CITATION:	*Court v Armstrong* [2019] NTSC 38
PARTIES:	COURT, Michael v ARMSTRONG, Rohan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 3 and LCA 4 of 2019 (21812446 and 21848910)
DELIVERED:	30 May 2019
HEARING DATE:	28 May 2019
JUDGMENT OF:	Mildren AJ

CATCHWORDS:

CRIMINAL LAW - APPEAL AGAINST SENTENCE BY PROSECUTION - appeal across two separate files by one notice - whether one notice of appeal required or two - failure to institute separate appeal notices - power to dispense with compliance of condition precedent to right of appeal - relevant circumstances - applicant did not do what was reasonably practical - leave to amend notice of appeal confined to one matter of appeal granted.

CRIMINAL LAW- APPEAL AGAINST SENTENCE BY PROSECUTION - whether sentences imposed manifestly inadequate - problems involving mandatory minimum sentences where multiple offences - appeal allowed- respondent resentenced.

Local Court (Criminal Procedure) Act 1928 (NT) s. 120, 121A, 131A, 165, 171(1), s. 172(1), 172(3), 175.

Criminal Code (NT) s. 3 52(1), 52(3), 78B, 78C, 78CA(3), 78DD(1), 78DD(2), 188.

Anzac v Flynn [2019] NTSC 8, *Bugmy v The Queen* (2012) 249 CLR 571, *Court v Magtibay* [2019] NTSC 12, *Elliott v Harris (No 2)* (1976) 13 SASR 516, *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8, *Lawrie v Stokes* (1951)

NTJ 65, *Mill v The Queen* (1988) 166 CLR 59, *Osmasich v Evans* [1970] SASR 60, *R v Mills* [1998] 4 VR 241, *R v Osenkowski* (1982) 30 SASR 212, *Reilly v Baker* (1989) 99 FLR 52, *Samuels v Leech* [1970] SASR 60, *The Queen v Mossman* [2017] NTCCA 6, *The Queen v Roe* [2017] NTCCA 7, *Warford v Firth* [2017] NTSC 75 referred to.

REPRESENTATION:

Counsel:

Appellant:	S. Lapinski
Respondent:	C. Dane

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Mil19554
Number of pages:	22

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Court v Armstrong [2019] NTSC 38
LCA 3 and LCA 4 of 2019 (21812446 and 21848910)

BETWEEN:

MICHAEL COURT
Appellant

AND:

ROHAN ARMSTRONG
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 30 May 2019)

[1] The respondent was charged in relation to matter no 21812446 with one count of aggravated assault contrary to s. 188(1) and (2)(a) and (b) of the *Criminal Code* and with one count of menacing or intimidating or threatening to do injury or cause detriment to a person involved in an ongoing investigation, contrary to s.103A(1) of the Code.

[2] In relation to matter no 21848910 the respondent was charged with 7 counts as follows:

- One count of breach of a domestic violence order;
- One count of breach of bail;
- Two counts of aggravated assault;
- One count of aggravated unlawful entry of a dwelling house; and
- Two counts of causing damage to property.

[3] The learned sentencing Judge convicted the respondent of all charges and imposed the following sentences:

(1) In relation to matter no. 21812446, an aggregate sentence of imprisonment for 3 months.

(2) In relation to matter 21848910:

Count 1: Breach of the domestic violence order: imprisonment for 14 days.

Count 2: Breach of bail: 5 days to be served concurrently.

Count 3: Aggravated assault on Ms. McCormack: 3 months cumulative on counts 1 and 2.

Count 4: Aggravated unlawful entry 2 months cumulative (presumably on count 3);

Count 5: Damage to property: 1 month concurrent (presumably with count 4);

Count 6: Aggravated assault on a young girl (Campbell): 4 months, 2 months of which is to be served cumulatively (presumably on count 4);

Count 7: Damage to property: 28 days, 14 days of which was cumulative (presumably on count 6).

This amounted (so His Honour said[1]) to a total sentence of 8 months and 28 days, cumulative on the 3 month sentence imposed in relation to matter number 21812446, giving a total effective sentence of 11 months and 28 days, backdated to commence on 24 November 2018.

[4] However, the sentences imposed only totalled 7 months and 28 days. Despite this, the warrant of commitment which his Honour approved provided that count 5 was ordered to be cumulative on count 4 despite the transcript showing that it was ordered to be concurrent. His Honour's notations on the file indicate that this was changed from 1 month concurrent to 1 month cumulative.

[5] His Honour then ordered that the respondent be released after serving 6 months and 28 days and fixed an operative period of 2 years from the date of the

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1 Tr p 31.

respondent's release on certain conditions. Implicit in his Honour's order is that the balance of the total sentence, which was 5 months, was held in suspense.

