CITATION:	*Thomas v The Queen* [2017] NTCCA 4
PARTIES:	THOMAS, Angus v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	CA 5 of 2016 (21534966)
DELIVERED:	23 June 2017
HEARING DATES:	7 February 2017
JUDGMENT OF:	Grant CJ, Southwood and Riley JJ
APPEALED FROM:	Blokland J

CATCHWORDS:

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – JUDGMENT AND PUNISHMENT

Appeal against sentence – the manner in which the sentences for each of the four counts were cumulated resulted in a total sentence that was not appropriate or proportionate having regard to the gravity and totality of the appellant's criminal conduct – appeal allowed and appellant resentenced.

Criminal Code (NT) s 188, s 192
Sentencing Act (NT) s 51, s 52, s 65

Attorney-General (SA) v Tichy (1982) 30 SASR 84, *Azzopardi v The Queen* (2011) 35 VR 43, *Buckley v R* (2006) 224 ALR 416, *Cahyadi v R* (2007) 168 A Crim R 41, *Carroll v The Queen* (2011) 29 NTLR 106, *Channon v The*

Queen (1978) 20 ALR 1, *Green v The Queen* (2000) 9 NTLR 138, *Johnson v The Queen* (2004) 205 ALR 346, *Lade v Mamarika* (1986) 83 FLR 312, *Mill v The Queen* (1988) 166 CLR 59, *Murray v The Queen* (2006) 200 FLR 89, *Nguyen v R* [2007] NSWCCA 14, *R v AT* [2016] NTSC 20, *R v Dunn* (2004) 144 A Crim R 180, *R v KM* [2004] NSWCCA 65, *R v Scanlon* (1987) 89 FLR 77, *R v Wilson* [2005] NSWCCA 219, *R v XX* (2009) 195 A Crim R 38, *Veen v The Queen* (1979) 143 CLR 458, *Veen v The Queen (No 2)* (1988) 164 CLR 465, referred to.

REPRESENTATION:

Counsel:

Appellant:	M Aust
Respondent	M Chalmers

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent	Office of the Director of Public Prosecutions

Judgment category classification: B
Number of pages: 22

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

Thomas v The Queen [2017] NTCCA 4
No. CA 5 of 2016 (21534966)

BETWEEN:

ANGUS THOMAS
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, SOUTHWOOD and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 23 June 2017)

THE COURT:

[1] On 8 December 2015 the appellant pleaded guilty to four counts on an indictment dated 4 December 2015.

[2] Count 1 pleads that on 15 July 2015 at Darwin the appellant indecently assaulted JC contrary to s 188(1) and (2)(b) and (k) of the *Criminal Code* (NT). The maximum penalty for this offence is imprisonment for five years.

[3] Count 2 pleads that on 15 July 2015 at Darwin the appellant performed an act of gross indecency on KP without her consent, while knowing about that

lack of consent, contrary to s 192(4) of the *Criminal Code*. The maximum penalty for this offence is imprisonment for 14 years.

[4] Count 3 pleads that on 15 July 2015 at Darwin the appellant performed an act of gross indecency on JW without his consent, while knowing about that lack of consent, contrary to s 192(4) of the *Criminal Code*. The maximum penalty for this offence is also imprisonment for 14 years.

[5] Count 4 pleads that on 15 July 2015 at Darwin the appellant had sexual intercourse with KD without her consent, while knowing about that lack of consent, contrary to s 192(3) of the *Criminal Code*. The maximum penalty for that offence is imprisonment for life.

[6] On 4 April 2016 the appellant was sentenced to a total effective period of imprisonment for 14 years backdated to 15 July 2015, with a non-parole period of 11 years. That sentence was made up as follows:

- two years' imprisonment for count 1;
- three years' imprisonment for count 2, which was to be served wholly cumulatively on the sentence imposed for count 1;
- four years' imprisonment for count 3, three years of which was to be served cumulatively on the sentence imposed for count 2; and
- seven years' imprisonment for count 4, six years of which was to be served cumulatively on the sentence imposed for count 3.

