CITATION:	*Bush v Fairweather & Ors* [2024] NTSC 91
PARTIES:	BUSH, Keeanu Appellant AND FAIRWEATHER, James First Respondent AND MUNDAY, Josh Second Respondent AND COLE, Gary James Third Respondent
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from the LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 11, LCA 12, LCA 13 of 2024 (22301134; 22206670; 2237786)
DELIVERED:	31 October 2024
HEARING DATES:	21 October 2024
JUDGMENT OF:	Blokland J

CATCHWORDS:

APPEAL – SENTENCING – whether individual sentences or total effective term manifestly excessive – held not be manifestly excessive – whether errors in sentencing process –errors identified but no substantial miscarriage

of justice occurred – appeal dismissed. Compliance with the time in which to appeal dispensed with.

Criminal Code Act (NT) s 174E

Local Court (Criminal Procedure) Act (NT) ss 165, 172(2)

Sentencing Act 1995 (NT) ss 57, 53(1)(b)

Weapons Control Act 2001 (NT)

Carroll v R [2011] NTCCA 6; *Cranssen v The King* (1936) 55 CLR 509; *House v The King* (1936) 55 CLR 499; *Lowndes v The Queen* (1999) 195 CLR 665; *Makarian v The Queen* (2005) 228 CLR 357; *The Queen v Cumberland* [2019] NTCCA 13; *The Queen v Kieran Webster*; *Thomas v R* [2017] NTCCA 4; *Whitehurst v The Queen* [2011] NTCCA 11 referred to.

REPRESENTATION:

Counsel:

Appellant:	M Aust SC
Respondent:	K Thomas

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	BLO2411
Number of pages:	28

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

Bush v Fairweather & Ors [2024] NTSC 91
No. LCA 11, LCA 12,
LCA 13 of 2024 (22301134; 22206670; 2237786)

BETWEEN:

KEEANU BUSH
Appellant

AND

JAMES FAIRWEATHER
First Respondent

AND

JOSH MUNDAY
Second Respondent

AND

GARY JAMES COLE
Third Respondent

CORAM: BLOKLAND J

JUDGMENT

(Delivered 31 October 2024)

Background

[1] This is an appeal against sentences imposed by the Local Court on 4 December 2023 following pleas of guilty entered on 1st December 2023.

[2] The individual sentences are as follows:

Case No.	Charge	Sentence
22301134	Threat to use fire or an explosive substance to cause damage, s 243(3)CC Offence date: 26 January 2022 Maximum penalty, 7 years.	Imprisonment for 2 years. Cumulative as to one year (although subject to interpretation as to whether it as to one year on the Supreme Court sentence or the aggravated assault in 22237786). On the warrant, concurrent with the Supreme Court sentence.
22237786	Aggravated assault; (harm. Weapon, when victim not in a position to defend themselves), s 188(1)CC Offence date: 25 November 2022 Maximum Penalty, 5 years.	Imprisonment for 3 years. Apparently cumulative as to one year of the Supreme Court sentence.
22237786	Criminal Damage, s 241(1)CC. Offence date: 8 December 2022. Maximum Penalty, 14 years.	Imprisonment for 1 month, concurrent.
22237786	Conditional breach of bail, s 37B *Bail Act*. Offence date, 8 December 2022. Maximum Penalty 2 years.	Imprisonment for 1 month, concurrent.
22206670	Possess/control a controlled weapon, a knife in a public place, s 7(1)(3). Offence date 1 December 2021. Maximum penalty, 2 years.	Two years was stated in court, initially stated to be cumulative on 22301134, then stated to be a sentence of 6 months concurrent. Imprisonment for 2 years, was specified on the warrant. One year was cumulative according to the warrant.

[3] The precise commencement date, and whether the total effective term amounted to four years, partially cumulative on a Supreme Court sentence which was passed on 10 November 2023, or was five years, wholly concurrent with the Supreme Court sentence is open to interpretation.

[4] Plainly, a sentence should not require interpretation. A sentence should be capable of being readily understood by the defendant and all who have an

interest in the proceedings. However, it is at times understandable that clarity may be lacking given the pressure of busy lists in the Local Court combined with the complexity of some sentencing procedures. The indication from the transcript is that his Honour was about to commence contested hearings immediately after sentencing the appellant. The need for the sentencing Judge to have regard to, or to incorporate elements of the previous Supreme Court sentence appears to have led to the confusion discussed further in these reasons.

