THE QUEEN v ERIC JOE MULHOLLAND

Court of Criminal Appeal of the Northern Territory of Australia

Asche CJ, Gallop and Angel JJ

12, 13, 14 November 1990 and 16 January 1991 at Darwin

CRIMINAL LAW - Sentencing - proper approach - whether one stage or two stage approach to be followed

CRIMINAL LAW - Sentencing - rape - recidivist - head sentence - principles of fixing

CRIMINAL LAW - Sentencing - non-parole period - principles of fixing

CRIMINAL LAW - Sentencing - Crown appeal - principles

Cases followed:

Veen v The Queen [No.2] (1988) 164 CLR 465
Power v The Queen (1974) 131 CLR 623

Cases referred to:

Anderson v The Queen (1978) 19 ALR 212
Bain v The Queen (1983) 47 ALR 472
Baumer v The Queen (1988) 166 CLR 51
Bugmy v The Queen (1990) 64 ALJR 309; (1990) 92 ALR 552
Deakin v The Queen (1984) 54 ALR 765
Griffiths v The Queen (1976-77) 137 CLR 293
Griffiths v The Queen (1989) 167 CLR 372
Hoare v R; Easton v R (1989) 167 CLR 348
Peter David Hogon 30 A Crim R 399
Hunter v The Queen (1988) 62 ALJR 424
Jones v The Queen, unreported decision of the Federal Court sitting on appeal from the Supreme Court of the Northern Territory, 17 August 1984
Kovac v The Queen (1977) 15 ALR 637
Peter Kay Morgan and Douglas Kay Morgan (1980) 7 A Crim R 146
R v Creed (1985) 37 SASR 566
R v Ireland (1987) 49 NTR 10; Shane Leonard Ireland 29 A Crim R 353
R v Jabaltjari (1989) 64 NTR 1
R v Lian unreported decision of the NSW Court of Criminal Appeal, 28 June 1990
R v Paivinen (1985) 158 CLR 489
R v Raggett, Douglas and Miller, unreported decision of the NT Court of Criminal Appeal, 28 September 1990
R v Tait and Bartley (1979) 24 ALR 473
R v Watt (1988) 165 CLR 474

R v Yates, unreported decision of the NT Court of Criminal Appeal, 11 December 1986
William Howard Young, Brian John Dickensen, Kelvin Thomas West (1990) 45 A Crim R 147
Reg. v Combo (1971) 1 NSWLR 703
Sultan v Svikart (1989) 96 FLR 457; (1989) 42 A Crim R 15
The Queen v Brusch; Brusch v The Queen (1986) 11 FCR 582
The Queen v Scanlon (1987) 89 FLR 77
Webb v O'Sullivan [1952] SASR 65

Statutes referred to:

Parole of Prisoners Act 1971-79 (NT)
Criminal Code Act 1983 (NT)

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

No.CA 16 of 1990

ON APPEAL FROM THE
SUPREME COURT OF THE
NORTHERN TERRITORY
SCC No. 61 of 1990

BETWEEN:

THE QUEEN
Appellant

AND

ERIC JOE MULHOLLAND
Respondent

CORAM: ASCHE CJ, GALLOP AND ANGEL JJ

REASONS FOR JUDGMENT
(Delivered the 16th day of January 1991)

ASCHE CJ: I agree with the judgment of Gallop J and orders proposed by him. I also agree with the reasoning of Angel J in his judgment.

GALLOP J: This is a Crown appeal against the sentence imposed upon the prisoner on 24 August 1990 in respect of two convictions in this court when the accused pleaded guilty to the following offences:

"Count 1

On 21 October 1989 at Darwin in the Northern Territory of Australia unlawfully entered a building, namely Room No. 4, Nightcliff Hotel with intent to commit an offence therein;

AND with the following circumstances of aggravation;

a) That Eric Joe Mulholland did so with intent to commit therein a crime, namely, sexual assault;

b) That the said building was a dwelling-house, and

c) That Eric Joe Mulholland entered the said building at night-time.

Section 213(1)(4) and (5) of the Criminal Code.

Count 2

On 21 October 1989 at Darwin in the Northern Territory of Australia unlawfully assaulted (the prosecutrix) with intent to have carnal knowledge of her;

AND with the following circumstances of aggravation;

a) That Eric Joe Mulholland thereby caused bodily harm to (the prosecutrix), and

b) That Eric Joe Mulholland thereby had carnal knowledge of (the prosecutrix).

Section 192(1)(3) and (4) of the Criminal Code."

The maximum penalty for the offence in the first count is 20 years and for the offence in the second count is life imprisonment.

