CITATION:	*TRH v The Queen* [2018] NTCCA 14
PARTIES:	TRH
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CCA 5 of 2017 (21436128 & 21557095)
DELIVERED:	2 August 2018
HEARING DATES:	28 November 2017 and 20 March 2018
JUDGMENT OF:	Kelly, Blokland and Hiley JJ

CATCHWORDS:

CRIMINAL LAW – Sentencing – inter-jurisdictional sentencing – principles in *Mill v The Queen* - whole of criminal conduct - absence of statutory authority to enable concurrency – principles applicable – appropriate head sentence if there were no intervention of state boundaries –considerations of delay– principle of totality – leniency – use of backdating to effect concurrency - principles in *Mill v The Queen* correctly applied - the principles in *Mill v The Queen* do not require the court to adopt convoluted measures designed to “get around” the requirements of the legislation and restrictions on the court’s discretion imposed by the legislature - Legislative requirements restructure of sentences must be given proper effect - sentence proportionate in the circumstances - appeal dismissed

CRIMINAL LAW – Sentencing – inter-jurisdictional sentencing – effect of s 130(1) of the *Sentencing Act* – minimum non-parole period – parole as a benefit – any increase in minimum non-parole period by the introduction of s 55A not an increase in penalty – *Siganto v R* applied– appeal dismissed

CRIMINAL LAW – Sentencing – approaches in sentencing - effect of s 55A of the *Sentencing Act* - application to aggregate period of imprisonment – application to separate offences – not necessary to decide

Criminal Code Act 1983 (NT) ss 14, 128, 129, 132

Sentencing Act 1995 (NT) ss 40, 53, 54, 55, 55A, 121, 130

CEV v The Queen [2005] NTCCA 10, *Mill v The Queen* (1988) 166 CLR 59, *Siganto v R* (1997) 97 A Crim R 60, *The Queen v Mulholland* (1991) 1 NTLR 1, *R v Todd* [1982] 2 NSWLR 517, applied

CEV v The Queen [2005] NTCCA 10, *Commissioner of Taxation v Price* [2006] QCA 108; [2006] 2 Qd R 316, *Fisher v The Queen* [2014] NTCCA 19, *Inkamala v The Queen* [2005] NTCCA 6, *Johnson v The Queen* (2004) 78 ALJR 616, *Pearce v The Queen* (1998) 194 CLR 610, *Olsen v Sims* [2010] NTCA 8, , *R v Bowen* [2008] VSCA 33, *R v Ronen* [2006] NSWCCA 123; (2006) 161 A Crim R 300, referred to

REPRESENTATION:

Counsel:

Appellant:	I Read SC
Respondent:	S Robson

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	29

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

TRH v The Queen [2018] NTCCA 14
No. CCA 5 of 2017 (21436128 & 21557095)

BETWEEN:

TRH
Appellant

AND:

THE QUEEN
Respondent

CORAM: KELLY, BLOKLAND and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 2 August 2018)

THE COURT:

Introduction

[1] TRH pleaded guilty to five counts on an indictment dated 6 September 2016:

(a) Count 1 - carnal knowledge of KH, a boy of four or five years of age, in 1984, at Berrimah, NT - contrary to s 128(1)(a) of the *Criminal Code* as it then was - maximum penalty 14 years imprisonment;

(b) Count 2 - indecently dealing with RH, a six year old child, between 30 September 1988 and 30 June 1989, at Humpty Doo - contrary to s 132 of the *Criminal Code* - maximum penalty seven years imprisonment;

(c) Count 3 - indecently dealing with KAH, who was four or five years of age, between 30 September 1988 and 30 June 1989, at Humpty Doo - contrary to s 132 of the *Criminal Code* - maximum penalty seven years imprisonment;

(d) Count 4 - unlawful carnal knowledge of KRH, an eight year old girl, between 25 September 1989 and 30 March 1990, at Humpty Doo - contrary to s 129 of the *Criminal Code* - maximum penalty 14 years imprisonment;

(e) Count 5 - indecently dealing with RF, a six year old child, between 1 October 1991 and 30 April 1992, at Humpty Doo - contrary to s 132 of the *Criminal Code* - maximum penalty seven years imprisonment.

[2] On 14 November 2016 he was convicted and sentenced to four years imprisonment for count 1, two years imprisonment for each of counts 2 and 4, four years imprisonment for count 4 and one year imprisonment for count 5. The sentencing judge ordered that six months of the sentences ordered for each of counts 2, 3, 4 and 5 be served

cumulatively upon the sentences for counts 1, 2, 3 and 4 respectively. The judge fixed a total of six years imprisonment backdated to 12 August 2014. This was the date when TRH was extradited to the Northern Territory from Queensland after being released on parole there.

