CITATION:	*Williams v Firth & Anor* [2020] NTSC 9
PARTIES:	WILLIAMS, Rezaria Trina v FIRTH, Justin Anthony and BURNS, Gregory
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 44 of 2019 (21932462) LCA 45 of 2019 (21759961)
DELIVERED:	24 February 2020
HEARING DATE:	14 February 2020
JUDGMENT OF:	Mildren AJ

REPRESENTATION:

Counsel:

Appellant:	A Abayasekara
Respondent:	D Castor

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	MIL20557
Number of pages:	16

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

Williams v Firth & Anor [2020] NTSC 9
LCA 44 of 2019 (21932462)
LCA 45 of 2019 (21759961)

BETWEEN:

REZARIA TRINA WILLIAMS
Appellant

AND:

JUSTIN ANTHONY FIRTH and GREGORY BURNS
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 24 February 2020)

[1] This is an appeal against sentences imposed by the Local Court on 7 October 2019.

[2] The appellant was charged on matter number 21759961 with two counts of aggravated assault committed on 29 December 2017, the circumstance of aggravation being in each case that the victim suffered harm. Following pleas of guilty she was convicted on each Count and sentenced to imprisonment for 3 months on each Count with Count 2 to be served concurrently with Count 1 which was backdated to commence on 31 August 2019.

[3] The appellant was charged with breach of bail in relation to matter number 21932462. Following her plea of guilty, the appellant was convicted and sentenced to imprisonment for 1 month to be served cumulatively with the sentences imposed in matter number 21759961.

[4] The appeal in relation to matter number 21759961 is on two grounds:

1. That the sentences imposed were manifestly excessive; and

2. That the learned sentencing Judge erred in finding that the circumstances of the case were not exceptional pursuant to s 78DI of the *Sentencing Act*.

[5] The appeal in relation to matter number 21932462 is on the ground that the sentence imposed was manifestly excessive.

The facts

[6] Briefly stated, the appellant and Elton Limbiari, the victim in relation to Count 2, had been in a domestic relationship for three years. They had two children together. They separated in 2015 but continued to have on-and-off sexual relations. At the time of the offending, Limbiari and the victim in relation to Count 1, Felissa Raggett, had been in a domestic relationship for two weeks. At about 3:30am on 29 December 2017, after consuming alcohol and becoming intoxicated, the appellant went to House 1 Mulga Camp near Tennant Creek, entered the front yard and found Limbiari and Raggett asleep in bed together on the verandah. The appellant grabbed Raggett by the hair and dragged her from the bed and punched her numerous times in the face with her left fist, causing

immediate pain and minor bruising to the forehead. Whilst doing this, she yelled: "Now I got you mob. Tell me you mob been having sex. Now I know who's Elton's girlfriend. I thought I was your wife".

[7] Limbiari was woken by the noise and saw the appellant assaulting Raggett. Limbiari was walking away when the appellant punched him from behind, causing pain and minor swelling around his right jaw.

[8] Raggett called the police who attended and took the appellant into protective custody. Initially, both Raggett and Limbiari declined to provide statements to the police. However, later that morning they both attended and provided statements of complaint. Subsequently the same day the appellant was formally arrested and charged with these offences. She participated in an electronic record of interview in which she made admissions to the offending, and remained in custody until 30 December when she was granted bail.

[9] Whilst on bail, the appellant voluntarily entered the BRADAAG Rehabilitation Treatment program on 8 February 2018 and successfully completed her treatment on 4 April 2018. The report from BRADAAG recorded that the appellant had made significant progress in relation to her alcohol misuse and related issues, and maintained complete abstinence from alcohol and other drugs during the program. She also attended sessions regarding education in domestic and family violence, and healthy relationship programs and life skills through weekly groups at the Tennant Creek Women's Refuge. The report from the Women's Refuge stated that during this time she was identified as a young leader and attended a "train the trainer" program in Alice Springs, where she was

coached to assist other women in domestic violence relationships. A report from CatholicCare NT indicated that she also attended counselling sessions with them on four occasions and engaged well. Two of these sessions were subsequent to the completion of the BRADAAG rehabilitation program.