The Notice of Appeal - a preliminary issue

[6] The appellant purported to appeal against all of the sentences in a single notice of appeal which referred to both file numbers. The grounds of appeal as originally contained in the notice complained that the learned judge had erred in imposing an aggregate sentence in relation to both of the counts in relation to file number 21812446. This was because the *Sentencing Act* did not permit an aggregate sentence to be imposed when one of the matters was a violent offence. By a somewhat tortious process the Act makes clear that an offence against s 188, other than in the circumstances mentioned in s 188(2)(k), is a violent offence for the purposes of s 52: see s 3 definition of "violent offence" which refers to s 78C, which in turn refers to an offence against a provision of the *Criminal Code* listed in Schedule 2, which in turn refers to s 188 except for the circumstances mentioned in s 188(2)(k). Furthermore, the two charges in this file were not contained in the same information. For both of these reasons an aggregate sentence was not possible: see *Sentencing Act*, s 52(1) and 52(3).

[7] The second ground of appeal was that the total sentence imposed was manifestly inadequate. The intention was to refer to the total effective sentence of 11 months and 28 days imposed across both files.

[8] After hearing submissions, I ruled that there was only one notice of appeal filed and that there should have been two. I called upon the appellant to elect as to which of the two files he intended to appeal. The appellant elected to appeal file number 21848910 and sought leave to amend the notice of appeal. Leave was granted. I gave short reasons as the time for this ruling. What follows are my reasons in more detail that I gave orally.

[9] Objection was taken by Mr. Dane, counsel for the respondent, that the notice of appeal was bad because only one notice of appeal was filed, whereas there should have been separate notices of appeal filed for each file. Furthermore, the

charges on file number 21812446 were laid on separate information, and the charges in relation to file number 21848910 were contained in an information and a complaint. In order for an appeal to be validly lodged, *The Local Court (Criminal Procedure) Act*, s 172(3), requires two copies of a notice of appeal to be lodged with the Local Court. In practice the Local Court insists on 4 copies, one for its own file, one to be forwarded to the Supreme Court pursuant to s 175 of that Act, one for the appellant's file and one for service. What appears to have happened is that a clerk from the DPP's office was sent to the Local Court with the four copies of the Notice of Appeal. What happened next is vague but in fact the Local Court registry sealed one copy and made photocopies of that notice. When the notices were sent to the Supreme Court with the other documentation required by s 175 of the Act, this Court received separate notices for both matters and two copies of the notice of appeal, one for each matter, one being a photocopy of the other. In those circumstances I am satisfied that only one notice of appeal was filed in the Local Court, and not two.

[10] There is authority of this Court that when an appeal is lodged in relation to a matter where the Local Court has dealt with more than one complaint at the same time, there must be separate notices of appeal in relation to each matter of complaint[2]. In *Warford v Firth*, Southwood J. observed that there should at least be separate notices of appeal for charges on complaint and charges on information[3]. However, the authority is not all one way. In *Reilly v Baker*[4] there is dicta by Kearney J that where more than one complaint is heard together and it is desired to appeal against either sentence or conviction in relation to more than one offence involving more than one complaint, only one notice of appeal is necessary. His Honour referred to the decision of the Full Court of the Supreme Court of South Australia in *Elliot v Harris (No2)*[5] *Samuels v Leech*[6] per Hogarth

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2 *Lawrie v Stokes* (1951) NTJ 65 at 79 per Kriewaldt J; *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8 at 12 per Asche J; *Warford v Firth* [2017] NTSC 75 at [4] per Southwood J.

3 See footnote 2.

4 (1989) 99 FLR 52 at 55.

5 (1976) 13 SASR 516.

6 [1970] SASR 60.

J and *Osmasich v Evans*[7]. However, it seems to me that where there are quite distinct matters, the subject of two separate Local Court files, and those matters are not connected as arising out of the same circumstances or form or are part of a series of offences of the same or a similar character[8] the position is different, and if it is desired to appeal each of the sentences, at least two notices of appeal are necessary. As Bray CJ said in *Elliott v Harris* (*No.2)*[9]:

> Indeed, in some cases, as if there were absolutely no nexus at all between the various convictions, it might be an abuse of process of the court if there were not several notices.

[11] Apart from the fact that there is a common victim involved in the assaults on both files, there is no other nexus. The matters dealt with in file number 21812446 arose out of events which occurred in early January 2018 in a public place in both instances. The motive was the respondent's jealousy. The matters dealt with in file number 21848910 occurred on 24 November 2018 in the private home of another person. The offences are separated by a considerable period of time. The motive in relation to the November offences is unclear. It appears to have been related to a breakdown in the relationship between the respondent and the complainant. The offences had not been joined in the same information but there were 3 separate informations across the two files. In these circumstances there needed to be at least two separate notices of appeal.

[12] It is well established that lodging a notice of appeal within the time limited by s 171 of the *Local Court (Criminal Procedure) Act* is a condition precedent to a valid notice of appeal.[10] The time may be extended under s 171(2) in certain circumstances but that does not apply here. Alternatively, there is power under s 165 of the Act to dispense with compliance if "the appellant has done whatever is reasonably practicable to comply with this Act". I fail to see how the appellant is able to establish that it did everything reasonably practicable. The position in

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7 (1980) 25 SASR 481.

