The Queen v Inkamala [2006] NTCCA 11

PARTIES:	THE QUEEN
	v
	INKAMALA, Gerhardt Max
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 24 of 2005 (20325198)
DELIVERED:	7 JUNE 2006
HEARING DATES:	4 MAY 2006
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & THOMAS JJ
APPEAL FROM:	NORTHERN TERRITORY SUPREME COURT, 20325198, 10 October 2005

CATCHWORDS:

CRIMINAL LAW - Appeal – Crown appeal against sentence - sentence manifestly inadequate – appeal against partial restoration of sentence for breach of suspended sentence – appeal allowed – resentenced and sentence restored.

Sentencing Act (NT), s 43

Veen v The Queen [No 2] (1988) 164 CLR 465, applied.

REPRESENTATION:

Counsel:

Appellant:	R Coates & N Rogers
Respondent:	V Whitelaw

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	A
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Inkamala [2006] NTCCA 11
No. CA24 of 2005 (20325198)

BETWEEN:

THE QUEEN
Appellant

AND:

GERHARDT MAX INKAMALA
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 7 JUNE 2006)

Martin (BR) CJ:

Introduction

[1] This is a Crown appeal against a sentence of four years imprisonment imposed for the crime of sexual intercourse without consent committed on 21 November 2003. In addition, the Crown appeals against the partial restoration of a sentence previously suspended. Finally the Crown complains that the total period to be served is manifestly inadequate.

[2] On 1 August 2001 the respondent pleaded guilty to the crime of attempted sexual intercourse without consent committed on 18 November 2000. On 7 September 2001 a sentence of three years imprisonment commencing

9 June 2001 was imposed. The learned sentencing Judge ordered that the sentence be suspended after the respondent had served six months. An operational period of three years was fixed.

[3] On 21 November 2003, in breach of the suspension of the 2001 sentence, the respondent committed the crime of unlawful sexual intercourse without consent. He pleaded guilty on 1 April 2005 before the Judge who had sentenced him in 2001. On 10 October 2005 the Judge ordered partial restoration of the suspended sentence by directing that the respondent serve one year of the balance of two years and six months. His Honour then imposed a sentence of four years imprisonment for the crime of unlawful sexual intercourse without consent committed in November 2003 and directed that it be served cumulatively upon the one year already restored. In respect of the total period liable to be served of five years imprisonment a non-parole period of four years was fixed.

Facts

[4] The facts are set out in the joint judgment of Mildren and Thomas JJ. Subject to the following remarks, I agree with the reasons and orders proposed in the joint judgement.

[5] A number of facts require emphasis:

- The victim was a female child aged seven months. She was not merely vulnerable. She was a helpless child who was unable to offer any resistance whatsoever. Furthermore, by reason of her age the victim

would later be unable to make a complaint about the conduct of the respondent or identify him.

- The victim was removed from a bedroom in her home in the early hours of the morning when everyone in the home was asleep.

- The crime was premeditated and committed in the context of an earlier attempt by the respondent during the same evening to remove the victim from the home. That attempt was thwarted by persons who were caring for the victim.

- After the respondent digitally penetrated the victim's vagina, and following discovery of the respondent on the back veranda holding the victim over his shoulder, the respondent was reluctant to return the victim to those caring for her.

- In committing the crime, the respondent used sufficient force to cause significant injuries to the victim's vagina. Those injuries were life threatening through the heavy loss of blood. Surgical repairs were required under general anaesthetic.

- Although the respondent and the victim are cousins, there is no suggestion that the respondent's crime is in any way related to traditional Aboriginal law or culture.

[6] Viewed objectively, the respondent's criminal conduct was extremely serious. There were no mitigating circumstances accompanying the commission of the crime.

[7] It is a significantly aggravating circumstance that earlier on the same evening the respondent had attempted to remove the victim from her home. Plainly that attempt was made with the intention of perpetrating a sexual offence. The respondent was not deterred by his initial failure. Rather, he persisted by returning in the early hours of the morning when he knew that the child and others who were caring for the child would be asleep. The crime was accompanied by persistence and significant premeditation.

[8] The respondent's personal circumstances excite considerable sympathy. In brief, his early childhood was marked by domestic violence and from a young age he has sniffed petrol and used alcohol and other drugs. At the time of the offending in 2001 he was affected by both cannabis and alcohol. On a number of occasions while in custody awaiting sentence in respect of that offence the respondent attempted to harm himself and was prescribed anti-depressant medication.

