CITATION:	*Joran v The King* [2024] NTCCA 1
PARTIES:	JORAN, Jason v THE KING
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 4 of 2023 (SCC 22111020 & 22138735)
DELIVERED:	24 January 2024
HEARING DATE:	28 June 2023
JUDGMENT OF:	Kelly ACJ, Barr J & Hiley AJ

CATCHWORDS:

CRIME – Appeals – Appeal against sentence – Whether sentencing judge erred in treatment of the harshness of pre-sentence custody – Whether sentencing judge erred in applying the principle of totality – Whether sentencing judge erred in treatment of the applicant's childhood deprivation and complex PTSD – Held that applicant failed to establish error in the sentencing exercise – No less severe sentence to that imposed by the sentencing judge was warranted – Leave to appeal granted but appeal dismissed

CRIME – Appeals – Appeal against sentence – Violent offending against family members – Sentences for four offences made fully cumulative – Whether sentencing judge erred in applying the principle of totality – Sentencing judge confirmed full cumulation after considering whether adjustment was necessary – Decision to accumulate discretionary – Applicant failed to establish that discretion miscarried – Leave to appeal granted but appeal dismissed

CRIME – Appeals – Appeal against sentence – Whether sentencing judge erred in treatment of the applicant's childhood deprivation and complex PTSD – Held that *Bugmy* principles were taken into account – Moral culpability was still high due to the nature of the offending – No error in the sentencing discretion

Criminal Code Act 1983 (NT), s 188, s 310, s 390, s 411
Domestic and Family Violence Act 2007 (NT), s 13, s 121

Barr v The Queen [2003] NTCCA 2, *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571, *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106, *Clinch v The Queen* (1994) 72 A Crim R 301, *Director of Public Prosecutions (Vic) v Herrmann* [2021] VSCA 160; 290 A Crim R 110, *GS v The Queen* [2016] NSWCCA 266, *McDonald v R* (1992) 85 NTR 1, *Mill v The Queen* [1988] HCA 70; 166 CLR 59, *Nguyen v R* [2007] NSWCCA 14, *Postiglione v The Queen* [1997] HCA 26; 189 CLR 295, *R v MAK* [2006] NSWCCA 381; 167 A Crim R 159, *Rostron v The Queen* (1991) 1 NTLR 191, *The Queen v Olbrich* [1999] HCA 54; 199 CLR 270, *Thomas v The Queen* [2017] NTCCA 4; 40 NTLR 70, referred to.

Clayton Ruby, *Sentencing* (Butterworths, 3rd Edition, 1987)
D A Thomas, *Principles of Sentencing* (Heinemann, 2nd Edition, 1979)

REPRESENTATION:

Counsel:

Appellant:	J Murphy, J Bourke
Respondent:	L Babb SC, L Auld

Solicitors:

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

Judgment category classification:	B
Number of pages:	37

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

Joran v The King [2024] NTCCA 1
CA 4 of 2023 (22111020 & 22138735)

BETWEEN:

JASON JORAN

Applicant

AND:

THE KING

Respondent

CORAM: KELLY ACJ, BARR J & HILEY AJ

REASONS FOR JUDGMENT
(Delivered 24 January 2024)

Kelly ACJ:

[1] I have had the benefit of reading the draft decision of Barr J and agree that the appeal should be dismissed for the reasons given in that decision.

Barr J:

[2] The applicant seeks leave to appeal against the sentence imposed by the Supreme Court on 3 March 2023 in relation to three offences of aggravated assault, charged on indictment, and a further offence of contravention of a domestic violence order, charged on complaint and transmitted from the Local Court pursuant to s 390 *Criminal Code*.

[3] The applicant was born on 4 March 1978, and so was 43 years old at the time of committing the offences.

[4] The offence charged as count 1 in the indictment was committed on 28 March 2021. The applicant was at home with GT, his partner of 10 years, his seven year old daughter and his four year old son. The children were playing and making noise. The applicant became frustrated and yelled and swore at the children, demanding that they play elsewhere. They ignored his direction. The applicant then threw a lighter at his daughter as she was sitting on a mattress in the lounge room. He then walked over to her and stomped on her arm, causing her to scream in immediate pain. She suffered fractures to the right distal 1/3 radius and ulnar shaft. She was admitted to hospital on 29 March 2021, where she underwent a closed reduction procedure under anaesthesia after which a cast was applied. She was discharged on 2 April 2021.

[5] The admitted circumstances of aggravation for count 1 were that it was a male-on-female assault; that the victim was under the age of 16 years; that the victim was unable to defend herself due to age, physique and situation; that the victim suffered harm, and that she was

threatened with an offensive weapon (a reference to the lighter which the applicant had thrown at her).[1]

[6] On 4 April 2021, the applicant was arrested. He participated in a police interview in which he denied intentionally stomping on his daughter's arm. He claimed that he had accidentally stepped on his daughter's arm while it was extended across a five centimetre gap between two separate mattresses. He was charged, served with a domestic violence order ('DVO'), and granted bail. The DVO was subsequently confirmed by the Local Court on 13 April 2021.

[7] The applicant's partner, his seven year old daughter and his four year old son were named as the 'protected persons' under the DVO,[2] which restrained the applicant from causing harm or attempting or threatening to cause harm to them; from intimidating, harassing or verbally abusing them, as well as exposing any child or children of the parties to domestic violence. The DVO was to be in force for two years.

[8] In the evening of 13 April 2021 (the same day the Local Court confirmed the DVO), the applicant abused his daughter to the point where she was upset and crying. He also verbally abused his partner,

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1 The single assault charged was constituted by two assaults: the initial throwing of the lighter at the victim and then the stomping on the victim's forearm. Under s 310 of the *Criminal Code*, the two assaults could be charged as one assault on the basis that they were committed on the same person at or about the same time.

