CITATION:	*Gibson v Firth & Harland* [2019] NTSC 26
PARTIES:	GIBSON, Martha v FIRTH, Justin and HARLAND, Maurice
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	LCA 62 of 2018 (21819931) and LCA 63 of 2018 (21841549)
DELIVERED:	26 April 2019
HEARING DATE:	11 March 2019
JUDGMENT OF:	Barr J

CATCHWORDS:

CRIMINAL LAW – Sentencing – appeal against sentence – guilty plea – recklessly endangering serious harm – head sentence 12 months, part of effective sentence of 13 months imprisonment, suspended after nine months – no order for supervision or other conditions – appellant contends sentencing judge erred in failing to order report as to suitability for supervision – held no requirement for such report – no intention to impose supervised suspended sentence – judge's discretion – no error of principle in not requesting supervision suitability report – no basis for re-sentencing – alternative contention that nine months actual imprisonment before suspension manifestly excessive – held sentence not manifestly excessive – appeal dismissed.

CRIMINAL LAW – Sentencing – appeal against sentence – breach of bail – failure to attend court in breach of bail undertaking – background of

uncharged ongoing breach of bail over many months – failure to participate in residential rehabilitation for which bail granted – sentence of imprisonment of one month – effectively fully suspended – manifest excess not established – appeal dismissed.

Mitchell v Gibson [2014] NTSC 59, distinguished.

Burrenjuck v Garner [1999] NTSC 66; *Tait v Bartley* (1979) 46 FLR 386; *Jambajimba v Dredge* (1985) 33 NTR 19; *Bartusevics v Fisher* (1973) 8 SASR 601, referred to.

Criminal Code, s 43AK(1), s 174D, s 174G(a)

Sentencing Act, s 103

Bail Act, s 37B

REPRESENTATION:

Counsel:

Appellant:	J R Murphy
Respondent:	D Jones

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Bar1905
Number of pages:	15

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gibson v Firth & Harland [2019] NTSC 26
No. LCA 62 of 2018 (21819931), LCA 63 of 2018 (21841549)

BETWEEN:

MARTHA GIBSON
Appellant

AND:

JUSTIN FIRTH and
MAURICE HARLAND
Respondents

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 26 April 2019)

[1] The appellant was charged on information that, on 3 May 2018, at Darwin, she engaged in conduct that gave rise to a danger of serious harm to a (named) female victim, being reckless as to the danger of serious harm to the victim arising from her (the appellant's) conduct, contrary to s 174D of the *Criminal Code*. The short form of the charge is 'recklessly endangering serious harm'.

[2] The maximum penalty for an offence contrary to s 174D is imprisonment for seven years, but for an 'aggravated offence' (in the present case, aggravated

by the use of an offensive weapon, a shard of glass), the maximum penalty was imprisonment for 10 years.[1]

[3] By her plea of guilty to the aggravated offence of *recklessly* endangering serious harm, the appellant admitted that she had been aware of a substantial risk that serious harm would result from her conduct and that, having regard to the circumstances known to her, it was unjustifiable for her to have taken the risk.[2] The definition of 'serious harm' includes harm that endangers or is likely to endanger a person's life or harm that is or is likely to be significant and long-standing.[3] In this case, the serious harm endangered was not life-threatening and so was in a less serious category of 'serious harm'. I refer to the actual harm caused in [8] to [11] below.

[4] On 8 November 2018, the appellant entered a plea of guilty and was sentenced to 12 months imprisonment, backdated to 8 September 2018, suspended after nine months without conditions. She appeals against that sentence.[4]

[5] The grounds of appeal, as amended, are as follows:

1. His Honour erred in not ordering a report of the Commissioner of Correctional Services as to the suitability of the appellant to be under supervision or, in the alternative, his Honour did not apply the sentencing principles relating to youthful offenders.

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1 s 174G(a) *Criminal Code*.
2 s 43AK(1) *Criminal Code*: reckless in relation to a result.
3 s 1 *Criminal Code*, definitions.
4 The appellant also appeared before the Local Court charged with three separate counts of breaching bail, in files 21823864, 21826057 and 21841549. The sentence of one month's imprisonment imposed in file 21841549 is also subject to appeal – see pars [36] to [39] below.

