Green v R [2000] NTCCA 1

PARTIES:	HARRISON GREEN
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA22 of 1998 (9721574)
DELIVERED:	11 February 2000
HEARING DATES:	3 June 1999
JUDGMENT OF:	GALLOP, ANGEL and MILDREN JJ

CATCHWORDS:

Criminal Law – Sentencing Act 1995 (NT) – Indefinite sentences for violent offenders - Appeal against sentence – Judicial discretion to impose indefinite sentences

Sentencing Act 1995 (NT), ss 65(8), (9) and (10)

R v Tait and Bartley (1979) 24 ALR 473 at 476, applied
Singh v R (1984) 55 ALR 692 at 695, applied
R v Wilson (Court of Appeal, Queensland, unreported 12 August 1997), considered
R v Fletcher (Court of Criminal Appeal, Queensland, unreported, 25 September 1998), discussed
R v Moffatt (1998) 2 VR 229, discussed

Statues – Acts of Parliament – Interpretation – Sentencing Act 1995 (NT) – Indefinite sentences for violent offenders – Words and Phrases – conjunction "and/or" – whether an "offender is a serious danger to the community" – whether the nature of the offence is "exceptional"

Sentencing Act 1995 (NT) ss 65(8), (9) and (10)

R v Moffatt (1998) 2 VR 229 at 254-255, applied

Criminal Law – Sentencing – Sentencing Act 1995 (NT) – Indefinite sentences for violent offenders – "offender is a serious danger to the community" – "dangerousness" – time for determining whether an offender is a serious danger to the community

Chester (1988) 165 CLR 611, discussed
R v Wilson (Court of Appeal, Queensland, unreported, 12 August 1997), applied
Lowndes v R (1997) 95 A Crim R 516 at 524, applied
R v Fletcher (Court of Criminal Appeal, Queensland, unreported, 25 September 1998) applied
Carr v R (1996) 1 VR 585 at 592, discussed

Criminal Law – Evidence – Sentencing – Relevance of opinion evidence of lay witnesses – Relevance of pre-sentence reports

Sentencing Act 1995 (NT), ss 104, 105 and 106

R v Davey (1980) 50 FLR 60, applied
Munungurr v R (1994) 4 NTLR 63 at 71-73, applied

REPRESENTATION:

Counsel:

Appellant:	K Kilvington
Respondent:	R Wild QC

Solicitors:

Appellant:	Centralian Australian Aboriginal Legal Aid Service
Respondent:	Director of Public Prosecutions

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

No. CA22 of 1998 (9721574)

Green v R [2000] NTCCA 1

BETWEEN:

HARRISON GREEN

Appellant

AND:

THE QUEEN

Respondent

CORAM: GALLOP, ANGEL and MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 11 February 2000)

GALLOP J:

[1] I have read the judgments of Angel and Mildren JJ in draft form in this matter. I agree with their conclusion that leave to appeal should be granted and the appeal dismissed for the reasons set out in the judgments.

[2] As Mildren J has observed, this is the first occasion upon which this Court has been called upon to consider the provisions of Subdivision 4 Division 5 of Part 3 of the *Sentencing Act* which is headed "Indefinite Sentences for Violent Offenders".

[3] The application raised a number of important questions concerning the application of the terms of those provisions and, accordingly, it is

appropriate to grant leave to appeal. Where there is a sufficiently arguable case on an application for leave to appeal against sentence, the appropriate course is to grant leave to appeal, deal with the merits of the appeal and reach a decision allowing or dismissing the appeal (*Bailey v Director of Public Prosecutions* (1988) 62 ALJR 319, a decision of the High Court of Australia, Mason CJ, Brennan, Dawson and Toohey JJ).

[4] The substance of the appeal is a challenge to the sentencing Judge's imposition of an indefinite sentence on the appellant. I agree with Mildren J that on an appeal of this nature, the principles laid down in *R v Tait and Bartley* (1979) 24 ALR 473 are to be applied in accordance with the decision of this Court in *Singh v The Queen* (1984) 55 ALR 692. This Court will only interfere with the decision of the sentencing Judge if the Judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence.

[5] The decision of Thomas J in this case involved first making findings of fact and then deciding whether the facts as found established the statutory background to permit the imposition of an indefinite sentence. Thomas J found as facts that the appellant had been convicted of a violent offence (s65(2)) and that the appellant was a serious danger to the community because of the matters set out in s 65(8) and s 65(9). Having determined those questions of fact, she then exercised her discretion to impose an indefinite sentence on the appellant on those facts. Although it may be said that the exercise of the sentencing power by a court is "discretionary", in

fact in the application of s 65 of the *Sentencing Act* the sentencing Judge has to exercise not a single, but a number of discrete kinds of judgmental processes. Once the facts have been found and hence the power to impose an indefinite sentence and the factors which govern the exercise of that power do exist, the decision whether to impose an indefinite sentence becomes a discretionary decision of the kind with which appellate courts are well familiar. In respect of such discretionary decisions and in accordance with well known authority appellate courts exercise a high degree of restraint. But on the question whether or not the statute applies to the facts found, appellate courts are not inhibited by the authorities on discretion.

[6] Angel and Mildren JJ have respectively detailed the findings of fact made by her Honour. Her discretion to impose an indefinite sentence has not been shown to be in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence.

[7] The appeal should be dismissed.

ANGEL J*:*

[8] This is an application for leave to appeal against an indefinite sentence imposed upon the applicant pursuant to s 65 *Sentencing Act* on 21 October 1998 in respect of a conviction for rape.

[9] The indefinite sentencing provisions of the *Sentencing Act* are contained in ss 65 – 78. They include certain procedural requirements. It is not alleged that there was any procedural irregularity in what her Honour did. It is argued that her Honour's conclusion that the applicant is a serious danger to the community, based as it was, upon undisputed primary evidence, was wrong, and that, even if that conclusion be correct, her Honour erred in the exercise of her discretion in actually imposing an indefinite sentence.

[10] The provisions raise some difficult questions of construction and the concept of dangerousness.

[11] Upon conviction for a violent offence – the present offence, rape, is by definition a violent offence, s 65(1)(c) – the Supreme Court may sentence the offender to an indefinite term of imprisonment, s 65(2).

[12] S 65(8), 65(9) and 65(10) provide as follows:

> "(8) The Supreme Court shall not impose an indefinite sentence on an offender unless it is satisfied that the offender is a serious danger to the community because of –
>
> (a) the offender's antecedents, character, age, health or mental condition;

(b) the severity of the violent offence; and/or

(c) any special circumstance.

