PARTIES:	THE QUEEN
	v
	AH SAM, Shane
TITLE OF COURT:	COURT OF CRIMINAL APPEAL (NT)
JURISDICTION:	DARWIN
FILE NO:	CA 4 of 1994
DELIVERED:	15 MARCH 1995
HEARING DATES:	1 DECEMBER 1994
JUDGMENT OF:	MARTIN CJ., ANGEL & PRIESTLEY JJ.

CATCHWORDS:

Criminal Law - Appeal - Crown - Sentence - Plea of guilty - Assault with intent to have carnal knowledge - Gross indecency involving children under fourteen -

Criminal Code 1983 (NT), ss129(1) & (2), s192(1),(2) and (4)

Criminal Law and Procedure - Approach - Error of principle - Manifest inadequacy or inconsistency - Crown right of appeal against sentence -

Criminal Code 1983 (NT), s 414(1)

Everett v The Queen (1994) 124 ALR 529, distinguished.
Griffiths v The Queen (1977) 137 CLR 293, followed.

Criminal Law and Procedure - Difference between rape and carnal knowledge - Absence of consent - Seriousness of offence -

Criminal Code 1983 (NT), ss129 & 192 -

Criminal Law and Procedure - Sentencing - Mitigating factors - Weight - Matters not taken into account - Factors to be taken into account - Too much emphasis on rehabilitation - Deterrence and retribution - Nature of crime - Gravity of offence -

Power v The Queen (1994) 131 CLR 623, referred to.
Bugmy v The Queen (1990) 64 ALJR 309, referred to.
R v Mulholland (1991) 1 NTLR 1, approved.
R v Babui (1991) 1 NTLR 139, approved.

REPRESENTATION:

Counsel:

Appellant: Mr C Cato
Respondent: Mr J Lawrence

Solicitor:

Appellant: Ms K Channells
Respondent: Mr J Lawrence

Judgment category classification:
Judgment ID Number:
Number of pages: 41

DISTRIBUTION: LOCAL

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

No CA of 1994

BETWEEN: THE QUEEN
Appellant

AND

SHANE AH SAM
Respondent

CORAM: MARTIN CJ, ANGEL and PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 15 March 1995)

MARTIN CJ. & PRIESTLEY J:

Appeal by Crown Law Officer. This is an appeal by the Director of Public Prosecutions against the sentences imposed by Kearney J upon the respondent following his plea of guilty to an indictment charging him with eleven crimes. The appeal is authorised by s 414(1) of the Criminal Code, which so far as relevant says:

"A Crown Law Officer may appeal to the Court -

(a) ...

(c) against any sentence with respect to a crime ... and the Court may, in its discretion ... vary the sentence and impose such sentence ... as the Court thinks proper."

The eleven crimes charged to which the respondent pleaded guilty: Nine of the charges to which the respondent pleaded guilty were of unlawful assault with intent to have carnal knowledge, involving the

circumstances of aggravation that the accused was an adult and by the assault had carnal knowledge of a female under sixteen.

These were offences contrary to s 192(1), (2) and (4) of the Code. At the time of the offences "carnal knowledge" was defined as meaning "sexual intercourse, sodomy or oral sexual intercourse" (s 2 of the Code). An unlawful assault within the meaning of s 192(1) was one for which there was no authorization, justification or excuse (s 2 of the Code). It was accepted at the hearing of the appeal that an assault without authorization, justification or excuse whereby the assaulter had carnal knowledge of the person assaulted (an offence formerly called rape) must involve the offender having sexual intercourse without consent. It was also accepted that the Crown, to establish a case of unlawful assault whereby the offender had carnal knowledge of the victim, must negative consent by the victim.

The maximum penalty for each of the nine offences contrary to s 192 was life imprisonment.

The other two charges to which the respondent pleaded guilty were of acts of gross indecency involving the circumstances of aggravation that the accused was an adult and the victims were females under fourteen. These were offences contrary to s 129(1) and (2) of the Code.

The maximum penalty for each of these offences was fourteen years.

The victims: The eleven offences were committed against four females, called in the proceedings DL, LA, KA and DA. Three of the s 192 offences were committed against DL when she was seven and eight, three against LA when she was eight, one against KA when she was eleven and another when she was twelve, and one against DA when she was five. One of the two s 129 offences was committed against DL when she was eight, the other against KA when she was eleven.

LA, KA, and DA were sisters.

The sentences: Kearney J imposed an effective head sentence for all offences of seven years, with a non-parole period of two years.

Facts: The respondent was born on 10 November 1972. Between 1 January 1991 and some date towards the end of 1992 he was living with the family of DL, who was his niece. Three of his offences against DL were committed when, during that period, on two occasions in the home, and on a third in the bush, he "placed his penis in her vagina", to use the words of the prosecutor at the sentencing hearing. No other factual detail of these acts was given, beyond that on one occasion the respondent ejaculated, and on a second he did not, nothing being said about the third. However, the court must treat the intercourse on each occasion as having been without DL's consent, this being necessarily admitted by the respondent's pleas of guilty. The respondent's fourth offence against DL, that of gross indecency, happened during December 1992, while he and DL were in his car at her grandfather's place, when he "rubbed her vagina with his hand".

LA, KA and DA were daughters of the respondent's stepsister. Their family moved to Darwin in about June 1992 and the respondent went to live at their home about the end of the year. The three s 192 offences against LA were committed between 30 September 1992 and 1 January 1993, the first at the home of DL, the second at the respondent's stepsister's house, that is, LA's home, and the third in the respondent's car in the bush. On the first occasion, LA was in the respondent's bedroom, "he pulled her pants down and placed his penis inside her vagina". On the second occasion, in the early hours of the morning, the respondent found LA asleep on a bed in the lounge room,

> "placed his penis inside her vagina and had sexual intercourse with her without waking her, ... then picked her up, took her into his bedroom ... placed his penis back inside her vagina and continued sexual intercourse. He was interrupted by LA's sister knocking on the bedroom door. LA awoke ... the accused gave LA $10 later on that same morning."

On the third occasion the respondent "put his tongue around inside her vagina".

The respondent's three offences against KA were committed between 1 July 1992 and 1 January 1993. The first was a s 192 sexual assault in the home. KA slept through the respondent putting his penis into her vagina and ejaculating. The second was a s 129 act of gross indecency, which took place at the home, when the respondent put his fingers inside KA's vagina. She began to cry. The third was a s 192 sexual assault at a house in Jingili. Against KA's objection the respondent "inserted

his penis into her vagina ... (and) withdrew before ejaculation".

