The Queen v Riley [2006] NTCCA 10

PARTIES:	THE QUEEN v RILEY, Morgan Jabanardi
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 25 of 2005 (20425897)
DELIVERED:	7 JUNE 2006
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JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & THOMAS JJ
APPEAL FROM:	NORTHERN TERRITORY SUPREME COURT, 20425897, 10 OCTOBER 2005

CATCHWORDS:

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Appeal – Crown appeal against sentence – sexual intercourse without consent - sentence manifestly inadequate – appeal allowed – resentenced.

Criminal Code (NT), s 192(3) and s 127(1)(b)

R v Meyer (1984) 35 SASR 137; *R v Barbara* (NSW Court of Criminal Appeal, unreported judgment number 60638, 24 February 1997); *R v Osenkowski* (1982) 30 SASR 212, approved.
Regina v O [2005] NSWCCA 327, explained.
Ibbs v The Queen (1987) 163 CLR 447; *Everett v The Queen* (1994) 124 ALR 529, followed.

REPRESENTATION:

Counsel:

Appellant:	R Coates, N Rogers
Respondent:	V Whitelaw

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Central Australian Aboriginal Legal Aid Service

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

The Queen v Riley [2006] NTCCA 10
No. CA 25 of 2005 (20425897)

BETWEEN:

THE QUEEN
Appellant

AND:

MORGAN JABANARDI RILEY
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 7 JUNE 2006)

Martin (BR) CJ:

Introduction

[1] This is a Crown appeal against sentences imposed for crimes of sexual intercourse without consent and gross indecency.

[2] The appellant pleaded guilty to three crimes, all of which were committed on the same occasion. First, that on 10 November 2004 at Tennant Creek he had digital vaginal sexual intercourse with the victim without her consent. Secondly, that he had digital anal sexual intercourse with the victim without her consent. Thirdly, that he committed an act of gross indecency upon the victim being a child under the age of 16 years.

[3] The maximum penalty for the crimes of sexual intercourse without consent is life imprisonment. Although the victim was under the age of 10 years, the Crown charged gross indecency with a child under the age of 16 years for which the maximum penalty is 16 years.

[4] The learned sentencing Judge imposed sentences of three years imprisonment on each of the first and second counts and directed that those sentences be served concurrently. In respect of count 3, a sentence of four years imprisonment was imposed to commence after service of two years of the sentences imposed on counts 1 and 2. By reason of the partial concurrency, the total sentence to be served was six years. A non-parole period of four years and six months was fixed.

Facts

[5] The facts are set out in the judgment of Thomas J. The following matters require emphasis:

- The victim was aged two years. She was not merely vulnerable. She was helpless child who was unable to offer any resistance whatsoever. Furthermore, by reason of her age the victim would later be unable to make a complaint about the conduct of the respondent or to identify him.

- The victim lived in an Aboriginal community at Tennant Creek and was playing in her own "front yard". Considerable freedom is given to children to move about within such communities beyond the boundaries of individual residential premises. It is commonplace for young children

in such communities to play outside house boundaries in the streets. Adult members of the communities are trusted not to behave inappropriately towards children.

- Although the act of the respondent in removing the child from her area of play was spontaneous in the sense that it followed immediately upon the respondent waking from a drunken sleep, the crimes were planned to the extent that the respondent removed the child from the area of play with the specific intention of taking her to a remote area for the purpose of sexually assaulting her.

- The respondent took the child to a remote area in the bush.

- The respondent's criminal conduct involved digital penetration of both the vagina and anus. Force was used and the respondent persisted in the perpetration of the crimes notwithstanding that the child screamed in pain and cried. He told her to be quiet.

- The respondent desisted from the acts of digital penetration only when he obtained a partial erection and because he had in mind penetrating the child's vagina with his penis.