2 *Domestic and Family Violence Act 2007*, s 13.

calling her a "slut" and a "big hole".[3] That breach of the DVO was not the subject of any charges heard by the Supreme Court.

[9] The applicant's bail was then varied to prohibit him from approaching or contacting (directly or indirectly) any of the three victims.

[10] On 9 November 2021, the police attended the home of the applicant's partner and children as a result of a domestic disturbance. Police officers were informed that there had been a disagreement earlier in the evening but that it had resolved. However, the applicant had breached the conditions of bail by contacting or being in contact with his partner.

[11] The offences charged as counts 2 and 3 were committed on 13 December 2021, at which time the DVO was still in force.

[12] On 13 December 2021, the applicant attended the home of his partner and children. He became angry with his son for getting into trouble at school and struck him three to four times to the back, causing bruising and pain. The little boy immediately began crying and ran to the neighbour's house. The assault against his son was aggravated by the fact that the boy was under the age of 16 years (he was four years old), unable to defend himself and that he suffered harm. The assault was also a breach of the DVO.

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3 Application book, p 107: Agreed Facts, par 19.

[13] Shortly after the assault on his son, the applicant became angry at his partner. He picked up a plastic cricket bat and hit her to the forearm with enough force to cause immediate pain. The aggravating circumstances for this assault were that it was male-on-female, that the victim was unable to defend herself, that she was threatened with an offensive weapon and that she suffered harm. The assault was committed in the presence of both children,[4] and was a further breach of the DVO.

[14] The day after the commission of the offences charged as counts 2 and 3, the applicant was once more at the home of his partner and children. He started yelling at his partner. He told her that she had "bastard children". This abuse occurred in the presence of both children. They became scared and ran from the house. The applicant's partner followed, running in the direction of the children's school. The applicant chased her with a butter knife, yelling out that he wanted to stab her. She feared for her life and thought that the applicant was going to hurt her.

[15] The conduct of the applicant described in the previous paragraph was in contravention of the DVO and was the factual basis for the transmitted charge.

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4 The agreed facts also note at par 27 that the applicant's daughter witnessed both assaults: the assault on her brother and the assault on her mother.

Applicant's criminal record

[16] The applicant's criminal record included a conviction for aggravated assault when he was 17 or 18 years old; a conviction for unlawfully causing grievous harm, for an offence committed in September 2000, when he was 22 years old; a male-on-female aggravated assault committed in April 2017, when he was 39 years old, and a male-on-female aggravated assault committed in November 2019, when he was 41 years old. He also had convictions for high range drink driving, for offences committed in March 2009 and February 2014.

[17] The applicant's offending in September 2000 was particularly serious. The applicant and his former wife were in Darwin so that he could attend an alcohol program run by the Council for Aboriginal Alcohol Program Services (CAAPS). In the course of an argument in relation to his excessive drinking, he punched his wife to the face a number of times, causing her to fall to the floor unconscious. He then kicked her once to the back. A caretaker entered the room of the accommodation where the applicant and the victim were staying and saw that blood was coming from the nose of the victim. There was blood on the wall and on a bedspread. Young children were on the bed crying. The victim was taken to hospital where she remained unconscious. She had suffered a severe closed head injury, bruising and facial fractures, as well as some impairment of her cognitive function. She was transferred to intensive care and it was not until 19 October 2000 (more than four

weeks later) that she was transferred to the rehabilitation ward. At that stage, she was still suffering post-traumatic amnesia and inability to do simple day to day tasks. She had slowed speech, unsteady gait and marked forgetfulness. She was finally discharged from hospital on 21 November 2000. At the time of the assault, she was 21 weeks pregnant.

[18] The applicant was not sentenced for the grievous harm offence until July 2006. The sentencing remarks of Riley J indicate that he was charged on 21 September 2000 and granted bail on 22 September 2000. He failed to attend court on 20 December 2000 and a warrant was issued for his arrest. He was not apprehended until August 2005, when he came to the attention of police in relation to an unrelated matter. The applicant attended a committal hearing on 19 April 2006, when the matter proceeded by way of a hand up committal. However, he failed to appear in the Supreme Court on 2 May 2006. A warrant was issued for his arrest and he remained in custody from 24 May 2006 to the date of sentencing on 19 July 2006.[5]

[19] The applicant was sentenced by the Supreme Court to a term of imprisonment of two years and nine months, suspended after nine months. The applicant was required to be supervised for two years after his release from prison. The sentencing judge observed that the offending was a serious assault committed in the presence of young

5 Application Book p 172: Sentencing remarks, 19 July 2006 (Riley J).

children, with severe consequences for the victim. His Honour noted that the applicant had been drinking alcohol since the age of 15 and smoking cannabis from the age of 11. He warned the applicant that he was a risk for reoffending if he continued to abuse alcohol. A condition of the applicant's suspended sentence was that he attend the FORWAARD 12-week residential substance misuse program.[6]

[20] The male-on-female aggravated assault committed by the applicant in November 2019 involved the applicant grabbing his partner with both hands by the shirt, shaking her and punching her in the chest area while still holding her by the shirt. At the time, the applicant was significantly affected by the consumption of synthetic cannabis. The apparent motive for the assault was that the victim had earlier refused the applicant's request to provide him with more synthetic cannabis. The assault took place in the presence of the couple's two young children. The victim was yelling for the applicant to stop, and the two small children were crying. The assault was committed just four weeks after the applicant had been served by police with a DVO.[7] For the assault, the applicant was sentenced by the Local Court to a term of imprisonment of 3 months, partially suspended. He was also separately sentenced for the DVO contravention.

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6 Ibid, p 175.

