CITATION:	*Anderson v Nicholas* [2019] NTSC 55
PARTIES:	ANDERSON, Marshall v NICHOLAS, Sally
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 59 of 2018 (21833774)
DELIVERED:	5 July 2019
HEARING DATES:	18 January and 10 April 2019
JUDGMENT OF:	Hiley J

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST SENTENCE – requirement to provide procedural fairness in relation to proposed sentencing dispositions – defence counsel's expectations of a lower sentence.

CRIMINAL LAW – APPEAL AGAINST SENTENCE – whether sentences manifestly excessive – starting point 60 per cent of maximum penalty before discount for plea – non-parole period fixed at 75 per cent of head sentence.

CRIMINAL LAW – SENTENCING – intoxication as an aggravating feature – foreknowledge on the part of the offender as to how he or she is likely to behave when affected by alcohol.

Criminal Code (NT) s 166, s 188.
Criminal Law (Conditional Release of Offenders) Act (NT) s 4.
Sentencing Act (NT) s 54, s 78DA.

CEV v The Queen [2005] NTCCA 10; *Edmond and Moreen v The Queen* [2017] NTCCA 9; *Forrest v The Queen* [2017] NTCCA 5; 267 A Crim R 494; *JF v The Queen* [2017] NTCCA 1; *R v Mulholland* (1991) 1 NTLR 1; *Veen v R (No 2)* [1988] HCA 14; 164 CLR 465, applied.

Brand v Parson [1994] 1 VR 252; *Garling v Firth* [2016] NTSC 41; 260 A Crim R 279; *Sams v Sims* [2013] NTSC 18; *Weir v The Queen* [2011] NSWCCA 123; *Wilson v Hill* [1995] NTSC 2, distinguished.

Bara v The Queen [2016] NTCCA 5; *Baroudi v The Queen* [2007] NSWCCA 48; *Button v The Queen* [2010] NSWCCA 264; *Daniels v The Queen* [2007] NTCCA 9; 20 NTLR 147; *Demur v The Queen* [2014] NTCCA 15; 255 A Crim R 144; *Dinsdale v The Queen* [2000] HCA 54; 202 CLR 321; *Emitja v The Queen* [2016] NTCCA 4; 262 A Crim R 126; *Hasan v The Queen* [2010] VSCA 352; 31 VR 28; *House v The King* [1936] HCA 40; 55 CLR 499; *Hunter R E v R* [1988] HCA 35; 62 ALJR 423; *Lalara v Andreou* [2018] NTSC 75; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 92 ALJR 713; *Ng v The Queen* [2011] NSWCCA 227; 214 A Crim R 191; *Noakes v The Queen* [2015] NTCCA 7; *Phan v Western Australia* [2014] WASCA 144; *R v Anderson*, SC 21114632, Barr J, 25 November 2011; *R v Coleman* (1990) 19 NSWLR 467; *R v King* [2013] NSWSC 801; *R v Lobban* [2001] SASC 392; 80 SASR 550; *R v Morse* (1979) 23 SASR 98; *R v Stubberfield* [2010] SASC 9; 106 SASR 91; *TB v The Queen* [2018] NTCCA 8; *TRH v The Queen* [2018] NTCCA 14; *UBS AG v Tyne* [2018] HCA 45; 92 ALJR 968; *Weir v The Queen* [2011] NSWCCA 123; *Whitehurst v The Queen* [2011] NTCCA 11, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Murphy
Respondent:	R Everitt

Solicitors:

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

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

Anderson v Nicholas [2019] NTSC 55
No. LCA 59 of 2018 (21833774)

BETWEEN:

MARSHALL ANDERSON
Appellant

AND:

SALLY NICHOLAS
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 5 July 2019)

Introduction

[1] The appellant has appealed against the sentence imposed by the Local Court on 18 October 2018.

[2] The appellant pleaded guilty to and was convicted of the following two charges:

(a) Count 1 - Aggravated assault of JD contrary to s 188(1) & (2) of the *Criminal Code* - punishable by imprisonment for up to five years; and

(b) Count 3 – Threat to kill KG contrary to s 166 of the *Criminal Code* - punishable by imprisonment for up to seven years.

[3] He was sentenced to a total period of four years' imprisonment, backdated to 11 August 2018. The Court fixed a non-parole period of three years imprisonment. After discounts from three years imprisonment on account of his pleas of guilty, he was sentenced to two years and six months imprisonment on each count, 12 months of the sentence for count 3 to be served concurrently with the sentence for count 1.

Grounds of Appeal

[4] The notice of appeal as amended contains the following grounds:

Ground 1 – the sentence for count 1 was in all the circumstances manifestly excessive;

Ground 2 – the sentence for count 3 was in all the circumstances manifestly excessive;

Ground 3 – the total effective sentence was in all the circumstances manifestly excessive;

Ground 3A – the total effective sentence was in all the circumstances manifestly excessive by virtue of the head sentence and/or the non-parole period;

Ground 4 – her Honour erred in the assessment of the Appellant's moral culpability;

Ground 4A – her Honour erred in finding that intoxication was an aggravating circumstance;

Ground 5 – her Honour failed to afford the Appellant procedural fairness.

