months. Supervision for 12 months was ordered.

[17] A précis outlining the facts of the previous offences of aggravated assault was tendered during the sentencing proceedings.[7] The applicant was 16 at

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6 Exhibit P2, Information for Courts: AB 17-18.

7 Exhibit P3: AB 19-21. Some question was raised before the sentencing judge concerning whether the applicant was dealt with for one or two counts of aggravated assault: see AB 7. Counsel for the Crown agreed that the criminal history tendered was unclear in that respect, but also tendered the précis of facts which confirmed that there were two victims involved in the offending. It should be noted in this respect that the Information for Courts tendered in the sentencing proceedings contains a clear notation that two counts of aggravated assault were dealt with and an aggregate sentence was imposed, indicating that the applicant was dealt with for more than one offence. The matter is confused by the fact that an aggregate sentence cannot be imposed for violent offences, which suggests some irregularity in the proceedings before the Court of Summary Jurisdiction: see *Sentencing Act* (NT), s 52; *Youth Justice Act* (NT), s 125; *R v Rudd* [2015] NTCCA 3; 34 NTLR 131; *Tomlins v The Queen* [2013] NTCCA 18. Nothing turns on that matter for the present purposes.

the time. He assaulted two female relatives after an argument by kicking one in the face and punching the other. He left, returned and threatened one of them with a knife. He was intoxicated at the time. One of the victims could smell fuel on his clothing.[8] The offence of unlawfully causing serious harm was also committed when the applicant was 16 years old. The victim was a 13 year old girl. The applicant punched the victim, as a result of which she suffered a broken jaw.

[18] Shortly after the offending the subject of this application, but before he was arrested, the applicant committed and was dealt with for one count of assaulting a worker who suffered harm and one count of engaging in conduct that contravened a domestic violence order. On the charge of assaulting a worker he was sentenced to four weeks' imprisonment, which was suspended immediately with an operational period of six months. On the charge of engaging in conduct that contravened a domestic violence order, he was sentenced to seven days' imprisonment, which was also suspended immediately, with the same operational period of six months. Although these later convictions were appropriately put before the sentencing judge as part of the applicant's general antecedents, they were not prior convictions for the purposes of the relevant offending. The sentencing remarks make it clear that the applicant was not on a suspended sentence at the time of this offending.

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8 AB 7.

The applicant's personal circumstances

[19] The sentencing court was told the applicant was 18 years at the time of the offending and had turned 19 by the time of the sentencing proceedings. He was born in the Willowra community and is an initiated Warlpiri man.

[20] He is the only child from his parent's brief relationship. He was raised by his paternal grandmother on an outstation approximately 70 kilometres north-west of Tennant Creek.

[21] He attended school at the Warrego community and later completed primary school at Tennant Creek. He was granted a scholarship and sent to Melbourne Grammar School. He completed four years of study in Victoria, and during that time would return to the Northern Territory for school holidays. He left school and returned to Tennant Creek after completing year 10 and lived with his mother. The sentencing judge was told the applicant deeply regretted his decision not to continue with his education. It was also said he reads and writes English well.

[22] As was pointed out in the court below, within six months of returning to Tennant Creek the applicant committed the offences described above that were dealt with in the Youth Justice Court on 20 May 2013. During the course of sentencing submissions counsel for the applicant told the court those offences were committed when the applicant was experimenting with alcohol and sniffing volatile substances. So much was apparent from the précis of facts referring to intoxication and the smell of fuel on him.

[23] After those events the applicant went to Katherine to live with his paternal grandfather. This was to distance himself from negative influences and habits which had developed while he was in Tennant Creek. The applicant was hoping to find work in Katherine. He registered with the Jobfind Centre but was unable to secure employment. He commenced moving between Katherine and Lajamanu. He considered Lajamanu, where he had extensive family, to be his place of residence. At his mother's request he returned to Alice Springs in June 2015 to visit his half-sister who required dialysis and hospitalisation. The applicant had not intended to stay in Alice Springs but remained for four months. As part of socialising in Alice Springs he started drinking substantial amounts of alcohol. He was staying with a paternal uncle at the Old Timers camp.

[24] In the hours leading up to this offending the applicant had consumed a substantial amount of beer and rum. His counsel told the sentencing judge the applicant initially thought when the victim sat down with him there may be a chance of some consensual sexual liaison. He accepted, however, that the victim soon made it very clear that she was not interested in that way and he accepted that his behaviour thereafter was accurately described in the Crown facts. His counsel told the sentencing judge that when asked about how he felt about the offending the applicant said, "I knew it was the wrong thing to do. I don't feel good. I wish I hadn't done that. I don't know why I did that."

Sentencing submissions before the Supreme Court

[25] During the course of the sentencing proceedings the Crown submitted that the offending was at the "upper end of the scale of seriousness" given it was a protracted assault, the victim was subjected to a level of violence, and the attack occurred in two phases which were said to be illustrative of the applicant's persistence. Counsel for the Crown conceded that the applicant's criminal history extended over a short time frame only, but pointed out it was apparent from that history that the applicant had lost control on previous occasions. It was also conceded the applicant was properly treated as a youthful offender for sentencing purposes.

[26] The Crown's primary submissions on sentence were directed to the need for a substantial head sentence, however the prosecutor also traversed the issue whether a suspended sentence or the imposition of a non-parole period would be the appropriate disposition in the circumstances.[9] The Crown submission in that respect was that despite the applicant's youth a non-parole period was appropriate in all of the circumstances, notwithstanding the minimum non-parole period of 70 per cent of the head sentence required by s 55 of the *Sentencing Act* (NT). There was no submission by the Crown that the particular offending was aggravated by reason of the applicant's intoxication.

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9 AB 8.

[27] During the course of sentencing submissions counsel for the applicant acknowledged both that the offending had occurred when the applicant had drunk to excess and that intoxication was no excuse for the offending. The defence accepted this was a serious example of offending of this kind, but made the point that there had been other examples of offences against s 192(3) of the *Criminal Code* involving greater degrees of violence. It was submitted that given the applicant's age, the rehabilitative purpose of the sentencing process should not be completely ignored; youth was still a relevant consideration.

[28] Counsel for the defendant also drew attention to the following matters during the course of submissions on sentence:

- by reason of the early plea at committal neither the victim nor any other person had been required at any time to give evidence;
- the early plea was indicative of a willingness to facilitate the administration of justice, the acceptance of responsibility for wrongdoing, and remorse on the part of the applicant;
- this would be the first time the applicant was to be subject to an actual term of imprisonment, as all previous sentences imposed on him had been fully suspended; and

- the Central Australian Aboriginal Legal Aid Service would assist the applicant by advising him to enrol in any courses available for alcohol rehabilitation in preparation for a future parole application.

The sentencing remarks

[29] During the course of his remarks the sentencing judge summarised the Crown facts and noted a number of aggravating features. The offending comprised three acts of sexual intercourse without consent which were all part of the same attack but which were committed in two phases. The first phase involved the applicant chasing the victim, pushing her to the ground, and having unprotected sexual intercourse with her while she was screaming for help. During the second phase, the applicant again chased the victim and pushed her against the pipes before again sexually assaulting her, desisting only because he saw a car approaching.

[30] The sentencing judge also noted that the applicant had a criminal history involving aggravated assault, and had previously been given suspended sentences which had not been sufficient to deter him from further offending. So much was apparent from the fact that the applicant had gone on to offend in a much more serious way.

[31] In relation to intoxication, his Honour said:[10]

> It is an aggravating circumstance that you were under the influence of alcohol at the time. This is not a case where you were brought up in a disadvantaged community, that you were subjected to violence or a lot

10 AB 25.

> of alcohol as a child. You were not introduced, as far as I know, to alcohol or drugs as a child.
>
> On the contrary, you were sent to attend Melbourne Grammar School in Toorak and you were there for four years of study and completed year 10. You are not a foolish man. You are not someone who has come from a background such that I should treat your alcohol problem as mitigating. On the contrary, it is aggravating.