7 Application Book, p 169: Agreed Facts in file 21944028.

Proceedings in the Supreme Court

[21] On 3 November 2022, the applicant entered pleas of guilty to the four offences referred to above. The agreed facts were read in court and admitted by the applicant's counsel on his behalf. Relevant to this appeal, counsel for the applicant submitted that the applicant had suffered exposure to domestic violence and a sexual assault during his childhood years, enlivening the principles enunciated in *Bugmy v The Queen*,[8] and that the applicant had faced onerous conditions on remand as a result of Covid-19 restrictions, lockdowns, overcrowding and the death of his father.

[22] In relation to conditions on remand, defence counsel referred to hardship in custody and submitted that there was significant overcrowding in the prison.[9] Defence counsel informed the presiding judge that the applicant had been "in several lockdowns for periods of one to two weeks", during which time he was locked in a wing and not allowed to go outside. The overcrowding was said to have reduced the applicant's access to programs on a day-to-day basis as well as access to work. Defence counsel said that the applicant was not engaged in any employment at the prison as at November 2022, because he was focused on an educational program undertaken at the Batchelor Institute. In very comprehensive written submissions, defence counsel

8 *Bugmy v The Queen* (2013) 249 CLR 571.

9 Application book, pp 27-29: Transcript of proceedings 3 November 2022.

informed the court that the applicant was attending a program run by the Batchelor Institute on Monday, Tuesday, Thursday and Friday of each week, in which participants were required "to study various subjects for the entire day".[10] Defence counsel accepted as correct the comment of the presiding judge that such access to education programs was "not bad, in prison", but reiterated that the harshness was on account of lockdowns and overcrowding, specifically that the applicant was currently in a two-person cell occupied by four prisoners.[11]

[23] Following a concession by the applicant's counsel that there was no or little evidence to support his submissions, the presiding judge ordered a pre-sentence report. His Honour also ordered an institutional report from the Darwin Correctional Centre to include the length of time and occasions that the applicant had been in lockdown, the number of people in his cell from time to time, and his opportunities to engage in rehabilitation programs while in remand. Finally, his Honour requested a psychiatric assessment, to enquire into any substance use by the applicant and the impact of his childhood experience of domestic violence and sexual assault. The matter was then adjourned.

[24] On 22 February 2023, the sentencing proceeding resumed before another judge, the original judge being unavailable. At that time, a number of reports were available: (1) a report of Dr Mary Frost,

10 Application book, p 193, par 39.

11 Application book, p 29.

specialist psychiatrist, dated 19 December 2022; (2) a Darwin Correctional Centre Institutional Report dated 23 January 2023, and (3) a pre-sentence report dated 25 January 2023. Counsel for the applicant and the prosecutor made submissions, after which the matter was adjourned for further submissions on 23 February 2023, before being adjourned to 3 March 2023 for sentence.

Report of Dr Frost – Psychiatrist

[25] The report of Dr Mary Frost (exhibit P8) included a number of concerning matters about the applicant's early childhood and teenage years. The applicant described to Dr Frost how his father, a heavy drinker, would beat the applicant and his mother. He recalled on one occasion, as a child, requiring medical attention after his father had beaten him with an electric cord. He witnessed his mother being beaten and badly injured by his father. The applicant felt alienated at home, and at school he was bullied for being "big and fat".

[26] The applicant's counsel, in written submissions,[12] described an incident when the applicant's father held him by the leg upside down over a cliff and threatened to drop him. The applicant's grandfather intervened and tackled the applicant's father before he was able to drop his son off the cliff. There was no evidence in relation to this particular incident, and it was not mentioned in the report of Dr Frost. However, it appears to have been accepted as true by the sentencing judge.

12 Application book, p 191, par 16.

[27] The applicant told Dr Frost that, when he was 11 or 12 years old, he was sexually assaulted by two older boys. It is unclear exactly what happened to the applicant. No details of the assault were mentioned in the report of Dr Frost, save that Dr Frost described it as a "brutal assault".

[28] In relation to the consequences of the sexual assault, the applicant told Dr Frost that, for many years, he experienced nightmares and flashbacks relating to the trauma suffered in his early adolescence. He had kept the assault secret until about two years previously, when he began to speak about it with a doctor in the Tiwi Islands and subsequently with a counsellor.

[29] Dr Frost expressed the opinion that the sexual assault on the applicant as a young adolescent had had a marked impact on his identity and had contributed to early substance use. Additionally, it had left him with problems regulating his emotions and being impulsive, aggravated by substance use.

[30] In reference to the applicant's experience of childhood trauma, Dr Frost acknowledged that this would not automatically mean that he would be violent, but added:

> ... in indigenous Australians in the Northern Territory, its co-existence with excessive alcohol use escalates rates [of violence] to alarming levels (Ramamoorthi et al, 2014).

[31] The applicant was arrested on 14 December 2021. Dr Frost noted that, soon after he was placed in custody, the applicant heard of his father's death, and became acutely suicidal. He attempted to hang himself. The given reason was that he was "sad and angry at himself" for being unable to attend his father's funeral.[13] It may be accepted that, as the eldest son, the applicant had cultural obligations in relation to his father's funeral. There was limited corroboration of the applicant's history of attempted suicide in the Institutional Report from the Darwin Correctional Centre, which indicated that the duration of his suicidal state may have been a day or two.[14]

[32] Dr Frost diagnosed the applicant with (1) Complex Post-traumatic Stress Disorder (C-PTSD), a possible feature of which is emotional dysregulation, and (2) Substance Use Disorder (involving alcohol and cannabis).

[33] Dr Frost also expressed the view that the applicant's Substance Use Disorder had clearly impinged "upon his violence, impulsivity and capacity to remain emotionally stable".

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13 Exhibit D4: Notes of conversation with Aboriginal Health Practitioner.