General principles re appeals against sentence

[5] It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error is shown. The presumption is that there is no error. The appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it is shown that the sentencing judge was in error. The error may appear in what the sentencing judge said in the proceeding or the sentence itself may be so excessive as to manifest such error. It must be shown that the sentence was clearly and not just arguably excessive.[1]

[6] Counsel for the appellant submitted that in respect of Ground 5 (procedural fairness), the principles of appellate judicial restraint

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1 *House v The King* (1936) 55 CLR 499 at 504-505; *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *Noakes v The Queen* [2015] NTCCA 7 at [23]; *Emitja v The Queen* (2016) 262 A Crim R 126 at [39].

outlined in *House v The King*[2] do not apply. That is because procedural fairness is a not a question about which reasonable minds may differ, rather it is a question admitting of only one answer; procedural fairness either was afforded or it was not.[3]

Relevant facts

[7] The victim JD was the ex-partner of the appellant. At about 2.30 pm on Saturday, 11 August 2018 the appellant and the two victims were sitting down in a bush camp near Phillip Street, Fannie Bay, drinking Chardonnay together. An argument occurred between the appellant and JD concerning relationship issues. The argument escalated and the appellant armed himself with a black handled kitchen knife. JD, fearing for her safety, stood up and started to run away.

[8] The appellant ran after JD and slashed her left arm, using a backward slicing motion with the knife. This caused a large cut to her left arm, just above the wrist. It was bleeding heavily. She sat down.

[9] KG saw this happen and began to assist JD with her injury. The appellant got angry at KG and stood over the top of her while still holding the knife, and said: "I will kill you too." KG became frightened and started running towards Phillip Street. The appellant

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2 (1936) 55 CLR 499.

3 *UBS AG v Tyne* (2018) 92 ALJR 968 at [123] per Nettle and Edelman JJ (dissenting in the result). See also *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at [18] per Kiefel CJ, [49], [55]-[56] per Gageler J, [85]-[87] per Nettle and Gordon JJ, [145], [154]-[155] per Edelman J.

chased after her and said: “I will catch you and kill you too.” The appellant held the knife up above his head, and ran after KG. KG continued to run towards Phillip Street, where she asked a bystander to contact police.

[10] The appellant then withdrew and walked off towards the Fannie Bay shops. It was an agreed fact that KG was fearful of suffering harm at the time when she was running away from the appellant.

Sentencing submissions before the Local Court

[11] The appellant had 14 relevant prior convictions. It was common ground that s 78DA(2) of the *Sentencing Act* applied to count 1, as a result of which he was required to serve a mandatory minimum period of 12 months’ imprisonment.

[12] Counsel for the appellant said that the appellant was very intoxicated at the time of the assault and that he was very angry. He argued that his conduct was reckless. The judge rejected this and said that it was intentional. Counsel said that the defendant accepts that he should have known better and that his intoxication was no excuse for what he did on this occasion. He accepted that there were “14 priors of like offending that go over many years” and that “certainly specific deterrence is a significant feature of this sentencing exercise”.

[13] Counsel said that: "The term 'kill' in Aboriginal English is a nebulous term" and that when he used that term when he was chasing KG "it was meant in a nebulous sense." He conceded that it was "certainly very menacing conduct." Counsel referred to the defendant's upbringing, the fact that he had three children from different relationships, has had employment doing station work and operating machines and that he has been through ceremony.

[14] Counsel then said:

> He does instruct … he says his primary issue, which he is aware of, is alcoholism. His alcoholism is very deep and entrenched. It at a point where he feels a sense of hopelessness, in the face of his alcoholism. He presents as a gentle person, while sober. He … instructs that he is not a violent person when he is sober, and feels deep remorse for his conduct. But, that his alcoholism is so deep and extreme, and when he does drink, he drinks to such extreme levels that he has very little control over his judgement and effectively enters into a different state of mind, where he became very violent, very angry and very reactive.[4]

[15] Counsel then spoke further of the defendant's remorse and shame and referred again to his alcoholism:

> … he presents today, and has presented many times in the past and at points where his alcoholism has gone out of control, and effectively he doesn't have the pride and dignity that's important to his sense of identity.[5]

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4 Transcript of proceedings, 18 October 2018 at pp 6.9-7.1.

5 Transcript of proceedings, 18 October 2018 at p 7.4.

[16] After making further submissions about the defendant's deep sense of shame and deep sense of hopelessness, mainly as a result of his alcoholism, defence counsel made the following submission concerning the appropriate sentence:

> He realises that he is going to get a significant punishment. He accepts that. He expects - accepts that it is appropriate in the circumstances. I ask your Honour to consider not imposing a non-parole period, and consider a period of supervision after the mandatory period, that would directly go towards dealing with his alcoholism. Given there will be such a significant term of actual imprisonment, there will be time for referrals to be made to full-time residential rehabilitation.
>
> Either we are at a point where there is just no hope. And, certainly his past history might lead your Honour down to that conclusion. But, at the age of 43, we would effectively be saying that there is nothing that can be done, and community protection becomes the only consideration here. Certainly it's a very major one. Or there can be a combined and dual approach to sentencing, which does seek to protect the community, does seek to deter him …[6]

[17] Her Honour interrupted counsel at that point saying that:

> Any non-parole period does that, doesn't it? Giving him an opportunity to be released on parole, (inaudible) by the parole board and if he's done what's available in prison.[7]

[18] Counsel responded by saying that the defendant was currently homeless and that it would be unlikely that he would receive parole. He added that: "routinely, we see people who do commit horrendous crimes, and courts rightly punish with significant sentences, with parole periods."

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6 Transcript of proceedings, 18 October 2018 at p 7.7.

7 Transcript of proceedings, 18 October 2018 at p 7.9.

He said that "both [sentencing options – i.e. suspended sentence or fixed non-parole period] are certainly open to your Honour."

