CITATION:	*DF v Rigby* [2019] NTSC 46
PARTIES:	DF
	v
	RIGBY, Kerry Leanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 67 of 2018 (21816719)
DELIVERED ON:	17 June 2019
HEARING DATE:	27 May 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – JUDGMENT AND PUNISHMENT

Whether verdict unsafe and unsatisfactory – application of force not reasonably needed for common intercourse of life – evidence insufficient to find sexual connotation beyond reasonable doubt – appeal allowed in part – finding of guilt on circumstance of aggravation that victim indecently assaulted set aside – offender resentenced.

Criminal Code 1983 (NT), s 187, s 188

BD v The Queen [2017] NTCCA 2, *Beer v McCann; Ex parte McCann* [1993] 1 Qd R 25, *Boughey v The Queen* (1986) 161 CLR 10, *Bowden v Hales* [2001] NTSC 96, *Case Stated by Director of Public Prosecutions (SA) (No 1 of 1993)* (1993) 66 A Crim R 259, *Dennis v Davis* [2010] NTSC 35, *Drago v The Queen* (1992) 8 WAR 488, *Hall v Rigby* [2018] NTCA 12, *Harkin v R* (1989) 38 A Crim R 296, *Horan v Ferguson* [1995] 2 Qd R 490, *R v Coombes* [1961] Crim LR 54, *R v Court* [1989] AC 28, *R v George*

[1956] Crim LR 52, *R v RL* [2009] VSCA 95, *Theisinger v Rigby* [2018] NTCA 8, *The Queen v Phillips* (1971) 45 ALJR 467, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Ker
Respondent:	I Rowbottam

Solicitors:

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

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

DF v Rigby [2019] NTSC 46
LCA 67 of 2018 (21816719)

BETWEEN:

DF
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 17 June 2019)

[1] This is an appeal against a finding of guilt for the offence of aggravated assault made by the Local Court. The sole ground of appeal is that the finding was unsafe and unsatisfactory. The two issues presenting for consideration are whether the force was applied and reasonably needed for the common intercourse of life, and whether the aggravating circumstance of indecency was made out.

[2] The terms of the charge were that on 14 April 2018 at Humpty Doo in the Northern Territory of Australia the appellant unlawfully assaulted his son contrary to s 188(1) of the *Criminal Code 1983* (NT), and the assault involved the following circumstances of aggravation:

(a) that the victim suffered harm (*Criminal Code*, s 188(2)(a));

(b) that the victim was under the age of 16 years, namely seven years of age, and the offender was an adult (*Criminal Code*, s 188(2)(c));

(c) that the victim was unable due to infirmity effectually to defend himself (*Criminal Code*, s 188(2)(d)); and

(d) that the victim was indecently assaulted (*Criminal Code*, s 188(2)(k)).

[3] Following a hearing which proceeded over three separate days, on 19 November 2018 the trial judge found the appellant guilty of the assault and each of the circumstances of aggravation. The appellant was sentenced to imprisonment for four months, backdated to commence on 30 October 2018 to take into account time already served on remand. The sentence was suspended forthwith subject to an operational period of 12 months.

The evidence at trial

[4] The substance of the Crown case was that the appellant had bitten his seven-year-old son on his naked buttocks on the morning of 14 April 2018, causing him pain, markings and abrasions. The markings were observed by the child's mother immediately after the incident and the grazes were observed on medical examination approximately 18 hours later. The child suffers from cerebral palsy with the consequence of decreased muscle tone and abnormal movements and posture of the

limbs. He has limited mobility as a result and requires assistance with toileting and other tasks.

[5] The child's mother gave evidence during the course of the trial. She said she had slept with the child on the night of 13 April 2018 because the appellant had been drinking that evening. The appellant recommenced drinking the following morning. They began arguing about various matters, including his drinking. The appellant then said, "I want some privacy" and took the child from his chair into the bedroom shared by his parents. The child was naked at the time. The mother was concerned. She went to listen at the door, but heard nothing and returned to the lounge room. Ten minutes later she heard the child screaming and asking the appellant to stop. She ran into the bedroom and saw the child lying on the ground with the appellant biting him on the buttocks. The appellant said, "Your mum come and save you". She told the appellant to stop, but he did not do so until she intervened and took the child from the room. When she saw the red marks on the child's buttocks she took images and asked the child what had happened in the room.

