The Queen v GJ [2005] NTCCA 20

PARTIES:	THE QUEEN
	v
	GJ
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No CA 19 of 2005
DELIVERED:	22 December 2005
HEARING DATES:	3 November 2005
JUDGMENT OF:	MILDREN, RILEY & SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW- Crown appeal against sentence – whether sentencing judge erred – whether sentence manifestly inadequate – whether appeal court should interfere

CRIMINAL APPEAL – HREOC seeks leave to intervene – whether court has power to allow intervention in criminal cases – whether intervention assists court of criminal appeal – whether counsel for HREOC able to appear as amicus curiae

Canadian Criminal Code s 181
Crimes Act 1900 (NSW) s 437
Criminal Code Act (NT) s 1, s 127(1)(a), s 139A , s 192 s 192(3), s 298, s 302, s 331, s 407(1), s 410, s 414, s 414(1)(c), Division 2 of Part 10
Director of Public Prosecutions Act (NT) s 12(1), s 14, s 14(b)
Human Rights and Equal Opportunity Act 1986 (Cth) s 3, s 11(1) of Part II Division 2, s 11(1)(o), s 11(1)(g), s 11(1)(h), s 46A, Part IIA of the HREOC Act,
Sentencing Act (NT) Part 5 s 43, s 91
Sex Discrimination Act 1984 (Cth) s 48(1) and s 48(1)(d)

Commentaries on the Laws of England, Vol 1, Book 1, p 269, Claitor's Publishing Division, 1915 ed, republished 1976
Convention on the Elimination of All Forms of Discrimination against Women
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Crime, D. Ross QC, Law Book Company, 2004
International Convention on the Elimination of Forms of Racial Discrimination
International Covenant on Civil and Political Rights

House v The King (1936) 55 CLR 499, applied
Levy v The State of Victoria and Ors (1997) 189 CLR 579, applied
Markarian v The Queen (2005) 215 ALR 213, applied
R v Osenkowski (1982) 30 SASR 212, applied

R v Wurramara (1999) 105 A Crim R 512, followed

Grzybowicz v Smiljanic [1980] 1 NSWLR 627, referred to
Hales v Jamalmira (2003) 13 NTLR 14, referred to
Kenny (unreported, Supreme Court of Victoria, 2 October 1978) referred to
R v Allpass (1993) 72 A Crim R 561, referred to
R v C [1982] 2 NSWLR 674, referred to
R v Clarke (1996) 2 VR 520, referred to
R v Day (2004) 14 NTLR 218, referred to
R v Morton (2001) 11 NTLR 97, referred to
R v Murphy (1986) 5 NSWLR 18, referred to
R v Raggett & Others (1990) 101 FLR 323, referred to
R v Shrestha (1991) 100 ALR 757, referred to
R v Zundel [1992] 2 SCR 731, referred to
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Rushby and Another v Roberts and Another [1983] 1 NSWLR 350, referred to
The Queen v De Simoni (1980-1981) 147 CLR 383, referred to
United States Tobacco Company v Minister for Consumer Affairs (1988) 20 FCR 520, referred to
Victorian Council for Civil Liberties Inc and Another v Minister for Immigration and Multicultural Affairs and Another (2001) 110 FCR 452, referred to

REPRESENTATION:

Counsel:

Appellant:	T. Pauling QC with S. Brownhill
Respondent:	A. Haesler SC with P. Dwyer
Human Rights and Equal Opportunity Commission:	C. McDonald QC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Legal Aid Service
Human Rights and Equal Opportunity Commission:	Ward Keller

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

The Queen v GJ [2005] NTCCA 20
No. CA 19 of 2005 (20418849)

BETWEEN:

THE QUEEN
Appellant

AND:

GJ
Respondent

CORAM: MILDREN, RILEY & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 22 December 2005)

Mildren J:

Introduction

[1] This is an appeal against sentence brought as of right by the Director of Public Prosecutions pursuant to s 414(1)(c) of the Criminal Code.

[2] The respondent was charged with one count of unlawful assault involving the circumstances of aggravation that the respondent was a male and that the person assaulted was a female under the age of 16 and that the person assaulted was threatened with an offensive weapon, namely a boomerang, for which the maximum penalty was imprisonment for five years; and also with a further charge that the respondent had sexual intercourse with SS, a

child under the age of 16 years, contrary to s 127(1)(a) of the Criminal Code, for which the maximum penalty was 16 years imprisonment.

[3] Upon the respondent's pleas of guilty, the learned sentencing judge imposed a sentence of five months imprisonment on Count 1 and 19 months imprisonment on Count 2 to be served cumulatively upon the sentence of five months imposed on Count 1, making a total period to be served of 24 months, but ordered that those sentences be suspended after the respondent had served one month upon the respondent entering upon his own recognisance of $250 to be of good behaviour for a period of two years. It was a further condition of the suspension of the sentences, that for the period of two years, the respondent not communicate, directly or indirectly, with the child, SS.

The grounds of appeal

[4] The grounds of appeal are that, in all the circumstances of the case, the sentence imposed in respect of Count 2 was manifestly inadequate. Although the Notice of Appeal appeals against the whole of the sentences imposed, at the hearing of the appeal counsel for the appellant made it clear that there was no difficulty with the head sentence imposed in relation to count 1. The appellant complains against both the inadequacy of the head sentence imposed in respect of count 2 as well as the order for suspension which it is submitted has resulted in a manifestly inadequate sentence.