8 See *Local Court (Criminal Procedure) Act* s.s51 91) and 101A(1).

9 At 519.

10 *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8 at 10; *Anzac v Flynn* [2019] NTSC 8 at [5] per Barr J and cases there cited.

this case is not greatly different from the position of the prosecutor in *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd*[11]. As Asche J (as he then was) said in that case, any delay must be explained in terms which show that the appellant exercised all reasonable caution and expedition which would be expected of a reasonable person desiring to appeal and who knows or who should know of the limitations of time relating to appeals. The same might be said of the necessity for separate notices of appeal having regard to the longstanding authority of this Court. The most that can be said is that the counsel who prepared the notice of appeal, and his superior who signed the notice, did not turn their minds to the problem.

[13] This left only one remedy open. The Court has power to amend the notice of appeal to delete all reference to one or other of the two files and to confine the appeal accordingly[12]. Counsel for the appellant indicated that he would confine his appeal to the matters dealt with in relation to the November offending on the information only. Counsel for the appellant also sought leave to further amend the notice of appeal to alter the grounds of appeal so that it would read that the sentences imposed in relation to this matter were manifestly inadequate, and to raise as a separate ground that the decision to suspend the sentences after the appellant had served 6 months was manifestly inadequate and I granted leave accordingly, as the application was not opposed.

The facts as found by the sentencing Judge: matter 21812446

[14] Although not now the subject of appeal, I think it is relevant to state the facts relating to this matter bearing in mind that they have some relevance to the other matter. On 6 January 2018 the respondent assaulted Josie McCormack who was the mother of the respondent's 2 year old child. The woman and the respondent had separated some time previously. At the time that the child was born, the respondent was living in Western Australia and had never been in trouble before. The respondent had had a very difficult upbringing. Some family members

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11 (1987) 47 NTR 8 at 14-18.

12 *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8 at 12

arranged for the respondent to be sent to Western Australia for schooling and also to engage in a Clontarf program to encourage his capacity as a footballer. After he had finished year 12 and obtained some certificates the respondent became employed and was "travelling very well in life with good prospects". He decided to return to Alice Springs because Ms. McCormack had fallen pregnant with the child. He came to Alice Springs without a job.

[15] I pause here to note that the evidence was that the respondent was born on 18 May 1998. As of 6 January 2018, he was aged 19. He had been in an off and on relationship with Ms McCormack for 4 years, i.e. since he was aged 15. The child was born when he was aged 17 given that it was aged 2 in January 2018. According to Exhibit P3, Ms. McCormack was then aged 21 having been born on 2 November 1996.

[16] At 4am on 6 January 2019, Ms. McCormack was sitting on a rock outside of Hungry Jacks with two friends. The respondent approached her and asked: "Are you seeing anyone else?" She replied that this was none of his business. The respondent then struck her numerous times to her head and body with his fists, causing her to fall off the rock onto the ground. Her friends told the respondent to stop, but he kicked her in the head, causing her to become dazed and disoriented for a few moments. When she recovered, she crawled away but her dizziness prevented her from standing. The police were called. Ms. McCormack told the police that she had been assaulted. Ms. McCormack was later taken to the Alice Springs hospital for medical treatment. She sustained a 5 cm laceration to her forehead which was too shallow to suture and so steri-strips were applied. Tenderness was also noted around the head. There was also general forehead swelling. She later refused to provide the police with a statement. The learned Judge said that she refused to make a statement because she did not want the trouble that would follow and she would not get a great deal of support if she did make the statement.[13]

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13 The facts in this sentence are not in a copy of the agreed facts on the Local Court file nor was this read onto the transcript when the agreed facts were tendered, but they are noted in handwriting on another

[17] A couple of days later, the respondent approached Ms McCormack and threatened her that if she ever gave a statement to the police about being assaulted, he would flog her in front of their two year old son.

[18] The respondent was arrested on 18 March 2018 in relation to a separate assault matter upon Ms. McCormack being matter number 21812448 which occurred on that day. On 19 March 2018 bail was granted on condition that the respondent not approach Ms. McCormack directly or indirectly.

Matter number 21812448

[19] Although this file is not the subject of appeal either, it is relevant to the sentences imposed in relation to the file which is under appeal. This file dealt with two charges. First, an aggravated assault on Ms. McCormack on 18 March 2018. Secondly a charge of engaging in conduct that endangered the occupant of a motor vehicle, contrary to s 180A of the *Criminal Code*. Briefly, the facts were that the respondent assaulted Ms. McCormack on the road between Beaurepaires and Hungry Jacks. He got the victim on the ground, stuck his fingers in her eyes and bit her on the face and arm. He then threw a rock at the car of a civilian who attempted to intervene, breaking the back window. Police attended and arrested the respondent. Ms. McCormack then provided two statements to the police; the first related to the assault on 6 January and the second the assault on 18 March. As a result, the respondent was served with a domestic violence order which prohibited him from having any contact, directly, or indirectly with the victim. Only part of this information is referred to in the transcript when the agreed facts in relation to matter number 21848910 were read out. Some of the information is contained in the respondent's Information for Courts Exhibit P1. The facts constituting this offending were not referred to by counsel in the lower court, and no documents were tendered in relation to it other than the Information for Courts. They were provided by the appellant in the appellant's written submissions, but also referred to by the sentencing Judge in the following terms:

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copy of the statement of facts marked as P1. I assume that this was an inference drawn by the learned Judge when he passed sentence.