[9] On the basis of clinical observation, in August 2005 a psychologist expressed the view that the respondent's cognitive capacity "appears to be within the borderline range, suggesting that he is functioning at a well-below average of intelligence in comparison to his same-aged peer group". The psychologist reported that the respondent possesses "diminished

impulse control" and identified a number of factors contributing to that diminished capacity and the respondent's "dysfunctional style" in coping with day-to-day pressures.

[10] At the time of the offence under consideration, the respondent was aged 18 years. As has often been said, sentencing courts are anxious to give priority to rehabilitation of young offenders, but when young offenders commit particularly serious crimes other considerations such as punishment and general deterrence must take precedence over rehabilitation. Similarly, personal circumstances that ordinarily excite considerable sympathy attract little weight in mitigation in the face of those other considerations that must prevail following the commission of a particularly serious crime.

[11] In addition, the background and personal circumstances of the respondent "illuminate" his moral culpability and give rise to considerable concern as to his prospects for rehabilitation and the risk of re-offending.

[12] In November 2000 at the age of 15 years the respondent committed the crime of attempted rape. In the early hours of the morning in a street in Alice Springs the respondent attacked the 48 year old female victim and attempted to have sexual intercourse with her. Eventually a bystander flagged down police and the respondent ceased his attack and attempted to escape. Following apprehension he denied committing the offence. On 1 August 2001 the respondent pleaded guilty and was sentenced to three years imprisonment suspended after he had served six months commencing 9 June

2001. The crime under consideration was committed a little under two years after the respondent was released from detention.

[13] The respondent is not to be further penalised for his prior offending and the sentence for the November 2003 crime must be proportionate to the gravity of that crime. However, given the timing and nature of the prior offending, it is relevant to the exercise of the sentencing discretion. In a joint judgment in *Veen v The Queen [No 2]* (1988) 164 CLR 465 Mason CJ and Brennan, Dawson and Toohey JJ explained the relevance in the following terms (477):

> "The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind."

[14] The respondent's prior offending demonstrates that his crime in November 2003 was not "an uncharacteristic aberration". The respondent has demonstrated a "continuing attitude of disobedience of the law" and a "dangerous propensity" to commit crimes of a sexual nature.

[15] As the sentencing Judge observed, there are "worrying circumstances" in connection with the respondent's limited ability to empathise with the victim and his tendency to denial in connection with his offending and the likelihood of further offending. The underlying deficits to which the

psychologist referred and which contribute to the respondent's diminished impulse control continue to exist. Whether the respondent undertakes the prison-based sex offender treatment program, and if he does whether that program reduces the risk of re-offending, cannot be predicted with any confidence.

Principles

[16] The principles governing Crown appeals are not in doubt. They are discussed in *The Queen v Riley* [2006] NTCCA 10, a judgment delivered on the same occasion as these reasons.

[17] I agree with Mildren and Thomas JJ that there is no substance in the submission that this Court should decline to interfere by reason of the conduct of the Crown before the sentencing Judge.

[18] In my opinion, the sentence of four years imprisonment for the crime of unlawful sexual intercourse without consent is so manifestly inadequate as to shock the public conscience and demonstrate error in point of principle. This is one of those rare cases in which this Court should intervene.

Re-sentencing

[19] In *Riley* I set out my views concerning the seriousness of sexual crimes against children in Aboriginal communities and the proper approach to assessing the gravity of offending involving digital penetration. In the circumstances under consideration, in my opinion the respondent's crime

was extremely serious and, like the offending of the respondent in *Riley*, falls within the more serious category of crimes of sexual intercourse without consent.

[20] Before making allowance for the respondent's plea of guilty, and having regard to the principle of "double jeopardy" discussed in *Riley*, in my view a sentence of 11 years imprisonment is appropriate. After allowance for the plea, I would impose a sentence of nine years imprisonment. If this sentence stood alone, I would have fixed a non-parole period of seven years.

Restoration of sentence

[21] As I have said, the sentencing Judge restored one year of the suspended sentence to be served. The Crown submitted that his Honour should have restored the entire balance.

[22] During submissions an issue arose as to the operational period of the suspension during which the respondent was not to commit any further offences. On 7 September 2001, in imposing sentence and partially suspending it, the sentencing Judge said:

> "The sentence of the court will be three years custody, backdated to 9 June [2001] to take account of time spent in custody. After he has served six months of three years I direct that the rest of his sentence be suspended.
>
> He is not to re-offend during that period of suspension, the period of suspension being three years."

