Hales v Jamilmira [2003] NTCA 9

PARTIES:	HALES, Peter William v JAMILMIRA, Jackie Pascoe
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 17/2002 (20112873)
DELIVERED:	15 April 2003
HEARING DATES:	13 March 2003
JUDGMENT OF:	MARTIN CJ, MILDREN & RILEY JJ

REPRESENTATION:

Counsel:

Appellant:	R Wild QC
Respondent:	C McDonald QC

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	North Australian Aboriginal Legal Aid Service

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

[2003] NTCA 9
No. AP17 of 2002

BETWEEN:

PETER WILLIAM HALES
Appellant

AND:

JACKIE PASCOE JAMILMIRA
Respondent

CORAM: MARTIN CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 15 April 2003)

MARTIN CJ:

[1] On 30 April 2002 the respondent was convicted, by the Court of Summary Jurisdiction sitting at Maningrida, upon his pleas of guilty for that on 20 August 2001 he had unlawful sexual intercourse of A, who was then a female under the age of 16 years, namely 15, contrary to s 129(1)(a) of the Criminal Code, and that on 21 August 2001 he discharged a firearm in a manner that was likely to endanger, annoy or frighten any person, contrary to s 84(1) of the Firearms Act. On the first count he was sentenced to 13 months imprisonment to be suspended after serving four months and the court fixed an operational period of 18 months. On the second count he was

sentenced to two months imprisonment. The two sentences, by operation of s 50 of the Sentencing Act, were to be served concurrently.

[1] From those sentences the respondent appealed to the Supreme Court, under s 163 of the Justices Act. The sentences imposed by the learned Magistrate were set aside. In substitution the respondent was sentenced to 24 hours imprisonment on the first count and 14 days imprisonment on the second. They were also to be served concurrently.

[2] The appellant, complainant in the Court of Summary Jurisdiction, now appeals from the whole of that judgment as of right pursuant to s 51 of the Supreme Court Act. He asserts that his Honour failed to give appropriate weight to the legislation requiring a sentence of actual imprisonment to be imposed in respect of the first count and in summary, that his Honour gave too much weight to certain cultural factors surrounding the respondent's conduct and too little to the need expressed in the legislation to protect young girls.

[3] As to the firearms offence, the appellant says that his Honour erred in failing to give sufficient weight to the purpose for which the shotgun was discharged, namely to preserve a relationship against the wishes of A and her family.

[4] This appeal also raises issues going to a suggested change of attitude by the respondent before his Honour and this Court, and the principles applying generally to an appeal by the Crown.

[5] The facts upon which the learned Magistrate acted, as cited in the reasons of his Honour, follow (I have substituted "A" for the victim's name):

> "Jackie Pascoe was a resident of an outstation, Gamurru-Gayurra, which is located approximately 120 kilometres east of Maningrida by road. He is a 50 year old male – 49, and on the evening of Monday 20 August, the defendant approached the victim, A, whose date of birth was 19 May '86, making her 15 I think at the relevant time, who he states is his promised wife.
>
> She was at the blue house. The defendant said, 'Come on, let's go back home and have a rest'. The victim replied, 'No'. The defendant then insisted and said, 'Come on, let's go'. The defendant and the victim walked about 60 metres to his house, the green house. The defendant and the victim walked into his bedroom and he sat down on the mattress in his bedroom.
>
> The victim then listened to his stereo and the defendant told the victim to shut the bedroom door. The victim replied, 'Leave it open because I need some air'. The defendant replied, 'Shut that door. It's cold in here'. The victim then shut the door.
>
> The defendant said, 'Take off your clothes'. The defendant then got up off the mattress and walked over to the victim. The defendant then again told the victim to take off her clothes and the victim complied. The defendant then got on top of the victim. The defendant then removed his shorts and had penile/vaginal intercourse with the victim.
>
> The defendant moved up and down on top of the victim nine or ten times and then ejaculated inside the victim. The defendant then got off the victim and lay beside her. The victim started to get up and the defendant said, 'Sit down'. The defendant then went to sleep beside the victim.
>
> On the morning of Tuesday 21 August 2001, the defendant was still asleep on his mattress when the victim had woken and left the room. On the afternoon of the same day, Tuesday 21 August 2001, the defendant was at the outstation with a group of visiting Maningrida family members - - -

And then the names are given.

> At about 3pm, the defendant became upset when his stated promised wife, the victim, A, tried to leave the outstation to return to Maningrida in the vehicle, being a Troop Carrier, driven by friends.

> The defendant got a single-barrel 12-gauge shotgun, serial number 498. After telling the victim not to leave, the defendant fired the weapon once into the air. The victim returned to the defendant's side and remained with him as she feared for safety of her friends and herself if she didn't comply with the directions from the defendant.
>
> The vehicle left the outstation and the victim remained in the company of the defendant. The defendant does not hold an NT Shooter's Licence and the shotgun was not registered.

And then there was some discussion about the shotgun. His Worship was told at the time of the defence Gamurru-Guyurra Outstation was a public place open to and used by the public.

> On Wednesday 22 August 2001, Maningrida Police attended at the outstation and the defendant was subsequently arrested for the offences. He was conveyed to the Maningrida Police Station and held under the Police Administration Act, section 137, pending arrival of CIB members from Darwin.
>
> At 3pm on Thursday 23 August 2001, the defendant participated in an audio recorded interview at the Maningrida Police Station with an interpreter and prisoner's friend present.
>
> When asked why he had sexual intercourse with the victim who was only 15 years old, he replied: "She is my promised wife. I have rights to touch her body.' When asked if he was aware that it was an offence to have sex with a 15 year old girl, the defendant replied: "Yes, I know it's called carnal knowledge. But it's Aboriginal custom, my culture. She is my promised wife.' When asked if he was the holder of a current NT Shooters' Licence, the defendant replied: 'No.'

And then there was some conversation about that.

> When asked why he fired the shotgun, the defendant replied: 'I was trying to get her towards me and I wanted her to know that I was serious.' He was asked if anyone made him or told him to fire the shotgun, he replied: 'No, just myself.' The defendant was asked if he thought that he had frightened anyone by firing the shotgun and he replied: 'Yes, the others were frightened too, they got a little bit upset.' He was charged and bailed.