For the purposes of sentencing the Judge regarded the circumstances of the offence set out in Count 1 as being an intrinsic part of the offence set out in Count 2. He sentenced the prisoner to six months' imprisonment on

Count 1 and 14 years' imprisonment on Count 2, both sentences to be served concurrently. The offences were committed while the prisoner was on parole. In addition to the sentences imposed, the Judge ordered that the prisoner undergo imprisonment for the term he had not served at the time when he was released from prison in pursuance of the parole order and ordered that that term commence at the expiration of the term of imprisonment to which he was being sentenced. Accordingly, he ordered that the prisoner undergo imprisonment for a further term of four years arising from the breach of parole, making a total in all of 18 years.

He fixed a period of four years during which the prisoner was not to be eligible to be released on parole.

By application dated 29 October 1990 the prisoner applied for an extension of time within which to file a notice of cross-appeal. On the hearing of the appeal, the Crown not opposing the grant of an extension of time, the Court made an order extending the time for filing a notice of cross-appeal to 29 October 1990 pursuant to s.417(2) of the Criminal Code Act 1983 and Order 84.06 of the Supreme Court rules.

On the hearing of the appeal, the Crown conceded that the additional period of imprisonment of four years imposed

by the Judge for breach of parole would have to be adjusted because his Honour had not taken into account remissions which the prisoner had earned on the portion of head sentence already served when he was released on parole. At the time of his release on parole, the unexpired portion of the head sentence which the prisoner had then to serve, less remissions, was a period of 778 days. Counsel for the Crown submitted that the order that the Judge should have made in accordance with s.12(2) of the Parole of Prisoners Act was to order the prisoner to undergo imprisonment for the term that he had not served at the time when he was released from prison in pursuance of the parole order and that that term of imprisonment commence at the expiration of the term of imprisonment to which he was then being sentenced for the later offences. Such an order would accord with the terms of s.12(2) of the Parole of Prisoners Act, which reads:

> "(2) Where -
>
> (a) a person has been sentenced or committed in the Territory to a term of imprisonment for an offence committed while a parole order is or was in force in relation to him; and
>
> (b) that parole order is, by reason of that sentence or committal, deemed to have been revoked by virtue of section 5(8),
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> the court by which the person is sentenced or committed shall order the person to undergo imprisonment for the term that the person had not served at the time when he was released from prison in pursuance of the parole order, which term of imprisonment shall commence at the expiration of the term of imprisonment to which he is sentenced or committed for the later offence."

The submission on behalf of the Crown is correct and should be adopted in the necessary adjustment of the sentence imposed. Section 15 of the Parole of Prisoners Act provides that, where a parole order is revoked and before the revocation the person had earned a period of partial remission of the sentence of imprisonment in respect of which the parole order was made, the period so earned shall be deducted from the term of imprisonment that remains to be served as a result of the revocation of the parole order.

Counsel for the Crown also referred to a further difficulty arising out of the preparation of the warrant for the prisoner's commitment to prison pursuant to the orders made by the sentencing judge. Section 405(2) of the Criminal Code Act 1983 provides that, where an offender has been in custody on account of his arrest for an offence and he is then convicted of that offence and sentenced to imprisonment, it may be ordered that such imprisonment shall be regarded as having commenced on the day on which he was released, or on any other day between that day and the day on which the court passes sentence.

The sentencing judge who sentenced the prisoner on 29 October 1987 for previous offences of unlawfully entering a dwelling house with intent to steal contrary to s.231 of the Criminal Code, and unlawful assault with

intent to have carnal knowledge and having carnal knowledge contrary to s.192 of the Criminal Code, purported to give effect to that provision and backdated the concurrent sentences of two years and six years imprisonment to 24 February 1987. When the warrant of commitment to prison was drawn up and executed, it wrongly specified that the head sentences and non-parole period of two years were to date from 24 September 1987. The consequence of that error, which was made in the Court Registry, was that the prisoner served an additional seven months' imprisonment before being considered for parole. The equivalent period in terms of head sentence without remissions was about ten and a half months. Accordingly, it was submitted on behalf of the Crown that the Court might consider it appropriate, if it saw fit to alter the sentences now under appeal, to reflect in some way in the substitute sentences the fact that the prisoner had served an additional period of seven months due to the error in the warrant.

In my opinion that submission ought also to be adopted in the adjustment of the sentence imposed.

Turning to the substance of the Crown appeal against inadequacy of sentence, it is directed to the inadequacy of the non-parole period of four years as fixed by the sentencing judge. The grounds of appeal argue that that non-parole period:

(a) bears no adequate relationship to the gravity of the offences

(b) fails adequately to reflect the fact that the respondent had been on parole for similar offences when he committed the present offences

(c) when measured against the totality of the respondent's criminality demonstrates manifest inadequacy

(d) is inordinately low when viewed against the totality of the head sentences

(e) fails adequately to punish the respondent.

It must be said at once that in fixing a head sentence of 14 years for the offences to which the prisoner pleaded guilty and another four years, which was purportedly the unexpired portion of the previous head sentence at the time when the prisoner was released on parole, making a total of 18 years, and a non-parole period of only four years, the sentencing judge does not appear to have imposed a duly proportionate and balanced sentence. It is necessary to review the circumstances of the prior offences and those in relation to the offences for which the prisoner was sentenced on 24 October 1990 and are now the subject of this appeal. All the relevant material was before the sentencing judge.