[19] The prosecutor responded and referred amongst other things to the defendant's very violent history. She said this included 12 prior convictions for aggravated assault, most on women, some of whom were at the time of the assaults previous partners of the defendant. She pointed out that he had been sentenced to three years imprisonment in 2006 for unlawfully causing grievous harm and also to two years imprisonment in 2011 for unlawfully causing serious harm and aggravated assault. She also pointed out that since then he "continued to assault people in the same fashion", referring presumably to his subsequent convictions for aggravated assault in 2014, 2015 and 2017. I note that in relation to the 2006 and 2011 convictions a non-parole period was fixed, in both cases the minimum 50 per cent required under s 54 of the *Sentencing Act*. I also note that his lengthy criminal history included numerous breaches of domestic violence orders and several breaches of orders suspending sentences.

Ground 5 - failure to provide procedural fairness

[20] Counsel for the appellant addressed this ground first. In his written submissions counsel contended that the appellant "was denied an

opportunity to be heard in respect of a proposed minimum term three times the magnitude of that submitted on."[8]

[21] During oral submissions counsel referred to the first of the two paragraphs which I have quoted in [16] above and in particular to the words which I have underlined. Counsel contended that this amounted to a submission by defence counsel that the defendant should not have to serve much more than 12 months in prison - namely "the mandatory [minimum] period" of 12 months - even if he was not given the benefit of a suspended sentence. Counsel for the appellant also contended that the sentence which was imposed was much higher than that which those who practice in that jurisdiction would normally expect for that kind of offending. Accordingly, the sentencing judge should have announced that she was proposing to impose a much higher sentence and in particular that she was thinking of requiring him to spend a significant time in actual custody before being eligible for parole. Accordingly, the judge should have given defence counsel the opportunity to argue against such a sentence.

[22] In his written submissions[9] counsel for the appellant said:

> 22. Where, on a severity appeal, an Appellant complains of denial of an opportunity to be heard on a particular issue –

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8 Appellant's Written Submissions dated 3 January 2018 at [21].

9 Appellant's Written Submissions dated 3 January 2018 at [22] – [25].

including an increased penalty[10] – the Court will look to whether the Appellant was put on notice of the issue. The question is one of "practical injustice".[11]

23. An offender may be put on notice about a particular matter in various ways. Most obviously, the Sentencing Judge may put the offender on notice by explicitly adverting to the possibility of making a particular finding. Equally, however, the offender may be put on notice by the way in which the Crown has conducted its case.[12]

24. Importantly, the requirements of procedural fairness are not relaxed merely because an offender has come to the proceedings with unrealistic expectations. To the contrary, an offender with unrealistic expectations is pre-eminently a candidate for the protections of procedural fairness. As has been said in this jurisdiction before: "Unrealistic expectations ought not to be nurtured and then dashed without warning."[13] This is true even where an offender makes submissions directed towards a disposition that is "not an available [or appropriate] sentencing option".[14]

25. The most common context in which a complaint of this nature is raised is when a judge indicates a likely sentence to be imposed but then imposes a higher penalty without first inviting further submissions from the parties.[15]

[23] Counsel for the appellant placed particular emphasis on the decision of this Court in *Wilson*. Counsel contended that "this case is similar to *Wilson v Hill* where 'his Worship gave no indication of his thinking

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10 *Brand v Parson* [1994] 1 VR 252 at 257 (***Brand***). *Brand* concerned the requirements of procedural fairness on appeal, rather than at first instance. However, the appeal at issue was a *de novo* appeal and, as such, the statements of principle there are equally applicable to a first instance sentencing exercise. As much is apparent from the apparent approval exhibited in *Wilson v Hill* [1995] NTSC 2 (***Wilson***) at p 22-23.

11 *Weir v The Queen* [2011] NSWCCA 123 at [78].

12 *TB v The Queen* [2018] NTCCA 8 at [41]. See also *R v Stubberfield* (2010) 106 SASR 91 at [15]; *R v Lobban* (2001) 80 SASR 550 at [20]-[24].

13 *Wilson* at p 22.

14 *Wilson* at p 21.

15 *Baroudi v The Queen* [2007] NSWCCA 48 at [33]; *Button v The Queen* [2010] NSWCCA 264 at [18]; *Weir v The Queen* [2011] NSWCCA 123 at [78]-[80]; *Ng v The Queen* (2011) 214 A Crim R 191 at [48]-[51].

about the submissions [on the question of penalty].'"[16] Once the sentencing judge in the present matter had "formed a view that the appellant's minimum term of imprisonment should be considerably in excess of 12 months, namely three years … it was incumbent on her Honour 'to signal her intention to counsel and invite counsel to make submissions in relation to the matter.'"[17]

[24] In the matter the subject of the appeal in *Wilson* defence counsel sought an order for the conditional release of the defendant without conviction under s 4 of the *Criminal Law (Conditional Release of Offenders) Act* or alternatively the imposition of a fine or a community service order.[18] There was a short discussion between both counsel and the magistrate in relation to the application under s 4. Per Martin CJ:

> No other submissions were made on the question of penalty and his Worship gave no indication of his thinking about the submissions. In particular, he did not then indicate that he considered the assault to be such as to warrant a sentence of imprisonment.[19]

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16 Appellant's Written Submissions dated 3 January 2018 at [26] quoting from *Wilson* at p 8.

17 Appellant's Written Submissions dated 3 January 2018 at [27] quoting from *Sams v Sims* [2013] NTSC 18 at [16].

18 If the power in s 4 of the *Criminal Law (Conditional Release of Offenders) Act* was exercised and no conviction entered the court did not have the power to impose a fine or order a community service order. That situation changed with the repeal of that Act and enactment of the *Sentencing Act 1995*, relevantly ss 7 & 8.