[10] In the meantime, the matter was adjourned in the Local Court from time to time, partly because of a need to change legal representation because of a conflict of interest, and partly because it was alleged as a circumstance of aggravation in relation to at least one of the charges that a weapon had been used which was in contention.[1] On 18 July 2018, the matter was transferred to be heard in Darwin, because in the meantime the appellant had left Tennant Creek to reside in Darwin. On 7 September 2018, the Court recorded that the matter had settled, and set it down for a plea on 3 October 2018 when she was bailed to appear. However, the appellant did not appear and her bail of $300 was estreated and a warrant was issued for her arrest. She was subsequently arrested on 2 September 2019 in Darwin. It was this failure to answer her bail which constituted the facts in relation to the breach of bail charge.

[11] Following her arrest, the appellant remained in custody until she appeared in the Local Court situated at Darwin and pleaded guilty to the charges on 7 October 2019.

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1 During the hearing of this appeal, counsel were not sure what was in dispute but the Local Court file notation for 6 March 2018 records that it is adjourned for a 1 day hearing "dispute weapons use." The exhibits tendered at the eventual plea hearing included a photograph of a rock, a small stick and a playing card under the title "weapons used by Rezaira (sic) Williams during incident" although by then the circumstance of aggravation that a weapon was used was dropped.

The sentencing hearing

[12] The appellant's criminal history was tendered. It revealed a prior conviction for aggravated assault on 7 April 2011 on which she was released on a 12 month good behaviour bond. She also had one previous matter for breach of bail which resulted in a no conviction fine, a conviction for being armed with an offensive weapon at night, which also resulted in a fine, and some other minor offences which resulted in small fines. She had not been sentenced to prison before.

[13] The prosecutor also tendered a victim impact statement from Miss Raggett who stated that she wanted the appellant "to go to the big house" and would not feel safe if she only got a fine. No victim impact statement was tendered in relation to the victim Limbiari. On the appellant's behalf, counsel submitted that the appellant had subsequently met the victims in Alice Springs, had apologised to them, and that her apology had been accepted.

[14] Because of the previous conviction for aggravated assault, the court was required to impose a mandatory minimum sentence of actual imprisonment for three months on both of the assault charges, unless the Court was satisfied that the circumstances of the case were exceptional.[2] Consequently, counsel for the appellant focused his submissions in the Court below in attempting to persuade the Judge that there were exceptional circumstances. A number of matters were put:

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2 *Sentencing Act 1995*, ss78CA (3), 78DD and 78DI (2).

- The harm suffered to both victims could be described as “minor” and the objective seriousness of the offending was below mid-range.
- The appellant had a relatively minor criminal history with only one previous conviction for violence.
- The appellant had been the victim of domestic violence in her previous domestic relationships (including her relationship with the victim Limbiari) and as a result had got into a cycle of drinking and violence.
- Apart from the breach of bail she had not reoffended.
- She had successfully attended the courses referred to voluntarily, and as a result of what she had learned from those courses, she had moved to Darwin to remove herself from criminogenic and social influences in Tennant Creek which had contributed to her offending behaviour.
- She had since obtained her own house where she and her children resided and she was now focused on raising her children.
- She was the sole carer of four children.
- She had directly apologised to both victims who had accepted her apologies.
- She had spent a period of quasi custody in rehabilitation.

[15] In relation to the breach of bail, the thrust of the appellant’s submissions was that she went to Alice Springs for a funeral for an uncle, and that she was terrified at having to spend time in prison which would leave her children in circumstances where she had just moved them from their social network in Tennant Creek to

Darwin where she was on the path to self-rehabilitation. She had pleaded guilty at the first opportunity and it was "her first breach of bail on her record".[3]