14 The report read, relevantly, as follows: "... it is reported that on 18 December 2021, Mr Joran reported to officers through his cell intercom he had a shirt tied around his neck in an attempt to self-harm. As per prison protocols, he was immediately taken to medical and placed at risk to undergo an at risk assessment. Upon being monitored for 2 days, he was assessed on 20 December 2021 and deemed to be no apparent risk of self-harm, and returned to mainstream accommodation".

Darwin Correctional Centre Institutional Report

[34] The following information in relation to the applicant's conditions on remand was provided in response to the request for specific information by the first presiding judge:[15]

> Whilst accommodated within the high and medium security sectors, Mr Joran was subject to the following:
>
> > 15 December 2021 to 18 December 2021 – full lockdown, COVID isolation on reception in single cell.
> >
> > 18 December 2021 to 20 December 2021 – 'At Risk' in single cell (locked down – medical housing).
> >
> > 20 December 2021 to 21 December 2021 – housed in single cell, not locked down.
> >
> > 21 December 2021 to 5 January 2022 – housed in double up cell with various other prisoners. Out of cell time limited (2-4 hours out of cell) on 5 days, full unlock on another 10 days (medium accommodation).
> >
> > 5 January 2022 – transferred to the low security accommodation.
>
> Whilst accommodated within the low security sectors, Mr [Joran] was subject to the following:
>
> > November 2022 to current – subject to lockdown on nine (9) occasions.
> >
> > June to November 2022 – subject to lockdown on twenty-nine (29) occasions.
> >
> > January to May 2022 – subject to lockdown on seven (7) occasions.
>
> During the above timeframes within the low security accommodation, the number of people in the offender's cell from time to time would depend on size of cell and prisoner numbers, however could range between there being two (2) and four (4) up [sic] accommodation cells.

[35] It can be seen that, in 2022, the applicant was subject to lockdown on 36 occasions between January and November. From November 2022,

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15 Exhibit P7 – Darwin Correctional Centre Institutional Report, 21 January 2023.

he was subject to lockdown on a further nine occasions up to 23 January 2023. However, the evidence was unclear as to how long the lockdown periods lasted on each of the "occasions". In relation to overcrowding, the evidence was unclear as to the size of the cell in which the applicant was accommodated and how many prisoners were in the cell with him, and as to the period of time during which the overcrowding situation continued. For example, it was not possible to make a clear finding as to the length of time the applicant had spent in a prison cell intended for two prisoners which was actually occupied by four prisoners.

[36] The Institutional Report provided information in relation to the applicant's opportunities to engage in rehabilitation programs on remand. In June 2022, he completed the Alcohol and Other Drugs (AOD) program facilitated through the Prison In-Reach program (PIP) and delivered by Top End Health Services. He had made a request to participate in the Safe Sober Strong (SSS) program and the Alternative to Violence Program (AVP), and was waitlisted for both those programs as at January 2023.

[37] Information was also provided about the applicant's employment while on remand. From May to September 2022, he had worked as a window cleaner in the low security accommodation sectors at the prison. It appears that his employment was then interrupted during the period he engaged in programs and education, from September to December

2022.[16] He was also enrolled in a 'foundation skills course' and completed a Cert 1 in 'Access to Vocational Training' over the period August to November 2022.[17] On 19 January 2023 the applicant commenced employment as a general hand within food services.

[38] The applicant's legal representatives did not seek to adduce further evidence to cure any perceived deficiencies in the Institutional Report, or otherwise to support the submissions made by defence counsel. Moreover, the applicant did not give evidence about hardship, including its subjective effects: matters which he was required to establish on the balance of probabilities in order to have them taken into account in his favour.[18]

Sentence imposed 3 March 2023

[39] Each offence of aggravated assault carried a maximum penalty of imprisonment of five years.[19] The offence of contravention a domestic violence order carried a maximum penalty of imprisonment of two years.[20]

[40] The sentencing judge applied a discount of 25 per cent to each individual sentence to reflect the applicant's guilty plea and remorse.

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16 This was probably a reference to the Batchelor Institute program referred to in [21] above.

17 Application book, p 136. There is some ambiguity in the information provided in the Institutional Report, in relation to whether separate programs undertaken by the applicant overlapped, or whether there was one or more programs which followed one another.

18 *The Queen v Olbrich* (1999) 199 CLR 270, at [25], [27] per Gleeson CJ, Gaudron, Hayne and Callinan JJ.

19 *Criminal Code*, s 188(1) & (2).

20 *Domestic and Family Violence Act 2007*, s 121(1).

On count 1 (aggravated assault of seven year old daughter) the applicant was sentenced to a term of imprisonment of two years and three months. On Count 2 (striking blows to four year old son) he was sentenced to a term of imprisonment of nine months. On count 3 (assault on partner with plastic cricket bat), he was sentenced to a term of imprisonment of 15 months. Finally, for the DVO contravention, he was sentenced to a term of imprisonment six months. The sentences were ordered to be served wholly cumulatively, which resulted in a total effective term of imprisonment of four years and nine months. His Honour fixed a non-parole period of 2 years and 6 months.

[41] The sentencing judge made the following remarks in relation to his decision to order full accumulation:

> The total of the sentences is four years and nine months. I have had regard to the principal of totality and concurrency and concluded that that period is a just and appropriate sentence for your offending.
>
> In this respect, I have had regard to the fact that each of your offences involved a separate assault on a separate victim, associated with circumstances of domestic violence.