(9) In determining whether the offender is a serious danger to the community, the Supreme Court shall have regard to –

(a) whether the nature of the offence is exceptional;

(b) the offender's antecedents, age and character;

(c) any medical, psychiatric, prison or other relevant report in relation to the offender;

(d) the risk of serious physical harm to members of the community if an indefinite sentence were not imposed; and/or

(e) the need to protect members of the community from the risk referred to in paragraph (d).

(10) Subsection (9) does not limit the matters to which the Supreme Court may have regard in determining whether to impose an indefinite sentence.".

[13] Subsections (8) and (9) each employ what Viscount Simon in *Bonitto v Fuerst Bros* [1944] AC 75 at 82 described as " the bastard conjunction 'and/or'", a device or shortcut which often leads, as it does here, to confusion or ambiguity. See, generally, Piesse, The Elements of Drafting 4th ed (1968) pp 102-110 (which, incidentally, misquotes Viscount Simon, supra) and the cases and examples cited.

[14] Whereas s 65(8) proscribes the matters "because of" which the Court is to be satisfied that an offender is a serious danger to the community, s 65(9) requires the Court to "have regard to" certain matters in determining whether the offender is a serious danger to the community.

[15] The words "because of" in s 65(8) import cause and effect. The conjunction "and/or" indicates that any one or more of the factors mentioned in (a) or (b) or (c) can ground a finding that an offender is a serious danger to the community. I think this is so as a matter of literal construction and because there is no reason why each of the (possibly quite unrelated) factors should be a cause or a contributing cause for concluding that an offender is a serious danger to the community. The literal construction gives a less confined role to the Court and greater protection to the public. I do not think there is reason to think the Legislature intended otherwise.

[16] On the other hand I am unable to give any sensible literal meaning to the words "and/or" in s 65(9). Plainly, I think, the Court is required to have regard to all the matters referred to in s 65(9). The "and/or" between sub-ss 9(d) and 9(e) simply makes no sense in so far as it purports to include the disjunctive "or". One can not uncouple sub-ss 9(d) and (e) because of their very terms; they are inextricably bonded. Subsection 10 supports this conclusion. I can only conclude that the "and/or" in s 65(9) is a mistake and was intended to mean and should be construed as "and". The mistaken use of "and/or" in s 65(9), it seems to me, is no sufficient reason for the Court to infer that a like mistake is made in s 65(8).

[17] The prosecution has the onus of proving that an offender is a serious danger to the community, s 70, the standard of proof required being that proscribed by s 71, which provides:

"71. STANDARD OF PROOF

The Supreme Court may make a finding that an offender is a serious danger to the community only if it is satisfied –

(a) by acceptable and cogent evidence; and

(b) to a high degree of probability,

that the evidence is of sufficient weight to justify the finding.".

[18] Any finding that an offender is a serious danger to the community referred to in s 71 is to be made necessarily having regard to the matters referred to in s 65(9). However, it is "because of" the matters referred to in s 65(8) that the Court must be satisfied that the offender is a serious danger to the community. A "special circumstance" in s 65(8)(c), means, I think, no more than a particular or peculiar or notable or significant circumstance of the offender or the offence which indicates that the offender is a serious danger to the community.

[19] It is to be noticed that s 65(8)(b) speaks of "the severity of the violent offence", whereas s 65(9)(a) speaks of "the nature of the offence". The latter section is not expressed in terms of "the circumstances of the offence" or "the nature of the offending". S 65(9)(a), in contrast to s 65(8)(b) appears to be addressing the offence as proscribed by the *Criminal Code* rather than the offending of the offender. However the Victorian equivalent of s 69(9)(a) was construed in *Moffatt* (1997) 91 A Cr R 559 to cover the offending of the offender and I am content to accept that construction. Having regard to s 65(8)(b) it probably does not matter much. It is also to

be noticed that whereas s 65(9) requires the Court to have regard to certain matters "in determining whether the offender is a serious danger to the community", that is, it relates to the initial finding that necessarily precedes the exercise of the sentencing discretion as to whether the offender ought in fact be sentenced to an indefinite term of imprisonment, s 65(10) refers to the matters to which the Supreme Court may have regard "in determining whether to impose an indefinite sentence", that is, matters to which the Supreme Court may have regard in exercising the sentencing discretion, the Court necessarily having already found as a fact that the offender is a serious danger to the community. It was not disputed that the Court has a discretion. See *Lowndes v The Queen* (1999) 73 ALJR 1007 at 1010.

[20] I think, on the evidence, it can be said there is a risk of serious physical harm to members of the community. The sexual crimes of the applicant, involving young children, as they did, are particularly heinous, and yet, even though there is no evidence of *serious* physical harm having been inflicted as a consequence of the present offence, any adult act of sexual intercourse with a young child carries with it the risk of serious physical harm.

[21] The factors referred to in s65(9) may be inconsequent to a finding of serious danger to the community in the particular circumstances of a case. A Court may be satisfied that an offender is a serious danger to the community because of a special circumstance, s 65(8)(c), and may impose an indefinite sentence because of matters other than those referred to in s 65(9), see s 65(10). As was held in *Moffatt* (1997) 91 A Crim R 559 at 562, 575, the

Victorian equivalent of s 65(9)(a) did not *require* an offence to be exceptional before the Court could make a finding of a serious danger. The Court said that in order for an offence to be "exceptional" there may "be a need to identify some feature or features of the offending which attracts sterner punishment .... ." cf *Wilson* [1996] 1 NZLR 147 at 151.

I respectfully agree. I think the present offence is properly to be characterised as exceptional. Indiscriminately to seize an eight year old stranger from a public sideshow area, physically carry him, protesting all the while, to a secluded area and there anally rape him in broad day light, is in my view exceptional.

