Wilson v Berlin [2015] NTSC 52

PARTIES:	WILSON, Cain v BERLIN, Brenden
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 89 of 2014 (21347576)
DELIVERED:	31 AUGUST 2015
HEARING DATES:	14 AUGUST 2015
JUDGMENT OF:	KELLY J
APPEAL FROM:	J NEILL SM

CATCHWORDS:

APPEALS – *Justices Act* s 176A – Fresh evidence – Grounds for receiving fresh evidence – Whether reasonable explanation as to why the evidence was not adduced in the lower court proceedings –Whether evidence is likely to be credible – Evidence 'likely to be credible' must be capable of belief – Whether evidence would not afford a ground for allowing the appeal – Evidence capable of affecting the assessment of the appeal – Evidence admitted

CRIMINAL LAW – Sentencing – Mandatory sentencing – Exceptional circumstances – Circumstances not exceptional when taken individually – Cumulative effect of circumstances exceptional – Mandatory minimum period excluded – Appeal allowed – Resentence

Criminal Code s 43C
Justices Act s 176A
Sentencing Act ss 78CA(3); 78DD; 78DI

R v Duncan [2015] NTCCA 2, applied

Bean v Considine [1965] SASR 351; *Hook v Ralphs* (1987) 45 SASR 529; *Marshall v Court* [2013] NTSC 75; *Pagett v Hales* [2000] NTSC 35; *Smith v Torney* (1984) 29 NTR 31; *Woods v Eaton* [2009] NTSC 49; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290, followed

Ho v Professional Services Review Committee No 295 [2007] FCA 388; *Leaney v Bell* (1992) 108 FLR 360; *Pascoe v Davis* [2010] NTSC 40; *Seears v McNulty* (1989) 89 FLR 154, referred to

REPRESENTATION:

Counsel:

Appellant:	D Sexton
Respondent:	D Jones

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	KEL15012
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wilson v Berlin [2015] NTSC 52
No. JA 89 of 2014 (21347576)

BETWEEN:

CAIN WILSON
Appellant

AND:

BRENDEN BERLIN
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 31 August 2015)

[1] This is an appeal against the sentence imposed on the appellant at the Daly River Court of Summary Jurisdiction on 20 November 2014.

[2] The appellant pleaded guilty to one count of aggravated assault on his then wife committed in October 2013.[1] In summary, the facts were that the appellant and his wife were arguing. He said, "All right I'm going to get my axe." He grabbed her and made her wait by the front door saying, "I'm going to get the axe out of the car." The victim grabbed the appellant's arms to stop him leaving the house and he punched her in the face with a closed fist, knocking her to the ground.

[1] He also pleaded guilty to a number of driving offences, for which he received aggregate fines. These are not subject to appeal.

[3] The aggravated assault was a category 3 offence.[2] Therefore, as the appellant had been previously convicted of a violent offence (in fact a number of violent offences, as discussed below), the mandatory sentencing provisions in the *Sentencing Act* applied and the sentencing magistrate was obliged to impose a minimum sentence of three months actual imprisonment[3] unless satisfied that the circumstances of the case were exceptional.[4]

[4] The solicitor appearing on behalf of the appellant on 20 November 2014[5] submitted that the learned magistrate should find that the circumstances of the case were exceptional. The circumstances relied on were:

(a) that the appellant had made substantial efforts at rehabilitation since the date of the offence more than 12 months before;

(b) the attitude of the victim, which had changed since she first made a victim impact statement; and

(c) the fact that the appellant was the primary carer for his two year old son.

[5] The efforts at rehabilitation consisted of undergoing some counselling and expressing an intention to enter rehabilitation. The appellant's counsel submitted that his attitude had changed, his rehabilitation was "well

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2 *Sentencing Act* s 78CA(3)
3 *Sentencing Act* s 78DD
4 *Sentencing Act* s 78DI(1)
5 Ms Julia Kretzenbacher, solicitor from the North Australian Aboriginal Justice Agency (NAAJA).

advanced" and that "prison might be a step backwards" on the road to rehabilitation. He had been on bail without incident for 13 months and had not been charged with another offence in that time.

[6] It was submitted that the appellant's change of attitude had been evident to the victim. She had crossed out what she had initially written in the victim impact statement in October 2013 and instead wrote: "Cain has got counselling and he's going to rehab when the paperwork's processed. I don't want him to go to gaol, he needs to stay at home and help me raise Dane (their two year old child)."