The respondent's s 192 sexual assault against DA took place between 28 February 1993 and 1 April 1993, in the home; the respondent "pushed his penis into her vagina remaining inside her until he ejaculated".

In April 1993 the father of LA, KA and DA became suspicious of the accused. Two of the girls complained and the father discovered what had happened. The respondent, who was still living with the family, was ordered out of the house and went to Western Australia.

Arrest, charges, extradition, bail: The respondent was located by police in Perth in June 1993 and when interviewed by them at first denied molesting the girls, but after their statements were read to him, made some admissions. In the interview he admitted all the offences with which he was later charged.

He was then extradited to the Northern Territory where he acknowledged to the Northern Territory police the admissions made in Western Australia. He was later committed for trial and set free on bail. One condition of bail was that he obey all reasonable directions about attending for psychological assessment and counselling, and at the time of sentencing he had been observing this condition for seven months. The respondent was undertaking a course at the Tamarind Centre, which was directed specifically to helping and rehabilitating people guilty of sexual offences.

The sentencing hearing: Kearney J had before him the following material: a report from a psychologist dated 28 February 1994, a pre-sentence report from the Probation and Parole Officer to which was annexed a letter of 30 May from a counsellor with the Community Drugs and Alcohol Services, a letter from the psychologist updating his previous report and a form of contract into which the respondent entered as part of the "Sex Offender Treatment Program". These materials indicated that the respondent had a difficult childhood, claimed to have been sexually abused when young, and that he had been a heavy user of marijuana which may have contributed to his behaviour which led to the crimes. The psychologist stated that the respondent was serious about his treatment at the Tamarind Centre, had benefited from the program, and that his prognosis was good.

The sentencing judge also considered statutory declarations from the fathers of the four victims describing the effects of the crimes upon their daughters and other family members. These were tendered without objection.

Confining ourselves to what was said in the declarations about the victims, DL's father's account was to the effect that she had been showing signs of significant disturbance over a significant period, attributed to what the respondent had done to her. The father of LA, KA and DA gave details of KA's activities, attributed to what the respondent had done, showing distinctly adverse developments in her behaviour. He had not noticed any adverse effects on LA and DA. Although this material is rather unclear in some ways, it was

before the court, and no challenge was made to it on behalf of the respondent. Of it, Kearney J said:

> "This court frequently receives information about the impact of crimes on victims because that's clearly a factor with some relevance to sentencing.
>
> As I say this information was placed before me without objection. There is no statutory basis in this jurisdiction which regulates the significance of victim impact statements for sentencing purposes. Some other states have looked into it and, indeed, I think in South Australia there's a special statutory provision which requires the prosecutor to furnish the court with particulars of the victim's injury and requires the court to have regard to the victim's personal circumstances and loss.
>
> Although there's no such statutory provision here, it's normal for the court to take account of the effect of crime upon a victim to some extent. The court, however, takes an objective approach to assessing the impact of crimes upon victims. It's important, at least as the law now stands, that the court be seen to be impartial and independent and sentencing in the interests of the entire community and not just in the interests of the victim; there's a need to strike a balance. So I bear in mind what's said in those statutory declarations but it doesn't really count in the way of the sentence which I'm going to impose upon you."

In his subsequent remarks on sentence the judge rightly emphasised the serious nature of the crimes and responsibility of the legal system to protect children from such crimes by imposing severe punishment. However, his Honour found that the following mitigating factors were relevant. Firstly, the respondent was a young man, 18 at the time of the first offence and 21 when before the Court. Secondly, there was no particular violence alleged against the respondent in any case. Thirdly, the

respondent was remorseful. Fourthly, he sought treatment and the prospects of his rehabilitation, if he pursued that treatment, were very good. Fifthly, the respondent avoided the need for the young children to testify by pleading guilty and agreeing to a "hand-up committal". Sixthly, for some of the victims there was no evidence that they had sustained psychological damage, although the judge acknowledged that it was not possible to be sure of this. Seventhly, the respondent had no criminal record. Eighthly, when imprisoned the respondent would probably have to be kept in solitary confinement, for his own protection. Finally, the judge did not consider, on the evidence, that the respondent was a continuing danger to society provided he received treatment. His Honour considered that the object of protecting the community would be best served by a sentencing disposition which would best ensure the respondent's rehabilitation. Against these mitigating factors his Honour weighed the fact that the respondent had breached the trust which the families of the four girls placed in him and the fact that the crimes against DL were part of a lengthy course of conduct over two years.

The sentences in detail: The sentences imposed in respect of each offence separately were as follows:

> "In relation to count 1 - that is, the first rape upon the child DL - the sentence is four years imprisonment. In relation to counts 2 and 3 - that is, the other two rapes upon DL - the sentence is three years imprisonment on each count. In relation to count 4 - that is, the act of gross indecency upon DL - the sentence is one year's imprisonment. In relation to counts 5 and 6 - that is the first two rapes upon the child LA - the sentence is four years imprisonment on each count. In relation to

> count 7 - that is, the third rape on the child LA - the sentence is two years imprisonment. In relation to count 8 - that is, the first rape on the child KA - the sentence is four years imprisonment. As to count 9, the act of gross indecency, the sentence is two years imprisonment. As to count 10 - that's the second rape on the child KA - the sentence is four years imprisonment. Finally, in relation to count 11, the rape of the child DA, the sentence is five years imprisonment."

Application of the totality principle: Kearney J, applying the totality principle, made the sentences for counts 2, 3 and 4 concurrent with the sentence for count 1, the sentences for counts 6 and 7 concurrent with the sentence for count 5, and the sentences for counts 9 and 10 concurrent with the sentence for count 8. The sentence for count 5 was to commence after the respondent had served one year of the four year sentence for count 1, and the sentences for counts 8 and 11 were to commence after he had served two years of the sentence for count 1. 24. The effect was a total head sentence of seven years. In view of the mitigating factors and in particular the respondent's good prognosis for the future, the judge fixed a non-parole period of two years.

Grounds of Appeal: submissions for Crown: The grounds of appeal state in a short and convenient form the points that were made for the Crown in argument.

Ground 1.

1. That the learned sentencing judge erred in imposing an ultimate sentence which was manifestly inadequate in all the circumstances of the case.

Ground 2.

2. That the learned sentencing judge erred in fixing a non-parole period that was manifestly inadequate in all the circumstances of the case.

Ground 3, 4 and 5.

3. In regard to counts 1 and 11, the maximum sentence of four and five years imprisonment was manifestly inadequate bearing in mind:-

   (a) the age of the victims;

   (b) the breach of trust.