[5] By the way of further development of the principal ground that the sentence imposed was manifestly inadequate, the appellant complains in the Notice of Appeal that the learned sentencing judge either gave excessive weight to certain factors going to the respondent's culpability and/or failed to give sufficient weight to factors which would have warranted a heavier sentence. It was not alleged that the learned sentencing judge had made any specific sentencing error capable of being identified by reference to his Honour's remarks on sentence.

Principles applicable to Crown appeals

[6] It is well established that even where no specific error is able to be pointed to, a Court of Criminal Appeal may reach the conclusion that the sentencing judge erred having regard to the manifest inadequacy of the sentence imposed in all of the circumstances. In *House v The King* (1936) 55 CLR 499 at 505, Dixon, Evatt and McTiernan JJ said:

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[7] It must be emphasised that this is an appeal from a discretionary judgment and that this Court will not interfere merely because it believes that the sentence is less than what the individual judges constituting this Court would have themselves imposed had they been sitting at first instance. If specific error cannot be demonstrated the sentence must not only be inadequate, it must be manifestly so. None of these principles are in doubt, but it is worth reiterating the limits upon the proper role and function of Crown appeals. In *R v Osenkowski* (1982) 30 SASR 212 at 212-213, King CJ said:

> "It is important that prosecution appeals should be not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform. The proper role for prosecution appeals, in my view, is (1) to enable the courts to establish and maintain adequate standards of punishment for crime, (2) to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and (3) occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."

[8] These principles have been accepted by this Court on numerous occasions: see *R v Raggett & Others* (1990) 101 FLR 323 at 325-331 per Kearney J; at 336 per Martin J; *R v Day* (2004) 14 NTLR 218 at [54] and the authorities cited therein.

The facts

[9] The respondent was at the time of sentencing a 55-year-old traditional Aboriginal man. He was born in about January 1950 at the old Timber Creek Police Station. He was brought up in the traditional way and grew up at Yarralin, a remote Aboriginal community located 382 km southwest of Katherine and some 16km west of the Victoria River Downs Cattle Station on the banks of the Wickham River. The respondent grew up in Yarralin. He had no schooling. English is his fourth language. When he was only 10 years of age he commenced work as a stockman and he continued in that employment until five or six years ago. He had a strong ceremonial life across a number of communities and is regarded by the Yarralin community as an important person in the ceremonial life of the community. He is responsible for teaching young men traditional ways. He is married. His wife, J, was present in a supportive capacity at the hearing before the learned sentencing judge. The respondent has a good relationship with his wife. The respondent does not now reside at Yarralin. He resides on his father's country at Fitzroy Station, just off the Victoria Highway, some 200km west of Katherine. On that station, there are four houses which rely for electricity upon a generator. The respondent lives there with his wife, sister, brother-in-law and his eldest brother as well as with six young children. His current employment, which is limited to CDEP work on the station, involves maintenance work for which he receives $400 a fortnight.

[10] The child, SS, was born in mid 1990. When she was about four years of age, the child's family promised her as a wife to the respondent in accordance with traditional Aboriginal law. As the child grew older, she went to college in Darwin. In June 2004 during the school holidays, when the child was in Year 9, she formed a friendship with a young male. She had returned during the school holidays to reside with her grandmother in the Yarralin community. She did not really know the respondent except as "the old man".

[11] On about Friday 18 June 2004, the child stayed in the home of a mutual friend with whom the boy also stayed. Word spread about this and the respondent believed that a sexual relationship had occurred between the young boy and the child.

[12] On Saturday 19 June 2004, the respondent and the child's grandmother went to the house where the child and boy had stayed. The child was having breakfast. The grandmother took the child outside. The respondent had gone to the house armed with two boomerangs. When the child was brought outside by her grandmother the respondent struck the child with one of the boomerangs with some force over her shoulders and back.

[13] The respondent and the grandmother then took the child back to the grandmother's house. At that house, the respondent again struck the child over the area of her shoulder and arms. The grandmother also struck the child with a big stick. Not surprisingly, the child was upset and crying.

[14] The child, the grandmother and the respondent decided that the respondent would take the child to an out-station. The grandmother told the child that she had to go with the respondent. The child did not want to go with the respondent and said so to him. She asked her grandmother if she could stay, but rather than assisting the child, the grandmother packed the child's personal belongings including her school bag and insisted that the child go with the respondent. She was forced into the respondent's car where she sat with the respondent's wife and two other persons crying and shaking.

[15] The respondent then drove to the out-station and stopped at the respondent's house there. The child was taken into the house with the respondent and his wife and two small children.

[16] During the evening the respondent took the child by the leg and dragged her into a bedroom. The wife took the other children and went to another room. The child kicked and screamed and resisted. The respondent lay her on a bed in the room and asked for sexual intercourse. The child told the respondent that she was only 14 years old. The respondent hit her on the back. He then lay next to the child and remained there throughout the night. No act of sexual intercourse occurred.

[17] The child spent the next day in the company of the respondent's wife. That night the respondent told her to go into the bedroom. She obeyed and the respondent followed her into the bedroom where he removed all of her clothes except her t-shirt. He then pushed the child onto the mattress. Whilst

she was lying on her stomach, the respondent had a boomerang in his hand and threatened her with it. He then had anal intercourse with her. During the intercourse the child was frightened and crying. She was in pain. The intercourse caused a deep laceration at the edge of her anus. Later examination by a doctor also revealed painful areas over the child's body.

[18] Whilst in the room that night the child kicked the respondent in the groin area. The respondent told her that she was not going to be allowed to go back to her grandmother or to school. The respondent turned off the light and went to sleep with his arm around her.

