CITATION:	*The Queen v Skeen* [2018] NTSC 28
PARTIES:	THE QUEEN
	v
	SKEEN, Peter
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21638623
DELIVERED:	10 May 2018
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – CRIMINAL LIABILITY AND CAPACITY – ACCUSED UNFIT TO PLEAD OR BECOMING INCAPABLE DURING TRIAL

Accused charged with conduct giving rise to danger of serious harm – accused fit to stand trial – parties in agreement that suffering from mental impairment – verdict of not guilty because of mental impairment – nature of supervision order – considerations – hypothetical sentencing exercise – conduct directly related to schizoaffective disorder – general and specific deterrence less relevant factors – community protection – appropriate sentence which would have been imposed – major review of custodial supervision order.

Criminal Code (NT) s 43C, s 43H, s 43I, s 43K, s 43XA, s 43ZA, s 43ZC, s 43ZG, s 43ZJ

The Queen v Ebatarintja [2010] NTSC 6, *The Queen v Gibson* [2017] NTSC 47, referred to.

REPRESENTATION:

Counsel:

Crown:	M Chalmers
Accused:	M Aust
Department of Health (CEO):	R Brebner

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission
Department of Health (CEO):	Solicitor for the Northern Territory

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

The Queen v Skeen [2018] NTSC 28
No. 21638623

BETWEEN:

THE QUEEN

AND:

PETER SKEEN

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 10 May 2018)

[1] By indictment dated 15 November 2016, Peter Skeen ("the supervised person") was charged that on 19 August 2016 at Darwin he engaged in conduct that gave rise to a danger of serious harm to another person, being reckless as to the danger of the serious harm arising from that conduct. The offence was aggravated by the fact that it was committed by the use of an offensive weapon, namely a cigarette lighter. The maximum penalty for that offence is imprisonment for 10 years.

Not guilty by reason of mental impairment

[2] Section 43C of the *Criminal Code* (NT) provides that the defence of mental impairment is established if by reason of mental impairment at the time of carrying out the conduct constituting the offence: (1) the

offender did not know the nature and quality of the conduct; (2) the offender did not know that the conduct was wrong; or (3) the offender was not able to control his actions. If the defence of mental impairment is established, the person must be found not guilty by reason of mental impairment.

[3] By report dated 28 June 2017, Dr Jonathan Linacre, a psychiatric registrar under supervision by a consultant forensic psychiatrist, gave an opinion stating that the time of the offending the supervised person was suffering from auditory hallucinations that directed him to offend against the victim in the manner charged; that he was suffering from schizophrenic delusions and was deprived of the capacity to meaningfully distinguish right from wrong; and that he may have lost self-control at the time of the offending.

[4] The *Criminal Code* has recently been amended by the insertion of s 43XA to permit the parties to agree that the evidence establishes the defence of mental impairment without need for a special hearing. That amendment commenced on 15 June 2017. Prior to that time, there was no facility for an agreement in those terms and the matter was required to proceed by way of special hearing. The parties were in agreement that the medical evidence established the defence of mental impairment at the time of the offending conduct. Given that agreement, it was open to the Court to accept a plea and record a finding of not guilty of

the offence because of mental impairment. There was no suggestion that the supervised person was not fit to stand trial.

[5] The supervised person entered a plea of not guilty by reason of mental impairment, and on 4 July 2017 I accepted that plea and recorded a finding of not guilty by reason of impairment pursuant to s 43H of the *Criminal Code*.

[6] The agreed facts on which the plea of not guilty by reason of mental impairment proceeded were as follows:

> On 18 August 2015 the offender in this matter was at the Charles Darwin University campus accommodation block "International House" because his brother Liam lived at the accommodation. It is not known whether or not he visited his brother that day. His brother has declined to assist police. The offender drew attention due to his behaviour including trying door handles around the accommodation. He was escorted off the campus by a security officer.
>
> That evening at approximately 10pm the offender rode a bicycle to the United Service Station on Bagot Road and filled up a 1.25 ml soft drink bottle with petrol from one of the bowsers. He then went into the shop area and paid for the petrol and a bottle of ginger beer. He rode away from the service station a short time later.
>
> At 7:54am on 19 August 2016 the offender arrived at the Charles Darwin University campus by bicycle. He rode to the student accommodation. He decanted an amount of petrol out of the soft drink bottle into a disposable coffee cup.
>
> Debra Batty was staying at the student accommodation that day. Ms Batty is a special education support officer with the Centralian Senior College and was visiting the campus with a group of high school students and fellow teachers from Alice Springs. The group was in Darwin to attend the university open day scheduled for the 21st of August.
>
> The group had arranged to meet at 8am before going out for the day and had congregated in a common room on the ground level of

the student accommodation. The door to the common room was wedged open with a bench.