   AND did not

   (a) adequately punish the offender;

   (b) provide deterrence;

   (c) protect children from offending of this kind;

   (d) reflect the community's concern and condemnation of sexual offending of this kind in relation to young children.

4. That the ultimate sentence and the period fixed for non-parole:-

   (a) bears no adequate relationship to the number of offences including:-

      (i) the number of offences of aggravated sexual assault involving non-consensual intercourse;

      (ii) the fact that the offences involved four young victims;

      (iii) the period of time over which the offending took place;

      (iv) the breach of trust involved in each case;

(v) the trauma and effect of such activity on young children;

(vi) the prevalence of sexual offending in relation to young children in the community;

(b) fails to adequately

(i) punish the respondent;

(ii) provide deterrence;

(iii) protect children from offending of this kind:

(iv) reflect the community's concern and condemnation of sexual offending of this kind in relation to young children.

5. That the learned sentencing judge, in applying the totality principle, gave insufficient regard to the factors or principles contained in (4) in assessing the length of the head sentence, and the length of the non-parole period.

Ground 6.

6. That the learned sentencing judge misdirected himself in taking into account as a "mitigating" factor the fact that there was no "particular" violence alleged in each case.

Grounds 7 and 8.

7. That the learned sentencing judge placed too much weight on subjective factors and thereby devalued the objective considerations requiring a higher ultimate head sentence and non-parole period as referred to in paragraph 3.

8. That the relationship between the ultimate head sentence and the non-parole period is not properly balanced.

Respondent's submissions: In the submissions for the respondent, counsel laid emphasis on all the factors that Kearney J had taken into account in favour of the respondent, and referred to the cases which say that a court of criminal appeal must be very cautious in allowing a Crown appeal against sentence and will only do so when there has been a well demonstrated mistake on the part of the sentencing judge or where the sentences are so very obviously inadequate that they are unreasonable or plainly unjust. It was submitted that the sentence imposed on the respondent had been lenient, but not appellably inadequate.

The court's jurisdiction on Crown appeals: The approach which the cases recommend courts of criminal appeal should take to Crown appeals against sentence has been frequently discussed: the principal cases were recently collected in the High Court, in *Everett v The Queen* (1994) 124 ALR 529. The appellants in that case had been convicted in the Supreme Court of Tasmania. The sentencing judge, Slicer J, sentenced them to terms of imprisonment, which he suspended. The Crown applied for leave to appeal against the sentences. The Tasmanian Court of Criminal Appeal granted leave to appeal, allowed the appeal and varied the sentences in a way requiring the appellants to serve a term of imprisonment. The High Court granted the appellants special leave to appeal against the decision of the Court of Criminal Appeal granting leave to

appeal to that court. The High Court then ordered that the orders of the Tasmanian Court of Criminal Appeal be set aside and directed that instead an order be made dismissing the Crown application for leave to appeal to the Court of Criminal Appeal.

In joint reasons for their decision, Brennan, Deane, Dawson and Gaudron JJ emphasised that where the Crown must obtain the leave of the Court of Criminal Appeal before the court will entertain a Crown appeal against sentence, "the jurisdiction to grant leave ... to appeal against sentence should be exercised only in the rare and exceptional case" (at 531). McHugh J, in separate reasons, made the same point (at 536-7).

Those observations do not apply directly to the present case, for in this jurisdiction the Crown does not have to seek leave to appeal against sentence but, by s 414(1) of the Code, has a right to appeal.

The direct relevance of *Everett* for present purposes is that in discussing the particular question which the court there had to deal with, Brennan, Deane, Dawson and Gaudron JJ approved the following statement by Barwick CJ in *Griffiths v The Queen* (1977) 137 CLR 293:

> "an appeal by the Attorney General should be a rarity, brought only to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons." (at 310)

The significance of the reference in Everett to Griffiths is threefold: Griffiths was an appeal from the New South Wales Court of Criminal Appeal which had upheld a Crown appeal against sentence. The appeal to the Court of Criminal Appeal had been as of right, there being no need, as there is no need in the Northern Territory, for any application for leave.

The next point of present significance is that after Brennan, Deane, Dawson and Gaudron JJ cited in Everett the passage I have set out above from Griffiths, they proceeded to clarify its meaning, by going on to say:

> "The reference to 'matter of principle' in that passage must be understood as encompassing what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which Barwick CJ saw as constituting 'error in point of principle'." (at 532)

The third point presently relevant is that the full sentence from which the words of Barwick CJ quoted were taken, read:

> "Gross departure from what might in experience be regarded as the norm may be held to be error in point of principle." (at 310)

So, what the High Court has indicated in Everett, in regard to Crown appeals against sentence, where there is a right of appeal, is that they should only be brought to establish some point of principle, including the correction of gross departure from what might in experience be regarded as the norm for the type of case involved, but bearing in mind also that "gross departure" was such as showed "manifest inadequacy or inconsistency".

It may be of some importance that Barwick CJ's observations were directed at the bringing of Crown appeals by the appropriate authorities, not directly at the exercise of jurisdiction by a Court of Criminal Appeal, once invoked. In any event, if in an appeal as of right against sentence, the Crown contends that there has been an error of principle by the sentencing judge, or that the sentence in itself demonstrates manifest inadequacy or inconsistency, then the Court is bound to consider those contentions and act according to the views it forms upon them. If the contentions are not upheld, the sentence will stand. If the contentions are accepted, then, s 414(1) of the Code authorises this court, in its discretion, to vary the sentence.

Should the court accept the Crown's contentions in the present case? It seems that counsel for the respondent at the sentencing hearing directed his submissions to the question whether the respondent should serve any time in custody at all; to a discernible extent he succeeded in making the issue: custody or no custody? Kearney J was firmly against him on this issue. He said:

> "These 11 crimes all involve sexual offences against children, and nine of them amount, as I say, to what's called 'rape'. The crime of rape is in itself a very serious crime at any time, but when it's committed on young and therefore helpless children, it's given by the law an extra dimension of gravity."

However, he then went on to enumerate the mitigating factors earlier listed. They are powerful considerations, and we acknowledge also the width of the discretion available to a sentencing judge. But there are some

features of the remarks on sentence which seem to be properly describable as errors of principle, or the overlooking of material considerations bearing upon sentence, which need to be dealt with.

