Gaykamangu v Court & Anor [2014] NTSC 29

PARTIES:	**GAYKAMANGU, Stewart** v **COURT, Michael** And **FERRY, Nicholas Jon**
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 10 of 2013 (21308390) and JA 11 of 2013 (21343840)
DELIVERED:	24 July 2014
HEARING DATE:	12 March 2014
JUDGMENT OF:	SOUTHWOOD J
APPEAL FROM:	BORCHERS SM

CATCHWORDS:

Criminal law – appeal against sentence – aggravated assault - mandatory sentence - physical injury that interferes with the victim's health – minor superficial facial laceration – prior good character – manifestly excessive - breach of bail - totality - appeals dismissed

Sentencing Act s 78BA

Dinsdale v The Queen (2000) 202 CLR 321; *Hampton v The Queen* [2008] NTCCA 5, applied.

Wayne v Boldiston (1992) 85 NTR 8, followed.

Tranby v The Queen (1992) 1 Qd R 432, *Wayne v Cornford* [2013] NTSC 1, referred to.

REPRESENTATION:

Counsel:

Appellant:	M Aust
Respondent:	R Micairan

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
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

Gaykamangu v Court & Anor [2014] NTSC 29
No. JA 10 of 2013 (21308390) & JA 11 of 2013 (21343840)

BETWEEN:

STEWART GAYKAMANGU
Appellant

AND:

MICHAEL COURT

AND:

NICHOLAS JON FERRY
Respondents

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 24 July 2014)

Introduction

[1] On 8 October 2013, in the Court of Summary Jurisdiction in Alice Springs, the appellant pleaded guilty to an aggravated assault upon his wife and to breaching his bail. For the aggravated assault, he was sentenced to one month's imprisonment to be suspended after seven days in prison. For the breach of bail, he was sentenced to seven days imprisonment. The total sentence was backdated to 4 October 2013 to reflect the time that the appellant had been on remand for these offences. An operational period of

six months was specified during which the appellant was not to commit another offence that was punishable by a term of imprisonment.

[2] The appellant has appealed against both sentences of imprisonment. The grounds of appeal are:

1. The sentencing Magistrate erred in his construction of s 78BA of the *Sentencing Act* and its application on the evidence before the Court.

2. The sentencing Magistrate erred in that he gave inadequate weight to the evidence supporting the [appellant's] character and personal circumstances.

3. The sentencing Magistrate erred in failing to consider the principle of totality on file 21343840 [breach of bail].

4. The sentencing Magistrate erred in imposing sentences that were manifestly excessive in all the circumstances.

[3] The appeal has been pressed by the appellant, despite the sentencing Magistrate passing a total sentence on the appellant which was in accordance with the submissions made by counsel for the appellant in the Court of Summary Jurisdiction. Save that the appellant spent seven days in prison and not five days, counsel for the appellant obtained the sentencing disposition he asked for.

[4] At the end of his submissions in the Court of Summary Jurisdiction, Mr Aust stated the following.

> Your Honour, given all of the factors, it is my submission that this man can be dealt with by way of a partially suspended sentence.

> Under s 78BA of the Sentencing Act, he has to serve an actual term of imprisonment. He is a man of exceptional prior character. He is a contributor towards society. He is a man that has come from a disadvantaged background but who has risen above that to become a contributor.
>
> He is a family man. I ask your Honour to consider this as an abomination. This man has got no propensity for violence. He has got no record whatsoever. He has already [had his $500 security for bail estreated]. He has served four days in custody. I ask that your Honour can sufficiently meet all of the sentencing requirements by imposing on him a significant head sentence to reflect the gravity of the offending; and to give him an opportunity at a suspended sentence, suspended forthwith so he can continue to do his good work in the community.

[5] But for the fact that both parties asked the Court to consider whether s 78BA of the *Sentencing Act* was applicable in this case, I would have dismissed the appeal in limen. Regardless of whether the physical harm suffered by the victim fell within s 78BA of the *Sentencing Act* or not, the sentences imposed on the appellant were just and proportionate.

The facts of the aggravated assault

[6] The facts of the offending are as follows.

[7] The victim is the partner of the appellant. They have been married for 16 years and have three children together.

