CITATION:	*The Queen v RG* [2018] NTSC 85
PARTIES:	THE QUEEN
	v
	RG
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	SCC 21754732
DELIVERED ON:	14 December 2018
HEARING DATE:	8 November 2018
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT

Application pursuant to s 112 of the *Sentencing Act* (NT) to fix error in sentencing – offender pleaded guilty to offence against s 127(2)(b) of *Criminal Code* (NT) – non-parole period slightly more than 50% of head sentence fixed – s 55A of *Sentencing Act* required non-parole period not less than 70% of head sentence – whether power under s 112 of the *Sentencing Act* limited to application of mandatory minimum non-parole period or permits reconsideration of whether order fixing a non-parole period or suspending sentence should be made – power of correction does not extend to correction of reasons, correction of mere factual error, general review of exercise of sentencing discretion, or general rehearing of sentencing proceedings on merits – power of correction extends to misapplication of statutory law, error in sentencing principle established by binding precedent, failing to take into account a relevant sentencing consideration or taking into account an irrelevant consideration with the a fundamental bearing on

exercise of the sentencing discretion – legal error infected not only length of non-parole period fixed but also determination whether to fix non-parole period or make order suspending sentence – exercise of power properly extends to making order suspending sentence rather than fixing non-parole period – circumstances militate in favour of order suspending sentence – order in those terms subject to conditions directed to community protection and victim's interests.

Criminal Code (NT) s 127
Sentencing Act (NT) s 55A, s 112

Ho v Director of Public Prosecutions (1995) 37 NSWLR 393, *Melville v The Queen* (1999) 9 NTLR 29, *Melville v The Queen* [1999] NTSC 56, *Staats v The Queen* (1998) 123 NTR 16, *The Queen v Shrestha* (1991) 173 CLR 48, *Whitehurst v The Queen* [2011] NTCCA 11, referred to.

REPRESENTATION:

Counsel:

Informant:	D Jones
Defendant:	M Aust

Solicitors:

Informant:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v RG [2018] NTSC 85
SCC 21754732

BETWEEN:

THE QUEEN
Informant

AND:

RG
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 14 December 2018)

[1] This is an application made pursuant to s 112 of the *Sentencing Act* (NT) to fix an error in the orders I made in sentencing the offender on 14 September 2018.

[2] The offender pleaded guilty to and was convicted of committing an act of gross indecency on a child who was 13 years old, aggravated by the fact that she was under his care at the time, contrary to s 127(2)(b) of the *Criminal Code* (NT). The maximum penalty for that offence is imprisonment for 20 years. At the time of sentencing, I imposed a head sentence of two years and four months backdated to 24 November

2017, and fixed a non-parole period of 15 months. That non-parole period was slightly more than 50% of the head sentence.

[3] A number of days following the imposition of that sentence the Crown brought it to the Court's attention that s 55A of the *Sentencing Act* provides that in circumstances where a court sentences an offender to be imprisoned for an offence against s 127 of the *Criminal Code*, the offender was an adult when the offence was committed, the offence was committed on a person who is under the age of 16 years, and the sentence is not suspended in whole or in part, the court must fix a non-parole period of not less than 70% of the head sentence.

[4] In response to that notification, I relisted the matter on 19 September 2018. At that time counsel for the offender made application for an adjournment to consider the offender's position and to make further submissions. That application was granted. The Crown subsequently made a formal application dated 7 November 2018 pursuant to s 112 of the *Sentencing Act* seeking rectification of the error.

The scope of s 112 of the *Sentencing Act*

[5] It is not in dispute that the criteria in s 55A of the *Sentencing Act* have application to the offender's circumstances. For that reason, the sentence I imposed on 14 September 2018 was not in accordance with the law and, or in the alternative, I failed to impose a sentence which

legally should have been imposed. Section 112 of the *Sentencing Act* provides, so far as is relevant for these purposes:

> **Court may reopen proceeding to correct sentencing errors**
>
> (1) Where a court has in, or in connection with, criminal proceedings (including a proceeding on appeal):
>
> (a) imposed a sentence that is not in accordance with the law; or
>
> (b) failed to impose a sentence that the court legally should have imposed;
>
> the court (whether or not differently constituted) may reopen the proceedings unless it considers the matter should more appropriately be dealt with by a proceeding on appeal.
>
> (2) Where a court reopens proceedings, it:
>
> (a) must give the parties an opportunity to be heard; and
>
> (b) may impose a sentence that is in accordance with the law; and
>
> (c) may amend any relevant conviction or order to the extent necessary to take into account the sentence imposed under paragraph (b).