19 *Wilson* at p 8.

His Worship sentenced the defendant the following Monday and without any warning or further submissions sentenced him to imprisonment, fully suspended.

[25] On appeal Martin CJ discussed the obligations of a sentencing court to afford procedural fairness to an accused in the course of sentencing. His Honour said: "[I]t is undoubted that denying the opportunity to present a submission on the matter of sentence generally is an appellable error."[20] His Honour concluded that the magistrate ought to have invited further submissions once he decided to reject the defendant's contention that a conviction should not be entered.

[26] At pp 21-22 Martin CJ said:

> The appellant had an expectation that he might avoid conviction, but nevertheless have to pay pecuniary penalties or perform community service. Once it was plain to his Worship that that expectation could not be met … and his Worship was considering imposing substantial penalties he should have said so and invited further submissions. The penalties available under the criminal justice system in the Territory are very wide both as to the type and range, and they had to be applied against a background of these 3 disparate and serious offences in respect of the particular offender, who presented with features upon which he could rightfully base a claim for mitigation. The position is quite clear in a case where the Court is contemplating sentencing a person for a discretionary term of imprisonment, whether it has in mind that the person should serve the whole of the term or not, it should say so unless it is manifest that the offender understands that such a sentence is at least likely. A sentence to actual imprisonment carries harsh consequences, and even when wholly suspended, may do so. Anyone facing such a prospect should be informed and

20 *Wilson* at p 20 citing *Hunter (R E) v R* (1988) 62 ALJR 423.

> given the chance to make submissions. Unrealistic expectations ought not to be nurtured and then dashed without warning. Not every accused person or his legal representative can be taken to be aware of the sentencing practices of a particular Court, Magistrate or a Judge in relation to the offence for which he or she stands to be punished. Where the most severe sanction known to the criminal law is contemplated there is a requirement of procedural fairness which alerts an offender to his or her situation of jeopardy and enables a formulation of a response to it.

[27] Whilst I have no reason to disagree with anything said by Martin CJ in *Wilson*, the circumstances in that matter are quite different to those involved in this appeal. Indeed none of the authorities to which counsel for the appellant referred are analogous or useful in the present case: many concerned a judge imposing a different kind of penalty than that which had been discussed during the hearing; others concerned a judge who had made a positive indication as to what he had in mind but then imposed a more severe sentence; others, such as *Brand v Parson*[21], involved appeals against sentence where the appellant would not have expected a sentence higher than that appealed against even if unsuccessful on the appeal. In the decisions cited by the appellant and those available in the Northern Territory on this issue, such as *Sams v Sims*[22], *Wilson*, *Garling v Firth*[23] and *Weir v The Queen*[24] the appellants

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21 [1994] 1 VR 252.

22 [2013] NTSC 18. The Magistrate imposed a conviction without warning, in opposition to submissions made by defence counsel, and after the Magistrate refused to hear further submissions on the issue.

23 (2016) 260 A Crim R 279. In that case no procedural unfairness was found. The Appellant was sentenced to a period of imprisonment suspended on the condition that he was not to possess or consume alcohol for a period of one year. The Court said that: "the person should be told of that possibility and provided an opportunity to make submissions, especially where the particular disposition is not obvious or clearly called for".

were refused an opportunity to make submissions on sentence or had a penalty of a different kind imposed without warning.

[28] Counsel for the appellant contends, and I accept, that the categories are not closed. However, as the respondent submits, it is not the case that the sentencing judge must indicate his or her position on the ultimate sentence, in order to give parties the opportunity to reply. In cases such as these, the question will be whether the appellant has lost the opportunity to make submissions in opposition to a proposed course and in support of a course which he urges.[25]

[29] In my opinion the appellant was not denied procedural fairness. It is plain from the dialogue referred to in [16] - [19] above that her Honour was very likely to reject the request for a suspended sentence and to impose a substantive sentence and fix a non-parole period somewhat higher than the minimum mandated by s 78DA(2) of the *Sentencing Act*. That defence counsel was alive to this possibility is clear from what he said to the Court.

[30] During oral submissions I asked counsel for the appellant what additional submissions defence counsel could have made had the sentencing judge indicated that she was proposing to impose the

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24 [2011] NSWCCA 123.

25 *Weir v The Queen* [2011] NSWCCA 123. In that case, the sentencing judge had indicated a "tentative view" on sentence, and then went on to impose a lengthier sentence without giving an opportunity for submissions.

sentences which she did impose. Counsel said that defence counsel would have said more about the objective seriousness of the offending and about totality. I doubt that. The objective seriousness of the offending was addressed by counsel and little more could have been said about that, irrespective of whether the potential sentence was the minimum 12 months imprisonment or even the maximum sentences of five and seven years. That the judge was fully aware of concurrency and totality principles and their application to the two counts is clear from the fact that she did order 12 months concurrency.

[31] Counsel also tendered (over objection) a document[26] showing the range of sentences imposed by Northern Territory courts for offences involving "acts intended to cause injury" during the period 2016-2017.[27] The document was tendered for two purposes: partly to suggest that the sentences imposed in the present matter were "outliers"; and partly to indicate the range of sentences which defence counsel would have expected her Honour to impose. Apart from the fact that there was no evidence or suggestion that defence counsel was aware of that document or those statistics at any relevant time, I found some difficulty attributing much weight to the document. Whilst "acts

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26 Exhibit P4.