> …on the 18th March you assaulted her again. You had already indicated to the court that you weren't going to plead guilty to the assault on the 6th January. And on the 18th March again you indicated to the court that you weren't going to plead guilty. You weren't taking any responsibility for these matters. You had your legal advisors adjourn these matters including because you didn't go to court.[14] And they didn't come up for hearing for some time.
>
> The 18th March matter didn't come up for hearing until August. And in fact it was a hearing and you were found guilty. Not only did you assault her badly outside Hungry Jacks, you also threatened and endangered the occupants of a motor vehicle. That was an innocent bystander, a man who got out of his car to try to stop you as you were hovering over Ms McCormack assaulting her on the ground. You threatened him with assault, the usual threat. "What are you looking at?" expletive. He got in his car and you threw rocks at it. You disputed all that. It went to hearing and you were found guilty.
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> So the 6th of January remained in abeyance. It wasn't until after that hearing. Her hearing was set for 3rd December. One has got to understand why it is of which there is no explicable answer as to why the second matter was heard before the first matter. And you remained on bail all that time. You remained on bail for the first matter. You assaulted her again. You remained on bail for the first and second matter after you had been sentenced and you assaulted her a third time. The law and more than the law has let this woman down significantly.

[20] I can only infer that the sentencing judge either read file number 21812448, or he was also the Judge who dealt with that matter at the time. Apparently the respondent received a community work order of 140 hours of community service which he completed after a contested hearing in August.[15]

The facts in relation to matter 21848910

[21] The agreed facts in relation to this matter were that on 22 September 2018, the respondent had been served with the domestic violence order which included conditions that he was not to approach Ms. McCormack when consuming alcohol or when under the influence of alcohol and was restrained from causing harm or attempting to cause harm to her. He had also been granted bail on matter

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14 The file indicates that on 30 July 2018 the respondent did not appear and a warrant was issued. It was recalled later the same day and bail granted on the same terms and conditions.

15 Tr p 11 and the appellant's list of convictions.

number 21812446 with a condition that he not contact Ms. McCormack directly or indirectly. That matter was listed for hearing on 3 December 2018.

[22] At approximately 3am on Saturday, 24 November 2018, Ms. McCormack and her 13 year old niece Kristy-Lee Coulthard-Campbell, (Campbell), attended a social gathering at Trucking Yards Camp, Alice Springs. The respondent was already there when they arrived. The respondent and Ms. McCormack later became involved in an argument which caused her and Campbell to leave. They returned to their home at 16 Warber Court and went to bed. That property was owned by 50 year old Adam Holme, who is Ms. McCormack's foster parent.

[23] At about 8.30am the respondent called the home phone number. It was answered by Mr. Holme. He was asked if Ms. McCormack was at home and he said she was. The respondent then ended the call.

[24] About 10 minutes later, the respondent arrived at the premises and kicked the locked front door causing it to break open. He walked into the kitchen in the direction of McCormack's bedroom. Holme confronted him and requested that he leave immediately. The respondent ignored this and continued on towards McCormack's bedroom. He kicked in the locked bedroom door and started to punch McCormack to the head and upper body while she was lying asleep in bed. Holme attempted to intervene but he was pushed away. The respondent grabbed McCormack by the hair and dragged her off the bed onto the floor. She screamed in pain and fear. The respondent kicked her in the face as he yelled at her[16]. Holme again attempted to intervene and both he and the respondent fell to the floor. Whilst on the floor, the respondent interlocked his legs around McCormack's legs. He twisted her right ankle with such force that she feared that her ankle would break. He then stood up and kicked her whilst she lay defenceless on the floor. Campbell and Mrs. Holme then entered the room. Campbell threw herself on top of McCormack in order to protect her. The

16 In his Honour's sentencing remarks he finds that the respondent said "I'm going to kill you." This is not in the agreed facts P1, but is in another copy of the Agreed Facts (not marked as an exhibit) which is on the file. I have decided to ignore this. It appears that the agreed facts were sent to the Court before the hearing, but later amended to delete reference to this so that when the agreed facts were tendered, these words were deleted.

respondent pushed Campbell off. Then Holme and his wife grabbed hold of the respondent who yelled "Just shoot me". He then walked out of the room and he punched a mirror attached to a hallway dresser causing it to smash. He then picked up two ornaments and threw them onto the floor, causing them to smash, then walked out of the front door.