2. (Ground 1A) His Honour erred in failing to provide sufficient reasons for not ordering a report of the Commissioner of Correctional Services as to the suitability of the appellant to be under supervision.

3. By virtue of the order that the appellant serve nine months actual imprisonment, the sentence was manifestly excessive.

[6] In relation to the first and second grounds of appeal, consideration of a "report of the Commissioner of Correctional Services" is a requirement under s 103 *Sentencing Act*. Before a court may impose a supervised suspended sentence,[5] the court must have regard to a report of the Commissioner of Correctional Services as to the suitability of the offender to be under supervision. In a case where a court is considering imposing a sentence requiring supervision, the court must request such a report. The court may impose supervision even when the writer of the s 103 report assesses that an offender is not suitable for supervision. A court is not required to request a report for the purposes of s 103 if the court is not considering imposing a sentence involving supervision.

Facts of offending

[7] The appellant was born on 21 September 1994, and was 23 years and seven months old at the time of offending in May 2018. She is from the Binjari Community, outside Katherine, and had been living with her grandfather in public housing at John Stokes Square, Nightcliff. She had a limited record of prior offending as a youth: property damage in October 2009, and aggravated unlawful entry and property damage in March 2011. She had

5 In the words of s 103 *Sentencing Act*, "a sentence … that requires an offender to be under the supervision of a probation and parole officer".

been sentenced by the Katherine Youth Justice Court in March 2012 and required to carry out community work.

[8] The facts in relation to the offending in May 2018 were contained in a document tendered and read out in court. Some factual matters were then clarified by the prosecutor. In brief, the appellant and the victim, who was previously unknown to her, became involved in a verbal argument which led to a fist fight at the Nightcliff shops. The victim may have made some provocative remarks, in that the agreed facts stated "The victim was 'talking smart' to the [appellant]." Both women were affected by alcohol. The appellant went to walk away from the fight but when she was crossing Progress Drive to return to John Stokes Square, she picked up a shard of glass from the ground, and then went back to where the victim was standing. While holding the shard of glass in her right fist, the appellant punched the victim once to the jaw, and then with a downward movement cut the front of the victim's chest with the glass shard, causing a 15 cm laceration. The judge accepted that it was "not a one/two blow", but a continuous movement with a change of direction: "Holding the shard of glass in her closed fist she punched the woman and then ran her hand down ripping open the woman's right breast."[6]

[9] The cut penetrated the victim's breast tissue, but not into muscle. The areola and nipple were not affected. However, the victim suffered significant blood loss.

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6 Transcript 08/11/2018, pp. 15, 20.

[10] When police arrived at the scene, they found the victim collapsed against the fence line at the front of John Stokes Square. Her wound was bleeding profusely. Police provided first aid. The victim was then taken by ambulance to Royal Darwin Hospital, where she underwent surgery for her injuries.

[11] The learned judge accepted that, although the appellant's actions had the potential to cause serious harm, the actual harm caused was not 'serious harm'. His Honour referred to the "shocking nature of the injury", but observed that the prosecutor had not informed the court about how deeply the breast tissue had been penetrated, how many stitches were required, the likely extent of blood loss (if the victim had not received medical care), and the extent of long-term scarring (if the injury had not been treated).[7] It would appear that the medical evidence in the prosecution brief was not very informative.

[12] When arrested by police, the appellant had a bloodstained shard of glass concealed in her bra cup. In her formal police interview, she made full admissions. She said, apparently referring to the victim, "She hit me once on the back with a stick". That claim is not reflected in the admitted facts. The appellant also said "I didn't start the problem, she deserved it". When she was asked if she felt bad for stabbing the victim, the appellant replied, "I'm not feeling anything".[8]

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7 Transcript 08/11/2018, p 17.

8 The appellant's statements are taken from page 4 of exhibit P-1, under the heading "Defendant's account". However, it does not appear from a reading of the transcript, especially page 5, that that part of the exhibit was read out in court by the prosecutor and formally admitted by defence counsel.