The observation (in the passage set out at p 7 above) that the evidence of the effect upon the victims of the respondent's offences "doesn't really count in the way of the sentence which I'm going to impose upon you", is a departure from a current sentencing practice correctly recognised by the judge himself. Once he had said that information about the impact of crimes on victims was clearly a factor with some relevance to sentencing, it was inconsistent to say it did not really count. Some consideration should have been given to the weight, whether that turned out to be great or little, of the information in the fathers' declarations.

Allied with this is the scant consideration given overall to the effect of the offences on the victims. It is true there was no psychiatric evidence of the likely effect of the offences on the four victims. But the judge appears to have accepted assertions made on behalf of the respondent that his conduct had been affected, and his offences were partly explained, by abuse in his childhood. This is important, not so much as showing inconsistency in the sentencing process, as in emphasising the need for especial weight to be given to deterrence in such cases.

A further feature to which insufficient attention was given, was that the nine s 192 offences all involved lack of consent. Although Kearney J several times referred to the offences as what was formerly called rape, he does not

appear to have taken into account what was bound up in that description, which is that there were nine instances of an actual assault upon a non consenting young female, consisting in sexual penetration. Although this may involve no actual violence, in the sense of blows or extreme force, such an event is of its nature violent in a very real sense of the word.

We mentioned when setting out the facts of the offences against DL how few were placed before the Court. The position was the same in regard to most of the offences against LA, KA and DA also. No direct mention was made, in the s 192 cases, of facts relating to non-consent. However, this was admitted by the respondent's pleas of guilty. The statements of the four victims were not before the court. It would seem that the facts presented to the court were based on the admissions of the respondent. We assume this situation came about from a very understandable and proper effort by all concerned to avoid the need to again go over with the four victims the details of what had happened to them. In some ways this may have been an advantage to the respondent (and to some extent it was to his credit) but, for example, in the case of DA, it leaves as the relevant factual situation, the stark picture of a twenty year old male having full non consensual sexual intercourse with a five year old female.

There is a very important difference between s 192 ("rape") cases and s 129 ("carnal knowledge") cases, reflected in the difference between their maximum penalties, life imprisonment for the former, seven years for the latter if the female is fourteen or more and under sixteen, and fourteen years if the offender is adult and

the victim under fourteen. That difference is that consent is irrelevant to proof of an offence under s 129, but must be negatived in s 192 cases.

The absence of consent must be a matter to be borne in mind in sentencing offenders convicted on s 192 charges, particularly when the victims are children. More weight should have been given in these cases to this aspect of the matter. It bears heavily on the seriousness of the offence when compared with other sexual offences.

So far as deterrence is concerned, it is to be remembered that these offences all occurred in suburbs of Darwin, and it is the communities of those suburbs whose interests must be borne in mind in particular.

What has been said so far leads to the conclusion that strong though the mitigating factors were on which the sentencing judge relied, by not taking into account the matters mentioned, or in the case of some of them, by not giving appropriate weight to them, he was led to undervalue the weight to be given to both deterrence and retribution, and to undervalue it to a degree greater than exercise of discretion should have permitted. This is demonstrated particularly, although not exclusively, by the period during which it was ordered the respondent would not be eligible for release on parole, 2 years. This Court has applied the decisions of the High Court in *Power v The Queen* (1994) 131 CLR 623 and *Bugmy v The Queen* (1990) 64 ALJR 309 and other cases in relation to the provisions of the *Parole of Prisoners Act* (*R v Mulholland* (1991) 1 NTLR 1, *R v Babui* (1991) 1 NTLR 139). As in the latter case (at p143) the Crown submission here was to the

effect that the non-parole period fixed gives far too much emphasis to rehabilitation and insufficient emphasis to the factors of deterrence and retribution, features which loom large in relation to offences of this nature, especially involving very young females. In *Mulholland* at p9, Gallop J. with whom Asche CJ. and Angel J. agreed, placed amongst the matters to be considered, before arriving at a proportioned and properly balanced sentence, "the nature of the crime and its gravity in the scale of crimes of its type". Both of those factors weigh heavily against the respondent and his Honour did not give them the effect they required.

A further factor which strengthens this view is the number of the crimes and the period over which they were committed. They cannot be treated as one episode of criminality. They were serious, separate, crimes. In view of the maximum penalty prescribed, and what is regularly taken to be prevailing community attitudes to crimes of this kind, the overall sentence arrived at by the sentencing judge was manifestly inadequate. The court should vary the sentence.

If the court decides to do that, it must then decide, in its discretion, what sentence should be imposed. The various considerations which are relevant have been mentioned. Giving as full weight as we can to the mitigating circumstances relied upon by the sentencing judge, taking into account the factors the other way earlier discussed, our opinion is that the sentences for the respondent's crimes should be restructured to result in an overall sentence of nine years with a non parole period of five years.

The sentencing judge said that he noted with regret that the type of treatment the respondent had been receiving at the Tamarind Centre was not then available at the prison. If that is still the case, we agree. It would obviously be desirable from the viewpoint both of the respondent and the community if arrangements could be made for the continuation of that treatment. We also support the sentencing judge's observation that it is highly desirable that the conditions of any parole the respondent may in future be granted should include conditions requiring him to receive suitable treatment to be rehabilitated. A copy of these observations should be kept upon the respondent's file in his place of custody.

So long as effective rehabilitation programmes are not available to those in custody but only upon release into the community, then the Courts may lean towards release before the time which would otherwise be appropriate.

ANGEL J:

Crown appeal as of right against sentence pursuant to s414(1) of the Criminal Code (NT).

On 29 April 1994, the respondent pleaded guilty to 11 counts. The first three counts of aggravated sexual assault - rape - contrary to s192(1)(2) and (4) of the Criminal Code involved a seven year old female victim, whom I shall call 'DL'.

The fourth count was an act of gross indecency, contrary to s129(1)(b) and (2) of the Criminal Code which involved the same female complainant when she was aged eight years.

The fifth, sixth and seventh counts were that of aggravated sexual assault - rape - contrary to s192(1)(2) and (4) of the Criminal Code which involved an eight year old female complainant, whom I shall call 'L'.

The eighth count was that of aggravated sexual assault - rape - contrary to s192(1)(2) and (4) of the Criminal Code involved an 11 year old female complainant, whom I shall call 'K'.

The ninth count was that of an act of gross indecency, contrary to s129(1)(b) and (2) of the Criminal Code which involved the complainant, K.

The tenth count, another charge of aggravated sexual assault - rape - contrary to s192(1)(2) and (4) of the Criminal Code involved the complainant, K, when she was 12 years of age.

The eleventh and last count was that of aggravated sexual assault - rape - contrary to s192(1)(2) and (4) of the Criminal Code which involved a five year old female victim, whom I shall call 'DJ'.