[22] Counsel for the appellant drew the Court's attention to certain authorities and interstate indefinite sentencing provisions which address the time for determining the question whether the offender is a serious danger to the community. We were referred to *Carr* [1996] 1 VR 585 at 592; *Moffatt,* supra, at 583; *Lowndes* (1997) 95 A Crim R 516 at 524; *Fletcher,* CA no. 243 of 1998 Court of Appeal Qld (unreported 25 September 1998), and *Wilson* CA nos. 200 of 1996 and 333 of 1996 Court of Appeal Qld (unreported 28 November 1997). Whereas in *Carr* and *Moffatt* it was held that it was for the Court only to consider whether the offender is a serious danger at the time of sentencing, in *Fletcher, Wilson* and *Lowndes*, it was said the matter was to be approached not only at the time of sentencing but also in the future if an indeterminate sentence was not imposed, and that the question of a continuing danger to the community after release had to be

addressed. The Queensland cases emphasised the Queensland equivalent of s 65(9)(d) and s 65(9)(e) in reaching this conclusion. In *Wilson*, Pincus JA said:

"It is my opinion that the primary question is dangerousness at the time of sentencing; but it seems to me evident that dangerousness at later points in time is made relevant by s163(4)(d). Under that paragraph the Court must have regard, in determining whether the offender is a serious danger to the community, to –

> ' … the risk of serious physical harm to members of the community if an indefinite sentence were not imposed…'

The hypothesis that there is no indefinite sentence does not direct the Court's consideration to the possibility that no custodial sentence at all is imposed; since a very serious offence must be in issue, it appears that, as in the present case, if there is no indefinite sentence there will be a sentence of determinate length – the sentence referred to in s163(2). Therefore, in deciding whether the offender is a serious danger to the community the court must have regard to the risk of serious physical harm to members of the community if a determinate sentence of the appropriate length were imposed, instead of an indefinite sentence.

If such a sentence were imposed, the offender might be released on parole at the half-way point or later, or might serve the full term. Of course, there are other possibilities, such as a release to work. It is my opinion that s163(4)(d) compels the conclusion that in determining whether the offender 'is' a serious danger the Court has to consider among other matters what danger would be presented to the community if there were, rather than an indefinite sentence, a determinate one; this is a difficult task, because the Court cannot know whether the offender will be released before the end of the determinate sentence hypothesised, and if so, when.

If the offender is regarded as a serious danger to the community at the time when he becomes eligible for parole under a determinate sentence he would not, other than in error, then be released on parole. But the possibility of an offender who is still regarded as a serious danger earning remissions, so as to obtain release earlier than the end of the determinate sentence, cannot be ignored.

In my view, the result of para(d)(with ancillary provision, para(e)) of s163(4) is that the Court must consider the danger at the precise time of sentencing but also, and at least as importantly, look to the future; if it does not, the Court cannot carry out the mandatory requirement of para(d) and that of para(e). What the Court has to do, then, is to look at the present danger and also consider the extent of the risk of serious physical harm to people, if there is a determinate sentence instead of an indeterminate one.".

[23] I respectfully agree with these remarks. As the High Court said in *Lowndes v The Queen* supra, at 1010, questions of evaluation and prediction are to some extent involved.

[24] As to the time for determining the "serious danger" Counsel for the appellant argued that the prosecution had the onus of proving, to the standard of proof required by s 71, and particularly by reason of s 65(9)(d), that the appellant would re-offend. I am unable to accept this submission. It involves what Gleeson CJ, in the context of a Mareva case, *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325, described as "the theoretical objection concerning the conceptual difficulties involved in applying the standard of balance of probability to future, as distinct from past, events referred to by Lord Reid in *Davies v Taylor* [1974] AC 207 at 212".

[25] That objection is not diminished by the higher standard of proof required by s 71, a provision obviously influenced by the High Court's reference in *Chester* (1988) 165 CLR 611 at 618 to the requirement for "cogent evidence that the convicted person is a constant danger to the community". In *Addington v Texas* (1979) 441 US 418 at 429 Burger CJ said: " … there is a serious question as to whether the state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous". It could not, I think, have been the intention of the Legislature to require proof of the unprovable.

[26] I am, of course, anxious not to "drown in a sea of semantics"; cf per Meagher JA in *Patterson* (supra) at 327, but it is clear that the legislation requires a finding of present fact, viz. that the offender IS a serious danger to the community. Proof of dangerousness has proved elusive to both the legal and medical professions, as the extensive literature addressing it attests. For example Professor Ian Campbell has said:

> "Degree of certainty about dangerousness. It is unnecessary to review the well-thumbed pages of the literature on the fallibility of predictions of dangerousness. The false positives and false negatives in predictions of dangerousness continue to be observed, despite some high true positive rates well above chance for some particular offender groups. It suffices to note that the ineradicability of false positives has signalled, for some, the need to abolish or at least limit to the greatest possible extent any form of preventive sentencing based upon fallible psychiatric judgments (Radzinowicz & Hood 1981a, 1981b). However, the expectation that predictions of dangerousness need to be completely valid and reliable, or of a much higher order of validity and reliability than has been observed to date before they can be acted upon is disingenuous.".

See Campbell, "Indeterminate Sentences and Dangerousness" in Serious Violent Offenders : Sentencing, Psychiatry, and Law Reform, Conference Proceedings of the Australian Institute of Criminology No. 19 (1991) at 89.

[27] With respect, I do not think it is helpful or accurate to speak of "predictions of dangerousness". Dangerousness is a state.

[28] I respectfully think Hayne JA's reference to nitro glycerine in *Moffatt* (supra), viz. " … nitro glycerine IS dangerous because it WILL explode IF it is not handled properly" is apt, though not, with respect, strictly correct.

The finding required by the legislation is, I think, that an offender is a serious danger to the community in that he or she is liable or likely or predisposed to reoffend, not that an offender is a serious danger to the community because the offender will, in fact, at some future time, reoffend. Nitroglycerine IS dangerous because it IS LIKELY TO - not will - explode IF it is not handled properly. It is dangerous before it explodes. The judicial task involves a finding of present fact, and an evaluation of present and future risk, not foretelling the future. The High Court in *Chester* at 618, 619 said the Court must be " … satisfied by acceptable evidence that the convicted person is … so likely to commit further crimes of violence (including sex offences) that he constitutes a constant danger to the community". I take it that "likely" in that context means no more than a substantial or real risk that the offender would reoffend regardless of whether the risk is more or less than fifty per cent, cf Boughey (1986) 161 CLR 10. A less than fifty per cent chance of reoffending may nonetheless constitute a serious danger to the community if the gravity of the consequences of reoffending is sufficiently dire. A small (but nevertheless real) danger of reoffending in which event there would be catastrophic consequences would nonetheless, it seems to me, constitute a serious danger to the community. It all depends on the circumstances.