[23] The operational period fixed by the sentencing Judge was three years. The issue that arises for consideration is when the operational period commenced. On one view his Honour could have intended that it commence on 9 June 2001. Alternatively he could have intended that it commence either on the day sentence was imposed, namely, 7 September 2001 or on 9 December 2001 when the respondent would be released having served the period of six months. The notice of suspended sentence signed by the respondent and the deputy Sheriff identifies the period as three years from the day on which the order was made, namely, 7 September 2001. Whatever view is taken of the commencement date, when the respondent committed the crime under consideration on 21 November 2003 he did so within the three year operational period.

[24] As to restoring part or all of the suspended sentence, s 43(5)(c) and (d) of the Sentencing Act provides that the court may restore the sentence or part of the sentence held in suspense and order the offender to serve it. Significantly, however, ss (5)(c), which empowers the court to restore the entire sentence, is expressly subject to s 43(7) which directs the court to restore the entire sentence unless the court is of the opinion that it would be unjust to do so:

> "(7) A court shall make an order under subsection (5)(c) unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state its reasons."

[25] In my opinion there was no basis for arriving at an opinion that it would be unjust to restore the entire balance of the sentence. There were no circumstances that had arisen since the suspended sentence was imposed which could reasonably have led to such a conclusion. The timing and facts of the subsequent offence strongly militated against such a conclusion. I agree with Mildren and Thomas JJ that the entire balance of two years and six months should have been restored. In my view, restoring of only part of the balance was so manifestly inadequate as to demonstrate error in principle and this is one of those rare cases in which this Court should allow the Crown appeal to correct the error.

[26] In addition, s 43(7) directs that if the court is of the opinion that it would be unjust to restore the entire balance of the sentence, the court "shall" state its reasons for reaching that conclusion. The Judge failed to give any reasons. That failure was also an error in the sentencing process. I am inclined to the view that had the error stood alone it would not have justified allowing the Crown appeal, but it is unnecessary to decide this question.

[27] In the absence of the complications discussed by Mildren and Thomas JJ, I would have ordered that one year of the balance of 2 years and six months be served cumulatively upon the nine year sentence thereby reaching a total of 10 years. I would have fixed a non parole period of seven years and six months. However, for the reasons explained in the joint judgment, I agree with the orders proposed which result in a total sentence of nine years with a non parole period of seven years.

Mildren and Thomas JJ

[28] This is a Crown appeal from a sentence imposed by the Supreme Court in Alice Springs on 10 October 2005.

[29] The respondent, Gerhardt Max Inkamala, was convicted following a plea of guilty to a charge of sexual intercourse without consent of a female child contrary to s 192(3) of the Criminal Code. The maximum penalty for this offence is life imprisonment.

[30] The agreed facts as found by the sentencing Judge are as follows (AB 4-5):

> "At the time of the offence, the offender was 18 years of age. He was a male Aboriginal from the Hermannsburg Community. He normally resides there with relatives. The victim was the offender's cousin. She was born on 9 April 2003 and therefore was 7 months of age at the time of the offending. That child resided with both her parents at Hermannsburg.
>
> On the evening of Friday 21 November 2003, the offender had been consuming alcohol at East Side Community. The victim's mother was also consuming alcohol in the same proximity. The victim's father was not in Hermannsburg at the time. The mother had left the victim at the house to be looked after by some other people.
>
> In the course of the evening the offender came to the residence of the victim, House 159 East Side Camp, Hermannsburg. The victim was asleep in a bedroom with an adult female. The offender entered the bedroom of the premises, switching on the light, removing the fully clothed, sleeping victim from the bed, saying 'I'll take this baby to its mother'. The woman, who had been sleeping with the child, quickly told another female who intervened and prevented the offender removing the victim from the premises by taking the child from him and returning the victim into the care of the first adult female.
>
> The offender was thought to have departed the premises. However, later that night a male resident of the house who had been woken up by the noise, saw the offender standing on the back veranda of the premises holding the victim over his left shoulder. The offender had

clearly entered the bedroom again and removed the victim, without this time waking the female who was looking after the child.

When the offender was approached by the male resident that man noticed that the victim was naked from the waist down. He asked the offender why he had the victim. The offender said, 'That the mother had chased him away and she (the mother) was drunk'. The reference to the mother referred to the victim's mother with whom the offender had had words earlier that night saying in effect that she should go home and look after her baby. The man who had got up because he had heard noise tried to take the baby off the offender who refused to give up the baby. But then the man succeeded in persuading him that it was cold outside and the baby should be put to bed. He asked the offender to come in with the child.