[6] Videos taken by the child's mother on her phone show that on the morning in question the appellant was unsteady on his feet and slurring his words. They show the appellant was upset at the time he took the child from his chair to the parents' bedroom, and that the child was naked. They show that the child's right buttock is unmarked at that

time. The child did not ask to be taken to the toilet, and the appellant did not take the child to the toilet or to the child's bedroom. The video shows that after the incident the child was upset and crying and told his mother that the appellant had bitten him, would not stop, and had caused him pain.

[7] The child participated in a child forensic interview with police and gave unsworn evidence at the trial. During the course of the forensic interview the child gave an account in which the appellant removed him from the lounge room while he was eating, took him to the bedroom, put him on the floor and bit him on the buttocks. The child says that he said to the appellant, "Please stop biting" but the appellant "just keep going". He says the appellant bit him "a lot of times" so that it felt "like it is getting raw because he keep biting me and he didn't stop".

[8] The child was examined by a medical practitioner approximately 18 hours after the incident. That examination disclosed abrasions which may have been caused by a bite but which may also have had an innocent explanation.

[9] The appellant participated in a record of interview with police the day after the incident in which he admitted biting his son on the buttocks on one occasion, but as part of ordinary play and physical interaction between father and son. The appellant contended that the incident had

taken place on the evening of 13 April 2018 rather than the following morning. The appellant admitted he had been drinking but denied he was intoxicated. He agreed he had been arguing with his wife at the time and that he took the child to his bedroom in the course of that argument. He said his purpose in doing so was to take his son to the toilet to get him ready for bed in the child's room. He said that he gave his son a harmless bite on the bum while changing his nappy, and that his son was laughing. He said that he had then read the child a story and put him to bed. He denied the child was crying out and denied that his wife had entered the bedroom and witnessed him biting the child on the floor. He said the red marks apparent in the photographs were smack marks rather than bite marks. The appellant elected not to give evidence during the course of the trial.

[10] The trial judge rejected the appellant's account given in the record of interview on the basis of its inconsistency with the other evidence, and particularly the objective video evidence.

Unsafe and unsatisfactory

[11] The considerations which govern an appeal on this ground were described by the Court of Appeal in *Theisinger v Rigby* as follows:[1]

> The second ground of appeal is, in essence, that the findings of guilt made by the trial judge were unsafe and unsatisfactory. The function to be performed by an appellate court in determining an

1 *Theisinger v Rigby* [2018] NTCA 8 at [27]-[29].

appeal on that ground was described in *M v The Queen* (1994) 181 CLR 487 at 493 in the following terms:

> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

That question also governs the determination of an appeal on this ground from a summary trial by judge alone. The determination turns on the appeal court's own assessment of whether it was open to the tribunal below to be satisfied of the appellant's guilt to the criminal standard: see, for example, *GAX v The Queen* (2017) 344 ALR 489 at [25]; *M v The Queen* (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ; *SKA v The Queen* (2011) 243 CLR 400 at [11]-[14] (405-6) per French CJ, Gummow and Kiefel JJ. This is not to say that the appellate court must disregard the advantages in fact-finding which the trial judge enjoys by reason of hearing the evidence in its entirety and in its context, and having opportunity to assess the demeanour of the various witnesses while they are giving evidence. However, the approach properly taken in the event that the appeal court has some doubt on its own assessment of the evidence was described in *M v The Queen* (at 493) in the following terms:

> It is only where a jury's [or trial judge's] advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.