[29] Particularly given the applicant's history of offending and the circumstances of the present offence and its resemblance to the applicant's 1990 and 1993 child sex offences, I have no difficulty reaching the conclusion that the

applicant is a serious danger to the community. The applicant is prone to violence and when drunk is apparently unable to control his sexual instincts. The applicant is a recidivist sex offender with an extensive prior history of other offences of violence dating back to 1976. Both personally and statistically there is a real likelihood of him reoffending – at least in the presence of alcohol and the absence of some effective intervention. I do not think the attack on her Honour's finding that the applicant is a serious danger to the community succeeds.

[30] I turn to the question of her Honour's exercise of discretion.

[31] Her Honour was bound to give reasons for imposing an indefinite sentence (s 69) and said:

> "I am satisfied to a high degree of probability, based on cogent evidence, that Harrison Green is a serious danger to the community. The circumstances I have found proved are such to give a power to impose an indefinite sentence. I should then consider whether, in the exercise of my discretion, I should in fact proceed to impose such sentence. The imposition of an indefinite sentence is a discretionary power, and I refer to the matter of *R v Fahey* [1954] VLR 460. The use of habitual criminal provision should be exercised very sparingly indeed, and it is only in the rarer circumstances that a person should be declared an habitual criminal. And I am referring there to a decision of *Nabobbob v R*, which was a decision of the Northern Territory Court of Criminal Appeal number 11 of 1990, unreported, delivered on 9 December 1991, where at p 7 of the report, the Court of Appeal were quoting with approval the remarks of Nader J, being the Judge at first instance.
>
> Applying that principle to the provisions of the *Sentencing Act*, I would agree that it is only in exceptional circumstances that a power such as contained in s 65 of the *Sentencing Act* should be invoked. And I refer also to the decision of *R v Chester* and the decision in *Moffat*, both of which I have already referred to, the latter decision being the remarks of Hayne J at p 584. It is a power that should be used very sparingly and only after most careful consideration.
>
> Having given this matter careful consideration I am of the opinion that it is an appropriate matter to exercise a discretion and pursuant to the provisions of s 65

impose an indefinite sentence. I intend to just pause there for a moment. I will go on and fix the nominal sentence that I am required to do under s 65(5).".

[32] Her Honour appears to have been largely influenced by her findings of fact in reaching her conclusion that the applicant was a serious danger to the community and that the applicant had been warned by the Chief Justice in March 1994 that any further offending may well result in him being gaoled for an indeterminate term. There is no reason to suppose the applicant did not understand the warning. He was described as "articulate" by the Chief Justice and as "intelligent" by Mr Joblin, a psychologist. Her Honour did not expressly advert to whether a lengthy determinate sentence would suffice. However she must have considered that alternative – the only realistic alternative to the indeterminate sentence imposed. In each case it is a matter of making an objective assessment of the whole of the circumstances of the offence and the offender and the sentencing options available to determine how best to reconcile the conflict between the interests of the offender and the legitimate interests of the community having regard to the serious danger to the community posed by the offender. It is a matter of reconciling the conflict between one good (freedom of the individual) and another good (community protection) and choosing the appropriate sentence. Any choice involves some degree of sacrifice – cf Lord Hoffman, *Human Rights and the House of Lords* (1999) 62 Mod LR 159 at 165.

[33] The following matters are not in dispute.

[34] The applicant is an intelligent, articulate full blood Aboriginal man. Gaol apart, he has lived almost his whole life in Ali-Curung. He is married. He is 38 years of age. He is alcohol dependent. Under the influence of alcohol he is violent and aggressive and unable to control his sexual instincts. Since 1980 he has committed four serious sexual offences, the last three on young children. In addition he has 12 convictions for assault and aggravated assault since 1978 for which sentences of imprisonment were imposed. Very significantly for present purposes imprisonment in the past has proved no deterrent. There is no discernible trend of psychological maturation despite his age. In the past he has refused parole on a number of occasions because he will not accept "vigilant supervision". He has never completed available alcohol abuse rehabilitation programmes in the past. There is nothing in his history to indicate he has the capacity or the will to change his ways. The Ali-Curung community do not want him to return to the community and there is no post release plan for him. Prior to the present offences he had received strong comments from various sentencing judges and magistrates about his offending. In March 1994 he was specifically warned by the Chief Justice that if he did not mend his ways, any further offending may well result in the imposition of an indefinite sentence of imprisonment. Her Honour found that the applicant is a serious danger to the community and that there was a risk of serious physical harm to young children if an indefinite sentence was not imposed. Implicit in this finding was a rejection of a fixed term sentence as a suitable alternative. Such a

finding was in my view justified given, inter alia, that imprisonment in the past had proved no deterrent, that the applicant had neither the capacity nor the will to change his ways and that he had deliberately refused rehabilitative efforts in the past. At all events, it has not been shown to be wrong.

[35] Given the circumstances of the present offence and the matters I have referred to, it can not be said that in imposing an indefinite sentence her Honour's discretion miscarried.

[36] I would grant leave to appeal but dismiss the appeal.

MILDREN J

Background:

[37] This is an application for leave to appeal against sentence.

[38] On 21 October 1998, the appellant was sentenced by Thomas J to an indefinite term of imprisonment, pursuant to s65(2) of the *Sentencing Act* (the Act). On 1 April 1998 the appellant had pleaded guilty to having sexual intercourse with a boy aged eight without his consent, contrary to s192(3) of the *Criminal Code* (the Code). Pursuant to s66(1) of the Act, the prosecutor, at the conclusion of submissions on sentence and upon the recording of a conviction by Thomas J, advised the Court that it was intended to apply to the Court under s65(3) of the Act for the imposition of an indefinite sentence. Thereafter the necessary procedures provided for by the Act were invoked to enable the Court to consider the prosecutor's application. No complaint is made that either the Court or the prosecutor failed to comply with any of the procedural requirements of the Act.

[39] After hearing evidence and the submissions of the parties, her Honour concluded that the appellant is a serious danger to the community because of:

(a) the appellant's antecedents, character and age, and his proclivity for aggression and loss of control of his sexual instincts when he is drunk;

(b) the severity of the violent offence; and

(c) the special circumstances being a total of four sexual assaults between 1980 and 1997, the last three of which were upon

young children, and the consequences of such offences on young children.

[40] Her Honour found that she therefore had a discretion whether or not to impose an indefinite sentence. After referring to several authorities which she said required her to exercise her discretion adversely to the appellant in only exceptional circumstances, her Honour decided that this was such a case, and she imposed an indefinite term of imprisonment. Her Honour also imposed a nominal sentence of six years imprisonment, noting, after referring to several authorities, that the nominal sentence was lighter than she would have imposed had she sentenced the appellant to a definite term of imprisonment. The sentence imposed was backdated to take effect from 26 September 1997 when the appellant first was taken into custody. An order was made pursuant to s72(2) of the Act that the matter be listed before the Supreme Court on 26 September 2000 "to commence proceedings for review".