[16] Overall, the appellant's counsel submitted that the sentences for the aggravated assault should be ordered to be served concurrently and backdated to take into account the time already spent in custody of about one month and eight days, that there were exceptional circumstances warranting no further time in custody, that the balance of the sentences should be suspended, and that the sentence for breach of bail should be ordered to be served concurrently. Counsel for the informants told his Honour that "there are a number of circumstances that might suggest exceptional circumstances are made out…"[4] and repeated this shortly thereafter saying "It is a matter for your Honour, but it certainly seems that there are some grounds available for exceptional circumstances".[5]

The sentencing remarks of the learned sentencing judge

[17] His Honour noted that the appellant had attacked both of the victims whilst they had been sleeping and punched them "in a fit of jealousy, because of her intoxication".[6] After referring to the evidence relating to the injuries sustained, his Honour said that in relation to the assault on Limbiari, the starting point would be six months. He allowed a discount of 15% for the value of the plea.

[18] In relation to the appellant's prospects of rehabilitation his Honour said:

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3 This was not strictly correct. Her previous breach of bail matter was on 23 June 2011.

4 Tr p 17.

5 Tr p 18.

6 Tr p 18 After referring to the mandatory sentencing provisions and the maximum penalty for the assaults, his Honour agreed with defence counsel's submission that these offences should fall below a half of such offences.

> I allow more for rehabilitation prospects. They are clearly made out. She has succeeded in the three month residential course at BRADAAG[7]. She has not been the subject of police enquiries or any further offending. Since this offending, she has made a new life for herself, I am informed, in Darwin with her children. And I am satisfied that this evidence of rehabilitation, together with her young age, although not a youthful offender at the time of the offending, together with the discount, I would be satisfied of the- to reduce the sentence to 3 months with those discount factors. *I emphasise that these 3 months are not the mandatory 3 month sentence required by the legislation.* (emphasis mine).

[19] His Honour imposed the same sentence in relation to Count 2 and directed that the sentences be served concurrently because the offending was "clearly part of the one course of conduct".

[20] In relation to the breach of bail, his Honour found that because the appellant did not want to go to gaol, she did not answer her bail and that she took no steps to purge this situation by surrendering to the police. It was only because of fortuitous circumstances that led to her being taken into custody on 2 September 2019, some 11 months later. His Honour said that "this is as manifest to the direct breach of bail that has come my way".[8] His Honour imposed a conviction and sentence of one month imprisonment to be served cumulatively on Counts 1 and 2.

[21] His Honour then said:

> The total effective sentence across both files is therefore 4 months imprisonment from 31 August 2019. *This is where the issue of mandatory minimum sentence comes into play. I am not satisfied, on the matters put before me by Mr. Saunders, that I should allow the defendant to serve any lesser period of 3 months*. (emphasis mine)

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7 Actually it was two months.

8 Tr 20

[22] His Honour then suspended the total sentences of four months after serving three months from 31 August 2019.

Submissions of counsel on the appeal

[23] It was not put on behalf of the appellant that the head sentences of three months imposed by his Honour were manifestly excessive. The focus of the appellant's case was to challenge the decision not to suspend any part of the sentences. It was put that the problem facing the appellant was that it was not entirely clear what his Honour meant by the words italicised above. During argument at least four possibilities were suggested:

- His Honour considered that at least three months of the sentences needed to be served in all the circumstances on ordinary sentencing principles. In those circumstances it was not necessary to consider whether there were exceptional circumstances made out.[9]
- His Honour was explaining that he needed to ensure that he did not impose the sentences in the wrong order if he was intending to suspend the total four month sentence after three months. This would not have been possible if he had imposed one month for the breach of bail and then imposed three months for the assaults to be served cumulatively without considering the exceptional circumstances submission.

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9 *The Queen v Duncan* (2015) 34 NTLR 201 at 205-206 [22] per Riley CJ, Southwood and Hiley JJ. In that case their Honours said that where the appropriate sentence *exceeds* the mandatory minimum period the need for exceptional circumstances does not arise. In this case, counsel conceded, correctly, that the same would apply if the appropriate sentence *equals* the mandatory minimum period. This is because s 78DI provides that the section applies if a court is *required* to impose a minimum sentence of a specified period of actual imprisonment.