[6] Although the provision uses the word "may" in relation to the imposition of sentence in accordance with law, it is well established that when directed to the exercise of a judicial power or function the word has mandatory operation. Where the error falls within the scope of the provision, it is obligatory to impose a sentence in accordance with the law unless the matter is more appropriately dealt with on appeal.

[7] The operation of s 112 of the *Sentencing Act* was considered by the Northern Territory Court of Criminal Appeal in *Staats v The Queen*[1]. That case also involved the mandatory 70% minimum non-parole period in circumstances where the sentencing judge had fixed a shorter non-parole period. However, the position in that case differed from the present matter in that the term of the head sentence did not permit an order suspending sentence and the fixing of a non-parole period was the only option available.

[8] Chief Justice (BF) Martin held that s 112 of the *Sentencing Act* is limited in its application to errors of law in relation to the imposition of the sentence. It does not extend to the correction of reasons or a review of the exercise of a discretionary judgment.

[9] Justice Angel considered it unnecessary to express any concluded view as to the scope of s 112 of the *Sentencing Act*. However, his Honour did consider that the sentencing judge, in that case Mildren J, was correct to adjust the non-parole period pursuant to s 112 of the *Sentencing Act* to accord with the statutory requirement. Justice Angel considered that the provision might also permit the reopening of the case where there has been judicial oversight of a fact obviously material for sentencing purposes.

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1 (1998) 123 NTR 16.

[10] Justice Thomas rejected the submissions by counsel for the appellant that the sentence which may be reopened pursuant to s 112 of the *Sentencing Act* is only the head sentence and not the non-parole period. That conclusion is also implicit in the reasons of the other two members of the Court. Her Honour observed that where the head sentence is derived after a proper consideration of the nature of the offences and the proportionality of the sentence to its gravity, and a non-parole period is also fixed, the section comprehended reopening the sentence to comply with the statutory minimum non-parole period. There was no error in applying the statutory minimum to the head sentence as previously fixed, notwithstanding that it resulted in the imposition of a longer minimum period of imprisonment than in the exercise of the independent judicial discretion.

[11] That approach to the operation of s 112 of the *Sentencing Act* would seem to be generally consistent with Kearney J's approach in *Melville v The Queen*[2]. There, his Honour held that the exercise is not the same as resentencing on appeal, and what is required is "an assessment of the effect of the identified legal error on the original sentence, and an adjustment of that sentence to take account of the error".[3] The legal error identified in that case was that the sentencing Judge had treated the distress experienced by the victim through having to give evidence

2 [1999] NTSC 56.

3 *Melville v The Queen* [1999] NTSC 56 at [13].

on five occasions as an aggravating circumstance. In his Honour's view, that was a matter amenable to correction in the exercise of the power under s 112 of the *Sentencing Act*.

[12] Kearney J's decision in that matter followed on from a consideration of the issue by the Court of Criminal Appeal in a decision delivered the previous day, in which it was held that in the circumstances there presenting any application under s 112 of the *Sentencing Act* was required to be brought before the Supreme Court rather than the Court of Criminal Appeal.[4] In making that finding, Kearney J (with whom Martin (BF) CJ and Priestley J agreed) considered the scope of the provisions and conducted a review of the relevant authorities. That review included the following analysis:[5]

(a) s 112 of the *Sentencing Act* was modelled closely on s 188 of the *Penalties and Sentences Act 1992* (Qld);

(b) the Queensland Court of Appeal had previously held that the formulation "not in accordance with the law" did not extend to a factual error of substance, such as a misapprehension in sentencing that a prisoner had no previous convictions[6] or an error as to the amount of heroin a prisoner had produced[7];

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4 *Melville v The Queen* (1999) 9 NTLR 29.

5 *Melville v The Queen* (1999) 9 NTLR 29 at [22]-[27].

6 *R v Woodford* (1996) 89 A Crim R 146.

7 *R v Deacon* (1993) 65 A Crim R 261.