[41] The grounds upon which the appellant has sought leave are set out in a document entitled "Amended Notice of Appeal" annexed to the affidavit of Mr Kilvington, who appeared as counsel for the appellant. The grounds allege a number of errors by Thomas J in finding that the appellant was a serious danger to the community, and allege further, that her Honour's discretion miscarried. It is not necessary to set out that document, which is somewhat lengthy, in full; the points relied upon will be referred to hereunder.

Leave to appeal

[42] The Act does not provide for a right of appeal to this Court from the imposition of an indefinite term, although s77 of the Act does provide for rights of appeal to this Court in respect of a decision to discharge, or a decision to refuse to discharge, an indefinite sentence at the time when it is reviewed. The appellant's right of appeal is therefore pursuant to s410(c) of the Code, which requires the leave of the Court. If leave is granted, the usual principles apply. The appellant submitted that it was not necessary to establish error; the only question is whether the case has been correctly categorised, and that this Court ought to follow the approach in *Warren v. Coombes and Another* (1979) 142 CLR 531. In *Singh v. The Queen* (1984) 55 ALR 692 (a case which considered an appeal against a declaration that the prisoner was an habitual criminal, and a consequential indeterminate sentence of imprisonment) Forster J (with whom Woodward and Neaves JJ concurred) said, at 695:

> The principles which should guide appeal courts when reviewing the exercise of a sentencing discretion are well established. In *R v. Tait and Bartley* (1979) 24 ALR 473 this court said (at 476): "An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or 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 or inadequate as to manifest such error."

In my opinion, that is the correct approach to be taken to this case.

[43] This is the first occasion that this Court has been called upon to consider the provisions of Subdivision 4 of Division 5 of Part 3 of the Act which is headed "Indefinite Sentences for Violent Offenders" and this application raises a number of important questions concerning the construction of those provisions, the drafting of which appears to have been modelled on similar provisions to be found in Queensland's *Penalties and Sentences Act 1992,* and Victoria's *Sentencing Act 1991*. As to the Victorian provisions, Hayne JA (as he then was) in *The Queen v. Moffatt* (1998) 2 VR 229 at 247, said that there "...are questions, perhaps difficult questions, of construction presented by these provisions". I entirely agree. I would add the further comment that the draftsman of the Northern Territory's provisions did not slavishly follow either of these models. That is not in itself a criticism, but the problems of construction have not been made any easier because the difficulties identified by Hayne JA have remained, and it appears to me that the draftsman has added a few more of his own.

The Act

[44] S65(2) provides that the "Supreme Court may sentence an offender convicted of a violent offence or violent offences to an indefinite term of imprisonment". *Prima facie* this subsection envisages the possibility of an indefinite term even though the defendant is convicted of a single "violent offence" and has no prior convictions of any kind. "Violent offence" is defined by s65(1). The definition includes any crime that in fact involves the use or attempted use of violence against the person *and* for which an

offender may be sentenced to imprisonment for life; aggravated offences against ss127 and 128 of the Code; and offences against ss129 or 192 of the Code. The offence of which the appellant was convicted, was an offence against s192, and therefore a "violent offence".

[45] Ss65(8), (9) and (10) provide:

> (8) The Supreme Court shall not impose an indefinite sentence on an offender unless it is satisfied that the offender is a serious danger to the community because of –
>
> (a) the offender's antecedents, character, age, health or mental condition;
>
> (b) the severity of the violent offence; and/or
>
> (c) any special circumstances.
>
> (9) In determining whether the offender is a serious danger to the community, the Supreme Court shall have regard to –
>
> (d) whether the nature of the offence is exceptional;
>
> (e) the offender's antecedents, age and character;
>
> (f) any medical, psychiatric, prison or other relevant report in relation to the offender;
>
> (g) the risk of serious physical harm to members of the community if an indefinite sentence were not imposed; and/or
>
> (h) the need to protect members of the community from the risk referred to in paragraph (d).
>
> (10) Subsection (9) does not limit the matters to which the Supreme Court may have regard in determining whether to impose an indefinite sentence.

[46] If s65(8) had stood alone, it would appear that the intent is that the court could not impose an indefinite term unless it was satisfied to the relevant

standard of proof fixed by s71, that the offender "is a serious danger to the community" *because of either one or more* of the factors referred to in s65(8)(a), (b) or (c). The words "because of" suggest that the requirement is one of cause and effect; the words "and/or" indicate that at least one or more of the relevant factors must be found. As to what is meant by "a serious danger to the community" there is no particular guidance, but presumably the danger need not necessarily be so serious as to require any further qualifying epithet. The concept of "special circumstances", referred to in s65(8)(c) is imprecise. The factors in s65(8)(a) are expressed as alternatives. It is very difficult to imagine how a person could be a danger to the community simply because of his or her age, for example. Presumably one must read each of the items listed in s65(8)(a) as being sufficient either alone or in combination with some other such factor or factors.

[47] Another difficulty is caused by s65(9). Unlike s65(8) the factors mentioned in s65(9) are not expressed to be triggers which found jurisdiction to impose an indefinite sentence. S65(9) provides that the matters referred to are matters the court 'shall have regard to'. How does this fit with s65(8)? Suppose the conclusion was reached that because of the offender's antecedents, character and age (s65(8)(a)) he was a serious danger to the public, what would be the point of having regard to whether the nature of the offence was exceptional (s65(9)(a)), bearing in mind that the relevant

conclusion has already been reached? Why would the court need to again address the offender's antecedents, character and age under s65(9)(b)?

[48] A further problem arises from s65(10), which says that subsection (9) does not limit the matters to which the Supreme Court may have regard in determining *whether to impose an indefinite sentence,* rather than (as perhaps one might expect) *whether the offender is a serious danger to the community*. (This provision, I note, departs from the Victorian model, which is more along the expected lines, but follows the Queensland model.)

[49] Although we have been referred to some decisions from the Courts of Criminal Appeal of both Queensland and Victoria, they do not assist in resolving the questions of construction we are faced with by the Act's provisions in this jurisdiction. Particularly is this so in that in both of those jurisdictions, the conjunction used in the respective equivalents to s65(8) and s65(9) is "and" rather than "and/or".