At the time of the commission of the prior offences the prisoner was a 17 year old Aboriginal boy from Borroloola. On 2 December 1986 he spent most of the day drinking alcohol and by night-time was quite drunk. At about midnight he wandered away in search of food and more alcohol, ultimately arriving at the home of the prosecutrix, a teacher at the Borroloola School. She was in bed but had forgotten to lock the front door. All lights in the residence had been switched off. She was asleep when the prisoner entered the unit through the front door, looking for more alcohol. He found his way to the kitchen and caught sight of the prosecutrix in her bed through the bedroom doorway.

He went to the side of her bed, removed his clothing and lay on the bed beside her. She awoke and, while orienting herself after having been asleep, she twice asked, "Who is it?" and each time the prisoner answered, "It's me". She said, "What are you doing here? What do you want?" She switched on a bedside light. The prisoner turned it off and knocked it out of her reach. She was unable to move freely because the prisoner had placed one of his arms across her body. She started to scream and appealed to him to leave. She was struggling and he struck her once on the left side of the face and held his hand over her mouth to stop her screaming. She was dazed, partially smothered and completely overpowered and her

resistance diminished. The prisoner climbed on top of her, forced her legs apart and had carnal knowledge of her. He then dressed and left by the rear door. The prosecutrix, hysterical and shaking, remained where she was for a minute or two and then got up to turn on the kitchen light. She dressed and ran to a neighbour's house where she complained of rape. She was in a very distressed condition, was comforted by the neighbour and taken to the police station.

Assisted by a tracker, police subsequently found the prisoner at his father's house on the afternoon of the same day. He was taken to the Borroloola Police Station and interrogated. He freely admitted the facts alleged. The prosecutrix suffered traumatic stress disorder as a result of the assault.

When sentenced for those offences on 21 August 1987 the prisoner had only a minor criminal record, almost of no significance. The sentencing judge on that occasion regarded the prisoner as being previously of good character and well respected in his country. Taking all relevant matters into account, the judge sentenced the prisoner to two years' imprisonment for the offence of unlawfully entering the dwelling house with intent to steal, and six years' imprisonment for the offence of unlawfully assaulting the victim with intent to have carnal knowledge of her and having carnal knowledge of her, both sentences

to be served concurrently. He specified a non-parole period of two years and ordered that the sentences and non-parole period commence from 24 February 1987. The prisoner was released on parole on 23 September 1989.

On 21 October 1989 he committed almost identical offences in Darwin and it is the sentences imposed in relation to those offences and his breach of parole which are the subject of this appeal and cross-appeal.

The facts giving rise to the later offences, as found by the sentencing judge, are that it was a term of the prisoner's release on parole that he enter the Gordon Symons Centre in Darwin for a period of two months and not leave that establishment without the permission of his parole officer. He reported to the Gordon Symons Centre, but without permission left the establishment on 19 October 1989. He was next identified as having been at the Bagot Reserve on the afternoon of 20 October drinking with a group of people, after which he went to the Nightcliff Hotel and continued drinking through the evening.

The prosecutrix was staying at the Hotel. She arrived in a car which was driven away and went to enter her room, pausing to get her keys from her handbag. Just as she was about to open the door the prisoner pushed into her from

behind and she fell on her hands and knees just inside the room. He stumbled or half fell on top of her and from that position locked the door and put the security chain on. She started to scream and struggle but he said that he had a pocket knife, which she had no reason to disbelieve. He threatened to hurt her with the knife and made it clear by vulgar language and physical abuse that he intended to have sexual intercourse with her. He pushed her on to the bed and despite her struggles managed to remove her clothing. He overpowered her despite her pleas and struggles and had sexual intercourse with her. She estimated that this first act of intercourse lasted for about ten minutes, after which he spoke to her for some additional few minutes and proceeded to rape her again.

It is unnecessary to relate further the circumstances of the offences, except that he finally released her about 6.30 am. When he got up to go to the bathroom, she was able to grab some clothes and escape through the window of the bedroom. She went into a nearby room and woke the occupants. She suffered various minor physical injuries in the attack upon her and was considerably distressed for some time. The prisoner was not apprehended until 12 March 1990 when police were investigating another matter and these offences were raised by him. He made a number of admissions.

Turning to the subjective factors, the sentencing judge noted that on 24 August 1990 the prisoner was then a 22 year old single initiated Aboriginal man who was born in and had spent most of his life in Borroloola and the surrounding areas. He detailed all the subjective factors relevant to the question of sentence, including the prisoner's prior record and the fact that the offences for which he was to be sentenced had been committed by the prisoner only one month after he had been released from prison.

He also considered a submission put on the prisoner's behalf as follows:

> "Your Honour has to set the head sentence and that is for the community's protection, and then set the non-parole period and leave it up to the Parole Board".