[42] As to objective seriousness his Honour found as follows:

> Each of these offences is a serious offence involving domestic violence. The victims were vulnerable and were incapable of defending themselves. You were in a position of trust and under a moral responsibility to protect them and keep them free from harm.
>
> Further, despite being subject to a domestic violence order for their protection, you still committed the offences. The first victim, ET [daughter], suffered significant harm. The first and second

> victims, your two children, were both of a very young age. The assault upon the first and third victims, namely ET and GT [partner], involved the use of a weapon.
>
> All of your victims live in fear of you. Because of her fear, GT delayed taking your daughter, ET, to the clinic when she was suffering from the broken arm that you inflicted on her. They all suffered emotional trauma as a result of your crimes. Your children are likely to suffer ongoing emotional and psychological harm as a result of your violent conduct. None of your victims is to blame for the violence that you inflicted on them.

[43] His Honour took into account the applicant's criminal history which included convictions for violent offences in 2006, 2017 and 2019, two convictions for breaching domestic violence orders, and one previous conviction for breaching a suspended sentence. His Honour observed that the applicant's criminal history was relevant to structuring the applicant's sentence and taking into account the need for specific deterrence, protection of the community and prospects of rehabilitation.

[44] His Honour detailed the applicant's violent and dysfunctional family upbringing and referred to the sexual assault perpetrated against him by two older boys when he was 11 years of age, acknowledging the resultant trauma and difficulties faced by the applicant.[21] As to the principles in *Bugmy*,[22] his Honour found as follows:[23]

> Having regard to your history, you are entitled to the benefit of the principles in *Bugmy*. That is to say your moral culpability is reduced as a result of your violent and dysfunctional upbringing.

21 Application book: Sentencing remarks, p 97.5.

22 *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571.

23 Application book: Sentencing remarks, p 99.1.

> However, your moral culpability is still, I consider, high. Furthermore, in cases of domestic violence such as this, considerable weight must be given to specific and general deterrence and to protection of your family and the community.
>
> Crimes of domestic violence are particularly serious crimes. They cause enormous harm in our community and are a great burden on medical and hospital resources. You must be punished and others must be deterred from committing further violence against their family members. Women and children are entitled to be safe in our community, and the community strongly disapproves of these crimes.

[45] His Honour rejected the applicant's submission that his time on remand was onerous and required a reduction in his sentence:

> I turn next to identify a number of factors which affect the sentence to be imposed on you. First, I have had regard to the fact that you have now been in custody since 14 December 2021. Accordingly, I propose to backdate your sentence to that date.
>
> Your counsel suggests I should have regard to the circumstances of hardship endured by you while you have been in custody; however, I do not see that those hardships have affected you more than the average remandee, and I therefore reject that submission.

[46] Although the evidence was vague in relation to the length of periods of lockdown and the extent of overcrowding, his Honour accepted that the applicant had experienced some hardship on remand, notwithstanding that he had engaged in rehabilitation programs, employment and education in prison. However, it would appear that his Honour was under the impression that counsel for the applicant had submitted that the applicant had endured greater hardship than other prisoners, and, on that understanding, his Honour rejected the submission made, essentially on the basis that the applicant was in the 'same boat' as all

his fellow prisoners. Given that the first ground of appeal is that the sentencing judge "erred in his treatment of the onerousness of the applicant's experience of custody", it is appropriate at this point to identify the actual submissions made.

[47] On 3 November 2022, defence counsel referred to a number of matters, including overcrowding because of COVID-19 and industrial action, before making the following submission to the presiding judge:[24]

> ... The further hardship I say in relation to why your Honour should find that his time in custody has been more difficult than other prisoners at other times that do not have these circumstances, is that he has instructed he is currently in a wing where they have two up cells, being two persons to a cell. There are four people in his cell. ... And he has been sleeping on a mattress on the floor for the past few months just because there's no bed for him to sleep in at this stage. That is not unique only to my client. There are multiple people in the prison that are subjected to these conditions right now. ... I submit that his time in custody has been more difficult and his sentence should be moderated accordingly.

[48] In addendum submissions dated 20 February 2023,[25] defence counsel referred to the Institutional Report and made this submission:

> It is submitted that Mr Joran has faced hardship whilst on remand, and his time in custody has been more difficult than the average remandee that is not subjected to similar conditions.

[49] On 22 February 2023, defence counsel made a similar submission to the sentencing judge to that made by him on 3 November 2022, namely

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24 Application book, p 29: Transcript 03/11/2022, p 19.

25 Application book, p 207: 'Addendum to defence submissions on sentence', par 7.

that the applicant had been in custody during the time COVID-19 had been rampant, with ongoing industrial actions and significant overcrowding. When his Honour suggested that being locked down was common in prison, defence counsel submitted as follows:[26]

> ... It is common these days but my point is, it is one we may rely on to say that his time in custody now, these days, has been more difficult than prisoners that have not been subjected to similar conditions in the past or may not be subjected to similar conditions in the future.

[50] Defence counsel's submission to the sentencing judge was that, in common with all other prisoners affected by lockdowns as a result of COVID-19 restrictions and industrial actions, the applicant's time in custody had been more onerous: that there had been more significant restriction on his liberties than if there had not been such lockdowns. The submission was not one which might be made in circumstances where an offender has been a prisoner in protective custody, with greater restrictions on his liberties than other prisoners.

[51] I conclude that the sentencing judge misapprehended the submission which defence counsel had made in relation to the conditions faced by the applicant as a remand prisoner. Counsel for the applicant in this Court argues that the sentencing remarks extracted in [45] demonstrate error in at least two respects,[27] more fully submitted as follows:

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26 Application book, p 72: Transcript 22/02/2023, p 30.

27 Application book, p 223: Written submissions of counsel for the applicant, 31 March 2023.

- The applicant's complex PTSD could not be described as common to 'the average remandee', and thus it appears that his Honour simply overlooked the evidence and submissions relevant to the experience of custody. His Honour must thus be found to have mistook the facts or failed to take into account a relevant consideration.
- His Honour's consideration of the *generally applicable* nature of the hardships imposed by the pandemic and overcrowding prevented the applicant from calling them in aid, in terms of some moderation of the length of the sentence.