[7] This appeal is brought against sentence on the sole ground that both the total sentence of 14 years' imprisonment and the non-parole period of 11 years are manifestly excessive. The appellant identified a number of discrete factors in support of the proposition that the sentence is manifestly excessive. However, the principal contention was that the manner in which the individual sentences were cumulated resulted in a crushing total sentence that was not justly proportionate to the whole of the appellant's criminal conduct.

[8] At the conclusion of the hearing this Court allowed the appeal and resentenced the appellant. The sentences imposed in respect of each individual offence remained undisturbed, but the orders made for the cumulation of the sentences imposed for counts 2, 3 and 4 were set aside. Different orders were made for the cumulation of the sentences, resulting in a total effective period of imprisonment of 10 years backdated to 15 July 2015. A non-parole period of seven years was fixed. The new sentence is made up as follows:

- two years' imprisonment for count 1;
- three years' imprisonment for count 2, two years of which is to be served cumulatively on the sentence imposed for count 1;
- four years' imprisonment for count 3, two years of which is to be served cumulatively on the sentence imposed for count 2; and

- seven years' imprisonment for count 4, four years of which is to be served cumulatively on the sentence imposed for count 3.

[9] The Court indicated it would publish reasons at a later date. These are those reasons.

The facts

[10] The objective facts of the offending and the appellant's subjective circumstances may be summarised as follows.

[11] The appellant was born at Daly River in 1976 and raised at Peppimenarti. He was 39 years of age at the date of the offending. He is a fully initiated Aboriginal man.

[12] The appellant comes from a deprived background. The appellant's father was a violent man. He died when the appellant was three years of age. His mother remarried after his father died. The appellant's stepfather was also a violent man who sexually assaulted him between the ages of 10 and 14. The appellant was also sexually assaulted on a number of occasions by other boys when he was eight years of age, and by a brother and another adult when he was 11 years of age. He was subjected to genital fondling and anal penetration in the course of those assaults.

[13] The appellant has significant hearing, communication and language problems. He left school when he was 12 years of age and made his way to

Darwin where he became involved in criminal offending and was placed in youth detention.

[14] The appellant has been employed at various times under the Community Development Employment Program. He has worked building fences and as a ranger. Despite his traumatic upbringing and his developmental issues, he had a reputation as a polite, compliant and diligent worker.

[15] He was married for a period of about 12 months during 2006 and 2007.

[16] The appellant has a long-standing problem with the misuse of alcohol and volatile substances. He has been a petrol sniffer. Most of his criminal offending has involved the misuse of alcohol. When he misuses alcohol he is unable to control his behaviour. Dr Walton, a forensic psychiatrist who has attended on the appellant, diagnosed him as suffering from substance dependency and antisocial personality disorder (discussed further below). Dr Walton is also of the view that the appellant is a severely psychologically damaged individual.

[17] The appellant has a criminal history which extends for nine pages. At the time he committed the offences which are the subject of this appeal the offender had numerous prior convictions for sexual offences.

[18] At approximately 5:20 pm on 15 July 2015, the appellant approached JC who was a 48 year old woman. At the time JC was returning to her car in the undercover car park at Casuarina Shopping Centre. When the appellant

came close to JC he lunged at her and grabbed at her groin. She was able to turn and avoid contact. The appellant lunged at JC again and one of his hands got caught in the strap of JC's bag causing her to fear she was being robbed. The appellant then lunged at her a third time and slapped her on the buttocks. He said, "You have got a nice arse." He then walked off.

[19] Shortly after assaulting JC the appellant walked over to the entrance of the Kmart store, still within the Casuarina Shopping Centre. At 5.36 pm KP, a 19-year-old female, was walking down the footpath outside Kmart. The appellant walked up behind her, pushed one of his hands between her upper legs and grabbed her vagina. He squeezed her vagina through the outside of her leggings. This caused KP to jump. She grabbed the appellant's arm and said, "Get the fuck off me". The appellant lost his balance and fell over.

[20] At approximately 5:40 pm JW, a 10-year-old male, was walking with his mother and some other relatives along the same footpath outside the Kmart store. The group stopped for a short time near the appellant before JW and his mother proceeded to their car. While his mother was loading the shopping into the car JW was standing on the footpath. The appellant approached him from behind. The appellant reached out and jabbed at JW's anus through the outside of his shorts with one of his fingers. JW's mother saw the assault, rushed at the appellant and pushed him away.