And later:

> "But put a lower non-parole period than what your Honour would otherwise do in a normal case where someone had been out on parole for less than a month and then done the same thing ..."

The judge considered all the relevant principles of sentencing before finally imposing the sentences under appeal. He discussed the principles applicable to the fixing of a non-parole period and said:

"It is, to my mind, of vital importance to understand that fixing a period prior to which the prisoner is not entitled to parole does not mean that at the expiry of that period he will be released. That will be a matter for the parole board to consider in the light of all the circumstances then known concerning the prisoner, with particular reference to his then prospects for rehabilitation.

The board will have before it not only all the information concerning the offence and what was known about the prisoner at the time he was sentenced, but in a case such as this, it would also have, one would expect, up-to-date and perhaps more exact information, and the benefit of expert opinion above and beyond that available to me.

The board would also, I expect, have available to it, information as to those who are prepared to undertake responsibility for the future conduct of the prisoner, would see that he is released to an appropriate place and given the opportunity to be guided by counselling and supervision with appropriate people."

And later:

"I emphasise again that it will be for the parole authorities to assess in due course the reality of the influences upon your life and the means whereby any real problems arising therefrom, might be attempted to be resolved."

Those passages indicate that the sentencing judge adopted the submission by counsel for the prisoner.

It was submitted on behalf of the Crown that those passages demonstrate error in that the judge failed to fix a non-parole period in accordance with the principles laid down by the High Court in Power v The Queen (1974) 131 CLR 623.

In that case the High Court put paid to the notion that the sentencing judge, in fixing the minimum term, approaches the task on the footing that he or she is solely or primarily concerned with the prisoner's prospects of rehabilitation. At p.628 the High Court (Barwick CJ, Menzies, Stephen and Mason JJ) observed:

> "To our minds no assistance towards the construction of the Act is to be had by considering the various objects of criminal punishment and by treating the non-parole period as retributive and the remainder of the time served in confinement as a period of rehabilitation. Confinement in a prison serves the same purposes whether before or after the expiration of the non-parole period and, throughout, it is punishment, but punishment directed towards reformation. The only difference between the two periods is that during the former the prisoner cannot be released on the ground that the punishment has served its purpose sufficiently to warrant release from confinement, whereas in the latter he can. In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention. -
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> Nor do we understand how it is said that the fixing of a non-parole period is not concerned with deterring either the prisoner himself or others from crime. Surely the requirement that a prisoner must stay in confinement for some period seen by a judge to be appropriate in all circumstances, would operate more as a deterrent than to allow the prison gates to be opened almost as soon as they have closed, that is, when the paroling authority has had time to consider whether the sentence should be served in confinement. To the extent to which deterrence is an object of imprisonment, then imprisonment without a chance of release for a longer time, rather than a shorter time, is within that objective."

And later at p.629:

> "To read the legislation in the way we have suggested fulfills the legislative intention to be

> gathered from the terms of the Act, i.e. to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence."

Power, supra, is clear authority for the rejection of the proposition that the minimum term should be seen as the shortest time required for a parole authority to form a proper view of the prisoner's prospects of rehabilitation. Although Power was concerned with different legislation, no relevant distinction with the law of the Northern Territory is suggested.

Power, supra, has been affirmed many times in the High Court (see, for example, Deakin v The Queen (1984) 54 ALR 765; R. v Paivinen (1985) 158 CLR 489; R. v Watt (1988) 165 CLR 474 at 481; Hunter v The Queen (1988) 62 ALJR 424; Griffiths v The Queen (1989) 167 CLR 372; and more recently, Bugmy v The Queen (1990) 64 ALJR 309).

In Bugmy, supra, the majority allowed an appeal by a person sentenced to life imprisonment against the allocation of a minimum term of 18 years 6 months and remitted the matter to the Court of Criminal Appeal of Victoria for further consideration. In their dissenting judgment, Mason CJ and McHugh J, approving the observations

of Jenkinson J in Peter Kay Morgan and Douglas Kay Morgan (1980) 7 A Crim R 146, said that considerations relevant to the interest of the community which the imprisonment of offenders is designed to serve, as well as circumstances which mitigate punishment, will be taken into account in determining the head sentence and again in fixing the minimum term, and that the considerations that the sentencing judge must take into account when fixing a minimum term will be the same as those applicable to the head sentence. Their Honours discussed the factors for the sentencing judge to take into account in fixing a minimum term, including rehabilitation, the nature of the crime because a more serious offence will warrant a greater minimum term due to its deterrent effect upon others, the need to give close attention to the danger which the offender presents to the community, and the prospects as assessed by the sentencing judge of the future progress of the offender and the danger he or she would present to the community.

I do not understand the majority (Dawson, Toohey and Gaudron JJ) to have disagreed in any way with those observations.