(c) the New South Wales Court of Appeal had previously held that a power to reopen proceedings on the basis that a sentence imposed was "contrary to law" was a remedial provision which should be afforded the broadest available construction so as to achieve its stated objects;[8]

(d) in the application of that principle, the provision would permit the rectification of a sentence imposed without consideration of the time a prisoner had already spent in custody but would not permit a general rehearing of sentencing proceedings on the merits;[9] and

(e) the power of correction under s 112 of the *Sentencing Act* was not limited to a misapplication of statutory law, and extended to a "sentence … not imposed in accordance with the law which governs the proper exercise of the sentencing discretion".[10]

[13] Those comments were *obiter dicta*, but I respectfully concur with that analysis and those conclusions. The power of correction under s 112 of the *Sentencing Act* does not extend to the correction of reasons; the correction of mere factual error, even one of substance; a general review of the exercise of the sentencing discretion; or a general rehearing of sentencing proceedings on the merits. However, the power of correction does extend to a misapplication of statutory law; an error in sentencing principle established by binding precedent; and

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8 *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393 at 402.

9 *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393 at 403.

10 *Melville v The Queen* (1999) 9 NTLR 29 at [27].

failing to take into account a relevant sentencing consideration or taking into account an irrelevant consideration, including a matter of fact, which had a fundamental bearing on the exercise of the sentencing discretion.

[14] The question which presents for determination in this application is whether the exercise of the power under s 112 of the *Sentencing Act* is limited to the application of the mandatory minimum non-parole period to the head sentence fixed, or whether it permits a reconsideration of the question whether an order fixing a non-parole period or suspending sentence should be made.

Effect of the identified legal error on the original sentence

[15] The application of s 112 of the *Sentencing Act* involves a three stage process. First, it is necessary to determine whether the court "imposed a sentence … not in accordance with the law" or "failed to impose a sentence that the court should legally have imposed". The second stage involves an assessment of the effect of the identified legal error on the original sentence. The third stage involves an adjustment of that sentence to take account of the error exercising the powers under s 112(2)(b) and (c) of the *Sentencing Act*.

[16] As stated at the outset, there is no doubt in this case that the sentence imposed on 14 September 2018 was not in accordance with the law and, or in the alternative, was not a sentence which legally should have

been imposed. The error is therefore *prima facie* amenable to correction.

[17] The assessment of the effect of the error on the sentence informs what would be required to rectify the error. That involves an exploration of the process by which the relevant part of the sentence was formulated. In each case, that will depend on the circumstances and the statutory framework. The imposition of the head sentence was unaffected by the error, and the application has no bearing on that matter. The operative decision in this case was the fixing of a non-parole period of a particular term. In circumstances where an order suspending sentence is unavailable, as was the case in *Staats*, the immediately anterior determination is whether fixing a non-parole period would be inappropriate.[11] Where it is determined in those circumstances to fix a non-parole period, the effect of the error is a failure to comply with the mandatory minimum. The only adjustment required and available to rectify that error is the application of the mandatory minimum (or some greater period).

[18] However, where an order suspending sentence is an available option, the immediately anterior determination is whether to make an order suspending sentence or to fix a non-parole period. In *Whitehurst v The*

11 *Sentencing Act*, s 53(1).

Queen[12], that process was described by Riley CJ (Mildren and Martin JJ concurring) as follows:

> [27] The first task of the sentencer is to impose a sentence which is appropriate to the offending in light of all of the relevant circumstances of the offence and the offender. Thereafter it is necessary to determine whether to wholly or partially suspend the sentence or, alternatively, to set a non-parole period. If a non-parole period is to be set then the sentencer must consider the duration of that period. If the sentence is to be partially suspended then the sentencer must consider the actual term of imprisonment, to be served prior to the suspension of the sentence.
>
> [28] In choosing whether to proceed by way of a suspended sentence or a non-parole period the sentencing Judge must consider many things including any relevant legislative provisions, the nature of the offending, the minimum period of imprisonment which must be actually served to reflect the seriousness of the offending, and the personal circumstances of the offender including any prospects for rehabilitation. Consideration of the personal circumstances of the offender and his prospects for rehabilitation is likely to involve determining how any prospects for rehabilitation may be addressed and enhanced; whether there is a need for supervision and, if so, the nature of that supervision; the existence of, and the nature of, any support mechanisms available to the offender outside the custodial setting; the identification of impediments and risks to rehabilitation and so on.
>
> [29] The question of whether to impose a non-parole period or to suspend a sentence must be answered in light of all of the circumstances surrounding both the offence and the offender. Such considerations do not give rise to an expectation (as was suggested here) that for a particular type of offence a suspended sentence would result. [13]

[19] The minimum period of imprisonment which must be actually served to reflect the seriousness of the offending forms a crucial part of the

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12 [2011] NTCCA 11.