[19] The child later told the police that she was "at that old man's place for four days" and that she was crying "from Saturday to Tuesday". She knew that she was promised to the respondent in the Aboriginal traditional way but she did not like the respondent. In the words of the child: "I told that old man I'm too young for sex, but he didn't listen."

[20] On the Tuesday the respondent took the child back to Yarralin and dropped her off in the community. Her belongings remained at the respondent's house. The child's grandmother described the child as "quiet and sad" when she returned. She sought assistance from another person to make contact with the police.

[21] The Crown accepted that the respondent believed that intercourse with the child was acceptable because she had been promised to the respondent and had turned 14. The learned sentencing judge was satisfied that the

respondent believed that having sexual intercourse with the child was acceptable because she had been promised to him and she had turned 14. The Crown also accepted that based on his understanding and upbringing in traditional law, the respondent believed that the child was consenting to sexual intercourse, notwithstanding her objections.

[22] It is important to bear in mind that the respondent was not charged with an offence against s 192(3) of the Criminal Code, i.e. sexual intercourse with another person without the consent of that person, viz in this case anal rape. It was not an element of the offence which the Crown had to prove, in order to secure a conviction for the offence of carnal knowledge, that the child did not consent. Indeed s 139A of the Criminal Code provides that it is not a defence to a charge of a crime defined by subdivision 2 of part 5 of the Code (which includes s 127 - the carnal knowledge provision) for the accused to prove that the person in respect of whom the crime was committed consented to the act constituting the crime. Nor, in view of the fact that the Crown had not charged the accused with the offence of sexual intercourse without consent, could the sentencing court take lack of consent into account even if the facts before it proved not only that the victim did not consent but that the respondent either knew that the victim did not consent or foresaw the possibility that the victim may not have been consenting but proceeded regardless. Had the respondent been charged with an offence against s 192 of the Criminal Code he faced a maximum possible sentence of imprisonment for life. It is well established that in sentencing a person, a

court is not entitled to take into account aggravating circumstances which could have been made the subject of a charge or a formal circumstance of aggravation but which have not been expressly so made in the indictment: see *The Queen v De Simoni* (1980-1981) 147 CLR 383.

[23] The learned sentencing judge also accepted that according to traditional law the striking of the child was justified as a means of punishing the child for having a sexual relationship with the young boy when the child was already promised to the respondent. However, as the learned sentencing judge found, there was nothing in the respondent's traditional law which required him either to strike the child or to have sexual intercourse with her in the circumstances. The learned sentencing judge was unable to find that the respondent was trying to punish the child, but he was satisfied that the respondent was asserting his rights as he believed them to be and that he was doing so forcefully in order to give the child a message that she had to do what the respondent told her to do. On the other hand the learned sentencing judge accepted that this was not a case where the respondent had sought out the child for sexual gratification and his Honour accepted that the respondent's beliefs meant that the respondent's moral culpability was less than those who know that this type of thing is wrong. His Honour observed:

> "Recognising these beliefs and their effect upon your culpability is not to condone what you did, but simply to recognise as a factor relevant to sentence the effects of your culture and your state of mind at the time."

[24] His Honour also found that the respondent did not know that he was committing an offence against Northern Territory law. On the other hand, as his Honour pointed out, this was not an act on the spur of the moment. It was, at least to some extent, premeditated. His Honour was satisfied that the respondent took the boomerang into the bedroom for the purposes of intimidating the child.

[25] So far as the effects of the offences on the child were concerned, his Honour observed that the child was upset and distressed and that he had no doubt that the offences had a significant effect upon her. Although the child had provided only a very brief victim impact statement in which she did not speak of any emotional or psychological impact upon her, his Honour found that this was not surprising because she had been shamed within a community that obviously had very strong male members and strong traditional beliefs. It was not surprising therefore that the child would not be prepared to publicly state how she was feeling.

[26] His Honour accepted that the respondent had indicated that he would obey the law in the future and will not in the future seek that the child be his wife. He took into account the respondent's plea of guilty and indicated that he had reduced the sentences which he would otherwise have imposed by approximately 20 percent. Although the pleas meant that the child did not have to give evidence (she was not required to give evidence at the committal hearing) there was no evidence of any contrition.

[27] On the other hand, as his Honour recognised, he has a duty to protect vulnerable members of the community, particularly women and children in Aboriginal communities, as best as he could through the imposition of appropriate penalties which would act as a deterrent to other men who are minded to commit acts of violence including sexual violence against women and children. His Honour recognised also that the penalties which he must fix should reflect and recognise the seriousness of the offending and reflect and recognise that the respondent's behaviour was regarded as very serious criminal offending in the eyes of the wider community. His Honour emphasised that where there are differences between Aboriginal law and the law of the Northern Territory, the law of the Northern Territory must prevail.

Was the sentence imposed manifestly inadequate?

[28] As noted previously, the principal submission of the Crown is that the head sentence imposed was manifestly inadequate and that the decision to suspend all but one month of the sentence was similarly so. Notwithstanding the famous dictum of Young CJ in *Kenny* (unreported, Supreme Court of Victoria, 2 October 1978) that "such a submission is not one which is capable of a great deal of elaboration", Mr Pauling QC referred (inter alia) to the following:

1. The objective facts were very serious.

2. The respondent could rely on customary law only for the limited purpose of reducing his moral culpability.

3. Although there were other mitigating circumstances present, there was no contrition.

4. The sentences imposed did not give adequate effect to general deterrence and retribution.

5. The sentences imposed gave no weight to recent legislative amendments which increased the maximum penalty available from 7 years to 16 years imprisonment.