Breaches of bail

[13] Following her arrest in the early morning of 3 May 2018, the appellant was granted bail by the Local Court on 8 May 2018. One of the conditions of bail was that she not possess or consume alcohol. However, on 29 May 2018 she consumed a quantity of wine and became intoxicated. When police spoke to her, she appeared intoxicated: her eyes were bloodshot and she smelled strongly of liquor. She was arrested for breach of bail. She subsequently registered a breath alcohol reading of 0.108.[9]

[14] On 30 May 2018, the appellant was again granted bail by the Local Court, subject to the condition that she not possess or consume alcohol. On 13 June 2018, she consumed an unknown amount of alcohol in the Darwin CBD and became intoxicated. She was taken into protective custody because of her level of intoxication. A handheld breath test device registered a high breath alcohol reading, 0.299. The appellant was once more arrested for breach of bail.

[15] On 25 June 2018, the appellant was once more granted bail, on the same condition as previously, that she not possess or consume alcohol, but with a further condition that she travel to Katherine on 2 July 2018 and there enter the Venndale three-month residential rehabilitation program. Her next court appearance was to be in Darwin on 24 September 2018, to allow her sufficient time to complete the Venndale program. Arrangements were made for the appellant to be collected from the prison and taken straight to

9 That is, 0.108 g of alcohol per 210 litres of exhaled breath.

Katherine. However, once in Katherine, the appellant failed to attend and participate in the Venndale program.[10] After she failed to attend court on 24 September, a warrant was issued and she was arrested in Katherine on 2 October 2018. She told police at the time of her arrest that she did not know that she had to attend court.

[16] The appellant was remanded in custody from 2 October 2018 to the date of sentencing on 8 November 2018.

Appellant's personal circumstances and background

[17] The appellant was born on 21 September 1994,[11] and so at the time of offending she was 23 years and seven months old. She was 24 years old at the time of sentencing. The learned judge was prepared to treat the appellant as "still just a young person for sentencing purposes", and took into account that she had no criminal history between the age of 15 and 24, which his Honour considered was "very significant in terms of both character and her prospects of rehabilitation".[12]

[18] In arriving at the sentence, the learned judge took as his starting point a term of imprisonment of two years. His Honour then allowed a discount of 25% for the very early plea of guilty, and further reduced the consequent sentence of 18 months by a further six months, down to 12 months.[13]

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10 Admitted by defence counsel in the Local Court – see transcript 08/11/2018, p 8.8.
11 Not 1 January 1994, as stated in the Information for Courts document, exh P-6.
12 Transcript 08/11/2018, p 20.8.
13 Transcript 08/11/2018, p 21.2.

[19] His Honour appears to have departed from the instinctive synthesis approach, by allowing – in addition to a specified discount for the plea of guilty – an additional discount for youth and rehabilitation prospects.[14] In this respect, his Honour erred in the appellant's favour.

[20] The appellant contends that, although his Honour may have identified two years imprisonment "in starting [his] sentencing consideration", that was not a starting point reached after taking into account the appellant's youth, character and prospects for rehabilitation. Taking into account those matters, the 'real' starting point would have been 18 months. If that contention is correct, his Honour still erred in the appellant's favour by applying the discount of 25% to a two-year sentence, rather than to an 18-month sentence.

[21] My conclusion is that the head sentence of 12 months was arrived at by an impermissible process of reasoning, but one which clearly favoured the appellant.

[22] In my opinion, a sentence of two years was the appropriate minimum starting point, with objective and subjective factors properly taken into account. The only permissible discount from that starting point was for the plea of guilty. If a discount of 25% were allowed for an early plea of guilty, the appropriate head sentence should have been 18 months. In my opinion, the head sentence of 12 months imposed by the learned judge was lenient.

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14 Transcript 08/11/2018, pp 20.7 to 21.2. It may be noted that the Northern Territory Court of Criminal Appeal has acknowledged that quantification of the reduction for a plea of guilty is a legitimate exception to the principle of intuitive synthesis - see *Forrest v the Queen* [2017] NTCCA 5 at [71].