27 Based on Australian Bureau of Statistics, Criminal Courts, Australia 2016 – 17, Tables 57a, 57b & 57d. Table 57b indicated that of the 1,444 custodial sentences imposed by the Magistrates' Courts 1,339 were for periods of less than 12 months, 100 were for periods between 1 and 2 years, and 5 were for 2 years or higher.

intended to cause injury" would presumably include aggravated assaults, and threats to kill if any, I would think that a very large majority of the sentences imposed by the lower court[28] and summarised in the document would be for less serious offences, in particular simple assaults which would only carry a maximum sentence of one year imprisonment.

[32] Irrespective of defence counsel's attempts to obtain a much lower sentence he should have been well aware of the likelihood of a more substantive sentence being imposed with a substantive non-parole period. Counsel was on notice that the sentencing judge had assessed the offending as being particularly serious and that she rejected the request for a suspended sentence and for the defendant to be released from prison after the mandatory minimum period of 12 months.

[33] There was no practical injustice due to the judge's failure to give any more specific indication of the sentence that she was about to impose. There was no denial of procedural fairness. This ground is not made out.

Ground 4A - Intoxication

[34] Her Honour regarded the defendant's intoxication as an aggravating feature. She said:

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28 Previously the Court of Summary Jurisdiction, now the Local Court.

> His Honour, Justice Barr, considered that your moral culpability in 2011 was somewhat reduced because you were intoxicated. However, I find that in 2018, your continued intoxication does not reduce your moral culpability, even in light of your addiction. In my view, it has now become an aggravating feature, because you continue to be intoxicated and engage in violence in spite of the fact that you must know that when you drink, you are a serious risk to others, and when you drink, you can become involved in serious, indeed, horrendous acts of violence to other members of our community.
>
> So, as far as I'm concerned, in relation to this matter, the fact that you were again intoxicated and you had on your person a weapon, is an aggravating feature in light of your history and your own knowledge of your history. Justice Barr noted in 2011, that the assault that you were involved in was unprovoked. Again, your assaults on this occasion, or the assault and the threat, were unprovoked.[29]

[35] Counsel for the appellant referred to the decision of the Court of Criminal Appeal in *Forrest v The Queen*[30] and summarised relevant parts of that decision as follows:

(a) Intoxication is a "common feature of violent offending".[31]

(b) It will be rare for intoxication to operate as an aggravating circumstance, and "careful consideration is required before a sentence may be increased on account of intoxication".[32]

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29 Transcript of proceedings, 18 October 2018 at p 13.2.

30 (2017) 267 A Crim R 494 (***Forrest***).

31 *Forrest* at [42] quoting *Hasan v The Queen* (2010) 31 VR 28 at [20].

32 *Forrest* at [41].

(c) In order for intoxication to operate as an aggravating circumstance, the offending must be attended by one or more "particular features".[33]

(d) One such "particular feature" will be "where a drunk and violent offender appears more frightening and less open to reason than would ordinarily be the case."[34] This was referred to by counsel in *Forrest* as the "objective" basis on which to characterise intoxication as an aggravating circumstance.[35]

(e) Another "particular feature" will be where "the offender is shown to have foreknowledge of how he/she is likely to behave when affected by alcohol."[36] In order to make good such a showing, "something more than a criminal history which includes violent offending while intoxicated will be required".[37] This was referred to by counsel in *Forrest* as the "subjective" basis on which to characterise intoxication as an aggravating circumstance.[38]

[36] The present appeal concerns the second, "subjective", basis referred to in *Forrest*. Counsel for the appellant contended that the facts of the

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33 *Forrest* at [41].

34 *Forrest* at [49].

35 *Forrest* at [49].

36 *Forrest* at [42] quoting *Hasan v The Queen* (2010) 31 VR 28 at [21]. See also *Forrest* at [50] - [52] discussing *R v Coleman* (1990) 19 NSWLR 467 per Hunt J (Finlay and Allen JJ agreeing) and *R v King* [2013] NSWSC 801 at [90].

37 *Forrest* at [51].

38 *Forrest* at [50].

present case pertaining to intoxication are not relevantly distinguishable from those in *Forrest*. Counsel contended that here, as in *Forrest*, "there was an acknowledgement by counsel … during the sentencing proceedings of … previous offending and its association with intoxication." Quoting from *Forrest* counsel said, "importantly":

> [T]he 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, was not sufficient for that purpose.[39]

[37] Counsel then submitted:[40]

> Just as in *Forrest*, in the present case there was only information before the Sentencing Judge in relation to *one prior instance* of violence committed by the Appellant while intoxicated. That information was contained in the sentencing remarks of Justice Barr from some seven years earlier.[41] Even then, Justice Barr's sentencing remarks contain scant details of the Appellant's intoxication, and the interrelation between his intoxication and his violent conduct, on that earlier occasion. In fact, the limited information contained in Justice Barr's sentencing remarks suggested a case of drunken mistaken identity, and nothing like the jealousy-inspired domestic dispute that combined with alcohol to contribute to the offending in the present case. Accordingly, there was nowhere near enough information for the learned Sentencing Judge in the present case to make the finding that the Appellant had foreknowledge of the way in which his intoxication was likely to result in him behaving in a violent manner.

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39 *Forrest* at [53].