- Having removed his fingers from the child's vagina and anus, the respondent persisted with his criminal conduct by endeavouring to penetrate the child's vagina with his penis. The respondent's lack of success did not deter him. He masturbated in an unsuccessful attempt to

obtain an erection for the purpose of penetration. It was only when the masturbation was unsuccessful that the respondent desisted.

- The respondent did not return the child to her home or family.

- The respondent's conduct caused significant injuries to the genitalia of the child.

[6] Viewed objectively, the respondent's crimes were extremely serious. There were no mitigating circumstances accompanying the commission of the crimes.

Scale of Seriousness - Manner of Penetration

[7] As to where the crimes of unlawful sexual intercourse sit in the scale of seriousness for crimes of this type, while acknowledging that the crimes were serious counsel for the respondent referred to the observation of Sully J in *R v O* [2005] NSW CCA 327 that as a general proposition an act of digital penetration is less serious than an act of penile penetration. Sully J said [32]:

> "I would accept that, as a general proposition, an act of digital penetration, as such, is less serious than an act of penile penetration as such. I do not agree, however, that such a general proposition is, more or less as of course, a proposition of universal applicability in cases of digital penetration. One only has to read the victim impact statements of KW and of JS to see at once how damaging to a particular victim an act of digital penetration, let alone more than a single such act, can be to a very young child."

[8] Speaking generally, it is not difficult to imagine circumstances in which an act of penile penetration will be viewed as a more aggravated offence than an act of digital penetration. However, advancing a general proposition that an act of digital penetration is less serious than an act of penile penetration is apt to mislead.

[9] As a community, we have moved beyond many misguided views with respect to sexual assaults of various types to a more enlightened understanding of the motivations for and impacts of sexual assaults. The community has come to understand that the gravity of sexual offending should not be judged simply by drawing a distinction between penile penetration and penetration by other parts of the body or objects. Regardless of the means used for penetration, the community now understands that these types of sexual assaults are all serious crimes of violence accompanied by sexual acts, the gravity of which must be assessed according to its individual circumstances rather than by an artificial and often misleading distinction between penile and other means of penetration.

[10] Throughout Australia, Legislatures have reflected this enlightened understanding by abolishing the distinction between different forms of penetration. Prior to such abolition, acts of digital penetration without consent were classified as offences of indecent assault or gross indecency which attracted significantly lower maximum penalties than the crime of rape. By abolishing the distinction between penile and digital penetration

the Legislatures have reflected the change in community thinking about the essential nature of sexual crimes involving penetration.

[11] In *Ibbs v The Queen* (1987) 163 CLR 447 the High Court was concerned with Western Australian legislation which, for the purposes of sexual penetration without consent, included penetration of the vagina or anus by any part of the body or an object manipulated by the offender. In a joint judgment the Court rejected the proposition of principle emerging from the judgments in the Court of Criminal Appeal that "divorced from the circumstances, each kind of sexual penetration as defined … is neither more nor less heinous than another" (451). The judgment continued(451 – 452):

> "The maximum penalty prescribed for the offence of sexual assault is reserved for the worst type of case falling within section 324D … . The maximum penalty is not prescribed as an appropriate penalty for the worst type of case falling within each of the respective categories of sexual penetration described in section 324F. The inclusion of several categories of sexual penetration within the offence described as sexual assault carries no implication that each category of sexual penetration is as heinous as another if done without consent. When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case. In a case of sexual assault, a sentencing judge has to consider where the facts of the particular case lie in a spectrum at one end of which lies the worst type of sexual assault perpetrated by any act which constitutes sexual penetration as defined." (citations omitted).

[12] As the High Court pointed out, a determination as to where a particular crime sits in a scale of seriousness must be determined according to the facts of the individual case having regard to "the worst type of sexual assault perpetrated by any act which constitutes sexual penetration as defined". It

is inappropriate to approach that task from the starting point that, as a general proposition, penile penetration is more serious than digital penetration.