Ms Batty went upstairs to one of the rooms to put away and iPad. As she was walking to the room she encountered the offender who she saw was holding a cigarette lighter and a disposable coffee cup. She thought the offender was going to ask her for a cigarette. The offender didn't say anything and Ms Batty continued walking up to the room to put the iPad away.

When Ms Batty came back down a short time later she walked back towards the common room and again saw the offender. She said "g'day" and kept walking. On entering the common room Ms Batty pushed a bench out of the way to allow the door to close. As she was doing this the offender came up behind her and threw the disposable cup containing the petrol in her direction. The petrol splashed over her neck and upper back area and the cup fell to the ground. The offender started to flick the cigarette lighter. Ms Batty looked behind her and saw the offender 4 steps away from her flicking the lighter. She immediately retreated into the common room pulling the door closed and raising the alarm. By this stage Ms Batty had registered that it was fuel that had been thrown on her because of the smell. She was in fear for her own safety and also the safety of her students and colleagues. She called out "I've had fuel thrown on me". She yelled to the students to shut all the curtains and doors. She instructed a fellow teacher to call security. Another staff member called 000. While one of the students peered out the offender returned to the scene and picked up the cup and then left. He rode off on the bicycle a short time later, caught on CCTV at 8:08am.

In the meantime Ms Batty was being assisted by others to wash herself. The petrol caused a tingling burning sensation in the areas where it had contacted Ms Batty's skin. One of her students was overpowered by the fumes in the enclosed space and suffered breathing difficulties and had to be taken to hospital. Everyone was frightened by the unexplained incident.

Police attended the scene a short time later and spoke with witnesses. They obtained a description of the offender and conducted patrols in the vicinity including a search of the nearby Casuarina coastal reserve.

At 9:50am police members located the offender and bicycle at Casuarina Beach. He gave them his name when asked, but was observed to be staring forward and seemed unresponsive. The offender was still in possession of the soft drink bottle still partly full of fuel and had a cigarette lighter in his hand. The offender also had two Stanley knives, one in his rear jeans pocket and

another in a plastic bag located in a carrier basket on his bicycle. A second cigarette lighter was also found in the plastic bag. The offender was arrested and kept in custody for questioning. He declined to be interviewed.

Petrol is a highly volatile substance. By dousing the victim in petrol and then flicking a cigarette lighter in her immediate vicinity the offender exposed Debra Batty to a real danger of serious harm through fire and resultant burns. In carrying out this conduct the offender was not guilty by reason of mental impairment. A psychiatrist has given an opinion stating that the offender was suffering from schizophrenic delusions and was deprived of the capacity to meaningfully distinguish right from wrong. Additionally he may have lost self-control at the time of the offending. At the time of the offending he was suffering from auditory hallucinations that directed him to offend against the victim in the manner described.

As a result of the offender's conduct the victim was fearful for her safety and that of her students. She did not receive any injuries or require medical treatment.

The offender has been remanded in custody since his arrest on 19 August 2016. Shortly after being received by Corrections on 19 August 2016 he was transported to a mental health facility for assessment and was subjected to involuntary detention for a period of approximately six weeks. He was released to Corrections once his condition stabilised with medication.

Liability to supervision

[7] On recording that finding it was necessary for the Court either to declare the offender liable to supervision under Division 5 of Part IIA of the *Criminal Code*, or to order that the offender be released unconditionally. The parties were in agreement that the Court should declare the offender liable to supervision. I made an order in those terms pursuant to s 43I(2)(a) of the *Criminal Code* at the time the finding of not guilty by reason of impairment was recorded.

[8] Section 43ZA of the *Criminal Code* provides that a supervision order may be a custodial supervision order or a non-custodial supervision order. The court must not make a custodial supervision order unless it is satisfied there is no practicable alternative given the circumstances. In order to assist in that determination, I ordered further that the "appropriate person" was to prepare and submit a report to the court pursuant to s 43ZJ of the *Criminal Code*. That section provides:

> **Court to receive report on condition of accused persons declared liable to supervision**
>
> (1) If the court declares under Division 2 or 4 that an accused person is liable to supervision, the appropriate person must, within 30 days after the date of the declaration or the longer period (if any) agreed to by the court, prepare and submit a report to the court on the mental impairment, condition or disability of the accused person that is the reason he or she was found to be not guilty of the offence charged because of mental impairment or to be unfit to stand trial.
>
> (2) A report referred to in subsection (1) is to contain:
>
> (a) a diagnosis and prognosis of the accused person's mental impairment, condition or disability;
>
> (b) details of the accused person's response to any treatment, therapy or counselling he or she is receiving or has received and any services that are being or have been provided to him or her; and
>
> (c) a suggested treatment plan for managing the accused person's mental impairment, condition or disability.

[9] A report dated 1 August 2017 was subsequently provided by Dr Mrigendra Das, a consultant forensic psychiatrist with the Top End Mental Health Service. That report contained the following opinions and recommendations.

(a) The supervised person is a 41-year-old man who was diagnosed with schizophrenia in 2016 against a background of significant substance misuse, life stressors and a family history of mental illness.