The matters which an appeal court may take into account in determining whether it was open on the evidence to be satisfied of guilt beyond reasonable doubt cannot be exhaustively catalogued. Sometimes the question may resolve to whether the particular dealing described in the evidence was capable in law of constituting the offence charged. In other cases, the question will be whether a lengthy delay in making complaint requires particular caution; whether there are material inconsistencies between the initial complaint(s) and the evidence given at trial; whether the surrounding circumstances suggest some ulterior purpose for a victim's account; whether a victim might be considered unreliable due to some impairment of memory or suggestibility; whether there is a real possibility that the victim's account was a reconstruction; whether collusion between a victim and some other interested party cannot be excluded beyond reasonable doubt; or whether there are internal inconsistencies in

the victim's evidence which necessarily give rise to a reasonable doubt.

[12] The nature of the test to be applied was subsequently described by the Court of Appeal in *Hall v Rigby*, a decision handed down later that year:[2]

> The legal principles which govern the consideration of such a ground of appeal are well established. The question which must be determined is one of fact, to be resolved by the appellate court making its *own independent assessment of the evidence* [*M v The Queen* [1994] HCA 63; 181 CLR 487]. Notwithstanding that there is evidence upon which a trial Judge might have convicted the appellant, the appellate court must nevertheless determine whether it would be dangerous in all the circumstances to allow the verdict to stand. The High Court has stated the question for consideration by the Court of appeal is [*Libke v The Queen* [2007] HCA 30; 230 CLR 559 at 596–7 [113] per Hayne J (with whom Gleeson CJ and Heydon J agreed)]:
>
> > […]whether it was *open* to the [trial Judge] to be satisfied of guilt beyond reasonable doubt, which is to say whether the [trial Judge] *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the [trial Judge] to be sufficient to preclude satisfaction of guilt to the requisite standard. (Footnotes omitted)

[13] The challenge to the finding of guilt has two limbs. The first is that the trial judge must have entertained a reasonable doubt that the application of force in this case went beyond what was used and reasonably needed for the common intercourse of life. The second basis for the challenge is that there must be reasonable doubt whether the assault was "indecent" in the relevant sense.

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2 *Hall v Rigby* [2018] NTCA 12 at [5].

The common intercourse of life

[14] Section 187 of the *Criminal Code* defines “assault” subject to a number of exceptions, including:

> … the application of force … that is used for and is reasonably needed for the common intercourse of life.[3]

[15] In *Boughey v The Queen*, the High Court described the operation of the analogue provision in the Tasmanian *Criminal Code* as follows:[4]

> Section 182(3) of the Code expressly deals with one of the circumstances which would, at common law, not suffice to constitute a common law battery. It excludes from an "assault" any "act which is reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse, and which is not disproportionate to the occasion". The effect of this provision is to exclude from an "assault", for the purposes of the Code, commonplace, intentional but non-hostile acts such as patting another on the shoulder to attract attention or pushing between others to alight from a crowded bus. Such acts are, if committed inoffensively, regarded by the common law as ordinary incidents of social intercourse which do not, without more, constitute battery.

[16] After considering the earlier decision in *The Queen v Phillips*[5], the Court went on to say:

> It follows that, properly understood, *Phillips* does not establish the general proposition that the intentional application of force to the person of an unwilling victim cannot constitute battery at common law or "assault" or "unlawful assault" under the Code unless it be accompanied or motivated by positive hostility or hostile intent on the part of the assailant towards the victim. Such hostility or hostile intent may well convert what might otherwise be

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3 *Criminal Code*, s 187(e).

4 *Boughey v The Queen* (1986) 161 CLR 10 at 24 per Mason, Wilson and Deane JJ (Gibbs CJ concurring).

5 *The Queen v Phillips* (1971) 45 ALJR 467.

> unobjectionable as reasonably necessary for the common intercourse of life into assault under the Code or, as *Phillips* illustrates, preclude an excuse or justification of assistance or rescue. In the present case, however, the applicant's action was neither in a rescue or assistance context nor reasonably necessary for the common intercourse of life.

[17] As *Boughey* describes, the provision excludes from the definition of assault physical contact which is the inevitable consequence of living and moving among people in society. That extends to conduct in the form of jostling in crowded places, even where unwelcome, and the sort of touching used to demonstrate friendship or get attention. It should also be accepted as extending to play between parents and children, including "roughhousing" within acceptable limits.