So, in all, the respondent pleaded guilty to nine rape counts and two counts of gross indecency committed upon four female victims whose ages range from 5 years to 12 years.

The learned sentencing Judge sentenced the respondent to the following terms of imprisonment:

Count 1:	4 years
Count 2:	3 years
Count 3:	3 years
Count 4:	1 year
Count 5:	4 years
Count 6:	4 years
Count 7:	2 years
Count 8:	4 years
Count 9:	2 years
Count 10:	4 years
Count 11:	5 years.

He ordered that the sentences for counts 2, 3 and 4 be served concurrently with the four year sentence for count 1, that the sentences for counts 6 and 7 be served concurrently with the sentence for count 5, and that the sentence for count 5 commence after the respondent had

served one year of the four year sentence on count 1. He further ordered that the sentences for counts 9 and 10 be served concurrently with the sentence for count 8 and that the sentence for count 8 commence after the respondent had served two years of count 1. He further ordered that the sentence for count 11 commence after the respondent had served two years of the sentence for count 1. The net effect of the orders made by the learned sentencing Judge was that the respondent was ordered to serve a period of seven years imprisonment. The learned sentencing Judge fixed a non-parole period of two years.

The grounds of appeal are as follows:

"1. That the Learned Sentencing Judge erred in imposing an ultimate sentence which was manifestly inadequate in all the circumstances of the case.

2. That the Learned Sentencing Judge erred in fixing a non-parole period that was manifestly inadequate in all the circumstances of the case.

3. In regard to Counts 1 and 11, the maximum sentence of 4 and 5 years imprisonment was manifestly inadequate bearing in mind:

   (a) the age of the victims;

   (b) the breach of trust.

   AND did not

   (a) adequately punish the offender;

   (b) provide deterrence;

   (c) protect children from offending of this kind;

   (d) reflect the community's concern and condemnation Of sexual offending of this kind in relation to young children.

4. That the ultimate sentence and the period fixed for non-parole:

   (a) bears no adequate relationship to the number of offences including:-

      (i) the number of offences of aggravated sexual assault involving non-consensual intercourse;

      (ii) the fact that the offences involved four young victims;

      (iii) the period of time over which the offending took place;

      (iv) the breach of trust involved in each case;

      (v) the trauma and effect of such activity on young children;

      (vi) the prevalence of sexual offending in relation to young children in the community

   (b) fails to adequately

      (i) punish the Respondent

      (ii) provide deterrence;

      (ii)[sic] protect children from offending of this kind;

      (iii) reflect the community's concern and condemnation of sexual offending of this kind in relation to young children.

5. That the Learned Sentencing Judge, in applying the totality principle, gave insufficient regard to the factors or principles contained in (4) in assessing the length of the head sentence, and the length of the non-parole period.

6. That the Learned Sentencing Judge misdirected himself in taking into account as a "mitigating" factor the fact that there was no "particular" violence alleged in each case.

7. That the Learned Sentencing Judge placed too much weight on subjective factors and thereby devalued the objective considerations requiring a higher ultimate head sentence and non-parole period as referred to in paragraph 3.

8. That the relationship between the ultimate head sentence and the non-parole period is not properly balanced."

The applicable principles regarding Crown appeals against inadequacy of sentences are not in doubt. Sentencing being a matter of discretion, there is a strong presumption that the sentences imposed are correct. In order for this Court to interfere, the Crown must demonstrate that the sentences are so very obviously inadequate that they are unreasonable or plainly unjust; the learned sentencing Judge must be shown by the Crown to have either made a demonstrable error or have imposed a sentence that is so very obviously inadequate that it is manifestly unreasonable or plainly unjust, that is, the sentence must be clearly and obviously, and not just arguably, inadequate. It must be so disproportionate to the sentence which the circumstances required to indicate an error of principle. In this regard it is sufficient to refer to *Griffiths* (1977) 137 CLR 293, *Tait and Bartley* (1979) 24 ALR 473, *Anzac* (1987) 50 NTR 6, and *Everett* (1994) 124 ALR 529.

The respondent's crimes were committed at various times between 1 January 1991 and 1 April 1993. Nine of the crimes involved aggravated sexual assaults on four female

children, three of whom were sisters. The other two offences, acts of gross indecency, were committed on two of the same four victims. All of the girls were aged between five and 12 years at the time of the crimes. Three aggravated sexual assaults and one act of gross indecency were committed on DL and took place between 1 January 1991 and 1 January 1993. The first two aggravated sexual assaults occurred when she was seven years of age and the other aggravated sexual assault and the act of gross indecency took place when she was eight years of age. Three of the aggravated sexual assaults were committed on the victim L in the three months between 30 September 1992 and 1 January 1993 when she was eight years of age. Two aggravated sexual assaults and one act of gross indecency were committed on K in the six month period between 1 July 1992 and 1 January 1993. One of those aggravated sexual assaults was committed when she was 12 years of age. The other two offences were committed when she was 11 years of age. The other aggravated sexual assault was committed on DJ on some date between the end of February 1993 and the beginning of April 1993 when she was five years of age.

Aggravated sexual assault - rape - carries a maximum penalty of life imprisonment. The respondent's acts of gross indecency, carried out, as they were, on minors, each carry a maximum penalty of 14 years imprisonment.

The learned sentencing Judge's account of the facts was as follows:

> "There were first, as I say, the four crimes committed on the girl DL in the two year period between 1 January 1991 and 1 January 1993. The first three rapes on that child were committed in her parents' home, where you were then residing.

The first rape was committed sometime in 1991. You were then looking after her; she was aged seven. You were also looking after her brother. You had just finished bathing the brother when she came naked into the bathroom to have a bath. When the brother left the bathroom you picked her up, you sat her on the bench, you dropped your trousers and you placed your penis in her vagina and then you had sexual intercourse with her until you ejaculated.

The second rape on the child DL took place in the latter part of 1992; she was still seven years of age. You took her for a drive, you parked the vehicle in the bush - she was only wearing a pair of knickers at the time, you put her on the bonnet of the vehicle, you pulled her knickers down, you placed your penis in her vagina.

The third rape on the child took place some time in the month between 31 July and 1 September 1992; she was then aged eight years of age and with some other children she was actually in your bedroom and listening to music. All the other children eventually left except her. You then told her to lie on top of you, you placed your hands on her hips and you placed her on top of you, you pulled her knickers to one side, you placed your penis inside her vagina, you had sexual intercourse with her but you did not ejaculate.