[21] The appellant then left the area outside Kmart and walked towards the Casuarina bus exchange. A short time later he arrived at the bus interchange

where KD, an eight-year-old female, was waiting for a bus with her mother and her younger brother. She was standing next to her mother. Without warning the appellant approached KD from behind. He grabbed at her anal area and pushed a finger or fingers upwards penetrating the child's anus through her leggings. KD pulled away from the appellant and huddled into her mother. The appellant then sat down next to them and reached out to touch the child again. At this point security personnel arrived at the bus interchange and the appellant was apprehended. Police arrived a short time later. The appellant was arrested and assessed as being intoxicated. The next day the appellant was interviewed by police. He admitted the offences and said that he did not know why he had behaved in that manner, beyond the fact that he was drunk at the time.

[22] The appellant was subsequently examined by Dr Walton, the consultant psychiatrist whose opinion is described briefly above, and Ms Crawley, a psychologist. In his subsequent report of the examination Dr Walton stated:

> It would appear that [the appellant's] upbringing was blighted from the outset, his being raised in a dysfunctional family where he was the victim of repeated physical and also sexual abuse. Thus it is hardly surprising that from a young age he began to engage in criminal offending with parallel polysubstance abuse.
>
> [The appellant] would attract formal psychiatric diagnoses of substance-dependency and anti-social personality disorder. It is not the case precisely at present but it would seem likely that at least at times in the past he would also attract a diagnosis of depressive disorder. These diagnostic labels hardly capture the severity of [the appellant's] psychiatric problems. By any sensible standard he is a severely psychologically damaged individual.

> I presume that the Court is already satisfied that [the appellant] is properly classified as a violent offender. It is not the case that [the appellant] is suffering from any meaningful psychiatric illness, let alone mental disorder that would give rise to criminal offending. The label antisocial personality disorder is substantially tautological and amounts to little more than shorthand for established criminal history, rather than being explanatory of the antisocial conduct.
>
> It does seem that substance abuse is centrally relevant to this man's offending. He highlights the disinhibiting effects of drugs and alcohol himself, in fact, his providing no other explanation. That is a simplistic conclusion but a chemically-induced disinhibited behaviour is relevant.
>
> …there has been a recurring pattern of alcohol and drug induced intoxication which often seems to have made a central contribution to this man's offending and that was relevant to the latest offending.
>
> It would seem highly probable that if [the appellant] was released back into the community again he will promptly lapse back into drug and alcohol abuse which is a very significant factor in terms of his risk of reoffending generally and in violent offending in particular.
>
> I found no evidence that [the appellant] has a particular predilection for sexual involvement with children. His primary and preferred mode of sexual functioning is that of ordinary adult heterosexuality but, especially when intoxicated, he is simply likely to be rather indiscriminate when giving expression to his sexual urges. The fact that he was a sexual abuse victim himself as a child does place him in an elevated risk category of offending against children but I would not describe him as a paedophile.
>
> …. I believe he would be properly described as being in a high risk category of reoffending generally.

Sentencing remarks and the application for an indefinite sentence

[23] Before the sentencing judge passed sentence on the appellant, her Honour heard a Crown application for an indefinite sentence under s 65 of the *Sentencing Act* (NT). That application was ultimately refused.[1] The sentence was imposed and reasons for decision refusing the application were

1 *R v AT* [2016] NTSC 20.

delivered on the same day, and the dispositions in each matter appear to have been interrelated.