The offender followed him in, placed the victim in a bed with a young male who was sleeping and the offender then left. The man who had succeeded in getting him to put the baby to bed then took the baby and woke up his girlfriend. They put the baby in between them and they all went to sleep. The baby still had no nappy on. The mother who is still drunk from the night's activities returned home in the morning and the baby was found for her in the other bedroom. Without disturbing the person sleeping there, the baby was given to her mother. The mother took the baby to her room and put the baby in a top and pink trousers, no nappy and then left the house still drunk.

An older female in the house asked her young daughter to go and get the baby after she heard the mother leave. When the baby was brought back, she saw that it was bleeding in the crutch area of the pink trousers and took the pants off and saw that the baby was bleeding from the vaginal cavity. She put a nappy on the child and took her next door to her grandmother. The baby was then taken to Hermannsburg Clinic where a doctor arranged for the baby to be seen by a paediatrician in Alice Springs Hospital. The baby was then conveyed with her mother and grandmother to Alice Springs for examination.

The offender was arrested in Hermannsburg where he was held pursuant to requirements of s 137 of the Police Administration Act. The offender was subsequently transported to Alice Springs Police Station.

At Alice Springs Hospital a sexual assault examination by a paediatrician revealed that the victim had a superficial external laceration to the vagina and a deep internal and external laceration that extended one centimetre above the clitoris to one centimetre

above the anus which necessitated surgery to be conducted under general anaesthetic. The victim received further treatment in the Paediatric Ward at the Alice Springs Hospital. The injury sustained by the victim is consistent with penetration of the child's vagina by a blunt object. There was heavy blood loss that resulted in anaemia. It could have had fatal consequences if untreated. Medical opinion is that after the treatment of the injury it would heal without significant problems.

At 21:15 hours on Sunday 22 November 2003, the offender participated in an electronic record of interview. He denied any involvement in the assault upon the victim. He was charged and bail was refused. He has been in custody since being apprehended.

The Crown asserts that the offender on the second occasion when he had the child, removed the child's nappy and digitally penetrated the child. That's admitted by the defence. The child's blood was found on the outside and inside front of the tracksuit pants he was wearing that night. No semen or other biological material from the offender was detected on the child or the clothing including nappies that the child had on at the time of and subsequent to the assault."

[31] As a consequence of the offence, the victim suffered the following injuries as stated in the facts found by the sentencing Judge. They were:

i) a superficial external laceration to the victim's vagina

ii) a deep internal and external laceration that extended from one centimetre above the clitoris to one centimetre above the anus

iii) there was heavy blood loss which caused anaemia. It could have had fatal consequences if left untreated.

iv) surgical repairs under general anaesthesia were required to the vagina.

[32] On 7 September 2001, the offender was convicted following a plea of guilty to a charge of attempt to have sexual intercourse with IK without her consent. This offence occurred on 18 November 2000. At that time the appellant was 15 years old. He was sentenced to three years imprisonment backdated to 9 June 2001 to take account of time spent in custody. He was released after serving six months imprisonment, the balance of two yeas and six months was suspended. The operational period was specified to be three years.

[33] With respect to the offence the subject of this appeal, there were two victim impact statements from the mother and grandmother respectively of the seven month old victim. Both express their anger toward the offender and their feelings of sadness for the hurt to the child.

[34] A report dated 8 and 9 August 2005 was received from Dr Charlotte Ho, Senior Forensic Psychologist with the Alice Springs Correctional Centre. Dr Ho observed that the appellant had no concern over the seriousness of the offence. She noted he had been in the remand section of the gaol since 24 November 2003. The report noted Mr Inkamala displayed little empathy towards the victim. He was a petrol sniffer at the age of 14 years. He has abused alcohol and been an intermittent marijuana user. The report stated as follows (AB 31):

> "On the basis of clinical observation and judgement, Mr. Inkamala's cognitive capacity appears to be within the borderline range, suggesting that he is functioning at a well-below average of intelligence in comparison to his same-aged peer group.

> Mr. Inkamala's cognitive deficits might be partially contributed by alcohol abuse and petrol sniffing.
>
> **Cultural:**
>
> Mr Inkamala identifies himself as a traditional Aboriginal. He reported that he has been initiated and involved in traditional Aboriginal laws. Mr Inkamala reported that Arrente is his first language. During the interview, Mr Inkamala impressed that he has good command of speaking and understanding English."