40 Appellant's Written Submissions dated 3 January 2018 at [34].

41 See *R v Marshall Anderson* (Transcript of proceedings, SC 21114532, 25 November 2011).

> Her Honour's error in this regard appears to have arisen from an assumption that many or all of the Appellant's prior convictions for violence were for "drunken violence".[42] This assumption in turn appears to have been based on an erroneous reading of Justice Barr's sentencing remarks from 2011. Nowhere in those remarks did Justice Barr specify which, if any, of the Appellant's prior convictions for violence were alcohol related. Nor was any such specification attempted in the present case by the prosecutor at first instance, or the Sentencing Judge or the Appellant's counsel at first instance. Absent this information, it was not permissible for her Honour to refer to "your history and your own knowledge of your history"[43] as providing support for a finding that intoxication was an aggravating circumstance.

[38] Counsel for the respondent pointed out that while ultimately the Court of Criminal Appeal found in *Forrest* that the sentencing judge was in error, the Court was careful to state:

> 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.[44]

[39] Counsel identified the following points of distinction between *Forrest* in the present matter:

(a) *Forrest* involved a sexual offence, where the relevance of the defendant's intoxication was markedly different to that in a case such as the present involving physical violence.

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42 Transcript of proceedings, 18 October 2018 at p 12.8.

43 Transcript of proceedings, 18 October 2018 at p 12.3.

44 *Forrest* at [55].

(b) The remarks in *Forrest* convey only one prior matter in which the offender was intoxicated at the time of offending.[45]

(c) *Forrest* did not include submissions, particularly by defence counsel, in relation to long-term alcohol misuse and related offending.

(d) Those factors combined with the offender's youth caused the Court in *Forrest* to find that "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."[46]

[40] In the present matter her Honour did have material sufficient for her to make findings to the effect that the defendant had foreknowledge of how he was likely to behave when affected by alcohol to the requisite standard. These are the findings that I have underlined in the passages quoted in [34] above.

[41] In particular her Honour was quite entitled to make those findings on the basis of what defence counsel had told her, particularly in those passages that I have underlined in [14] and [15] above. Defence counsel spoke not only of his alcoholism and his "very violent, very

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45 *Forrest* at [16]-[18].

46 *Forrest* at [55].

active and very reactive conduct" that sometimes occurs when he does drink, but also of his awareness of his alcoholism and the deep remorse that he later feels after engaging in such conduct. These are the kind of "subjective" matters referred to in *Forrest* and are analogous to those in *R v King*[47] discussed and apparently adopted in *Forrest*.[48]

[42] In addition to those matters revealed by defence counsel her Honour was also entitled to take into account Justice Barr's remarks when he sentenced the appellant in November 2011.[49] His Honour referred to that offending as "unprovoked, drunken violence".[50] His Honour also said a number of other things to the appellant in effect that his alcoholism leads him to commit criminal offences. This included his Honour telling the appellant that: "you have an appalling record for violence and drunken violence"[51]; "you are a person who has allowed alcohol to lead you into all sort of criminal offending which otherwise you would not have engaged in"[52]; "your judgement was significantly impaired by your level of intoxication"[53]; "the community needs to be protected from people [such as him] who engage in wanton, mindless,

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47 [2013] NSWSC 801.

48 See *Forrest* at [52].

49 *R v Anderson*, SC 21114632, Barr J, 25 November 2011.

50 Ibid, p 2.9. See too p 4.9.

51 Ibid, p 3.6.

52 Ibid, p 4.2.

53 Ibid, p 4.5.

alcohol fuelled violence"[54]; and that he needs to engage in "programs that are specifically designed and focused to deal with alcohol and its effect on behaviour, on the management of anger, particularly where alcohol is at play, and also violent offending generally."[55] Even if the appellant had not been told these kind of things before, which I consider would be unlikely given his prior criminal record, the fact that his excess drinking may well result in him violently attacking others and that he needs to abstain was made very clear to him by Justice Barr. Moreover that knowledge should have remained with him during his subsequent period in custody that resulted from that "unprovoked drunken violence".

[43] Contrary to the submissions of counsel for the appellant I consider that her Honour was entitled to take into account Justice Barr's conclusions including about the appellant's appalling record of violence and drunken violence, notwithstanding that his Honour had not attempted to identify which of the appellant's previous convictions involved drunken violence on his part. Her Honour was entitled to refer to "your history and your own knowledge of your history" as providing support for her finding that intoxication was an aggravating circumstance.[56] Further, her Honour was entitled to take into account

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54 Ibid, p 5.2.

55 Ibid, p 5.3.

56 Cf Appellant's Written Submissions dated 3 January 2018 at [34].

that the brazen, excessive and egregious behaviour of the defendant when he committed the offences the subject of this appeal whilst intoxicated.

[44] I conclude that there was no error on the part of her Honour in finding that intoxication was an aggravating circumstance. This ground is not made out.

Grounds 1 – 3A - Manifest Excess

[45] The general principles regarding appeals against sentence on the basis that the sentence was manifestly excessive are well established and do not need to be repeated here.[57] An assessment of whether or not a sentence is manifestly excessive requires consideration of the maximum sentence, the sentencing standards customarily imposed, the seriousness of the offence within the range of conduct caught by that offence, and the personal circumstances of the offender.[58]

Manifest excess - count 1 (aggravated assault)

[46] Counsel for the appellant pointed out that the notional starting point for the sentence on count 1, prior to the discount for the plea of guilty, was three years' imprisonment. The maximum penalty for that offence

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57 See for example *House v The King (*1936) 55 CLR 499; *Dinsdale v The Queen* (2000) 202 CLR 321 at [6]; *Demur v The Queen* (2014) 255 A Crim R 144 at [5]; *Emitja v The Queen* (2016) 262 A Crim R 126 at [39]; *Bara v The Queen* [2016] NTCCA 5 at [75] – [76] and *JF v The Queen* [2017] NTCCA 1 at [49].