[52] I would reject the first dot-pointed submission in [51] because there was no evidence as to how the applicant's C-PTSD affected his experience of custody. The applicant did not give evidence. Dr Frost does not mention the effect which the applicant's C-PTSD may have had on his experience of custody. To the extent it may be relevant, I note that, when Dr Frost questioned the applicant about his current mental health, he told her that, prior to being incarcerated, he was experiencing anger, anxiety and sadness. However, in prison, being substance-free, he was of the view that both his anger and sadness had gone, particularly as more recently he had begun 'praying to God'.[28] Dr Frost noted that the applicant's sleep was still interrupted by nightmares, but that he would use prayer as a way of inducing sleep. He had re-established his Catholic faith. In prison, his appetite had improved and his weight had increased. It may be inferred that the applicant's mental health had improved in prison.

28 Application book, p 144: Report Dr Frost, p 6.

[53] In the addendum submissions on sentence, defence counsel referred to the diagnosis of C-PTSD and submitted: "Mr Joran has had to grapple with this illness whilst on remand",[29] footnoting page 13 of Dr Frost's report. There the doctor explained the diagnosis of C-PTSD. She also referred to Mr Joran's suicidal state at the time he was unable to attend his father's funeral. However, Dr Frost did not link that particular episode with the C-PTSD diagnosis. Nor did Dr Frost say anything about the applicant having to 'grapple with' that particular illness or experiencing any particular problem as a result of that illness while in prison.

[54] However, for reasons explained, I would accept the second dot-pointed submission in [51]. His Honour apparently misunderstood defence counsel's submission and did not consider whether the sentence might be moderated, and if so to what extent, as a result of the matters actually submitted, clarified by me in [50]. It does not follow that leave to appeal should be granted or any appeal allowed for that reason, given the factual matters discussed in [35] – [38] above. I consider below whether this Court should moderate the sentence on appeal, bearing in mind that the Court is required to dismiss an appeal unless of the opinion that another sentence, in this case a less severe sentence, should have been passed.[30]

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29 Application book, p 207.

30 *Criminal Code*, s 411(4).

[55] His Honour ultimately found that the applicant had "guarded" prospects of rehabilitation and "at least a moderate risk" of re-offending and in particular a risk of perpetrating future violence against the applicant's partner and children.

Proposed grounds of appeal

[56] The proposed grounds of appeal are as follows:

1. The sentencing judge erred in his treatment of the onerousness of the applicant's experience of custody.
2. The sentencing judge erred in applying the principle of totality.
3. The sentencing judge erred in his treatment of the applicant's profound childhood deprivation and associated complex post-traumatic stress disorder (C-PTSD).

[57] In relation to the second ground of appeal, counsel for the applicant referred to the sentencing judge's reasons in relation to totality, extracted in [41] above, apparently taking issue with his Honour's observation that each of the offences had involved a separate assault on a separate victim.[31] Although counsel for the applicant accepts that the applicant offended against each of three victims, he submits that domestic violence being the common character of the offending weighed against full accumulation.[32] The argument was developed as follows: the three victims were closely related, being part of the same family unit; the harm caused by each offence was harm to the family

31 Written submissions, par 27.

32 Written submissions, par 26.

unit as well as to its "constituent parts"; and there was a "significant degree of commonality in what made each offence objectively serious and thus what was the applicant's overall criminality".

[58] With respect, I do not see how that argument exposes error on the part of the sentencing judge. If anything, the argument draws attention to the physical and psychological or mental harm done to the victims. For example, it is possible to look back at the events through the eyes of the applicant's seven year old daughter, the traumatised victim of the offending charged as count 1. She was then exposed to the assault of her little brother and then the assault of her mother on 13 December 2021, and subjected to the deeply hurtful abuse and the violence which occurred the following day.

[59] In a separate but related argument, counsel for the applicant submits that the offending charged as counts 2 and 3 was part of a 'single transaction'. That may be accepted insofar as the assault on the applicant's partner was committed shortly after the assault on his son. However, it could equally be seen as two separate transactions, because there were two victims. The mere fact that offences form part of what might be described as a single episode does not of itself warrant concurrency. The operative question is whether the sentence imposed for one offence encompasses in whole or in part the criminality of the

other offence or offences.[33] In *Thomas v The Queen*, this Court approved the principle that temporal proximity is not conclusive in relation to whether concurrency should be ordered where offences are part of a single episode of criminality with common factors. In that context, the Court (Grant CJ, Southwood J and Riley AJ) observed as follows:[34]

> Temporal proximity is not conclusive, particularly in offences of violence (including sexual violence) involving separate attacks and/or separate victims. A failure to identify and evaluate the nature and seriousness of each offence and to cumulate the individual sentences appropriately will, among other potential errors, amount to a failure to accord appropriate weight to relevant factors such as the physical, psychological and/or emotional harm done to each victim.

[60] Counsel for the applicant makes the further submission that all of the offending was at least partially the result of the same underlying factors, namely the applicant's impulse to anger and violence in response to frustration experienced in the family context, "ultimately rooted in the same traumatic childhood experiences". That submission may be accepted, but with the qualification 'partially' noted. Dr Frost's explanation for the applicant's violent tendencies undoubtedly has a proper basis, but in this case it can only be a partial explanation because to elevate it beyond that would be to deny the applicant's 'agency' in his own abhorrent conduct. The unfortunate fact is that the applicant has a particularly nasty temper which he failed to curb on

33 *Nguyen v R* [2007] NSWCCA 14 at [12].