His counsel was asked the question by the magistrate: 'Are those facts admitted?' and his counsel replied: 'Yes, Your Worship.' His Worship then found the charges proved."

[6] The evidence of having unlawful sexual intercourse with a female under the age of 16 renders the perpetrator liable to imprisonment for seven years. The victim was aged 15 years 3 months at the date of the offence. That offence is to be distinguished from that of having sexual intercourse with another person without the consent of that person, which carries a maximum penalty of imprisonment for life. In relation to that crime consent means free consent which includes circumstances where the person submits because of force, fear of force or fear of harm of any type, to himself or herself or another person or where the person submits because he or she is unlawfully detained, or he is incapable of understanding the sexual nature of the act, amongst other things. The investigatory and prosecuting authorities in this case must be taken to have concluded that none of those elements could be made out to the required degree.

[7] The nature and severity of punishment imposed in respect of offences of this type varies considerably depending upon the circumstances in the individual cases. Factors such as the nature of the act of sexual intercourse (as defined), the relationship between the victim and offender, the age of each of them, whether there is more than one charge, or where it is accepted that the charge before the court is representative of a number of such offences committed over time. As Chief Justice Burt of the Supreme Court of Western Australia observed in *David Graham Ginder* (1987) 23 A Crim R 1 at 4:

> "There are no doubt many degrees of culpability within the circumstances of each act of sexual penetration … . They should not be ignored. And the personal antecedents of the offender must remain of considerable significance. They, too, cannot be ignored."

[8] The objective of penalising consensual acts of sexual intercourse with a girl under the age of sixteen has been said to be:

> "the protection of girls against themselves, and to act as a deterrent against men taking advantage of the youth and simplicity of young girls and inducing them to do things which their inexperience and age prompt them to do, and which a wider experience and greater age would prevent them from doing" *R v Cook* (1927) St R Qd 348 at 349.

[9] The provisions of the Criminal Code relating to abettors and accessories (s 12) are expressly excluded in relation to the female who engages in such an act of sexual intercourse.

[10] It will be noted from the Crown facts that when the respondent was asked if he was aware that it was an offence to have sex with a fifteen year old girl, he replied, "Yes I know; its called carnal knowledge, but its Aboriginal custom – my culture. She is my promised wife". The response indicates a reasonably sophisticated knowledge of the criminal law relating to this offending and introduces the matter which has been very much at the focus of the respondent's plea in mitigation. His Honour had before him material available to the Court of Summary Jurisdiction, together with a report specifically commissioned on behalf of the respondent and to which I will return shortly.

[11] The material before his Honour included the sworn evidence from the Court of Summary Jurisdiction of Charlie Djordila, an Aboriginal man who grew up at Maningrida. Although not especially qualified as a person having special knowledge in customary law operating in the area relating to traditional marriages, his standing to speak about such things was not put in issue. He told his Worship that A was promised to the respondent by her mother when she was a baby, "When she reaches puberty when she's about 14 to 15 years old that's when she can get married." He added that the custom was slowly being lost. For example, he had chosen not to marry his promised wife, but for love. Amongst other things, he said that the man would work for the promised wife's parents, like hunting and fishing, but nowadays "money is the way". If the promised wife does not want to go to the man there is "big trouble".

[12] His Worship had ordered a pre-sentence report pursuant to s 106 of the Sentencing Act. It was prepared by Mr Peter Curwen-Walker of the Northern Territory Correctional Services agency and it was put that his experience led credibility to the report. The report was received without objection and neither the prosecutor before his Worship nor the legal representative of the now respondent sought to introduce evidence to support or detract in any way from the contents of the report. It was before his Honour. The report is directed almost entirely to the circumstances of the offender and that may well be because the section does not appear to empower the author to investigate the circumstances of the offence (see

s 196(1)). The court did not direct the author to include in the report any matter other than those specified in s 196(1) (see s 196(2)).

[13] The report concentrates upon the offender's social history and background, s 196(1)(b). It shows that he was born at an outstation 25 kilometres west of Millingimbi, an Aboriginal man with strong cultural ties to his homeland, being fully initiated into tribal customs, and he was considered by many to be a custodian of traditional knowledge. He achieved a good standard of education and has had a varied employment record, having maintained employment for most of his adult life. He was born on 1 May 1951. His marriage in 1979 was "culturally arranged", but the relationship was marred by frequent episodes of binge drinking by both partners and associated domestic violence leading to a fight between them in 1994, as a consequence of which the respondent was convicted of manslaughter and sentenced to seven years imprisonment with a non-parole period of three and a half years. During the term of imprisonment the respondent applied himself to available education programmes, and upon his release, he resided some 100 kilometres from Maningrida which the report said was to allow sufficient "breathing space" to conclude negotiations that could lead to (his) eventual reconciliation with family and inclusion in the Maningrida community. Another indication of his involvement in the cultural life of the Aboriginal community of that area was his involvement in the ceremonial life of his family which contributed to creating difficulty in complying with requirements of supervision.

[14] The report indicates that he has rehabilitated himself from his pattern of binge drinking, now drinking infrequently and only moderately, and the substance abuse did not appear to have been a factor contributing to the commission of the present offences.

[15] The following passage is taken from the report:

> "Pascoe maintains that the relationship between himself and the victim of the offence committed on 20 August 2001 was culturally appropriate, in accordance with traditional Aboriginal Law. He refers to the victim as his "promised wife".
>
> Discussions with the offender and various members of his family and extended family, revealed the marriage between the offender and the victim was arranged, in accordance with traditional culture, shortly after the birth of the victim.
>
> It was suggested the term "promised marriage" may be somewhat of a misnomer. For the arrangement does not portend a future relationship but established a relationship between the parties from the time the arrangement was made. Mutual obligations were created and have been met over the years. Pascoe indicated that a significant proportion of his income had been given to the victim's family over the years.
>
> It was suggested that in the normal course of events a meeting between the two family groups would be conducted to determine when the promised wife would be given to cohabit with the promised husband. Whilst such a meeting had not taken place in this case, the offender asserted that he was being placed under increasing pressure, from individual members of the victim's family, to fulfill (sic) his "responsibilities" as the promised husband of the victim.
>
> According to Pascoe, this pressure was brought about by concern regarding the victim's behavior (sic). He related that the victim's school attendance was poor, that she had been "prowling" at night and had been using "gunga". He stated, "It wasn't my idea. I was just forced to take her, I been told so many times".
>
> At a later interview, Pascoe disclosed that he had been aware that the victim was sexually active and had experienced a miscarriage. He suggested that this was sufficient evidence for him to determine she was mature enough to have a sexual relationship with him.