[32] The sentencing judge took into account that at 36 years of age the victim was much older than the applicant and "comparatively defenceless" given her level of intoxication. That the rape occurred in a public place was considered by the sentencing judge to be a factor which aggravated the offending. The harm suffered by the victim and the nightmares experienced by her were also taken into account.

[33] The sentencing judge noted there were some, but not many, mitigating factors. They included:-

- The applicant was only 18 years of age at the time of the offending.
- The plea was entered at a very early stage and the applicant was entitled to a discount as he saved the victim from having to give the evidence.
- There was remorse and contrition, but no particular social, economic or other disadvantage associated with or related to the offender's Aboriginality.
- The applicant's prospects of rehabilitation were moderate.

- No weapon was used and there was no unnecessarily gratuitous violence; only such violence as needed to achieve the applicant's purpose.

- The offending was of moderate duration and did not involve unnecessarily gratuitous deprivation of liberty.

[34] The sentencing judge emphasised that, even allowing for those matters in mitigation, the sentence was required to indicate the community's abhorrence for offences of this kind and to incorporate appropriate components for the purposes of general and specific deterrence.

[35] The sentencing judge indicated he would have imposed a sentence of 14 years' imprisonment but reduced it to 10 years and 6 months in recognition of the early plea of guilty. In accordance with s 55 of the *Sentencing Act*, the non-parole period was fixed at 7 years and 6 months.

Ground 2: intoxication as an aggravating circumstance

[36] It is convenient to deal first with the question of intoxication as an aggravating circumstance, because if specific error is established in that respect the applicant is entitled to be re-sentenced if this Court concludes a less severe sentence is warranted and should have been passed.[11] Further, the question of whether or not the applicant's intoxication was properly taken into account as an aggravating circumstance potentially bears on the

11 *Criminal Code* (NT) s 411(4).

ground of manifest excess if taking that matter into account had the consequence of increasing the length of the sentence.

[37] As already described, counsel for the applicant made brief submissions during the course of the sentencing hearing dealing with the association between the applicant's intoxication, his previous offending and the current offending. Intoxication was not put as a matter in mitigation, although there was a reference to the possibility of future referral to relevant rehabilitation services. The applicant's counsel also made the submission that the applicant had left Tennant Creek because of negative influences and habits.

[38] That part of the sentencing remarks dealing specifically with intoxication as an aggravating circumstance has been extracted above. The basis for that treatment would appear to have been that the applicant did not suffer the social, educational and other disadvantages all too frequently experienced by Aboriginal children; that the applicant had the benefit of a good education and was a man of some intelligence; and that the applicant was not unduly exposed to violence, drugs or alcohol as a child. The sentencing judge considered these features operated such that the applicant's intoxication and "alcohol problem" were not mitigating factors, but were in fact aggravating circumstances.

[39] The sentencing judge's comment that the applicant's intoxication did not operate as a mitigating circumstance in this case was no doubt a reference to the fact that although behaviour influenced by the self-ingestion of alcohol

does not generally operate in mitigation, the social, economic and other disadvantages attributable to cultural background are properly taken into account in the sentencing calculus. As Malcolm CJ observed in *Rogers and Murray v The Queen*:[12]

> …. [T]he sentencing principles to be applied in relation to a sexual offence committed by an Aboriginal must be the same as those in any other case. It is apparent, however, that there may well be particular matters which the court must take into account, in applying those principles which are mitigating factors applicable to the particular offender. These include social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race.

[40] Those disadvantages may operate as a mitigating factor, including where there is a clear causal nexus between the commission of the offence, an offender's alcoholism and the circumstances of his or her upbringing; but there is no general rule that intoxication by reason of alcohol consumption is either an aggravating or mitigating factor.[13] It is rare that intoxication is properly regarded as operating in mitigation, and the sentencing judge was no doubt correct to find that it did not do so in the circumstances of this case.

[41] Just as it is rare for intoxication to operate in mitigation, offending of this nature must be attended by particular features before intoxication may

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12 (1989) 44 A Crim R 301 at 307.

13 *Pappin v The Queen* [2005] NTCCA 2 at [22] per Martin (BR) CJ (Angel and Southwood JJ agreeing); citing *R v Sewell and Walsh* (1981) 29 SASR 12; *R v Lane* (1990) 53 SASR 480; *R v Gordon* (1994) 71 A Crim R 459; *R v Walker* (unreported, Victorian Court of Appeal, 31 May 1996); *Groom v R* [1999] 2 VR 159.

operate as an aggravating circumstance. Approximately two-thirds of the cases to which the court was referred for comparative sentencing purposes during the hearing of this appeal involved intoxicated offenders. That statistic is unsurprising. Although intoxication is a common feature in cases of sexual intercourse without consent, none of the sentencing remarks to which the court was referred specifically characterised intoxication as an aggravating feature of the offending. This no doubt reflects the fact that careful consideration is required before a sentence may be increased on account of intoxication beyond what is required to serve ordinary and permissible sentencing purposes.

[42] In *Hasan v The Queen*[14] the Victorian Court of Appeal conducted a review of the authorities dealing with the relevance of intoxication to sentencing. The question in that case was whether intoxication was properly taken into account as a mitigating factor, and the focus of the discussion is on that issue. By way of preface to and summary of that review, the Court observed:[15]

> It is notorious that intoxication of the offender is a common feature of violent offending in general, and of sexual violence in particular. Not infrequently, sentencing judges are faced with a submission that the offender's intoxication made him/her behave in a manner that was 'out of character' and that his/her moral culpability for the offending should be seen as lessened accordingly. As already indicated, that is the submission which was advanced on this appeal.

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14 (2010) 31 VR 28.

15 *Hasan v The Queen* (2010) 31 VR 28 at [20]-[21].

> In the circumstances, it is timely to review the state of the law regarding intoxication as a sentencing consideration. As will appear, courts around Australia have consistently rejected the proposition that intoxication can mitigate the seriousness of an offence or reduce the offender's culpability. An 'out of character' exception is acknowledged to exist, but it has almost never been applied. On the other hand, it is recognised that intoxication can be an aggravating factor where the offender is shown to have had foreknowledge of how he/she is likely to behave when affected by alcohol. [See, for example, *R v Hay* [2007] VSCA 147, [18] (Buchanan JA), [33] (Maxwell P); *R v Martin* [2007] VSCA 291; (2007) 20 VR 14, 20 and the cases there cited.] No issue of that kind arises here.

[43] In the circumstances of the offending under consideration by this Court in *Pappin v The Queen,* intoxication was found to operate as both a mitigating and an aggravating factor.[16] In *Pappin* the appellant was sentenced for one count of aggravated assault. He was 18 years old at the time of offending. The female victim was aged 15 years. They were not known to each other. The offender consumed a large quantity of alcohol at a nightclub. He left the club at about 3:00 am and commenced walking home along Gap Road in Alice Springs. During the course of that journey the offender ran up to the victim from behind, grabbed her by the arms and pulled her backwards to the ground. He straddled her and put his fingers down her throat and covered her nose with his left hand. The victim struggled and tried to bite his fingers. The offender then leaned forward and bit the victim forcefully on the right cheek, the forearm, under the left upper arm, and above the right breast through her clothing. The victim continued to struggle and scream. People nearby reported the attack to police. The struggle and assault

16 *Pappin v The Queen* [2005] NTCCA 2 at [27].

continued until police attended. The offender ran away. The victim was in a distressed condition. The victim thought the offender was going to kill or rape her. She suffered physical and psychological injuries. The bites were forceful and photographs of the physical injuries were produced to the court.