[7] After making the amended victim impact statement, about two weeks before the appellant was sentenced, the victim left to go to Port Keats without telling the appellant that she was going. He didn't know when she would be back (if ever) and he was caring for their two year old son. They were living with the appellant's mother who assisted in that care, but the appellant was the child's primary carer.

[8] The learned magistrate found that these matters did not amount to exceptional circumstances. In doing so his Honour remarked (rightly in my view) that the three circumstances relied upon to establish the existence of exceptional circumstances really amounted to two: the appellant's change of behavior over the preceding year (as evidenced by his regular attendance at court, the absence of re-offending and the amended victim impact

statement), and the fact that he had recently become the sole primary carer for his two year old son.

[9] In coming to this decision, his Honour stated that he was not satisfied that the hardship that would be suffered by the appellant's family if the mandatory minimum sentence was imposed, was out of the ordinary. He also noted the appellant's lengthy criminal record[6] and said:

> "… This is a history of violent behavior over a period of four or five years which is well beyond any sort of typical or average behavior. Indeed, to the extent that there can be any justification for mandatory sentencing (a most arguable point) people like Mr Wilson are people [for whom] such sentencing policies are probably brought into being.
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> I think the appropriate starting point for this type of offending would be around 6 months. The early plea at the earliest opportunity reduces that. I allow the full discount of 25%, which takes us down to about 4 ½ months. I am satisfied on the material before me that there have been real indications of rehabilitation prospects. …… Because of this I reduce the sentence to the mandatory 3 months."

[10] The three month sentence commenced on 20 November 2014 and the appellant was taken into custody on that day. The Notice of Appeal was signed on behalf of the appellant on 10 December 2014. The sole ground of appeal indicated on the Notice of Appeal was 'that the learned Magistrate erred in failing to properly consider s 78DI of the *Sentencing Act* and whether exceptional circumstances applied in the matter.'

[6] This consisted of a number of convictions for aggravated assault (several against a female); assault by threatening with a firearm or weapon; breaching suspended sentences; engaging in conduct that contravenes a DVO; failing to leave a licenced premises on demand; disorderly behaviour in a public place; going armed with an offensive weapon; resisting police; stealing; behaving offensively in a dwelling house; consuming liquor in a prescribed area; possessing, carrying, or using a controlled weapon; threatening behaviour in a public place; unlawfully causing damage to property, and others.

[11] The appellant was granted appeal bail on 11 December 2014, having served 21 days in prison. He has been on bail without incident for approximately seven months. His medical records reveal that on 18 June 2015, he attended the clinic and saw a mental health nurse "requesting help in getting into alcohol rehab as he does not wish to go back to prison". The records indicate that he signed a CAAPS referral request/consent, but nothing further appears to have occurred.

[12] In my view, his Honour's sentencing remarks do not disclose any error of principle either in the finding, on the basis of the material before him, that there were no extraordinary circumstances which would exclude the mandatory minimum sentencing provision, or otherwise in fixing an appropriate sentence.

[13] However, that is not the end of the matter. The appellant seeks to adduce fresh evidence on the appeal pursuant to s 176A of the *Justices Act*. That evidence is a psychiatric report of Dr Walton which the appellant submits supports a contention that the appellant's actions in committing the aggravated assault on his wife were at least in part caused by compromised self-control due to a mental disturbance. This was not a matter advanced on behalf of the appellant during the original proceeding.

[14] Section 176A of the *Justices Act* permits the reception of evidence not adduced in the original hearing if:

(a) the evidence is likely to be credible, and would have been admissible in the proceedings from which the appeal lies;[7]

(b) the evidence was not adduced in those proceedings, and there is a reasonable explanation for this;[8] and

(c) appropriate notice of an intention to rely on the evidence is given to the respondent.[9]

If these conditions are satisfied, the court must admit the evidence on the appeal unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal.[10]

[15] It is common ground that the notice provisions in the Act have been complied with. The respondent concedes that the evidence of Dr Walton would have been admissible in the court below and was not led at the sentencing hearing, but contends:

(a) that no reasonable explanation has been given for the failure to adduce that evidence; and

(b) that Dr Walton's opinions are "not likely to be credible based on the information he has relied on in the formulation of those opinions".