[29] There can be no doubt that the objective circumstances were serious. The learned sentencing judge described the offending in respect of count 2 as "a very serious offence". I agree with his Honour's description. The victim, SS, had done all she could have done to impress upon the respondent that she was not consenting to intercourse with him. The intercourse was painful and humiliating and caused her considerable distress. Whilst it must be accepted that the respondent did not intend to have intercourse with SS without her consent, the reason for that lack of intent was to be found in his belief that intercourse was consented to, based on his understanding of traditional law and ignorance of Territory law. Nevertheless, the respondent ought to have realised that he was mistaken and that she was not in fact consenting.

[30] The learned sentencing judge observed in his sentencing remarks that the respondent's traditional beliefs reduced the respondent's moral culpability. It is not in contention that where Aboriginal customary law conflicts with Territory law the latter must prevail. Similarly, there is no doubt that an Aboriginal person who commits a crime because he is acting in accordance with traditional Aboriginal law is less morally culpable because of that fact: see *Hales v Jamalmira* (2003) 13 NTLR 14. But the question must be asked, less morally culpable than what? Mr Pauling QC submitted that the respondent had already received the benefit of his traditional beliefs because he had not been charged with sexual intercourse without consent contrary to s 192(3) of the Code. Was it right to give him much further leniency? The answer to that question in this case depends on the view which the learned sentencing judge took that the respondent believed that he was entitled to act as he had done because the child had turned 14. There was evidence before the learned sentencing judge which enabled him to take this into account and it is not contended that he was wrong to do so. What is contended is that in this case the respondent, although he was entitled to act as he had done according to traditional law, was not obliged to do so, and was not under any pressure to do so. There is a positive finding by his Honour as to the lack of obligation and no finding that he was under any pressure. In those circumstances, I consider that less weight should be afforded to this factor.

[31] In *Hales v Jamalmira* (supra), this Court considered a similar case where an Aboriginal person was convicted of the offence of carnal knowledge in circumstances where the victim was the promised wife of the defendant. In that case, there was evidence that the offender knew that what he was doing was against Northern Territory law, but there was also a finding that he was under pressure as well as some level of obligation under his culture to act as he did. The members of the Court accepted that these were mitigating factors, although the weight to be attributed to them was not such as to warrant significant leniency. As was pointed out by Riley J at [88]:

> "Whilst proper recognition of claims to mitigation of sentence must be accorded, and such claims will include relevant aspects of customary law, the Court must be influenced by the need to protect women and children, from behaviour which the wider community regards as inappropriate."

[32] Since *Hales v Jamalmira* was decided, the offence of carnal knowledge has been redefined by the legislature. At that time it was an element of the offence, which the Crown had to prove, that the intercourse was "unlawful", i.e. that the parties to the act were not "husband and wife", which meant that they were not persons living in a husband and wife relationship according to Aboriginal tribal custom: see *Hales v Jamalmira* (supra) at [50]. As a result of amendments to the Code passed in 2004, it is no longer necessary for the prosecution to prove that the intercourse was "unlawful" in this sense. Further, the maximum penalty has been increased from 7 years imprisonment to 16 years imprisonment.

[33] Clearly, these changes to the law by the legislature must be seen as a response to the outcome in *Hales v Jamalmira*. Of particular importance is the increase in the maximum penalty available: see *Markarian v The Queen* (2005) 215 ALR 213 at [30] per Gleeson CJ, Gummow, Hayne and Callinan JJ. As their Honours said at [31]:

> "It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick."

[34] There were some mitigating factors other than the matter involving customary law. The respondent was in effect a first offender. He had pleaded guilty and thereby saved the child from having to give evidence. The respondent is a respected leader in his community who is responsible for teaching young men traditional ways. He is not a sexual predator. He was ignorant of Territory law. He is of positive good character and, as the learned sentencing judge found, unlikely to re-offend. To that extent, personal deterrence was of less significance.

[35] On the other hand, the offending was objectively very serious. The respondent, because he believed he was justified in doing what he did, was not remorseful. There was a significant age difference between SS and the respondent. There was no evidence in this case, as there was in *Hales v Jamalmira* (supra) that the age difference was not a material sentencing matter. Obviously the younger the victim, the more serious the offending is

likely to be and in this case, the victim was, on the evidence, about 14 years of age.

[36] One purpose of s 127(1)(a) of the Code is to protect young persons from entering into sexual relations before they are mature enough to do so and to have weighed up the possible consequences. Another is to deter older persons, especially men, from taking advantage of the immaturity of the young in order to satisfy their lust or in order to exercise control over their victims. In the context of a case such as this, where a promised marriage is involved, whilst the law has stopped short of making such marriages illegal, such marriages cannot be consummated until the promised wife has turned 16. Plainly the purpose of s 127(1)(a) in that context is to give Aboriginal girls some freedom of choice as to whether or not they want to enter into such a marriage and to thereby empower them to pursue equally with young Aboriginal men employment opportunities or further education rather than be pushed into pregnancy and traditional domesticity prematurely.

[37] In all the circumstances, I consider that a head sentence of 19 months is manifestly inadequate, as was the decision to suspend all but one month of the sentences. In *R v Wurramara* (1999) 105 A Crim R 512 this Court said at [26]:

> "The courts have been concerned to send what has been described as "the correct message" to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so."

[38] The sentences imposed failed to punish the respondent adequately for the crimes he committed and failed to act as a deterrent to others who might feel inclined to follow their traditional laws.