[44] The offender told police he could not remember what had occurred but claimed he had the perception that a person had tried to take something from him. He was unaware of the gender of the person he attacked. He had not previously been in trouble with the law. A positive finding of good character was made. There was no explanation apparent for the attack other than his intoxication. The sentencing judge had characterised the attack as "a bizarre, drunken attack".

[45] In the discussion of intoxication, Martin (BR) CJ emphasised that each case must be determined according to its particular circumstances. His Honour referred[17] to the observations made by Zelling J in *R v Sewell and Walsh*[18] to the effect that in some circumstances intoxication "may swing the penalty towards deterrence". In explanation of the circumstances in which intoxication might aggravate penalty, Zelling J said:[19]

> In crimes of violence one may have some hope of putting rational arguments to deter a sober would-be assailant. That chance is much diminished if the assailant is under the influence of drink or drugs.

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17 *Pappin v The Queen* [2005] NTCCA 2 at [25].

18 (1981) 29 SASR 12.

19 *R v Sewell and Walsh* (1981) 29 SASR 12 at 15. Justice Zelling ultimately rejected the ground of appeal that sought to argue the sentencing judge was in error by treating intoxication as a circumstance of aggravation, on the basis that the sentence had not been increased on that account.

> Certainly an assault by a person under such influence is more frightening to the average person.

[46] Chief Justice Martin also referred to *Birch v Fitzgerald*,[20] a case concerning the sentencing of a 30 year-old offender for an unprovoked assault. He had not previously offended and was of prior good character. He was under the influence of alcohol and without warning head-butted the male victim causing significant injuries. Chief Justice Bray observed:[21]

> Nevertheless there are offences in which, as it seems to me, the deterrent purpose of punishment must take priority. When people act under the influence of liquor, passion, anger or the like so as to constitute themselves a physical danger or potential physical danger to other citizens it may well be that a sentence of imprisonment will be appropriate, even in the case of a first offender of good character, in order to impress on the community at large that such behaviour will not be tolerated.

[47] The passage quoted demonstrates that in a variety of circumstances, including the commission of an offence under the influence of liquor, the deterrent purpose of punishment may prevail, even in the case of a first offender. Those comments do not speak of intoxication (or passion or anger) as a circumstance of aggravation in and of itself. The mere fact that intoxication may operate to constitute a person as a potential or actual physical danger to other citizens does not suffice for that purpose, and the passage provides no further explication.

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20 (1975) 11 SASR 114; approved in *R v Sewell and Walsh* (1981) 29 SASR 12.

21 *Birch v Fitzgerald* (1975) 11 SASR 114 at 116-117.

[48] The Court in *Pappin* considered that, given the nature of the attack by the offender upon a young female victim, intoxication was an aggravating feature of the crime. There was no examination of the precise manner in which intoxication was characterised and operated as an aggravating feature of the offending. When the comments concerning aggravation are considered in the context of the surrounding reasons, and in the overall context of the offending in question, the conclusion may be attributed to the patent irrationality manifested by the offender during the course of the assault, the particularly frightening impact that would have had on the young girl who was subjected to that attack, and the sentencing judge's characterisation of the offending as a "bizarre, drunken attack". In the final analysis it was determined that the mitigatory and aggravating effects cancelled each other out, "leaving the factor of intoxication as having neutral impact upon the sentencing discretion".[22]

[49] That attribution reflects what counsel for the respondent in the present appeal described as the "objective" basis on which to characterise intoxication as an aggravating circumstance. That is, where it is established as an objective fact that by reason of the offender's intoxication he or she presented in the commission of the offence as more violent, fierce or implacable than an assailant ordinarily would, the offending is thereby aggravated. Put another way, intoxication may be an aggravating factor

22 *Pappin v The Queen* [2005] NTCCA 2 at [27].

where a drunk and violent offender appears more frightening and less open to reason than would ordinarily be the case. That is reflected in the observations made by Zelling J in *Sewell and Walsh*[23] which are extracted above.

[50] It may also be that the circumstances in which an offender has come to be intoxicated will operate as an aggravating factor in the manner suggested by the Victorian Court of Appeal in *Hasan v The Queen*.[24] Counsel for the respondent in the present appeal referred to this as the "subjective" basis on which to characterise intoxication as an aggravating circumstance. In *R v Coleman,*[25] Hunt J (as he then was) observed that self-induced intoxication by an offender is more likely to aggravate than to mitigate; in some circumstances the crime may be aggravated because of the recklessness with which an offender became intoxicated; and that intoxication may be more likely to operate as an aggravating factor when it is as the result of the self-administration of a dangerous drug than as a result of the consumption of alcohol.

[51] *Coleman* involved an offender who had maliciously inflicted actual bodily harm with intent to have sexual intercourse. The offender had a history of alcoholism and manifesting aggression when under the influence of alcohol. Hunt J observed that he would not place much weight on intoxication in

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23 (1981) 29 SASR 12 at 15.

24 (2010) 31 VR 28 at [21].

25 (1990) 47 A Crim R 306 per Hunt J, with whom Finlay J and Allen J agreed.

mitigation, but would not take it into account in aggravation.[26] That was so even though "the violence which [the offender] exhibited on this occasion was sadly not out of character".[27] On that approach, something more than a criminal history which includes violent offending while intoxicated will be required before intoxication will be treated as an aggravating circumstance.

[52] In *R v King*,[28] following the entry of a guilty verdict for murder, the offender gave evidence of a significant history of poly drug use and alcohol consumption. He accepted his aggression increased when he consumed certain drugs. He acknowledged an awareness that if he took drugs and drank alcohol in certain situations he would respond in a violent manner. He agreed if he took particular types of drug he was a "very dangerous and violent person".[29] Applying *Coleman*,[30] Bellew J concluded that at the relevant time the offender knew he had a drug addiction and knew of the results that would inevitably flow from his consumption.[31] For that reason, his intoxication was regarded as an aggravating factor; it carried with it a specific moral culpability for the predictable consequences of the choice he made taking the drugs in the knowledge of the likely effect upon him.[32]

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26 *R v Coleman* (1990) 47 A Crim R 306 at 327.

27 *R v Coleman* (1990) 47 A Crim R 306 at 327.

28 [2013] NSWSC 801.

29 *R v King* [2013] NSWSC 801 at [71]-[74].

30 *R v Coleman* (1990) 47 A Crim R 306. Bellew J also referred to *Mendes v R* [2012] NSWCCA 103; 221 A Crim R 161; *Stanford v R* [2007] NSWCCA 73 and *R v Fletcher-Jones* (1994) 75 A Crim R 381 at 387.

31 *R v King* [2013] NSWSC 801 at [83].

32 *R v King* [2013] NSWSC 801 at [90].

[53] The references made in the plea proceedings concerning the applicant's history of intoxication and offending have been described above. The applicant's previous offending had been dealt with in the Youth Justice Court and had taken place approximately three years before the offending under consideration on the plea. Although there was an acknowledgement by counsel for the applicant during the sentencing proceedings of that previous offending and its association with intoxication, the information put before the sentencing court concerning the circumstances of the prior offending was not sufficient to prove to the relevant standard that the applicant had foreknowledge of how he was likely to behave when affected by alcohol. The fact that he had previously offended when under the influence of alcohol, and that this matter was acknowledged by defence counsel, did not suffice for that purpose. Conversely, the applicant's age militated against any finding that there was an entrenched and causal nexus between intoxication and offending, much less any self-awareness of that matter.

[54] There is otherwise nothing self-evident on the facts accepted for the purpose of the sentencing exercise which would indicate that the applicant presented in the commission of the offence as more violent, fierce or implacable than an assailant ordinarily would, or that there was any particular feature of the offending which elevated it into that category.