The fourth and final crime involving the child DL occurred when she was still eight years of age, some time in the month of December of 1992. She was sitting in your vehicle at her grandfather's residence, you pulled her bathers aside and you rubbed her vagina with your hand.

The other seven crimes were committed on the three sisters, and you're related to them. They all took place towards the end of 1992 and in the early part of 1993. Three of those involved the child whom I've called LA, who was aged eight.

In the first rape which took place in the two-month period between the end of September 1992 and the beginning of December that year, LA was at the home of the parents of the girl I've called DL, where you were then residing, and she was actually in your bedroom and lying on the bed, and while she was lying like that you pulled her pants down, you

placed your penis inside her vagina.

The second rape of the child, LA, took place in the three month period between the end of September, once again, of 1992 and 1 January 1993. This time she was in her own home and at the time you were staying there. She'd fallen asleep in the lounge room, and you came home that night; you went to the lounge room; you removed her knickers; you dropped your trousers; you placed your penis inside her vagina and you had sexual intercourse with her, and I'm told that all occurred without waking her up.

You then picked her up, you took her into your bedroom, you closed the door, placed her on your bed and you continued to have sexual intercourse until you were interrupted by her sister who was knocking at the bedroom door. She woke up, she pulled up her knickers, she walked out of the bedroom. I'm told that all took place in the early hours of the morning and the following day you gave her $10.

The third and final rape on this child took place in the month between 30 November 1992 and 1 January 1993. You picked her up from her residence; you drove her to the bush near Sanderson Primary School; you removed her pants and knickers and you performed the act of cunnilingus on her. That's one form of "carnal knowledge" under the Criminal Code and so it amounts to rape as far as the Criminal Code is concerned.

Your next three crimes involved the child, KA. The first rape occurred in the two-month period between 1 July 1992 and the end of August that year. She was then aged 11. She was staying at the same house as you were. One afternoon she was asleep when you came, and you began to touch her breasts and rub them. You then removed her jeans and knickers, put your penis into her vagina until you ejaculated, and when you'd finished you showered and then you returned to lie down beside her. She was apparently asleep by then.

Then the next crime involving the girl KA was the act of gross indecency, and that occurred in the month between the end of August and the beginning of September - beginning of October, rather, 1992, in the same house. She was then 11, as I say, and she and the girl, DL, were in DL's room. You came into

the room and the three of you were speaking together, until the girl DL fell asleep. You then went to the child, KA; you pulled her knickers to one side; you put your fingers inside her vagina; she began to cry. Her aunt came to investigate. You said that she was upset about something and you carried her to the lounge room where it seems the rest of the family were sleeping.

Then the third crime which you committed on the child, KA, was another rape. That took place in December of 1992 and by then she was 12 years of age. You went to her home to collect some clothes. Then she went back with you to the house where you were then living, and then while the other residents of that house were out, you sat beside her, you began to touch her between the legs. You pulled her knickers to one side. She objected, but you continued with this activity, and you then inserted your penis into her vagina but you withdrew it before you ejaculated. You then took her into the bedroom and you left her there.

Then the final crime involving - or rather the final crime, the eleventh of this series, involved the youngest of these children, DA, and you were living with her family at the time in 1993. This occurred in the month between the end of February and 1 April that year. As I say, she was the youngest of these four, she was five years old at the time. One morning you walked into her room - or rather, she walked into your room, and she was wearing knickers. You talked for some time and then you placed her on her back, pulled her knickers to one side, you dropped your shorts, you pushed your penis into her vagina and you remained inside her until you ejaculated."

The crimes came to light in April 1993 as a result of the suspicions of the father of the three sisters. When interviewed by police in Perth, the respondent made full admissions. The respondent was arrested in June and at the beginning of July 1993 was extradited back to the Territory where the respondent again admitted his guilt to Territory police.

The respondent was bailed and at the time of sentencing on 14 June 1994, had only spent ten days in custody. In the interim, the respondent had been bailed upon conditions, inter alia, that he obey all reasonable directions that may be given to him about attending for psychological assessment and for counselling. The respondent fully complied with that condition and much was made of that by counsel for the respondent in his submissions before the learned sentencing Judge.

The respondent was born in November 1972 in Darwin and at the time of the earliest of these offences, he was 18 years of age. The respondent is single and was educated in Darwin and reached Year 12 at high school. Since leaving school, he has only managed to secure occasional labouring work until he got one year's work from April 1992 to April 1993. The respondent had done some pre-apprenticeship training as a motor mechanic and an office procedures course; and whilst in Perth had started a ten week plant operators' course, of which he had completed four weeks at the time of his arrest. The learned sentencing Judge described the respondent as, "an industrious young man, working when you can". The respondent had no prior criminal record. A psychologist's report was put before the learned sentencing Judge. The learned sentencing Judge said:

> "The earlier report by the psychologist at the end of February this year gives very useful information, once again, as to your early life and upbringing. You claim there to have been sexually molested on one occasion when you were just a very small boy by some young woman. You are also said to have had a low self-esteem and to be chronically depressed and lonely; you've never managed to establish a

relationship, an adult sort of relationship, with a young woman.

You admitted to being a user of drugs in the past, mainly marihuana, the use of which you believe may have been the root cause of these sexual assaults. You are also said to be very remorseful - that is, very regretful - for what's happened and very willing to go into treatment and to be very co-operative in that respect.

In his updated report of about a week ago, the psychologist says that you've been attending individual and group counselling; you've completed two counselling parts of the course and recommended to attend again. You're also attending what's called the 'Main Core Program' in the treatment of sexual offenders and you're in the third week of a four-month period of that course, and if you complete it, you'll be invited to continue on with it.

The psychologist said that you'd benefited from those programs and your behaviour and participation was such as to show that you were by far one of the most conscientious members of the program and that you take very seriously the responsibility for your treatment, and his prognosis for you, as I say, as of a week ago, is that it's "very good". Very good prospects for your breaking away from the sort of behaviour you indulged in over this two-year period.

Then the letter of 30 May from the Community Drugs and Alcohol Services relates to your former drug problem. It sets out a history of heavy use of cannabis over a number of years, but also the fact that you've kept away from it for the past 12 months, and it tells me that the loss of control which you claim was a cause of a number of these offences, can in fact occur with the use of cannabis because it has that type of effect upon the brain.

Then there's the presentence report itself, which is the usual, careful and useful and detailed document. I note what it says about your attitudes and I accept that you are indeed very remorseful for what you did. I also note your father's failing health and the financial burdens which you and your father have been encountering, and I also note the probation officer's evaluation of you and her concluding comments. So much for the information placed before me."