[39] Although there is a residual discretion in the case of a Crown appeal not to interfere with a sentence imposed even though the sentence imposed is inadequate, that discretion must be exercised judicially. The kind of circumstances recognised by the authorities which might justify the exercise of this discretion was discussed in *R v Morton* (2001) 11 NTLR 97 at [11]-[12], *viz*, a failure by the prosecutor to assist the sentencing judge or a failure by the Crown to lodge a prompt appeal. Neither of those circumstances is present here and no other reason for exercising the discretion was suggested. In my opinion, the circumstances of this case called for a head sentence of approximately 5 years imprisonment, of which a considerable proportion should have been served before the respondent became eligible for release. However, as is well recognised, the principle of "double jeopardy" usually results in a lesser sentence being imposed where the Court of Criminal Appeal decides to intervene on a successful Crown appeal. In this case, bearing in mind all of the circumstances and the application of that principle, I consider that the Court should now impose a head sentence of 3 years 6 months, cumulative upon the sentence of 5 months for count 1, making a total sentence of 3 years, 11 months.

[40] In view of the findings concerning the respondent's prospects of rehabilitation and the reduced need for special deterrence, this is a case

where this Court is able to assess when it is appropriate that the respondent be released rather than leaving that question to the Parole Board: *c.f. R v Shrestha* (1991) 100 ALR 757 at 771. I consider that, having regard to all of the circumstances, the respondent should serve 18 months imprisonment before he is released. I would order that the balance of the sentences be suspended after having served 18 months, upon the condition that the respondent is not to communicate directly or indirectly with SS. I would fix a period of 2 years 5 months, commencing from the date of his release from prison and after having served the balance of the period of 18 months still to be served, as the period during which the respondent is not to commit another offence if he is to avoid the consequences of s 43 of the Sentencing Act and order that the sentence imposed in respect of count 1 be backdated to commence from one month prior to the date he is again taken into custody to serve the balance of the 18 months still to be served in order to take into account time already served.

[41] Accordingly, I would allow the appeal, set aside the sentencing orders imposed by the learned sentencing judge and impose the sentencing orders referred to above.

Application by the Human Rights and Equal Opportunity Commission for leave to intervene or to appear as amicus curiae

[42] The Human Rights and Equal Opportunity Commission (the Commission), which is established pursuant to the Human Rights and Equal Opportunity Act 1986 (Cth) (the HREOC Act), sought leave to intervene or to appear as

amicus curiae during the hearing of this appeal. After hearing submissions, the Court refused the Commission's application. We said we would provide our reasons at a later time. These are my reasons.

[43] The functions of the Commission as set out in s 11(1) of Part II Division 2 of the HREOC Act include its intervention in proceedings that involve human rights issues where the Commission considers it appropriate to do so, with the leave of the Court hearing the proceedings and subject to any conditions imposed by the Court: see s 11(1)(o). The Commission has a number of other functions which are set out in s 11(1) which might generically be described as functions designed to promote compliance by Australia with the provisions of the International Covenant on Civil and Political Rights and of the Declarations of any relevant international instrument as defined in s 3 of the HEROC Act, including the Convention on the Rights of the Child.

[44] Functions are also conferred on the Commission by s 48(1) of the Sex Discrimination Act 1984 (Cth) (the SDA) including the function to promote understanding and acceptance of and compliance with the SDA (s 48(1)(d)). The objects of the SDA include giving effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to promote recognition and acceptance within the community of the principle of equality between men and women (see s 3).

[45] Amongst the many functions of the Commission, Part IIA of the HREOC Act also establishes the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) and sets out the functions of the Commission to be performed by the ATSISJC on behalf of the Commission. This includes the provision to the Minister each year of a report on the enjoyment and exercise of human rights by Aboriginals persons and Torres Strait Islanders and the promotion of discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders. For the purposes of Part IIA of the HREOC Act, 'human rights' is defined in s 46A to mean, amongst other things, the rights and freedoms recognised by the International Convention on the Elimination of Forms of Racial Discrimination, the rights and freedoms recognised by the International Covenant on Civil and Political Rights and the rights and freedoms recognised by any relevant international instrument, which includes the Convention on the Rights of the Child.

[46] According to the affidavit of the President of the Commission, the Commission has been active in a wide range of activities relating to the recognition of Aboriginal customary law in Australia and the human rights of women and children. These are set out in some detail in his affidavit and it is not necessary to dilate upon them further. They are not in contention.

[47] The Commission resolved to seek the leave of the Court to intervene because it believed that the resolution of the issues raised by the appeal in this case would be assisted by a consideration of international human rights

law, principles and jurisprudence and that the Court, so it was submitted, may have regard to this source of jurisprudence as an aid to statutory interpretation and as a legitimate influence on the development of the common law.

[48] The HREOC Act does not confer a power on this Court to allow the Commission to intervene. What s 11(1)(o) of the HREOC Act does is to confer a power on the Commission to seek the leave of the Court to intervene. If there is jurisdiction or power in this Court enabling it to grant leave to intervene, it must be found elsewhere.

[49] This Court is established by s 407(1) of the Criminal Code which provides as follows:

> "The Supreme Court shall be the Court of Criminal Appeal and the Court shall be duly constituted if it consists of not less than 3 judges and of an uneven number of judges."