(b) His diagnosis has since been revised to schizoaffective disorder, currently in depressive episode.

(c) That illness will require treatment for a number of years with both medication and psychosocial intervention.

(d) The main risk of the illness is that of interpersonal violence, which is likely to be operational in the event of a florid relapse of symptoms. He also has a significant risk of self-harm.

[10] In the circumstances, it was Dr Das's recommendation that the supervised person should be managed on a custodial supervision order so that he could be provided with treatment and supervision appropriate to the risks which presented. Dr Das was of the further opinion that the supervised person was not yet at a point where he could be managed on a non-custodial supervision order.

[11] Dr Das provided a further report dated 17 November 2017. That report was generated following his review of the supervised person on 13 November 2017. Dr Das had also reviewed the supervised person on two occasions in August 2017 following the preparation of the initial

report, and again on 27 September 2017. Over that period there had been no incidents of aggression or self-harm, and the supervised person had remained free of psychotic symptoms. The supervised person continued to deny ever suffering from mental illness, and attributed his offending conduct to "people … trying to sing me". The supervised person also denied any problem with substance misuse, while accepting that he was using methamphetamine and sniffing petrol at the time of the relevant offending.

[12] Dr Das was of the view that the supervised person demonstrated poor insight into the circumstances and condition. Dr Das's opinions and recommendations in relation to the supervised person's diagnosis, prognosis and risks remained unchanged from those expressed in the report dated 1 August 2017. In particular, Dr Das expressed his disagreement with the opinions expressed in a psychiatric report prepared by Dr Olav Nielssen dated 7 October 2017.

[13] Dr Nielssen was engaged by the supervised person's legal representatives to provide an assessment, opinion and recommendations in relation to the question of supervision. Dr Nielssen interviewed the supervised person on 2 October 2017. Dr Nielssen diagnosed the supervised person with chronic schizophrenia and substance use disorder in remission. Dr Nielssen opined that the supervised person's offending behaviours took place during his first

acute episode of psychotic illness, which brought with it a greatly increased risk of serious offending.

[14] Dr Nielssen's report expresses the view that the literature showed that the rate of offending declines markedly after persons with psychosis become adherent to treatment. He was also of the view that conditionally released forensic patients have low rates of serious reoffending, "probably because breaches of conditions of release and relapse of illness results in return to hospital or secure care before further offences are committed".

[15] Dr Nielssen was of the opinion that the supervised person was limited in his opportunities for rehabilitation in the current setting, and that he should progress to a community-based rehabilitation service given his response to treatment. The essential elements of the plan proposed by Dr Nielssen would include:

(a) co-operation with the directions of a case manager, including residing in approved accommodation;

(b) attending rehabilitation programs, including substance abuse counselling;

(c) being available for home visits and meetings at the community health centre as required;

(d) attending fixed appointments with his treating psychiatrist;

(e) attending on time for injections of antipsychotic medication;

(f) taking any medication prescribed in tablet form in a reliable way; and

(g) abstinence from alcohol, illegal drugs and non-prescribed medication, and being available for breath, urine and blood tests to confirm adherence to that condition.

Custodial or non-custodial supervision

[16] It is necessary for the Court to determine whether the supervision order should be custodial or non-custodial in nature against the background of that divergence in the expert medical opinion. As already noted, the Court must not make a custodial supervision order unless it is satisfied there is no practicable alternative given the circumstances. In addition to that requirement, s 43ZM of the *Criminal Code* provides:

> **Principle court to apply when making order**
> In determining whether to make an order under this Part, the court must apply the principle that restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community.

[17] Section 43ZN of the *Criminal Code* then specifies the matters to be taken into account when the court makes a supervision order. It provides relevantly:

Matters court must take into account when making order

(1) In determining whether to make an order under this Part, the court must have regard to the following matters:

(a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;

(b) the need to protect people from danger;

(c) the nature of the mental impairment, condition or disability;

(d) the relationship between the mental impairment, condition or disability and the offending conduct;

(e) whether there are adequate resources available for the treatment and support of the supervised person in the community;

(f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;

(g) any other matters the court considers relevant.

[18] As is apparent from those terms, there are a number of considerations relevant to the determination whether the supervision order should be custodial or non-custodial in nature. First, the Court must have regard to the supervised person's condition and whether he or she presents a risk of self-harm or harm to others; and the level of that risk having regard to factors such as the relationship between the mental impairment and the offending conduct. Secondly, the Court must have regard to the availability of facilities and resources which would be available to permit the treatment and support of the supervised person in the community. Finally, the Court is required to make some assessment of the likelihood that the supervised person will comply

with the conditions of the supervision order made. That assessment is most obviously directed to the question whether conditions designed to ameliorate risk would likely achieve that purpose if a non-custodial supervision order were to be made.