[23] The learned judge determined that the 12-month sentence, part of a total effective sentence of 13 months (taking into account a cumulative sentence of one month imprisonment imposed for the third breach of bail) would be suspended after the appellant had served nine months imprisonment.

The appeal

[24] Unsurprisingly, the appellant does not seek to disturb the head sentence of 12 months. The thrust of the appeal is that (1) a sentence requiring the appellant to actually serve nine months of a 13-month total sentence was manifestly excessive, and that (2) the appellant should have been given the benefit of a suspended sentence after serving some unspecified period less than nine months.

[25] A further ground of appeal is that the sentence of one month's imprisonment, to be served cumulatively on the sentence of 12 months, was manifestly excessive for the breach of bail in failing to attend court on 24 September 2018.

Principles in relation to appeals against sentence

[26] It is not enough that the appeal court would have imposed a less or different sentence or considers the sentence overly severe. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it is shown that the sentencing judge was in error in acting on a wrong principle or in

misunderstanding or in wrongly assessing some salient feature of the evidence.[15]

[27] Unless there is demonstrable error, the presumption is that there is no error.[16] It is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked.[17] In particular, judges in the Local Court are working under pressures which mean that they are simply unable to give the kind of detailed reasons which might be expected of a court delivering a reserved judgment. Sentencing remarks delivered in such circumstances should not be subjected to the same degree of critical analysis as the words in a considered reserved judgment.[18] An appellate court is entitled to assume that a judge of the Local Court has considered all matters which are necessarily implicit in any conclusions reached.[19]

Grounds 1 and 2 (1A)

[28] As to the ground of appeal that the judge erred in not ordering a report pursuant to s 103 *Sentencing Act*, there was no requirement for him to do so in circumstances where he did not intend imposing a supervised suspended sentence. I refer to my observations in [6] above. If the real ground of appeal is that the learned judge erred in the exercise of his discretion by not suspending the sentence and requiring the appellant to be under supervision

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15 *Burrenjuck v Garner* [1999] NTSC 66 at [7].
16 *Tait v Bartley* (1979) 46 FLR 386; *Salmon v Chute & Anor* (1994) 94 NTR 1 at 24-25.
17 *Van Toorenburg v Westphal* at [23].
18 *Jambajimba v Dredge* (1985) 33 NTR 19, at 22 per Muirhead ACJ.
19 *Bartusevics v Fisher* (1973) 8 SASR 601.

after the appellant had served something less than nine months, the short answer is that there was no error. While it would have been permissible for his Honour to have suspended the sentence after the appellant had served less than nine months, with or without supervision, and, if supervision were ordered, to 'balance' the time to be actually served in prison against the time during which the appellant would be under supervision in the community, the discretion was his Honour's to exercise in accordance with proper principle. In my view, the appellant has failed to demonstrate any error of principle.

[29] The appellant relies on the decision of a single judge of this Court in *Mitchell v Gibson*.[20] The appellant in that matter successfully appealed a sentence imposed by the Court of Summary Jurisdiction on the ground that the magistrate had not turned his mind to the question of whether supervision (and residential rehabilitation) should have been a condition of a partly suspended sentence. Counsel for the respondent there conceded that the failure to order a supervision report appeared to be an oversight on the part of the magistrate. The appellant, who was 20 years old at the time, was sentenced to 13 months imprisonment, suspended after eight months, for six property offences and two breaches of suspended sentence. A comparable feature to the present case was that there were no conditions attached to the suspended sentence.

20 *Mitchell v Gibson* [2104] NTSC 59.

[30] The basis of the appeal decision in *Mitchell v Gibson* was the judge's conclusion that the magistrate had not considered supervision and residential rehabilitation as possible conditions for a suspended sentence.[21] In the present appeal, however, that could not be said of the approach taken by the learned Local Court judge. Defence counsel told his Honour that the appellant had "expressed a desire to try residential rehabilitation", and that the appellant could be supervised in the Binjari community and engage in residential rehabilitation.[22] Defence counsel had submitted, a short while earlier, that the sentence to be imposed should be one that would address the appellant's issues with alcohol and which removed her from Darwin. His Honour at that stage commented, "We've already done that. We've removed her from Darwin. We've arranged for her rehabilitation and she hasn't taken up either of those options … she took up the option of remaining in Katherine but she didn't attend Venndale."[23] Defence counsel made the final submission that "… perhaps, with a term of imprisonment held in suspense, the incentive to actually enter through the doors of Venndale … would be greater than it was previously" (that is, when the appellant had been subject to bail conditions).