> Despite no formal meeting between the family groups having taken place, the offender asserted that he had consulted the correct people and satisfied all of the cultural requirements prior to cohabiting with the victim."

[16] There was other material in the report which tends to support the respondent's view of the circumstances leading up to the commission of the offence. For example, Mr Curwen-Walker said that the victim's maternal grandmother and her maternal uncle were identified as the correct persons to determine the appropriateness of the relationship, in accordance with the custom, they confirmed the existence of the "promised" relationship and they had been consulted and consented to the cohabitation between the victim and the respondent. The grandmother said that in accordance with traditional culture she had assessed the sexual maturity of the victim and determined the appropriate timing for the partners to cohabit. A maternal uncle told Mr Curwen-Walker that he had satisfied himself that the victim had consented to the arrangement and that he had negotiated with the respondent to take proper care of her. Both those persons dismiss suggestions that the victim had been sexually active or that her behaviour had been problematical in any way. The material collected by the reporter as to the behaviour of the victim in the period leading up to her going to the respondent as his promised wife is conflicting and I do not pay any regard to it.

[17] Mr Curwen-Walker interviewed the respondent. He did not deny that he had asserted that he made a deliberate choice to follow the traditional law, and

was confident that the offence would not be disclosed as matters between promised husband and wife were considered private business. The respondent maintained that he did not regard his actions as wrongful, and he had expressed a strong sense of injustice at the inability of the law to accommodate traditional Aboriginal law and culture.

[18] That the cultural values and mores of the community in which the respondent and victim lived, and the steps which led to the commission of the offence are not convenient excuses, is borne out by the report commissioned on behalf of the respondent and tendered before his Honour on appeal. I agree with Milden J that as a result the appellant must show that his Honour erred on the expanded material before him. It was prepared by Mr Bagshaw, an anthropologist, whose degrees from the University of Adelaide have been followed by extensive practical experience, including as a research student in Arnhemland and as a consultant anthropologist. He prepared what he called a "brief anthropological overview of customary marriage practices among Burarra people of north-central Arnhemland". The respondent was one of those people known to Mr Bagshaw since 1970. In addition to those qualifications, Mr Bagshaw has conducted long term anthropological research amongst eastern Burarra people since 1979.

[19] Mr Bagshaw reviewed the work of noted anthropologists going back to 1926. Hiatt reported in the late 50s on the rights of Burarra men to engage in genealogically and/socially defined marriage rights in respect of particular females. He described those relationships. Mr Bagshaw's later

research broadly confirmed that of Hiatt with some additions, including that, "the Burarra marriage system is intimately bound up with complex considerations of estate tenure and religion …". Mr Bagshaw refers to Hiatt's observation that:

> "A woman could bestow her daughter as early as the crawling stage. … There was no bestowal or wedding ceremony. When a girl was about 14 years of age her mother told her it was time to go to her husband. The young wife often divided her time between his camp and her mother's until accustomed to the new status".

Hiatt also noted that:

> "A man had responsibilities to provide for his wife and young children and to make gifts of food regularly to the mother and the mother's brothers of his wife or betrothed."

[20] Annette Hamilton, whose anthropological fieldwork was conducted amongst the Burarra people in 1968 and 1969, was quoted extensively by Mr Bagshaw, including her observation that although under pressure, the system of traditional marriage arrangements was maintained to a considerable extent. There was much additional detailed information in the various reports referred to by Mr Bagshaw which it is not necessary to relate for present purposes. However, reference is also made to a report by Keen covering the period from the mid to late 1970s in which reference is made to genealogies disclosing that:

> "among the twenty mothers who were born after 1950, the average age at the birth of the first child was 15.6 years. 16 of the 20 bore their first child when under 16 years."

I have no doubt that from the perspective of the wider Territory community such a consequence from breaches of the law here in question is a good reason to reinforce the operations of the law.

[21] The final reference provided by Mr Bagshaw is to a recent book by Gurrmanamana, Hiatt and McKenzie entitled "People of the Rivermouth: The Joborr Texts of Frank Gurrmanamana." Mr Bagshaw says the book makes it clear that wife bestowal is construed by Burarra people as a fundamental aspect of the expression of *Joborr*, "the traditional corpus of normative moral values" otherwise described as behavioural rule, moral code, correct behaviour and etiquette (references are given).

[22] The Bagshaw report concludes:

> "The enjoining of sexual relations between a significantly older man and his promised wife (often under the age of 16) or, indeed, between such a man and any socially legitimated post-menarche (ie after first menstruation) female spouse, is not considered aberrant in Burarra society. Rather, it is the cultural ideal, sanctioned and underpinned by a complex system of customary law and practice. That such behaviour may be at variance with contemporary Western sensibilities, mores and laws (and may indeed be subject to increasing pressure to conform to such standards from elements and influences situated both within and external to the local society), in no way diminishes the fact that it is regarded as entirely appropriate – indeed, morally correct – conduct within the traditional parameters of the Burirra life-world".