[24] In the reasons for decision refusing the application for an indefinite sentence her Honour stated:[2]

> Today I sentenced [the appellant] to a total of 14 years imprisonment.
>
> …
>
> *The risk of serious harm of the type that resulted from the most recent offending is high if he is not incarcerated*, given his history and the type of offending he engages in. This is indiscriminate sexual offending primarily against women and children. *There is a strong need to protect the community from this risk*. Whether that requires an indefinite term to be set *in the face of a lengthy sentence* coupled with the availability of an application being made under the *Serious Sex Offenders Act* is not so clear.
>
> *If the offending were of a type that required for proportionality reasons, a relatively modest sentence be imposed*, or if there were no further mechanism such as orders available under the *Serious Sex Offenders Act, then an indefinite term may be the only way to provide proper protection for the community, however, given primarily those two factors,* I am not persuaded that it is appropriate or necessary to impose an indefinite sentence. *Those two factors operate well to protect the community from the risk, including future risk posed by [the appellant]*. I was referred to and have had regard to the comments in *Buckley v The Queen* [(2006) 224 ALR 416, 418 [7]]: "an indefinite sentence is not merely another sentencing option. Much less is it a default option. It is exceptional, and the necessity for its application to be considered in light of the protective effect of a finite sentence."
>
> It is a matter of discretion whether the Court imposes an indefinite sentence, even though as in this case most of the criteria have been met under s 65 of the *Sentencing Act*.
>
> ….
>
> *The length of the finite sentence imposed on this occasion*, coupled with the inevitability of an application under the *Serious Sex Offenders Act* should the finite sentence not be adequate protection, in my view

2 *R v AT* [2016] NTSC 20 at [1], [66]-[68], [81].

manages the acknowledged serious risk posed by this offender. It is therefore not necessary with respect to this particular offender to order an indefinite term. I decline to make an order for an indefinite term of imprisonment.

[25] The sentencing remarks included the following passages:

> At the time of entering the pleas, counsel for the Director of Public Prosecutions foreshadowed an application for the imposition of an indefinite sentence pursuant to the terms of s 65 of the *Sentencing Act*. I therefore adjourned the matter in order to obtain various reports and to hear submissions on the application. *I have dealt with that matter in separate reasons that I have had provided to counsel and as indicated I have declined that application. I deal now with the matters relevant to the current charges committed on 15 July 2015*.
>
> ....
>
> In terms of fixing terms of imprisonment for the current offending he is not to be sentenced on the basis of his previous record. However, obviously on this occasion the full weight of the principles of general and specific deterrence, denunciation *and within proper limits, the protection of the community* must all be emphasised and reflected to the fullest extent in the sentences.
>
> ....
>
> It is offending, which apart from its inherent seriousness, causes great alarm in the community. In this case that alarm has a sound basis. The impacts on the victims are very serious but entirely foreseeable given the nature of the offending. It can only be hoped that full recovery for the victims is eventually made. The emotional impact on the young child, the victim in count 4, illustrates why offending of this kind is extremely serious and why the sentencing response must emphasise denunciation, punishment and general and specific deterrence *in order to protect the community*.
>
> ....
>
> It would seem highly probable that if [the appellant] was released into the community again, he will probably lapse back into drug and alcohol abuse which is a very significant in factor in terms of his risk of re-offending generally and engaging in violent conduct in particular.
>
> *[Dr Walton] expressed the view that [the appellant] is in a high risk category of offending generally* and did not see any differential risk in

and of itself within in urban compared with a regional placement. Dr Walton did, however, state that factors may indirectly arise from the type of environment that [the appellant] is in. Factors such as the presence or absence of family support and constraint, access to liquor and illicit drugs, the availability of medical and rehabilitation services and the opportunity for cultural and work-like participation.

....

Ms Crawley is of the opinion that his risk to offend against children is high if located in the Darwin urban region and low to moderate if located in Wadeye, if he is abstinent from alcohol and the appropriate external risk management structures are instituted. Her opinion is that he does not meet the criteria for paedophilia disorder or sexual orientation. The difficulty with this is that if [the appellant] for various reasons eventually gets to Darwin, consumes alcohol and/or cannabis and offends.

....

The Pre-Sentence Report dated 17 February 2016 indicated Community Corrections *could not provide him the level of supervision he would require in the community*, indicating that interventions such as the Sex Offender Treatment Program and Alcohol and Drugs Program would be best implemented in a custodial setting. That is clearly what will need to occur.

As indicated, although I have declined the application for fixing an indefinite sentence, I would anticipate that unless there is a very strong turnaround in prison concerning rehabilitation and his attitude and participation in programs, he would be subject to an application under the *Serious Sex Offenders Act*.