[3] TRH had previously been convicted in Queensland of some 31 offences, mostly concerning sexual offending involving children including his own family. On 27 April 2006 he was sentenced to 13 years imprisonment with a non-parole period of 10 years and six months backdated to 18 February 2014. He was released on parole after serving 10 years, five months and 22 days of that sentence of imprisonment.

[4] The sentencing judge said:[1]

> The effect of the backdating of the sentence to 12 August 2014 is to make it partially concurrent with the sentence of imprisonment that was imposed in Queensland. I fix, as I am bound to fix, a non-parole period of four years and three months. The non-parole period is also to commence on 12 August 2014.
>
> Including the Queensland sentences that gives a total sentence of 16 years, five months and 22 days imprisonment and a non-parole period of 14 years, eight months and 22 days imprisonment. In my opinion, such a sentence is justly proportionate to the 36 sexual offences committed by the offender on children. *[emphasis by underlining added]*

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1 AB 254

Grounds of appeal

[5] The notice of appeal contained three grounds:

(a) Ground 1 - that in all the circumstances of the offending, the offender and the cross border sentencing considerations, the head sentence and non-parole period were manifestly excessive or, in the alternative, the learned sentencing judge fixed a commencement date for the Territory sentences so as to increase the overall sentence to one which is manifestly excessive.

(b) Ground 2 - that the learned sentencing judge erred in not applying the principles of *Mill v The Queen*[2] correctly with regards to inter jurisdictional sentencing.

(c) Ground 3 - the learned sentencing judge erred in attributing the delay to the appellant thus depriving him of the mitigatory effect of delay.

[6] Ground 1 was not pursued.

[7] Grounds 2 and 3 are closely related. In cases such as the present where offences of same nature were committed in different States at about same time, the proper approach is to ask what would be likely to have been the effective head sentence imposed if the applicant had

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2 (1988) 166 CLR 59

committed all the offences in one jurisdiction and had been sentenced at one time.[3] In *Mill v The Queen,* the High Court (constituted by Wilson, Deane, Dawson, Toohey and Gaudron JJ) quoted the following passage from the judgment of Street CJ (with whose reasons the other members of the Court agreed) in the New South Wales Court of Criminal Appeal in *R v Todd* [1982] 2 NSWLR 517, 519-520:

> It would be wrong, in my opinion, to disregard the practical situation that the appellant had already served a substantial period of imprisonment in Queensland for offences so closely related in time and character to the Sydney offences. ... where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense as to what will happen to him when in due course he comes up for sentence on the subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach - passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.

[8] In *Mill v The Queen*, the Court considered the complication in applying that approach where the second sentencing court is unable to properly apply the appropriate degree of concurrency between the two sentences because it is unable to backdate the second sentence:

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3 *Mill v The Queen* at 67.

> The principle is not confined in its operation to the fixing of a non-parole period. It applies also to the fixing of a head sentence which, when considered in association with the head sentence imposed by the first sentencing court, must be seen to be appropriate in all the circumstances. In the absence of statutory provisions enabling the new sentence to be backdated to a time when the offender was in custody serving the earlier sentence in the other State, it is not correct for the second sentencing court to determine the head sentence by reference to the normal tariff applicable to the offence for which he is then being sentenced, leaving the fixing of a non-parole period alone to reflect the principles laid down in Todd. The long deferment of the trial or punishment of an offender, with the consequent uncertainty as to what will happen to him, raise considerations of fairness to an offender which must be taken into consideration when the second court is determining an appropriate head sentence. The intervention of a State boundary denies to an offender the opportunity of having the series of offences dealt with together by a sentencing court which can avail itself of the flexibility in sentencing provided by concurrent sentences.
>
> …
>
> Without statutory authority, the only course open to the second sentencing court is to adopt a lower head sentence that reflects the long deferment that has taken place during which the offender has been in custody. It is true that the lower head sentence will fail to reflect adequately the seriousness of the crime in respect of which it is imposed. That is unfortunate. However, it is to be preferred to the injustice involved in the imposition of a longer head sentence because of the inadequacy of the law to cope satisfactorily with the intervention of State boundaries.
>
> If it be suggested that there is a degree of concurrency present in the sentence imposed on the applicant for the Queensland offence, because the sentence commenced at a time when the Victorian sentence still had two years to run, the answer is that to construe the circumstances in that way effectively denies to the applicant any remissions on the Victorian sentence.[4]

4 *Mill v The Queen* at 66, 67.