[25] Once outside, the respondent turned around and began to walk back towards the residence. Holme slammed the door shut and barricaded it. The respondent became enraged, picked up several pot plants and threw them at a number of windows causing seven windows to smash. He also smashed the windscreen and the front passenger side window of a Holden Commodore sedan owned by Holme. As this was happening, police arrived and he was arrested. He was later taken to the hospital to have lacerations caused to his hands and wrists when he punched the mirror, treated. Police observed that he was under the influence of alcohol. He refused to submit to a breath test. McCormack was taken to hospital. She suffered bruising and swelling to her face and upper body and pain to her right ankle and left wrist. Campbell suffered pain to her right arm and back. The respondent declined to participate in an EROI.

[26] A victim impact statement signed by Holme was tendered as exhibit P2 He stated that to witness such violence on an unprotected woman and young girl was very distressing. He was physically exhausted from trying to prevent the respondent from trying to bash McCormack. He was very shaken up by the respondent's behaviour. He described the cost of the damage caused by the respondent as being $3000-$5000 to replace the window glass, $550-$1000 to replace the car windows, $250 for a vacuum cleaner to clean up indoors, $200 for the broken dresser and $500 to hire a car for 2 days. No quotations were tendered to support these estimates. No victim impact statement was tendered in relation to the other victims. Counsel for the respondent offered to make restitution once the respondent obtained employment. No order for restitution was made.

Counsel for the respondent's submissions in the court below

[27] First, counsel submitted that the plea in relation to the November offending was indicated on the first occasion it was brought before the Court. The respondent at the time of this offending was aged 20 at the time of the November offending and 19 at the time of the January offending.

[28] The respondent was a 20 year old man of Aboriginal descent raised mainly by his grandmothers who lived at Jay Creek[17]. He is the second eldest of 5 children. His mother was an alcoholic and relied on family to look after her children. He did not have any contact with his father. His mother had care of him until he was aged 7. She moved around a lot and he was exposed as a young child to heavy drinking and associated violence. When he started to attend primary school he moved into the care of one of his father's sisters, which resulted in his being moved around between Hermannsburg, Ormiston, 8-Mile and Darwin. At aged 11 he lived with his grandmothers at Jay Creek. He was sent to Yirara College as a boarder and completed year 10. He did well at school. He was then assisted by his grandparents to attend the Clontarf football program in Perth where he completed year 12. He obtained a certificate II in engineering through the Clontarf Academy as part of his year 12 schooling, which gave him some skills in welding and construction work.

[29] He had met Ms. McCormack when returning home from school on holidays. They stayed in contact by telephone and he would see her whenever he returned to Alice Springs.

[30] He obtained employment with an aviation company after leaving school. When Ms. McCormack told him that she was pregnant, he returned to Alice Springs, initially living with his grandparents at Jay Creek. He then moved in with the Holme family where Ms. McCormack was residing. He obtained work as a

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17 The transcript refers to this as Jade Creek. I think this is a typo for Jay Creek.

labourer and later at the Bradshaw Primary School[18] as an after-hours carer at the Gap Youth Centre. The letter from the principal of the school indicated that he had known the respondent since he was a student at the school. In 2018 the respondent had begun working as a classroom tutor, as part of the education support team, and had carried out his duties effectively. He had worked effectively with students and staff and "worked well with some more challenging students, supporting them to calm down, self-regulate and re-engage in learning…He willingly took on additional responsibilities such as helping out on playground duty when staff were away. If it were possible Bradshaw would welcome [him] back to the team in a supported way."

[31] At some time in 2017 or early 2018, the relationship broke down. The respondent then moved into Stuart Lodge so that he could visit his son and attend to his employment.

[32] It was put on the respondent's behalf that before the January offending the respondent had no prior convictions, that he was disgusted with himself and that he wanted to do something to address his behaviour, particularly his anger and loss of control when dealing with his relationship breakdown when he was free to do so. It was also put that he was remorseful for the injuries and pain he caused to Ms. McCormack and Campbell.

[33] The respondent's counsel tendered a letter signed by Talitha Maher, Charlie Maher and Sharkira Armstrong who live in Port Macquarie, New South Wales. Charlie Maher is the respondent's uncle, and a Director of the Clontarf Foundation. Ms. Maher, who is also related to the respondent, is the Quality manager of the AAAC[19] based in Santa Teresa. She works off site at her home in Port Macquarie. It is not clear who Sharkira Armstrong is, but the context of the letter suggests that she is one of the respondent's sisters. The effect of the letter is that the respondent would be welcome to live with them on condition that he

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18 A letter was tendered from the principal of Bradshaw Primary School but this was not marked as an exhibit and not forwarded to this Court by the Local Court. By consent I have received a copy of the letter and placed it on the Court file and marked it as D1.