I note he has not previously served a term of imprisonment of this magnitude or close to it; *however, full weight must be given to the more punitive aspects of sentencing principles on this occasion.* ***I give very limited concurrency due to the different victims and the failure to stop offending after intervention***.

[26] While those extracts do not necessarily disclose any relevant error of principle, a number of preliminary observations may be made concerning the matters addressed.

[27] First, it is clear that the sentencing judge placed significant emphasis in the sentencing calculus on the purpose of community protection. While there can be no doubt that the protection of the Territory community may be a material factor in determining an appropriate sentence, it would be erroneous to impose a sentence beyond what is proportionate to the crime in order to extend the period of protection from the risk of reoffending on the part of the offender.[3] As the majority observed in *Veen v The Queen (No 2)*:[4]

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard protection of society among other factors, which is permissible.

[28] That is to say, the exercise of the sentencing discretion having regard to community protection is clearly permissible provided that the sentence does not go beyond what is proportionate to the crime in order to achieve a form of preventative detention. That purpose may only be achieved with the utmost transparency in the application of statutory schemes directed specifically to preventative detention, such as the indefinite sentencing provisions and the serious sex offender legislation.

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3 *Veen v The Queen* (1979) 143 CLR 458 at 467,468,482-483,495; *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477; *Channon v The Queen* (1978) 20 ALR 1 at 10.

4 (1988) 164 CLR 465 at 473.

[29] Secondly, in determining whether any order may or should be made under an indefinite sentencing regime a court may take into account such matters as the length of sentence the offence would ordinarily attract, the available maximum penalty, and whether the protective purpose could reasonably be achieved by the imposition of a finite sentence of imprisonment.[5] The protective effect of a finite sentence fixed according to ordinary sentencing principles may be all that is required, subject always to the qualification that the sentence must not go beyond what is proportionate to the crime. In particular, it is impermissible to impose a sentence which goes beyond what is proportionate to the crime(s) as an alternative to the imposition of an indefinite sentence pursuant to s 65 of the *Sentencing Act*.

[30] Thirdly, the potential for some application and form of order to be made under the serious sex offender legislation at the expiry of the sentence to be imposed by the court is not directly relevant in determining an application for an indefinite sentence pursuant to s 65 of the *Sentencing Act*. As the sentencing judge correctly identified, the relevant questions are whether or not the offender is a danger to the community at the time of sentencing, and whether or not there is a substantial or real risk that the offender would remain a danger to the community at the time of his release assuming a definite sentence were to be imposed.[6]

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5 *Buckley v R* [2006] HCA 7; 224 ALR 416 at [6]-[7].

6 *Murray v The Queen* [2006] NTCCA 9; 200 FLR 89 at [21], [91]; *Green v The Queen* (2000) 9 NTLR 138 at [22], [56]-[57].

[31] The second limb of that inquiry is not properly addressed by predictions and prognostications concerning the likelihood of the executive making an application under the serious sex offender legislation at the expiry of a definite sentence. The operative consideration is whether the definite sentence which would otherwise be imposed is of such duration that estimations of future risk at the time of an offender's prospective release are too fraught with uncertainty to justify the conclusion that there would still remain a substantial or real risk at that time. If that is the case, there will be no warrant for the imposition of an indefinite sentence and the question of whether the offender presents a "serious danger to the community" can only be addressed, if at all, in the context of the serious sex offender legislation at the appropriate time; but this is not to say that the availability of an order under that legislation is a relevant consideration in determining whether or not an indefinite sentence should be imposed.

Consideration

[32] It is apparent that the sentencing judge was of the opinion that there was a high risk the appellant would reoffend, and that the protection of the community required a lengthy sentence of imprisonment. The sentencing judge was also of the opinion that the offender's circumstances satisfied most of the criteria for the imposition of an indefinite sentence under s 65 of the *Sentencing Act*. On one reading of the sentencing remarks and the reasons refusing the application for an indefinite sentence, the sentencing judge would have imposed an indefinite sentence but for the lengthy

sentence she intended to impose on the appellant and the "inevitability" of an application under the *Serious Sex Offenders Act*.