[35] Mr Inkamala was assessed as being at the medium-low risk of offending. It was also noted that he had difficulty in maintaining social and romantic relationships, limited contact and support from family and had an inability to obtain employment. With respect to the offence, Dr Ho stated (AB 32):

> "… He had targeted a young child who is related to him and has no means to defend herself. Despite the first failed attempt to remove the victim from her home, Mr. Inkamala returned to carry out the offence in a persistently manner. The offence appeared to have a degree of planning involved."

[36] The conviction for this offence placed Mr Inkamala in breach of the suspended sentence previously imposed. The sentencing Judge restored one year of this sentence to be served. He imposed a sentence of four years imprisonment for this later offence in addition to the one year for breach of the suspended sentence making a total sentence of five years imprisonment. His Honour noted that given the relatively poor prospects of rehabilitation, it would be appropriate to fix a non-parole period of four years in prison. The sentence was backdated to 21 November 2003, to take account of time spent in custody.

[37] The grounds of appeal are that:

1. That in all the circumstances of the case, the sentence imposed by the learned sentencing judge was manifestly inadequate.

   During the course of arguing the appeal, counsel for the appellant Dr Rogers, sought and was granted leave to add a further ground of appeal.

2. That the judge erred in failing to give reasons for not restoring the full suspended sentence as required by s 43(7) of the Sentencing Act.

[38] The principles which apply to Crown appeals are set out in the judgements of this Court in *The Queen v Riley [2006] NTCCA* 10 and need not be repeated here.

[39] Ms Whitelaw, counsel for the respondent, submits that the prosecution did not raise with the sentencing judge the appellant's submission that the offending was the worst kind of offending. We do not consider there is any merit in this submission. The prosecutor before the sentencing judge sought condign punishment and stated "people are shocked and revolted by this sort of thing and of course fear for their own children, naturally". The sentencing judge categorised this as a serious offence and stated in his remarks on sentence as follows (AB 44):

> "The offence is clearly a serious one. It has a number of aggravated circumstances. The offence was committed in breach of a suspended sentence passed on 7 September 2001 when the accused pleaded

> guilty to attempted rape of a 48 year old woman whilst he was a juvenile aged 15. That offence occurred on 18 November 2000. A sentence was passed of three years head sentence, suspended after serving six months. The present offending occurred during the operative period.
>
> An aggravated circumstance of the present offence is that he had been warned off prior to committing the offence but persisted with his purpose that is to assault the child. The offence is further aggravated by the serious injuries, indeed life-threatening injuries caused to the child. In addition, the present type of offending is to be categorised as repulsive in nature. It is a crime which character calls for condemnation by way of heavy sentence. As the Crown submitted back in March this year when I heard initial submissions which only concluded today as a consequence of the delay caused by awaiting medical reports. People are shocked and revolted by this type of crime and it creates fear in people for the safety of their own children".

[40] The complaint by Dr Rogers, on behalf of the appellant, is that these strong words of condemnation are not reflected in the actual sentence imposed.

[41] Counsel for the respondent made reference to *Regina v O* [2005] NSWCCA 327 to support a proposition that digital penetration is less serious than penile penetration. We do not accept this submission. There are circumstances where digital penetration is equally serious, if not more serious, than penile penetration. In the matter before this Court, the digital penetration was extremely serious causing as it did serious injuries to a tiny baby.

[42] Dr Rogers, on behalf of the appellant, submitted there were three reasons why unlawful sexual intercourse with a baby is particularly serious:

1) A baby cannot escape. An adult may have a chance to struggle and free themselves but a baby is particularly vulnerable.

2) A baby is in no position to complain. The most a baby can do is to cry. The baby will never be able to give an account of the event or give evidence.

3) The physiology of a baby who will have a tiny anus and vagina particularly susceptible to injury.

[43] We accept these are very valid reasons why such an attack on a baby is very serious.

[44] Ms Whitelaw, on behalf of the respondent, submitted that this Court should not pay regard to these aspects raised by counsel for the appellant, as the prosecutor did not address the sentencing judge on these issues.