[50] As to the relationship between s65(8) and s65(9), logically there are only two possibilities. First, the legislature may have intended that the factors the court shall have regard to under s65(9) be considered for the purpose of drawing the relevant conclusions required by s65(8). If this is correct, the court considers the matters required by s65(8) to determine whether or not the conclusion can be drawn that the offender is a serious danger to the public because of the factors in s65(8). The second possibility is that the court considers the s65(9) factors to see if there are causes other than those

referred to in s65(8) from which the conclusion may be drawn that the offender is a serious danger to the public. I reject this latter alternative as highly improbable; clearly the first alternative is to be preferred.

[51] I find it impossible to reach any sensible conclusions about the meaning of these provisions if the conjunction in s65(8) and s65(9) is "and/or". I am convinced that this is a mistake and the conjunction should be "and", as in the Queensland and Victorian models. Apart from the matters I have already discussed the clearest evidence of the fact that there is an error is in s65(9)(d) and (e). By the terms of s65(9)(e) one could not consider (e) separately; it must be considered together with (d). It is well established that the court can modify the meaning to be given to a conjunction if satisfied that a mistake has been made: see *Re The Licensing Ordinance* (1968) 13 FLR 143 per Blackburn J at 146-7.

[52] I am fortified in the conclusion I have reached in that, if I am correct, there is no jurisdiction to order preventative detention unless there are special circumstances (s65(8)(c)). It is well established that provisions of this kind are to be used sparingly and in a clear case; *Chester v. The Queen* (1988) 165 CLR 611 at 618-19; *The Queen v. Moffatt* (1998) 2 VR 229 at 234, 255, 258-9; and the construction I have reached is consistent with this approach.

The Grounds of Appeal

[53] The first point argued by Mr Kilvington for the appellant is that her Honour erred in determining that the time for considering whether or not the

offender is a serious danger to the community is at the time of sentencing. It was submitted that the correct test required a finding not only that the appellant was such a danger at that time, but that he would remain a constant and continuing danger after his release. In support of this contention Mr Kilvington relied upon *Lowndes* (1997) 95 A Crim R 516 at 523-4 per Malcolm CJ (with whom Pidgeon and Walsh JJ concurred). However s98 of the *Sentencing Act 1995* (Western Australia) which the Court of Criminal Appeal of Western Australia was called upon to consider is very differently drafted to the provisions we are called upon to consider.

[54] In Victoria, the Court of Criminal Appeal unanimously held in *Carr v. The Queen* (1996) 1 VR 585 at 592 that the question had to be determined at the time of sentence:

> It is clear from these words that the learned judge took the view that the primary question for him was whether the prisoner was at the time of sentencing a serious danger to the community. In our view he was correct in so deciding. The argument that the section requires a prediction of future dangerousness at the end of the nominal sentence is, we think, contradicted by the use of the words "is a serious danger" in ss18B(1), (2) and (3) as well as by reference, in so far as there is any ambiguity in these subsections, to the remarks of the Attorney-General in her second reading speech already quoted from Hansard at p1355. That the assessment must be made as to dangerousness at the time of sentencing is also supported by reference to the passage quoted from the judgment of the High Court in Chester, at 619, ("cogent evidence that the convicted person is a constant danger to the community in the sense already explained"), reference to that judgment being dictated by the passage quoted from the Attorney-General's second reading speech. Furthermore, quite apart from the difficulty of predicting dangerousness at a time which may be a decade or more distant from the time of sentencing, the express requirement of the Sentencing Act by ss18H and 18M, for review of an indefinite sentence as soon as practicable after the offender has served the nominal sentence, and the requirement that

> the indefinite sentence must be discharged unless the court is satisfied to a high degree of probability at that time that the offender is still a serious danger to the community, all suggest to us that the intention of s18B is to direct the attention of a sentencing judge to the question whether the offender is a serious danger to the community as at the time of sentencing.

[55] Thomas J, after referring to the above passage, (and to the unreported decision of *Fletcher*, to which I will shortly refer), said that she considered *Carr v. The Queen, supra*, to be "the more correct approach" but that she must also "make some assessment of his future...as concerns him posing a serious danger to the community". Her Honour then referred to the evidence of a psychologist to the effect that although 38 years of age, there was no discernible trend of maturation; that he had in the past not responded well to attempts at rehabilitation; that there was nothing in his history to indicate a capacity or will to change his behaviour; that the appellant's past history was the most reliable indication of his future capacity for violence, and other factors which bespoke the risk of recidivism.

[56] In *The Queen v. Wilson* (Court of Appeal, Queensland, unreported, 12 August 1997) Pincus JA said (after referring to *Carr v. The Queen, supra*):

> It is my opinion that the primary question is dangerousness at the time of sentencing; but it seems to me evident that dangerousness at later points of time is made relevant by s163(4)(d) [S163(4)(d) is the equivalent of s65(9)(d)]. Under that paragraph the court must have regard, in determining whether the offender is a serious danger to the community, to '...the risk of serious harm to members of the community if an indefinite sentence were not imposed.'.

In *The Queen v. Fletcher* (Court of Criminal Appeal, Queensland, unreported, 25 September 1998) the court unanimously adopted the approach of Pincus JA.

[57] Although her Honour referred to *The Queen v. Fletcher, supra,* and said that *Carr v. The Queen, supra,* was the 'more correct approach', it does not appear that her Honour was referred to Pincus JA's judgment in *The Queen v. Wilson, supra,* and to precisely what it was that the court approved in *The Queen v. Fletcher, supra.* Her Honour's own approach is consistent with that in *The Queen v. Wilson, supra,* and in my opinion this was the correct approach. It does not appear that the *Sentencing Act (WA)* provided, as do the Northern Territory, Victorian and Queensland Acts, a system of regular reviews of any indeterminate sentence, together with a further right of appeal. I would therefore prefer the reasoning in *The Queen v. Wilson, supra,* and *The Queen v. Fletcher, supra*. As it has not been demonstrated that her Honour erred in this respect, I would dismiss this ground of appeal.