[8] On 24 February 2013 the appellant and the victim were in a hotel room at The Alice in the Territory Hotel on Stephens Road. They were both drunk and they had a verbal argument over jealousy issues. During the argument the appellant became angry at losing his mobile telephone and he began to swear and yell at the victim. He then punched her once to the face and

slapped her once to the face. This caused her immediate pain and she became disoriented.

[9] They then left their hotel room and went to the foyer of the hotel where the appellant called the police. He asked them to attend because he had punched his wife and her forehead was bleeding. Police attended and the appellant was arrested.

[10] He was interviewed by the police. When asked if he punched the victim to the face, he replied, “No.” When asked why he assaulted the victim he replied, “No, I didn’t punch her.”

[11] The following information about the victim’s injury was tendered in evidence during the plea on sentence. First, the admitted facts stated: “The victim received bruising and swelling to her face and a laceration to her right eyebrow. The victim received medical treatment for her injuries.” Second, the victim stated in her victim impact statement that: “The whole of my head is paining and I can’t think straight. My eyebrow is cut and really sore.” Third, two photographs of the victim’s head injuries were tendered in evidence. They are not good photographs. The photographs show a slightly swollen and bruised right eyebrow, a small blood clot that is in the process of forming into a scab above the victim’s right eye and three streaks of dried blood on the victim’s upper right cheek. The photograph does not clearly show the laceration which appears to be very superficial. It would appear to be less than three centimetres in length. It did not require stitches and it

does not look as though it bled very much. The medical treatment for the victim's injuries was comprised of placing a small piece of gauze over the laceration which was kept in pace with the use of either sticky tape or Elastoplast. The gauze is shown to have two small blood stains on it.

The facts of the breach of bail

[12] On 28 February 2013 the appellant was granted bail until 11 April 2013 by Mr Borchers SM. Mr Sullivan, who then appeared as counsel for the appellant, told the Court that the appellant was going to Nhulunbuy and the appellant was given leave to appear by telephone from Nhulunbuy on 11 April 2013.

[13] Bail was granted on the basis that the appellant provide security on his own recognisance in the sum of $500.00 and on the condition that he appear by telephone on 11 April 2013.

[14] On 11 April 2013 Mr Sullivan again appeared on the appellant's behalf. He told the presiding magistrate that his instructions were that the appellant was in Nhulunbuy. He gave the Court a telephone number which was dialled but the appellant did not answer. As the appellant failed to appear, a warrant was issued for his arrest. In fact, on 11 April 2013 the appellant was at Amanta.

[15] At 11.40 pm on 3 October 2013 (almost six months after the appellant was granted bail) the appellant was located by police at the 24 Hour Store on Todd Street, Alice Springs. He was placed in protective custody and taken to

the Alice Springs Watch House. While he was at the Alice Springs Watch House a name check by police showed the appellant had an outstanding warrant for breach of bail.

[16] At 6.30 am on 4 October 2013 the appellant was placed under arrest, cautioned and asked why he had not appeared at the Court of Summary Jurisdiction on 11 April 2013. He replied, "I transferred it to South Australia and went to court there." The appellant was then asked if he had an emergency reason for not signing in. He replied, "I got paperwork to go to court in South Australia." These statements were untrue.

[17] Between 11 April 2013 and 4 October 2013 when he was placed under arrest, the appellant did nothing to aid the police or inform the Court of Summary Jurisdiction of his whereabouts.

[18] On 4 October 2013 the appellant appeared in the Court of Summary Jurisdiction before Mr Borchers SM. He was represented by Mr Aust. By way of explanation for his non-appearance on 11 April 2013, Mr Aust told Mr Borchers SM that the offender ordinarily resides at Amata. He is a performance artist. He comes and goes from Alice Springs. He is performing at the Mbanta Festival and he is performing at CAALAS's 40th birthday.

[19] By way of explanation of his breach of bail, counsel for the appellant told the sentencing Magistrate on 8 October 2013 that it was the appellant's intention to comply with his bail conditions but the victim asked him to go back to Amata, he did so and he never contacted Nhulunbuy police.

Objective seriousness

[20] The objective seriousness of the aggravated assault is towards the lower end of the range of such offences. The assault was of short duration and did not involve a large amount of force. No weapon was used and the victim sustained minor injuries.