[5] After considering the primary elements of the sentence, the features of the offending and the subjective circumstances of the appellant, it cannot be said that the sentences and the total effective term are manifestly excessive. Even though there is some confusion over what the final sentence was, including the non-parole period which on one interpretation included the Supreme Court sentence, in its calculation, or possibly did not include it, the total effective term was not manifestly excessive and the errors identified did not lead to a substantial miscarriage of justice. For the reasons that follow, the appeal will be dismissed pursuant to s 177(2)(f) of the *Local Court* (*Criminal Procedure Act*).

[6] For further context it is necessary to understand that on the 10th of November 2023, the appellant was sentenced in this Court to imprisonment for two years for the offence of negligently causing serious harm, contrary

to s 174E of the *Criminal Code*.[1] The offending took place on 20 May 2021. The victim in that instance was the appellant's wife. The injury was caused by the appellant dropping a steel barbell on the victim's right leg. The victim was taken to Katherine Hospital, where x-rays revealed she had sustained a broken right tibia. She was then transferred to Royal Darwin Hospital where she underwent surgery on her right leg. The injury constituted serious harm as if left untreated, it would have led to permanent loss of mobility and pain.

[7] The appellant was 23 years old at the time of that offending and was 26 when he was sentenced in this Court in November 2023. He had been in custody for almost a year when he was sentenced for that offending. The sentence of imprisonment for two years commenced on 5 December 2022 and was suspended after serving one year on the conditions recommended by correctional services. The Supreme Court sentence was passed without the Court being meaningfully advised or seized of the matters to be dealt with in the Local Court, which are the subject of this appeal. A complicating factor for the Local Court sentencing process was that the Local Court sentences were imposed on 4 December 2023, a few days before the appellant was due for release on the Supreme Court partially suspended sentence.

[8] The offending dealt with by the Local Court took place after the date of the Supreme Court offending (20 May 2021) which as above was dealt with on

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1 *The King v Keeanu Bush*, SCC 22206670, 10 November 2023.

10 November 2023. A charge on complaint for the offence of possess or control a controlled weapon was for offending committed on 1 December 2021 and was on the same file as the Supreme Court matter (22206670). The sentencing Judge initially appears to have pronounced a sentence of two years imprisonment on that charge, then changed it to imprisonment for 6 months. The warrant records two years imprisonment, with one year of that sentence to be served cumulatively on the other sentences.

[9] The following extract sets out the sentencing remarks which illustrate some of the confusion mentioned. The remarks were the subject of substantial argument on appeal:[2]

> So those are some of the matters that her Honour set out in terms of antecedents and considerations for that offending, and she sentenced the offender some weeks ago. The offending on 20 May 2021. So those are — those helpfully set out his subjectives and antecedents. Coming to the offending in December 2021 — especially the aggravated assault. That is a very serious example of an aggravated assault.
>
> The use of hot water, unprovoked and out of nowhere to cause the scalding — which I've seen in the photographs — to the victim, and then the protracted and forceful assaults, including upon him when he's been rendered unconscious - and already suffering that scalding from the boiling water — renders this right up at the top end of an aggravated assault, unfortunately. Though I do take into account the matters relating to his antecedence, his early plea, his age and the matters properly set out by her Honour on more detailed submissions.
>
> I've taken all those matters into account, I sentence him to three years' imprisonment. Sorry, that's 25 November 2022. Three years' imprisonment on count 2. For count 3, the damage to property, one month imprisonment concurrent. And in count 4, the breach of bail,

2 *Police v Keeanu Bush*, Transcript, Local Court, 4 December 2023 at 7-8.

one month imprisonment concurrent. For the threats to burn and explode, that carries a maximum of seven years imprisonment.

Again, I'm conscious of the court that I sit in and the matters put by her Honour at the early plea, but is again, a serious example of this offending. It carries a maximum of seven years' imprisonment, the full utilitarian adjustment for the plea, two years' imprisonment. And for the possess — the control weapon at night, that's another serious example. And give him the full discount, six months' imprisonment.

So with an eye to totality — and having given, really, quite merciful sentences given the objective seriousness of the offending and the maximums, I'm going to make the 2 years on 22206670 cumulative upon 22301134. So that's 5 years' imprisonment and I am going to make 6 months for the weapon charge concurrent, so that remains 5 years imprisonment. Sorry, I mucked that up. I'll make one year of the two years cumulative, 4 years.

And I'm going to resentence on the existing sentence and make — from the Supreme Court, one year of that two-year cumulative, that will bring it to 5 years. I'm sorry to have done that to you, and I'll take you through it if you need to in a minute. I note her Honour's remarks and I'm mindful that she gives such thoughtful and decent sentencing remarks and I take heed of those, but really, the totality of the objective — the totality of the objective seriousness is such that we are no longer able to suspend any part of Mr Bush's sentence.