[55] This is not to suggest that a finding that intoxication operated as an aggravating factor is only available where the prosecution has presented

facts or led evidence directed specifically to that issue. A sentencing court may draw that conclusion from the agreed facts and materials tendered in relation to the relevant criminal history, but an inferential finding of that type was not available in the present case.

[56] We grant leave to appeal on this ground and find that the sentencing judge fell into error in his treatment of the applicant's intoxication as an aggravating circumstance. As already noted, if specific error is established this Court may only proceed to resentence an appellant if it reaches the further conclusion that a less severe sentence is warranted and should have been passed.[33] As Mildren J observed in *Gilligan v The Queen*:[34]

> The fact that error has been disclosed does not automatically have the consequence that "some other sentence ... is warranted in law": see *Damaso* [2002] NTCCA 2; (2002) 130 A Crim R 206 at 217 [53]. I accept the submission … that if error is disclosed, the Court must consider for itself what is the appropriate sentence and if the Court forms a positive opinion that some other lesser sentence is warranted, the Court must impose it.

[57] The question whether some other sentence is warranted in law is more conveniently addressed after a consideration of the ground of appeal asserting manifest excess.

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33 *Criminal Code* s 411(4).

34 [2007] NTCCA 8 at [12].

Ground 3: That the sentencing judge did not accord the applicant procedural fairness in relation to the finding that intoxication was an aggravating circumstance

[58] Although it is not strictly necessary to make any finding concerning the procedural fairness ground having regard to the finding made above on the second ground of appeal, a number of general observations should be made.

[59] It may be accepted that the Crown made no submission concerning how the applicant's intoxication should be taken into account, if at all. It may also be accepted that the sentencing judge gave no indication during the course of submissions that he was giving consideration to the question of whether the applicant's intoxication should be treated as an aggravating factor. However, unlike the circumstances which presented in *Pantorno v The Queen*,[35] this was not a situation where there was an agreed position between the parties on a matter of law from which the sentencing judge departed, without giving the parties prior notification and an opportunity to address the issue, in order to sentence on a different basis that aggravated the penalty. As was observed in *Pantorno*:[36]

> When the parties to an adversarial proceeding agree on a proposition of law and conduct their cases on that basis, their agreement does not bind the trial judge. If the judge determines the law to be different, he may apply the law as he determines it to be, but he must inform the parties of the view he has formed when that is necessary to give them an opportunity to address new issues arising from the judge's departure from the proposition of law on which the case was conducted. Otherwise both parties are taken by surprise: see *Fairmount Ltd. v.*

35 [1989] HCA 18; 166 CLR 466.

36 See *Pantorno v The Queen* [1989] HCA 18; 166 CLR 466 per Mason CJ and Brennan J at 472-3.

Environment Secretary [[1976] 1 WLR 1255, at pp. 1265-1266; [1976] 2 All ER 865, at p. 874].

[60] In the absence of such agreement, the sentencing judge had no general duty to advise counsel below how to present the case. The court's duty was to give both the applicant and the Crown a reasonable opportunity to present their respective cases.[37] In any sentencing exercise, there is a risk of an adverse finding against an accused with respect to a broad range of relevant factors. Similarly, there is a broad range of factors which the prosecution might consider either operate in aggravation or do not operate in mitigation. Leaving aside circumstances of aggravation fixed by statute, these are not propositions of law. Rather, they are questions of mixed fact and law, and the onus is on counsel to address any matter or circumstance which he or she considers to require particular attention for that purpose in the course of the sentencing submissions.

[61] A finding by a sentencing judge in relation to an aggravating or mitigating circumstance will not constitute a breach of procedural fairness by reason only of the fact that the matter was not the subject of express treatment in the course of sentencing submissions. In the particular circumstances of this case, the sentencing court was entitled to assume that counsel would be aware of the manners in which intoxication could potentially be taken into

37 See *Pantorno v The Queen* [1989] HCA 18; 166 CLR 466 per Mason CJ and Brennan J at 472-3.

account, and would address that matter to the extent that he or she considered necessary and appropriate.

[62] Leave to appeal on this ground is refused.

Ground 1: That the sentence was manifestly excessive in all of the circumstances

[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.[38]

[64] Manifest excess is a conclusion which does not depend upon attribution of specific error in the reasoning of the sentencing judge.[39] The relevant test is whether the sentence is unreasonable or plainly unjust.[40] It must be shown that the sentence was clearly and not just arguably excessive.[41] 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

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38 *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [58] per Gaudron, Gummow and Hayne JJ.

39 *Dinsdale v The Queen* [2000] HCA 54; 202 CLR 321.

40 *House v The King* (1936) 55 CLR 499; *Dinsdale v The Queen* [2000] HCA 54; 202 CLR 321 at [6].

41 *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *Noakes v The Queen* [2015] NTCCA 7 at [23]; *Emitja v The Queen* [2016] NTCCA 4 at [39]; *JF v The Queen* [2017] NTCCA 1 at [49].

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.[42]

[65] Counsel for the respondent submitted that although the sentence imposed in this case was condign, it was not manifestly excessive. It is accepted by both parties that the offending under consideration is properly regarded as objectively serious. However, it was not at the upper end of the scale of seriousness.[43]

[66] Regrettably, many cases involving this type of offending present with significantly more serious features. The fact that more serious features are not present here is not mitigating in itself,[44] but is relevant to the assessment of where on the scale the offending lies. Such comparisons form part of the broad context in which the gravity of the offending and the circumstances of the particular offender fall to be assessed for the purpose of arriving at an appropriate sentence. That a case involving more serious features may have in the past attracted a similar sentence cannot, without more, support a

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42 *Melham v The Queen* [2011] NSWCCA 121 at [85].

43 The Crown contended before the sentencing judge that the offending was at the upper end of the scale of seriousness. Counsel for the respondent in the appeal drew attention to cases involving a far higher gravity of offending which were not apt for comparative purposes. Examples of that category of case include *R v Ginger Green* (SCC 21217126, Sentencing Remarks, 27 September 2013) and *R v Norman Kernan* (SCC 21217002, Sentencing Remarks, 27 September 2013). A further example of offending of this kind at the upper end of the scale may be seen in *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106.

44 *Emitja v The Queen* [2016] NTCCA 4 at [52].

conclusion that the sentence was manifestly excessive. Consistency in sentencing is an important outcome, but does not resolve to "numerical equivalence".[45] Like cases are to be treated in like manner whilst preserving the legitimate breadth of the sentencing discretion.[46]

[67] The assessment of the objective gravity of the offending in this case is determined by a complex of factors. The maximum penalty is life imprisonment. The offence covers a wide range of criminal conduct. There was some violence beyond what is inherent in all offending of this kind. The offending involved more than one act of sexual intercourse, over two phases which included pursuit of the victim. It was rough, unprotected intercourse. The victim was vulnerable because she was noticeably intoxicated, alone and in a relatively isolated location. The full details of the offending have been described above. The victim suffered harm and experienced nightmares as a consequence of the attack. Offending of this kind is prevalent, is degrading to women, and causes significant alarm in the community.

[68] The objective gravity of the offending is qualified by the following factors. Although involving three acts of sexual intercourse, the overall offending episode was moderate in length. The sentencing judge concluded as much. In addition, the levels of attendant violence did not result in serious or

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45 *Barbaro v R*; *Zirilli v R* (2014) 253 CLR 58 at [40].

46 *Wong v The Queen* (2001) 207 CLR 584 at [6] per Gleeson CJ.

significant harm to the victim; nor were weapons used; nor was there extended deprivation of liberty; and nor was the offending committed in company.