[21] However, this was yet another instance of domestic violence committed by a male against a female victim who suffered a physical injury and was incapable of defending herself. The offender struck the victim twice in her face. The offending was unprovoked and occurred during an argument about trivial matters. Such crimes involving domestic violence are prevalent in Alice Springs. The offender threw a violent tantrum because the victim had not behaved in a manner in which he wanted her to behave.

[22] The breach of bail was an extended breach of bail. The appellant absconded for almost six months. His conduct demonstrated a flagrant disregard for the order of the Court. He showed no contrition for his conduct and he lied to the police about what had occurred. Sentences of seven to 14 days imprisonment are regularly imposed by the Court of Summary Jurisdiction in Alice Springs for such breaches of bail.

The subjective circumstances

[23] The appellant is 31 years of age. He is originally from Yirrkala. He is a first offender of prior good character.

[24] He has a 10 year old son who he is supporting through school. His son has been selected to attend Boarding School on the East Coast.

[25] At the time he committed the aggravated assault the appellant was working at the Amata School as a teacher's aide. He was teaching music and traditional dancing. The appellant is also an accomplished singer and musician. He has performed at a number of music festivals held in remote communities. He has been involved with CAAMA music since August 2009.

[26] The appellant showed little remorse. The matter was adjourned because he was going to plead not guilty and he did not plead guilty until 8 October 2013.

Section 78BA of the Sentencing Act

[27] At the time the appellant committed the assault on his wife, s 78BA of the *Sentencing Act* stated:

> (1) This section applies to:
>
> (a) Any of the following violent offences:
>
> (i) ……
>
> (ii) An offence against section 188 of 189A of the Criminal Code that results in harm to the victim;
>
> (b) …
>
> (1A) However, if an offence in subsection (1)(a) relates to causing or resulting in only physical harm to a victim, this section

applies only if the harm is a physical injury that interferes with the victim's health.

Example

A is found guilty of an offence against section 186 for unlawfully causing physical harm to B. If the harm consists only of pain that does not amount to a physical injury that interferes with B's health, this section does not apply to the sentencing of A for that offence.

(2) If a court finds an offender guilty of an offence to which this section applies, the court must record a conviction and must order that the offender serve:

(a) a term of actual imprisonment; or

(b) a term of imprisonment that is partly, but not wholly, suspended.

(3) This section does not prevent the sentencing court from exercising powers that may be exercised consistently with this section.

[28] It is apparent from the text of s 78BA(1A) that in a case such as this (1) there must a physical injury; and (2) the physical injury must be of such a level that it interferes with the victim's health. Physical injury simpliciter is not sufficient.

[29] It appears that s 78BA(1A) was introduced after the *Sentencing Amendment (Violent Offences) Bill* (Serial 7) was read a second time.

[30] During the second reading speech on 11 September 2008, the Minister for Justice and Attorney-General stated the following.

> This government is concerned about the rising level of violent crime. It is also concerned that sentences passed for serious crimes of violence often do not align with community expectations.
>
> Community concern lies with the sentencing of serious assaults.

[31] On 23 October 2008 during the debate about the *Sentencing Amendment (Violent Offences) Bill* (Serial 7) the Minister for Justice and Attorney general stated the following.

> Basically, we have nominated a number of offences, which I have outlined before, and I will repeat them:
>
> (a) section 181 – serious harm
>
> (b) section 186 – harm
>
> (c) section 188 – assault resulting in harm or serious harm to the victim
>
> (d) section 189A – assault on police resulting in harm or serious harm to the victim
>
> I believe our regime is very clear and straightforward if you are found guilty of those offences I have just mentioned. The committee stage amendment that I will be moving is simply:
>
> (1A) However, if an offence is subsection (1)(a) relates to causing or resulting in only physical harm to a victim, this section applies only if the harm is a physical injury that interferes with the victim's health.
>
> With that covering section and the clear intent of government relating to this serious set of offences, I honestly believe, member for Araluen, that our regime is certainly much simpler. There are deep problems with your regime; in any mandatory sentencing regime there is always the potential for injustice, and I will give you a fairly practical example that I have been given.

Eight years ago, say, a man pushed another man in a disagreement and was found guilty of common assault. Eight years further on, the man is somewhere with his partner, there is a drunk or some obnoxious person who insults in a fairly profound way and provokes the male in question. In both regimes I acknowledge that provocation is not a defence. However, the man retaliates and he might punch the other person in the altercation and that person gets a slight black eye or something that does not permanently affect their health. I am advised and you might tell me differently, member for Araluen, that this person if found guilty of course would be sentenced to a minimum of one month under your regime.