[9] In our view, the sentencing judge correctly applied the principles in *Mill v The Queen*. His Honour said:

> In sentencing the offender I have also taken into account the following. Firstly, what would be the appropriate head sentence if the offender had been sentenced for all of the offences he committed both in Queensland and the Northern Territory at once at the time he was sentenced in Queensland? Secondly, the delay which has occurred as a result of the offender being sentenced in Queensland first and the matters relevant to the delay, namely any progress in the offender's rehabilitation as a result of the time he has spent in prison, the offender being left in a state of suspense and in him being sentenced for these matters, and the need for understanding and flexibility when sentencing for stale crimes. Thirdly, the principle of totality.
>
> The delay in sentencing the offender comes about as a result of the pressure the offender placed on the victims to keep these crimes secret and the very young ages of the victims at the time the offences in the Northern Territory were committed. The delay in dealing with these offences does not come about as a result of any failure by the prosecuting authorities.

[10] His Honour plainly had in mind the principles in *Mill v The Queen* when making these remarks. It is also clear from these remarks that the sentencing judge did take into account the delay in sentencing attributable to the offender serving the Queensland sentence. The remarks in the following paragraph are directed to the even longer period of delay attributable to the appellant's efforts to keep his crimes secret.

[11] Moreover, the sentencing judge did not simply pay lip service to the principles in *Mill v The Queen*: his Honour applied them:

While all of the offences in Queensland were ordered to be served concurrently, the offences in the Northern Territory were committed between 1984 and 1992, that is some time before the offences were committed in Queensland but for one or two offences in Queensland, and involved in addition to the other children, two children who were not victims of the offences that the offender committed in Queensland. The offending in the Northern Territory also involved children as young as four or five years of age. In my opinion, it is likely that these factors including the expanded length of time throughout which the offender has committed all of these offences, would have resulted in some accumulation if the offender was sentenced at once for all of the crimes that he has committed.

I have also taken into account the principle of totality. It is apparent from the decisions of the High Court in *Pearce v The Queen* (1998) 194 CLR 610 and *Johnson v The Queen* (2004) 78 ALJR 616 and the Northern Territory Court of Criminal Appeal decision of *Fisher v The Queen* [2014] NTCCA 19, that in order to ensure the total sentence reflects or is justly proportional to the totality of the offender's crimes, it is not always necessary to moderate the individual sentences to be imposed for each offence. Totality may be achieved by making individual sentences concurrent or partially concurrent. The preferred approach is to fix sentences proportionate to the offending of each offence and then to achieve totality through concurrency.

…

For count 1 on the indictment, I sentence the offender to 4 years imprisonment. The sentence of imprisonment is backdated to 12 August 2014 to reflect the time that the offender has been in prison on remand for these offences. For count 2 on the indictment, I sentence the offender to 2 years imprisonment, 6 months of that sentence of imprisonment is to be served cumulatively on the sentence of imprisonment that I have imposed for count 1. For count 3 on the indictment I also sentence the offender to 2 years imprisonment, 6 months of that sentence of imprisonment is to be served cumulatively on the sentence I have imposed for count 2. For count 4 on the indictment I sentence the offender to 4 years imprisonment, 6 months of that sentence is to be served cumulatively on the aggregate sentence to date. For count 5 on the indictment I sentence the offender to 12 months' imprisonment, 6 months of that sentence of imprisonment is to be served cumulatively on the sentence of imprisonment that I have imposed for count 4.

> That gives a total sentence of 6 years imprisonment commencing on 12 August 2014. The effect of the backdating of the sentence to 12 August 2014 is to make it partially concurrent with the sentence of imprisonment that was imposed in Queensland. I fix, as I am bound to fix, a non-parole period of 4 years and 3 months. The non-parole period is also to commence on 12 August 2014.
>
> Including the Queensland sentences that gives a total sentence of 16 years, 5 months and 22 days imprisonment and a non-parole period of 14 years, 8 months and 22 days imprisonment. In my opinion, such a sentence is justly proportionate to the 36 sexual offences committed by the offender on children.

[12] It might be contended that, in stating, "The effect of the backdating of the sentence to 12 August 2014 is to make it partially concurrent with the sentence of imprisonment that was imposed in Queensland," the sentencing judge fell into the error referred to in *Mill v The Queen*, that "to construe the circumstances in that way effectively denies to the applicant any remissions on the [prior interstate] sentence."[5] However, the remedy for that proposed in *Mill v The Queen* is for the second court to compensate for the inability to backdate the second sentence to effect partial concurrency with the interstate sentence by imposing a more lenient sentence than would otherwise be warranted. In the appellant's case, the sentencing judge did precisely that by directing substantial concurrency between the Territory sentences to arrive at a total effective sentence for the Queensland and Territory offences that was proportional to the overall seriousness of the whole of the appellant's criminal conduct in both jurisdictions.