The principles applicable to fixing a non-parole period as laid down by the High Court in Power, supra, have been followed in the various States and Territories of the

Commonwealth (see, for example, R. v Creed (1985) 37 SASR 566; Morgan and Morgan, supra; R. v Lian, unreported decision of the New South Wales Court of Criminal Appeal, 28 June 1990; Anderson v The Queen (1978) 19 ALR 212; Jones v The Queen, unreported decision of the Federal Court sitting on appeal from the Supreme Court of the Northern Territory delivered 17 August 1984; Bain v The Queen (1983) 47 ALR 472; The Queen v Brusch; Brusch v The Queen (1986) 11 FCR 582; and R. v Raggett, Douglas and Miller, unreported decision of the NT Court of Criminal Appeal delivered 28 September 1990).

In amplification of its grounds of appeal, the Crown submitted that a non-parole period of four years is out of proportion to the gravity of the offence, fails adequately to reflect the fact that the offence was committed shortly after release on parole for a strikingly similar offence and, when measured against the totality of the prisoner's criminality, is manifestly inadequate.

The grounds of cross-appeal amplified in argument were that the head sentence is manifestly excessive and crushing, and that the difference between the head sentence and the non-parole period is too great. It was submitted that the head sentence should be reduced and the non-parole period confirmed.

The principles upon which this Court will approach a Crown appeal are well known and were enunciated in R. v Tait and Bartley (1979) 24 ALR 473; Kovac v The Queen (1977) 15 ALR 637; Griffiths v The Queen, supra. The appellate court will only interfere if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. Those principles have been applied by this Court in many instances (see, for example, R. v Yates, unreported decision of the NT Court of Criminal Appeal, 11 December 1986; R. v Ireland (1987) 29 A Crim R 353; 49 NTR 10; Peter David Hogan 30 A Crim R 399; The Queen v Scanlon (1987) 89 FLR 77; R. v Raggett, Douglas and Miller, supra).

Applying those principles, sufficient error has been demonstrated to warrant some adjustment of the sentence imposed on the prisoner. The failure of the sentencing judge to adjust the unexpired portion of the previous head sentence which the prisoner had then to serve by allowing for remissions pursuant to s.15 of the Parole of Prisoners Act, and the unfortunate error which resulted in the prisoner serving an additional seven months of his previous sentence before being considered for parole, are alone ample justification for this Court's intervention.

In the circumstances, this Court is required to consider what sentence would represent an appropriate duly proportioned and properly balanced sentence. The starting point must be the minimum period which the prisoner must serve before being eligible for parole, which will be arrived at by taking into account the nature of the crime and its gravity in the scale of crimes of its type, the need to give close attention to the danger which the offender presents to the community, the prospects of the future progress of the offender and the danger he would present to the community, and all the subjective factors, including his prospects of rehabilitation. Having done that, it is then necessary to structure a proportioned and properly balanced sentence.

In fixing a minimum period this Court also must take into account the likely length of remissions on the head sentence to be imposed:

(a) because, if remissions are not taken into account the non-parole period may be rendered nugatory by the earlier unconditional release of the prisoner on account of remissions on the head sentence, and

(b) because it is the policy of the legislature to confer upon the Parole Board power to impose conditions on the release of prisoners and to supervise those conditions.

(See Reg. v Combo (1971) 1 NSWLR 703; Anderson v The Queen (1977) 19 ALR 212 at 218.)

We were informed, and there is no dispute about it, that the prisoner will be entitled to remissions equal to one-third of the head sentence imposed, regardless of the fact that he has previously served a term of imprisonment. It is necessary to bear that in mind and, in structuring a proper sentence, to pay attention to the obvious fact that the nearer the non-parole period approaches two-thirds of the head sentence the less scope there is for the Parole Board to exercise its functions and the less encouragement would be given to the prisoner to seek release on parole at the expiration of the non-parole period. In other words, the prisoner should not be deprived of the chance of earning his release by responding favourably to his incarceration. A delicate balance has to be achieved and that balance must be a just sentence from the point of the view of the prisoner and of the community.

It was strongly argued on behalf of the prisoner that to arrive at a duly proportioned and balanced sentence, the correct approach is to fix upon what counsel described as the "objective sentence" and then apply subjective factors. That description of the head sentence is taken from the observations of Nader J in R. v Ireland, supra, at pp.22-23. Nader J, in what he himself described as a

digression, purported to enunciate a principle that the objective sentence is the appropriate punishment if there were no mitigating factors and that the sentencer should always have the objective sentence in mind before fixing upon the actual sentence, which will usually be less than the objective sentence. This approach was approved by Kearney J in Sultan v Svikart (1989) 96 FLR 457 at p.462 and R. v Raggett, Douglas and Miller, supra, at pp.19-20 of the roneod judgment.