[18] There is no onus on the Crown to prove that the act in question was done with or motivated by animus towards the alleged victim. The level of tolerable contact or force will vary according to the social context. An adult touching a young person in a fashion which is not indecent in order to offer encouragement, guidance or direction would not amount to an assault.[6] On the other hand, any degree of non-consensual force between partners in sexual matters is unlawful.[7]

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6 *The Queen v Phillips* (1971) 45 ALJR 467. *Horan v Ferguson* [1995] 2 Qd R 490; *Beer v McCann; Ex parte McCann* [1993] 1 Qd R 25.

7 *Case Stated by Director of Public Prosecutions (SA) (No 1 of 1993)* (1993) 66 A Crim R 259.

[19] The decision in *Dennis v Davis* [2010] NTSC 35 from this Court provides an example of the application of the principle in context. There, Southwood J stated:[8]

> In my opinion the evidence of Miss TE is not sufficient to exclude the reasonable possibility that Miss TE was grabbed by accident or that it was reasonably necessary for the person who grabbed her to grab her on the waist as part of the common intercourse of life. The wave pool was in motion, it was crowded, the surface of the water was between Miss TE's waist and shoulder height, the grab was momentary and it occurred after she had been swept along by a wave, Miss TE did not see the person grab her, the person who may have grabbed her was on his knees and he said sorry as soon as she turned around. There is a reasonable possibility that the wave may have swept Miss TE into the path of the other person or that he may have lost his balance in the waves and grabbed her as a result or both.

[20] The appellant says that the determination of this issue involves two issues. The first question is whether there was a reasonable possibility that the force was used for the common intercourse of life, and, if so, the second question is whether there was a reasonable possibility that the force was reasonably needed for that purpose. That part of the appellant's submission should be accepted.[9] That flows from a plain and literal reading of the provision. It is also consistent with the concept as expressed in the Tasmanian equivalent, which speaks of an act which is "reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse and which is not

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8 *Dennis v Davis* [2010] NTSC 35 at [96]. See also *Bowden v Hales* [2001] NTSC 96 at [4].

9 For reasons discussed further below, it should not be accepted that the assessment will necessarily involve two stages in the temporal sense of determining, first, whether the force was applied for common intercourse and, secondly, whether at some time after the initial application of the force it became disproportionate to that purpose.

disproportionate to the occasion". The test is one of purpose and proportionality.

[21] The evidence in this case left open the possibility that the appellant's initial interaction with his son on that morning was part of the common intercourse of life. That evidence included that the father had previously played with the son in that general physical manner, including "play" biting. That possibility is not excluded by the fact that at the time the appellant was intoxicated and arguing with his wife. Nor is it excluded by the fact that his purpose in taking the child to the bedroom was not to assist in his toileting or to get him ready for bed. However, those matters do provide context for the enquiry into proportionality.

[22] While it may be possible that the force was used as part of play, and was intended as such, the evidence did not leave open any reasonable possibility that the force ultimately applied by the appellant was proportionate to the occasion or reasonably needed for that purpose. So much is apparent from the combination of the child's cries for the appellant to stop (even allowing for the fact that the mother responded swiftly to those cries); the child's distress at the time the mother intervened and shortly thereafter; the child's account of the event; and the markings. It is not necessarily a question, as counsel for the appellant puts it, of whether sufficient time elapsed to convert a lawful act into an unlawful one. A single act may simultaneously be used for

the common intercourse of life but disproportionate to that purpose. Even if one accepts that the appellant inflicted only a single bite on the child, this was such a case.

[23] For these reasons, this limb of the challenge to conviction must fail.

The aggravating circumstance of indecency

[24] The trial judge correctly observed that it was incumbent on the prosecution to prove that the act of touching was plainly and obviously indecent. That observation implicitly recognised that there was no evidence on which to find that the appellant had a sexual motive or purpose for the act.[10] That matter was conceded by the prosecution during the course of the trial. The touching in this case was biting the child on his naked buttocks. The trial judge found that in order to constitute indecency the touching had to have a "sexual connotation". While acknowledging that touching certain parts of the body such as the genitals and anus, or the breasts of a female, will be plainly and obviously indecent, the trial judge observed that the touching need not be directed to one of those areas in order to be capable of that characterisation.