[23] The following is an extract from the Australian Law Reform Commission Report No 31 "The Recognition of Aboriginal Customary Laws" published in 1986 at par 227:

"*Promised Marriages Today.* The exchanging of marriage promises continues in many traditionally oriented Aboriginal communities, although some changes have taken place. (See J Whitbourn, *Transcript* Alice Springs (13 April 1981) 1302-3; K McKelson, *Transcript* La Grange (26 March 1981) 557; G Gleave, *Transcript* Willowra (21 April 1981) 1578; *Transcript of Women's Meetings,* Alice Springs (13 April 1981) 33-36, Fitzroy Crossing (31 March 1981); J Bucknall, *Transcript* Strelley (24 March 1981) 401; A Nelson Napururla & B Naburula, *Submission* 497 (7 October 1985) 3; and see Bell & Ditton (1984) 28, 90-2). For example, it appears that age differences between spouses have narrowed and a girl will not marry her promised husband until after leaving school. It is also increasingly likely that a promised marriage will not occur at all (especially if there is a large age disparity between the parties) (Hamilton (1978) 29. cf also Bell & Ditton (1984) 91; Hamilton (1981) 76). A consequence of the failure of 'promises' (For the failure of promised marriage arrangements in Darwin town camps cf B Sansom, *The Camp at Wallaby Cross*, AIAS, Canberra, 1980, 258) is that it is becoming less common for marriage arrangements to be made. In some communities the practice of exchanging promises has practically disappeared. In others it has been modified (For the influence of contact (and in particular schooling) on promised marriages see J Watson, *Transcript* Derby (27 March 1981) 570-1; P Roe, *Transcript* Broome (25 March 1981) 475-6; T Gardiner, *Transcript* Broome (25 March 1981) 488; W Edwards, *Transcript* Adelaide (17 March 1981) 26; W Clarke, *Transcript* Adelaide (17 March 1981) 43; G Hiskey, *Transcript* Adelaide (17 March 1981) 118; N Brumby, *Transcript* Kowanyama (27 April 1981) 1833; J Whitbourn, *Transcript* Alice Springs (13 April 1981) 1301; M Whaco, *Transcript* Alice Springs (13 April 1981) 1316; J Tregenza, *Transcript* Alice Springs (13 April 1981) 1413; S Martin Jambajimba, *Transcript* Willowra (21 April 1981) 1507; F Yunkaporta & J Koowarta, *Transcript* Aurukun (30 April 1981) 2014; D Yibaruk, *Transcript* Maningrida (7-8 April 1981) 1039-42, 1102; L Joshua, *Transcript* Nhulunbuy (9April 1981) 1152; A Nelson Napururla & B Naburula, *Submission* 497 (7 October 1981) 4.) It is much more likely that a girl, even if living in a traditionally oriented community, will be able to choose her own marriage partner despite the fact that she may have been promised at birth. And it is more common for a girl to air her grievances over a prospective marriage. Resistance to promised marriages has come both from young men and young women (See H Boxer, *Transcript* Fitzroy Crossing (31 March 1981) 703-6; G Gleave *Transcript* Willowra (21 April 1981) 1579). Resentment may be directed at parents as the persons responsible for the promise. A consequence is that parents may deny their own, or assert the other's, responsibility for making the promise (Hamilton

(1978) 31). On the other hand, Professor Hamilton observes that while opposition to promised marriages comes from some whites and also from younger Aboriginal people who seek freedom of choice, as they grow older Aboriginal men may still take second and third betrothed wives. She comments that only the concerted opposition of the young seems likely to modify the system, especially in areas such as Arnhem Land (Hamilton (1981) 76). This view accords with the views expressed to the Commission during its public hearings (see n23, 26)."

[24] That body of material satisfies me that the respondent was truthfully reflecting upon the position as he saw it when he told the investigating police that the victim was his promised wife and that he had rights to touch her body according to Aboriginal custom and culture.

[25] Turning to the relevant matters to which regard is to be had in sentencing an offender (Sentencing Act s 5(2)) I note:

(a) the maximum penalty prescribed for the sexual offence is 7 years imprisonment, and there is provision in s 78BB of the Sentencing Act that where a court finds an offender guilty of a sexual offence it must record a conviction and order the offender to serve a term of actual imprisonment or a term of imprisonment that is suspended by it partly but not wholly. The maximum penalty for the firearms offence is 12 months imprisonment.

(b) The nature of the offence has been outlined above. The harm done to the victim as disclosed by a victim impact statement, in so far as it reflects upon matters prescribed by s 106A of the Sentencing Act:

> "I am angry for what he done. I was sad and upset. I think about it all the time. I always get angry with everyone. This makes me upset."

Whether those feelings were induced by the physical act of intercourse or by the circumstances that led to it is not clear.

(c) The extent to which the offender is to blame for the offence is a difficult question. Of course, in committing the proscribed act, he was entirely to blame in the sense that the facts disclose that it was at his initiative that the sexual intercourse took place. That A had consented does not reduce his blameworthiness given the elements of the offence. On the other hand, as the evidence shows, the offence was committed in circumstances where the respondent was participating in a culturally encouraged practice which was part of a far more complex scheme of things and not simply related to his sexual gratification. Those circumstances might be regarded as a mitigating factor concerning the offender.

(d) The respondent's character, age and intellectual capacity have been detailed above. He has no prior convictions for offences of this type. The only matter of consequence which brought him to the attention of the criminal justice system, the killing of his wife, was dealt with years ago, he is not known to have shown any propensity for violence, and the root caused behind that tragic event, binge drinking, is not now a factor in his lifestyle.

(e) On the information available it cannot be said that offending of this kind is prevalent. To the contrary it appears to be decreasing.

(f) The respondent is to be given full credit for his assistance given to law enforcement agencies in the investigation of the offences.

(g) He pleaded guilty and it is not suggested that he withheld that plea beyond the first reasonable opportunity at which it could be offered. However, his attitude did not indicate that the plea was accompanied by remorse.

(h) He has spent but a few hours in custody whilst awaiting bail after sentencing in the Court of Summary Jurisdiction.

The respondent acknowledged that he was aware of the law of the Territory as embodied in the Criminal Code, that he knew he was breaking it and he did so because he wanted to observe the traditions of his culture.

[26] Personal and general deterrence must feature as significant factors in sentencing for an offence such as this. I am of the opinion that notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community. To hold otherwise would trivialise the law and send the wrong message not only to Aboriginal men,

but others in Aboriginal society who may remain supportive of the system which leads to the commission of the offence.