[13] In my opinion, viewed objectively the individual crimes of sexual intercourse without consent committed by the respondent were extremely serious and sit in the more serious category of cases of sexual intercourse without consent. Similarly, the crime of gross indecency sits in the more serious category of crimes of that type.

[14] As to the personal circumstances of the respondent, he presents with a depressingly familiar history so typical of many Aboriginal offenders who have grown up in deprived and dysfunctional circumstances. While those circumstances excite considerable sympathy, they can receive only very limited weight by way of mitigation when viewed against the gravity of the respondent's criminal conduct.

[15] There is no suggestion that the respondent's crimes are in any way related to traditional Aboriginal law or culture. Nothing in the material before the sentencing Judge or this Court suggests that a lenient view could reasonably be taken of the respondent's moral culpability. In addition, it must be recognised that the respondent's history and current circumstances mean that his prospects of rehabilitation are poor. Unless underlying problems are successfully addressed, and there is no material giving confidence in that regard, there is a significant risk that the respondent will re-offend.

General deterrence

[16] The crimes committed by the respondent are particularly abhorrent to right thinking members of our community. There is widespread concern about crimes of violence, particularly crimes of sexual violence committed against children. The following remarks of Wells J in *R v Myer* (1984) 35 SASR 137 are applicable to all sections of the community, including Aboriginal communities throughout Australia (140):

> "The maintenance of safety for children in our streets and elsewhere is a task to which many persons and organisations must contribute, but the courts have an especially important contribution to make. There are few misfortunes worse for a community than for parents and guardians to be affected by a gnawing fear, every time children go unaccompanied by an adult, that they may come to some serious harm – physical or psychological. Streets ought to be safe, and children ought to be free of threat. It follows that the object of general deterrence must be given a prominent place in the sentencing process."

[17] In many Aboriginal communities crimes of violence, including sexual violence, against women and children are prevalent. The victims frequently live in deprived and dysfunctional circumstances without significant support. They are particularly vulnerable. Such victims are entitled to look to the courts for protection against these types of crimes: *R v Wurramara* (1999) 105 A Crim R 512. General deterrence is a matter of particular importance.

Principles

[18] The principles governing Crown appeals are not in doubt and are well known. Thomas J has referred to the relevant passage from the joint

judgment in *Everett v The Queen* (1994) 181 CLR 295 at 299 – 300. As to the relationship between manifest inadequacy of sentence and the "matter of principle" of which Barwick CJ spoke in *Griffiths v The* Queen (1977) 137 CLR 293 at 310, in *Everett* their Honours said (300):

> "The reference to "matter of principle" in that passage must be understood as encompassing what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which Barwick CJ saw as constituting "error in point of principle".

[19] In *R v Barbara* (NSW Court of Criminal Appeal, unreported judgment number 60638 delivered 24 February 1997), Hunt CJ at CL, with whom the other members of the Court agreed, pointed out that the passage from the judgment in *Everett* cited by Thomas J was not limited to laying down some new point of principle. His Honour said:

> "It is usually overlooked by respondents that the High Court has at the same time also clearly indicated that sentences which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards, constitute error in point of principle which the Crown is entitled to have this Court correct."

[20] It is also appropriate to bear in mind the following remarks of King CJ in *R v Osenkowski* (1982) 30 SASR 212 at 213 which have been frequently cited with approval:

> "The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."

[21] In my opinion the individual sentences of three years imprisonment in respect of each crime of sexual intercourse without consent are so manifestly inadequate as to shock the public conscience and demonstrate error in point of principle. Further, although the sentence of four years imprisonment with respect to the crime of gross indecency is not, in itself, manifestly inadequate, the imposition of a longer sentence for that crime than the sentences imposed for the crimes of sexual intercourse without consent is demonstrative of error in the sentencing process. Finally, the total sentence of six years is manifestly inadequate having regard to the gravity of the total criminal conduct. In my view this is one of those rare cases in which this Court should allow the Crown appeal and re-sentence the respondent.