[50] The jurisdiction and powers of the Court are to be found in Division 2 of Part 10 of the Criminal Code. In essence, the Court has jurisdiction to entertain an appeal by a convicted person against any finding of guilt or by leave against any sentence passed on a finding of guilt and the Court may entertain an appeal or a reference by a Crown law officer under s 414. There are no provisions in the Criminal Code enabling a person not a party to the proceedings to intervene.

[51] It was submitted that the Court has inherent jurisdiction derived from the fact that the Court is constituted by the Supreme Court under s 407(1). There is no authority binding on this Court in support of the proposition that either this Court or the Supreme Court has the jurisdiction or power to permit any person to intervene in a criminal proceeding.

[52] We were referred by counsel for the Commission to some authorities which I should mention briefly. First is *R v Zundel* [1992] 2 SCR 731, a decision of the Supreme Court of Canada, in which there were a number of intervenors including the Canadian Civil Liberties Association, the League for Human Rights of B'nai Brith Canada and the Canadian Jewish Congress in a matter involving an appeal to the Supreme Court by a person convicted of an offence against s 181 of the Canadian Criminal Code. That case does not discuss the circumstances under which the intervenors were permitted to intervene and is of no assistance. We were referred also to *Regina v VA* [2001] 1 WLR 789 where the House of Lords gave leave to the Home Secretary to intervene in a rape proceeding where important questions under the Human Rights Act 1998 (UK) needed to be determined, but in that case there was statutory power to allow such intervention. There is no case of which this Court is aware where an Australian Court of Criminal Appeal has ever permitted a person to intervene nor is this Court aware of any case where intervention has been permitted in any criminal trial conducted before a Judge of the Supreme Court of the Northern Territory.

[53] We were referred by Mr McDonald QC to *Rushby and Another v Roberts and Another* [1983] 1 NSWLR 350; *United States Tobacco Company v Minister for Consumer Affairs and Others* (1988) 20 FLR 520;and *Re Bolton and Others; ex parte State of Victoria and Another* (1994) 126 ALR 620. None of these cases discusses the power of a superior court to permit a non-party to intervene in criminal proceedings except in cases of claims for criminal compensation under s 437 of the Crimes Act 1900 (NSW): see *Grzybowicz v Smiljanic* [1980] 1 NSWLR 627 and *R v C* [1982] 2 NSWLR 674. However, in the Northern Territory, an order for restitution or compensation under Part 5 of the Sentencing Act can only be made on the application of the prosecutor or on the Court's own motion; see s 91 of the Sentencing Act.

[54] There are significant reasons why this Court, in the absence of statutory authority, has no jurisdiction or power to permit an intervention in criminal proceedings. It is well established that if the Court grants leave to a non-party to intervene, the non-party then becomes a party to the proceedings with all of the benefits and burdens of that status: see *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534; *Victorian Council for Civil Liberties Inc and Another v Minister for Immigration and Multicultural Affairs and Another* (2001) 110 FCR 452 at 456. But there are no issues joined nor could there be any issues joined between the intervenor, the Crown and the accused. When an accused is put on his trial in accordance with the time-honoured formula repeated in every

criminal trial in the presence of a jury the issues are joined between the Sovereign and the accused. It is the Sovereign which represents all of the interests of the community including the individual interests of the victims of crime and no one else. As was said in Sir William Blackstone's *Commentaries on the Laws of England*, Vol 1, Book 1 p 269, Claitor's Publishing Division, 1915 ed, republished 1976:

> "All offences (sic) are either in the king's peace or his crown and dignity: and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason and a very few others) to be offences against the kingdom than the king; yet, as the public, which is an indivisible body, has delegated all its power and rights, with regard the execution the laws, to one visible magistrate, all affronts to that power and breaches of those rights are immediately offences against him to who they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eyes of the law."

[55] In *Levy v The State of Victoria and Others* (1997) 189 CLR 579 at 601, Brennan CJ, speaking of the jurisdiction of the High Court of Australia to allow non-party intervention, said:

> "None of the constitutional or statutory provisions which confers jurisdiction on this Court contains an express grant of jurisdiction to allow non-party intervention save s78A of the Judiciary Act 1903 (Cth). If there be jurisdiction apart from s78A to allow non-party intervention, it must be an incident of the jurisdiction to hear and determine the matters prescribed by the several constitutional and statutory provisions which confer this Court's jurisdiction. It is of the nature of that jurisdiction that it should be exercised in accordance with the rules of natural justice. Accordingly, its exercise should not affect the legal interests of persons who have not had an opportunity to be heard. Therefore, a non-party whose interests would be affected directly by a decision in the proceeding - that is, one who would be bound by the decision albeit not a party - must be entitled to intervene to protect the interest liable to be affected. This, indeed, is

> the explanation of many of the cases in which intervention has been allowed in probate and admiralty cases and in other cases where an intervener and a party are privies in estate or interest."

[56] Suffice it to say that there are no legal interests of this nature to which HREOC is able to point.

[57] His Honour went on to state that because the High Court of Australia in the exercise of its appellate jurisdiction extends to appeals from all Australian courts, a decision by the High Court may determine in any case the law to be applied by those cases in cases which are not distinguishable. His Honour said at 602:

> "A declaration of a legal principle or rule by this Court will govern proceedings that are pending or threatened in any other Australian court to which an applicant to intervene is or may become a party. Even more indirectly, such a declaration may affect the interests of an applicant either by its extra-curial operation or in future litigation. Ordinarily, such an indirect and contingent affection of legal interests would not support an application for leave to intervene. But where a substantial affection of a person's legal interests is demonstrable (as in the case of a party to pending litigation) or likely, a precondition for the grant of leave to intervene is satisfied. Nothing short of such an affection of legal interests will suffice."