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7 s 176A (1)(a)

8 s 176A (1)(b)

9 s 176A (1)(c)

10 s 176A (1)

In the alternative, the respondent says that such evidence is of such little weight that it would not afford a ground for allowing the appeal.

[16] In my view the affidavit of Ms Kretzenbacher, relied on by the appellant, does provide a reasonable explanation for the failure to call that evidence at first instance. In it she deposes that:

(a) Daly River is a single day bush court and usually only one NAAJA lawyer goes there;

(b) on average, that lawyer will have 20 to 25 bail and arrest matters as well as one or two hearings on which to take instructions and then appear;

(c) instructions are taken outdoors with little privacy or time available, usually only about 10 to 15 minutes per client;

(d) she had carriage of the sentencing hearing on behalf of the appellant on 20 November 2014;

(e) she first met the appellant on 17 July 2014, a day on which she had carriage of two hearings in the Daly River Court and also had to deal with the majority of the bail and arrest list, and she had no proper opportunity to sit down with the appellant and take detailed instructions;

(f) before that date two other lawyers had carriage of the matter and both spoke to the appellant only briefly;

(g) on 14 July the appellant's matter was adjourned to the 18 September sittings as the facts had not yet been agreed;

(h) the 18 September sittings in Daly River were cancelled owing to a number of funerals in the area and the appellant's matter was adjourned to 20 November;

(i) as a consequence of that cancellation, the 20 November sittings were very busy with nine matters listed for hearing, in addition to the bail and arrest list, divided between two NAAJA lawyers;

(j) she had not seen the appellant between 14 July and 20 November;

(k) she had little time to take instructions on 20 November and little privacy, and on that morning she utilised the services of a female interpreter in taking instructions;[11]

(l) before the appellant was taken away, the appellant's mother said words to the effect of, "He's not right in the head," and, "He takes pills because he's not right in the head," also that she was worried he might not get his medication in prison;

(m) this is the first indication any of the appellant's lawyers had that the appellant had any mental health issues;

(n) she later ascertained from the Daly River Clinic that the appellant was on anti-psychotic medication;

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[11] This fact appears from the transcript of the hearing on 20 November, not the affidavit.

(o) when she later spoke to the appellant at the prison, he seemed to her to be ashamed about the fact that he was taking medication; and

(p) she surmised that, for this reason, he may not have been comfortable about disclosing this earlier.

[17] Counsel for the respondent submitted that these matters did not amount to a reasonable explanation for the failure to take instructions about the appellant's mental condition and obtain any necessary psychiatric evidence before the plea hearing.

[18] Mr Jones for the respondent pointed out that the appellant had a long history of interactions with the criminal justice system and the only explanation offered for his failure to raise the issue with his lawyer was that he appeared to be ashamed. However, in his report Dr Walton said that the appellant told him that "the pills are to make you sleep" and he did not feel he needed them.

[19] Counsel for the respondent also contended that there was no reasonable explanation for the NAAJA lawyers' failure to contact the appellant between 14 July and 20 November in order to take more detailed instructions. Counsel for the appellant referred to the well-known difficulties facing lawyers trying to get instructions from clients in remote communities,[12] including the frequent lack of reliable telephone contact[13] and pointed out

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12 referred to by Mildren J in *Pascoe v Davis* [2010] NTSC 40 at [17]

13 In this case I was informed from the bar table that the appellant does not have a phone.

that there had been nothing to alert the lawyers that it would not be sufficient to take instructions on the morning of the plea.

[20] It has been held that the Court should be liberal in its interpretation of what amounts to a reasonable explanation.[14] It may be that none of these matters, on their own, would be sufficient to provide a reasonable explanation for the failure, but when they are added together, it is not difficult to understand why the appellant's lawyers were unaware that the appellant had any psychiatric history, and why the appellant himself was not aware that he should tell his lawyer that he had been treated for a psychiatric condition and had been prescribed medication and/or did not feel comfortable about telling her, especially when he had had three lawyers, each of whom had only been able to talk to him for a very short time in less than ideal circumstances to say the least. In my view the circumstances deposed to by Ms Kretzenbacher amount to a reasonable explanation for the failure to call any evidence about the appellant's mental condition at first instance.