It's too serious. Three really quite inexplicable offences of extreme violence, which renders him truly a dangerous individual, sadly. And his prospects for rehabilitation — at this point in time — must be poor, rather than as properly and accurately assessed by her Honour, the sole offending before her when she passed sentence.

But given his age and given his plea, I'll fix the most generous non-parole period that I can. This is really a matter for the parole board. I'll fix a non-parole period of 2 years and 6 months, backdate the sentence to the 5th of the 12th.

So that's 5 years' imprisonment with a 2 year and 6 month non-parole period, backdated to the 5th of the 12th and I will work on the warrant and release it to you by — and if you'd like to question me on it at 2 o’clock, I'll — happy to take you through it. It's a little but turgid to see what I've done there.

MR MCMASTER: Sure, you're Honour. We'll get it, but...

HIS HONOUR: Thank you. All right, sir. That's your sentence. I've resentenced you in total to 5 years, with a 2 year and 6 month non-parole period for all of the offending. It's all done now. And backdated it to that date last year. .

MR MCMASTER: 5th of December.

HIS HONOUR: Yes. And I'll just ask the prison guard to pop you in a room with a phone so you can talk to your lawyer about it, all right?

MS LOGAN: Mr Bush, if you leave, I will give you a call now.

HIS HONOUR: All right, thank you very much.

MR MCMASTER: Please the court.

HIS HONOUR: Thank you.

MS LOGAN: Thank your Honour.

HIS HONOUR: All right. Now, I'll knock the rough edges off that in Chambers. We've got some hearings? Thank you.

ADJOURNED

[10] The warrant which issued from the Local Court is in the following terms, and probably reflects further thought being given to the sentence structure by the sentencing Judge in Chambers, given his Honour's remark "Now, I'll knock the rough edges off that in Chambers."

CASE NO.	OFFENCE NO.	OFFENCE DESCRIPTION	SENTENCE
22301134(13)	1.	Threat to burn or explode	2 Year(s) commencing on 5 December 2022
22237786(18)	2.	Aggravated assault	3 Year(s) of which 2 years is concurrent with sentence imposed on file 22301134.
22237786(18)	3.	Damage to Property	1 month(s) concurrent upon the sentence imposed on offence 2 in case 22237786
22237786(18)	4.	Breach Of Bail Adult	1 month(s) concurrent upon the sentence imposed on offence 3 in case 22237786
22206670(30)	5.	Possess/Carry/Use Control weapon – night	2 Year(s) of which 1 year is concurrent with sentence imposed on file 22237786.

The total effective period of imprisonment is **5 YEAR(S)** to commence on 5 December 2022.

And it was further ordered that:

The offender shall not be eligible to be released on parole for a period of 2 YEAR(S) 6 MONTH(S).

[11] On the warrant, the total effective term of 5 years was to commence on 5 December 2022 which was the date of the commencement of the Supreme Court sentence.

[12] A non-parole period of two years and six months was fixed from the same date.

[13] All would be clear if it was proper to rely on the warrant, but the actual sentence is the orders pronounced in the Local Court. The warrant tends to support an interpretation of the remarks that the sentence commenced on the date of the Supreme Court sentence, with a two-year sentence for the charge of threat to destroy or burn property, three years imprisonment for the aggravated assault commencing after one year of the sentence for threat to

destroy or burn property, one month concurrent for each of the damage to property and breach of bail offences and two years, with one year cumulative on the possess controlled weapon charge. It may be noted the sentence indicated on the warrant for the possess controlled weapon charge was the maximum penalty which could be imposed under the *Weapons Control Act* 2001 (NT).

[14] Counsel for the Crown has suggested a practical well-reasoned way forward as follows. That despite the remarks, it should be accepted the sentencing Judge intended to impose a sentence of 5 years imprisonment, inclusive of the Supreme Court sentence. As counsel for the Crown acknowledged, it was also open to conclude the sentence was in total 4 years, but to commence on 5 December 2023, at the conclusion of the time to be served before partial suspension of the Supreme Court sentence. However, on that interpretation, the non-parole period which was fixed would run from 5 December 2022 and does not fit appropriately with the overall sentence.

[15] Mistakes have clearly been made during the consideration of the question of accumulation, concurrency and totality. Of the available interpretations, I tend towards the Crown's first proposition that the intended sentence was 5 years in total, incorporating one year of the Supreme Court sentence with a non-parole period of two years and six months.

Ground 1: The sentence was manifestly excessive

[16] The appellant contends that both the ultimate head sentence of imprisonment for 5 years and the subsequent fixing of a 2 year and 6 months non-parole period, as opposed to a partially suspended sentence, has resulted in a sentence which is manifestly excessive. There is also a challenge to the individual sentence imposed for count 2, the aggravated assault.