[25] The trial judge then rejected the defence submission that touching the buttocks of a young child does not carry any sexual connotation. The rejection of that argument drew a distinction between an adult

10 At one stage during his record of interview with police the appellant said words to the effect that he gave his son a bite on the bum while changing his nappy because his "bum … was cute".

smacking a child's bottom for disciplinary purposes and an adult biting a child's naked buttocks behind closed doors. The trial judge went on to observe that the child's physical disability also needed to be taken into account in determining the question of indecency. The ultimate finding that the victim was indecently assaulted was predicated on the following matters:

(a) the appellant was the child's biological father;

(b) the child was seven years of age;

(c) the child was naked;

(d) the biting occurred behind closed doors in the appellant's bedroom;

(e) the child was disabled in a manner which restricted his mobility;

(f) the child was bitten hard at least once on his right buttock, and more than once on other parts of his buttocks;

(g) the biting caused the child pain, sadness and confusion;

(h) the biting caused a red rash to form on the child's buttocks almost immediately; and

(i) the child was crying out and screaming during the assault.

[26] In reaching that conclusion, the trial judge made reference to the decision of the Court of Criminal Appeal in *BD v The Queen*.[11] That decision considered the meaning of indecency in the context of a

11 *BD v The Queen* [2017] NTCCA 2.

charge of indecently dealing with a child under the age of 16 years contrary to s 132(2)(a) of the *Criminal Code*. The Court concluded that the element of indecency required an element of sexual connotation or impropriety, rather than conduct simply unbecoming or offensive to common propriety. The same requirement applies to the aggravating circumstance of indecency in the offence of common assault. That is because the offence of assault involves the application of force to a person, which necessarily comprehends conduct involving the human body.[12] Different considerations might apply to legislation creating an offence by general language and with reference to any indecent act.

[27] In order to satisfy the element of indecency it is necessary to prove either that it was committed in circumstances of indecency by reason of the offender's motive or purpose, or that the dealing was inherently indecent in the sense of being plainly and obviously indecent. Those two different modes of proof were described by Nettle JA in *R v RL*:[13]

> There is also some authority for the proposition that, even where an assault is not such as unequivocally to offer a sexual connotation, it may still constitute an indecent assault if accompanied by an intention on the part of the assailant thereby to obtain sexual gratification.

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12 See, by analogy, *Drago v The Queen* (1992) 8 WAR 488 at 497 (per Nicholson J, Wallwork and Murray JJ concurring).

13 *R v RL* [2009] VSCA 95 at [9], citing *Harkin v R* (1989) 38 A Crim R 296 at 301; *R v George* [1956] Crim LR 52 at 53; *R v Coombes* [1961] Crim LR 54 at 55; cf *R v Culgan* (1898) 19 LR(NSW) 166 at 167; *R v Court* [1989] AC 28 at 33 and 42.

[28] As already described, the trial judge did not find any sexual motive or purpose.[14] The trial judge also correctly found that in order to be characterised as inherently indecent the conduct must carry a sexual connotation. The trial judge made express reference to the passage from *Harkin v R* to the effect that the sexual connotation: [15]

> … may derive directly from the areas of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are the relevant areas …

[29] The trial judge also made obvious reference to Lord Ackner's hypothetical example of an assault involving the removal of clothing which might also be characterised as patently indecent even where there was no contact with those areas of the body which might inherently give rise to a sexual connotation.[16]

[30] Having correctly stated the relevant test and principles, the factors identified by the trial judge were no doubt sufficient to characterise the conduct as abhorrent, disturbing and perverse. There can also be no doubt that the conduct was plainly unbecoming and offensive to common propriety. One might even conclude that the appellant was using the child as a proxy to vent his hostility towards the child's mother. However, the child's age, his relationship to the appellant, his

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14 *BD v The Queen* [2017] NTCCA 2 at [33]-[34].