Re-sentencing

[22] In re-sentencing an offender following a successful Crown appeal this Court is required to give effect to the element of double jeopardy involved in requiring an offender to face the prospect of being sentenced twice for the same criminal behaviour. This principle usually results in a lesser sentence being imposed by the appellate court when re-sentencing than would have been imposed when sentencing at first instance. In compliance with the principle, appellate courts often impose new sentences which sit at the lower end of the range of appropriate sentences.

[23] I have reservations about the application of the "double jeopardy" principle to circumstances of the type under consideration, but I am bound by previous authority to apply it. If I had not been constrained by that authority, and before making allowance for the pleas of guilty, I would have regarded periods of 12 years and 7 years as appropriate sentences for the crimes of sexual intercourse without consent and gross indecency.

[24] Applying the principle of "double jeopardy", and before allowance is made for the plea of guilty, the appropriate sentence for each of the crimes of sexual intercourse without consent would be nine years. After allowance for the plea of guilty, I would impose a sentence of seven years imprisonment in respect of each of those offences.

[25] As to the offence of gross indecency, although the sentence of four years is not manifestly inadequate and there is no cross appeal complaining that the sentence is excessive, as the sentencing discretion miscarried this Court should impose sentence afresh.

[26] It must be remembered that sentence for the offence of gross indecency is being imposed on the basis that the maximum penalty is 16 years and not 25 years which would have applied if the respondent had been charged under s 127(3) of the Criminal Code. In my view, applying the principle of "double jeopardy", and before allowance is made for the plea of guilty, a sentence of five years imprisonment would be appropriate. After allowance

for the plea of guilty, I would impose a sentence of three years and nine months.

[27] In determining the total period of imprisonment that the offender should be liable to serve, I must also apply the principle of "double jeopardy". In my opinion, the appropriate total period is eight years commencing on 10 November 2004. This result should be achieved by directing that the sentences of seven years imposed on counts 1 and 2 be served concurrently from 10 November 2004 and that one year of the sentence imposed on count 3 be served cumulatively upon the period of seven years imposed on counts 1 and 2. I would fix a non-parole period of six years and six months commencing on 10 November 2004.

Mildren J:

[28] I have had the benefit of reading a draft of the reasons prepared by the Chief Justice and by Justice Thomas with which I am in substantial agreement. I agree that the appeal should be allowed. But for the plea of guilty, I would impose a sentence of nine years imprisonment in relation to each of the crimes of sexual intercourse without consent. However, allowing for the plea and for the element of double jeopardy, I would reduce both of these sentences to six years, to be served concurrently.

[29] I would not interfere with the sentence imposed for the offence of gross indecency. In my opinion, to the extent that that sentence has been appealed by the Crown, I would dismiss the appeal as, in my opinion, that sentence

has not been shown to be manifestly inadequate and there has been no cross-appeal against that sentence.

[30] In my opinion, the total period to be served is seven years commencing from 10 November 2004. I would achieve this by directing that one year of the sentence imposed on count 3 be served cumulatively upon the period of six years imposed on counts 1 and 2.

[31] Bearing in mind s 53(1) and s 55(1) of the Sentencing Act, I would fix a non-parole period of five years and six months.

Thomas J:

[32] This is a Crown appeal against sentence imposed in the Supreme Court in Alice Springs on 10 October 2005. On 1 April 2005, the respondent entered pleas of guilty to two charges of unlawful sexual intercourse and one charge of an act of gross indecency upon a child under the age of 16 years. He was sentenced to three years imprisonment on Count 1, three years imprisonment on Count 2 to be served concurrently and four years on Count 3 to commence after the offender has served two years of the concurrent sentence of Counts 1 and 2. This makes a head sentence of six years imprisonment. The sentencing Judge fixed a non-parole period of four years and six months.