- His Honour considered that exceptional circumstances had not been made out.
- His Honour considered that at least three months ought to be served on ordinary sentencing principles, but if he was wrong in that, he found that there were no exceptional circumstances.

[24] I think that it is tolerably clear that his Honour had decided that the head sentence should be three months to be served on ordinary sentencing principles. His Honour said as much when he said, in the passage cited in paragraph [18] above that he was emphasizing that he had arrived at this decision and that this was not the mandatory minimum period required by the legislation. If this is correct, his Honour was still required to consider whether some or the whole of that sentence should be suspended on ordinary sentencing principles. Apparently his Honour decided to suspend the sentence after having served three months of that sentence, not because of the mandatory three month requirement, but because he considered that was the appropriate sentence.

[25] In order to show that the sentence was manifestly excessive, the appellant must show that not only was the sentence imposed excessive, but that it was manifestly so. As has been said many times, this Court does not interfere with the sentence merely because it thinks that it is excessive or that if this Court was sentencing the appellant anew, it would have imposed a lesser sentence. What must be shown is that the sentence imposed was unreasonable or plainly unjust.[10]

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10 *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

[26] It was not suggested that the starting point of six months was unreasonable. His Honour reduced this to three months taking into account the discount of 15% for the plea and the matters put in mitigation. This is unusual because it involves a staged sentencing process. It is not in accordance with the majority opinion in *Markarian v The Queen*[11] which favours the intuitive synthesis approach to sentencing. However, what his Honour did is not appellate error nor was this raised as a ground of appeal. It had the advantage of showing that his Honour gave substantial weight to the matters, or at least to some of the matters, put in mitigation on behalf of the appellant. Furthermore, as the respondent rightly submitted, his Honour adopted a distinctly moderate approach in ordering that both sentences be served concurrently. As there were different victims, it would have been open to his Honour to have ordered partial accumulation to reflect the totality of the offending.[12]

[27] A number of the matters put in mitigation were correctly given little or no weight by his Honour. The fact that the appellant had been herself the victim of violence in her previous domestic relationships could carry no weight in the absence of evidence that this operated on the appellant at the time of the offending. [13] The appellant was not entitled to an additional discount or additional leniency than otherwise given on the ground that she had spent two months in BRADAAG. Not only was that because that was not a condition of

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11 [2005] HCA 25; (2006) 238 CLR 357.

12 *Thomas v The Queen* [2017] NTCCA 4 [35] per Grant CJ, Southwood and Riley JJ citing *Nguyen v R* [2007] NSWCCA 14 at [12].

13 *Orsto v Grother* [2015] NTSC 18; (2015) 249 A Crim R 518 at 531 at [43] per Blokland J; *Douglas v Dole and Ors* [2019] NTSC 80 at [40] – [41] per Southwood J.

her bail (which is not determinative), but more importantly no evidence was led as to the circumstances under which the regime could be characterised as quasi-custodial in terms of discipline, structure, demands, strictures, expectations and work.[14] The other matters put on her behalf were clearly given significant weight by the learned Judge, except for the evidence that the appellant was the mother of four children.

[28] During the sentencing hearing, counsel for the appellant told his Honour that the appellant was a 28 year old Wurrumiyanga woman and that she was born in Darwin but raised in Tennant Creek. She has four children, three of whom were present in Court. Although the ages of these children is not mentioned, it is fair to infer from the appellant's stated age that at least some, if not all of them, were very young. Counsel went on to submit that the children were currently with the appellant's mother who had come to Darwin to assist the appellant with the children. Ordinarily the appellant was the sole carer of the children.

[29] It is well established that the rule that hardship caused to an offender's children cannot be taken into account is subject to an exception in the case of an offender who is a mother of young children.[15] Counsel for the respondent referred me to *Mawson v Nayda*[16] for the proposition that to establish one of the exceptions in *R v Nagas,* it is necessary to produce cogent evidence that imprisonment would effectively deprive the children of parental care. That was a case involving the father of a seven year old daughter whose de facto wife,

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14 *Lovegrove v The Queen* [2018] NTCCA 3 at [38]

15 *R v Nagas* (1995) 5 NTLR 45 at 54 per Gallop, Angel and Thomas JJ.