I think much of the public would say in that case if there has not been serious harm done or serious injury to the person's health, in the circumstances of the crime, that a month might be a fairly severe sentence – a minimum of one month. With ours there could be either part or all of the sentence, so the court could determine that it could be an hour, a day, the rising of the court, or it could be overnight if that person is incarcerated. The person would still have to serve a term of actual imprisonment. The court could even determine that the person be held until the rising of the court.

….

Madam Chair, I move amendment 4.2. The amendment also amends clause 5 by inserting after the proposed 78BA(1) a qualification to the proposed section 78BA(1A) (sic) to ensure that the proposed 78BA(1A) (sic) does not cause injustice by applying to minor assaults. Where the offending causes or results in physical harm, that harm must be such as to amount to physical injury that interferes with the victim's health. If the victim suffers pain or discomfort but it does not amount to physical injury that interferes with health, then the sentencing regime of section 78BA does not apply. This is as I foreshadowed.

Government's intent has never been to cover violent offences at the minor end of the scale, as I called it, the minor argy-bargy that goes on from time to time. This is all about capturing serious offences at the serious end of the spectrum that do cause harm and injury to someone's health.

[32] The word ‘health’ has a variety of shades of meaning depending on the context in which the word is used and may be indefinable. The meaning of the word was considered by the Court of Criminal Appeal of Queensland in *Tranby v The Queen*.[1] Derrington J who was in the majority stated[2]:

> The only question is whether the word “health” in the definition of grievous bodily harm connotes a permanent injury which neither affects the vitality or fitness of the body nor interferes with functions of which the body is capable of performance, but is limited to injury to the integrity of the body in other than an insignificant way. Particularly, does it refer to the loss of a part of the body causing a noticeable difference to the body’s appearance, but nothing more? This does not include a case of psychiatric injury resulting from such a change for in that case it is the psychiatric injury which is the subject of inquiry.
>
> The definition of “health” in the *Oxford English Dictionary* speaks essentially in terms of the functioning of the body, and while soundness or “wholeness” of body appears among the usages, they are only the equivalent of completeness or fulsomeness in its functioning. In ordinary usage, it is very doubtful that the removal of a part of the body that performs no useful function would be described as an injury to health. For example, it would be quite consistent with ordinary language in the present case if it had been said that the victim lost a part of her ear but her health was not affected. This would not be considered to be a contradiction and its significance would be understood.
>
> It would be quite reasonable to describe a noticeable loss of a significant part of the body as grievous bodily harm, but the difficulty here is that this expression is given a special meaning by the definition which does not use the word “includes”, but uses the word “means”. When a statute says that a word or phrase shall “mean” — not merely that it shall “include” — certain things or acts, “the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in the definition” (per Esher M.R. in *Gough v. Gough* [1891] 2 Q.B. 665; *Bristol Trams Co v Bristol* (1890) 59 LJQB 449).

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1 (1992) 1 Qd R 432.
2 (1992) 1 Qd R 432 at 438 – 439.

Nor in such circumstances is it permissible to construe the definition by reference to the term defined. The expression is given by the statute a special meaning which must be applied whether or not it accords with the ordinary meaning: *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 507 per Gibbs J. (as he then was).

There are special rules of construction relating to the words of a Code. “It is a well settled rule of construction that in the case of a statute being a code intended to replace the common law, its meaning is to be ascertained in the first instance from its language and the natural meaning of that language is not to be qualified by considerations derived from the antecedent law”: *Brennan v The King* (1936) 55 CLR 253 at 263; *Bank of England v Vagliano Brothers* [1891] AC 107 at 144–145. “But an appeal to earlier decisions can be justified if the language of the statute is itself doubtful or if some other special ground is made out, for example, if words used have previously acquired a special meaning which differs from their ordinary meaning: *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*(1975) 134 CLR 1 at p 22”: *Advance (N.S.W.) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606. In these circumstances, the common law cases, such as they are, must be of little assistance in construing this particular definition.