Whilst I would not purport to give advice to any sentencing judge about how he should arrive at a duly proportioned and balanced sentence, I do not think it appropriate in all cases to follow the two step approach by fixing upon an objective sentence and then applying the matters which would mitigate that sentence before arriving at the actual sentence. I am influenced against that course not only on the basis of my own experience in sentencing, but also by the decision of the Court of Criminal Appeal of Victoria in William Howard Young, Brian John Dickensen, Kelvin Thomas West (1990) 45 A Crim R 147.

In that case the Court found error in the sentencing process based upon the two stage approach. The Court reviewed all the relevant High Court authorities on sentencing and concluded that there is nothing in those

authorities to suggest that there should be a two stage approach to the task of arriving at an appropriate sentence.

In my opinion, the appropriate proportionate sentence should reflect the gravity of the crime in both the head sentence and the non-parole period. The stark realities in relation to this prisoner are that he was to be sentenced for a second offence bearing alarming similarities to his prior offences and committed just one month after the prisoner had been released on parole for those prior offences. In my opinion a non-parole period of four years was manifestly inadequate. The prior offence is highly relevant. The following passage from the judgment of Mason CJ, Brennan, Dawson and Toohey JJ in Veen v The Queen [No. 2] (1988) 164 CLR 465 underlines that relevance (at pp.477-8):

> "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. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's

understanding of what is relevant to the assessment of criminal penalties."

I would not find it necessary to alter the sentence of six months' imprisonment imposed in relation to the offence of unlawfully entering a building with intent to commit the offence of sexual assault.

In relation to the offence of unlawfully assaulting with intent to have carnal knowledge and causing bodily harm and having carnal knowledge of the victim, I would set aside the sentence of 14 years' imprisonment and substitute a sentence of 12 years' imprisonment to be served concurrently with the sentence of six months referred to. To those concurrent periods I would add the unexpired portion of the head sentence which the prisoner had then to serve less remissions, which is two years one and a half months. I would round that figure off to two years, making a total of 14 years.

I think it appropriate to fix a non-parole period of seven years, but would adjust that period to take account of the additional seven months served by the prisoner before being considered for parole in respect of his previous sentence. That process yields a non-parole period of six years five months. The Crown submission was that the inadequacy of the non-parole period fixed could be

remedied by fixing a period of six years, and in all the circumstances of the case I would adopt that submission.

Accordingly the orders I propose are:

(1) that the appeal be allowed and the cross-appeal be dismissed;

(2) that the sentence imposed be set aside and in substitution therefor the prisoner be sentenced for the offence of unlawfully assaulting with intent to have carnal knowledge and thereby causing bodily harm and having carnal knowledge, to 12 years' imprisonment;

(3) that the prisoner undergo imprisonment for the term that he had not served at the time when he was released from prison in pursuance of the parole order, and that that term of imprisonment commence at the expiration of the term of imprisonment to which he is now being sentenced;

(4) that a non-parole period of six years during which the prisoner will not be eligible for parole be fixed; and

(5) that the head sentence and non-parole period date from 9 March 1990.

ANGEL J: I generally agree with the reasons and conclusions of Gallop J but desire to say something about a particular submission of counsel for the respondent concerning the head sentence.

In the course of his forceful submission that the 14 year head sentence was manifestly excessive, counsel for the respondent submitted that there was a two stage process in fixing a head sentence. First, it was said, one had to look objectively at the offence to fix a provisional sentence that was appropriate for the offence, and secondly, one had to look at the respondent and the circumstances subjective to him, including his criminal record in order to ascertain what, if any, mitigatory factors there were to reduce the provisional sentence previously arrived at. It was impermissible to look at the appellant's prior criminal record, it was said, other than to ascertain the leniency, if any, that might be extended to him once one had settled upon a previously arrived at objective sentence. Here, it was said, the objective facts of the instant offence bore a striking resemblance to the respondent's previous offence. A head sentence of 6 years had been imposed in respect of the previous offence and parity of sentencing demanded, it was said, that the instant offence could not attract a higher or substantially higher provisional head sentence. We were referred to a

number of other sentences for rape and certain statistical information. It was argued that the penalty must fit the objective circumstances of the offence. The sentence had to be, it was said, proportional to the gravity of the offence. The respondent having served his sentence for the previous offence and, subject to being separately dealt with for breach of parole, could not be punished again for the former offence when being sentenced for the instant offence. It was submitted that propensity to offend again could not justify preventative detention for the purpose of protecting society and that the head sentence here contained that element. Counsel for the respondent particularly criticised the following sentencing remarks of the learned sentencing Judge:

> "I think it likely that if the information available to me had been available to the judge who had previously sentenced you, then that sentence may not have been as heavy as it was, but nevertheless, a significant period of imprisonment was called for and the facts surrounding the present offence demonstrate that notwithstanding the substantial period in gaol and its consequences, you did not learn your lesson.
>
> Taking those factors into account, I'm satisfied that the community demands that the sentence to be imposed upon you on this occasion and the minimum period which you must serve be in excess of those determined on the previous occasion.
>
> These were crimes of violence and as things stand at the moment, there must be a real likelihood of your re-offending in a similar way. There is a real need to protect the community against you and those considerations weigh heavily in this case."