[19] Counsel for the supervised person contended that the effect of those provisions is that the Court may only make a custodial supervision order if satisfied that it would not be reasonably practicable for the supervised person to be managed and supervised in the community in a manner that would keep the relevant risks at acceptable levels. It is further contended that the evidence in relation to those matters would need to be of a sufficient level of cogency to satisfy the *Briginshaw* standard.

[20] Sections 43E and 43G of the *Criminal Code* provide expressly that the question whether a person was suffering from a mental impairment at the time of carrying out the conduct constituting the offence, and whether the defence of mental impairment is established, must be determined on the balance of probabilities. Although the legislation is silent on the relevant standard of proof in determining whether to make a custodial or non-custodial supervision order, all parties accept that determination also falls to be made on the balance of probabilities and that the "appropriate person" – in this case, the Chief Executive Officer of the Agency administering the *Medical Services Act* (NT) – bears the

onus of satisfying the court to that standard that there is no practicable alternative to a custodial supervision order in these circumstances.

Risk, reasonable availability and compliance

[21] Dr Das is the supervised person's treating psychiatrist. In that capacity, he reviews the supervised person every two months, and more frequently in the event that reports are required for the purpose of these proceedings. Dr Das last saw the supervised person on 1 February 2018. He was able to say during the course of his oral evidence at hearing that the supervised person's condition had not changed since the preparation of his report dated 17 November 2017.

[22] Dr Das's oral evidence was consistent with the reports he has prepared. He provided some additional information in response to questions in examination-in-chief and cross-examination. He confirmed that the supervised person's positive symptoms of psychosis had abated, but that he continued to suffer from a lack of motivation and a failure to appreciate the risk of relapsing into substance misuse in the community. Dr Das was of the view that substance misuse counselling and relapse prevention treatment was crucial to reducing the supervised person's risk of reoffending upon his release into the community. In Dr Das's view, treatment directed to those matters in the custodial setting was essential before any release into the community could be contemplated, even allowing for the fact that such a release would be under supervision.

[23] In Dr Das's view, Dr Nielssen's report and opinion underestimated the supervised person's lack of insight and the need to undertake a risk reduction program before any non-custodial regime could be implemented. Dr Das also expressed the view that although the supervised person's persisting belief that his offending was the result of being "sung" was cultural in character and not delusional, it was also suggestive of a lack of insight concerning the relationship between the offending behaviours, mental illness and substance misuse.

[24] Dr Das expressed the opinion that Dr Nielssen's plan for supervision in the non-custodial setting, although otherwise appropriate, was missing the crucial step of preparing the supervised person for release into the community. That step was undertaking "psychological work" in the form of counselling and therapy in relation to substance misuse and violent offending. That step was necessary to equip the supervised person with the strategies and skills for him to deal with life stressors upon release and to avoid a relapse into substance misuse and psychotic symptomatology. Any release before that treatment would, in Dr Das's opinion, be premature – and dangerously so.

[25] In Dr Das's view, treatment in the form of counselling and therapy would ideally be administered in the secure hospital setting. Unfortunately, facilities of that nature have not been established in the Northern Territory. Although the secure hospital setting would be preferable, Dr Das was of the view that programs directed to substance

misuse and violent offending could be delivered effectively in the custodial setting. On the face of the matter, at least, it is a cause for concern that the supervised person had been in custody for 19 months when the matter last came before the court on 23 March 2018, but had not yet been provided with any psychological treatment of that particular nature. However, in Dr Das's opinion the supervised person had not been ready to commence on that sort of treatment prior to August 2017. This was because his symptoms of psychosis and depression prior to that time were such that he could not have engaged fruitfully with a treatment regime of that nature.

[26] It was also a matter of concern that Dr Das was unable to say with any certainty when that treatment program would be able to commence. That depended upon the availability of health practitioners for that purpose, and the demand for those services. That uncertainty notwithstanding, Dr Das's best estimate was that the programs would be able to commence shortly, and that it would take something in the order of 12 months – depending upon the supervised person's progress and response to those programs – to complete the psychological work to the point at which the supervised person would be able to commence on a graduated release into the community.

[27] That graduated release to the community would commence with supervised visits in the community. If those visits proceeded satisfactorily, the graduated release would then move to the

identification of suitable accommodation within the community, and preliminary visits to that accommodation by way of orientation and overnight stays, leading ultimately to supervision in a non-custodial environment.

[28] During the course of cross-examination Dr Das accepted that over the period of his incarceration the supervised person has never refused medication, has never threatened harm to another or self-harm, and has been of a stable mental state since at least 1 August 2017. Dr Das also conceded that the plaintiff did not present a risk on his current medication regime in the custodial setting. Having said that, Dr Das reiterated his concerns about a release into the community at this point in time where the supervised person would have access to alcohol and other drugs in circumstances in which he had not received adequate substance misuse treatment and counselling to sustain a successful release, and in which there would be a greater risk of non-compliance with the medication regime.