There may at first be some reluctance in accepting that a gross disfigurement to a person’s face but causing no other consequences should not be regarded as an injury to health, but there is a danger here of confusing injury to health with harm. If there were indeed no other consequences than horrific ugliness from loss of part of the body, then there must be resistance to a natural tendency to feel that the magnitude of the injury must be described as an injury to health if indeed the real meaning of “health” does not permit of that.

As this is a penal provision, “any real ambiguity persisting after the application of the ordinary rules of construction is to be resolved in favour of the most lenient construction”: *Beckwith v The Queen* (1976) 135 CLR 569 per Gibbs J. (as he then was) at 576; *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 145; *R v Judkins* [1979] Qd R 527 at 530. The court “ought not to stretch the language in any way”: *Allan v Quinlan, ex parte Allan* [1987] 1 Qd R 213 at 215.

In the present case, it is not possible to say that the word “health” plainly and unambiguously means an injury such as that in the

present case. If anything, the opposite is the more likely, but it is sufficient to say that there is a real ambiguity on this facet of its meaning. In that case, *Beckwith* requires the stricter or more lenient construction, and so it must be held that the section does not apply to an injury of this kind.

[33] De Jersey J who was also in the majority in *Tranby v The Queen* stated:[3]

> In my opinion, the evidence did not support a conviction for the offence of doing grievous bodily harm, because on the evidence the appellant did not inflict injury upon the complainant such as caused or was likely to cause permanent injury to health. The short issue before this Court is whether the injury constituted "grievous bodily harm" because, while obviously not endangering life, it caused or was likely to cause permanent injury to health within the terms of the definition of "grievous bodily harm". The only permanent effect of the severing of the ear lobe, disclosed by the evidence, is an adverse cosmetic effect. I do not consider that to involve permanent injury to "health".
>
> As the learned judge pointed out to the jury, the word "health" is not defined in *The Criminal Code*. Resort to the dictionaries confirms that a cosmetic disability with no consequence upon the *functioning* of the body does not involve impairment of "health" as that word is ordinarily understood. The definitions of "health" in the dictionaries focus on the functioning of the body.
>
> The first definition in the *Oxford English Dictionary* (2nd ed, 1989, vol 7) is "soundness of body; that condition in which its functions are duly and efficiently discharged", and by extension, "the general condition of the body with respect to the efficient or inefficient discharge of functions". The first offered by *Webster's Third New International Dictionary* (1971) reads "the condition of an organism or one of its parts in which it performs its vital functions normally or properly: the state of being sound in body or mind … the condition of an organism with respect to the performance of its vital functions". The *Macquarie Dictionary's* (1981) principal definition is "soundness of body; freedom from disease or ailment; the general condition of the body or mind with reference to soundness and vigour". *Collins English Dictionary* (1979) defines "health" as "the state of being bodily and mentally vigorous and free from disease; the general condition of body and mind". One concludes, therefore,

[3] (1992) 1 Qd R 432 at 441 – 443.

that the concept of "health", as ordinarily understood, covers the functioning of the body, and in relation to that, freedom from disease or ailment, and that it does not extend to the presence within or on the body of organs or parts which perform no function, the absence of which causes no disease or ailment.

The view that a body must be conventionally entire to be healthy seems to stem from the *Webster's Dictionary* definition set out in the annotations in *Carter's Criminal Code*, which reads: "State of being hale, sound, or whole, in body, mind or soul; well-being; esp. state of being free from physical disease or pain." I have not been able to locate that definition in *Webster*, although those precise terms appear in *Black's Law Dictionary* (5th ed, 1979). In the full context of that definition, the word "whole" is used in the sense of "freedom from disease" (one of the definitions of "whole" offered by the *Oxford English Dictionary*). It does not mean physically entire or intact, regardless of significance to functioning.

My view as to the ordinary meaning of the word "health" gains some indirect support from the definitions of "good health" offered in *National Mutual Life Association of Australasia Ltd v Kidman* (1905) 3 CLR 160. The question there was whether an insured person suffering from an ovarian tumor, of which she was aware, falsely declared that she was "in good health". The facts are completely different from those of the present case, but it is nevertheless of some present significance that Griffith CJ there defined "good health" by reference to the functioning of the body and freedom from disease (at 168): "… a sufficient definition of the term 'good health' as used in the declaration, is that it means that the person in question is free from any apparent sensible disease or symptom of disease, and is unconscious of any derangement of the bodily functions by which health can be tested."