[58] Next, Mr Kilvington submitted that her Honour erred in concluding that the nature of the offence was exceptional. In *Moffatt, supra,* Hayne JA said at 254-255:

> As I have already noted, s18B(2)(a) requires the court, in determining whether the offender is a serious danger to the community, to have regard to "whether the nature of the serious offence is exceptional". Several things should be noted about this provision. First, it requires the court to "have regard" to this question in determining whether the offender is a serious danger to the community; it does not say that the court may find an offender to be a serious danger only if it finds that the nature of the serious

> offence is exceptional. Secondly, regard is to be had to "the nature" of the offence and whether that nature is "exceptional". The notion that there is an "ordinary course" or a "usual" form of offending is a notion that some may well find difficult and may even think suggests that some forms of offending are not serious at all. However, it is clear that there may be different levels of criminality involved in the conduct of different offenders who are guilty of the same offence. Thus while it must be accepted that rape is *always* a serious offence, there may nevertheless be a need to identify some feature or features of the offending in any particular case which attract sterner punishment than would be meted out in the absence of that feature or those features. In that limited sense, then, it may be possible to say of an offender's conduct that it is "exceptional" and presumably it is to that kind of enquiry that s18B(2)(a) is directed.

With this analysis I respectfully agree.

[59] Her Honour said that the nature of the offence was exceptional because:

> ...it was a sexual assault (in fact, an anal rape) upon a young boy by a man 38 years of age who was an adult and a person who was in a position of some trust having been employed for a period of time to teach children through the CDEP program on a small isolated Aboriginal community.

The attack on the boy had nothing to do with the appellant's employment at the time, and I do not consider that his employment was a relevant consideration in this case. Nevertheless, the other reason given was, in my opinion, enough to make this case exceptional. I would dismiss this ground of appeal.

[60] Mr Kilvington's next submission was that her Honour wrongly took into account irrelevant factors in arriving at her decision that the appellant was a serious danger to the community. S68(2) of the Act provides that the rules of evidence apply, subject to s68(3), which makes admissible the transcript

of the trial and submissions made on sentence. The appellant complained that the opinion evidence of lay witnesses was wrongly admitted into evidence to show that the appellant was a danger to the community. It appears that at the hearing, evidence was given by the President of the Ali Curang Community Council, Mr Haywood; Ronnie Larrie, the Ali Curang Aboriginal Community Police Officer and by Louise Ogden, a Community Corrections Officer who prepared a pre-sentence report which was tendered at the hearing. The evidence of these witnesses was directed towards showing that the Ali Curang Community did not want the appellant to return to the community because there was fear that upon his release the appellant would reoffend by sexually assaulting a child. But Miss Ogden went further, expressing a personal opinion that the appellant at present poses a considerable risk to the community.

[61] Thomas J took into account the views of the community as expressed through these witnesses. Her Honour clearly considered these views to be relevant to the appellant's possible rehabilitation if he were ever to be released. In my opinion these opinions were very relevant to that question. It is well settled that such evidence is relevant and admissible, although cannot prevail over what is a proper sentence: see *The Queen v. Minor* (1991-92) 79 NTR 1 at 14; *Munungurr v. The Queen* (1994) 4 NTLR at 63 at 71. Obviously, if the appellant had been welcome in his community that fact might have assisted his rehabilitation upon his release. If, on the other hand, as was the case here, he was not welcome to return to his community,

it was necessary to consider what other options would be available for the appellant. This her Honour did, and concluded that there was at this time "no clear post-release plan for him". This finding cannot be challenged. Nor is the evidence inadmissible on any other ground. It was objected to as hearsay, but this Court has long accepted evidence of this nature from persons who are likely to know the community's feelings, notwithstanding the hearsay nature of this evidence: see *The Queen v. Davey* (1980) 50 FLR at 60-61 per Muirhead J; *Munungurr v. The Queen, supra,* at 71-73.

[62] As to Miss Ogden's opinion, (and her report generally) it is clear that the pre-sentence report was prepared by Miss Ogden after consulting a number of sources which she identifies in the report, including the appellant's family, the victim's family, Ali Curang Council members, Ali Curang community members, the Ali Curang police, the appellant's Correctional Services file, a psychological report, a psychiatrist's report, the appellant himself, as well as other material. In these respects, this particular pre-sentence report was no different from any other received by this Court.

[63] Miss Ogden's report was ordered by her Honour pursuant to s105 of the *Sentencing Act.* Mr Bamber, who appeared for the appellant at the sentencing hearing before Thomas J, objected to that course. He submitted that Thomas J had no power to order a pre-sentence report or to consider it in a case where the Crown proposes to seek an indefinite sentence. Her Honour over-ruled that objection. No complaint is raised before this Court as to the correctness of her Honour's ruling. Pursuant to s106 of the

Sentencing Act the report may "set out all or any of the following matters which, on investigation, appear to the author of the report to be relevant to the sentencing of the offender and are readily ascertainable by him or her". Then follows a list of items (a) to (k). It is clear that everything (or almost everything) in such a report would ordinarily be inadmissible hearsay. Subject to statute, at every sentencing hearing, (whether or not the Crown is seeking an indefinite term) only admissible evidence can be put before a sentencing judge. Matters of fact, whether led by the prosecutor or by defence counsel, are usually put in oral submissions from the bar table without the need to call oral evidence. Such material is nevertheless "evidence". But it can be objected to, and if it is, counsel can be forced to call evidence. However, a pre-sentence report is in a different category. It is plainly full of hearsay. It is prepared by a Correctional Services Officer pursuant to the order of a Judge. It is clear that s104(1), s105 and s106 when read together envisage that nonetheless, the contents of such a report are admissible by a sentencer.

[64] Pre-sentence reports in this Territory have traditionally contained material which is not confined to the matters listed in ss105 and 106 of the Act. In particular, the reports' authors usually evaluate the material, provide comments on the various factors relevant to sentence set out in ss105 and 106 of the Act, and often offer comment about the advisability of the likely available sentencing options. In my experience, no objection has ever been made to this before, even prior to the passage of the Act. It would be a great

pity if the authors of these reports could not provide this material which in my experience – and I am sure I can also speak for many other judges past and present – is often very helpful. However, that may be, it is a mistake to treat these opinions and comments as evidence, because they are not evidence; rather, they are the submissions of the relevant officer of a government department whose function it is to assist in the rehabilitation of offenders. In this case, for instance, the author of the report was required to advise the Court whether the appellant was suitable for supervision: see s103(1) of the *Sentencing Act*. Obviously, a conclusion on that subject required the author to evaluate the material gathered and presented in the pre-sentence report as there was no other basis upon which such advice might be offered to the Court. I therefore reject Mr Kilvington's submission, and I would reject this ground of appeal.