[69] Turning then to the applicant's subjective circumstances, previous convictions, especially for sexual offending (and, to a lesser extent, other violent offending), are relevant to the final disposition. Some offenders will have no previous history of offending, although that is rare in cases of this kind. The applicant had previously committed offences of violence as a juvenile. This might ordinarily be a factor tending against significant mitigation, however there was no history of sexual offending. It may be noticed in this respect that many of the comparative sentences to which the appeal court was referred involved accused persons with a prior history of sexual offending.

[70] It is common ground that the applicant's relative youth is a relevant mitigating feature. Section 5(2)(e) of the *Sentencing Act* requires a Court to have regard to the age of an offender. It was observed in *R v Tennyson*[47] that there is a point at which the seriousness of the crime overrides the mitigating factor of youth. Similarly, it has been observed that as the seriousness of the criminality increases there will be "a corresponding reduction in the mitigating effects of the offender's youth".[48] This Court

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47 [2013] NTCCA 2.

48 *Lantjin v Phipps* [2017] NTSC 39 at [35] per Grant CJ, citing *Fox and Freiberg's Sentencing: State and Federal Law in Victoria*, (Thomson Reuters, 3rd ed, 2014) 355. See also *The Queen v*

has also confirmed that the seriousness of the offending does not mean that no weight will be given to youth and immaturity.[49] Consistent with those principles, the sentencing judge considered age to be one of the few mitigating factors present in this case.

[71] A marked difference between sentences for offending of this type imposed following pleas of guilty and those imposed after trial is to be expected. This reflects the discount on sentence ordinarily afforded in recognition of the significant and substantial utilitarian value of guilty pleas in cases involving sexual offending. The sentencing judge acknowledged the plea of guilty in this case by reducing the head sentence from 14 years to 10 years and six months' imprisonment. A specified reduction for a guilty plea is a recognised exception to the single-staged sentencing methodology.[50] To make that specification is not to distort the process of instinctive synthesis. In this jurisdiction it is considered desirable for reasons relevant to the efficient administration of justice that any reduction in recognition of a plea of guilty be quantified.[51] Further, it has been held by this Court that the starting point of a particular sentence under appeal is the "critical question" in determining whether the sentence is outside the proper range of a

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Bloomfield [1999] NTCCA 137 at [21], [34]; *The Queen v Goodwin* [2003] NTCCA 9 at [10]-[11].

49 *R v Tennyson* [2013] NTCCA 2 at [30]; *Melpi v The Queen* [2009] NTCCA 13 at [30]; *JF v The Queen* [2017] NTCCA 1.

50 *Fox and Freiberg's Sentencing: State and Federal Law in Victoria,* (Thomson Reuters, 3rd ed, 2014) 355 at [6.25].

51 *Kelly v The Queen* [2000] NTCCA 3; 10 NTLR 39 at [26]-[29].

sentencing discretion "having regard to the gravity of the total criminal conduct and all other relevant circumstances".[52]

[72] Against that background, counsel for the respondent submitted that the assertion of manifest excess is to be assessed by reference to the term actually imposed, not the "starting point". The submission followed that a consideration of the starting point constituted "looking in the side window" or giving consideration only to the intermediate stage of the sentencing process. That submission is correct in the sense that the appeal is brought in respect of the sentence actually imposed rather than some notional sentence. The question is not properly approached on the basis that the applicant was sentenced to imprisonment for 14 years. Rather, the question is whether a sentence to imprisonment for 10 years and six months was plainly and obviously excessive having regard to all the surrounding circumstances, including the fact that the applicant entered a plea of guilty at an early opportunity.

[73] Neither the parties nor the appeal court can know the weight attributed by the sentencing judge to the various objective and subjective factors which presented. It is possible, for example, that the sentencing judge considered it was necessary to give greater weight to sentencing purposes such as punishment, denunciation and deterrence in fixing the starting point, but gave greater weight to rehabilitative purposes in allowing a reduction in

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52 *Daniels v The Queen* [2007] NTCCA 9; 20 NTLR 147 at [20] per Martin (BR) CJ and Riley J.

recognition of the guilty plea. For that reason, the focus of the examination must necessarily be directed to whether the final result of imprisonment for 10 years and six months is unreasonable or plainly unjust in context.

[74] This does not mean that the fact an offender has pleaded guilty is not a relevant consideration in assessing how the head sentence has been calculated and in comparing sentences imposed for like offending. To approach the exercise on any other basis would involve an assessment of the range or standard without taking into account adjustments that might have been made in recognition of a guilty plea, and lead to a consequent distortion.

[75] In *Emitja v The Queen*[53] this Court confirmed that a collation of appropriate sentences may comprise a "standard" for a particular crime, but not a fixed range departure from which will necessarily found demonstrable error. As the Court observed in that respect (footnotes omitted):[54]

> In entertaining and determining an appeal against sentence it is a particular function of this Court to minimise disparities of sentencing standards, while maintaining the reasonable and just area of discretion of the sentencing judge. As this Court has observed, "the orderly administration of the criminal law necessitates... the preservation of relativity in fixing head sentences and non-parole periods, whilst recognising the width of the range of criminality ... and the consequent extent of the variation between sentences in individual cases".
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> As counsel for the respondent contended, those observations reflect that while there is a range of appropriate sentences that can be said to comprise the sentencing "standard" for a particular crime, a

53 [2016] NTCCA 4.

54 *Emitja v The Queen* [2016] NTCCA 4 at [42]-[45].

sentencing standard is not a fixed range departure from which will necessarily found demonstrable error. As Martin (BR) CJ and Riley J observed in *Daniels v The Queen:*

> The role of sentencing standards must be properly understood. They do not amount to a fixed tariff, departure from which will inevitably found a good ground of appeal. We respectfully agree with the observations of Cox J in *R* v *King* (1988) 48 SASR 555 as to the proper role of sentencing standards (557):
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> > "... In a word, this case is about sentencing standards, but it is important, I think, to bear in mind that when a standard is created, either by the cumulative force of individual sentences or by a deliberate act of policy on the part of the Full Court, there is nothing rigid about it. Such standards are general guides to those who have to sentence in the future, with certain tolerances built into or implied by the range to cater for particular cases. The terms of approximation in which such standards are usually expressed - "about" and "of the order of' and "suggest" and so on - are not merely conventional... It follows that a particular sentence will not necessarily represent a departure from the standard because it is outside the usual or nominal range; before one could make that judgment it would be necessary to look at all of the circumstances of the case. Those circumstances will include, but of course not be confined to, the questions whether or not the offences charged are multiple or single and whether the defendant is a first offender with respect to the particular crime charged. That is not to undermine the established standard but simply to acknowledge that no two cases, not even two "standard" cases, are the same ..."

Those observations apply *a fortiori* in these circumstances given the frequently expressed observation that there is no tariff in respect of penalties to be imposed for the crime of assault. As this Court observed in *The Queen* v *JO*, having just cited the passage from *Daniels* extracted above:

> 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.

That statement reflects previous 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 limitations. Each case must be dealt with on its own merits having regard to the objective gravity of the particular offence, and to the subjective circumstances of the offending and of the offender. In undertaking that assessment, "[i]t is not this Court's task to see whether the sentencing under appeal is more severe or lenient than a particular sentence within the range, imposed on a person not a co-offender in the particular crime". Nor is it the task of this Court to "tinker" with sentences imposed by the Supreme Court.

[76] Similarly, although there is no tariff for crimes of sexual assault given the wide range of circumstances and offenders,[55] sentencing standards or practices for this type of offence might still be discerned. It was no doubt with those observations in mind that counsel for the applicant acknowledged his advertence to comparator sentences as an attempt to provide empirical support for the proposition that the sentence was manifestly excessive. While it is not uncommon for both judges at first instance and this Court to have regard to comparable sentences, there is no legislative requirement to do so under the *Sentencing Act*. In *The Queen v Kilic*, the High Court recently had cause to consider s 5(2)(b) of the *Sentencing Act 1991* (Vic) requiring courts in Victoria to have regard to "current sentencing practices".[56] The purpose of the section was said to "promote consistency of approach in the sentencing of offenders".[57]

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55 *The Queen v Nabegeyo* [2014] NTCCA 4; 34 NTLR 154 at [23].