34 *Thomas v The Queen* [2017] NTCCA 4; 40 NTLR 70, at [35], citations omitted.

three separate occasions, committing four violent offences: stomping on his little daughter's arm; striking his young son three or four times to the back; hitting his partner to the forearm with a plastic cricket bat; and finally abusing his partner and children in deeply offensive language and chasing his partner with a knife threatening to stab her. The offences in December 2021 were committed while the applicant was on bail and each of them constituted a breach of the DVO confirmed by the Local Court.

[61] Counsel for the applicant contends that the individual offences are connected "as a matter of fact and law". Counsel contends that "to treat each offence as so isolated as to warrant a separately cumulative sentence was ... artificial in the extreme".[35] That submission cannot be accepted. There was no relevant connection as a matter of law. As to any connection on the facts, I refer to my observations in [58] and [59] above. The applicant's impulse to anger and violence in response to frustration experienced in the family context may be a common element (and hence constitute a factual connection) but that does not mean that the sentencing discretion miscarried because separate sentences were ordered to be served wholly cumulatively. I fail to see how the asserted connection somehow renders it "artificial in the extreme" to impose separate sentences to be served fully cumulatively. In my opinion, it is not artificial at all.

35 Application book, p 226: Applicant's submissions, par 30.

[62] The final submission made by counsel for the applicant in relation to totality was that "... it is accepted that the severity of a sentence increases in an exponential rather than linear way as it increases in length". The proposition may be accepted, but it has little relevance in the present case. The 'compounding effect' on the severity of the total sentence by simply aggregating two or more lots of sentences was referred to by Malcolm CJ in *Clinch v The Queen*,[36] cited with approval by the New South Wales Court of Criminal Appeal (Spigelman CJ, Whealy and Howie JJ) in *R v MAK*.[37] However, the principle (if it can be called that) appears to have been stated or relied on in relation to very lengthy sentences. For example, in *Clinch* the caution expressed by Malcolm CJ was about aggregating a sentence of seven years and a sentence of eight years, with the resultant sentence of 15 years described as out of proportion to the degree of criminality involved. Similarly, in *R v MAK* the Court was dealing with a sexual offender who was serving a sentence of 16 years with a 12 year non-parole period who was then sentenced to a further sentence of nine years with a four year non-parole period.[38]

[63] The so-called compounding effect on the severity of the total sentence by aggregation has little significance in the present case, given that the

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36 *Clinch v The Queen* (1994) 72 A Crim R 301 at 306.

37 *R v MAK* [2006] NSWCCA 381; 167 A Crim R 159 at [16].

38 Similarly, in *GS v The Queen* [2016] NSWCCA 266, another case referred to by counsel for the applicant, the appellant was serving a term of imprisonment of 6 years with a non-parole period of 3 years when he was further sentenced to a total sentence of 8 years with a non-parole period of 5 years.

total effective sentence for all offences was four years and nine months, with a non-parole period of two years and six months being only slightly in excess of the mandatory minimum 50 per cent. The sentence was not a 'crushing sentence', nor was it out of proportion to the degree of criminality involved.

[64] In *Mill v The Queen*,[39] the High Court discussed the totality principle and the related principles of concurrency and cumulation. The Court described the totality principle as "a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences".[40] The Court referred with approval to Thomas, *Principles of Sentencing*, and quoted the passage extracted below:[41]

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['']; 'when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

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39 Citing *Mill v The Queen* (1988) 166 CLR 59.

40 Ibid, p 62-63.

41 Thomas, *Principles of Sentencing*, 2nd ed (1979), pp 56 – 57.

After then referring to Ruby, *Sentencing*, 3rd ed. (1987), pp 38 - 41, the Court observed:-

> Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.

[65] In *Postiglione v The Queen*,[42] Kirby J cited with approval the passage from Thomas, *Principles of Sentencing*, extracted above, and observed as follows:

> … The sentencing judge must first reach a conclusion as to what seems to be the appropriate sentence having regard to the maximum fixed by Parliament for the worst case and the norm that is appropriate to the objective criminality of the case. The judge must then adjust that sentence, where appropriate, for the factors personal or special to the offender, discounted by any relevant considerations (for example co-operation with authorities or absence of remissions). But it still remains for the judge to look back at the product of these calculations and discounts. It is then that the sentencing judge must consider whether the resulting sentence needs further adjustment. It may do so because it is out of step with the parity principle requiring that normally like cases should be treated alike. Or it may offend the totality principle because, looking at the prisoner's criminality as a whole, the outcome is, in its totality, not "just and appropriate". The last-mentioned conclusion will the more readily be reached where the judge comes to the conclusion that the outcome would be "crushing" and, as such, would not hold out a proper measure of hope for, and encouragement to, rehabilitation and reform.

[66] In this case, the implication is clear from the structure of the sentence that the sentencing judge decided that the sentences should not be made

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42 *Postiglione v The Queen* (1997) 189 CLR 295 at 341.

concurrent or partially concurrent on the basis of general principles relating to concurrency and cumulation. It may be inferred that his Honour did not consider that the sentence for any one offence could adequately comprehend and reflect the criminality of another offence.[43] As is apparent from the sentencing remarks extracted in [41], his Honour was mindful that the totality principle might operate in the sentencing of the applicant, and did what *Mill* required by considering whether the sentence needed adjustment. In the exercise of his discretion, for reasons given, his Honour determined not to make any adjustment. Reasonable minds may differ as to the need for cumulation and often there will be no clearly correct answer. For example, it was open to the sentencing judge to allow some limited concurrency between the sentences on counts 2 and 3. However, that does not mean that his Honour's decision to accumulate was not a sound discretionary judgment. In my judgment, the applicant has not demonstrated that the sentencing discretion miscarried.

[67] I turn to consider the third proposed ground of appeal, namely that the sentencing judge erred in his treatment of the applicant's profound childhood deprivation and associated complex post-traumatic stress disorder.