It was submitted that the objective facts of the respondent's instant offence justified a head sentence of 10 years at most. The sentence for the respondent's previous offence and other statistics, it was said, established that the head sentence on the second count, the subject of the cross-appeal, was manifestly excessive.

Counsel for the respondent relied upon the following passage from the reasons for judgment of the majority in Veen v The Queen [No.2] (1988) 164 C.L.R. 465 at 472:

> "The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in Veen [No. 1] that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender ..."

and the statement of Gaudron J (dissenting) at 496:

> "I also agree with Wilson J that neither considerations of community protection nor the repetitive nature of the offence should have the effect of increasing a sentence beyond that appropriate to the offence when the offence is viewed objectively. In practical terms this means that the fact that the prisoner has previously offended or that he is likely to re-offend in like manner should be considered by the sentencing judge only as a matter militating against leniency which might otherwise be afforded by reason of considerations personal to the prisoner."

Counsel for the respondent also relied upon the following passage in the reasons for judgment of the court in Baumer v The Queen (1988) 166 C.L.R. 51 at 58:

> "Propensity may inhibit mitigation but in the absence of statutory authority it cannot do more. In applying a section like s.154, the sole criterion relevant to a determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence."

He also relied upon the following passage in the reasons for judgment of the court in Hoare v R; Easton v R (1989) 167 C.L.R. 348 at 354:

> "Secondly, a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.",

the court citing Veen [No. 2], supra, at 472, 485-486, 490-491, 496. Counsel also relied upon the comments of Kearney J in relation to recidivism in Sultan v Svikart (1989) 96 F.L.R. 457 at 462; 42 A. Crim. R. 15 at 19, 20.

In R v Jabaltjari (1989) 64 N.T.R. 1 at 20, 21, 32, members of this court expressed difficulty with the concept of a tariff for rape cases, but I do not think the question

of a tariff or no tariff is relevant to the present submission.

I think counsel for the respondent's submission as to the use to be made of the respondent's prior criminal record is wrong. I think it is wrong in principle and contrary to authority binding on this court. I shall endeavour to say why I think it is contrary to principle. I say 'endeavour' because of "... the ease with which obscurity of meaning can infect this area of discourse": Veen v The Queen [No. 2], supra, per Wilson J at 486, 487.

I think there is an error in the submission and I think it is this: it overlooks that the previous offence of the respondent is a circumstance of the instant offence which bears upon the gravity of the instant offence.

Had a hypothetical disinterested bystander witnessed the respondent's actions, his actus reus, he might have observed little different to the actus reus of the previous offence of the respondent. However, to say the hypothetical disinterested bystander observing only the actus reus, observes the circumstances of the offence is to ignore circumstances relevant to the criminal intent, the mens rea, of the respondent. The fact that the respondent was a convicted rapist at the time of the instant offence demonstrates, prima facie, an increased animus and

culpability for the instant offence which ipso facto is deserving of greater punishment - and this is so quite apart from any question of a general propensity to re-offend after the time of sentencing. To impose a higher punishment a second time round is not a matter of adding anything to a so-called objective sentence; it is not a matter of punishing twice for the earlier offence: it is merely recognising that the prior offence is a circumstance relevant to the mens rea of the offender in committing the instant offence and that there is prima facie increased criminal culpability pertaining to the instant offence. The instant offence demonstrates an added disregard for the law, an added disregard for society in general and a further disregard for a particular member of society (the new victim) in particular. These matters reflect, in the absence of particular exculpatory facts, a more calculated animus in the case of the instant offence, and as I have said, this is so quite apart from any question of propensity to re-offend yet again. When courts speak of the circumstances of the offence they do not mean what the hypothetical disinterested bystander sees and hears at the scene. That is not exhaustive of the circumstances of the offence. The offence is constituted by the actus reus and the mens rea of the offender. So far as consideration of the mens rea of the offender is concerned, the hypothetical disinterested bystander is confined to what is said and done in his presence. There can be many factors relevant

to the mens rea that are not disclosed to the hypothetical disinterested bystander. The offender's mental state at the time of the actus reus is not only to be inferred from the actus reus itself. It can be inferred as much from a proven pre-existing propensity to commit the offence as from a previously stated intention, made elsewhere, to commit the offence. When it is said the punishment must fit the crime, the punishment must fit both the actus reus and the mens rea constituting the crime. A pre-existing propensity to commit a like offence is relevant to the issue of mens rea of the instant offence. A propensity to re-offend in like manner yet again, attracts additional but different considerations apropos the protection of the public.

I think the submission is contrary to both the decision and reasons of the majority in Veen v The Queen [No. 2], supra. Mason CJ, Brennan, Dawson and Toohey JJ said at 477-8:

> "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. Counsel for the applicant submitted that

> antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties."