19 Atyenhenge-Atherre Aboriginal Corporation.

received regular counselling (which they would ensure was provided to him), and that they would assist him to provide him with work and support. In effect, the submission was made that the Court ought to partly suspend the sentences to be imposed to allow the respondent to move to Port Macquarie where he could undergo counselling, and that given his age and work history, with that kind of support, he had good prospects of rehabilitation. Requiring him as a condition of a suspended sentence to live in Port Macquarie would also provide protection for Ms McCormack.

Counsel for the appellant's submission in the court below.

[34] The main thrust of the appellant's submission was that the Court should impose a head sentence which was in the upper range of the Court's jurisdictional limit and fix a non-parole period because the Parole Board would be in a better position to determine whether the respondent had made any effort to change his behaviour by doing programs, and when it would be safe to release the respondent into the community. The prosecutor submitted that the offending was very serious, it was committed whilst on bail for similar offending and in defiance of a DVO, it involved violence on a young aboriginal woman and child when the respondent was drunk, the assault at the Holme's house was premeditated, it was manipulative, and that because of the seriousness of the offences, despite his youth, he should receive a sentence in a fashion more akin to that of an adult.

The judge's sentencing remarks

[35] His Honour dealt with the facts and submissions in great detail. It was not suggested that he made any factual errors or that he understated the seriousness of the offending. In relation to the question of whether or not to fix a non-parole period, his Honour said:

> I am not going to appoint a non-parole period for the very reason that it seems to me that if you're given parole there's a very good chance that you won't be allowed to leave the Territory and your rehabilitation is inextricably tied up with you living with Mr. and Mrs Maher in Lake (sic) Macquarie in New South Wales because they are offering you many things

> that you haven't had in the past. They already have your sister there. They are going to be able to provide you with an opportunity for employment. They are going to be able to engage you with the local community through employment and through sport which it is hoped you will take up again and you will play. It you are granted parole it is my understanding that wouldn't happen. And if you were left here in this community there would be some doubts about your rehabilitation.

Submissions on behalf of the appellant

[36] The appellant contends that the total sentence imposed of 8 months and 28 days imprisonment is manifestly inadequate. Where this ground is relied upon on a prosecution appeal, the authorities are clear that what must be shown is that the sentences imposed are so inadequate that they constitute the kind of manifest inadequacy or inconsistency in sentencing standards as to amount to an error in principle.[20] It has been said that the degree of inadequacy must be so disproportionate to the seriousness of the crime as to "shock the public conscience".[21] The same principles apply in the case of prosecution appeals from sentences imposed by the Local Court.[22]

[37] In relation to the aggravated assault in January, this was in point of time, the respondent's first offence. However, because he had already been convicted of the second aggravated assault in relation to matter number 21812448 at the time he was sentenced in relation to these matters, a mandatory minimum sentence of imprisonment of 3 months actual imprisonment which could not be suspended, was required by s 178CA(3) and s 78DD of the *Sentencing Act.*[23]

[38] I turn now to consider the sentences imposed in relation to the counts dealt with on matter number 21848910. No complaint is made with the individual sentences imposed in relation to counts 1 and 2. The submissions focused on the remaining counts, and the totality of the conduct in the light of the sentences imposed on the January offending and the March offending. The total effect of

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20 *The Queen v Mossman* [2017] NTCCA 6 at [8]; *The Queen v Roe* [2017] NTCCA 7 at [10]-[15].

21 *R v Osenkowski* (1982) 30 SASR 212 at 212-213 per King CJ, cited with approval in *The Queen v Mossman* [2017] NTCCA 6 at [10].

22 *Court v Magtibay* [2019] NTSC 12 per Grant CJ at para [3].

23 S 78DD (1)(b) of the *Sentencing Act* provides that s 78DD applies if the offender has previously been convicted of a violent offence *whenever committed.* (Emphasis mine).

the sentences imposed in relation to the events on 24 November 2018 resulted in sentences of 8 months and 28 days in the following circumstances:

- The respondent breached his conditions of bail and also the conditions of a domestic violence order which were designed to protect the victim from the very conduct which ensued that day;
- The respondent had only recently been sentenced for offending of a like nature against the same victim;
- The respondent's unlawful entry was premeditated because he had already telephoned to ensure that the victim was at home;
- His intent when breaking into the house was to assault the victim in circumstances of aggravation;
- The respondent used considerable violence to gain entry to the home, damaging the door locks as he did so;
- The respondent refused to leave when told to do so by Mr. Holme, the lawful occupant of the property.
- The respondent kicked in the victim's bedroom door to gain entry to where she was sleeping;
- The respondent assaulted the victim in circumstances of aggravation which included delivering a barrage of punches to her head and upper body, dragging her off the bed by the hair onto the floor, yelling at her and kicking her in the face causing bruising and swelling to her face and upper body and pain in her left ankle and right wrist and placing the victim in considerable fear;
- The respondent assaulted a 13 year old female child who had come to the rescue of the victim causing pain to her right arm and back;
- The respondent only desisted assaulting the victim because of the intervention of the child, and Mr. and Mrs. Holme;
- The respondent caused considerable damage to Mr. Holme's home and his car.

