PARTIES:	SIGANTO, Colin Joseph
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 15/96
DELIVERED:	3 OCTOBER 1997
HEARING DATES:	6 & 7 MARCH 1997
JUDGMENT OF:	MARTIN CJ, KEARNEY & PRIESTLEY JJ

CATCHWORDS:

Criminal law and procedure - Appeal and new trial and inquiry after conviction - Appeal against sentence - Exercise of sentencing discretion - Impermissible grounds for increase of sentence - Can not infer such increase because sentencing Judge states bare facts - Whether is such increase on improper grounds may depend on appellate court's opinion as to sentence imposed - Use of not guilty plea in sentencing process - Whether treated as aggravating the offence by the sentencing Judge.

Appeal against sentence - Exercise of sentencing discretion - Any detrimental, prejudicial or deleterious effect on the victim by the commission of the crime a relevant factor in sentencing - Not apparent that penalty increased on account of aggravation of victim's distress by need to give evidence at committal proceedings and at trial -

R v Webb [1971] VR 147 at 151, referred to.
R v Teremoana (1990) 54 SASR 30 per Cox J. at p38, referred to.
Melville v R, NTCCA, Martin CJ., Thomas J. & Gray AJ, unreported 27.3.95, discussed.

Appeal against sentence - Whether sentence manifestly excessive - Whether sufficient weight given to the question of rehabilitation -

Sentencing Act 1995 (NT) s55(1)

Power v The Queen (1974) 131 CLR 623 at 629 per Barwick CJ, Menzies, Stephen & Mason JJ, applied.
Bugmy v The Queen (1990) 169 CLR 525 at 531 & 532 per Mason CJ & McHugh J, applied.

Criminal law and procedure - Probation, parole, release on licence and remissions - Remissions - Ministerial determination as to amount of remission a prisoner able to be granted - Minister empowered to repeal, rescind, revoke, amend or vary determination - Activation of remissions depended upon sentence to imprisonment having been imposed - Finding of guilt necessary - No certainty applicant would have been entitled to the benefit of determination if in force when sentenced - System of remissions entirely in the hands of the Executive -

Interpretation Act 1978 (NT) s43
Prisons (Correctional Services) Act 1980 (NT) s92
Prisons (Correctional Services) Amendment Act (No 2) 1994 (NT) s10

Hoare v R (1989) 167 CLR 348 at 354, referred to.

Probation, parole, release on licence and remissions - Parole - Legislative amendment - Fixing of non-parole period no longer an exercise of unfettered judicial discretion - Question of parole arises upon conviction and sentence to imprisonment - Not a right or privilege accruing at time of commission of offence - Granting of release on parole is not a right - Depends upon a decision of Parole Board - Not within authority of judiciary -

Parole of Prisoners Act 1971 (NT)

Probation, parole, release on licence and remissions - Parole and remissions - Changes in relation to fixing of non-parole periods - Abolition of remissions - Applicant required to serve a longer period in prison - Whether amounts to an increase in punishment - Reduction or abolition of possible benefit which reduces the term of imprisonment imposed by way of a penalty does not amount to an increase in the penalty -

Interpretation Act 1978 (NT)
Sentencing Act 1995 (NT) ss 120, 121, 130(1)

Statutes - Operation and effect of statutes - Legislative changes between commission of offence and time of conviction and sentence - Applicant sentenced with reference to legislative provisions which commenced operation after commission of offence - Whether should have been sentenced with reference to legislative provisions in operation at time of commission of offence - Common law rule that enactments prima facie construed as being of prospective operation - Interpretation Act - No right or privilege acquired by applicant when committed offence - Acquisition of any such right or privilege would only arise after conviction and sentence to imprisonment -

Interpretation Act 1978 (NT) ss 3(3) & 12
Prisons (Correctional Services) Act 1980 (NT), s 92(1)
Prisons (Correctional Services) Amendment Act (No 2) 1994 (NT)
Sentencing Act 1995 (NT), s 55(1)

Maxwell v Murphy (1957) 96 CLR 261 at 267 per Dixon CJ, applied.
Fisher v Hebburn Ltd (1960) 105 CLR 188 at 194 per Fullagar J, applied.