I do not think the High Court in either Baumer, supra, or Hoare v R; Easton v R, supra, in the passages relied upon was saying anything contrary to this. Veen [No. 2], supra, was cited in each case and if the members of the High Court had intended to qualify the decision or reasons of the majority in Veen [No. 2], supra, they would surely have said so. If Kearney J in Sultan v Svikart, supra, was saying anything contrary to what I have said, then I, with respect, disagree with him. I think the argument misconceives what the High Court in Baumer, supra, meant when it referred to the "circumstances of the offence" and what the High Court in Hoare v R; Easton v R, supra, meant when it referred to "the gravity of the crime considered in the light of its objective circumstances."

In Bugmy v The Queen (1990) 92 A.L.R. 552 at 559, Dawson, Toohey and Gaudron said:

> "Counsel suggested that, since Veen (No. 2), [(1988) 164 CLR 465] a method of sentencing, described as a two-step approach, has developed in the courts. This approach, it was said, involves first determining the outer limit of the sentence and then applying mitigating factors, if any, so as to arrive at an appropriate sentence. It was further suggested that had his Honour adopted such an approach he would have

> been less likely to fall into error. Such an approach was firmly rejected by the Victorian Court of Criminal Appeal in R v Young, Dickensen and West. In the view of that court, this court in Veen (No. 2) 'did not have in mind that a sentencer might, let alone should, proceed to arrive at the sentence to be imposed by a staged or structured approach' ...
>
> Whatever the merits of this debate ..." (my emphasis)

As Kearney J said in R v Raggett, Douglas and Miller unreported decision of the NT Court of Criminal Appeal, 28 September 1990), their Honours in the High Court were noncommittal about the condemnation of a two stage approach to sentencing. In William Howard Young, Brian John Dickensen, Kelvin Thomas West (1990) 45 A. Crim. R. 147, the Victorian Court of Criminal Appeal (Young CJ, Crockett and Nathan JJ), having noted that the High Court decision in Hoare v R; Easton v R, supra, provided no justification for a suggestion that a sentencing judge was obliged to approach his task in two stages or by other formalised steps, said (at 157):

> "The contrary view seems to stem from a notion that the very principle that a sentence must not be disproportionate to the offence charged of itself imposes an order in which a sentencing judge is to consider the factors relevant to his task. It is said that, therefore, a sentencing judge must first fix a sentence which is proportionate to the crime, taking into account some only of the relevant factors. We see no justification for this course whatever and we think that its adoption would be likely to lead either to the imposition of inadequate sentences or to injustice. It would certainly lead to an increase in appeals against sentence." (my emphasis)

It will be seen that the so-called two stage approach referred to by their Honours is somewhat different to that postulated by Dawson, Toohey and Gaudron JJ in Bugmy, supra. Their Honours in the High Court say nothing about leaving out relevant factors in fixing the outer limit of a sentence. With the profoundest of respect to the protagonists, I do not think there is really much to debate. I do not think there is any difference in principle between the one stage approach and the two stage approach once each is seen in its proper perspective. In the so-called one stage approach, the sentencing judge objectively looks at all relevant facts pertaining to the offence and the offender, and fixes a sentence to fit the offence and the circumstances of the offender. In the so-called two stage approach, the sentencing judge objectively looks at all relevant facts pertaining to the offence, that is, he looks at all facts (both aggravating and mitigatory) relevant to the actus reus and mens rea constituting the offence. He then provisionally decides what penalty is proportionate to that offence committed in the proven circumstances. Having necessarily looked at the offender in the course of that exercise he then turns to the offender again to see what matters, subjective to the offender and extraneous to the offence, for example, a contrite plea, supervening physical or mental infirmity, extraordinary family circumstances or other circumstances extraneous to the offence, which might mitigate the

provisional sentence first arrived at. I do not, with respect, see that the latter method, so stated, is subject to the reproach of the court in Young, Dickensen and West, supra, nor do I see that either method is wrong in principle or is to be preferred to the other. Both, it seems to me, ultimately have regard to the same factors, allow the same discretion to the sentencing judge (the two stage approach only means he pauses along the way) and are likely to lead to the same or a similar result. In my view, neither approach is innately preferable to the other. In other words, in my respectful view, obscurity of meaning has led to much misunderstanding and an apparent difference where in reality there is no difference. Each approach, or so it seems to me, is an endeavour, in the oft repeated words of Napier CJ in Webb v O'Sullivan [1952] S.A.S.R. 65 at 66: "... to make the punishment fit the crime, and the circumstances of the offender, as near as may be."

Having regard to my discussion above concerning culpability in the case of re-offenders, I would only add that on either approach to sentencing, the court recognises that in some cases protection of the public has a role to play even to the point of altogether overriding the question of moral culpability; see Veen [No. 2], supra, at 475 to 477.

I agree with the orders proposed by Gallop J.