[33] The single ground of appeal is that the sentence was manifestly inadequate. The maximum penalty on Counts 1 and 2 is life imprisonment and on Count 3 the maximum penalty is 16 years imprisonment.

[34] The principles on Crown appeals are set out in *Everett v The Queen* (1994) 124 ALR 529 at 531-532:

> "Nonetheless, in its exercise, a court of criminal appeal must, in the absence of clear statutory direction to the contrary, recognize that there are strong reasons why the jurisdiction to grant leave to the Attorney-General to appeal against sentence should be exercised only in the rare and exceptional case. An appeal by the Crown against sentence has long been accepted in this country as cutting across the time-honoured concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed ((1) See, eg, Whittaker v The King (1928) 41 CLR 230 at 248; Reg v Tait (1979) 24 ALR 473 at 476-477; Reg v Wilton (1981) 28 SASR 362 at 367-368; Reg v Holder (1983) 3 NSWLR 245 at 255-256; Reg v Peterson (1984) WAR 329 at 330-331; Reg v Stach (1985) 66 ALR 79 at 84; Cooke v Purcell (1988) 14 NSWLR 51 at 57-58; Reg v Dowie (1989) Tas R 167 at 177; Arnold (1991) 56 A Crim R 63 at 64-65 (Sup Ct WA); Reg v Hillsley (1992) 105 ALR 560 at 565.). That being so, a "court entrusted with the jurisdiction to grant or refuse such leave should give careful and distinct consideration to the question whether the Attorney-General has discharged the onus of persuading it that the circumstances are such as to bring the particular case within the rare category in which a grant of leave to the Attorney-General to appeal against sentence is justified" ((2) Malvaso v The Queen (1989) 168 CLR 227 at 234-235.). In determining whether that question should be answered in the affirmative, a court of criminal appeal should be guided by the following comment of Barwick CJ in Griffiths v The Queen ((3) (1977) 137 CLR 293 at 310. See, to the same effect, at 327 per Jacobs J, with whom Stephen J agreed, and 329-330 per Murphy J):"an appeal by the Attorney-General should be a rarity, brought only to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted person".

[35] His Honour made the following finding of facts:

> "The admitted Crown facts are that the victim was born on 5 August 2002. In November 2004, she was living at Tennant Creek at House 9 Dump Camp with her mother and older sibling, her grandparents,

two aunts and an uncle and four small cousins. At the time, she was aged two.

During the afternoon of Wednesday 10 November 2004, the offender was drinking port wine with his father and grandfather outside House 4 Dump Camp. They shared two 700 millilitre bottles. The offender assisted his father in walking the grandfather to House 4 and then the offender and his father walked to a public phone located near House 1 Dump Camp. The offender's father telephoned for a taxi which arrived shortly thereafter. The father got in the taxi. The offender remained sitting on the ground near the phone. He fell asleep.

Meanwhile at about 5 or 6 pm [the victim's mother] left the victim with her mother and went into town. The victim was dressed in a pink T-shirt and a nappy.

When the offender woke, he saw the victim playing near where he was sitting. He got up and walked over to the victim and picked her up and carried her down passed (sic) House 1, across Stanley Street and into the bush in order to have sex with her. The offender walked a considerable distance and then put the victim on the ground on her back. The offender pulled his jeans down and sat on the ground. The offender then, with force, inserted his index finger and middle finger into the victim's vagina and his ring finger and little finger into the victim's anus. The victim screamed in pain and began to cry.

With the force of the offender caused her vaginal tissue to tear. The offender told the victim to be quiet as he inserted half the length of his fingers into the vagina and anus. He moved his fingers in and out of the victim's vagina and anus for approximately four times before removing them completely. The offender developed a partial erection whilst his fingers were in the victim's vagina and anus. The offender then stood the victim on his lap and attempted to place his penis into the victim's vagina to have penile/vaginal intercourse with her. The offender placed his penis on the outside of the victim's vagina and his partial erection diminished.