In sentencing, the learned sentencing Judge said:

"These 11 crimes all involve sexual offences against children, and nine of them amount, as I say, to what's called 'rape'. The crime of rape is in itself a very serious crime at any time, but when it's committed on young and therefore helpless children, it's given by the law an extra dimension of gravity.

This is because the community and the legal system through the courts have a special responsibility to ensure the safety of those people in our community who are not able fully to look after themselves; and therefore anyone who takes criminal advantage of children or sick people or old people or people, as I say, who are unable really to look after themselves and protect themselves, people who do that are regarded as particularly vicious criminals, and the community would normally require that they receive what's called "condign" punishment; that is, severe punishment.

So when sentencing for such crimes, the principles of deterrence and denunciation generally have to be given prominence, so that the community detestation of these crimes is made very clear. Usually, that means, in turn, that there's going to be a lengthy custodial sentence, and that is designed for the protection of the community by way of deterring the specific criminal, and also serving as a warning to any other persons who may be tempted to behave in such ways. I'm just stating those matters generally.

Now coming to your particular case, there are of course mitigating factors; that is, factors in your favour. First of all, you're just a young man. Secondly, there's no particular violence alleged against you in each case. Thirdly, I accept that you are now remorseful for what you did and, indeed, that's shown by your guilty plea and by what you've said to others. Fourthly, you've sought treatment so you recognise you have a problem, and you're presently undergoing that treatment and, from what the psychologist said, the prospects of your rehabilitation if you pursue that treatment are very good.

Again, you've avoided the need for these young children to be hailed before a court or courts to testify, as they would've been required if you'd pleaded not guilty. That can involve a very traumatic experience for young children. So it's in your favour that you spared them that by agreeing to what's called a "handup committal" at the committal proceedings, and indicating at an early stage, and adhering to it, that you would be pleading guilty to these charges.

Indeed, in cases of this type involving very young children, it's my experience that the Crown often faces severe problems of proof if there's a trial, and so your frank admission of guilt is very much in your favour and bears particular weight. Again, particularly because you're a young man with many years of your life ahead, the object of protecting the community, it is said, by your lawyer, Mr Somerville, would best be met by some sentencing disposition which would ensure, best ensure, your rehabilitation. So that's a factor as well."

The learned sentencing Judge also said:

"I should say, that while you clearly require treatment, I don't think that, on the evidence, you're a continuing danger to society, provided you get that treatment. I haven't had a psychiatric assessment of you, but the psychological assessment seems to suggest that you're not a paedophiliac.

Weighing against you, on the other hand, in all of these crimes, apart from their intrinsic seriousness, is the fact that you very clearly breached the trust which had been placed in you by the respective families. Moreover, in the case of the first child, DL, this wasn't a case of some momentary loss of control on some isolated occasion, but an extended course of conduct over a lengthy period of some two years. Again, the fact that the sexual interference with these children involved, in nine of those crimes, actual rape, that is, actual penetration, points to a higher sentence, just as it makes the breach of trust in your case more serious.

There are matters to be weighed up everywhere and the

task of sentencing in your case, as indeed in most cases, is not straightforward. I bear in mind everything your lawyer, Mr Somerville, has urged on your behalf. As I mentioned earlier, he stressed that the important objective of protecting the public could best be met in your case by a head sentence which properly reflected the seriousness of your crimes, but also he's suggested you should be released provided your release was conditioned on terms which would enable you to continue the course of treatment which you've been undertaking, and undertaking successfully.

I should just mention, because your father gave evidence that I do bear in mind his sad circumstances, and what appears to be a very creditworthy part you've been playing in looking after him, in assisting him with his daily dialysis, checking his blood pressure and taking his temperature and so forth, and driving him in from the remote bush location in which you both live, many kilometres out of Darwin. Also I bear in mind, somewhat surprisingly, it seems, he hasn't got any source of Social Security benefits and that your own Social Security benefits, I'm told, have been the sole support for yourself and for him up to this time.

So doing the best I can, and weighing up all of these factors which can be said to count in your favour, I nevertheless consider that the appalling nature of your crimes, Mr Ah Sam, are such that there must be a period of actual custodial incarceration.

The proper protection of the community is not met simply by measures which are designed to rehabilitate you. There is also the powerful effect of general deterrence upon others which is also a factor which goes to the protection of the community. A sentence which did not involve some period of actual custodial incarceration in your case would be a sentence which would outrage, in my opinion, the moral conscience of the community."

Counsel for the Crown submitted that as to the overall sentence of seven years imprisonment with a non-parole period of two years, the period was manifestly inadequate, having regard to the serious nature of the offending and

in particular, the tender age of the children, the number of aggravated sexual assaults and other crimes, the period of time over which the children were sexually abused, the breaches of trust, both of the children and of their families involved, and the systematic and predatory way the respondent went about his offending. It was submitted that the actual sentences imposed did not adequately reflect the sentences which the circumstances of the offending required, in particular the sentencing principles of punishment and general deterrence, protection of children from this kind of offending and condemnation reflecting society's recognition and concern that children abused were not adequately reflected in the result. It was said that by contrast, the learned sentencing Judge had "considerably over-valued the subjective factors ... the respondent's age, and the prospect of rehabilitation". It was also submitted that the maximum individual sentence imposed of five years with respect to the victim DJ, a child of five years, was manifestly inadequate and the non-parole period of two years, too, was said to inadequately reflect the seriousness of the offending.

One issue which arose before this Court was whether the learned sentencing Judge had given appropriate weight in sentencing to the effect of the crimes upon the victims. Kearney J said (at page 67 of the Appeal Book):

> "... it's normal for the court to take account of the effect of crime upon a victim to some extent. The court, however, takes an objective approach to assessing the impact of crimes upon victims. It's important, at least as the law now stands, that the court be seen to be impartial and independent and sentencing in the interests of the entire community and not just in the interests of the victim; there's

> a need to strike a balance. So I bear in mind what's said in those statutory declarations but it doesn't really count in the way of the sentence which I'm going to impose upon you."

Kearney J was recognising a current sentencing practice and I do not think that his Honour departed from it, for he says that Courts adopt an objective approach to assessing the impact of crimes upon victims. His words that there is a "need to strike a balance" indicate that the impact on victims can not override other factors relevant to sentencing. It is but one factor in the process of determining an appropriate sentence. In this case, Kearney J identified eight mitigating factors as being relevant and two factors which went against the mitigating factors. When Kearney J said, "What's said in those statutory declarations ... doesn't really count in the way of the sentence which I'm going to impose upon you", I consider that he meant no more than that the mitigating factors were more pertinent than the actual consequences to the victims, not that the consequences were altogether irrelevant. I do not detect any error in the learned sentencing Judge's approach to that question.