58 *Edmond and Moreen v The Queen* [2017] NTCCA 9 at [30] (citing *Phan v Western Australia* [2014] WASCA 144). See also *R v Morse* (1979) 23 SASR 98 at 99.

was five years' imprisonment. While accepting that the conduct was serious counsel pointed out that the injury was inflicted by a single act rather than a sustained course of physical violence and the violence was inflicted on the victim's arm rather than other more vulnerable parts of her body. Counsel also submitted that the violence was spontaneous rather than premeditated. Counsel also submitted that her Honour's reference to this offending occurring "in public in daytime" distorted her Honour's characterisation of the effective seriousness of that offending.

[47] Her Honour assessed this offending as at the "upper end of seriousness". She said:

> In relation to count 1, in my view, the assault with the weapon on a woman who was fleeing is at the upper end of seriousness, also taking into account that it was out in public in daytime. It was just an egregious act of wanton violence.[59]

[48] Contrary to counsel's submission I consider that the offending did involve a degree of premeditation. It involved the defendant arming himself with a black handled kitchen knife, following which, fearful of her safety, the victim JD got off the ground and started to run away from the defendant. He chased her and slashed her with the knife causing a deep 8 centimetre laceration to her left forearm.[60] This

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59 Transcript of proceedings, 18 October 2018 at p 14.1.

60 This is readily apparent when one views the photographs which were tendered in court.

required stitching and other medical intervention and resulted in her staying overnight in hospital. Moreover that offending did not stop at that point. Rather than offering his victim some assistance, or even running away, he attempted to prevent her receiving assistance from KG.

[49] Further, the appellant has not challenged her Honour's conclusion that the defendant's conduct was intentional despite defence counsel's attempt to characterise it as merely reckless. Moreover the weapon, unlike a stick or a fist, would have been sharp and very likely to cause injury, possibly serious injury, to anyone who was stabbed with it, irrespective of the particular stabbing motion used.

[50] I do not consider that her Honour's reference to the offending having occurred in public in daytime was erroneous or that it unduly distorted her Honour's characterisation of the effective seriousness of the offending. Although the defendant and the two victims had been drinking together at what was described as "the bush camp on Phillip Street in Fannie Bay" there is no better identification of the precise location of that "bush camp". The reference to it being on Phillip Street, a well-used road in Fannie Bay, implies that the "camp" was very close to the street along which members of the public would drive and near adjacent public land on which people would walk. More relevantly, the offending actually took place after JD got off the ground

and started to walk away from the bush camp. That the bush camp itself was in or very close to land open to and used by the public is also evident from the fact that KG encountered a bystander as she was running away from the defendant shortly after he had stabbed JD. Moreover, the offending clearly occurred in daylight. These were circumstances which her Honour was entitled to take into account when assessing the objective seriousness of the offending.

[51] Counsel also contended that the appellant was remorseful and accepted responsibility for his conduct, and that the sentence in the order received by him should be reserved for more protracted instances of this offence committed by unrepentant offenders. I consider that his remorse and acceptance of responsibility was reflected in the discount which her Honour allowed.

[52] At first blush the starting point of 60 per cent of the maximum penalty appears high. However when one takes into account other relevant sentencing factors such as the obvious needs for punishment, denunciation, specific deterrence, general deterrence and community protection, including the aggravating effect of his intoxication, the sentence of two years and six months was not manifestly excessive.

Manifest excess - count 3 (threat to kill)

[53] In relation to this count counsel for the appellant also pointed out that the notional starting point prior to discount was three years

imprisonment. The maximum penalty for that kind of offending is seven years imprisonment. Again counsel contended that that offending was spontaneous rather than premeditated. Counsel also stressed the fact that the appellant had no prior convictions for that particular offence. Consequently, specific deterrence did not assume the same importance in respect of count 3 as it did for count 1. Accordingly "the very stern sentence of two years and six months imprisonment was manifestly excessive for a first time offender in this category, especially in circumstances where the offence does not appear to have been planned or otherwise premeditated."[61]

[54] I consider that this offending also was serious. It involved a third party, KG, who was attempting to attend to the knife injury that the defendant had just inflicted on JD. She had witnessed the defendant's attack on JD. This would have contributed to her fear, as well as her sense of the defendant's potential to carry out his threat. Moreover, he chased after KG after making the threat to kill her, and was holding the knife above his head while repeating his threat to kill her. The threatening conduct only ceased after KG had run towards Phillip Street. That conduct was brazen and protracted.

[55] I also reject the submissions based upon the fact that he had not previously been convicted of this particular kind of offence. This

61 Appellant's Written Submissions dated 3 January 2018 at [43].

particular offending, like his other offending, involved violence by him, actual or threatened, whilst intoxicated and angry. This offending and his criminal history shows an ongoing tendency to act in a violent manner, which is particularly relevant when considering the need for specific deterrence and community protection.

[56] For similar reasons to those stated in relation to count 1 I do not consider that sentence to be manifestly excessive.

Manifest excess – total effective sentence

[57] Counsel for the appellant submitted that both the head sentence (four years) and the non-parole period (three years) indicate that the total effective sentence was manifestly excessive.