Operation and effect of statutes - Whether s14(2) Criminal Code or s121 Sentencing Act deprive s130 Sentencing Act of its apparent operation in relation to offence in question - No change effected to the "law in force" as referred to in s14(2) Criminal Code from time of offence to time of conviction - Maximum penalty unaltered - Sentence imposed did not amount to punishment to a greater extent than authorised by the law at time of offence - Reduction or abolition of a possible benefit having the effect of reducing the term of imprisonment imposed by way of a penalty does not amount to an increase in the penalty -

Prisons (Correctional Services) Act 1980 (NT), s92.
Criminal Code 1983 (NT), s14(1) & (2).
Sentencing Act 1995 (NT), ss120, 121, 130(1).

REPRESENTATION:

Counsel:

Appellant:	Mr D Grace QC
Respondent:	Mr R Wild QC with Mr C Delaney

Solicitors:

Appellant:	Waters James McCormack
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	A
Judgment ID Number:	mar97028
Number of pages:	20

mar97028

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

No. CA15/96

BETWEEN:

COLIN JOSEPH SIGANTO
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ., KEARNEY & PRIESTLEY JJ.

REASONS FOR JUDGMENT

(Delivered 3 October 1997)

THE COURT

This is an application for leave to appeal from a sentence imposed by the Supreme Court on 3 September 1996. The applicant had been found guilty, after trial, of rape and was sentenced to imprisonment for nine years. It was ordered that the period prior to which he would not be eligible to be released upon parole be six years and four months. By consent, it was ordered that the application for leave to appeal and the grounds of appeals be heard together.

The amended grounds of appeal are:

1. The sentence and non parole period imposed upon the applicant were manifestly excessive in all the circumstances of the offence and of the applicant

    (a) The learned sentencing Judge erred in law in failing to give proper weight to the applicant's prospects of rehabilitation.

    (b) The learned sentencing Judge erred in law in failing to find that the applicant had good prospects of rehabilitation.

    (c) The sentence imposed will result in the applicant serving a period of incarceration which is manifestly greater than that served by persons previously convicted of the same crime committed with comparable features and circumstances.

2. The learned sentencing Judge erred in characterising the applicant's plea of not guilty effectively as an aggravating factor.

3. The learned sentencing Judge erred in law by failing to apply **Section 121(l) Sentencing Act 1995** to both the sentence and the non parole period.

4. The learned sentencing Judge erred in law in applying **Section 55 Sentencing Act 1995** to the calculation of the non parole period imposed upon the applicant by failing to have regard to **Section 121(l) Sentencing Act 1995.**

5. The learned sentencing Judge erred in law in failing to take into account the abolition of remissions in imposing the sentence and non-parole period upon the applicant, giving rise to a substantial miscarriage of justice.

The facts relating to the offence were summarised by his Honour in these terms:

> "On the evening in question you were driving along Bagot Road in the vicinity of the bus stop at Ludmilla Primary School. Your victim was waiting for a bus to go home, having spent the day with her sister and her sister's boyfriend. You offered her a lift, she got into your car. Against her wishes you drove her to a secluded bush area off Tiger Brennan Drive. You drove up a track with which you were familiar, having dumped rubbish there on a prior occasion.
>
> It was dark when you parked the car, you dragged your victim from the car, once out of the car you punched your victim hard in the mouth, with a clenched fist, splitting her lip and causing it to bleed. You ordered her to remove her pants. Out of fear of further violence she removed her pants and a tampon, for she was menstruating. You bent her over the bonnet of the car and raped her from behind. You ejaculated inside her. In the course of this you said to her: 'You have a lovely cunt'. When you had finished you drove away abandoning your victim in the dark."