[33] At the same time, the sentencing judge acknowledged that the individual crimes committed by the appellant did not possess the attributes which often accompany the most serious examples of sexual offending of this kind. Against that background, the sentencing judge gave no express consideration to the principle of totality and limited attention to the extent to which the four individual sentences of imprisonment that she imposed on the offender were appropriately to be served in terms of concurrency or cumulation. The extent of the sentencing judge's consideration of the question of cumulation was the determination to order "very limited concurrency due to the different victims and the failure to stop offending after intervention".

[34] In *Carroll v The Queen* this Court made the following broad statement of principle in relation to cumulation and concurrency in sentencing (footnotes omitted):[7]

> The following principles are well established. First, s 50 of the *Sentencing Act* creates a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders". There is no fetter on the discretion exercised by the Court and the prima facie rule can be displaced by a positive decision. Secondly, it is both impractical and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively. The assessment is always a matter of fact and degree. Reasonable minds might differ as to the need for cumulation. Often there will be no clearly correct answer. Thirdly, an offender should not be sentenced simply and indiscriminately for each

7 *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106 at [42] and [44].

> crime he is convicted of but for what can be characterised as his criminal conduct. The sentences for the individual offences and the total sentence imposed must be proportionate to the criminality in each case.
>
> ….
>
> However, the overriding concern is that the sentences for the individual offences and the total sentence imposed be proportionate to the criminality of each case. Concurrency may be appropriate because the crimes which gave rise to the offender's convictions are so closely related and interdependent. What is necessarily required in every case is a sound discretionary judgment as to whether there should be cumulation or concurrency.

[35] Counsel for the respondent made a number of submissions concerning the considerations which operate in the assessment of nexus, interdependency and sentence for these purposes. Those submissions should be accepted. The relevant provisions and principles include:-

- The imposition of an aggregate sentence was not permissible in the circumstances of this case.[8]

- The cumulation of a term of imprisonment imposed for one offence on a term of imprisonment imposed for another offence is discretionary and may be ordered in whole or in part.[9]

- Where the offences are part of a single episode of criminality with common factors it is more likely that the sentence imposed for one of the offences will reflect the criminality of both, particularly where the

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8 Section 52(2) of the *Sentencing Act* precludes the imposition of an aggregate sentence where one of the offences is rape.

9 *Sentencing Act*, s 51.

circumstances in which each offence was committed were "highly interdependent".[10]

- That the offences form part of what might be described as a single episode does not of itself necessitate or warrant concurrency. The operative question is whether the sentence imposed for one offence encompasses in whole or in part the criminality of the other offence or offences.[11]

- There will be circumstances where two or more offences take place in a single episode in which are discernible two or more courses of criminal conduct constituting "separate invasions of the community's right to peace and order" (such as a home invasion involving both robbery and rape).[12]

- Temporal proximity is not conclusive,[13] particularly in offences of violence (including sexual violence) involving separate attacks and/or separate victims.[14] A failure to identify and evaluate the nature and seriousness of each offence and to cumulate the individual sentences appropriately will, amongst other potential errors, amount to a failure

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10 *Cahyadi v R* [2007] NSWCCA 1; 168 A Crim R 41 at [27]; *Nguyen v R* [2007] NSWCCA 14 at [12]; *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106 at [40].

11 *Nguyen v R* [2007] NSWCCA 14 at [12].

12 *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 at 92-93; *Johnson v The Queen* [2004] HCA 15; 205 ALR 346 at [4].

13 *R v Scanlon* (1987) 89 FLR 77 at 85; *Lade v Mamarika* (1986) 83 FLR 312 at 315-316.

14 *R v XX* (2009) 195 A Crim R 38 at [52]; *R v Dunn* (2004) 144 A Crim R1 80 at [50]; *R v Wilson* [2005] NSWCCA 219 at [38]; *R v KM* [2004] NSWCCA 65.

to accord appropriate weight to relevant factors such as the physical, psychological and/or emotional harm done to each victim.

[36] Counsel for the appellant identified a number of factual and circumstantial matters relevant to the question of sentence generally and cumulation specifically.