16 (1995) 5 NTLR 56 per Kearney J

and the mother of the child, the defendant claimed might not be able to care for the child properly because of her drinking. His Honour considered that this did not go far enough to establish by cogent evidence that the case fell into one of the exceptions. That may be so in the case of a child being brought up by both parents, but where the parent is a sole parent, particularly where the children are young and the appellant is the mother and sole carer of the children, in my opinion different considerations arise. It is relevant that the children have someone close to them to look after them if the appellant is imprisoned, but a term of imprisonment which separates a mother from her young children can have a devastating effect on a child's welfare and upbringing. Obviously the weight to be given to this factor will vary according to the seriousness of the offence and the length of time that the Court considers the appellant must serve before being released back into the community. His Honour did not make mention whether or not he took this consideration into account although it was strongly submitted by defence counsel that he should. In my opinion, if proper weight had been given to this factor, his Honour should have imposed a sentence of less than three months actual imprisonment on ordinary sentencing principles, and I can only infer that his Honour overlooked this or failed to properly take it into account. In my opinion the circumstances of the appellant were such that on ordinary sentencing principles, a sentence of much less than three months actual imprisonment was warranted.

[30] In those circumstances, it is necessary to consider whether or not the circumstances of the appellant are "exceptional" as required by s 78DI of the

Sentencing Act. This expression was considered by the Court of Criminal Appeal in *R v Duncan*[17] In my opinion the circumstances of this case were truly exceptional when all the relevant factors are taken into account, including the relatively minor offending, the lack of any serious injuries to the victims, the fact that the appellant has apologised to both victims and the apologies have been accepted, her limited criminal history, the previous assault conviction was a long time ago and only resulted in a good behaviour bond, the extraordinary efforts she has made voluntarily to give up alcohol and attend family violence courses, the fact that she has left Tennant Creek with her children to start a new life away from influences which have got her into trouble in the past and the fact that she is a sole parent of four young children leave no question in my mind that the exceptional circumstances exception has been proved.

[31] The appellant's submission that the one month sentence imposed for the breach of bail was manifestly excessive cannot succeed. The learned Judge considered that the real reason that the appellant failed to appear was because she was fearful of going to gaol. The excuse that she had to attend a funeral was one that could not be given any weight. If indeed she needed to attend a funeral, she could have contacted her lawyer and asked him to apply for an adjournment. She could have handed herself in once the funeral was over. About 11 months passed before she was arrested on the warrant. She made no attempt to hand herself in. This was not a conditional breach of bail, but a failure to attend on the date fixed for her matter to be dealt with by the Court.

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17 (2015) 34 NTLR 201.

[32] I am unable to see any merit in the submission that the penalty imposed for the breach of bail should have been served concurrently with the sentences for the aggravated assaults. The breach of bail matter was a separate offence, carrying a maximum penalty of two years imprisonment. In order to ensure that the whole of the appellant's criminality was properly reflected in the sentences imposed, it was not unjustified to have made the sentence cumulative. Furthermore, the effect of the order to suspend the sentence after three months, meant that the sentence for the breach of bail matter did not result in any additional actual imprisonment.

[33] Exercising the sentencing discretion afresh, and bearing in mind that there is no complaint about the head sentences, after backdating the sentences to take into account time served, I would order that the appellant's sentences be suspended forthwith with an operative period of twelve months.

[34] The appeals are allowed. The appellant is resentenced as follows:

File Number 21759961

Count 1

Convicted and sentenced to imprisonment for three months, backdated to commence on 14 December 2019 to take into account time served including the one month and five days before the appellant was granted appeal bail.

Count 2

Convicted and sentenced to three months imprisonment to be served concurrently with Count 1.

File number 21932462

Convicted and sentenced to one month imprisonment cumulative on Counts 1 and 2 in file number 21759961.

Order that the sentences imposed be suspended forthwith upon the condition that the appellant not commit another offence punishable by imprisonment for a period of 12 months from today.

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