His Honour then went on to describe the work done by police in investigating the matter, including the victim's recollection of the first five

digits of the motor vehicle being used by the applicant and its colour. Forensic evidence arising from the examination of blood and semen provided a direct connection between the appellant and the victim, tyre tracks at the scene matched the tyres on his vehicle and there was a boot print which matched the applicant's boot. The victim was unable to identify the applicant, but in his Honour's view, the evidence brought together by the police "overwhelmingly indicated" the applicant's guilt.

Proceeding with his remarks his Honour said:

> "You pleaded not guilty, having always denied the charge, and have shown no remorse whatsoever. The jury took but a short time to find you guilty, an inevitable finding on the evidence. The jury were satisfied that you lied on oath in denying the crime, and that you lied to police during the record of interview when you said you were home on the night in question, and that you pretended to confuse your movements during that week when confronted with a Woolworths docket showing that you were out on the road on the night in question rather than at home as you had told the police.
>
> Your victim, a full-blood Aboriginal woman, was greatly distressed by your crime. Her distress was evident to police officers who attended the Winnellie Post Office, and other police officers who interviewed her sometime after the event. Your victim's distress was aggravated by having to give evidence against you, both at the committal and at trial.
>
> Your crime is a serious one. The crime of rape, as I have already said, is one of the most serious crime (sic) in the criminal calendar, carrying the maximum penalty of life imprisonment. The circumstance (sic)of your crime are serious. You punched your victim in the mouth in order to overpower her and you heaped indignity upon indignity upon her, finally abandoning her at the scene in the dark and quite some distance from any help.

> You are a 27 year old single man with no prior offences of a sexual nature. You have never been in prison before. You have lived in the Top End for about 20 years. I sentence you to 9 years imprisonment and fix a non-parole period of 6 years and 4 months. I note section 55(1) of the Sentencing Act."

It is desirable that consideration of ground 1 of the amended grounds of appeal be deferred until the other grounds assigning specific error have been considered. The outcome of those considerations may have an effect upon the success or otherwise of the first ground.

Ground 2 suggests his Honour erred in the way he treated the plea of not guilty. As the argument developed, it embraced objection to most of that which the learned Judge said at the commencement of the second passage quoted above. Reference to the not guilty plea, together with observations that the applicant had shown no remorse, usually serve to demonstrate nothing more than that the absence of a plea of guilty and indications of remorse mean that mitigation is not available because of those factors. However, it is put by the applicant that his Honour's reference to those matters and to the victim's distress occasioned by the commission of the offence, and to its having been aggravated by her being obliged to give evidence at committal and trial, demonstrated that his Honour adopted an impermissible course of aggravating the crime and thus the sentencing discretion miscarried.

A further submission was made under this heading that either standing alone or with what had gone before the reference to the finding of the jury that the applicant had lied on his oath and to police could only mean that his Honour had given more than would otherwise have been given by way of sentence.

It is not suggested that his Honour erred in his statement of the facts. No authorities were cited to demonstrate a proposition to the effect that simply because a sentencer recites facts in the case which will tell against mitigation, it can be concluded that the sentencer erred by increasing the sentence by reason of those matters.

The operation of the *Sentencing Act* 1995 (NT), which commenced on 1 July 1996, in relation to the offence is a significant matter to be considered on this application, but is best deferred until grounds 3, 4 and 5 are dealt with. For the time being, we content ourselves with brief reference to the common law. There is authority for the proposition that to impose a greater sentence than would otherwise be appropriate because an offender has:

(a) pleaded not guilty:

R v Flynn [1967] Crim L.R. 489

Baumer (1989) 40 A Crim R 74, per Nader J. at p79

R v Jabaltjari (1989) 64 NTR 1 per Asche CJ. at p15

Marijancevic (1991) 54 A Crim R 431

(b) lied to the Court at trial:

R v Behman & Ors [1967] Crim L.R. 597

Hryczszyn v R [1976] Tas.S.R. 10

R v Richmond [1920] VLR 9, per Cussen J. at p12

R v Tims [1921] VLR 503, per Cussen J. at p505

Yam (1991) 55 A Crim R 116 per Crockett J. at p117

(c) conducted the defence in a particular way:

Yam (supra) at p117

Harris v R [1967] SASR 316.

is to err in the exercise of a sentencing discretion. In some cases the error may be readily apparent from the remarks on sentence; *Hryczszyn* at p13. Whether the sentence has been increased on account of all or any of those factors:

(a) is not to be inferred simply because the sentencing Judge states the bare facts, *Marijancevic* at p446;

(b) may depend upon the appellate court's opinion as to the sentence imposed, *R v Harper* [1968] 2 QB 108 per Lord Parker CJ at p110 (undoubtedly severe); *Hryczszyn*, (6 months imprisonment reduced to three months imprisonment fully suspended upon condition) and *Marijancevic* at p446 ("the judge could scarcely have imposed a more lenient sentence").

The other matter suggested by the applicant as demonstrating error lay in his Honour's reference to the victim's distress caused by the crime being aggravated by her having to give evidence at committal and trial. It is undoubted that the harm the crime causes a victim will usually be a relevant factor in sentencing, *R v Teremoana* (1990) 54 SASR 30 per Cox J. at p38. A Judge is entitled to have regard to any detrimental, prejudicial, or deleterious effect that may have been produced on the victim by the commission of the crime, *R v Webb* [1971] VR 147 at p151. In this Court, Martin CJ., Thomas J. and Gray AJ., held in *Melville v R* (unreported 27 March 1995) applying *Webb*, that the sentencing Judge in that case was entitled to regard the distress suffered by the prosecutrix in having to give evidence on five occasions as an important aggravating feature. The case was referred to by the prosecutor in the course of submissions on sentence in this matter. It was submitted on behalf of the applicant that *Melville* was wrongly decided because it is at odds with the principle that an offender is not to be given a greater sentence because of the way in which the defence was conducted at trial. See also *Harris* (supra) at pp327-8.

The Director appearing on behalf of the respondent submitted that his Honour, having seen the witness, was in the best position to give proper weight to the effect which the ordeal had on her. By this we take him to refer to the ordeal of relating the details of the attack, in evidence. He submitted

the ordeal aggravated the distress occasioned by the physical conduct of the accused when committing the offence; since harm occasioned to a victim is a relevant sentencing factor, any aggravation of that harm must also be relevant and may lead to an increased penalty. Here, the applicant maintained that he was not the offender, he was elsewhere at the time. The victim was accordingly obliged to tell her story in open court. The circumstances of the offence are set out at the beginning of these reasons.

We do not think that it is necessary to consider the correctness of the decision of this Court in *Melville*. It might be reasonably inferred that his Honour looked at it, but it is not apparent that he increased the penalty because of the aggravation of the victim's distress caused by her having to give evidence at committal and trial. It is not possible to say that his Honour, by his bare statement of this and other facts, increased the sentence on account of any of them. They demonstrate at least as much the basis for his finding that the applicant had "shown no remorse whatsoever", going to the issue of mitigation. In our opinion none of the errors assigned in argument addressed to the proposed ground 2 have been made out.

A significant issue in this case lies in the complaints set out in grounds 3, 4 and 5. The offence occurred on 27 September 1994. The *Sentencing Act* together with *Prisons (Correctional Services) Amendment Act (No 2)* 1994 (NT) commenced operation on 1 July 1996. The applicant was convicted and

sentenced in September 1996. It appears his Honour arrived at the sentence taking into account the legislation which commenced operation after the offence was committed (see the reference to s55(1)). Had the applicant been sentenced to a term of imprisonment without reference to the law which commenced on 1 July 1996, he would have been entitled to expect the benefit of an executive determination made under s92(1) of the *Prisons (Correctional Services) Act* on 3 June 1981, whereby the effective sentence would have been reduced by remission to the extent of one third. The fixing of a period prior to which he would not have been eligible for release on parole would have been at the discretion of the court, and given the prospect of reduction of the sentence by one third, the non parole period fixed would in all likelihood have been less and perhaps substantially less than two thirds of the sentence imposed.