[21] The respondent submits that Dr Walton's opinions lack credibility "based on the information he has relied on in the formulation of those opinions". I do not understand this submission to intend any criticism of Dr Walton's professional credentials or integrity, but rather to be directed at the adequacy of the information upon which the opinions are based.

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[14] *Bean v Considine* [1965] SASR 351 cited with approval by Reeves J in *Woods v Eaton* [2009] NTSC 49 at [22]

[22] Dr Walton sets out the history he obtained from the appellant which includes a history of cannabis and alcohol abuse, cannabis use of two or three cones nightly which tended to promote feelings of paranoia, mild auditory hallucinations, treatment with anti-psychotic medication and "consideration" having been given at some time in the past to a diagnosis of drug-induced psychosis. Details of who "considered" the diagnosis and with what conclusion (if any) are not given. Dr Walton stated that at the date of the report the appellant was not suffering from any thought disorder, hallucinations, paranoia or psychosis, but that he had suffered from bouts of drug induced psychosis in the past. He expressed the opinion that while the appellant had no defence of mental impairment available to him, "there would have been some compromise of self-control … caused by drug induced mental disturbance and not a legally recognised disease of the mind."

[23] The test under s 176A is, not whether the appeal court considers that the evidence lacks credibility, but whether it is "likely to be credible" in the sense that it is capable of belief.[15] Put another way, "on an objective view of the evidence, is the evidence *prima facie* credible?"[16] In my view, there is no doubt that Dr Walton's opinion evidence is "credible" in this sense.

[24] The respondent makes a number of criticisms of Dr Walton's report, including the lack of any testing, the lack of more than one face to face

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15 *Hook v Ralphs* (1987) 45 SASR 529 at 535

16 *Smith v Torney* (1984) 29 NTR 31 per Muirhead J at 33; *Pagett v Hales* [2000] NTSC 35 per Mildren J at 35; *Woods v Eaton* [2009] NTSC 49 at [28]

consultation and the lack of any explanation of what is meant by a "drug induced mental disturbance" or how it could occur when the individual concerned was not under the influence of drugs at the time of the offending.[17] I do not think these matters render the report unlikely to be "credible" in the sense of "being capable of belief": it is, as the respondent has properly acknowledged in submissions, a low bar.

[25] In any event, on the hearing of the question of whether his evidence should be received as fresh evidence on the appeal, Dr Walton gave further oral evidence and was cross examined by counsel for the respondent and was able to meet some of the criticisms levelled by the respondent by giving a more detailed explanation for the reasons for his conclusions. The clinic notes relied upon by Dr Walton in forming his opinion were tendered. The entries from September 2013 to October 2014 frequently record symptoms of paranoia, contain some references to delusional thoughts and a reference to auditory hallucinations, and suggest (in the earlier notes) that he is developing a "gunja inducted psychosis" and (in the later notes) that he has "paranoid thinking/psychosis". He was prescribed Resperidone (an anti-psychotic drug) for his paranoia but his compliance appeared to be erratic.

[26] It was put to Dr Walton in cross examination that during their consultation the appellant had said, in relation to the assault on his partner, "I just get angry with things", that he said he had not been drinking or using illicit

[17] The report states that the appellant told Dr Walton that he was not drunk or under the influence of any drugs at the time.

drugs at the time of the assault, and that he had acknowledged that what he had done was wrong. Counsel suggested that this was not consistent with the view expressed by Dr Walton that, at the time, the appellant had been suffering from drug induced paranoia that would have compromised his self-control, but rather, the direct evidence from the appellant suggested that this was a case of domestic violence simpliciter. Dr Walton disagreed. He said the appellant had been taking a drug well-known to cause psychotic symptoms and had been displaying those symptoms over a period of about 12 months. He explained that where a drug induced psychosis is present, the symptoms can persist when the individual is not intoxicated, but will usually disappear if the person is abstinent for some time. He expressed the view that this was consistent with his observation that the appellant was not displaying symptoms of drug induced psychosis when he interviewed him after a period of abstinence from the drug while in prison, though the clinic notes showed he had been suffering from those symptoms while in the community and regularly taking the drug.