[58] Although this Court is for all practical purposes the final court of appeal in sentencing matters in this Territory (because the High Court only very rarely grants special leave to appeal involving a sentencing matter), this Court does not by a declaration of legal principle govern proceedings that are pending or threatened in any other Australian court. It may be that in a very rare case, a point of law to be determined by this Court could affect an accused in another pending proceeding and in such a case the Court may

have jurisdiction to grant leave to intervene. It is not necessary to decide that point in this case. Suffice it to say that, in my opinion, HREOC does not have a demonstrable substantial affection of its interests such as would enliven a power (if it existed) to enable the Court to grant leave to intervene.

[59] There are indications also in the provisions of the Director of Public Prosecutions Act which suggest that such a jurisdiction or power does not exist in this Court. Pursuant to s 12(1) of that Act, it is a function of the Director to bring and conduct prosecutions on indictment for offences. Under s 14, it is provided that it is a function of the Director to institute and conduct or conduct as respondent any appeal or further appeal relating to a prosecution or to request and conduct a reference under s 414 of the Criminal Code. Further, under s 14(b), it is a function of the Director where a prosecution has been brought by another person and an appeal or further appeal relating to that prosecution has been brought to take over the appeal from that person whether as appellant or respondent.

[60] Section 298 of the Criminal Code provides that where a person charged with a crime has been committed for trial and it is intended to put him on his trial for the crime, the charge is to be reduced to writing in an indictment which is to be signed by a "Crown law officer". The expression "Crown law officer" is defined by s 1 to mean "the Attorney-General or the Director of Public Prosecutions and includes a person authorised under a law of the Territory to exercise a power or perform a function in the name of or on

behalf of a Crown law officer". Since the passage of the Director of Public Prosecutions Act, the Attorney-General has not exercised the power of a Crown law officer. There are other provisions of the Criminal Code which indicate that only a Crown law officer can pursue criminal proceedings in the Supreme Court. Under s 302, for example, a Crown law officer may file a *nolle prosequi* and where that occurs the accused person is to be discharged from any further proceedings upon that indictment. Section 331 requires an accused to give notice of alibi to the Director of Public Prosecutions. Also, under s 410 and s 414 only a person found guilty on indictment or a Crown law officer may appeal to this Court. If this Court had power to grant leave to a non-party to intervene and in fact made such an order, it is difficult to see how this could affect the Director of Public Prosecution's right either to enter a *nolle prosequi* or to abandon an appeal. The same applies to an appeal brought by a convicted person. If the appellant wished to abandon the appeal, he may do so. This suggests that the only proper parties to the appeal are the appellant and respondent to the appeal.

[61] Mr McDonald QC referred to s 419(1) of the Criminal Code which provides as follows:

> (1) The Court may, if it thinks it necessary or expedient in the interests of justice –
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> > (a) order the production of any document, exhibit or other thing connected with the proceedings;

(b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order any such persons to be examined before any person appointed by the Court for the purpose and admit any depositions so taken as evidence;

(c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness;

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, that cannot, in the opinion of the Court, be conveniently conducted before the Court, refer the question for inquiry and report to a commissioner appointed by the Court and act upon the report of such commissioner so far as the Court thinks fit; and

(e) appoint any person with special expert knowledge to act as assessor to the Court in any case in which it appears to the Court that such special knowledge is required for the determination of the case,

and exercise in relation to the proceedings of the Court any other powers that may for the time being be exercised by the Supreme Court on appeals or applications in civil matters and issue any warrant or other process necessary for enforcing the orders or sentences of the Court.

[62] Mr McDonald's submission depends upon the words "and exercise in relation to proceedings of the Court any other powers that may for the time being be exercised by the Supreme Court on appeals or applications in civil matters". His submission assumes that notwithstanding the structure of s 419 which is set out in paragraphs and sub-paragraphs, that the words quoted above stand alone unconnected with any of the heads of power referred to in sub-paragraphs (a) to (e). Accepting without deciding that submission to be

correct and that s 419(1) confers wide powers on this Court where the Court "thinks it necessary or expedient in the interests of justice", it is difficult to see how it is either necessary or expedient in the interests of justice to permit in the circumstances of this case intervention by HREOC; but in any case, s 419(1) confers only powers and not jurisdiction. Yet, as was recognised by Brennan CJ in *Levy v The State of Victoria and Others* (supra) the question is not one of power but of jurisdiction.

[63] On the other hand I accept this Court has power as well as jurisdiction to permit counsel to appear as *amicus curiae*. Indeed that frequently occurs in this Court, particularly in cases where a person who has been found guilty of an offence wishes to appeal and is unrepresented. In those circumstances it is the long standing practice of this Court to allow counsel to appear as *amicus curiae* and to put such arguments in favour of the appeal or the granting of leave to appeal as may have been put properly by the appellant or would be appellant had he been legally represented. I accept also that the power to allow a person to so appear is not so narrowly confined as in the case of an intervenor. In *R v Murphy* (1986) 5 NSWLR 18, Hunt J permitted counsel, who had been instructed to seek leave to appear by the President of the Senate, to appear as *amicus curiae* in criminal proceedings brought against a former Justice of the High Court and a former Judge of the NSW District Court in order to ensure that the trial judge was properly appraised of the law relating to Parliamentary privilege.