It was that act that constituted count 3 on the indictment.

He then masturbated himself in an attempt to develop a full erection but was unable to do so. The victim continued to cry the whole time the offender was doing this. The offender then put the victim on the ground and stood up and pulled his jeans back up. He picked the

victim up and carried her back to Dump Camp, entering near House 4. The victim at the time was naked.

The offender carried the victim to the tin sheds at Dump Camp where his mother and father were. He carried the victim to his side; the victim's legs were together. His father told him to return the child to its home. The offender handed the victim to his father and the offender then walked to House 4 and went to sleep. The father had noticed that the victim had been crying. He carried the victim to House 9 and put her on a mattress outside the house and left her there with other children.

The following day the victim's mother noticed blood on the victims vagina and down her leg when showering her. The victim was crying and pointing to her vagina saying, 'Mum, sore'. The mother put another nappy on the child and noticed the child remained unhappy. Some time later, the nappy was removed and blood was noticed on the nappy. Another new nappy was put on the victim and the mother was told that the offender had taken the victim earlier in the day towards his parents' house and that they had been told that he was going to feed the victim.

The victim was taken to the police station and then to the Tennant Creek Hospital. The victim couldn't be fully examined because of her distress. As a result, the victim was flown to Alice Springs and on 12 November 2004 was examined under a general anaesthetic at the Alice Springs Hospital which revealed a one centimetre tear at the bottom of the vagina towards the anus. Two tears to the hymen; one being deep, the other superficial. The victim is also considered to have an irregular shaped sized anus.

The offender was arrested on the morning of 13 November 2004. He later participated in an electronic record of interview, making admissions to all the offences. When asked what he was thinking when he saw the victim playing in the camp, the offender replied, quote, 'To take it out bush to have sex', end of quote. When asked his reason for sexually assaulting the victim, the offender replied; 'Because something was forcing me inside'. When asked about the size of the victim's vagina and anus, the offender answered, 'Only little holes. Opened it and maybe scratched inside'. He was later charged.

> He was aged 26 at the time of the offence. Blood stained areas were ascertained in three areas on the offender's blue shorts and DNA profiles taken. DNA confirmed the presence of DNA of the offender on the victim's person. There were no male DNA components obtained from the victim's rectum and vulval swabs. No semen was detected on the swabs and smears from the victim's SAIK.
>
> At no time did the offender have permission to take or sexually assault the victim."

[36] A record of prior convictions was tendered. The respondent has no prior convictions for sexual offending or for any offences of violence. His Honour noted that gaol had not been a deterrent with respect to Mr Riley's driving offences. The respondent had a lengthy record of driving offences, including convictions for breach of suspended sentence. He also had convictions for enter a building with intent, stealing and unlawfully damage property which convictions were all imposed by the Court of Summary Jurisdiction in Alice Springs on 13 March 2002. He was sentenced to three months imprisonment suspended with an operational period of three years. He subsequently breached this suspended sentence.

[37] A victim impact statement was prepared by the mother of the victim. In this statement, the mother refers to the pain and distress experienced by her daughter. She also refers to the worry this offence has caused to herself as the mother and her concern for her daughter's future.

[38] A statutory declaration dated 18 February 2005 from Dr Rose Fahy, a consultant paediatrician at Alice Springs Hospital, was presented to the Court. This report details the physical injuries suffered by the victim. It

was noted that her injuries are consistent with both vaginal and anal trauma. She was treated imperically for sexually transmitted infections with triple antibiotics. The statement of Dr Fahy also notes that at the time of her discharge on 19 November 2004, "[the victim] was a much happier, content little girl".