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5 *Mill v The Queen* at [17] extracted at [8] above

[13] Nor is this a case in which the offender had made considerable progress in rehabilitation during his years in prison in Queensland which was not appropriately taken into account. The sentencing judge was apparently asked by the prosecutor to impose an indefinite sentence under s 65 of the *Sentencing Act*. His Honour declined to do so but made the following observations about the appellant and the offending (which was serious sexual offending against children including his own children):

> The offender is a 57 year old man who has been in prison for about 13 years since being convicted in Queensland of 31 sexual offences over a long period of time against predominantly intrafamilial and some extrafamilial victims. His victims were children, teenagers and adults. Dr Le, a forensic psychiatrist who prepared a report for the Court, states that the characteristics displayed by the offender strongly suggest the presence of a disorder of sexual deviance specifically paedophilic disorder and sexual sadism, although he does not meet the full criteria for either disorder.
>
> The offender has been diagnosed as suffering the following conditions. Alcohol use disorder, moderate and in sustained remission in a controlled environment; cannabis use disorder, moderate and in sustained remission in a controlled environment; other specified paraphilic disorder – a history suggesting paedophilic disorder and sexual sadism disorder but not meeting full criteria; and other specified personality disorder – a history suggesting antisocial and narcissistic personality traits without meeting the full criteria for the disorder.
>
> The offender does not have a mental illness or cognitive impairment. There is a moderate to high risk of him reoffending and committing further sexual offences. When examined in Queensland on 23 April 2013, he self-reported that he gained a thrill and sexual gratification from his offending against underage victims.
>
> …

The offending is very serious offending. It involves high moral culpability. All of the offending involved a serious breach of trust. All of the children were of a young age and were in an extremely vulnerable situation. There are a number of different children who were his victims. The victims were of different gender, they were pre-pubescent and two of his acts involved incest. The offence against his son was committed on a public street. Two of the offences were committed in the presence of the other victim. There was a significant difference in age between the offender and his victims. The offender committed these offences for his own sexual gratification.

Dr Le stated that at the time he examined the offender on 21 October 2016, the offender demonstrated clear evidence of persisting cognitive distortions relating to his victim's contribution to the offences, and minimised the significance of his own behaviours. He was able to describe and think about emotions for the victims but did not demonstrate any meaningful evidence of effective empathy. That is, he did not appear able to share the experience of emotions for the victims. He demonstrated partial insight into his predicament, although he had some simplistic protective strategies to prevent future relapse of his substance misuse and sexual offending.

…

The offender's explanations about his offending in the Northern Territory demonstrate an attempt by the offender to justify, rationalise and normalise his criminal behaviour. They demonstrate a substantial minimisation and denial of his offending behaviour many years after these crimes were committed.

…

I note that despite undertaking four sexual offender treatment programs he still suffers from the cognitive distortion about his offences in the Northern Territory to which I have referred and he still continues to minimise his offending behaviour. He still remains a moderate to high risk of reoffending and it will be for the parole board to determine how those factors should be managed in the community if he is to be released on parole.

Hearing 28 November 2017

[14] The appellant abandoned Ground 1 in written submissions provided before the hearing of the appeal. Counsel's major focus was the fact that, taking into account the Queensland sentence, the sentence imposed by the sentencing judge results in an overall effective non-parole period of 89% of the overall effective head sentence. Whilst the total sentence of 16 years five months and 22 days imprisonment was not said to be excessive, the appellant contended that the sentencing judge should have structured the sentence for the Territory offending in such a way as to avoid such a consequence.

[15] Counsel contended that this could have been done by not fixing a non-parole period at all, but by suspending part of his sentence under s 40 of the *Sentencing Act 1995*. Section 40(1) only permits a court to suspend all or part of a sentence of imprisonment if the term imposed is a sentence of not more than five years, but the appellant contended that the sentencing judge could have reduced the six year sentence to five years but ordered it to commence at some date later than 12 August 2014.