[27] In *Neal v The Queen* (1982) 149 CLR 305 at 326, Justice Brennan said:

> "The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal".

[28] Aboriginality of itself, therefore, is neither an aggravating nor a mitigating factor, but facts which exist only by reason of the offender being an Aboriginal may be. There may be many circumstances which arise only as a result of an Aboriginal being involved in the cultural affairs of his race which can be taken into account as a circumstance surrounding the commission of an offence. Here, however, the cultural environment permits the commission of the offence and the court can no more condone that element of Aboriginal customary law than it condones assaults in the context of payback. There is a distinction between taking into account the custom which leads to an offender being punished in accordance with both the law of the Territory and by the Aboriginal community, and circumstances such as this where the custom gives rise to the commission of the offence. In my

view the latter circumstance does not permit mitigation to the same degree as may be available in the former.

[29] The respondent says that it would be unjust to expose him to double jeopardy because of an error affecting his sentence where the Crown's presentation of the case before his Honour contributed to the error, *R v Tait and Bartley* (1978-1979) 24 ALR 473. I am not satisfied that the respondent has demonstrated that there was a change in the position adopted by the appellant before his Honour and this Court. Certainly, counsel before his Honour said that the sentence in relation to the sexual offence was excessive and it was said that the case seemed to be one where "a period of actual imprisonment is not required". That comment was subject to the provisions of s 78BB of the Sentencing Act to which his Honour's attention was drawn, and counsel reminded his Honour that a term of imprisonment could be partly but not wholly suspended. His Honour was informed that in the Court of Summary Jurisdiction, Magistrates had sentenced people to the rising of the court or imposed a period of imprisonment that required the actual period to be served to be as little as the rising of the court or 24 hours. I do not take that as an indication to his Honour that for this particular offence it would be appropriate to follow that course. Section 78BB covers a wide range of sexual offences and his Honour referred to it. I regard counsel as having done no more than to assist his Honour to come to grips with the relevant sentencing principles as dictated in the legislation and as applied by the courts, a practice which, Rowland J, expressing the

judgment of the Western Australian Court of Criminal Appeal, believed must be helpful to the court, *R v Acerbi* (1983) 11 A Crim R 90 at 92, a view shared by McHugh JA in *R v Jermyn* (1985) 2 NSWLR 194 at 204.

[30] This is not a case where the Crown had either made no submissions about sentence or had conceded that the court would not fall into error if it did not impose a custodial sentence (see the authorities referred to by Phillips JA in *DPP v Waak* (2001) 3 VR 194 commencing at p 199). There is a significant difference between a submission that suggests that a term of actual imprisonment is not required, subject to statutory requirements, and one which suggests that a sentence to imprisonment at all is not required.

[31] Counsel before his Honour was indicating that a sentence of imprisonment almost wholly suspended, so as to comply with s 78BB would be appropriate. His Honour did not follow that course. In any event, I regard the concession made by counsel before his Honour as inappropriate. But that is not necessarily fatal to this appeal:

> "It is ultimately a matter for the court's discretion what weight to accord to the position taken by the Crown at first instance, if different, and such weight will vary from case to case according to the facts" *DPP v Waack* at p 207.

[32] His Honour imposed a sentence of imprisonment of 24 hours on this count and in that, with respect, he erred. In my opinion, it was manifestly inadequate.

[33] Turning to this appeal in respect of the sentence for the firearms offence, his Honour took the view that it was more serious than the sexual offence. I do not agree particularly when regard is had to the maximum penalty respectively prescribed for each of them. It is clear from what the respondent told the police about that incident that he discharged the firearm to convince A that she should not leave him, and he achieved that objective. The agreed fact is that she returned and remained with him as she feared for her safety and that of her friends. The nature of the firearm itself, when coupled with the purpose behind the discharge of it, compound the seriousness of the offence.

[34] I am satisfied that each of the sentences imposed by his Honour are clearly, and not just arguably, inadequate. They were "so disproportionate to the sentence which the circumstances required as to indicate an error in principle" (*R v Anzac* (1987) 50 NTR 6 at p 12). This appeal, "serves the public interest, for the community as a whole suffers when manifestly inadequate sentences are imposed" (*DPP v Bulfin* (1998) 101 A Crim R 40).

[35] The sentences imposed by his Honour must be quashed. Had I been dealing with the matter at first instance on the material before his Honour, including that which in reality only provided additional support for the respondent's views as to the cultural environment which led to the commission of the offence, I would have imposed heavier sentences than did his Honour on both counts. On this appeal, however, the respondent stands in double jeopardy, a circumstance which frequently calls for the amelioration of the

sentence which might otherwise be substituted for that which is the subject of the appeal (see *Wurramarra*, a decision of this Court (1999) 105 A Crim R 512 at 522 and 525).

[36] I would allow the appeal, set aside the sentences ordered by his Honour and impose a sentence of 12 months imprisonment for the sexual offence, but order that it be suspended after a period of one month. As for the firearms offence, I would impose a sentence in excess of two weeks, but as I am in the minority on that point, do not proceed further.

[37] The operation of s 50 of the Sentencing Act is such that the two sentences will be served concurrently unless the court otherwise orders. In all the circumstances I am not disposed to otherwise order. I would fix an operational period of 12 months from the date of the respondent's release from prison.

MIDREN J:

[38] The facts and issues arising out of this appeal are set out in the judgments of Martin CJ and Riley J and I am therefore relieved of having to repeat them.

[39] However, I have reached a different conclusion from that of their Honours. In my opinion, no error has been shown by Gallop AJ such as to warrant interference by this Court. I will now endeavour to explain why.

The nature of the appeal

[40] I agree with Riley J that, as new factual material had been admitted on the hearing of the appeal before Gallop AJ, the sentencing discretion had to be exercised anew by Gallop AJ and it was not necessary to show that the learned Magistrate's sentencing exercise was infected by error: see *Seears v McNulty* (1987) 89 FLR 154 at 160-162; *Mason v Pryce* (1988) 34 A Crim R 1 at 5-7; *VT v Winzar* (1992) 106 FLR 306 at 309; *Robertson v Flood* (1992) 111 FLR 177 at 186. Thus, the appellant must show that Gallop AJ erred in the exercise of his sentencing discretion, rather than that his Honour erred in finding that the learned Magistrate had erred in the exercise of the learned Magistrate's sentencing discretion. This is a significant difference in approach and one apparently not appreciated by the parties at the hearing of this appeal. However, I would not confine this observation only to the offence of carnal knowledge (s 129 of the Code) because the additional material also had relevance to the firearms offence.