15 *Harkin v R* (1989) 38 A Crim R 296 at 301.

16 *R v Court* [1989] AC 28 at 42–43.

disability, and the force of the bite and its impact on the child could not properly inform the question whether the conduct had a sexual connotation. The child's naked condition, the application of a bite to the buttocks in these circumstances, and the fact that it took place in the appellant's bedroom were not sufficient to give rise to a finding beyond reasonable doubt that there was a sexual connotation, either by themselves or in combination with the other factors. This is not to say that touching the buttocks of another person, be they child or adult, cannot be characterised as plainly and obviously indecent in some circumstances. It is only to say that those circumstances did not present in this case.

[31] For these reasons, the appeal against the finding that the assault was indecent must succeed.

Resentence

[32] The appellant was 34 years of age at the time of the trial in the Local Court. He was born in Broken Hill, his parents separated when he was approximately 18 months of age, and he spent a peripatetic childhood in the custody of his father. He had limited contact with his mother. His father remarried when he was seven years of age and he has a number of siblings. The appellant's instructions were that he had been subjected to some physical abuse during his childhood. Although his schooling was disrupted, he completed to year 12 level. Since leaving school the appellant has been consistently employed, mainly in the

retail industry. He suffered a back injury when he was approximately 20 years of age which has required continuing treatment and has sometimes interfered with his employment activity. That injury has been suggested as one cause for the appellant's problems with alcohol. The appellant had resumed employment at the time sentence was passed in the Local Court.

[33] The appellant was remanded in custody for this offending between 14 April and 11 May 2018 before being released on bail. The appellant had no prior convictions. The appellant had remained abstinent from alcohol from the time of the offending to the time of the trial before the Local Court. A reference was tendered attesting to his otherwise good character, and particularly in relation to his qualities as a parent.

[34] The appellant exercised his right to a trial and is not entitled to any reduction in sentence on account of a plea of guilty. It was suggested that the appellant's remorse was evident from the fact that he regretted the impact the offending had on his son, and sorely missed the separation from his son which had been forced by a domestic violence order made as a result of the incident. Those matters do not suggest any real insight on the part of the appellant into the criminality of his conduct, or remorse in the relevant sense.

[35] The essential circumstances of the offending have been described in the consideration of the appeal. Counsel for the appellant is correct in the

submission that this decision on appeal does not substantially disturb the factual basis for sentencing, but does alter the legal characterisation of the offending in the sense that there is no element of indecency. However, I cannot accept the submission that because there remained a reasonable possibility that the appellant's initial interaction with his son on that morning was part of the common intercourse of life, including any initial bites or biting, that the offending does not warrant the imposition of a term of imprisonment.

[36] As the trial judge found, the offence took place in an atmosphere of marital discord. The appellant was intoxicated at the time. Although these are not aggravating factors in the circumstances, they would have been emotionally confusing for the victim. As the appellant acknowledges, the offending constituted a breach of trust. The victim in this case was particularly vulnerable due to his disability. Apart from the minor physical harm done to the victim, it would no doubt have caused him emotional harm. The offending involved violence which caused the victim considerable distress. While counsel for the appellant describes the conduct as "transitory", the appellant did not desist until the physical intervention of victim's mother. The appellant has nobody but himself to blame for his offending behaviours. The application of disproportionate force in that manner and in those circumstances, although not indecent in the relevant sense, involved an element of perversity which elevates the need for personal deterrence.

The offender gave no real assistance to law enforcement authorities, and in fact gave an account to police which was misleading or untrue in a number of aspects. In all the circumstances, I have come to the conclusion that a term of imprisonment is called for.

Disposition

[37] Accordingly, I make the following orders:

1. The finding of guilt on the circumstance of aggravation that the victim was indecently assaulted is quashed.
2. The sentence to imprisonment for four months is quashed.
3. The appellant is sentenced to imprisonment for two months, backdated to commence on 30 October 2018 to take into account the time he served on remand, and suspended with effect from 27 November 2018 subject to an operational period of 12 months from that date for the purposes of ss 40(6) and 43 of the *Sentencing Act*.