[45] We do not accept this submission by counsel for the respondent. Dr Rogers, on behalf of the appellant, was eloquent in elucidating the reasons why a baby is particularly vulnerable. However, these were matters which could be said to be obvious. In *R v Amohanga* 155 A Crim R 202, Hulme J at 207:

> "…judges can reasonably be expected to be conscious of matters staring them in the face and it should not be held against the Crown, or the community which the Crown represents, that their representative has not expressly drawn a judge's attention to the obvious. …"

[46] The Crown does not seek to say this is the worst type of sexual assault but rather it is in the spectrum towards the serious end.

[47] We agree with this submission – see *Ibbs v The Queen* (1987) 163 CLR 447 at 452.

[48] The sentencing judge identified as an aggravating circumstance that the respondent had earlier been thwarted in his attempt to remove the victim from the premises and the serious nature of the injuries suffered by the victim.

[49] The sentencing judge correctly took into account certain matters in mitigation, being the plea of guilty, the fact the respondent had been on remand since 21 November 2003 and the principle of totality.

[50] Dr Rogers argued, on behalf of the appellant, that the unserved part of the suspended sentence, namely two and a half years, should have been ordered to be served by the sentencing judge.

[51] Notwithstanding Ms Whitelaw's submission to the contrary, in imposing sentence on 7 September 2001 for the offence of attempted unlawful sexual intercourse committed on 18 November 2000, the sentencing judge was proceeding under the Sentencing Act as distinct from the Juvenile Justice Act. This is because of the sentence of three years imprisonment that was imposed. On this occasion, his Honour was very conscious of the youth of the offender who at the time of the commission of the offence was 15 years

old. His Honour also took into account the fact that the offender at that time had no prior convictions.

[52] The sentence of three years imprisonment was backdated to 9 June 2001 to take account of time spent in custody. The offender was to be released after serving six months. His Honour said: "He is not to re-offend during that period of suspension, the period of suspension being three years".

[53] Section 40(6) of the Sentencing Act provides that the operational period commences from the date of the order in a wholly suspended sentence or the date specified in the order if a part of the sentence is suspended.

[54] In this particular instance, we have interpreted his Honour's order to mean that the operational period was for a period of three years calculated from 9 June 2001 rather than from 7 September 2001, the date sentence was passed.

[55] On this interpretation, which is the most favourable to the offender, the further offence of unlawful sexual intercourse committed on 21 November 2003 was a little over two years and five months into the three year operational period. If our interpretation is not correct as to the date when the operational period commenced and it should in fact be from 7 September 2001, the date the order was actually made, then the time when the further offence was committed would be two years and two months into the operational period. Alternatively his Honour may have meant that the three year period was to commence from the date of his release from prison on 9

December 2001, in which case the time would be some 19 months into the three year period. Either way, a significant portion of the operational period of the suspended sentence had passed before the commission of a further offence. This is a relevant consideration in deciding whether or not to restore the whole or part of the suspended sentence – *Baird v The Queen* (1991) 104 FLR 113 at 119:

> "The length of time during which the offender observed the conditions of the recognisance may be relevant."

[56] However, we have come to the conclusion that the whole of the unserved part of the 2001 sentence of two and a half years, should have been restored for the following reasons:

1) Section 43(7) of the Sentencing Act contemplates that a breach of suspended sentence would result in the offender serving the sentence held in suspense unless it would be unjust to do so.

2) The offence committed on 18 November 2000 being attempted unlawful sexual intercourse was found by the sentencing judge to be serious and the attack persistent.

3) There is no evidence of attempts at rehabilitation – *R v Bowen* [1997] 2 Qd R 379 at 385. Even worse than the failure to embark on any rehabilitation program is the finding of the sentencing judge with respect to the offence committed on 21 November 2003 that:

> "There are worrying circumstances, however, about the present matter. He is currently in denial of the sexual offences or responsibility of sexual offences or the serious consequences of sexual offences. He denies potential to engage in further sexual offences. He has limited ability to empathise with the likely feelings or reactions of victims. He is, the report says on page 9, considered suitable for a prison-based sex offender treatment program which will be available later this year – was hoped to be available later this year, though as I understand the report is not currently available."

4) The offence committed on 21 November 2003 was the same type of offending but even more serious than the offence committed on 18 November 2000. We note that in *Baird v The Queen* (supra) at p 119 this Court said:

> "… Whether the breach evinces an intention to disregard the obligation to be of good behaviour or to abandon any such intention would normally be relevant. For instance it would be an aggravating factor if the breach amounted to the commission of another offence of the same nature as that which gave rise to the recognisance. …"

5) The respondent committed a more serious offence of a similar nature after he had attained the age of adulthood. The youth of the offender was a consideration in respect of both offences. However, the weight to be attached to his young age is diminished in the light of the seriousness of the offence.