The amending legislation abolished remissions and required that the non parole period be not less than 70% of the period of imprisonment in relation to this type of offence (s55(1) *Sentencing Act*).

The applicant argued that the changes wrought by the legislation which came into operation on 1 July 1996 do not apply to him, because he committed the offence prior to that date and he should have been sentenced under the law as it stood at the time of the offence. A proper head sentence being imposed, a discretionary order should have been made that he be eligible to be released on

parole at a time fixed somewhat earlier than the two thirds of the term of the head sentence which he would have to serve after taking into account the remission.

The common law framework in which these legislative provisions were placed is conveniently summed up, with respect, by Dixon CJ. in *Maxwell v Murphy* (1957) 96 CLR 261 where at 267 his Honour said:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

See also Fullagar J. in *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194:

> "There can be no doubt that the general rule is that an amending enactment - or, for that matter, any enactment - is prima facie to be construed as having prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement".

Subject to the contrary intention appearing (*Interpretation Act* 1978 (NT) s3(3)) the repeal of s92 of the *Prisons (Correctional Services) Act* would not affect the previous operation of that part of the Act or anything done under it, nor would it affect a right, a privilege, obligation or liability acquired, accrued or incurred under it (*Interpretation Act* s12). In our view, however, neither the common law nor that statutory provision avails the applicant. He acquired

no right or privilege when he committed the offence. Whether he was to acquire any such right or privilege would only arise after he was convicted and sentenced to a term of imprisonment.

At the time of the offence, pursuant to the powers contained in s92 of the *Prisons (Correctional Services) Act*, the Minister had exercised a discretion to make a determination specifying the amount of remission which may be granted to a prisoner. That determination provided that the maximum amount of remission which could be granted in respect of a term of imprisonment being served by a prisoner who has been industrious and of good conduct, was to be calculated in accordance with rules set out in it (s92(2) and par2 of the determination). Remission of sentence was to be calculated so that the maximum amount of remission that may be earned would not exceed one third of the maximum length of the sentence. The Minister was empowered to repeal, rescind, revoke, amend or vary the determination (s43 *Interpretation Act*). The activation of the remissions depended upon there having been a sentence to a term of imprisonment imposed. It could not be triggered unless there had been a finding of guilt. Even if the determination had been in effect when the applicant was sentenced, there was no certainty he would have become entitled to the benefit of it (*Hoare v R* (1989) 167 CLR 348 at p354). The legislature recognised the true position in the transitional provisions contained in s10 of the Act which repealed s92 by continuing in force the determination made under s92 in respect of a person who was a prisoner

immediately before the commencement of the amending Act. That could only mean a prisoner serving a term of imprisonment. The remission system was entirely in the hands of the Executive.

Similar considerations apply in relation to the amendments to the *Parole of Prisoners Act* 1971 (NT) which put an end to the unfettered judicial discretion in the fixing of a non parole period. The question only arises after a conviction and a sentence to a term of imprisonment. It would not have been a right or a privilege as at the time of the offence. The granting of release on parole is not a right, it too is discretionary and is in the hands of authority other than the judiciary. The fixing of non parole periods was discretionary and designed to effect a reduction in the term of punishment which the prisoner must undergo by being imprisoned. But whether or not the prisoner was released in accordance with the date for commencement of the parole period as fixed by the court was outside the jurisdiction of the court, it being dependent upon a decision of the Parole Board. Whether a prisoner would be released by the Parole Board at the fixed date or some time thereafter depended upon a variety of factors including the prisoner's conduct in prison and prospects for rehabilitation.

Furthermore, it is provided in s130(1) of the *Sentencing Act* that the Act applies to a sentence imposed after the commencement of that section, irrespective of when the offence was committed, (the section commenced on

the same date as the Act as a whole, 1 July 1996). However, it was submitted by the applicant that either taken alone or separately, s14(2) of the *Criminal Code* 1983 (NT) or s121 of the *Sentencing Act* deprives s130(1) of the latter Act of its apparent operation in relation to this offence.