[17] The principles relevant to a ground of this kind are well-known. It is not necessary to find specific error to make out this ground. However, it is fundamental that the exercise of the discretion is not disturbed on appeal unless error in the sentencing exercise is shown. The presumption is that there is no error. Judges at first instance are to be allowed as much flexibility when sentencing as is consonant with consistency of approach and as accords with the relevant statutory regime. There is no one correct sentence.[3] An appellate court cannot simply substitute its own opinion in place of the sentencing Judge's sentence.[4] In short, this ground is to be governed by the principles applicable to discretionary rulings and judgements found in *House v The King*[5] and *Cranssen v The King*.[6]

[18] Although a sentence of three years following a plea of guilty is in the higher range for offending of that kind, manifest excess is not made out in terms of the sentence for the aggravated assault. While this offending was not an

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3 *Makarian v The Queen* (2005) 228 CLR 357 at [27].

4 *Lowndes v The Queen* (1999) 195 CLR 665 at [15].

5 (1936) 55 CLR 499.

6 (1936) 55 CLR 509.

assault on the appellant's wife or a domestic violence offence (as the Supreme Court matter was) it was a protracted assault and included violent acts at a time when the victim was defenceless.

[19] Senior Counsel for the appellant submitted the three year sentence was more akin to a sentence for cause serious harm, an offence which has a maximum penalty of imprisonment for 14 years rather than to the offence of assault with circumstances of aggravation which has a maximum penalty of imprisonment for five years.

[20] Sentencing cases turn largely on the assessment of the gravity of the facts. The statutory maximum is but one consideration. Many cases of cause serious harm are capable of being characterised as in the lower levels of cases of that generic type. For example, cases of serious harm caused by one strike without a weapon and a resultant injury that has quickly resolved may not attract a sentence beyond imprisonment for three years. Some assaults with circumstances of aggravation, depending on the facts, are serious for other reasons, notwithstanding the injury has not reached the level of serious harm and notwithstanding the lower maximum penalty when compared with the maximum penalty for cause serious harm.

[21] The following features of the appellant's offending need to be considered:

- The assault was without warning or provocation; the victim had attended the appellant's house.

- The appellant threw hot water on the victim, rendering the victim defenceless. While it was not 'boiling' water as the sentencing Judge on one occasion referred to it as,[7] it was hot water, enough to burn or scald the victim who was asking for tobacco at the appellant's house in Beswick. The appellant told the victim to leave and then assaulted him.

- The extent of the injuries may not have been clear but it was accepted in the Local Court there were burns to the victim's arms and torso.

- The victim was kicked and punched to the head a number of times.

- Intervention by third persons was not successful during the course of the assault.

- The victim became unconscious twice throughout the series of assaults which continued during the episodes of loss of consciousness.

- The appellant jumped and stomped on the victim while the victim was unconscious.

- The victim required treatment at Royal Darwin Hospital.

[22] Counsel for the appellant made the point that photos tendered in the Local Court did not determine any issue relevant to assessing 'physical harm' for applicable mandatory sentencing purposes. That submission is rejected. It

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7 *Police v Keeanu Bush*, Transcript, Local Court, 4 December 2023 at 4.

was accepted in the Local Court the victim was burnt, had been unconscious and the treatment required was indicative of harms of a significant kind. He was transferred to Royal Darwin Hospital for treatment.

[23] The sentencing Judge took into account the appellant's antecedents, his early plea, his age, and the same matters relevant to rehabilitation which were taken into account by the Supreme Court.

[24] Counsel for the appellant drew attention to the Local Court's starting point of four years imprisonment, only one year less than the maximum available. Once again, it was pointed out this was more or equal to many sentences which are imposed for serious harm. When the features of the offending are fully appreciated, it is clear that the sentence may be at the outer limits of the available sentencing discretion, but it was not manifestly excessive. An additional consideration was that the appellant was on bail for an offence of violence at the time of committing this assault and had previous convictions for assault with circumstances of aggravation.

[25] It is accepted four years imprisonment is a higher than usual starting point, for most cases of aggravated assault. Reasonable minds may differ on the appropriate starting point. While the sentence is towards the outer limits of an appropriate sentence for a charge of aggravated assault, it is not excessive in all of the circumstances.

[26] For similar reasons the same conclusion can be drawn with respect to the sentence for count 1, the charge of threat to burn or explode property. The

maximum penalty for that offence is imprisonment for seven years. That offending involved the appellant emptying a jerry can full of petrol over the floor of a house in Barunga community after he and his girlfriend had been arguing. A number of people, including children were sleeping in the house and woke up to the argument. He yelled at his girlfriend to give him matches while he was saying he wanted to burn the house down. Some of the occupants were splashed with petrol and fled the house in fear.