[65] Mr Kilvington's next submission depended on his *Warren v. Combes* argument referred to in paragraph [6], *supra*. Mr Kilvington invited this Court to substitute its own conclusion for that of Thomas J as to whether or not the conclusion should be drawn that the appellant is a serious danger to the community. I reject this argument for the reasons previously given in paragraph [6] above. In my opinion, it is necessary to show error on the part of Thomas J, and no error has been shown.

[66] Mr Kilvington's final submission was that, even if Thomas J correctly concluded that the appellant was a serious danger to the community because of the matters referred to in s65(8) of the *Sentencing Act*, her Honour had a

discretion whether or not to impose an indefinite sentence and she erred in exercising it. I accept that there is a discretion, notwithstanding the doubts expressed by Hayne JA in *Moffatt v. The Queen, supra,* at 247, for the following reasons. First, in *Moffatt,* it was submitted that s18B(1) which provided that the court "may only impose an indefinite sentence...if it is satisfied...that the offender is a serious danger to the community" should be understood as if it read "The court may impose an indefinite sentence...only if it is satisfied". Winneke P in *Moffatt* at p234 accepted that submission, and accepted that the result was that a discretion still existed. Hayne JA, at 246-247 did not examine its correctness. Charles JA did not deal with the point. In the Northern Territory Act the wording is "The Supreme Court shall not impose an indefinite sentence...unless it is satisfied...". This would appear to be even stronger than the form of words accepted by Winneke P as conferring a discretion. Secondly, I have considered *Mitchell v. The Queen* (1996) 184 CLR 333 where the High Court unanimously held that s40D(2a) of the *Offenders Community Corrections Act* (WA) (which provided that in certain circumstances a court "may...order that the person is not to be eligible for parole") did not confer a discretion but conferred a power, the exercise of which depended upon proof of the case out of which the power arose. In this case there is a clear indication that a discretion does exist in that s65(10) of the Act provides that s65(9) does not limit the matters to which the court may have regard "*in determining whether to impose an indefinite sentence*". In other words, the decision to impose an indefinite

sentence is treated by the legislature as a separate decision from a finding that an offender is a serious danger to the community. Finally, the Queensland Act which is closer to the Northern Territory's provisions, has been held to confer a discretion: see *The Queen v. Wilson, supra,* per Pincus JA; and *The Queen v. Fletcher, supra.* Mr Wild QC for the Crown did not argue otherwise.

[67] As to the question of error, Mr Kilvington submitted that an indeterminate sentence was only appropriate in rare and exceptional cases. In *The Queen v. Moffatt, supra,* it was unanimously held that the power is to be sparingly exercised and then only in clear cases: see Winneke P, at 234; Hayne JA at 255; Charles JA at 256. In particular, Hayne JA applied at p258 what was said by the High Court in *Chester v. the Queen* (1988) 165 CLR 611 at 618-19:

> ...the power...should be confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm.

As I have already stated in paragraph [4] above, her Honour considered those authorities and concluded that this was such a case. Mr Kilvington submitted that the authorities show that only cases of extreme depravity, and where there were no prospects of rehabilitation, warranted the sentencer exercising his or her discretion to be exercised adversely to the offender. I accept that neither the circumstances of this offence nor of the offender in

this case are as bad as that considered in *Carr v. The Queen, The Queen v. Moffatt, The Queen v. Wilson* and *The Queen v. Fletcher, supra.*

[68] On the other hand, the appellant had in March 1994 been warned by Martin CJ in these terms:

> There are some signs that you want to try and rehabilitate yourself and all I can suggest is that you do that because if you don't then the next time that you come back before this court on an offence such as this you may well find yourself being dealt with as a person who cannot control their sexual restraints and might find yourself in gaol for an indefinite term.

[69] Mr Kilvington originally complained that Thomas J gave undue weight to this warning, but that ground was eventually abandoned. In my opinion, that was a relevant consideration in deciding whether or not to exercise the discretion adversely to the appellant.

[70] Although Thomas J does not clearly explain precisely why she decided to exercise her discretion adversely to the appellant, I am not satisfied that her discretion miscarried. It is true that this was not a case which fell into the worst category such as to attract the maximum penalty, but I do not consider that that is necessary. It is not a requirement of the provisions of the Act that only cases falling into the worst category require this type of disposition. Indeed, in cases warranting the maximum penalty, (imprisonment for life) a sentencer can also, if the circumstances warrant, refuse to fix a non-parole period: see s53(1) of the *Sentencing Act*. If the offence is murder, there can only be one sentence, namely, imprisonment for

life without parole (*Criminal Code*, s164; and *Sentencing Act*, s53(3)). Consequently, the provisions of the *Sentencing Act* providing for indefinite sentences cannot apply to cases of this kind in the Northern Territory, as a term of imprisonment for life without parole is the most extreme example of an indefinite sentence. Consequently, the principles referred to in paragraph [31], *supra*, must be viewed in this light. Bearing in mind these considerations, care must be taken before applying analogous situations in jurisdictions where the courts are required to fix non-parole periods or minimum terms, even in cases where, in this jurisdiction, an indefinite sentence would be required.

[71] It is difficult to spell out all of the considerations which would warrant the exercise of the discretion on the one hand and those which would count against it on the other. Apart from the requirement that the case must be an exceptional one where the exercise of the power is demonstrably necessary to protect society from physical harm, there is no guidance in the authorities. The fact that the discretion exists at all demonstrates that there will be cases where a finding that the prisoner is a serious danger to the public will not result in an indefinite sentence. I consider that the factors in s65(9) are relevant, because in s65(10) it is provided that s65(9) does not limit the matters to which the court may have regard in determining whether to impose an indefinite sentence.

[72] The findings her Honour made, so far as s65(9) are concerned, included findings that the nature of the offence was exceptional; that imprisonment in

the past has not acted as a deterrent; that, under the influence of alcohol, the appellant is violent and aggressive and loses control of his sexual restraints; that in the past the appellant has refused parole because he would not accept vigilant supervision; the appellant has failed to take previous opportunities available to him to redress his alcoholism; there is nothing in the appellant's history to show the will to change his behaviour; the appellant is a serious danger to the community; that there exists a risk of serious physical harm to young children if an indefinite sentence is not imposed, and a need to protect the community, particularly young and vulnerable children. There are no countervailing findings, except that her Honour did not completely rule out the appellant's prospects of rehabilitation, but, as she pointed out, there was nothing to indicate any capacity or will to change his ways.

[73] In those circumstances, I do not consider that it is open to this Court to find that her Honour's discretion miscarried.

[74] I would grant leave to appeal, but dismiss the appeal.