[58] Counsel contended:

> The head sentence of 4 years' imprisonment was imposed after pleas of guilty. It must be assumed that, but for his pleas of guilty, the appellant would have been sentenced to approximately 5 years' imprisonment. While the head sentence of 5 years is merely notional, it assumes a critical place in any consideration of manifest excess.[62] It is submitted that in the present case the notional head sentence indicates that the sentence was in all the circumstances manifestly excessive. After all, the offending, while serious, was of relatively short duration and only involved a single application of force to the victim of count 1. Furthermore, the offending on counts 1 and 3 occurred as part of a single course of conduct and was close in time and related in its contributing factors. For such a single transaction to attract a head sentence in the order of 5 years (before accounting for the plea) is suggestive

62 *Daniels v The Queen* (2007) 20 NTLR 147 at [20] per Martin (BR) CJ and Riley J, referred to with approval in *Forrest v The Queen* (2017) 267 A Crim R 494 at [71].

> of manifest excess. The discount afforded for the plea of guilty does nothing to alter this suggestion.[63]

[59] As counsel for the respondent pointed out the proper approach is to consider whether the actual sentence imposed, namely four years' imprisonment, was "plainly and obviously excessive having regard to all the surrounding circumstances, including the fact that the [defendant] entered plea[s] of guilty."[64]

[60] As I have said the appellant's extensive criminal history of violent conduct is particularly relevant. It demonstrates a continuing attitude of disobedience to the law and the need to impose condign punishment for specific or general deterrence.[65] It also demonstrates that the appellant's prospects of rehabilitation are very poor, and the need to protect the community is paramount. As her Honour said: "It seems to me that you are as dangerous today as you have been over the many years that you have been coming to court."[66]

[61] Although both offences occurred at about the same time they involved two different victims and two different acts of violence. It was appropriate for her Honour to reflect those differences in the way she did by fixing the total sentence and allowing for some, but not total,

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63 Appellant's Written Submissions dated 3 January 2018 at [45].

64 Quoting from *Forrest* at [73].

65 *Veen v R (No 2)* (1988) 164 CLR 465 at 477.

66 Transcript of proceedings, 18 October 2018 at p 13.8.

concurrency. I do not consider that the total sentence of four years' imprisonment was manifestly excessive.

[62] Counsel for the appellant also contended that the non-parole period of three years was manifestly excessive. Counsel pointed out that the non-parole period was 75 per cent of the head sentence and that her Honour offered only limited reasons for fixing that period. Counsel referred to some observations of Riley AJ in *Lalara v Andreou* in support of the proposition that a non-parole period in the order of 70 or 75 per cent of the head sentence may be manifestly excessive even in respect of an offender who has poor prospects of rehabilitation and a poor history of compliance with court orders.[67]

[63] It is clear that the minimum 50 per cent stipulated under s 54 of the *Sentencing Act* is just that – a minimum. There is no reason why a higher non-parole period should not be fixed where appropriate.[68]

[64] In *CEV v The Queen*[69], the Court of Criminal Appeal specifically rejected a submission that there was a "normal rule of practice" in the Northern Territory of fixing whatever the statutory minimum non-parole period might be unless there were sound reasons for departing

67 *Lalara v Andreou* [2018] NTSC 75 at [10]-[22].

68 See for example *TRH v The Queen* [2018] NTCCA 14 at [44].

69 [2005] NTCCA 10.

from it.[70] At [39] – [40] the Court cited with approval the following statements of Gallop J in *The Queen v Mulholland*[71]:

> The starting point must be the minimum period which the prisoner must serve before being eligible for parole, which will be arrived at by taking account of the nature of the crime and its gravity in the scale of crimes of its type, the need to give close attention to the danger which the offender presents to the community, the prospects of the future progress of the offender and the danger he would be to the community, and all the subjective factors, including his prospects of rehabilitation.

[65] More recently, in *JF v The Queen*[72], the Court of Criminal Appeal referred to the following passage from Fox and Freiberg's sentencing text[73] as a useful summary of the relevant principles and factors generally applied when setting a non-parole period:

> The non-parole period must be proportionate to the head sentence and to the gravity of the crime. Proportionality cannot be reduced to a mathematical formula and will depend upon the circumstances of the case and subject to the judicial discretion. As a general rule there should not be too great a disparity between the head sentence and the non-parole period. In the absence of statutory authority, there is no usual or fixed rule regarding the relationship between the head sentence and the non-parole period and the length of the period on parole is a matter of discretion that will depend upon all of the circumstances of the case including the offender's prospects of rehabilitation, age (both young and old), criminal record and past parole history, and protection of the community. Because some of these circumstances are personal to the offender, there may be more scope for variation in the length of non-parole periods than there may be in setting head sentences …

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70 *CEV v The Queen* [2005] NTCCA 10 at [36] - [44].

71 (1991) 1 NTLR 1 at 9.

72 [2017] NTCCA 1 at [62].

73 Arie Frieberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) at 858 - 859.

(footnotes omitted)

[66] The Court went on to note that:[74]

> In *Emitja v The Queen*,[75] Grant CJ and Kelly J observed that in setting the non-parole period, although the same considerations apply which inform setting the head sentence, different weightings may be applied to those sentencing considerations in respect of the duration of the non-parole period.

[67] In the present case the appellant's prospects of rehabilitation, his age, his criminal record and protection of the community required particular weightings to be applied to this particular offender when considering the length of his non-parole period. I do not consider that fixing a non-parole period amounting to 75 per cent of the head sentence was manifestly excessive. Indeed having regard to the defendant's dreadful criminal history and his very poor prospects of rehabilitation there might have been some justification for declining to fix a non-parole period at all.

[68] Accordingly I do not consider that the head sentence or the non-parole period were manifestly excessive. These grounds are not made out.

Conclusions and orders

[69] The appeal is dismissed.

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74 [2017] NTCCA 1 at [64].

75 (2016) 262 A Crim R 126 at [57].