[27] That count also represents objectively serious offending. Even given the early plea of guilty, the relatively young age of the appellant and the fact his actions went no further than emptying petrol combined with the threats, it cannot be characterised as an excessive sentence.

[28] In terms of whether the sentence structure led to the sentence as a whole being manifestly excessive, the indications from the remarks are not clear given the different ways accumulation and concurrency was expressed and the apparent corrections made in the remarks. The confusing and inconsistent orders are mentioned above.

[29] While the sentences for counts one and two are not manifestly excessive, it is not the case as the sentencing Judge stated that when considering totality, that he had 'given, really, quite merciful sentences given the objective seriousness of the offending'.[8] If it *was* the case that the maximum was applied to the weapons charge on complaint, that would be a manifestly

8 *Police v Keeanu Bush*, Transcript, Local Court, 4 December 2023 at 7.

excessive sentence in respect of that charge. On one interpretation that sentence was fully concurrent in any event with count 2. However, on the warrant it was one year concurrent with and one year cumulative on the sentence for that count. Even on that scenario the length of the total effective term was mitigated by the sentence for count 1 being made fully concurrent with one year of the Supreme Court sentence and one year of the aggravated assault. While it is difficult to conclude precisely what the final sentence structure was, on either interpretation it cannot be said that the total effective term was manifestly excessive.

[30] The way the sentence structure came about indicates his Honour may have had a view of what the overall sentence should have been and then ordered certain amounts of accumulation and concurrency to fit the total effective term he had in mind. If that occurred, that indicates an erroneous approach. The Court of Criminal Appeal has discussed the issue of concurrency and accumulation many times. For example in *Carroll v R*[9] after discussing proportionality the Court said:

> However, the overriding concern is that the sentences for the individual offences and the total sentence impose be proportionate to the criminality of each case. Concurrency may be appropriate because the crimes which gave rise to the offender's convictions are so closely related and interdependent. What is necessarily required in every case is a *sound discretionary judgement as to whether there should be cumulation or concurrency.* (Emphasis added).

9 [2011] NTCCA 6 at [44].

[31] In *Thomas v R*[10] the Court stated:

> It is well accepted that the severity of a term of imprisonment is exponential not linear. The principle of totality requires a sentencing judge to give consideration to the proposed sentence and consider whether it is justly proportionate to the whole of the offender's conduct; and precludes the cumulation of sentences beyond what is proportionate to the whole of the offender's conduct. The overriding principle is that the total sentence must not exceed the total criminality. (Footnotes omitted)

[32] In *Thomas v The Queen*[11] the Court considered how offences of violence involving separate victims had a distinct bearing on the question of the overall criminality. As can be seen from the resentencing by the Court of Criminal Appeal in *Thomas v The Queen*, this does not always mean that there will be cumulative sentences in respect of each offence against each victim. However, individual incursions of violence remain a consideration when determining accumulation, concurrency and the further consideration of totality, tending towards accumulation.

[33] There was no error by the partial accumulation of the sentences for the counts heard in the Local Court on that portion of the Supreme Court sentence which was served (one year). There was no error accumulating counts 1 and 2 to the extent of one year and ordering concurrency of the remaining counts, including the weapons charge which was on complaint. Some level of accumulation may be expected given the multiple victims across all files. The warrant does not reflect the same, rather it reflects an

10 [2017] NTCCA 4.

11 (2017) 40 NTLR 70.

intention to make count 1 partially concurrent with the Supreme Court sentence and Count 2.

[34] The weapons charge should not have increased the overall sentence as it appears to have done as recorded on the warrant, if that was the way the sentence was structured. Although the weapons charge was on complaint, it was a reasonably significant example of offending of that kind. It involved the appellant threatening his mother after an argument with her. He pulled a knife from his shorts. Others were nearby. He then threatened to stab himself. Imposing the maximum available, yet mitigating the overall sentence by more generous concurrency elsewhere has lead to the conclusion here, that overall, the total effective term was not manifestly excessive.

[35] The imposition of the minimum non-parole period of two years and six months was not excessive. While it was open to the sentencing judge to consider a partially suspended sentence, it must be remembered that the basis for sentencing the appellant had changed markedly since the appellant was sentenced by the Supreme Court. The Supreme Court dealt with a single incident of negligently causing serious harm. The Local Court dealt with two further instances of violence and another involving a weapons charge, as well as one less serious property charge and a charge of breach of bail. This fundamentally changed the complexion of the sentencing exercise.