Crown appeal

[41] I disagree with the other members of the Court about the role played by the prosecutor, Mr Dooley, at the hearing before Gallop JA. In my opinion, it is plain that the prosecutor was not asking for an actual sentence of imprisonment for the s 129 offence beyond the minimum required by s 78BB of the Sentencing Act. The following exchange occurred during the

prosecutor's reply to submissions by counsel for Mr Pascoe Jamilmira (at AB 86-87):

> "HIS HONOUR: Well what do I do – what do I do about this carnal knowledge charge?:
>
> PROSECUTOR: *... But as to this case in answer to Your Honour's question, this case would certainly seem to be one where a period of actual imprisonment is not required. You're constrained by the Sentencing Act to impose a period of actual imprisonment* but that can, as my learned friend has put ...
>
> HIS HONOUR: I have no discretion at all?
>
> PROSECUTOR: No discretion, no, Your Honour, on our reading of the Sentencing Act. Section 78BB spells it out, Your Honour.
>
> HIS HONOUR: 78BB.
>
> PROSECUTOR: *Your Honour's obviously – the second time today coming up against some of our Draconian laws. The bar is, Your Honour, that the term of imprisonment can be suspended partly but not wholly and that that's what has led Your Honour to cases in which magistrates, in particular, have sentenced people to the rising of a court* or imposed a period of imprisonment of some length that required that the actual period to be served be as little as the rising of the court or 24 hours."
>
> (emphasis mine).

[42] In *R v Tait and Bartley*, (1979) 24 ALR 473, a decision of the Federal Court, Brennan, Deane and Gallop JJ said, at p477:

> "Although the existence of error is the common ground which entitled the appellate court to intervene in appeals by the Crown and by a defendant… there would be few cases where the appellate court would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error, or if the defendant were unduly prejudiced in meeting for the first time on appeal the true case against him."

[43] In this case, no particular sentencing error is alleged, except that the learned sentencing judge imposed a sentence which is manifestly inadequate, the other grounds of appeal being no more than particulars of this ground. No question of sentencing principle arises for the decision of this Court. The sentencing principles to be applied to the facts of this case are well established by existing authority.

[44] The Director of Public Prosecutions, Mr Wild QC, appeared to me to concede that, in the light of the submissions of the prosecutor, the appellant was obliged to show that this was an exceptional case before this Court was entitled to interfere and that, in accordance with principles decided by this Court in *R v Morton* (2001) 11 NTLR 97 at 101-102, the appellant needed to show in a sentencing case that the sentences imposed clearly fell into the category of being demonstrably and seriously inadequate and that the degree to which the sentencing judge fell into error was substantial.

[45] I accept the submission of Mr Wild QC that the transcript does not reveal that the prosecutor invited Gallop AJ not to impose a head sentence of some period of time expressed in months, albeit almost fully suspended. But, nor

did the prosecutor make it clear that that was the course which should be adopted, notwithstanding Gallop AJ's direct question. His Honour was not given the assistance which, according to the appellant's submissions, his Honour should have received. In these circumstances, this Court should be very reluctant to interfere with the sentence imposed in respect of s 129 of the Code unless there is not just an inadequate sentence, but one which is demonstrably and seriously inadequate. It is difficult to see how that can be so when the appellant does not even now contend for an actual custodial term longer than that already imposed.

[46] The position so far as the offence against the Firearms Act is different. There is no suggestion that the prosecutor played a role in failing to properly assist the trial judge in arriving at the appropriate sentence or that any concession was made which led to his Honour imposing the sentence that he did. In these circumstances the approach is that referred to in *R v Tait and Bartley* (1979) 24 ALR 473 at 476-477. No error has been shown to have been made by Gallop AJ and the sentence his Honour imposed was within his Honour's discretion.

The circumstances of the offence and of the offender.

[47] As to the offence against s 129 of the Code, it is important to bear in mind a number of considerations. First, Ms A was 15 years and 3 months old at the time of the offence. The evidence suggested that she was considered by her grandmother at least, who had responsibility in this matter, to have

sufficient sexual maturity to live with the respondent. There was no other evidence on the subject. This offence serves a number of purposes, one being to prevent young persons from entering into sexual relations before they are mature enough to do so and to have weighed up the possible consequences. Another is to protect young girls and to deter older men from taking advantage of them before they are old enough to make a proper choice. The age of 16 has long been accepted as the norm. The common law fixed the "age of consent", as it was known, at 12. That age limit was gradually lifted to 14 and then 16 in the 19th century: see, in relation to New South Wales, G D Wood, A History of Criminal Law In New South Wales, Federation Press, 2002, pps 123, 259-260 and 348. I will not dwell on the position in South Australia and the Northern Territory. Suffice it to say that except for a period when the "age of consent" was increased from 16 to 17 years by the Children's Protection Act 1899 (SA), for most of the period since the middle of the 19th century the age of consent has been 16 years in this Territory. Therefore, one measure of the seriousness of the offence is the age and maturity of the victim. The nearer the victim is to 16 and the more mature she is, the less serious is the offence and vice-versa.