[39] A number of reports were obtained that were taken into consideration by the Judge at first instance. The pre-sentence report dated 16 May 2005, describes the offender as a twenty seven year old initiated aboriginal man. His primary language is Warlpiri. He has a good command of the English language. His literacy and numeracy skills are almost non-existent. He claims to be medically fit with no ongoing medical issues. He admitted having an extensive history of alcohol and illicit drug (cannabis) misuse as well as being a long term petrochemical inhalant user. The author of the pre-sentence report stated the offender failed to acknowledge any personal responsibility for his offending, but rather blamed it on an external influence which was "a little thing" which entered his head and "made me do it".

[40] A clinical assessment dated 11 August 2005, was prepared by Dr Charlotte Ho, Senior Forensic Psychologist, Alice Springs Correctional Centre. This report states that on interview with Mr Riley, no psychological or psychiatric disturbances were noted. This report states (p 5):

> "Furthermore, Mr Riley showed limited insight and seemed to display little empathy towards the victim, indicating that he struggled

> to conceptualise and acknowledge how his offence might have impacted on the victim in both short and long terms."

He admitted to being under the influence of alcohol at the time of the offence but denied he was under any other influence. He told the author of this report that at the time of the offence there was "something in [his] head to tell [him] to rape the victim".

[41] The author of this report also states at p 6 of the report:

> "On the basis of clinical observation and judgement, Mr. Riley's cognitive capacity appears to be within the normal range, suggesting that he is functioning at an average level of intelligence in comparison to his same-aged cultural peer group. Mr. Riley's cognitive functioning is possibly hindered by his alcohol abuse over the years, thus his skills in consequential thinking might be hindered."

[42] Mr Riley was assessed by Dr Ho as being at a medium-high risk of re-offending, his "prime victim target groups are pre-pubescent girls".

[43] A report dated 15 September 2005, was also received. This report was prepared by Dr Marcus Tabart, Forensic Psychiatrist with the Department of Health and Community Services in Central Australia. The report made reference to the use of an interpreter because of Mr Riley's poor comprehension of the English language. Under the heading "Work History", Dr Tabart has noted:

> "He has never worked and has no prospects or coherent plans to alter this in the foreseeable future. He says he get a pension every fortnight."

[44] Under the heading "Conclusions and Recommendations", Dr Tabart states:

> "Mr. Riley is a 27-year old Walpiri man who has a past history of alcohol dependence, marijuana abuse and had been a former petrol sniffer. He has had one admission to a Psychiatric unit in 2002 with a transient organic psychosis that was related to his poly-substance abuse. He was lost to follow-up but it seems there have been no further episodes of psychosis and he had by this stage ceased inhaling petrol.
>
> Mr. Riley continues to drink alcohol and use marijuana at a hazardous level and this use has caused problems in the legal, interpersonal and social domains of his life. He has never engaged in effective drug rehabilitation partly because of his motivation to effect control of his substance usage is minimal. He only evinces a superficial acceptance of the harmful effects of alcohol and marijuana in his life."

and then:

> "There is no significant evidence that he was suffering a mental illness such as Schizophrenia at the time of the commission of the offences nor indeed does he suffer from significant cognitive impairment that could have explained his behaviour. His naïve explanation seems, in my opinion to be a defensive rationalisation and attempt to externalise responsibility rather than a full acceptance of responsibility.
>
> He did accept this behaviour was wrong and was clearly ashamed realising that the Community would be expecting to punish him.
>
> There is no obvious evidence of a paraphilia th[r]ough his capacity to empathise with his victim; accept responsibility; recognise that without remedial therapy he could re-offend; his superficial reassurance that this would not happen again because [he] is going to live out bush and finally his lack of motivation to address his substance abuse issues is of considerable concern.
>
> Without attention to these areas th[r]ough specific sex offender programs, alcohol rehabilitation, social skills training and the like one could not provide reassurance to the community that this behaviour will not reoccur."

[45] In his remarks on sentence, his Honour mentioned the various reports. He noted the limited empathy with the victim. He gave credit to the respondent for having some recognition of what he has done and that when he is released he wishes to go bush because he feels ashamed of what he has done. His Honour also gave the offender credit for the frankness of his admission in the record of interview before there was DNA evidence available against him. There was evidence before him, in particular in the psychologists report to base his finding, that the prospects of rehabilitation were poor.