The Chief Justice substantially endorsed (at 167) the definition of "good health" in its ordinary sense provided by Lord Fullerton in *Hutchison v. National Loan Insurance Co.* (1845) 7 Court Sess. Cas. (2nd series) 467 as follows: "The perfect conscious enjoyment of all one's faculties and functions, and the conscious freedom from any ailment affecting them, or any symptoms of ailment"

Similarly, in the Supreme Court of North Carolina in 1852, Pearson J defined the word "health", "in its ordinary acceptation, (as meaning) free from disease or bodily ailment or a state of the system peculiarly susceptible or liable to disease or bodily ailment" (*Bell v Jeffreys*

> (1852) 35 NC 329, 330). That court held short-sightedness not to be unhealthiness; and on similar reasoning, in *Harrell v Norvill* (1857) 50 NC 41, the court held that a state of fixed contraction of the little fingers inwardly towards the palm was not a state of unhealthiness. Those courts considered that because of the deficiencies, the conditions of the persons concerned were "unsound", but not unhealthy, because although functioning was impaired, there was no disease or bodily ailment. I would not go so far as to limit "health" to freedom from disease or ailment in the sense of sickness. To my mind, the ordinary sense of the term focuses on the functioning of the body, which of course may often be impaired by disease or illness. But functioning may also be impaired by, for example, deliberately inflicted injury. The American decisions nevertheless provide some support for the conclusion that "health" is not impaired by removal of a part of the body which serves no particular function with respect to the rest of it.
>
> For these reasons, the evidence in this case did not support a conviction for the offence of doing grievous bodily harm. As was conceded by counsel for the appellant, the offences of unlawful wounding (s 323) or unlawful assault occasioning bodily harm (s 339) could have been charged, but they were not, and a verdict of not guilty should have been entered as a matter of law with respect to the count of doing grievous bodily harm which was charged on this indictment.
>
> Neither unlawful wounding nor unlawful assault occasioning bodily harm was an alternative count open on this indictment, as both counsel agreed before us. Accordingly, no question of substituting a verdict under s 668F(2) arises, even though there was no issue at the trial but that the appellant did inflict the injury.

[34] *Tranby v The Queen* was concerned with whether the loss of a substantial part of a person's ear lobe, which had been bitten off by the appellant in that case, constituted grievous bodily harm; hence the majority of the Court of Criminal Appeal placed considerable emphasis on the necessity for the Crown to establish a permanent loss of bodily function. The case was not concerned with mere wounding.

[35] *Tranby v The Queen* was considered and distinguished by Mildren J in *Wayne v Boldiston*[4]. In the latter case the appellant pleaded guilty to a charge against s 188(1) and (2) of the *Criminal Code* (NT) (as in force at that time) of unlawful assault involving a circumstance of aggravation that the victim of the assault thereby suffered bodily harm. "Bodily harm" was defined in the *Criminal Code* (as in force at that time) to mean "any physical injury that interferes with health".

[36] The facts of *Wayne v Boldiston* were that the appellant in that case picked up a broken bottle and slashed a woman on each side of her face with the broken bottle. The victim was taken to the Alice Springs Hospital where the wounds required 18 stitches. On examination the patient was distressed and uncommunicative. She had a 6cm laceration on the left side of her face, extending from just inferior and lateral to the eye into the hairline above the ear. There was also a 2cm laceration in the right submandilar region. Both lacerations were superficial without breaching subcutaneous layers. The victim stated: "At the time I was in a lot of pain and I lost quite a bit of blood. I remember I felt dizzy for about a week later. Because the right side of my mouth was sore I had to chew my food on the left side and it hurt when I moved my mouth. The smaller cut hurt when I moved my eyes. Now I have an ugly raised scar on the right side of my face and it makes me feel shame. Everyone asks me what happened to cause the scar … The smaller scar isn't quite as noticeable, because my hair covers it.

[4] (1992) 85 NTR 8.

Even now the big scar sometimes pains me, maybe there is still a piece of glass inside. It is a sharp pain and I rub the scar and it goes away. Sometimes when the children press down on the scar it hurts. I had the stitches out about three days after Pollyanna slashed me and this hurt a lot. When the stitches were in I could only speak a bit, but I could talk okay when they came out. I am thinking of going back to the doctor because my scar still hurts."