13 *Whitehurst v The Queen* [2011] NTCCA 11 at [27]-[29].

complex of considerations properly taken into account in making the determination whether to proceed by way of suspended sentence or non-parole period. The importance of that consideration is reflected in the following observation by Deane, Dawson and Toohey JJ in *The Queen v Shrestha* (1991) 173 CLR 48 at 67-69:

> … the legislative intent to be gathered from the terms of the parole legislation applicable in that case … was to provide for possible mitigation of the punishment of the prisoner only when the stage is reached where "the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence". This approach has been consistently accepted in subsequent cases in this court.[14]

[20] The effect of the identified legal error in this case was not simply that the mandatory minimum non-parole period was not applied to the head sentence. It was that the sentencing court determined to fix a non-parole period ignorant of the application of s 55A of the *Sentencing Act* to the circumstances, and under the consequent misapprehension that the minimum period determined appropriate to reflect the seriousness of the offending would be available under either an order suspending sentence or a non-parole period.

[21] The effect of the legal error was to infect not only the length of the non-parole period fixed but also the determination whether to fix a non-parole period or make an order suspending sentence. That then leads to a consideration of whether the determination is amenable to

14 *The Queen v Shrestha* (1991) 173 CLR 48 at 67-69.

adjustment, if appropriate, in the exercise of the powers under s 112(2)(b) and (c) of the *Sentencing Act*. There can be no doubt that the error in this case constituted a misapplication of statutory law, an error in sentencing principle established by binding precedent, and a failure to take into account a relevant and fundamental sentencing consideration.

[22] To correct or adjust the sentence following review, including making an order suspending sentence if considered appropriate, would no more constitute the correction of reasons than did the determination in *Melville* to impose a lesser sentence having regard to the impermissible consideration of distress as an aggravating circumstance. To review that discrete determination would also not constitute a general review of the exercise of the sentencing discretion, or a general rehearing of sentencing proceedings on the merits.

[23] For those reasons, I am of the opinion that the exercise of the power under s 112 of the *Sentencing Act* would properly extend to an adjustment of that sentence to make an order suspending sentence rather than fixing a non-parole period if that is what the correct application of the sentencing principle requires in the circumstances. Of course, there remains a very clear limit to the scope of the power. It would be impermissible, for example, to apply s 112 of the *Sentencing Act* to reduce a head sentence below five years in circumstances such as those presenting in *Staats* so that an order

suspending sentence became available. Where a sentence to imprisonment is considered necessary, the head sentence reflects the appropriate and proportionate punishment having regard to the objective circumstances of the crime and the offender's subjective circumstances. It is derived separately to the other incidents of sentence such as the non-parole period or any period of suspension, and is unaffected by the availability of an order suspending sentence.

Non-parole period or order suspending sentence

[24] In fixing a non-parole period a court is not solely or primarily concerned with the prisoner's prospects of rehabilitation, and the parole legislation is not intended to convert a sentence of imprisonment into an opportunity for rehabilitation.[15] While a purpose of fixing a non-parole period is to assist the prisoner's rehabilitation through conditional freedom, it also has a penal element which must appropriately reflect the purposes of retribution, protection of the community, and specific and general deterrence.[16] The same may be said of an order suspending sentence.

[25] Although the legislature has made express provision fixing the minimum non-parole period for the offence, that provision expressly contemplates that the court may fix a shorter minimum time the offender is required to serve by an order suspending sentence if the

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15 See *Power v The Queen* (1974) 131 CLR 623 at [7]; *Bugmy v The Queen* (1990) 169 CLR 525 at [17].

16 See *The Queen v Hopkins* (2008) 22 NTLR 125 at [10]-[11].

head sentence fixed is a term of imprisonment of not more than five years. Where the head sentence falls within that range, the legislature has purposefully left room for the exercise of discretion by a sentencing court to determine what the circumstances require, including in relation to both rehabilitation and the penal element.

[26] The conduct constituting this offending may be described as follows. The offender lay down next to the victim where she was asleep on a mattress in the house they shared. The offender then placed the victim on his stomach, rubbed her breasts, and pushed her back and forward so that her body made contact with his groin region. That contact was such that at some point his ejaculate made contact with the victim's underwear. At the time I originally sentenced the offender it was my determination that the minimum time justice required the offender to serve was 15 months. The application of the statutory minimum non-parole period would require the fixing of a non-parole period of 19 months and 18 days. That is a difference of almost five months, which is significant in both relative and absolute terms.