[36] It is tolerably clear the sentencing Judge thought that the series of violent offences were too serious to deal with by way of a partially suspended

sentence. The appellant claims the reasons were inadequate on this point. In my view the reasons were sufficient to explain the exercise of the discretion. The appellant's ongoing violence was a major concern. I see no error in the approach taken on this point which is a discretionary decision. A non-parole period was readily justified. I see no conflict between the approach taken and what was said in *Whitehurst v The Queen*:[12]

> The first task of the sentencer is to impose a sentence which is appropriate to the offending in light of all of the relevant circumstances of the offence and the offender. Thereafter it is necessary to determine whether to wholly or partially suspend the sentence or, alternatively, to set a non-parole period. If a non-parole period is to be set then the sentencer must consider the duration of that period. If the sentence is to be partially suspended then the sentencer must consider the actual term of imprisonment, to be served prior to the suspension of the sentence.
>
> In choosing whether to proceed by way of a suspended sentence or a non-parole period the sentencing Judge must consider many things including any relevant legislative provisions, the nature of the offending, the minimum period of imprisonment which must be actually served to reflect the seriousness of the offending, and the personal circumstances of the offender including any prospects for rehabilitation. Consideration of the personal circumstances of the offender and his prospects for rehabilitation is likely to involve determining how any prospects for rehabilitation may be addressed and enhanced; whether there is a need for supervision and, if so, the nature of that supervision; the existence of, and the nature of, any support mechanisms available to the offender outside the custodial setting; the identification of impediments and risks to rehabilitation and so on.
>
> The question of whether to impose a non-parole period or to suspend a sentence must be answered in light of all of the circumstances surrounding both the offence and the offender. Such considerations do not give rise to an expectation (as was suggested here) that for a particular type of offence a suspended sentence would result.

12 [2011] NTCCA 11 at [27]-[29].

[37] In terms of subjective material, the Local Court Judge took into account the following portions of the Supreme Court sentencing remarks.

> Keanu Bush was 23 years old at the time of the offending and is now 26 years old. He was born in Katherine but grew up in Numbulwar and Ngukurr. He was raised by his grandmother, as his parents separated when he was a young child, and it is understood that his father was in and out of jail, resulting in no meaningful relationship with him. He also has two siblings. He is the middle child.
>
> Growing up, he attended community school in Numbulwar, Katherine High School and Kormilda College, where he completed year 10. He also obtained employment as a result, as a retail assistant, where he worked numerous years before stopping as a result of requiring surgery for rheumatic heart disease. He then obtained work through CDP in Numbulwar, doing maintenance and rubbish removal.
>
> He was not working at the time of the arrest and was receiving Centrelink benefits. I am told that he has two daughters who are 10 and two years' old, who live with their mother and he has little contact with them. This causes great sadness for him. He has a relevant criminal history, particularly this victim, for violent offences.
>
> Following the plea in this court, the court has received a supervision report, which has found him suitable for general supervision. Obviously, he must serve a term of imprisonment, but I can have no confidence that imprisonment will lead to any greater awareness of the wrongfulness of his conduct, nor lessen the risk of reoffending. Perhaps supervision will help to do that.
>
> As this matter was progressed fairly quickly and the plea was indicated early, he will be awarded the full adjustment of the utilitarian value of his early of guilty. It is often difficult to ascertain remorse in criminal matters as he appears to have stated to the author in the s 103 report, that the bar slipped out of his hand. I accept that there is not much in the way of remorse that can be accepted.
>
> Like many abusers, the tendency on his part to minimise the conduct is strong. Given his relatively young age and strong employment history, there are still prospects of rehabilitation. There is a

> requirement for a personal deterrence, as he has a history of violent offences against his spouse and he needs to understand that violence in domestic relationships is unacceptable.
>
> And her Honour goes on in relation to matters pertaining to that particular offending:
>
> This case is really a matter of gratuitous, albeit negligent, violence. I am not sure why anyone would do what he has done. He did it because he could. It must have been humiliating for the victim, who was his wife, over and above the injury. Prison offers no or little rehabilitation. The court is told this in almost every case. A sentence is designed to reduce the risk of reoffending, especially in this way and especially in relation to this victim.

[38] There was a suggestion in the submissions on behalf of the appellant to the effect that the sentencing in the Local Court had interfered with the Supreme Court sentence. I disagree. It is perhaps unfortunate that not all matters were dealt with in the same proceedings. It was not however an interference with the Supreme Court sentence.

Ground 2: The sentencing Judge erred by imposing a sentence not in accordance with the law

[39] The appellant submitted the Local Court had no power in the circumstances to fix a non-parole period. It was unfortunate that prosecuting counsel at the commencement of the proceedings submitted to the sentencing Judge that a new non-parole period would need to be fixed by his Honour.[13] That was incorrect as the appellant was not subject to a non-parole period at that time.