[31] It can be seen that the judge specifically considered and dismissed the possibility of imposing mandatory alcohol rehabilitation treatment as a condition of a suspended sentence. The fact that his Honour did not accept defence counsel's final, speculative, submission and give the appellant

21 *Mitchell v Gibson* [2104] NTSC 59 at [17].
22 Transcript 08/11/2018, p 16.5.
23 Transcript 08/11/2018, p 8.6.

another chance to participate in a residential rehabilitation program does not constitute an error in the exercise of his sentencing discretion. A judge is perfectly entitled to take into account past compliance or non-compliance with court orders in fixing an appropriate sentence.

[32] His Honour also gave consideration to possible conditions of a supervised suspended sentence other than mandatory alcohol rehabilitation treatment, specifically (1) a condition confining the appellant to the Binjari community and (2) a condition that she not consume alcohol. As to the former, his Honour stated that he had no familiarity with Binjari, and that he did not know how realistic it might be to confine the appellant to that place and forbid her from entering Katherine. It is arguable that a s 103 report might have fully informed his Honour in relation to the Binjari Community (which is situated only about 15 minutes' drive from Katherine), but that would not have resolved his Honour's legitimate concern in relation to the appellant's access to alcohol, freely available in Katherine, which he explained as follows:[24]

> I had considered imposing a full non-alcohol condition but then I formed the view that would probably set the defendant up to fail and inevitably cause her to have to serve the balance of the suspended sentence if I impose one. I have decided that it is not in her interests or the interest of the community or justice.

[33] While it is possible to subject the judge's stated reasons to adverse critical analysis, as was done on the hearing of this appeal, it is clear that his

24 Transcript 08/11/2018, p 21.9 - 22.

Honour considered the imposition of a suspended sentence subject to conditions, including mandatory participation in a residential rehabilitation program, confinement to the appellant's home community and a ban on alcohol (all of which could have been subject to supervision). His Honour clearly turned his mind to those matters. There was no error of the kind identified by Kelly J in *Mitchell v Gibson*.

[34] The appellant has failed to establish error on the part of the learned judge, whether in not ordering a s 103 report; not imposing a supervised suspended sentence, suspended at a point in time earlier than nine months; or not giving adequate reasons. Grounds 1 and 2 must be dismissed.

[35] As to ground 3, the appellant has failed to demonstrate manifest excess in relation to the order requiring the appellant to serve nine months of a total effective sentence of 13 months before the sentence was suspended. Indeed, having regard to the facts set out in [8] – [10] above, I am of the view that it was appropriate in all the circumstances that the appellant be required to serve nine months actual imprisonment, in respect of the reckless endangerment offence, before being released on a suspended sentence.

Appeal against sentence for breach of bail

[36] I turn finally to consider the appeal in relation to the sentence of one month's imprisonment imposed in file 2184 1549, for the appellant's breach of bail in failing to attend court on 24 September 2018.

[37] The one-month sentence was ordered to cumulative on the sentence of 12 months imposed for recklessly endangering serious harm, and given that the total sentence was suspended after nine months, the sentence for breach of bail was thus fully suspended.

[38] The maximum penalty for an offence contrary to s 37B *Bail Act* is 200 penalty units or imprisonment for two years.

[39] I am not persuaded that a fully suspended sentence of one month – just over four per cent of the maximum sentence – is manifestly excessive for a fundamental breach of bail (the failure to appear in court in accordance with a bail undertaking), particularly where the background to that offence is an (uncharged) ongoing breach of bail over many months in failing to participate in the residential rehabilitation program for which bail had been granted.

[40] The appeals – all grounds – must be dismissed.