[16] It should be noted at the outset that the fact that the non-parole period ended up being approximately 89% of the head sentence is a mathematical artefact attributable in part to the fact that the head sentence for the Territory offences was made partly concurrent with the

Queensland sentence. Further, we do not agree that the principle in *Mill v The Queen* requires a court to adopt convoluted measures designed to "get around" the requirements of the legislation and the restrictions on the court's discretion imposed by the legislature in the manner suggested by the appellant. Once the appellant abandoned, as he did, the contention that the overall sentence was manifestly excessive, it necessarily followed that the provisions in the legislation concerning a sentence of that length (namely that the sentence could not be partly suspended) needed to be given proper effect.

[17] Discussion then ensued about his Honour's statement: "I fix, as I am bound to fix, a non-parole period of four years and three months," and the fact that that amounts to 70% of the head sentence. Under s 55A of the *Sentencing Act*, when sentencing an offender to a term of imprisonment for certain offences against persons under 16 years of age, a court is required to fix a non-parole period of not less than 70% of the period of imprisonment that the offender is to serve under the sentence.

[18] The appellant contended:

(a) that s 55A did not apply at all as it should not be given retrospective effect to sentences for offences committed before its introduction; and

(b) that even if it applied, it did not apply to the whole of the sentence, only to that part of the sentence for offences listed in the section.

[19] Section 55A was enacted in 2001.[6] It provides as follows:

> **Fixed non-parole periods for offences against persons under 16 years**
>
> (1) Subject to this section, if:
>
> (a) a court sentences an offender to be imprisoned for an offence against section 127, 130, 131, 131A, 132, 134, 177(a), 181, 184, 186, 186B, 188 or 192(4) of the Criminal Code; and
>
> (b) the offender was an adult when the offence was committed; and
>
> (c) the offence was committed on a person who was under the age of 16 years; and
>
> (d) the sentence is not suspended in whole or part;
>
> the court must fix a period under section 53(1) of not less than 70% of the period of imprisonment that the offender is to serve under the sentence.
>
> (2) Subsection (1) does not apply where under section 53(1) the court considers that the fixing of a non-parole period is inappropriate.

Does s 55A apply to sentencing for offences committed before the introduction of the section?

[20] Section 130(1) of the *Sentencing Act* which commenced on the same date as the Act as a whole, (1 July 1996) provides:

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6 Act No 38, s 5

SENTENCING ACT - SECT 130

Savings and transitional

This Act applies to a sentence imposed after the commencement of this section, irrespective of when the offence was committed.

[21] It was argued on behalf of the appellant that, s 130 notwithstanding, the 70% minimum non-parole period does not apply by reason of s 121 of the *Sentencing Act* and/or s 14 of the *Criminal Code*.

[22] In our view, provided it can accurately be said that the appellant was sentenced to be imprisoned for an offence against s 132 of the *Criminal Code*, then the 70% minimum non-parole period did apply to at least that portion of the sentence imposed for the offences against s 132.

[23] Section 121 of the *Sentencing Act* provides:

Effect of alterations in penalties

(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.

[24] Section 121 of the *Sentencing Act* has no application. It is directed to the situation where “the penalty for a particular offence is increased or

decreased while the underlying offence provision remains unchanged."[7] That is not the case here.

[25] Between 1 January 1984 and 30 April 1992, when the offences were committed, the section under consideration in this appeal (s 132 of the *Criminal Code*) provided as follows:

> **132 INDECENT TREATMENT OF CHILD UNDER 14 YEARS**
>
> (1) Any person who indecently deals with a child under the age of 14 years is guilty of a crime and is liable to imprisonment for 2 years.
>
> (2) If the child so dealt with is under the age of 10 years the offender is liable to imprisonment for 5 years and if the offender is an adult he is liable to further imprisonment for 2 years.
>
> (3) Section 12 does not apply with respect to the child with whom an act herein proscribed is done.

[26] That section was replaced on 30 April 1992 by an expanded provision which (*inter alia*) changed the age of children in relation to whom it was an offence to do the proscribed acts and added a number of additional proscribed acts. It also increased the maximum penalty. As at the date when the appellant was sentenced, s 132 provided as follows:

> **132 INDECENT DEALING WITH CHILD UNDER 16 YEARS**

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7 *Olsen v Sims* [2010] NTCA 8 at [17] and first instance decision of Riley J at [26] - [28]; *R v Ronen* [2006] NSWCCA 123; (2006) 161 A Crim R 300 at [31] - [35] per Howie J with whom Spigelman CJ and Kirby J agreed; *R v Bowen* [2008] VSCA 33 at [11]; *Commissioner of Taxation v Price* [2006] QCA 108; [2006] 2 Qd R 316 at [73] - [83].

(1) In this section, "deals with" includes the doing of any act which, if done without consent, would constitute an assault within the meaning of sections 187 and 188.