[68] Based on the sentencing remarks extracted at [44] above, counsel for the applicant contends that the sentencing judge considered only the

43 *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106 at [42], [44].

'general' application of *Bugmy* to reduce moral culpability, and that his Honour completely failed to take into account the 'specific' way in which the applicant's profound childhood deprivation could be causally or realistically linked to his offending so as to explain that offending. The contention was based on an analysis of the High Court's decision in *Bugmy* by the Victorian Court of Appeal (Maxwell P, Kay, Niall, T Forrest and Emerton JJA) in *Director of Public Prosecutions (Vic) v Herrmann*.[44]

[69] Before dealing with the contention, I should note that the sentencing judge's consideration of the applicant's background and upbringing, relevant to *Bugmy* principles and the appellant's C-PTSD, was not confined to the matters summarized and sentencing remarks extracted by me at [44] above. His Honour also referred to the applicant's history of cannabis consumption, starting at the age of 13, "to forget about [his] previous trauma".[45] Before then imposing sentence, his Honour considered the pre-sentence reports (the three reports referred to in [24] above), and specifically the report of Dr Mary Frost. After referring to the doctor's diagnosis of C-PTSD (and substance use disorder), the judge addressed possible conditions of release and read out this quote from Dr Frost's report:

> Consistent access to culturally appropriate trauma counselling in order to learn skills to better regulate his emotions and to manage

44 *Director of Public Prosecutions (Vic) v Herrmann* [2021] VSCA 160; 290 A Crim R 110 at [37], [38].

45 Application book, p 98: Sentencing remarks.

> his anger, coupled with the teaching of skills to enhance his avoidance of substance use will be important facets of reducing Mr Joran's chance of recidivism. …

[70] It is clear from all the matters dealt with by the judge in his sentencing remarks, referred to in [44] and [69], including the quoted extract from Dr Frost's report, that His Honour understood the causative nexus between the applicant's unfortunate traumatic childhood experiences and his difficulty as an adult in regulating his emotions and managing his anger. The applicant's contention, that his Honour's reasons evince "no engagement" with the evidence or submissions concerning that nexus,[46] should be rejected. In my judgment, his Honour's statements, extracted in [44], that the applicant was entitled to the benefit of the principles in *Bugmy*, and that his moral culpability was reduced as a result of his violent and dysfunctional upbringing, demonstrated an implicit acceptance that the applicant's exposure to violence and sexual abuse were an explanation for his recourse to violence when frustrated such that his moral culpability for the inability to control his impulse was reduced.[47] In this respect, I accept the submissions of counsel for the respondent.[48]

[71] The applicant's case in relation to the asserted deficiencies in the judge's approach to the application of the *Bugmy* principles ends with

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46 Application book, p 132, par 53.

47 *Bugmy v The Queen* (2013) 249 CLR 571 at [44], per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

48 Written submissions on behalf of the respondent, par 34.

the submission that his Honour afforded the applicant "only the most modest reduction in moral culpability".[49] Any response to that submission must be qualified. It is correct that the judge found that the applicant's moral culpability remained high, even taking into account his violent and dysfunctional upbringing. However, the applicant's moral culpability may otherwise have been considered to be *very high*, particularly the offence committed against his daughter.

[72] As to moderation of sentence, the applicant's focus on the *Bugmy* principles in relation to reduced moral culpability overlooks the second part of the following statement in [44] of the *Bugmy* decision:

> An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

[73] Protection of the applicant's family and the community were specific matters which the judge considered should be given considerable weight.

[74] There is a further matter that I consider should be mentioned, notwithstanding that the applicant has not sought to appeal on the ground of manifest excess. In my opinion, the sentence imposed in respect of count 1 was very lenient. The applicant was a heavily built

49 Application book p 232, par 54.

man, 43 years old, who became frustrated with his young children to the extent that he walked over to where his seven year old daughter was sitting on a mattress and stomped on her arm, causing wrist fractures which had to be treated by a closed reduction procedure under anaesthesia and the application of a cast. The child was hospitalised for some days. The offending was not only violent, it was also cruel. For the stomping component of count 1, there were four admitted circumstances of aggravation. The offence carried a maximum penalty of imprisonment of five years. The applicant had a significant history of relationship violence. I consider that the appropriate starting point was a sentence of four to five years before any discount was allowed for a guilty plea. Although the applicant admitted in the Supreme Court that he stomped on his daughter's arm, he had told the police that he had accidentally stepped onto her arm. He told Dr Frost that he trod on his daughter's arm "by accident". I mention these matters because I am by no means convinced that the applicant was entitled to a 'full' 25 per cent discount.

[75] Nonetheless, in sentencing the applicant on count 1, the sentencing judge took as his starting point a sentence of three years, from which he allowed a 25 per cent discount, to arrive at a sentence of two years and three months.

[76] Although his Honour might possibly have provided a detailed analysis of the *Bugmy* factors, the applicant has not established that the

sentencing judge erred in failing to apply the *Bugmy* principles. The sentence on count 1 was sufficiently lenient as to reflect moderation on account of reduced moral culpability, even in the absence of an express statement to that effect.

[77] I would grant leave to appeal on all three grounds.[50] However, notwithstanding the error on the part of his Honour identified in [54] above, I am of the opinion that no other, less severe, sentence to that imposed by his Honour was warranted or should have been passed. The consequence is that, in accordance with s 411(4)(b) *Criminal Code*, the appeal should be dismissed.

Hiley AJ:

[78] I too have had the benefit of reading the draft decision of Barr J and agree that the appeal should be dismissed for the reasons given in that decision.

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50 For applications for leave to appeal, the test is whether the grounds of appeal are arguable: *McDonald v R* (1992) 85 NTR 1; R*ostron v The Queen* (1991) 1 NTLR 191 at 196; and *Barr v R* [2003] NTCCA 2 at [4].