[48] Another relevant matter is the age and experience of the offender. Here the offender was 49 years of age at the time of the offending. It is not so much the age difference which is relevant, but the level of maturity of the offender which is important. The Courts are likely to react more leniently where the offender is young and immature than in the case of an older person, because

in the latter case one would expect an older person to realise more clearly the consequences of their misbehaviour and also because very often older persons have used their influence over a much younger inexperienced girl to prompt them to do what they might otherwise have refused to do. In this case, the circumstances were relevant to show two things. First, that there were cultural pressures which were very much acting upon the will of both Ms A, as well as on her family, and on the respondent. This was not a case therefore of the respondent using his position as an older person to satisfy his lust for Ms A. Secondly, it was accepted by the learned Magistrate, before Gallop AJ and before this Court, that the age difference in the circumstances of this case was not a material sentencing matter. The reason why that was so is because the evidence was that it is quite common for there to be a significant age difference between a man and his promised wife and that, according to the culture of the respondent and Ms A, there was nothing wrong with that, and the respondent had the right to have consensual sexual intercourse with her, notwithstanding that they were not yet tribally married. Thirdly, the respondent, although aware of the law of the Northern Territory, felt obliged to follow the dictates of his own culture. Therefore, it follows that the age of the respondent is not an aggravating feature in this case

[49] I also consider that it is important to bear in mind that if the respondent and Ms A had been tribally married, no offence would have been committed at all. Section 129(1) of the Code relevantly provides:

> "Any person who with respect to a female who is under the age of 16 years –
>
> (a) has unlawful sexual intercourse with her; or
>
> (b) ...
>
> is guilty of a crime and is liable to imprisonment for 7 years."

The word "unlawful" is defined by s 126 to mean "that the parties to the act are not husband and wife". Section 1 of the Code defines "husband" and "wife" to include, in the case of Aborigines, "persons living in a husband and wife relationship according to tribal custom". Although it has never been suggested that the respondent and Ms A were "living in a husband and wife relationship according to tribal custom", the evidence strongly suggests that they were close to achieving that status.

[50] One of the difficulties with this particular culture is that there is no symbolic ceremony at which the parties become married. Without going into the evidence in detail, it appears that there is a process which begins when the girl is sent by her mother to live with the promised husband. It is not clear at what stage the parties are regarded as being married, but in the nature of things it could not be long after the parties have begun to cohabit. In this case, the evidence is not clear, but it seems that Ms A was sent to the respondent's outstation to live with the respondent as his promised wife a short time – perhaps two days – before the offence occurred. The significance of this, is that given the vagueness of the situation as known to

the Court, it is a relevant mitigating circumstance that the respondent and Ms A were on the way to a marriage which, if it had reached that stage, no offence could have been committed, notwithstanding Ms A's age.

[51] I concur with the other members of the Court that the fact that this offence was committed because of social pressures which have been brought to bear as a result of the respondent's culture is a relevant mitigating circumstance. In addition to the authorities already referred to by my brothers, I would refer to *Shannon* (1991) 56 A Crim R 56 at 58, and 61-62, a decision of the Court of Criminal Appeal of South Australia which is directly in point on this issue. Mr Wild QC did not cavil with this in principle, but emphasised that young Aboriginal girls are entitled to the protection of the law as much as other young girls and that Aboriginal offenders are not to be treated differently to other offenders merely because they are Aboriginal. I accept these propositions put by Mr Wild QC, but the latter proposition accepts that there are appropriate exceptions to it. The respondent was not dealt with differently *merely* because he is Aboriginal; it is the pressure placed upon him by his cultural beliefs that reduce his culpability for his offending. The evidence showed that this pressure was significant given the importance of arranged marriages to the religious beliefs and estate tenure of the Burarra people, a matter dealt with in some detail in the report of the anthropologist, Mr Bagshaw. Indeed, his evidence was, that not only was the respondent's conduct lawful according to customary law, it was positively the cultural ideal:

> "The enjoining of sexual relations between a significantly older man and his promised wife (often under the age of 16) or, indeed, between such a man and any socially legitimated post-menarche (i.e. after first menstruation) female spouse, is not considered aberrant in Burarra society. Rather, it is the cultural ideal, sanctioned and underpinned by a complex system of customary law and practice. That such behaviour may be at variance with contemporary Western sensibilities, mores and laws… in no way diminishes the fact that it is regarded as entirely appropriate- indeed, morally correct- conduct within the traditional parameters of the Burarra life-world."

[52] It should be made clear that whenever there is a direct conflict between the law of the land and Aboriginal customary law, the law of the land must prevail: see *Walker v The State of New South Wales* (1994-1995) 182 CLR 45. However, that does not deny that social pressures brought to bear on an Aboriginal defendant as a result of Aboriginal customs are not relevant to moral blame and therefore to sentencing. The weight to be given to the effect of customary law or cultural factors by a sentencer will vary according to the circumstances. Those circumstances will include the strength of the customary law in the area in which the offender lives and the degree of punishment or social ostracism the offender is likely to suffer should he or she refuse to conform to the rules of the community in which he or she lives. The evidence is that the customary laws relating to arranged marriages within the Burarra community, whilst slowly dying out, is far from dead. In fact Mr Djordila, who gave evidence on this topic, said that whilst he had chosen his own wife, he and his wife were under an obligation to promise their daughters to a "poison cousin". Other factors would include the seriousness of the offending as seen by the general community. For example, the offence of female genital mutilation contrary to s 186B(1)

of the Code, which was mentioned during argument, carries a maximum penalty of 14 years and s 186B(4) makes it clear that the offence is committed, notwithstanding that it is performed as, or part of, a cultural, religious or other social custom. In my view, an offence against that provision, even if justified by religious or cultural beliefs, would be dealt with far more seriously than an offence against s 129(1). The seriousness of an offence against s 186B(1), as compared with s 129(1), is reflected not only in the differing maximum penalties, but is likely to be reflected also in the fact that the victim is seriously mutilated at a very young age with all the consequences which flow from that.