[37] In *Wayne v Boldiston* Mildren J stated:[5]

> In the end result, I accept Mr Roberts' submission that not much assistance is to be gained from *Tranby* because the injury to health being considered in that case was of a permanent nature, and I consider that I should distinguish *Tranby* on that ground and approach the matter afresh. As previously mentioned, the full definition of "bodily harm" is "any physical injury that interferes with health" and I consider that it is that composite phrase which needs to be considered rather than the word "health" taken out of context. Firstly, the statute uses the expression "interferes with", which I take in this context to mean "to affect adversely". Secondly, the interference need not be permanent, so that even a temporary interference is sufficient. Thirdly, the statute does not use the expression "results in bodily injury", although it might have done so. It seems to me therefore unlikely that parliament meant to convey the meaning that a bodily injury, no matter how minor, is an interference with health, although this is a possible construction. The narrowest dictionary meaning commonly given to the word "health" is "soundness of body": see for example the *Shorter Oxford English dictionary*, 3rd ed and the definitions referred to by De Jersey J in *Tranby* at 237-8; and "sound" is defined, for example, by the *Macquarie Dictionary* to mean "free from injury, damage, decay, defect, disease, etc."; and the definition of "sound" in the *Shorter Oxford English dictionary* is to similar effect, viz, "free from disease, infirmity or injury". Mr Roberts urged that this was the meaning intended, but if this was intended, why give the expression "bodily harm" a defined meaning at all and why not use the words "results in a bodily injury"? Moreover, the consequences of such a

[5] (1992) 85 NTR 8 at 13 – 14.

> meaning do not seem to accord with the seriousness that the Code treats the causing of bodily harm. Section 188(2)(a) of the Code increases the maximum penalty for an assault, where bodily harm is suffered, from one year to five years' imprisonment. Section 186 of the Code imposes a penalty of five years' imprisonment for unlawfully causing bodily harm to another. Section 192(3) increases the maximum penalty for a sexual assault from seven years to 14 years where bodily harm is caused. It is hard to see how an offence against s 182 is likely if the intent is to cause only a minor injury, given that that section creates the crime of placing explosives in place with intent to cause any bodily harm. Further, only physical injuries can result in bodily harm, yet a mental injury, although temporary, can be far more devastating than a minor injury such as a bruise. Finally, I am not helped much by De Jersey J's observation that the definitions of "health" in the dictionaries focus on the functioning of the body. In one sense, even a minor bruise or a minor headache as a result of a blow to the head interferes to some extent with the temporary functioning of the body, although the body has the capacity to heal in such cases without the need of any medical assistance. I do not consider that in ordinary parlance, one could describe minor injuries, not requiring any medical treatment, as a temporary interference with one's health. On the other hand, an injury of such a kind that warranted seeking medical treatment may well fall within that description, although the fact that medical treatment was or was not sought would not be determinative of the matter.

[38] Consistent with Mildren J's reasons for decision, in my opinion, what constitutes an interference with a person's health is ultimately a question of degree which is to be determined in the particular circumstances of each case. However, there must be an injury to the integrity of the victim's body in other than an insignificant way. The injury need only be temporary.

The submissions of the parties about section 78BA

[39] The appellant submits that for the provisions of s 78BA of the *Sentencing Act* to apply the sentencing magistrate must be satisfied beyond reasonable doubt that the victim's physical injury interfered with the victim's health.

More than mere physical injury is required. The injury must be an injury of the magnitude specified in the section.

[40] The appellant further submits that the evidence before the Court of Summary Jurisdiction was incapable of establishing that the injury was a physical injury of the specified magnitude. The victim complained only of pain. The photographs do not enable the Court to adequately assess the size of the laceration sustained by the victim. The victim's disorientation was momentary. The full extent of any medical intervention was the placement of a small piece of gauze over the laceration above the victim's right eye. There was no evidence that the laceration interfered with the ability of her body to function.

[41] The respondent submitted that the laceration on the victim's eyebrow is significant; it was beyond mere momentary pain or discomfort and required the victim to seek medical attention. The laceration is an example of a case where bodily function has been impaired – specifically, the human skin. The immediate consequence of the laceration was the breach of the protective function of the skin, allowing blood to exit and to expose the internal of the eyebrow to external factors.