[46] The aspect of general deterrence and personal deterrence are important in the sentencing process for offences of this nature. The offences were grave, calling for a strongly punitive and deterrent sentence.

[47] The statement in the Court of Criminal Appeal decision in *The Queen v Innes Wurramara* (1999) A Crim R 512 at 520 are applicable to this case:

> "Courts in the Northern Territory, and elsewhere in Australia, have been consistently expressing concern as to the level of violence occurring in some Aboriginal communities. …
>
> The courts have been concerned to send what has been described as "the correct message" to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so. …"

[48] I consider the head sentence of six years with a non-parole period of four years and six months is "so obviously inadequate as to be unreasonable or plainly unjust" – *The Queen v Stephen Day* [2004] NTCCA 2 Mildren J at par 54. This is so, having particular regard to the following matters:

1) The young age of the victim who was two years and three months at the time of the offence. The offender was 26 years old. Sexual attacks upon young children must be severely punished if the courts are to protect young children – *R v Arnold* (1991) 56 A Crim R 63 at 68 per Ipp; *The Queen v Myer* (1984) 35 SASR 137 at 140 per Wells J.

2) There was a degree of premeditation in the commission of the offences. The respondent carried the victim a considerable distance into the bush. He removed the victim's t-shirt and nappy and lay her on the ground on her back.

3) The respondent inserted his index and middle fingers into the victim's vagina and his ring finger and little finger into her anus. He did not desist when the victim screamed in pain but told her to be quiet. He inserted half the length of his fingers into the vagina and anus. He moved his fingers in and out approximately four times. Regard must be had to the smallness of the victim's vagina and anus in assessing the seriousness of digital penetration with respect to Counts 1 and 2.

I would regard the digital penetration of this young child in the manner that has been described using two fingers together to be as serious, if not more serious, than some of the cases before this Court involving penile penetration.

4) The victim sustained a number of injuries including a 1 cm tear at the victim's posterior fourchette. Tears to her hymen which extended deep into the vagina, her introitus and urethra were swollen and she had tears to her anus.

5) The respondent was not entitled to any leniency with respect to his prior record. He had no prior convictions for sexual offences. However, his record indicated he had committed a number of driving and dishonesty offences. He had breached three suspended sentences and a home detention order.

6) The victim impact statement outlines the effects of the offence upon the victim and her mother.

7) The respondent was given credit for making full admissions to the offending prior to the availability of the DNA evidence. He was deserving of such credit. However, I note from the accepted Crown facts that his association with the child was known to others in his community including his own parents. This is not the class of case where, without the DNA evidence, the offender would never have been identified.

8) Counts 1 and 2 carry a higher maximum penalty than Count 3 and given the fact penetration occurred in Counts 1 and 2 they must be viewed more seriously.

9) Whilst the respondent did evidence some feelings of shame, he had limited empathy for his victim and a lack of understanding of the consequences of his alcohol abuse.

10) Count 3 being the offence of gross indecency involved actions toward penile penetration.

11) The poor prospects for rehabilitation:

(i) part of which are the lack of social support within his own community, his long term unemployment and his lack of insight into the consequences of his own alcohol abuse; and

(ii) the assessment by the forensic psychologist Dr Ho that Mr Riley was at a medium to high risk of re-offending.

[49] Accordingly I would allow the appeal.

[50] It is appropriate for this Court to re-sentence the respondent. The respondent is entitled to a discount for his plea of guilty. When the respondent is re-sentenced following a successful Crown appeal, I have to make allowance for the principle of "double jeopardy" which usually results in a lesser sentence being imposed than would otherwise be an appropriate sentence. Having regard to the principle of "double jeopardy" and the principle of totality, I would agree with the sentence as proposed by Martin CJ.