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13 *Police v Keeanu Bush*, Transcript, Local Court, 1 December 2023 at 3.

[40] The submission to this Court was that the only power to proceed in the manner which the Local Court did, was through s 57 of the *Sentencing Act* (1995) NT:

> 57 **Fixing of new non-parole period in respect of multiple sentences**
>
> (1) This section applies if:
>
> (a) An offender has been sentenced to be imprisoned for an offence and a non-parole period has been fixed in respect of the sentence; and
>
> (b) Before the end of the non-parole period the offender is sentenced by a court to a further term of imprisonment.
>
> (1A) The court must fix a new single non-parole period in respect of all the sentences the offender is to serve or complete.
>
> (2) The new single non-parole period fixed at the time of the imposition of the further sentence:
>
> (a) supersedes any previous non-parole period that the offender is to serve or complete; and
>
> (b) must not be such as to render the offender eligible to be released on parole earlier than would have been the case if the further sentence had not been imposed; and
>
> (c) must not be less than the non-parole period required to be fixed in accordance with section 53A, 54, 55 or 55A, as the case may be, in respect of the further sentence.

[41] To accept the appellant's submission would be to accept that s 57 is the only governing principle. Section 57 applies to the particular circumstance where an offender has been sentenced to be imprisoned for an offence, a non-

parole period has been fixed in respect of that sentence and before the end of the non-parole period the offender is sentenced again.[14] That was not the situation here. A non-parole period had not been fixed. The submission made by counsel for the Crown before the sentencing Judge was an error. On one interpretation the sentencing Judge adopted that course. However, after some consideration, in my view the approach taken which incorporated the Supreme Court sentence in the calculation of the non-parole period was not in error. If it was, it was to the benefit of the appellant.

[42] Counsel for the appellant submitted that the only options for the sentencing Judge after imposing terms of imprisonment were to either:

- Refuse to fix any non-parole period and order straight terms of imprisonment with a fixed commencement date; or

- Impose a non-parole period on the new charges only.

(i) it may also have fixed the commencement date at the completion of the unsuspended term of imprisonment by the Supreme Court had it chose to impose a non-parole period on the new charges

- Impose a partially suspended sentence to commence at a particular date (that may have seen the new sentences being wholly or partially concurrent with the current orders) and either;

14 *The Queen v Kieran Webster*, Transcript, SCC 22018400, 5 August 2021 at 10-11.

(i) Suspend the sentence on the same date of release and on the same conditions as the Supreme Court; or

(ii) Suspended sentence on some future date of release and on the same conditions as the Supreme Court.

[43] It was submitted the setting of a non-parole period was ultra vires as it was non-compliant with s 53(2) of the *Sentencing Act*.

[44] As the sentence imposed by the Local Court exceeded imprisonment for 12 months and was not suspended in any part, s 53(1)(b) of the *Sentencing Act* required a non-parole period to be fixed. It was required to be fixed over the aggregate sentence as there were multiple counts involved.

[45] Section 53 of the *Sentencing Act* provides:

53 Fixing of non-parole period by sentencing court

(1) Subject to this section and sections 53A, 54, 55, 55A and 148, if a court sentences an offender to be imprisoned:

(a) for life; or

(b) for 12 months or longer, that is not suspended in whole or part;

It must, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate.

(1A) Subject to section 57, if a court sentences an offender to be imprisoned for less than 12 months or for a term that is

suspended in whole or part, the court may not, as part of the sentence, fix a non-parole period.

(2) Where a court sentences an offender to be imprisoned in respect of more than one offence, a period fixed under subsection (1) is in respect of the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed.

[46] Counsel for the appellant emphasised the words in s 53(2) '… is in respect of the aggregate period of imprisonment that the offender is liable to serve under all sentences *then imposed*'.

[47] In a different context, the Full Court analysed the application of s 53(2) in *The Queen v Cumberland*.[15] In the context of the fixing of non-parole periods for specified offences which carried mandatory minimum terms the Court said 'Where a court has fixed an aggregate sentence of imprisonment under s 52 of the *Sentencing Act*, the operation of s 53(2) would require the Court to give application to the minimum non-parole prescribed for the specified offence or offences.' The Court also endorsed a limitation on the construction of s 53(2), namely that the Court can only impose a single non-parole period that covers 'all the sentences then imposed'. However, the Court was clear that s 53(2) should not be applied in a manner which would produce an 'unjust result'.[16]

15 [2019] NTCCA 13.

16 *The Queen v Cumberland* [2019] NTCCA 13 at [48].