6) In the circumstances there is no injustice in restoring the full period of the suspended sentence.

7) In view of the substantial sentence imposed for the later offence it would be inappropriate to restore only part of the suspended sentence. To

do so would be to leave the remainder in suspense which would serve no useful purpose.

[57] In *R v Marston* (1993) 60 SASR 320 the South Australian Court of Appeal was dealing with an offender who had committed a minor offence of larceny which put her in breach of a suspended sentence for a crime of robbery with violence. The Court of Appeal found that the activation of the three years suspended sentence was not justified by the relatively minor nature of the offending which constituted the breach.

[58] In the course of his reasons for judgment, King CJ commented on the principles applicable to the sentence for breach of a suspended sentence at p 322:

> "I repeat what I said in *R v Buckman* (1988) 47 SASR, 303 at 304:
>
> > 'There is a clear legislative policy that in general a breach of a condition of a recognizance upon which a sentence has been suspended, should result in the offender serving the sentence which was suspended. A sentence of imprisonment is imposed and suspended only where imprisonment is fully merited but the court considers it appropriate to give the offender a last chance to avoid imprisonment by leading a law abiding life. It is intended to be a sanction suspended over the head of the offender which is to be activated if there is a lapse into non law abiding ways. The court will not lightly interfere with the ordinary consequence of a breach of the recognisance.'
>
> It is of great importance that the courts adhere to that principle. Departure from it by the nonrevocation of suspended sentences tends to undermine the integrity of the system of suspended sentences and their effectiveness as a means of deterring future offenders. Nevertheless, as *Buckman's* case (supra) clearly recognises, and as, indeed, the section recognises, there are circumstances in which it is proper to refrain from revoking the suspension of the sentence."

[59] In the matter before this Court, the breach involved an even more serious example of the commission of a serious offence.

[60] Consequently we consider the full period of the suspended sentence should have been ordered to be served.

[61] With respect to the Crown appeal against sentence, we have come to the conclusion that the total sentence of five years imprisonment was so inadequate as to demonstrate that the exercise of the sentencing discretion has been unsound – *Cranssen v The King* (1936) 55 CLR 509; (1936) 10 ALJR 199, see also *The Queen v Stephen Day* [2004] NTCCA 2, Mildren J at par 54; *R v Osenkowski (1982) 30 SASR 212 at 213 per King CJ.*.

[62] We do this having taken into account the mitigating circumstances which are, the youth of the respondent, the plea of guilty and the long period of time he had spent on remand from 21 November 2003 before being sentenced on 10 October 2005.

[63] We would allow the appeal against sentence on Ground 1 of the appellant's grounds of appeal.

[64] With respect to Ground 2, the Sentencing Act provides in s 43(5) that where there has been a breach of suspended sentence, the Court may:

> "(c) subject to subsection (7), restore the sentence or part sentence held in suspense and order the offender to serve it;"

Subsection (7) states as follows:

> "A court shall make an order under subsection (5)(c) unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state its reasons."

[65] We read this provision as requiring reasons to be given for a decision not to restore the sentence or part-sentence held in suspense, in its entirety. In this instance, there were no specific reasons given for only partially restoring the suspended sentence. We consider this to be an error. However, as we have already allowed the appeal on Ground 1, we do not need to consider whether or not it is an error that would inevitably lead to the appeal being allowed and the respondent re-sentenced.

[66] Before proceeding to resentence the respondent it is necessary to consider another matter which was raised by the Court during argument. The learned sentencing judge restored part of the sentence held in suspense under s 43(5)(d) of the Sentencing Act to the extent of one year. His Honour also imposed a sentence of 4 years imprisonment for the offence against s 192(3) of the Criminal Code which he ordered to be in addition to the one year restored, making a total term of 5 years. His Honour then fixed a non-parole period of 4 years and, as we understand it, back-dated the commencement of the 5 year term and of the non-parole period to 21 November 2003 to take into account time already spent in custody.