[29] Dr Das was of the view that once the supervised person had been appropriately prepared, the conditions of a non-custodial supervision order proposed by counsel for the supervised person would be appropriately imposed, perhaps with the additional element of electronic monitoring. In making that concession, however, Dr Das was not accepting that a non-custodial order would be appropriate at this particular point, or that the imposition of conditions of that nature

would alleviate risk such that a non-custodial order at this point in time would be “practicable” in the relevant sense.

[30] Dr Nielssen also gave evidence at the hearing of the matter by way of supplement to his report. He confirmed his view that the supervised person could be safely managed in the community without undue risk. He also considered that the purpose of rehabilitation would be enhanced by a non-custodial order, primarily because the supervised person would be able to see rehabilitation services more frequently. In making that assessment, however, Dr Nielsen conceded that he had limited knowledge of the facilities available in Darwin.

[31] So far as Dr Das’s opinion was concerned, Dr Nielssen queried the basis on which it might be concluded that the supervised person’s condition would change over the next 12 months, or that he would have better access to services in a secure facility. Dr Nielssen expressed the view that the symptoms which led to the offending conduct were now fully controlled by medication, thereby reducing the risk occasioned by impaired decision-making and loss of inhibition. In Dr Nielssen’s opinion, the supervised person now had a reasonable understanding that substance use was a significant risk factor for reoffending, and that he would be precluded from substance use if released into the community on supervision.

[32] In cross-examination, Dr Nielssen conceded that the supervised person's substance abuse had not been addressed by way of alcohol and drug counselling. That fact notwithstanding, Dr Nielssen was not particularly concerned about the risk presented by substance abuse because the supervised person would be subject to supervision with a regime of drug testing. Dr Nielssen agreed that any non-custodial order would require a high level of support for the supervised person, involving supported accommodation, close supervision, monitoring of substance abuse and community-based rehabilitation, until he reached the stage where he could live independently. Dr Nielssen expressed the view that if community-based services of that level were not available, the risk of reoffending would be heightened.

[33] The key difference between the opinions expressed by Dr Das, on the one hand, and Dr Nielssen, on the other hand, concerns the question of the supervised person's insight and the need for counselling and therapy preparatory to his release. Dr Nielssen conceded that most patients with mental illness have ambivalent insight, but was of the view that a lack of insight can be overcome by treatment with long-acting medication. The risk presented by a lack of insight is a relapse into substance abuse, and the primary key to the supervised person's rehabilitation would be adherence to an appropriate medication regime. Conversely, it was Dr Das's essential conclusion that that risk was too substantial to warrant a release into the community until the supervised

person received appropriate intervention therapy and drug and alcohol counselling.

[34] An affidavit by Maraea Handley was also read into evidence during the course of the hearing. Ms Handley is the Operations Manager for Top End Mental Health and Alcohol and Other Services. Her affidavit evidence was directed to the community-based residential rehabilitation services available in the Darwin region. She identified six facilities which might possibly be able to provide supported accommodation and supervision in the community setting. Ms Handley's affidavit disclosed the following matters in relation to each of those facilities.

(a) The Manse Residential Program was operating at full capacity and had a six-month waiting list. It is a voluntary program and staff do not exercise any coercive measures to keep clients within the facility. For that reason, the facility is considered unsuited to high risk clients demonstrating negative symptoms of schizoaffective disorder and/or significant lack of insight.

(b) The Papaya Sub Acute Care Program only offers an eight week residential program, directed primarily to persons without substance misuse issues. It is also a voluntary program, and presents the same risks in terms of clients leaving the facility.

(c) The Sunrise Centre Drug and Alcohol Program is also a voluntary program. It offers a 12 week program only. The facility conducts its own assessment process to determine whether a person qualifies for entry to the program. It is a precondition to entry into the program that a person has a stable mental state, and the supervised person's negative schizoaffective symptoms may affect his suitability.

(d) The Sunrise Centre Homeless Program also conducts its own assessment process. The typical length of stay is three months. Again, in order to be accepted into the program the person in question must have a currently stable mental state. There were no available beds in that program at the time the affidavit was prepared.

(e) Golden Glow Nursing provides 24-hour supported accommodation. The assessment process involves an evaluation of an individual's behaviour and criminal history. A history of aggression and assault may exclude an applicant from admission. In addition, Golden Glow will only accept a person if they have been certified fit by Top End Mental Health Services to move into supported accommodation.

(f) Top End Mental Health Services operate supported accommodation at an address in Nakara. The residence has five

beds. Any resident with a diagnosed mental illness is required to have a Top End Mental Health case manager. The length of stay is 12 months. The current waiting list for this facility is approximately three years.

[35] Ms Handley's affidavit also stated that clients living in private accommodation can be provided with support and services by the Forensic Mental Health Team. That support and supervision includes drug and alcohol testing, psychiatric and case management reviews, home visits by case managers, and referrals to drug and alcohol services. However, the Forensic Mental Health Team would not in those circumstances be able to provide security, 24-hour supervision or electronic monitoring.