[48] Counsel for the appellant drew attention to the remarks in *The Queen v Kieran Webster*[17] where, it was submitted the Chief Justice accepted a construction which would restrict the inclusion of partially served terms in the calculation of a non-parole period. I do not read his Honour's remarks in the way suggested. His Honour there was answering a submission which requested the imposition of a single head sentence across all offences, including earlier offences for which the offender had been sentenced. In that sentencing process s 57 of the *Sentencing Act* was not applicable, however the remarks do not purport to consider s 53(2) or to make restrictions when fixing a non-parole period in the manner suggested on behalf of the appellant.

[49] If s 53(2) of the *Sentencing Act* were to be applied in the way suggested on behalf of the appellant, it would be to his disadvantage. Section 53(2) does not on its terms exclude other sentences in the calculation of the non-parole period. It specifically deals with the sentences currently before a Court, but does not purport to exclude other sentences from the calculation. It is directed to ensure multiple offences attract a single non-parole period. The application suggested on behalf of the appellant would lead to an unjust result in almost all cases where a prior sentence was in existence but the circumstances did not fall within s 57 of the *Sentencing Act*. Such a result goes against the reasoning employed in *Cumberland* as above. Alternatively, it is unlikely the intention behind that part of the *Sentencing Act* was to

17 SCC 22018400, 5 August 2021.

interfere with a court's power to backdate a sentence which includes the non-parole period in relevant cases. On the warrant, the sentences 'then imposed' commenced on the same date as the Supreme Court sentence.

[50] In any event, if I am wrong in my analysis of how the Court applies s 53(2), the way it was applied by the sentencing Judge was to the appellant's benefit.

[51] While errors have been identified, in my view, no substantial injustice has actually occurred and the appeal will be dismissed pursuant to s 177(2)(f) of the *Local Court* (*Criminal Procedure*) *Act*.

[52] Even if I re-sentenced the appellant, I cannot envisage passing a total effective term that differs materially from the Local Court sentence. The appellant was fortunate that no application was made under s 42 of the *Sentencing Act* given his circumstances appear to have 'materially altered' since the suspended sentence was imposed. On re-sentencing, the one year portion held in suspense would require re-consideration under s 42.

Application to dispense with the time limitation to file the Notice of Appeal

[53] The appellant commenced the appeal well out of time, close to 4 months outside of the 28 day period. Initially the Crown opposed the application to dispense with the 28 day requirement. In the circumstances, given the limited information provided, such a position was reasonable.

[54] At the hearing of the appeal the Crown was neutral on the question of the application under s 165 of the *Local Court (Criminal Procedure) Act*, which permits the Court to dispense with compliance of any condition precedent to the right of appeal, if in its opinion, the applicant has done whatever is reasonably practicable to comply with the Act. The change in position was understandable given further material tendered at the hearing.

[55] Initially before the Court was one affidavit filed by the Northern Territory Legal Aid Commission (NTLAC) covering the period of time when the appeal papers were forwarded from the North Australian Justice Agency (NAAJA) to the NTLAC. At the time of the transfer of the file to NTLAC, the appeal was already out of time. Further processes were required by NTLAC to approve a grant of aid for the appeal. Those processes are comprehensively detailed in the affidavit of Jacob Henderson promised on the 10th day of September 2024. On the day of the appeal hearing, counsel for the appellant filed two further affidavits, one from Daniel Thomas, the current appeals practice manager employed by NAAJA and one from Elizabeth Logan, at the relevant time a locum lawyer at NAAJA. Mr Thomas was not in the appeals practice manager position at the relevant time.

[56] It is clear from the contents of the combination of those affidavits that the appellant gave instructions to appeal immediately after he was sentenced. He was told NAAJA would file an appeal on his behalf if they considered the appeal arguable. The then acting manager of the criminal section was notified by email and a number of other NAAJA practitioners were notified

by email of the appellant's instructions. Ms Logan believed she had put the process in motion at NAAJA before she left the employment of NAAJA. Mr Thomas, as the current appeals practice manager did not become aware of the appellants' files until the middle of March 2024, well after the limitation period. Mr Thomas first held the position of appeals practice manager well after the limitation period so did not have knowledge of the intention to appeal before time ran.

[57] In circumstances where the appellant was in custody and had given clear instructions that he wanted to appeal at the time of the sentence, and given there were errors identified, albeit not to the extent that a substantial miscarriage of justice occurred, it is appropriate to dispense with the time requirement in which to appeal under s 172(2).

Orders

1. Compliance with the time in which to appeal is dispensed with pursuant to s 165 of the *Local Court* (*Criminal Procedure*) *Act*.
2. The appeal is dismissed.
3. These reasons will be forwarded to counsel via email on 31st October 2024.
4. The reasons will be published on the Court website on 4 November 2024.