[27] The respondent's final submission was that Dr Walton's evidence is of such little weight that it would not afford a ground for allowing the appeal. Under s 176A, once the court is satisfied of the other matters set out in that section (discussed above) it **must** admit the evidence on the appeal **unless** it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal. It seems to me that Dr Walton's opinions about the appellant's mental state have the capacity to affect an assessment of whether

the circumstances of the case are "exceptional" so as to exclude the application of the mandatory minimum term in s 78DD. They would certainly be relevant to that exercise. Counsel for the respondent conceded (rightly in my view) that it was not necessary for me to conclude that the evidence of Dr Walton would lead to a finding that "exceptional circumstances" exist in order to admit the evidence under s 176A, simply that the evidence would weigh in the balance in favour of a finding that the circumstances were exceptional. In my view the evidence would weigh in the balance in favour of such a finding. I am therefore not satisfied that it **would not** afford a ground for allowing the appeal and, the other criteria in s 176A having been satisfied, the evidence of Dr Walton should be received on the appeal.

[28] It follows that, once the fresh evidence is admitted, the appeal must proceed as a hearing *de novo*.[18] Once the court embarks on a rehearing *de novo*, the court is not confined only to the evidence which has been admitted before the learned magistrate, and the fresh evidence admitted pursuant to s 176A. The court engages in a fresh sentencing exercise and may receive any further evidence which the parties wish to tender.[19] The duty of the court is to 'determine the rights of the parties by reference to the circumstances as they then exist at the conclusion of the appeal, and to give such judgment as

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[18] *Marshall v Court* [2013] NTSC 75, per Mildren AJ at [1]. See also *Seears v McNulty* (1989) 89 FLR 154 at 160, and *Leaney v Bell* (1992) 108 FLR 360 at 369

[19] *Marshall v Court* [2013] NTSC 75, per Mildren AJ at [18]

ought to have been given if the case at that time came before the court of first instance'.[20]

[29] The question for determination is whether the circumstances of the case are "exceptional" so as to exclude the application of the mandatory minimum term in s 78DD. When determining whether the circumstances of the case are exceptional, it is necessary to consider the whole of the circumstances of the particular case.[21] The Attorney-General observed in the second reading speech when introducing the amended mandatory sentencing provisions: "The exceptional circumstances exemption is intended to be broad and the court may consider any matters it considers relevant."[22]

[30] "Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional."[23]

[31] As I have already remarked, I do not think the learned sentencing magistrate made any error in finding, on the material before him, that the circumstances of the case were not exceptional. Further, although I rejected the respondent's submission that the report of Dr Walton lacked credibility or, alternatively should be accorded no weight, it seems to me that that

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20 *ibid*; see also *Smith v Torney* (1984) 29 NTR 31 at 162 per Muirhead J

21 *R v Duncan* [2015] NTCCA 2 at [27]

22 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 November 2012, quoted in *R v Duncan* supra at [24]

23 *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66], referring to *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [26], cited with approval in *R v Duncan* at [26]

evidence, when added to the evidence before the sentencing magistrate, would not, without more, be sufficient to bring the case within the exceptional circumstances provision.

[32] Dr Walton made it clear that the appellant did not have a defence of mental impairment available to him, first because a drug induced psychosis does not amount to a mental illness, and also because he was not, in any event, suffering any of the impairments set out in s 43C of the *Criminal Code*. The most he could say was that, as a result of habitual use of gunja, the appellant was suffering from a drug induced psychosis which caused or exacerbated feelings of paranoia and compromised his self-control. According to Dr Walton these are well known side effects of this particular drug. Use and abuse of this drug is common in our community. It is a common experience in our courts that, in Aboriginal communities in particular, abuse of alcohol and gunja in combination is often a precipitating factor in the commission of violent offences.[24] The appellant may have been suffering from drug induced paranoia to a greater degree than average: if so it is a matter of degree only. I do not think it can be said to be unusual or out of the ordinary when taken in the context of violent offences of this kind.

[33] However, it does seem to me that when the whole of the circumstances are taken into account, a combination of ordinary factors (none of them exceptional in themselves) render the circumstances of this case exceptional.

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[24] Sometimes this is as a result of feelings of paranoia brought on by abuse of the drug, sometimes a result of irritation brought on by lack of access to the drug.

(a) The learned magistrate was correct, in my view, to conclude that the degree of hardship that would be suffered by the appellant's family was not out of the ordinary so as to enable him to take it into account in sentencing. Nevertheless, the fact that the appellant is caring for his now three year old son, the child's mother now living elsewhere, is one in itself unexceptional factor which supports the conclusion that, taken all together, the circumstances of this case are exceptional.