56 *The Queen v Kilic* [2016] HCA 48; 339 ALR 229.

57 *The Queen v Kilic* [2016] HCA 48; 339 ALR 229 at [21], with reference to s 1(a) of the *Sentencing Act 1991* (Vic).

[77] Although the *Sentencing Act* does not include an equivalent requirement, the High Court's observations concerning the approach to be taken to current sentencing practices also have application in the Territory context. Regard to current practice is an essential part of the appellate function of minimising disparities in sentencing standards, and the process of comparison has long been recognised as a legitimate forensic tool for that purpose.[58] As the Court observed in *Kilic* (citations omitted):[59]

> Consideration of "current sentencing practices" will include, where appropriate, the proper use of information about sentencing patterns for an offence. The requirement of currency recognises that sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some forms of offending. For example, current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, *inter alia*, of changes in understanding of the long-term harm done to the victim. So, too, may current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations.

[78] Importantly for present purposes, the High Court in *Kilic* held that similar cases may provide a yardstick which assists in achieving consistency in sentencing, but that the yardstick:

> … does not mean that the range of sentences imposed in the past fixes the boundaries within which future sentences must be passed; rather the range of sentences imposed in the past may inform a

58 *Wong v The Queen* (2001) 207 CLR 584 at [11]-[12] per Gleeson CJ.

59 *The Queen v Kilic* [2016] HCA 48; 339 ALR 229 at [21].

> "broad understanding of the range of sentences that would ensure consistency in sentencing and a uniform application of principle".[60]

[79] In *Kilic* it was found that the Victorian Court of Appeal had erred in attributing undue significance to the sentences imposed in previous cases. The sentences considered by the Victorian Court of Appeal as comparators were too few in number and too disparate in circumstance to constitute a sentencing pattern for the purposes of the particular offence under consideration.[61]

[80] *Kilic* confirms that each sentencing exercise turns on its particular facts and circumstances. Although the circumstances of a given case may represent a grave instance of offending, if the offending is not so grave as to warrant the imposition of the maximum prescribed "a sentencing judge is bound to consider where the facts of the particular offence and offender lie on the 'spectrum' that extends from the least serious instances of the offence to the worst category, properly so called".[62]

[81] So far as sentencing practices for the offence of sexual intercourse without consent are concerned, Riley J made the following observations in *Gilligan v The Queen*:[63]

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60 *The Queen v Kilic* [2016] HCA 48; 339 ALR 229 at [22]; citing *Kilic v The Queen* [2015] VSCA 331 at [48] and making reference to *Director of Public Prosecutions (Vic) v OJA* [2007] VSCA 129 at [30]–[31] per Nettle JA (Ashley and Redlich JJA agreeing at [71], [72]).

61 *The Queen v Kilic* [2016] HCA 48; 339 ALR 229 at [25].

62 *The Queen v Kilic* [2016] HCA 48; 339 ALR 229 at [19].

63 [2007] NTCCA 8 at [39]-[41].

In *Siganto (No 1)* [1997] NTCCA 163; (1997) 97 A Crim R 60 the Court of Criminal Appeal dealt with an appeal against sentence where the prisoner had been sentenced to nine years imprisonment for the offence of rape. In that case the Court observed (at 68):

> "General and personal deterrence undoubtedly play the most significant part in fixing an appropriate sentence for crimes of this type. After all, the maximum penalty is imprisonment for life. The Parliament intends that the offence be seen at the top end of the scale of gravity of criminal conduct. The head sentence of nine years imprisonment is not excessive. It is within the range of sentences imposed in this Court in recent years for offences of rape where the accused is convicted after trial, and the assault is accompanied by violence and degradation beyond the minimum which might be expected. It is a sentence warranted by the objective facts measured against the maximum."

Siganto was the subject of further appeal and, as a consequence, the appellant was re-sentenced: *Siganto (No 2)* [1999] NTCCA 52; (1999) 106 A Crim R 30. However the observations to which I have referred were not challenged.

In the course of argument counsel for the applicant referred to the range of sentences imposed for offences against s 192(3) of the Criminal Code since 2003. In considering the schedule of information provided it is necessary to bear in mind the observations of Street CJ appearing in *R v Visconti* [1982] 2 NSWLR 104 and adopted by this Court in *R v Ireland* (1987) 49 NTR 10 at 18:

> "The second initial consideration is the ascertainment of the existence of the general pattern of sentencing by criminal courts for offences such as those under consideration. The task of the sentencing judge, no less than the task of an appellate court, is to pursue the ideal of evenhandedness in the matter of sentencing. Full weight is to be given to the collective wisdom of other sentencing judges in interpreting and carrying into effect the policy of the legislature. That collective wisdom is manifested in the general pattern of sentences currently being passed in cases which can be recognised judicially as relevant to the case in hand. This is not to suggest that sentences are to be arbitrarily dictated by mathematical application of statistics. There is an enormous difference between recognising and giving weight to the general pattern as a manifestation of the collective wisdom of the sentencing judges on the one hand and, on the other hand, forcing sentencing into a straightjacket of computerisation. There is, moreover, always a danger, as is recognised on the civil side in the assessment of damages, of seeking to use a factual assessment in

one case as a legal precedent or authority to govern the decision in another."

[82] So far as the relevant sentencing practices up to 2007 are concerned, that discussion suggests a head sentence of nine years' imprisonment is within the range of sentences imposed by the Supreme Court and by this Court for offences against s 192(3) of the *Criminal Code* in circumstances where the accused is convicted after trial (that is, without any discount for a guilty plea), and the assault is accompanied by violence and degradation beyond the minimum which might be expected. For the reasons already discussed, although the force and violence applied by the applicant in this case went beyond the minimum, the offending did not involve gratuitous violence beyond the acts themselves and such violence as was applied did not result in serious or significant harm.

[83] It falls then to consider whether sentencing practices for this type of offence have changed appreciably since 2007. Counsel for the applicant made the submission that for those sentences imposed by the Supreme Court or this Court between 1 January 2012 and 31 January 2015 for an offence against s 192(3) of the *Criminal Code* involving an adult offender and an adult victim, after excluding the most serious of cases, the average head sentence was six years and five months and the average non-parole period was four years and three months. That calculation is broadly consistent with the observation made in *The Queen v Nabegeyo*[64] to the effect that six of nine

64 [2014] NTCCA 4; 34 NTLR 154 at [27].

sentences referred to the Court on that occasion involved a starting point of six years or higher.

[84] Having drawn attention to that averaging exercise, counsel for the applicant acknowledged that advertence to a mean sentence was of limited utility because that methodology failed to take account of the particular facts and circumstances at play in each case, and failed to take account of whether and what discount had been applied in recognition of a guilty plea. Both counsel agreed that the facts under consideration here are substantially more serious than those described in *The Queen v Nabegeyo*, in which the offender was re-sentenced to a head sentence of five years.[65] That is clearly the case. It is also useful to consider some of the other cases referred to by counsel during the hearing of the appeal in order to determine whether there may be said to be relevant sentencing standards or practices and, if so, whether they have changed since 2007.

[85] Both counsel drew attention to the matter of *Wilfred Thomas*.[66] The offender in that matter was sentenced for two counts of sexual intercourse without consent. The offending comprising the two counts was considered to constitute one course of conduct. The offender was sentenced to 10 years' imprisonment for each count, to be served concurrently. The

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65 *The Queen v Nabegeyo* [2014] NTCCA 4; 34 NTLR 154. That case involved a sleeping victim incapable of resistance who did not suffer harm or physical pain, a spontaneous and unplanned act which did not involve gratuitous violence, and a first offender who pleaded guilty (albeit not at the earliest opportunity).