[42] I reject the respondent's submisssions. The facts that there was a laceration which bled and that the victim experienced more than mere momentary pain does not mean that the victim suffered an injury which interfered with her health. The injury sustained by the victim had an insignificant impact on the

integrity of her body. The laceration was a very minor laceration, which did not require medical attention (the admitted fact was that the victim received medical attention not that she required medical attention), and the laceration had started to heal of the victim's body's own accord very shortly after the victim was struck by the appellant.

[43] Section 78BA of the *Sentencing Act* had no application in this case. The sentencing magistrate erred in finding it had application. However, that is not to say that the sentence imposed on the appellant should not have been imposed. The sentencing magistrate's discretion was at large. As I have said, in my opinion, the sentence imposed on the appellant for the aggravated assault was just and proportionate given the objective seriousness of the appellant's conduct.

Ground 2 – prior good character

[44] The appellant submitted that the sentencing magistrate gave inadequate weight to the evidence supporting the appellant's character and personal circumstances.

[45] In my opinion, this ground of appeal cannot be sustained. The sentencing magistrate accepted that the appellant had made some contributions to his community and that he had no prior convictions. His Honour expressed confidence that the appellant would not return to court and he suspended the sentence of imprisonment after the offender had served seven days in prison.

[46] The appellant is an intelligent person who appreciates the serious consequences of domestic violence but who nevertheless deliberately punched and then slapped his partner in the face without any explanation or excuse. The victim did nothing to provoke him. The argument which sparked the offending was trivial. The appellant resorted to domestic violence because the victim was not behaving in the manner that he wanted her to behave. He thereby breached the trust he owed her and abused his physical power in order to try and assert his physical dominance over her.

[47] Further, the appellant showed little remorse and entered a very late plea of guilty.

[48] In the circumstances, the appellant's prior good character only entitled him to a limited degree of leniency. It did not excuse his conduct. It did not mean that he was so exceptional that he should not get his just deserts. It is also important in cases of domestic violence that appropriate weight is given to general deterrence because such offences are very prevalent.

Ground 3 - Totality

[49] The appellant submitted that the sentencing magistrate erred because he did not take into account the fact that he had already forfeited $500 self-recognizance.

[50] While I accept that the amount of any such forfeiture is a proper matter to be taken into account, it is my opinion that the total penalty sustained by the appellant in this case for his breach of bail was justly proportionate to his

conduct. The appellant flagrantly disregarded the order of the Court. The reason he came before the Court in October 2013 was because he was taken into protective custody. The sentence imposed on the appellant is consistent with the decision of this Court in *Wayne v Cornford*.[6] Breach of bail by failure to appear is a prevalent offence in Central Australia and appropriate weight must be given to general deterrence.

Ground 4 – manifestly excessive

[51] The appellant submitted that both sentences of imprisonment were manifestly excessive. In support of this contention the appellant relied on the other three grounds of appeal and also submitted that the need to give weight to general deterrence cannot result in a sentence that is disproportionate to the objective serious of the offence.

[52] The principles that apply when considering whether or not a sentence is manifestly excessive were considered by the Northern Territory Court of Criminal Appeal in *Hampton v R*.[7] The Court of Criminal Appeal applied the principles enunciated by the High Court of Australia in *Dinsdale v R*.[8] Riley J with whom Martin CJ and Southwood J agreed stated at par [44] that:

> It is necessary for the excess to be "plainly apparent": *Dinsdale v R*. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view

[6] [2013] NTSC 1.
[7] [2008] NTCCA 5.
[8] (2000) 202 CLR 321.

> that the sentence is excessive. It interferes only if it be 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. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon an appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive. The sentence must be so very obviously excessive that it was unreasonable or unjust.

[53] While the sentencing magistrate erred by wrongly determining that s 78BA of the *Sentencing Act* was applicable in this case, the sentences imposed on the appellant were not excessive. The sentences were proportionate to the objective seriousness of the offending and due allowance was made for the appellant's prior good character.

Conclusion

[54] The appeal is dismissed. Although the sentencing magistrate erred in his application of s 78BA of the *Sentencing Act*, it is my opinion that this Court should not intervene because each of the sentences imposed on the appellant were just and proportionate and due allowance was made for the appellant's prior good character.