(2) Any person who:

(a) indecently deals with a child under the age of 16 years;

(b) exposes a child under the age of 16 years to an indecent act by the offender or any other person;

(c) permits himself to be indecently dealt with by a child under the age of 16 years;

(d) procures a child under the age of 16 years to perform an indecent act;

(e) without legitimate reason, intentionally exposes a child under the age of 16 years to an indecent object or indecent film, video tape, audio tape, photograph or book; or

(f) without legitimate reason, intentionally takes or records, by means of any device, an indecent visual image of a child under the age of 16 years,

is guilty of an offence and is liable to imprisonment for 10 years.

[27] As the underlying offence provision did not remain unchanged – and in fact was substantially altered - this is not a case where s 121 has any application.

[28] Even if s 121 of the *Sentencing Act* were to apply, for the reasons set out in *Siganto v R*,[8] the introduction of a 70% minimum non-parole period in s 55A did not amount to an increase in the penalty for any of the offences listed in that section regardless of the fact that after the introduction of that minimum non-parole period, a sentenced prisoner might in fact end up serving more time in prison than before the

8 (1997) 97 A Crim R 60

introduction of the section. "[T]he fixing of a non-parole period … 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."[9] "The word "penalty" is not defined in the *Sentencing Act* or in the *Interpretation Act* (s 38C 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 s 121. 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."[10]

[29] Where the substantive law has changed between the date of the offence and the date of sentencing, the relevant provision is s 14 of the *Criminal Code* which provides as follows:

> **14 EFFECT OF CHANGES IN LAW**
>
> (1) A person cannot 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 cannot be punished to any greater extent than was authorized by the former law or to any greater extent than is authorized by the latter law.

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9 *Siganto v R* at 67
10 *Siganto v R* at 67

[30] The relevant provision is s 14(2). As the maximum penalties for an offence against s 132 were increased after the appellant committed these offences, the effect of s 14(2) is that, on sentencing in 2016, the appellant could not be sentenced to any term greater than the maximum penalty prescribed by the legislation in force at the time of the offence. At that time, for offences against s 132(1), the maximum penalty when the child was under the age of 10 and the offender was an adult was imprisonment for seven years.[11] The maximum penalties for offences against s 128(1)(a) and 129(1)(a) were in each case imprisonment for 14 years.[12] On count 1 (the offence against s 128(1)(a) which carried a maximum of 14 years imprisonment) the appellant was sentenced to imprisonment for four years; on counts 2 and 3 (offences against s 132 which carried a maximum of imprisonment for seven years) he was sentenced to terms of imprisonment for two years and six months on each count; on count 4 (the offence against s 128(1)(a) which carried a maximum of 14 years imprisonment) he was sentenced to imprisonment for four years; and on count 5 (another offence against s 132(1) which carried a maximum of imprisonment for seven years) he was sentenced to a term of imprisonment for 12 months. All of these were made substantially concurrent. None of these sentences was greater than the maximums prescribed at the time the offences were committed. Nor did

11 Section 132(2)
12 Sections 128(2) and 129(2)

they exceed the maximum penalty prescribed at the time of sentencing. (At the time of sentencing, the maximum penalty for indecent dealing with a child under the age of 10 was imprisonment for 14 years.[13])

[31] Section 14(2) could have no effect on the fixing of non-parole periods as the Court is authorised to require an offender to serve the whole of the sentence imposed – ie not fix a non-parole period at all. The legislation specifies minimum, not maximum non-parole periods.

[32] So, the question arises whether, having regard to the changes in s 132 between the date when the offences in question were committed and the date when s 55A was introduced, it is true to say that the appellant was sentenced to a term of imprisonment for an offence against s 132 within the meaning of s 55A? In our view, it is. If, for example, the old s 132 had dealt with an entirely different subject matter (for example stealing or property damage), then one would hesitate to impute to the legislature an intention that s 55A should apply. But that is not the case. Section 132 still deals with the same kind of sexual offending against children as the old s 132 and the evident purpose of s 55A was to ensure that offenders who commit sexual or violent offences against children serve at least 70% of their sentence in prison (unless the sentence has been suspended or partly suspended).

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13 Section 132(4)

[33] Accordingly, the minimum non-parole periods in s 55A apply to at least that part of the appellant's sentence that was imposed for offences against s 132.

Does the requirement to fix a non-parole period of not less than 70% of the sentence apply to the whole sentence?