The *Criminal Code* provision is:

> "14(1)A person can not be found guilty of an offence unless the conduct impugned would have constituted an offence under the law in force when it occurred; nor unless that conduct also constitutes an offence under the law in force when he is proceeded against for that conduct.
>
> (2)If the law in force when the conduct impugned occurred differs from that in force at the time of the finding of guilt, the offender can not be punished to any greater extent than was authorised by the former law or to any greater extent than is authorised by the latter law."

The applicant submitted that the repeal of s92 of the *Prisons (Correctional Services) Act* so as to abolish the remission to which the applicant could expect to be entitled, amounts to an increase in punishment, in that it has the effect of increasing the period during which the applicant must be confined under the sentence. He will serve a longer period in prison and accordingly he would be punished to a greater extent than was authorised by the law as it was under the *Prisons (Correctional Services) Act* at the time he committed the offence. Similarly, he stood to be punished to a greater extent because of the changes in the law in relation to the fixing of a non parole period. Whereas, previously the date fixed would have been somewhat less

than two thirds of the head sentence, it must now be at least 70% of the term of the head sentence.

The maximum penalty which might have been imposed by a court upon conviction for rape at the time of the offence was life imprisonment. That was not changed by the *Sentencing Act*. The sentence to imprisonment imposed did not amount to a punishment to a greater extent than was authorised by the law at the time when the impugned conduct occurred. There had been no change in that law. In so far as remissions were concerned, that was a matter outside the jurisdiction of the courts. It was regarded as having been in the nature of an exercise of prerogative of mercy. That prerogative is preserved by the *Sentencing Act* (Part 10). If s14(2) of the *Criminal Code* applies, and we doubt that it does, then the remedy lies in the hands of the Executive not the Court. As to the fixing of a non parole period, it too is a benefit, a means by which a prisoner might be released from punishment by way of imprisonment earlier than the full term of the sentence.

We have indicated we do not consider that s14(2) of the *Criminal Code* has any application to the issues here. That is because in our view "the law in force", referred to in subs(2), is the same as "the law in force" referred to in subs(1). That law is the law constituting an offence, and that law did not change from the time of the commission of the offence to the time of the conviction.

Section 121 of the *Sentencing Act* is as follows:

> "(1) Where an Act, including this Act, or an instrument of a legislative or administrative character increases the penalty or the maximum or minimum penalty for an offence, the increase applies only to an offence committed after the commencement of the provision effecting the increase.
>
> (2) Where an Act, including this Act, or an instrument of a legislative or administrative character reduces the penalty or the maximum or minimum penalty for an offence, the reduction extends to an offence committed before the commencement of the provision effecting the reduction for which no penalty had been imposed at that commencement."

The applicant does not derive any benefit from s121. There was no Act or instrument of a legislative or administrative character which increased the penalty for rape between the time of the offence and the conviction. It remained imprisonment for life, subject to the powers of a court to impose a shorter term (s120). The applicant is aggrieved that by the time he came to trial, and was convicted and sentenced, the law had been changed such that he did not receive the prospective benefit of the remission and the possibility of a lesser period being fixed prior to which he would not be eligible to be released upon parole. The word "penalty" is not defined in the *Sentencing Act* or in the *Interpretation Act* (s38(c)) does not assist). In common parlance a penalty is a punishment imposed for violation of the law and it is in that sense that it is used in s121. The abolition or reduction of a possible benefit having the effect of reducing the term of imprisonment imposed by way of a penalty does not amount to an increase in the penalty.

We were invited by counsel for the applicant to read the then Attorney-General's Second Reading speech. We have been able to come to our views in this matter without any cause to resort to that possible source of assistance. However, having had a look at it, it does not assist. Counsel for the applicant relied upon a passage in which the Attorney said:

> "While it is the intention of the government to see that offenders are properly punished for their offences, it does not intend that sentences be effectively increased by reason of the abolition of remission alone".

That sentence, however, in its context, is part of an explanation as to why government had decided to include s58 in the *Sentencing Act*. It does not go to the general policy lying behind the enactment as a whole. In the material provided to us there is no reference by the Attorney to s130(1) or s121.