[36] During the course of her oral evidence at hearing, Ms Handley stated that the Top End Mental Health Service had recommended that the supervised person was more appropriately accommodated at a specific mental health facility rather than a residential rehabilitation facility.

[37] At the conclusion of the evidence heard over the course of 6 and 7 February 2018, counsel for the Crown provided the following further information. Dr Das made a request of the prison authorities in November 2017 that the supervised person be referred for the recommended counselling and therapy. The prison authorities sought an assurance that the supervised person's mental condition had

stabilised before a referral could be made for treatment. The supervised person had been hospitalised, and the certification that his mental condition had stabilised could not be given until January 2018. Following that certification, the prison authorities began progressing the request. The responsibility for providing recommended counselling and therapy lies with the prison authorities. There are delays in providing supervised prisoners with access to those programs because of limited availability. The Forensic Mental Health Team was continuing to work with the supervised person by way of monthly visits.

[38] The hearing was adjourned to 23 March 2018. When the matter resumed at that time, counsel for the Department of Health advised that the supervised person had been unsuccessful in securing a place at the Manse. Although a position had become available, it had been taken by another client. Ms Handley advised that there were presently no placements available in the six facilities she identified in her affidavit, even if the supervised person was assessed as suitable for entry to one or other of those facilities.

[39] So far as programs in the prison were concerned, the supervised person had commenced the Safe Sober Strong program. The principal psychologist for Correctional Services had at that time advised that the supervised person had been referred for the recommended counselling and therapy. The prison authorities were unable to identify a

timeframe within which that treatment would be provided. The obvious corollary is that the graduated return into the community contemplated by Dr Das's proposed program cannot commence until that counselling and therapy has been undertaken.

[40] Counsel for the Department of Health also advised the Court that her client was unable to certify that there were facilities or services available for the custody, care or treatment of the supervised person in some place other than a custodial correctional facility. Section 43ZA of the *Criminal Code* provides that the Court cannot commit an accused person to custody in a place other than a custodial correctional facility unless the Chief Executive Officer of the Department of Health has certified that facilities or services are available in that place for the custody, care and treatment of the accused person.

[41] The consequence of that indication in the present circumstances is that the options available to the Court are limited to a custodial supervision order committing the accused person to custody in a custodial correctional facility, or a non-custodial supervision order involving the release of the supervised person. It is against that background that the Court must consider whether, in accordance with s 43ZA(2), there is no practicable alternative to a custodial supervision order committing the accused person to custody in a custodial correctional facility.

[42] Counsel for the supervised person contended that it was artificial in the circumstances to suggest that any true rehabilitative program was in place for the supervised person while he was being held in custody at the correctional facility. Counsel for the supervised person submitted that it was clear from the evidence of Ms Handley that 24-hour care facilities do exist, and urged the Court to make a non-custodial supervision order on condition that the supervised person reside at an address deemed appropriate by the Chief Executive Officer of the Department of Health. It would then be incumbent on the Department of Health to make a place available in one of its facilities.

[43] Various Judges of this Court have in the past made comment on the unsatisfactory state of facilities available for the accommodation of supervised persons who are found not guilty by reason of mental impairment or who are unfit for trial. A custodial supervision order will often be required, in the initial stages at least, to ensure compliance with the conditions of the supervision order, to provide for the safety of treating healthcare professionals, and to ensure that the supervised person does not abscond from the place at which he or she is to be held under the terms of the order. As a matter of general principle and practice, it is clearly desirable that a person subject to a custodial supervision order by reason of mental impairment should be kept in a place other than a custodial correctional facility. This is both to serve therapeutic purposes and to comply with the statutory

principle that the restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum.

[44] That desirability notwithstanding, there is in this jurisdiction a dearth, or at least a shortage, of appropriate secure accommodation outside the prison context to house supervised persons subject to custodial supervision orders. There was at one point a concern that personnel employed in accommodations of that nature would have no power to restrain a supervised person in the event of non-compliance with the conditions of the order or an attempt to abscond. In *The Queen v Ebatarintja* [2010] NTSC 6, this Court found that Part IIA of the *Criminal Code* as it then stood did not empower the Court to make an order authorising the restraint of a supervised person accommodated outside a custodial correctional facility.

[45] Section 43ZA of the *Criminal Code* was subsequently amended to provide expressly that the Court may make a supervision order subject to the condition that a person authorised by the Chief Executive Officer of the Department of Health may use reasonable force and assistance to enforce the order. Despite that amendment, supervised persons subject to custodial supervision orders continue to be detained in mainstream correctional facilities for extended periods due to the unavailability of any suitable alternative. That unavailability is reflected in the indication given in this matter by counsel for the Department of Health that her client is unable to certify that there are facilities or services

available for the custody, care or treatment of the supervised person in some place other than a custodial correctional facility. That situation is clearly unsatisfactory.