[37] First, the appellant was psychologically damaged and, at the relevant time, disinhibited by a combination of petrol fumes and alcohol. As such, his case did not present as a particularly appropriate vehicle for general deterrence and his moral culpability was lower than would be the case for an offender who did not suffer from the same psychological overlay. Those matters may be accepted.

[38] Secondly, although the offences were repugnant in nature and brazen in execution, they were not attended by the features often seen in sexual offending in the higher categories of objective seriousness. In particular, counts 1 and 2 involved adults and were fleeting in nature; and count 4, although it constituted the very serious offence of rape, was of an unusual character and a relatively low level of criminality, involving as it did a digital rape of short duration through clothing. Again, those matters may be accepted and were acknowledged by the sentencing judge.

[39] Thirdly, counsel for the appellant submitted that the individual sentences imposed in relation to counts 1, 2 and 3 were at the higher end of the range for each of those offences when considered individually and in their

objective aspects. That submission may also be accepted. While the appellant did not prosecute any appeal in relation to individual sentences imposed, he contended that the manner in which those sentences were cumulated yielded a result which was manifestly excessive. By way of illustration, counsel for the appellant pointed to the fact that a total effective period of imprisonment of eight years was imposed in respect of count 1, 2 and 3. This was said to be obviously excessive and disproportionate having regard to the character and totality of the criminality involved, which error was compounded by the cumulation of a further six years in respect of count 4.

[40] It was not suggested by counsel for the appellant that the sentence for any one or other of those offences entirely comprehended the criminality of all the other offences. Nor did counsel for the appellant press for full concurrency between all the sentences. Rather, the submission was that the principle of totality could be satisfied by ordering a shorter period or periods of cumulation which would still appropriately accommodate and reflect the different criminality referable to each episode and victim. That submission should also be generally accepted, although not insofar as it asserts that it was in error to order any cumulation of the sentences imposed in respect of counts 1, 2 and 3. It is correct to say that those offences involved common features, but they also involved separate invasions of the persons of the victims and of the community's right to peace and order.

[41] While the crimes committed by the offender involved different victims of varying ages and gender, and different elements and maximum penalties (particularly as between counts 1 and 4), the crimes were closely related in location, time and circumstance. The appellant engaged in a course of conduct over a relatively short period of time involving a number of offences which might be generally described as involving the same type of impulsive, opportunistic and unsophisticated sexual offending. The commission of a series of offences in short order and all with that character is consistent with the appellant's psychological profile, and lends support to the characterisation that although the offending is not properly described as a single course of conduct it did have a single cause. His mental state and intoxication at the time of the offending have already been described above, and bears on the significance of the fact that he did not take the opportunity to desist between the commission of the separate offences. These features of the offending and the totality of the criminality which they encompassed required a greater level of concurrency than was allowed by the sentencing judge.

[42] It is well accepted that the severity of a term of imprisonment is exponential not linear.[15] The principle of totality requires a sentencing judge to give consideration to the proposed sentence and consider whether it is justly proportionate to the whole of the offender's conduct; and precludes the

15 *Azzopardi v The Queen* [2011] VSCA 45; 35 VR 43 at [62].

cumulation of sentences beyond what is proportionate to the whole of the offender's conduct. The overriding principle is that the total sentence must not exceed the total criminality.[16] Having regard to those considerations, both the total sentence of imprisonment imposed and the non-parole period fixed in this case were manifestly excessive, even allowing a permissible component designed to protect society from the risk of recidivism. The appeal was allowed on that basis.

Disposition

[43] The appeal is allowed, and the original sentence is set aside and the following orders made in lieu:

1. The offender is sentenced to imprisonment for two years for count 1.

2. The offender is sentenced to imprisonment for three years for count 2, two years of which is to be served cumulatively on the sentence imposed for count 1.

3. The offender is sentenced to imprisonment for four years for count 3, two years of which is to be served cumulatively on the sentence imposed for count 2.

16 *Mill v The Queen* (1988) 166 CLR 59 at 63.

4. The offender is sentenced to imprisonment for seven years for count 4, four years of which is to be served cumulatively on the sentence imposed for count 3.

5. A non-parole period of seven years is fixed.

6. Both the total sentence and the non-parole period are to commence on 15 July 2015.

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