We now turn to consider whether or not the sentence of nine years imprisonment was manifestly excessive as alleged in proposed ground of appeal 1. If it was not, then the non parole period fixed in accordance with s55(1) of the *Sentencing Act* could not be so held.

The applicant places this submission on the suggested failure of his Honour to make findings as to the prospects of rehabilitation, and to give proper weight to them. The grounds are advanced because his Honour does

not expressly mention the subject. There were before the Court, in addition to the information the learned Judge set out in the reasons, further submissions based upon the applicant's satisfactory work record, responsibilities as a father of two young children (of whom his wife had custody), and strong family support, particularly from his mother. The applicant's submission is that it must be concluded that his Honour's attention to the factors which demonstrated the seriousness of the crime and the applicant's lack of remorse overshadowed the need to also give more detailed attention to the question of rehabilitation. Had that matter been given proper attention, then the applicant would have expected to benefit. We do not agree. General and personal deterrence undoubtedly play the most significant part in fixing an appropriate sentence for crimes of this type. After all, the maximum penalty is imprisonment for life. The parliament intends that the offence be seen at the top end of the scale of gravity of criminal conduct. The head sentence of nine years imprisonment is not excessive. It is within the range of sentences imposed in this Court in recent years for offences of rape where the accused is convicted after trial, and the assault is accompanied by violence and degradation beyond the minimum which might be expected. It is a sentence warranted by the objective facts measured against the maximum. The rehabilitative aspects of sentencing have assumed greater importance in the fixing of the period prior to which a prisoner will not be eligible to be released on parole. It provides for: "mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate,

once the prisoner has served a minimum time the judge determines justice requires that he must serve having regard to all the circumstances of the offence" (per Barwick CJ., Menzies, Stephen and Mason JJ. in *Power v The Queen* (1974) 131 CLR 623 at 629 affirmed by the majority in *Bugmy v The Queen* (1990) 169 CLR 525 at 531. It is regarded as not only a process by which a benefit may be derived by the offender but as well by the community. In *Bugmy* at p532 in the judgment of Mason CJ. and McHugh J.:

> "A prisoner's prospects of rehabilitation will be relevant to the fixing of a minimum term, both by way of mitigation and because the community benefits from the reformation of one of its members. Conversely, the community needs to be protected from a violent offender, especially one whose prospects for rehabilitation are bleak. Likewise, the nature of the crime will be relevant because a more serious offence will warrant a greater minimum term due to its deterrent effect upon others. But the nature of the offence does not assume the importance which it has when the head sentence is determined. There, the sentence must be proportionate to the gravity of the offence *Veen v. The Queen [No.2]* (1988) 164 CLR 465, at p477, whereas the minimum term represents a portion of the head sentence during which the offender will not be considered for parole. In one sense, that portion must itself bear a proportionate relation to the crime. Generally speaking, the perceived prospects of rehabilitation will make a significant difference. Among other things, those prospects will affect what is required by way of protection of the community. Release on parole is a concession made when the Parole Board decides that the benefits accruing by way of rehabilitation and the recognition of mitigating factors outweigh the danger to the community of relaxing the requirement of imprisonment."

By enacting that the non parole period for this offence is to be not less than 70% of the head sentence, the parliament has significantly restricted the discretion available to a sentencing judge to give appropriate weight to the prospects of rehabilitation in most cases. Here, the period fixed by the Court

was but fractionally greater than the minimum permitted (we suspect only for the purposes of rounding out the period to a complete month) and thus his Honour has given to the applicant the opportunity to satisfy the Parole Board that he should be released from confinement at the earliest time permissible by law. In those circumstances it can not be concluded that his Honour erred in relation to the rehabilitative aspects of sentencing because he did not mention it specifically nor mention all the factors which may have been relevant.

Given that this is the first case in which issues of this type under the *Sentencing Act* and other associated legislation has arisen, we would give leave to appeal but dismiss the appeal.