[46] Against that background, I turn to consider whether the supervision order in this case should be custodial or non-custodial in nature. In the determination of that matter I am prepared at this stage to accept the opinion given by Dr Das, as the supervised person's treating psychiatrist, to the effect that he should not be released into the community until he has undertaken counselling and therapy in relation to his substance misuse and violent offending. I am prepared at this stage to accept that if the supervised person was released into the community at this point, even subject to the supervisory conditions identified by Dr Nielssen, there is a likelihood that he would relapse into substance misuse and/or be non-compliant with his medication regime thereby causing danger to himself or another person.

[47] Dr Nielssen's view that the supervised person presents a low risk in that respect is predicated on the assumption that he will be compliant with his medication regime; and the further assumption that if he is not he will bring himself to the attention of authorities and be returned to hospital or secure care. That is not to say there is not the relevant risk. It is only to say that risk might be prevented from coming to fruition by the intervention of authorities. In making those assumptions, Dr Nielsen concedes that people with the supervised person's condition

have ambivalent insight, and that impaired insight may beget a relapse into substance abuse. That concession needs to be considered in light of the very clear relationship between the supervised person's schizoaffective disorder and the offending conduct in this case.

[48] In light of that relationship and the attendant risks, and the evidence of Ms Handley, I find that as matters now present there are not adequate resources available for the treatment and support of the supervised person in the community. While I am loath to make a custodial supervision order in circumstances where the effect of that order will be to commit the supervised person to a custodial correctional facility, that is an unavoidable consequence of the finding that a non-custodial supervision order is not presently suitable and the failure of the executive to make alternative facilities and services available for the custody, care and treatment of supervised persons.

Aggregate period of supervision

[49] Pursuant to s 43ZG of the *Criminal Code*, the Court is also required to fix the period of imprisonment or supervision that would have been the appropriate sentence to impose on the offender if he or she had been found guilty of the offence charged. The Court must then conduct a review of the supervision order at least three months prior to the expiry of that term. So far as is presently relevant, s 43ZG of the *Criminal Code* provides:

Major review of supervision orders

(1) When the court makes a supervision order, the court must fix a term in accordance with subsection (2), (3) or (4) that is appropriate for the offence concerned and specify the term in the order.

(2) Subject to subsections (3) and (4), the term fixed under subsection (1) is to be equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the court's opinion, have been the appropriate sentence to impose on the supervised person if he or she had been found guilty of the offence charged.

(3) …

(4) …

(4A) A reference in subsection (2) to a period of supervision is a reference to a period of custody or any other form of supervision of a person under a court order (including, for example, a home detention order) on the court finding the person guilty of an offence.

(4B) The court may decide the term fixed under subsection (1) is taken to have commenced from a specified time that was:

(a) before the making of the supervision order; and

(b) at or after the time the supervised person was first taken into custody for an offence because of which the court may make the supervision order.

(5) At least 3 months (but not more than 6 months) before the expiry of the term fixed under subsection (1) in respect of a supervision order, the court must conduct a review to determine whether to release the supervised person the subject of the supervision order from it.

[50] Fixing the term brings ordinary sentencing principles into play. As Barr J observed in *The Queen v Gibson* [2017] NTSC 47 at [11]:

> The hypothetical sentencing exercise under s 43ZG requires the Court to assume that the supervised person has been found guilty of the offence or offences charged, and thus by necessary implication that mental impairment was not such as to affect the making of that assumed finding by providing a defence under s 43C(1) *Criminal Code*. Nonetheless, s 43ZG does not otherwise

> exclude the application of ordinary sentencing principles, and thus the symptoms of the supervised person's schizophrenia (his paranoid delusions, his agitated and suspicious state, his perception of non-existent threats, his high degree of impulsivity and lack of rational consideration) may still be taken into account. In my opinion, the hypothetical sentencing exercise required by s 43ZG Criminal Code is not an appropriate vehicle for either general or specific deterrence. That still leaves for consideration the need for community protection in sentencing. However, that would be best achieved, as Dr Das pointed out, by ongoing supervision under the conditions of a non-custodial supervision order.

[51] That principle has application here. This is also not a case in which the sentencing purposes of general and personal deterrence should be given significant weight. On the other hand, as counsel for the supervised person concedes, the purpose of community protection may attract considerable weight in the sentencing calculus, subject to the condition that the sentence imposed may not be disproportionate to the criminality of the offending.

[52] There is no tariff for this type of offence. It comprehends a broad range of conduct. As is inevitable in such exercises, the circumstances of the offender and the offending vary widely between cases. That variance is seen in matters such as the facts of the offending in question, the age of the offender, the nature and extent of the offender's prior criminal history, the seriousness of the resulting injuries, and the impact of the offending on the victim. The comparative head sentences imposed by this Court for contraventions of s 174D of the *Criminal Code*, including matters involving a

circumstance of aggravation, ordinarily range from starting points of imprisonment for 12 months through to imprisonment for four years.