[27] The determination that the minimum time justice required the offender to serve was 15 months was made in the consideration of a number of factors. As the Court of Criminal Appeal observed in *Whitehurst*, that determination necessarily took into account such matters as the nature of the offending, the criminality of the conduct, the need for community protection including the interests of the victim, the

offender's prospects for rehabilitation, the need for supervision, and the impediments and risks to rehabilitation.

[28] At the time I originally sentenced the offender I determined that the purposes of punishment, community protection and the enhancement of his prospects of rehabilitation would be best served by the imposition of a non-parole period which would permit the offender's release after he had served a minimum of 15 months, if considered appropriate by the Parole Board and on conditions to be determined by that Board. The question of whether to fix a non-parole period or make an order suspending sentence was finely balanced in the circumstances.

[29] In making the determination to fix a non-parole period I accepted many of the submissions made on behalf of the offender. The victim did not suffer physical harm and the duration of the offending conduct was relatively brief. Apart from this offending he has been responsible in many other areas of his life. The offender made full admissions to police on the day following the incident, and indicated a plea of guilty at an early stage. The offender was genuinely remorseful for his conduct. The offender has a limited criminal history and has never previously been subjected to a period of actual imprisonment. The offender did not have a problem with substance misuse. As a consequence of this conviction the offender will be subject to reporting conditions under the child protection legislation for the next 15 years.

[30] Ranged against those matters, the offender stood *in loco parentis* to the victim, and the abuse constituted a gross breach of trust and had a significant and deleterious impact on the victim. At the time of sentencing, the victim had only just begun to reengage with school and sporting activity some 10 months after the incident. The author of the assessment of offender suitability for supervision reported that police in Galiwinku had expressed some concern that the offender's return to the community would upset the victim's progress. Those were matters which properly informed the penal element of any order fixing a non-parole period or suspending sentence. They were matters taken into account in the determination that the minimum time justice required the offender to serve was 15 months. They are also matters properly taken into account in determining the conditions of any early release, whether on parole or suspension of sentence.

[31] At the time of sentencing, and in this application, counsel for the offender drew attention to the fact that the assessment of suitability for supervision identified a number of potential accommodation options at Ski Beach, well away from the community in which the victim presently resides. The report expressed some concern about those possible placements given the presence of three young male children there, and the fact that the area generally is plagued by the abuse of volatile substances by youths, including female youths. While those circumstances are obviously less than ideal, I accept the submission

that there is no basis on which to conclude that the offender has a sexual interest in children generally.

[32] I remain of the view, having regard to the nature of the offending, the interests of the victim and those of the broader community, that there would be some advantage in the Parole Board being able to give consideration to the extent of the offender's rehabilitation and the conditions of any early release at the time the non-parole period expires. However, that advantage is offset by the fact that the offender would be required to spend a minimum of a further four months and 18 days in prison before that assessment could be given effect. On balance, that consideration militates in favour of an order suspending sentence after the offender has served 15 months. An order in those terms can be made subject to conditions which address concerns about community protection and the victim's interests.

Disposition

[33] Accordingly, I make the following orders pursuant to s 112 of the *Sentencing Act* to impose a sentence that is in accordance with the law:

1. The offender is convicted of the offence on the indictment dated 13 June 2018.

2. The offender is sentenced to imprisonment for 2 years and 4 months for that offence, backdated to 22 November 2017.

3. That sentence to imprisonment will be suspended after the offender has served 15 months' imprisonment, subject to the following conditions:

(a) During the period of the order suspending sentence the offender is under the ongoing supervision of a probation and parole officer, must obey all reasonable directions from a probation and parole officer, and must report to a probation and parole officer directly after the order comes into force.

(b) During the period of the order suspending sentence the offender must not commit any other offence punishable by imprisonment.

(c) During the period of the order suspending sentence the offender must reside at an address at Ski Beach in Nhulunbuy, or some other address that is approved or directed by a probation and parole officer.

(d) During the period of the order suspending sentence the offender must not leave the location of Nhulunbuy except in case of medical or dental emergency or with the prior written permission of a probation and parole officer.

(e) During the period of the order suspending sentence the offender shall not return to Elcho Island.

(f) During the period of the order suspending sentence the offender must not make contact or communicate with the

victim either directly or indirectly and whether in person or by electronic means.

4. I fix an operational period of 18 months following the offender's release pursuant to ss 40(6) and 43 of the *Sentencing Act*.