(b) The evidence of Dr Walton in relation to the influence on his behaviour of his suffering from a drug induced psychosis, while not exceptional on its own, is another factor which supports the conclusion that the circumstances are exceptional. It provides a partial explanation of why the appellant fell from grace in 2013 by committing a violent offence after four years of good behaviour: his self-control was affected to some degree by his drug induced psychosis.

(c) The appellant does seem to have been making successful efforts to refrain from committing violent offences (or offences of any kind). His criminal history shows a steady stream of offences (many of them violent offences) starting as a juvenile in 2002 and continuing to 2009. Then there is a break of four years until the present offence in October 2013. Following the commission of that offence, the appellant was on bail for 13 months before being sentenced by the learned magistrate on 20 November 2014 and did not commit any further offences of any kind during that time. After serving 21 days in prison, the appellant was

released on appeal bail. He has been on bail for a further seven months, again without re-offending. Counsel for the respondent contended that it could be inferred that the reason why the appellant was no longer committing violent offences is because his wife had removed herself from his presence. However, not all of his earlier offences had been committed against his wife and (more tellingly) she was with him for the first 12 months of his first 13 month bail period. The respondent pointed out that his active efforts to obtain help in rehabilitating himself did not amount to much – some counselling and some enquiries about residential rehabilitation facilities. He did not actually attend residential rehabilitation. Nevertheless has refrained from re-offending.

(d) Finally, there is a factor which was not present at the time the sentencing magistrate passed sentence on 20 November 2014, at least to the same degree. It is now nearly two years (one year 10 months) since the original assault. The appellant has been out on appeal bail, caring for his son and remaining of good behaviour, for the past seven months, having served 21 days of the original sentence in prison, and there is no suggestion that the appellant bears any responsibility for the delay in the resolution of this matter. It is not a case, for example, where the offender has absconded for a lengthy period of time in breach of bail. In those circumstances the nexus between the offence and any further sentence the appellant might be required to serve is very much

weakened, to the extent that the purposes of both general and (especially) personal deterrence would not be advanced to any real extent by a further prison term. Indeed it is quite conceivable that requiring the appellant to return to prison after such a period of good behaviour would send entirely the wrong message to him and to other members of the community and set back his progress at rehabilitation.

[34] This combination of factors it seems to me renders the circumstances of this case exceptional so as to exclude the application of the mandatory minimum term in s 78DD.

[35] I turn to re-sentence the appellant. The assault was a serious one. It involved a threat to use a particularly nasty weapon – an axe – and a punch to the victim's face of sufficient force to knock her to the ground. Both the victim and the offender are fortunate that the consequences were not more serious. On the other hand the assault was committed nearly two years ago and the appellant has been of good behaviour since and attending to his family responsibilities in caring for his son with the assistance of the child's grandmother (his mother). It seems to me that the objectives of denunciation, general and personal deterrence as well as the encouragement of rehabilitation, would best be served by a rather more lengthy head sentence backdated to take into account the 21 days already served, and suspended forthwith on conditions of supervision.

[36] I set aside the sentence imposed by the Court of Summary Jurisdiction and in lieu thereof sentence the appellant to a term of imprisonment for 4 ½ months beginning on 10 August 2015 to take into account time already served. (I have adopted a starting point of six months reduced by 25% on account of the appellant's guilty plea which I accept is indicative of remorse.) I direct that the sentence be suspended forthwith on the following conditions.

(a) For a period of six months the appellant is to be under the supervision of Community Corrections and will obey all reasonable directions of a probation and parole officer.

(b) He is to report to a probation and parole officer within two days of the order coming into effect.

(c) He is not to leave the Territory without the prior permission of a probation and parole officer.

(d) He is to notify a probation and parole officer within two days of any change of address or change of employment.

(e) He is not to purchase, possess or consume any illicit drugs and must submit to random drug testing by a probation and parole officer or police.

(f) He is to undertake counselling or rehabilitation as directed by a probation and parole officer including residential rehabilitation if so required.

[37] For the purposes of s 40(6) of the *Sentencing Act*, I fix a period of 12 months if the appellant is to avoid being dealt with under s 43 of that Act.