[64] In *Levy v The State Victoria and Others* (supra) at 604, Brennan CJ said:

> "The hearing of an amicus curiae is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted. In *Kruger v The Commonwealth*, speaking for the Court, I said in refusing counsel's application to appear for a person as amicus curiae:
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> > "As to his application to be heard as amicus curiae, he fails to show that the parties whose cause he would support are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case. The Court must be cautious in considering applications to be heard by persons who would be amicus curiae lest the efficient operation of the Court be prejudiced. Where the Court has parties before it who are willing and able to provide assistance to the Court it is inappropriate to grant the application."
>
> It is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an amicus who is willing to offer assistance. All that can be said is that an amicus will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that it expected."

[65] The difficulty that faced Mr McDonald QC in this case is that I was not satisfied that this Court would be significantly assisted by submissions by HREOC in arriving at the correct determination of this case. In my opinion, the sentencing principles to be applied in this case are well known and no new sentencing principle is involved. If there is a proper case to take into account in a sentencing matter international conventions to which Australia is a party, this is not that case.

Riley J:

[66] I agree with Mildren J.

Southwood J:

[67] I have read a draft of the judgment prepared by Mildren J. I agree with the conclusions which his Honour has reached. However, there are two matters about which I wish to make some comments.

The application to intervene

[68] The Commission for Human Rights and Equal Opportunities made three main points during its application to intervene. First, that unauthorised, unjustified and inexcusable violence used to enforce a promised marriage is extremely serious criminal conduct because of the effect that such violence has on the mental and physical integrity and dignity of women. Such violence deprives women of the equal enjoyment and exercise of their positive human rights and freedoms. The underlying consequence of such violence maintains women in subordinate roles and contributes to their low level of education, skills and work opportunities and political participation. Secondly, principles of international human rights law and international charters and covenants recognise that women should be able to equally enjoy and exercise their positive human rights and freedoms. Thirdly, Australian law in appropriate circumstances recognises the principles of international law. While each of these propositions are important propositions their voluminous assertion is of no assistance when it comes to the complex and

difficult task of sentencing Aboriginal offenders who have acted in accordance with Aboriginal customary law.

[69] Australian law recognises women's right to freedom from violence and to equal enjoyment of positive human rights such as the right to education and to seek employment. The criminal law of Australia including the Criminal Code in the Northern Territory protects women from unauthorised, unjustified and inexcusable violence. The courts of the Northern Territory have said on numerous occasions that they are, "concerned to send what has been described as the correct message to all concerned, that is, that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so.": *R v Wurramara* (supra). Implicit in such pronouncements of the courts of the Northern Territory is a recognition that such violence has an extremely deleterious effect on the mental and physical integrity and dignity of women. That it may well have the consequence, if women are not protected, of maintaining them in subordinate roles and preventing them from the equal enjoyment and exercise of their positive human rights and freedoms. In this case the Supreme Court sat in a remote Aboriginal community and the respondent was sentenced in his own community to imprisonment so that the people in his community would better understand these important principles.

[70] Unfortunately, the consultation with Aboriginal communities about such principles has too often been perfunctory. The Commission may wish to give consideration to the implementation of educational programs about these

matters in Aboriginal communities pursuant to s 11(1)(g) and s 11(1)(h) of the Human Rights and Equal Opportunity Act (Cth).

[71] It has never been the case that the courts of the Northern Territory have given precedence to Aboriginal customary law when it conflicts with the written law of the Northern Territory. Nonetheless the law of sentencing involves important principles including that a person should not be punished twice for a crime and that the punishment should fit the crime. The assessment of the culpability of the offender is an important element in the application of the latter principle. Subsection 5(2)(c) of the Sentencing Act directs a court to have regard to the extent to which an offender is to blame for an offence when sentencing an offender. The courts of the Northern Territory when sentencing an Aboriginal offender properly take into account whether he or she has received tribal punishment and whether what he or she has done has been in accordance with Aboriginal customary law and in ignorance of the other laws of the Northern Territory. Clearly, a person who commits a crime because he is acting in accordance with Aboriginal customary law may be less morally culpable than someone who has acted in an utterly contumelious way without any justification whatsoever and this may in appropriate circumstances be a ground for leniency when sentencing Aboriginal offenders: *Hales v Jamalmira* (supra). It must not be forgotten that Aboriginal customary law often has an important and beneficial influence in Aboriginal communities.

Overriding discretion

[72] An appellate court has an overriding discretion which may lead it to decline to intervene, even if it comes to the conclusion that error has been shown in the original sentencing process. So important is the element of double jeopardy in Crown appeals that this court may exercise its discretion to dismiss the appeal because of the unfairness or injustice which would otherwise be occasioned to the respondent by reason of his double jeopardy: *R v Day* (2004) (supra); *R v Allpass* (1993) 72 A Crim R 561 at 562 – 563; *R v Clarke* (1996) 2 VR 520 at 522. A useful summary of these principles is also set out in D Ross QC, Crime, Law Book Company 2004 at 77. Although this discretion is ordinarily exercised when either the Crown has been late in instigating an appeal or has changed its conduct in relation to a sentencing matter the discretion is not so confined.

[73] This is not a case where the Crown has acted inappropriately or changed its position. However, but for the objective seriousness of the offending, I would have declined to intervene in this case. Where sentencing and the manner of sentencing has the purpose of educating both the offender and the community care must be taken to ensure that an offender is not seen to be doubly punished and is not made to shoulder an unfair burden of community education: *Walden v Hensler* (1987) 163 CLR 561 at 570. Although there is no injustice in the course proposed by this court there will unfortunately be some confusion in the respondent's community as a result of the consequences of the orders to be made by this court.