- The respondent caused considerable alarm to Mr. Holme and his wife who had previously permitted him to live in their home until he moved out following the breakdown of the relationship between the victim and the respondent.
- At the time, the respondent was heavily intoxicated.

[39] Counsel for the respondent submitted that the agreed facts referred to a "barrage of punches" to the victim which, although providing some sense as to the degree of violence used, was limited by its ambiguity. The prosecution had not proved the number of punches thrown by the respondent and the ambiguity ought not to be resolved in favour of the appellant. Whilst I accept that submission in principle, it is not uncommon for situations to arise where a number of punches were thrown but no-one, not even the victim, is able to be precise about how many. All one can do is say that there were a number of punches thrown in close proximity to one another at the time. In this case, the precise number of punches thrown is not significant.

[40] Counsel for the respondent submitted that there was no evidence that, when the respondent telephoned Mr. Holme's number, he had already formed an intention to assault the victim. However, I think that is a reasonable inference to be drawn from all of the circumstances.

[41] In his submissions, counsel for the respondent emphasised that the respondent was still very young and referred to the observations of Batt JA in *R v Mills*[24] to the effect that in the case of a youthful offender, rehabilitation is usually far more important than general deterrence because punishment may in fact lead to further offending. Rehabilitation is to be preferred because it is of benefit to the community. These observations, whilst relevant, have to be placed in context. The respondent had already been found guilty of an aggravated assault on the same victim and had been dealt with by a non-custodial sentence. He was on bail for the aggravated assault offence committed in January at the time of this offending and had a domestic violence order served on him. There is a limit to

24 [1998] 4 VR 235 at 241 per Batt JA, Phillips CJ and Charles JA concurring.

how much leniency can be afforded even to young offenders who have been warned by the courts that this type of behaviour will not be tolerated. That is not to say that the appellant's youth should be given no weight when fixing the head sentence. When considering whether or not to impose a non-parole period or a suspended sentence, matters personal to the offender are often, and usually, given more weight than in fixing the head sentence.

[42] It was submitted by the respondent that the respondent's lack of positive role models and exposure as a child to antisocial behaviour bears to some extent on his moral responsibility, citing *Bugmy v the Queen.*[25] Whilst the facts show that the respondent was exposed to violent drunkenness as a child up until the age of 7, thereafter he had loving support from his family who took great care to ensure that he had a good education and opportunities in life. In fact he did well at school, completed year 12 and obtained employment. Whilst I accept that early childhood experiences can have an effect which lasts into adulthood, to suggest that whatever effect his exposure to antisocial behaviour had on him did not materialise until he turned 19 seems unlikely.

[43] Counsel for the respondent submitted that, because the learned sentencing judge was required to impose individual sentences, his Honour was required to give effect to the fact that certain of the offences had common elements with others, and to take into account the totality principle which would entitle him to impose a lesser sentence in relation to an individual charge or charges than would otherwise be appropriate in order to reflect the fact that a number of sentences were being imposed: see *Mill v The Queen*[26]. Counsel for the appellant accepted this. Clearly the offending all arose out of a single course of conduct and for that reason the total head sentence rather than individual sentences had to be shown to be manifestly inadequate. The position is also complicated by the fact that each offence was also subject to mandatory sentencing requirements.

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25 (2012) 249 CLR 571 at 592-594, paragraphs [37] – [40].

26 (1988) 166 CLR 59 at 63; Anzac v Flynn [2019] NTSC 8 at [50] per Barr J.

[44] I agree with the appellant that this appalling behaviour required a significant total head-sentence in all of the circumstances, notwithstanding the matters put in mitigation by the respondent's counsel as to his future prospects of rehabilitation, his troubled early childhood, his youth and his early plea and remorse, in order to reflect the need for general deterrence, personal deterrence, denunciation by the Court and retribution. This Court has said many times that there needs to be a strong message sent to the community that violent drunken offending against defenceless females will not be tolerated. That it happened in this case by forcibly entering not only the home in which she was living but also by kicking in her bedroom door compounds the offending even more, as does the wanton damage to Mr. Holme's property. In these circumstances less weight should have been given to the respondent's prospects of rehabilitation than was apparently given when fixing the total head sentence. In my opinion the total sentence imposed was so inadequate as to amount to an error of principle. This will necessitate an adjustment to be made to the period held in suspense in order to comply with the mandatory minimum sentencing requirements. In my opinion a total head sentence of 2 years and 14 days, reduced to 18 months and 14 days to reflect the value of the plea, was warranted.