[67] In our opinion this could not be done. Section 55 (1) of the Act requires the fixing of a non-parole period of 70 percent of the sentence imposed for the

offence against s 192(3) of the Criminal Code. Assuming it is possible to fix a non-parole period in respect of a restored sentence, this would have required a minimum non-parole period of 45.6 months. Alternatively, if, it is not possible to fix a non-parole period in respect of a restored sentence, a minimum non-parole period of 33.6 months commencing from the date of the commencement of the sentence of 4 years for the offence against s 192 (3) was required. It is clear that the learned sentencing judge intended to fix a non-parole period in respect of both the restored sentence and the offence against s 192(3) of the Criminal Code as he fixed a period of 4 years.

[68] In our opinion it is not possible to fix a non-parole period in respect of a restored sentence. The power to fix a non-parole period is to be found in s 53(1) which expressly excludes sentences which are suspended whether in whole or in part: see s 53(1)(b). Further, the power to fix a non-parole period arises under s 53(1)"where a court sentences an offender to be imprisoned." Where a court restores a sentence or part sentence held in suspense it does not "sentence an offender to be imprisoned". The sentence of imprisonment imposed on the offender was the sentence imposed at the time of the original sentencing order: see also s 40(8) which provides that "a partly suspended sentence of imprisonment shall be taken, for all purposes, to be a sentence of imprisonment for the whole term stated by the court." Counsel for the appellant submitted that s 57(1) applies, but with respect, that subsection applies only to previous sentences where a non-parole period has been fixed, and has no application here. In our opinion, when a court

restores a sentence or part sentence, the court commits the prisoner to gaol for the period or part period of the sentence already imposed: cf. *The Queen v Baird* (supra) at 117. Counsel for the appellant submitted that the restoration of the suspended sentence amounted to being "sentenced" relying upon the judgment of Callaway JA in *H* (1997) 95 A Crim R 46 at 52. It is clear that the legislation under consideration in that case is quite different from the provisions of the Sentencing Act (NT). The same might also be said of the legislation being considered in *The Queen v Baird*. However the provisions of the Sentencing Act (NT) make it clear, for the reasons we have endeavoured to express, that when a court restores a sentence already imposed, it does not "sentence" an offender. This is to be contrasted with a court resentencing a prisoner under s 42(1).

[69] Section 43(6) provides that *unless the court otherwise orders*, where a court orders an offender to serve a term of imprisonment that has been held in suspense, the term shall be served "immediately" and concurrently with any *previously* imposed term. There is no specific power under the Sentencing Act to back-date the commencement of a term which has been restored. The power to back-date found in s 63(5) applies only where an "offender has been in custody on account of his or her arrest for an offence and the offender is convicted of that offence and sentenced to imprisonment." In the circumstances of this case, the offence for which the offender was arrested was the offence against s 192(3) of the Code. Arrest for breach of a condition of a suspended sentence is not an arrest for an "offence"

[70] However, we consider that s 43(6) confers a discretion upon a court to order, in a proper case, that the term may be ordered to be served from the date the offender went into custody in respect of the breach or in respect of the date he went into custody for the "offence" which gave rise to the breach. The words "unless the court otherwise orders" confer on the court a wide discretion to make such orders as the circumstances and the justice of the case require. Nevertheless the requirements of s 43(6)(a) and s 43(6)(b) provide the general rule and, as with any discretionary power, some good reason must exist before the general rule can be departed from. In other words the discretion must be exercised judicially

[71] It is particularly important to pay regard to these provisions when the sentencer decides to order a suspended sentence to be served, impose a fresh cumulative sentence for another offence and impose a non-parole period, because of the requirements of the Act relating to minimum non-parole periods which can have the effect in some cases, particularly where there is a 70% minimum requirement, of requiring a total sentence very much in excess of 70% of the total of the sentences restored and imposed.

[72] In resentencing for the offence committed on 21 November 2003, we have had regard to the principle of double jeopardy and have taken into account the fact that a plea of guilty had been entered, the youth of the offender and the period of time spent on remand. We would impose a sentence of nine years imprisonment. The offence being against s 192(3) of the Criminal Code, a non-parole period must be fixed as required by s 53(1) and s 55 (1)

of the Sentencing Act of not less than 70 per cent of the period of imprisonment for that offence. We would impose a non-parole period of seven years.

[73] With respect to the breach of suspended sentence we would restore the whole of that part of the sentence for the offence committed on 18 November 2000 which has not been served. Having regard to the requirements of the Act to which we have already referred, the principle of totality and the issue of double jeopardy, we would order that sentence to be served concurrently with the sentence for the offence committed on 21 November 2003. We would also order that the sentence and non parole period ordered to be served and the restored sentence commence from 21 November 2003 to taken into account time already spent.