66 *R v Wilfred Thomas* (SCC 21121283, Sentencing Remarks, 24 February 2012).

circumstances were that both the offender and victim were intoxicated in public. The offender persuaded the victim to accompany him to a creek bed in Alice Springs. The victim tried to leave but was forced to the ground. The offender climbed on top of her. The victim tried to scream and the offender covered her mouth to prevent her from doing so. He performed penile-vaginal intercourse to ejaculation, punched the victim to the face, and hit her on the forehead with an object when she struggled. The offender subsequently performed a second act of penile-vaginal intercourse to ejaculation. During that second act the offender punched the victim to the nose and made it bleed. The victim escaped, ran to the nearby shops and called police. She sustained abrasions to her genital region, lacerations, a cut to her forehead and associated swelling.

[86] In addition to those matters, the sentencing judge found the offending was calculated and planned and that the offender had used deception to lure the victim to the place at which the crimes were committed. Although the offender pleaded guilty, it was described as "not the earliest plea" and there was no apparent remorse. An adjustment of 15 percent was made on account of the plea. The offender was 34 years of age at the time of the offending and had a long criminal history. He had a previous inhalant problem and still drank heavily. In terms of his criminal history, he had seven convictions for aggravated assault, five of which were against women and three of which involved weapons. There were also four breaches of

suspended sentences, two breaches of restraining orders and other previous convictions not considered relevant.

[87] In the matter of *Massilas Ganambarr aka Rogers*[67] the offending involved one count of sexual intercourse without consent committed during the course of the unlawful entry of an occupied building. The victim was a 58 year old rural nurse and the offence took place in her temporary accommodation at the Ngukurr Clinic. The offender broke into that accommodation. The victim woke up to the sound of the offender in the house but initially pretended she was asleep. She then got up and confronted the offender. The victim could smell alcohol on the offender. He commenced sexually assaulting her and continued to do so for approximately one hour. There was a substantial struggle, numerous unlawful penetrations including digital, penile-vaginal and penile-anal insults. He stripped the victim naked in the course of that attack.

[88] The victim suffered a fractured collarbone, numerous abrasions and bruises, and haematomas to the area around her anus. Her phone was stolen and not recovered. The impact on the victim was severe. At the time of sentencing she was unable to return to work in remote communities. An extended period of recovery was required in respect of the physical injuries. There were 14 separate instances of penetration. The objective seriousness of that

67 *R v Massilas Ganambarr aka Rogers* (SCC 21563139, Sentencing Remarks, 17 August 2016).

offending was significantly higher than in the matter under consideration in this appeal.

[89] In common with the matter under consideration in this appeal, the offender was 18 years of age. His antecedents, however, were more favourable than those of the applicant. He was from a family of non-drinkers, had a good upbringing, was educated at Ngukurr Primary School and went to boarding school at Shalom College in Townsville. He left boarding school when he was in year 10. The evening of the offending was his first experience of being heavily intoxicated. He told a psychologist that alcohol caused him to commit the offences. His prospects for rehabilitation were described as good by the sentencing judge. The starting point adopted was imprisonment for 13 1/3 years. Following the application of the discount for a plea of guilty, the offender was sentenced to 10 years' imprisonment with a non-parole period of seven years. The sentences imposed for the offences of unlawful entry and stealing were ordered to be served concurrently.

[90] The matter of *Lloyd Ashley*[68] involved circumstances in which the offender had been drinking with the victim and both had become intoxicated. They met when the victim was looking for a cigarette. The offender gave the victim alcohol and asked her for something in return. The victim believed he was asking for sex and replied that she was married. He forced himself on top of her, removed her shorts and underwear, held her down and had

68 *R v Lloyd Ashley* (SCC 21432870, Sentencing Remarks, 13 January 2015).

unprotected penile-vaginal intercourse with her. The victim called for help and passers-by called police. The offender placed his hand over her mouth to silence her. The offending did not cease until police pulled the offender from the victim. The offender claimed the victim was his wife, knowing that to be untrue.

[91] The offender was 27 years old at the time of sentencing. The victim was 34 years old. The sentencing judge remarked that the attack occurred in a public place against a vulnerable and intoxicated female, and the offender continued the attack despite being aware that police had been called. He ceased only on physical intervention by police. The offender had no previous conviction for sexual offences. He had two previous convictions for stealing, three for breach of bail and one for carrying a weapon in a public place. The guilty plea was entered at a relatively late stage and there was no apparent remorse. An 18 month discount was given on account of the plea. He was sentenced to imprisonment for five years and six months with a non-parole period of four years.

[92] In the matter of *ZP*[69] the offender came across the victim walking alone at night in the city area. He approached her and asked for a cigarette. The victim became concerned and spoke to two men about the offender. The offender moved out of sight of the victim. The victim believed the offender had left the area and commenced walking. The offender cut her off, held

69 *R v ZP* (SCC 21400986, Sentencing Remarks, 18 July 2014).

scissors to her throat, and threatened to kill her if she screamed. She pleaded for her safety. The offender walked her to a park area and forced her to lie down while continuing to threaten her with scissors. He performed acts of digital penetration and penile-vaginal intercourse on the victim.

[93] The offender was 19 years old at the time of offending and the victim was 21 years old. The sentencing judge noted that the offender had a traditional upbringing, poor literacy and numeracy, no record of employment, and a history of abusing alcohol and drugs. The offender entered a guilty plea, but there was no indication of remorse for or insight into his offending. He received a two year reduction on account of the guilty plea. His young age and deprived upbringing were taken into account, as was the fact that while on remand he had completed one module of the Safe, Sober, Strong program.

[94] The offence was committed within four days of the offender's release from prison. The conduct was predatory, involved the use of a weapon, took place in a public place at night, and involved the commission of a number of different acts of sexual offending after the pursuit of the victim. The offender had 16 prior convictions, including four offences for violence and a number of failures to comply with previous orders. There were no prior convictions for sexual offences. He was sentenced to a term of nine years' imprisonment, with a non-parole period of six years and six months.

[95] In the matter of *Jonex Finlay*[70] the victim had been drinking with a group and became very intoxicated. The offender joined the group. The victim left the group and the offender grabbed her, pushed her to the ground and kicked her twice in the face. He pushed the victim into a nearby house and forced her onto a mattress on the floor. She asked to go home. The offender told her to shut-up and that he would allow her to leave if she had sex with him. He removed her T-shirt, pulled down her shorts and told her to "suck [his] dick". She struggled and refused. He then had penile-anal intercourse with her, causing considerable pain and anal bleeding. He insisted she shower. He attempted to join her. When she refused he locked her in the bathroom, returning later to let her out. She sustained swelling and bruising to her face and eyes. As a result of the assault the victim lost one tooth, had another tooth loosened, and sustained a tear to her anus.

[96] The offender was 24 years old at the time of the offending. He had changed his plea on a number of occasions, and did not finally plead guilty until the morning of the trial. There was no remorse. He had a deprived childhood and limited capacity to read and write. He was exposed to violence and bullying by his mother, and sniffed petrol and glue when he was younger. He had a significant criminal history including four previous counts of aggravated assault, one of attempted sexual intercourse without consent, and

70 *R v Jonex Finlay* (SCC 21128478, Sentencing Remarks, 29 October 2012).

one of indecent assault. He was sentenced to imprisonment for nine years and six months with a non-parole period of seven years.