[45] I note in this respect that the sentences imposed by the learned Judge did not fully comply with the provisions of the *Sentencing Act* relating to mandatory minimum sentences when his Honour fixed the total period of the suspended sentence. Although not the subject of a specific ground of appeal, I raised this with counsel for the respondent who conceded that this was so, although his concession was not for the full amount of the problem. The problem arises in this fashion. His Honour imposed a sentence of 3 months in relation to both counts on the January indictment. That included a mandatory minimum actual sentence of three months which could not be suspended. He then dealt with the November offending and imposed a sentence of 14 days in relation to count 1. He did not say whether that was to be cumulative on the 3 month sentence for the January offending but the total of 8 months and 28 days total sentence across both files would indicate that that was his Honour's intention. Leaving aside the breach of

bail (count 2), his Honour then imposed a sentence of 3 months on count 3 cumulative on count 1 for the November offending. So far, there is a total sentence of 6 months and 14 days. The offender's sentences were suspended after six months. Next his Honour imposed on count 4 a sentence of 2 months cumulative on count 3 for the unlawful entry. However, count 4 is an aggravated property offence which cannot be wholly suspended[27], yet that is the effect of his Honour's order. Then his Honour imposed a sentence of 1 month in relation to count 5 which he ordered to be served cumulatively with count 4. That was also an aggravated property offence. As to count 6, his Honour imposed a sentence of 4 months, two months of which was cumulative on count 5. That was a sentence that required a mandatory minimum sentence of 3 months which could not be suspended, yet it was. Finally there was a sentence of 28 days on count 7, 14 days of which was ordered to be cumulative on count 6. This was another aggravated property offence which could not be wholly suspended, yet it was.

[46] I have some sympathy for the learned Judge who was not given any assistance by those appearing before him when dealing with the intricacies of the present mandatory sentencing regime, which can become a sentencer's nightmare in a case where there are multiple charges. The only way to arrive at a just sentence, when fixing the period to be served before being released on a suspended sentence may be, in cases such as the present, to impose a number of sentences to be served concurrently or partly concurrently in order to avoid the consequences of imposing an unreasonably long period of actual imprisonment, despite the fact that ordinary principles of sentencing might normally require that the sentences or some of them ought to be served cumulatively. However, I believe this approach is justified by the totality principle, which, as has been said, may in some cases require some individual sentences to be less than might otherwise properly be the case, or to be served concurrently with other sentences even though some cumulation would ordinarily be warranted.

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27 *Sentencing Act*, s.78B.

[47] I have upheld the appellant's contention that the total actual period to be served before being released on a suspended sentence is manifestly inadequate. In arriving at a longer period of actual imprisonment before the respondent is able to be released on a suspended sentence, I have had regard to all of the matters relevant to fixing the head sentence and reached the conclusion that the offending was too serious to result in release after only 6 months and 28 days. It was not contended on appeal that the respondent's sentence ought not to be suspended; the submission was that 6 months 28 days was manifestly inadequate.

Resentence

[48] The appellant is convicted on all counts and resentenced as follows:

1. File 21848910[28]

    Count 1. Imprisonment for 14 days backdated to 24 November 2018.

    Count 2. Imprisonment for 5 days to be served concurrently with count 3.

    Count 3. Imprisonment for 9 months to be served cumulatively on count 1.

    Count 4. Imprisonment for 10 months to be served cumulatively on count 3 as to 9 months.

    Count 5. Imprisonment for 6 months to be served concurrently with count 3.

    Count 6. Imprisonment for 4 months to be served concurrently on count 5

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28 Ss. 121 (6) and (7) of the *Domestic and Family Violence Act 2017* requires the other sentences imposed to be cumulative upon count 1. Ss. 78CA(3) and 78DD (2) of the *Sentencing Act* require mandatory minimum sentences of 3 months actual imprisonment for the aggravated assaults, albeit that they can be ordered to be served concurrently with other sentences under s.50 of the *Sentencing Act*. Therefore I have started with count 1 on file 21848910 and backdated it to ensure that it is served concurrently with the sentences imposed on file number 21812446. I have imposed sentences which attract mandatory minimum 3 months sentences starting with count 3 first, making each concurrent with one another. Then I have considered s.78B of the *Sentencing Act* which requires that there must be a sentence of imprisonment for an aggravated property offence (counts 4, 5 and 7) which cannot be wholly suspended, to ensure that that sentence is not ordered to be wholly suspended and fixed concurrency or part concurrency to take into account totality and also making allowance for those counts where there are common elements such as in counts 3, 4, 5 and 6. I have also had regard to the jurisdictional limits of the Local Court which are set out in the *Local Court (Criminal Procedure) Act*, ss 120. 121A and 131A. Although the solution in the end appears to be relatively simple, this is a very time-consuming, excessively complicated and difficult exercise only fit for a mathematician.

Count 7. Imprisonment for 3 months concurrently with count 4.

Total sentence is 18 months and 14 days. I order that the sentences be suspended after the respondent has served 9 months and 14 days on the same terms and conditions as was imposed by the Local Court.

[49] The formal orders of the Court are:

1. The appeal is allowed.

2. The respondent is resentenced in accordance with paragraph [48] of these reasons.