I turn to the question whether the sentence was manifestly inadequate. As Fox J said in *Dixon* (1975) 22 ACTR 13 at 16, "Rape is a crime which comprehends an immensely wide field of circumstances, and as many degrees of culpability". The maximum penalty known to our law - life imprisonment - is the maximum penalty for this offence and thus a sentencing Judge has a large discretion to exercise. Head sentences as little as six months imprisonment have been given for rape, see eg *Ibbs* (1987) 163 CLR 447, and sentences incorporating six months custody followed by a bond have also been passed; see eg

Williams (1992) 109 FLR 1; *R v Lee* (NTSC) 97 of 1992 (16 February 1994); and, although rare, non-custodial sentences have been given, see eg *Billam* (1986) 82 Cr App R 347 at 349, *Taylor* (1983) 5 Cr App R (S) 241, *Love* (1986) 86 FLR 199. The same may be said for sexual offences against young children, see eg *McCracken* (1988) 38 A Cr R 92, a case described by Crockett J (at 94) as a 'very special one', and by Young CJ (at 98) as 'an exceptional case'. The wide range of circumstances comprehending the crime and the many degrees of culpability involved underlies the importance of the fact that the nature of the act or acts constituting the offence is of vital significance. In *Ibbs*, supra, the High court said (at 452):

> "When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case. In a case of sexual assault, a sentencing judge has to consider where the facts of the particular case lie in a spectrum at one end of which lies the worst type of sexual assault perpetrated by any act which constitutes sexual penetration as defined."

It is in the very nature of sexual offences against children of tender years that the full facts are not known. The Crown facts in the present case in respect of each offence are skimpy. The court was told nothing of the physical consequences (if any) to the victims. In all but two offences there is no allegation of protest on the part of the victim. Significantly, it is only the older victim who apparently appreciated to any substantial degree the nature of the offence and who made complaint. Significantly, too, she appears to be the one most affected traumatically and in so far as she was most

psychologically traumatised, in one sense the offences against her were more heinous.

There are certain other features of the present case which are relevant. The offences, whilst multiple, are not representative of larger offending. This is a case more akin to carnal knowledge or gross indecency with females under 16 years (s129 Criminal Code), or incest (s134 Criminal Code) than what the man or woman in the street, as distinct from a lawyer, would regard as rape, cf Taylor, supra, at 243. This is not a case which involves the seduction of young children. It is not a case involving the corruption of young minds. There is no element of provocation or encouragement by the victims. It is a case of gross breach of trust. It is a case of exploitation of vulnerable young children. It is a case where the respondent knew he was doing wrong. There was a payment to one victim to suppress discovery. It is a case of a young first offender with good prospects of rehabilitation with treatment. The respondent has already voluntarily undergone treatment prior to sentencing.

There are many cases where courts have said that sexual assaults upon young children, especially by those who stand in a position of trust to them, should be severely punished not only to punish the offender but in an endeavour to deter others with similar inclinations, see eg *Fisher* (1989) 40 A Cr R 442 at 445. General deterrence and retribution are both important sentencing factors in such cases and it is important that courts, moved by personal circumstances of the defendant, are not "weakly merciful", *Kane* (1987) 29 A Cr R 326 at 329, *Fisher*, supra, 445, for, generally speaking, so to proceed

is to err. To minimise the need for general deterrence and the need to allay the strongly and unanimously held public abhorrence of this type of offending and to substantially excuse such conduct is to betray the public interest, in so far as it fails to punish and fails to mark the public's strongly and unanimously held view that sexual offences against children are abhorrent and that children need and the community is entitled to expect the protection of the courts.

The present case is not a series of violent rapes against victims who fully understood the nature of the crime being committed upon them, cf *Taylor*, supra, at 243. Certain parallels between this case and incest cases may be drawn. In the incest case of *J* (1982) 45 ALR 331, Toohey J, in dealing with a Crown submission "that an immediately effective custodial sentence is the proper norm of punishment for anyone convicted of the offence of incest, as it is for anyone convicted of indecent assault upon a young person" (see at 332), said (at 335):

> "It would not be right to derive from a consideration of the English and Australian decisions a proposition of law that, save in the most special circumstances, a person convicted of incest on a young child should receive an immediate custodial sentence of some years.
>
> But it is right to infer from them a prevailing attitude by the courts that such a sentence is appropriate in such a case and that anything less is likely to be inadequate."

In the present case, counsel for the appellant submitted that, save in the most special circumstances, a person convicted of multiple sexual offences against young

children should receive a heavy custodial sentence. However I do not think a consideration of the numerous decisions to which we were referred sustains any such proposition of law. What is demonstrated abundantly enough, is that a heavy sentence is usually appropriate and that anything less is likely to be inadequate. Given the wide sentencing options applicable in the Territory, whatever the crime - murder, for which there is mandatory life imprisonment, apart - subjective factors of the offender can sometimes sufficiently outweigh the objective facts of the offence or offences such as to justify a lighter than normal sentence. As I said (dissenting) in *Braham* (unreported NT Court of Criminal Appeal, 22 June 1994):

> "... a sentencing Judge has the right and responsibility, in an appropriate case, to allow the promptings of mercy to operate and, even in cases which normally call for a heavy deterrent sentence, a Judge may conclude that the public interest is best served by taking action calculated to encourage reform; *Wihapi* (1976) 1 NZLR 422 at 424 (CA), *Morlina* (1984) 2 FLR 508 at 510; 13 A Crim R 76 at 77."

As King CJ said in *R v Osenkowski* (1982) 30 SASR 212 at 213 - in a familiar passage that was cited to the Court once again:

> "It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally be extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the

> offender's life might lead to reform. The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."

The net sentence in the present case is properly conceded by counsel for the respondent to be a very light one. The learned sentencing Judge - lamentably experienced in cases of child abuse - devoted much care in reaching what he considered to be an appropriate disposition in respect of sentencing the respondent. On balance, I have reached the conclusion that in the circumstances of this case, the sentence in fact imposed was open to the learned Judge and that there is no demonstrated and clear basis upon which this court should, or, indeed, can interfere. I do not think it is possible to say that the custodial sentence imposed was simply not open to the learned Judge and that it was outside his sentencing discretion. I do not think the sentence was so low as to shock the public conscience.

I would dismiss the appeal.