[97] In the matter of *Clancy Ryan*[71] the offender was intoxicated. On seeing the victim he grabbed her, pulled down her underwear and shorts, and forced her to a school oval where he dragged her to the ground. She struggled and told him to stop. He engaged in penile-vaginal intercourse to the point of ejaculation and then ran off. The offender initially claimed the sex was consensual, although later admitted his guilt. The offender was 22 years old at the time of offending and the victim, who was his cousin, was 33 years old. A twenty percent discount was allowed on account of the guilty plea and remorse. The offender's relative youth was taken into consideration, as was the fact that he was a relatively unsophisticated person without high intelligence. He was intoxicated. Although he had 48 previous convictions since 2004, including for aggravated assault, there were no previous convictions for sexual offences. He was sentenced to seven years' imprisonment with a non-parole period of four years and 11 months.

[98] In the matter of *Preston Andy* [72] the offender was charged with the offences of unlawful entry of a dwelling at night while armed and with intent to commit the offence of sexual intercourse; sexual intercourse without consent; and stealing. The offender had entered the victim's yard area.

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71 *R v Clancy Ryan* (SCC 21211174, Sentencing Remarks, 29 June 2012).

72 *R v Preston Andy* (SCC 21043090, Sentencing Remarks, 28 March 2012).

When the victim went outside he asked her for water. He then brandished a pair of scissors and pushed his way into her home. The victim thought the scissors were a knife. He pushed the victim into her bedroom and prevented her from getting up. He raised the scissors and said, "Don't struggle or I'll hurt you". He then demanded a "blow job". The victim pretended not to understand. The offender forced the victim's hand on to his penis and put the weapon down at her request. He then forced the victim to have penile-vaginal intercourse. There were two acts of penetration, but of a limited nature. The offender stole the sheets and pillowcase from the victim's bed in an attempt to remove incriminating evidence.

[99] The offender was a 25 year old alcoholic with a long history of alcohol and substance abuse, memory loss due to sniffing petrol, anxiety, hostile thinking and anger management difficulties. The victim was 67 years of age. At the time of the attack the offender was on conditional release for an aggravated assault. He had multiple previous convictions for aggravated burglary in Western Australia. He also had a previous conviction for an indecent assault in 2002 and for an indecent act in 2003. The total effective term imposed was ten years' imprisonment with a non-parole period of seven years. The sentence for sexual intercourse without consent was seven years, with that term to commence after three years of the sentence for the aggravated unlawful entry had been served.

[100] The matter of *Hyuntae Kim*[73] involved a Korean national who was living on the streets of Darwin. The victim was a 46-year old woman. She was approached late at night, dragged off the street, and punched repeatedly in the face during one act of penile-vaginal intercourse. After a short period of time the offender removed his penis, at which point the victim escaped. Intoxication was not a factor in the offending. The victim suffered a broken nose and fractured eye socket. The offender had no relevant previous convictions. The starting point adopted by the sentencing judge was imprisonment for 11 years before an adjustment to take account of the guilty plea (which was noted as a late plea). The head sentence imposed was imprisonment for nine years and four months.

[101] Unsurprisingly, counsel for the applicant and counsel for the respondent sought to draw different conclusions from the survey of comparative sentences. Counsel for the applicant drew attention to those comparators for which lesser sentences were imposed, but which involved the use of weapons, more extensive criminal histories on the part of the offenders, threats to kill, gratuitous violence and/or late guilty pleas. Particular attention was drawn in these respects to *Wilfred Thomas, Lloyd Ashley, ZP, Jonex Finlay, Clancy Ryan* and *Preston Andy*. Conversely, counsel for the respondent submitted that this is the class of case which fits within the range at around 10 years (after discount for the guilty plea). The offending

73 *R v Hyuntae Kim* (SCC 21141636, Sentencing Remarks, 12 December 2012).

comprised three acts, was relatively prolonged, was perpetrated against an intoxicated and vulnerable victim, was not spontaneous, and involved the offender chasing and effectively confining the victim on two occasions after she had attempted to remove herself from the situation.

[102] In cases involving child victims of sexual intercourse without consent this Court has observed that the starting point will generally be somewhere between 12 and 16 years.[74] It is not possible to identify with such specificity a range or standard for offending involving adult victims. The survey conducted above of sentences imposed between 2012 and 2015 may even suggest that sentencing practices in respect of the offence of sexual intercourse without consent have changed since *Siganto*, and then *Gilligan*, were decided. Matters which might be broadly described as "rape" cases are particularly fact-sensitive, such that the determination whether a sentence falls within or without the relevant "range" is often fraught with difficulty.

[103] That difficulty is exacerbated by the test which must be applied to such determinations, and the different processes of factual reasoning and matters of discretionary judgment which underlie the sentencing exercise. In *Truong v The Queen*,[75] this Court made the following observation:

> In *Hili v The Queen* [(2010) 242 CLR 520 at [47]-[56], per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ], the High Court discussed general concepts of "systematic fairness" and "reasonable consistency" in sentencing, as an aspect of the administration of federal

74 *R v Tennyson* [2013] NTCCA 2 at [28].

75 [2015] NTCCA 5; 35 NTLR 186 at [26].

> criminal justice. Those concepts apply to persons charged with similar offences arising out of unrelated events. The consistency they require is "consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence" [*Hili v The Queen* (2010) 242 CLR 520 at [18], per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ]. Further, as Heydon J observed in a separate judgment in Hili:
>
> > [77] Sentences must be reasonably consistent. But it does not follow that disparities between them may not exist. … where marked disparity renders sentences vulnerable on appeal, it cannot be said that any particular disparate sentence is necessarily wrong merely because it is disparate. Indeed, even within a single jurisdiction, one court … may arrive at sentencing results in particular cases which are different from those reached by earlier courts in that jurisdiction without being open to appellate reversal or criticism for "error" merely because of those differences.

[104] This Court went on in *Truong*[76] to refer with approval to the following statement in relation to manifest excess made by Bongiorno JA in *Hanks v The Queen*:[77]

> The term "manifest excess" is usually used when a ground of appeal alleges that a sentence is so egregiously erroneous that the sentencing judge must have made a sentencing error although that error cannot be identified. To succeed on this ground the excess must be obvious, plain, apparent, easily perceived or understood and unmistakable. It must be so far outside the range of a reasonable discretionary judgment as to itself bespeak error.

[105] In the application of those principles it is difficult to conclude that the sentence imposed by the sentencing judge in this case was unreasonable or plainly unjust in the relevant sense. However, it is unnecessary to do so in the circumstances. As already observed, if specific error is established this

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76 *Truong v The Queen* [2015] NTCCA 5; 35 NTLR 186 at [37].

77 [2011] VSCA 7 per Bongiorno JA at [22], Redlich JA agreeing. Also cited in *Namala v Whittington* [2016] NTSC 71 at [25].

Court may proceed to resentence an appellant if it reaches the further conclusion that a less severe sentence is warranted and should have been passed.

Conclusion

[106] For the reasons already given in the context of the second ground of appeal, the sentencing court fell into error by treating the applicant's intoxication as an aggravating factor. It may be assumed that the severity of the sentence imposed was influenced by the sentencing judge's treatment of the applicant's intoxication. Having regard to the applicant's relative youth, antecedents and prior criminal history, and to the objective circumstances of this offending in terms of inception, duration and the nature of the violence perpetrated on the victim, we are of the opinion that a less severe sentence was warranted in the circumstances and should have been passed. We will proceed to re-sentence the applicant accordingly.

Re-sentence

[107] We grant leave to appeal on the second ground and find that the sentencing judge fell into error in his treatment of the applicant's intoxication as an aggravating circumstance. The sentence of imprisonment for ten years and six months is quashed. We sentence the applicant to nine years' imprisonment (after allowing a 25 per cent discount in recognition of the guilty plea), and fix a non-parole period of six years and four months.