[53] A broad range of circumstances present in those matters. There are a number of subcategories of offending which give rise to particular considerations, including the use of a motor vehicle in the commission of the offence, the use of knives and scissors, the use of blunt objects, and disproportionate conduct in the context of a consensual fight. In some of the sentences imposed for this category of offending, the circumstances were such that the offender's psychological overlay told against the application of the ordinary sentencing purposes involving deterrence. Counsel for the Crown pointed in particular to the matter of *Calma* (SCC 21647379) in that respect.

[54] The matter of *Riley* (SCC 21550501) involved circumstances in which the offender sparked a cigarette lighter at his partner's face. In that case, however, the victim's hair was set alight and she suffered some burns to her scalp. The starting point adopted in that case was a sentence to imprisonment for four years.

[55] The circumstances of this offending are as described above in the agreed facts. As counsel for the Crown submits, the use of petrol and an open flame in a confined space elevate the objective seriousness of the offending. Dousing a person with petrol and then manifesting the intention to set them alight is a particularly cruel and abhorrent form of

offending. The circumstances would have been horrifying for the victim. That is graphically described in the Victim Impact Statement received into evidence. The statement was made some months after the offending. At that stage, the victim was still experiencing feelings of violation and continuing fear. She had disturbed sleep. She was discomfited in the company of strangers. She was responding unnaturally to stimuli such as loud noises and touching. The incident had impacted on her interactions with her students. These responses are unsurprising given the nature of her ordeal.

[56] The supervised person has a criminal history, some of which is relevant. He has two convictions in 2010 and 2012 respectively for carrying an article intended to cause fear. The record does not shed any further light on the circumstances of that offending. He has convictions for aggravated assault in 2002, 2009 and 2010 respectively. He has a conviction for threatening to injure, endanger or harm a person in 2008. He also has various convictions for property damage and drug offences.

[57] Leaving aside the psychiatric overlay, the supervised person's personal circumstances may be summarised as follows. He was 41 years of age at the time of this offending. He is an indigenous man who was born in Broome and has divided his time between Broome, Darwin and remote Western Australian communities, including Hall's Creek. His mother is a trained nurse. His parents separated when he was young and he

was brought up with his mother and two sisters. He has a large extended family and enjoyed close and supportive family relationships. There were apparently no issues with violence or substance abuse in the family home.

[58] Despite that relatively positive environment, the supervised person was a troubled child who struggled at school and was given to running away from home. He attended school in Darwin from commencement to Year 9 level. After leaving school the supervised person worked as a manual labourer in various occupations, including in the mining and pearling industries. He has five children with two ex-partners. At the time of the offending he had little contact with those children. His intimate partner relationships have typically been volatile. He has not been employed since 2009.

[59] He began using cannabis at an early age. His drug use escalated at or about the time he ceased employment. Over that period he was using cannabis, methamphetamine and alcohol. This is reflected in an escalation in the nature of his offending from about that time. He had periods of homelessness in both Broome and Darwin, and stayed occasionally with relatives at other times. He first came to the attention of mental health services in the Northern Territory in February 2015, although he was known to the mental health services in Broome prior to that time. Those attendances related largely to methamphetamine use. He first reported auditory hallucinations on

6 August 2016, prior to this offending, but his psychiatric condition remained undiagnosed until after that time.

[60] Against that background, I consider the appropriate sentence which would have been imposed on the supervised person if he had been found guilty of the offence charged to be imprisonment for two years and six months. I fix that term for the purposes of s 43ZG(1) of the *Criminal Code*.

Orders

[61] Accordingly, I make the following orders:

1. The supervised person is subject to a custodial supervision order pursuant to s 43ZA(1)(a)(i) of the *Criminal Code*.

2. A term of two years and six months is fixed pursuant to s 43ZG(1) of the *Criminal Code*.

3. The term of two years and six months is deemed to have commenced on 19 August 2016.

4. The appropriate person is to file and serve a major review report pursuant to s 43ZG(5) by close of business on 19 October 2018.

5. The matter is listed for major review at 9.00 am on 16 November 2018.

6. While subject to the custodial supervision order, the supervised person is to remain under the care and treatment of the Top End Mental Health Service (TEMHS).

7. The supervised person is to co-operate fully with the treatment plan offered to him by the treating team at TEMHS, and in particular he is to:

   (a) comply with all reasonable directions of TEMHS, including taking of prescribed medications, the testing, assessment and other medical interventions necessary as adjuncts to the taking of those medications;

   (b) comply with all ongoing assessments relevant to his mental illness that may be ordered as part of his treatment plan;

   (c) participate in any counselling or education relevant to his mental illness as deemed necessary or appropriate by the treating team at TEMHS; and

   (d) attend any rehabilitation or treatment program relevant to violent offending and/or the misuse of alcohol and illicit or dangerous drugs as required by the treating team.

8. The parties have liberty to apply.