[34] The appellant argued that, in any case, the sentencing judge was wrong to say that he was bound to fix a non-parole period of not less than 70% across the whole sentence, as part of the sentence was imposed for offences against s 128 and 129 of the *Code* which are not listed in s 55A of the *Sentencing Act*.[14] Counsel for the appellant contended that the correct approach to calculating the required minimum non-parole period in such cases is to take 70% of the sentence imposed for any offences listed in s 55A and add 50% of the balance.

[35] Counsel for the respondent, on the other hand, submitted that the Court was bound to fix a non-parole period of at least 70% of the whole sentence imposed where any part of that sentence relates to an offence listed in s 55A. The reasoning is as follows.

(a) Sub-section 53(1) of the *Sentencing Act* requires a court sentencing an offender to a term of imprisonment for 12 months or more that is not suspended (or partly suspended) to fix a period

14 Section 129 was repealed before the introduction of s 55A. Section 128 now deals with sexual intercourse or gross indecency involving children over the age of 16 in special care.

during which the offender is not eligible to be released on parole, unless the court considers that it would be inappropriate to fix a non-parole period at all. Sub-section 53(1) is expressed to be subject to "this section" (ie s 53) and sections 53A, 54, 55 and 55A.

(b) Subsection 53(2) provides:

> (2) Where a court sentences an offender to be imprisoned in respect of more than one offence, a period fixed under subsection (1) is in respect of the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed.

(c) That is to say, when looking at the following sections, (53A, 54, 55 and 55A) the thing that they operate on is the single "aggregate period of imprisonment" – or as counsel for the appellant referred to it "the total effective term of imprisonment".

(d) For "standard" offences (those not subject to the special provisions in ss 53A, 55 and 55A), s 54(1) provides:

> **Minimum non-parole period**
>
> (1) Subject to this section, where a court sentences an offender to be imprisoned for 12 months or longer that is not suspended in whole or in part, the court must fix a period under section 53(1) of not less than 50% of the period of imprisonment that the offender is to serve under the sentence.

That is to say, read in conjunction with s 53(2), s 54 requires the court to fix a non-parole period of not less than 50% of the total effective sentence imposed for all offences.

(e) Section 55A provides "if a court sentences an offender to a term of imprisonment for an offence against" any of the sections of the Code listed in that section, (where the offender was an adult and the victim a child, and the sentence has not been suspended or partly suspended), "the court must fix a period under section 53(1) of not less than 70% of the period of imprisonment that the offender is to serve under the sentence."

That is to say, read in conjunction with s 53(2), where it applies, s 55A requires the court to fix a non-parole period of not less than 70% of the total effective sentence imposed for all offences.

(f) Sections 54 and 55A are not inconsistent. A non-parole period of "not less than 70%" of a sentence is also "not less than 50%" of that sentence.

(g) In this case, the precondition for the application of s 55A has been met: the Court has sentenced the appellant to a term of imprisonment for an offence against one of the nominated sections – s 132.

(h) The respondent contends that the combined effect of s 53(2), 54 and 55A is that, where (as in the case of the appellant) the Court is sentencing an offender for more than one offence, at least one of which is an offence listed in s 55A, then to comply with all three provisions, the sentencing court must fix a single non-parole period[15] of not less than 70% of the total effective sentence imposed.[16]

[36] The appellant contends that this is not correct; that s 53(2) does not have this effect. Its purpose is to provide that there should be only one non-parole period fixed for the total sentence imposed – not one for each separate offence: it says nothing about how to calculate the minimum non-parole period which must be imposed. Sections 55A and 54 can both be given effect to by fixing a single non-parole period that is 70% of the sentence for any offences listed in s 55A and 50% of the balance of the sentence.

[37] The respondent counters that the mathematical approach contended for by the appellant would be to take the focus of the Court away from fixing a non-parole period for the aggregate total effective sentence, as required by s 53(2), and to apply instead an erroneous approach of

15 to comply with s 53(2)
16 to comply simultaneously with both s 54 and s 55A

looking at non-parole periods for individual sentences and then adding them up, contrary to the requirements of that sub-section.

[38] The contentions of the respondent have considerable force. However, there are two decisions of this Court which have applied the approach contended for by the appellant.

[39] In *Inkamala v The Queen*[17] the appellant had been sentenced to a term of 11 years imprisonment for a number of counts of rape and one count of deprivation of liberty. The sentencing judge stated that under the *Sentencing Act* the minimum non-parole period that could be set was 70% of the period of 11 years, and fixed the non-parole period accordingly. On appeal Martin (BR) CJ, with whom Thomas and Riley JJ agreed, said:

> [21] Section 55(1) of the Sentencing Act provides that where a court sentences an offender to be imprisoned for an offence against s 192(3) of the Criminal Code that is not suspended in whole or in part, the court shall fix a non-parole period of not less than 70% of the period of imprisonment that the offender is to serve under the sentence. The sentences to which s 55(1) apply were those imposed in respect of the crimes of rape in counts 2 - 5. Section 55(1) did not apply to the sentence imposed for deprivation of liberty contrary to s 196(1) of the Code.
>
> [22] In respect of the sentence for deprivation of liberty, pursuant to s 54 of the Code, the minimum non-parole period was 50% of the sentence imposed.
>
> [23] In these circumstances, the fixing of the non-parole period has been attended by an error of principle. This requires this

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> Court to consider the question of the non-parole period afresh in the exercise of this Court's discretion. In my view, the appropriate non-parole period would be a period of seven years.

[40] No reasons were given for this approach to minimum non-parole periods and we understand that the contention now made by the respondent was not made to the Court in *Inkamala* and there was no real discussion of how the minimum non-parole period provisions should be construed.

[41] In *CEV v The Queen*[18] the Court of Criminal Appeal (consisting of Mildren, Riley and Southwood JJ), in resentencing the appellant following a successful appeal against his sentence, said:

> 35. The starting point is to bear in mind that s 55 and s 55A of the Sentencing Act require a minimum of 70 per cent of the head sentences imposed in respect of Counts 4 and 5, but in respect of Count 3, s 54(1) requires only a minimum of 50 per cent of the head sentence. Where, as here, there is some concurrency in the head sentences in respect of which the Act imposes differing minima, the Court must fix a total minimum term which allows for the greater minimum term to take priority to the extent of any concurrency. Therefore, in this case the minimum terms are 3 years in respect of Count 3 and 2.1 years in respect of Counts 4 and 5, a total of 5.1 years.

[42] Again no reasons were given, the argument now raised by the respondent was not before the court, and the approach adopted seems merely to have been assumed to be the correct approach.

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[43] Given the existence of those two decisions, it seems to us that it would be preferable for this issue to be decided by a bench of five judges unless it is necessary to decide it in the present case, and in our view it is not necessary to decide the question one way or the other in this case.

[44] It must be borne in mind that the sections in question only prescribe minimum non-parole periods. Provided the period fixed is not less than the prescribed minimum, the sentencing judge has a discretion in fixing a non-parole period, and is required to fix an appropriate term in all of the circumstances. In *CEV v The Queen*, the Court of Criminal Appeal specifically rejected a submission that there was a "normal rule of practice" in the Northern Territory of fixing whatever the statutory minimum non-parole period might be unless there were sound reasons for departing from it.[19] As Gallop J said in *The Queen v Mulholland*,[20] cited with approval in *CEV v The Queen*:[21]

> The starting point must be the minimum period which the prisoner must serve before being eligible for parole., which will be arrived at by taking account of the nature of the crime and its gravity in the scale of crimes of its type, the need to give close attention to the danger which the offender presents to the community, the prospects of the future progress of the offender and the danger he would be to the community, and all the subjective factors, including his prospects of rehabilitation.

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19 [36] - [44]
20 (1991) 1 NTLR 1 at 9
21 at [39] – [40]

[45] As the Court went on to say: "All of the factors relevant to the fixing of a head sentence are relevant to the fixing of the minimum term and must be given their proper weight."[22]

[46] Given the objective seriousness of these offences, the appellant's lack of insight and remorse, victim blaming and consistent minimising of his offending, his assessed risk of reoffending, and all of the other circumstances of the case, set out in more detail in the sentencing remarks referred to above, in our view the non-parole period fixed by the sentencing judge was appropriate. We agree with the assessment of the sentencing judge that the total sentence of 16 years, five months and 22 days imprisonment and the non-parole period of 14 years, eight months and 22 days is justly proportionate to the 36 sexual offences committed by the offender on children.

[47] That being the case, even if the appellant is correct and his Honour was wrong in thinking he was required to fix a non-parole period of at least 70% of the whole sentence, we consider there has been no substantial miscarriage of justice and we decline to interfere with the sentence including the non-parole period: we would dismiss the appeal.

[48] As we would dismiss the appeal whether the respondent's contention regarding the construction of the minimum non-parole periods is

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22 *CEV v The Queen* at [40]

correct or the appellant's contention is correct, we think it would be preferable for final consideration of the question of the construction of the minimum non-parole periods in the *Sentencing Act* to be deferred until it can be brought before a five person bench. (Perhaps it could be referred to the Full Court as a question of law when it arises for consideration in sentencing in the near future.)

[49] Order of the court: The appeal is dismissed.