[53] Finally, there is the fact that this is only the second occasion, as far as can be ascertained, that an Aboriginal person has been charged with an offence against s 129(1), or its earlier statutory equivalents, in the history of this Territory since its foundation in 1869. The only previous known case was *R v Mungurala* (unrep) NTSC, 18 April 1975; SCC 313 of 1974, a sentence imposed by Forster J. That case involved a breach of s 63 of the Criminal Law Consolidation Act and Ordinance, (carnal knowledge of a female under the age of 12) which carried a maximum of imprisonment for life. The victim in that case was ten yeas of age and the offender was aged 18. The victim was the promised wife of the offender's grandfather, who had since passed away. As a result, she became the promised wife of the offender but the offender did not know that. The victim was already post menarche and according to the customs of her people (she came from the Oenpelli area),

although customary law had been transgressed, it was not regarded as a serious matter and the offender would be punished only by being sent to an outstation for a time. Forster J, after taking into account the offender's plea of guilty and the fact that he had been in custody for three weeks, sentenced him to 12 months imprisonment fully suspended to be of good behaviour for two years. In many respects, that case was far more serious than this matter. However, the point to be made is that, notwithstanding that tribally arranged marriages with girls under 16 is still wide spread in a number of Aboriginal communities, prosecution for offences committed against s 129(1) or its statutory predecessors by Aboriginal males and involving Aboriginal females is extremely rare. The fact that this Court has not previously dealt with such a case so as to give warning that this kind of behaviour will not be tolerated in Aboriginal communities even where what is done does not infringe customary law, is a strong reason for acting cautiously in this case.

Conclusion

[54] The conclusion I have reached is that it has not been shown that the sentence imposed by Gallop AJ in respect of the penalty for the breach of s 129(1) of the Code was demonstrably and seriously inadequate and that the degree to which his Honour fell into error was substantial. That is not to say that I would have imposed the sentence imposed by Gallop AJ; nor is it to say that in future cases of this kind, a sentence of the kind imposed in this case will be adequate. As a general rule, it is my view that in cases involving a

breach of s 129(1), the sentencer should ordinarily impose an appropriate head sentence and order that at least some portion of the sentence be served. Whilst not wishing to entirely discount the possibility of a sentence to the rising of the Court or some similar type of disposition, as that is the minimum sentence permitted by law, it should be reserved for those rare cases which fall at the very bottom of the scale of seriousness.

[55] I would dismiss the appeal.

RILEY J

[2] Since preparing these reasons I have had the benefit of reading a draft of the judgment of the Chief Justice. I agree generally with the reasons of his Honour regarding the offence against s 129 of the Criminal Code. However, as I differ slightly in my approach I wish to make some observations of my own.

[3] On 30 April 2002 the respondent pleaded guilty in the Court of Summary Jurisdiction to having had unlawful sexual intercourse with a female under the age of 16 years and to discharging a firearm in a manner likely to endanger, annoy and frighten any person. In relation to the first offence, which is contrary to s 129 of the Criminal Code, the respondent was sentenced to imprisonment for 13 months, suspended after he had served 4 months. In relation to the firearms offence he was sentenced to 2 months imprisonment.

[4] The respondent appealed to the Supreme Court and on 8 October 2002 Gallop AJ allowed the appeal and set aside the sentences. His Honour substituted a sentence of 24 hours imprisonment in relation to the first offence and a sentence of 14 days imprisonment in relation to the firearms offence. The sentences were directed to be served concurrently.

[5] The Crown has now appealed to this court.

[6] In relation to the matters now before the court the evidence led in the Court of Summary Jurisdiction and which was also before Gallop AJ was that the relationship between the respondent and his victim, Ms A, was culturally appropriate and in accordance with traditional Aboriginal law. A marriage between the respondent and Ms A was arranged in accordance with local traditional culture shortly after the birth of Ms A on 19 May 1986. Those arrangements were entered into between the respondent and members of the family of Ms A.

[7] As a consequence of the arrangements mutual obligations were created and these obligations have been met over the years. According to the respondent a significant part of his income had been given to the family of Ms A over the years. He said he was under increasing pressure from individual members of the family of Ms A to fulfil his “responsibilities” as the promised husband of Ms A.

[8] In a presentence report provided to the Court of Summary Jurisdiction and also to the Supreme Court the following information was provided without challenge:

> "The victim's maternal grandmother and her maternal uncle were identified as the correct persons to determine the appropriateness of the relationship in accordance with custom. They confirmed the existence of the "promised" relationship and described in some detail the manner in which the arrangement was made soon after the victim's birth. They confirmed that they had been consulted and had consented to the cohabitation between the victim and the offender. The victim's grandmother related that it was her role, in accordance with traditional culture, to assess the sexual maturity of the promised wife and to determine the appropriate timing for the partners to co-habit. She indicated that traditional marriages had occurred at a much earlier age and that she had been satisfied the relationship was appropriate. The maternal uncle related that he had satisfied himself that the promised wife consented to the arrangement and that he had negotiated with the offender to take proper care of the promised wife and to establish ongoing obligations to the family of the promised wife.
>
> According to the victim's maternal uncle, it was the victim who had initiated discussion with him regarding the promised marriage. He related that the victim had requested his consent. Both the uncle and the grandmother dismissed suggestions that the victim had been sexually active or that her behaviour had been problematic in any way. (The offender had forewarned the writer that these issues were a source of great embarrassment to the victim's family and he had predicted that they would not confirm his assertions in this regard).
>
> The offender acknowledges that he was aware of the implications of the law relating to sexual intercourse involving females under 16 years of age at the time of the offence. He asserted that he made a deliberate choice to follow his traditional law. He was confident that the offence would not be disclosed as matters between promised husband and wife are considered private business. (The respondent) maintains that he does not regard his actions as wrongful. He has expressed his strong sense of injustice at the inability of the law to accommodate traditional Aboriginal law and culture."

[9] On the day the offences occurred the respondent and Ms A were at the outstation. They had been there for a period the duration of which is not entirely clear. On one version it may have been a few days and on another a few weeks.

[10] On 20 August 2001 the respondent, who was then aged 49, approached Ms A, who was then aged 15 years, and said "come on let's go back home and have a rest". Ms A replied "no" and the respondent then insisted that they should go. They walked about 60 metres to his house and entered his bedroom. Ms A listened to his stereo. The respondent told her to shut the bedroom door and she replied "leave it open because I need some air". He repeated his request stating "shut the door it's cold in here". She then shut the door. The respondent then told her to remove her clothes and he walked over to where she was standing. He again told her to remove her clothes and she did as she was asked. They then had penile vaginal intercourse during which the respondent ejaculated inside the victim.

[11] The defendant then lay beside Ms A. She started to get up but was told to "sit down". The respondent then went to sleep beside her.

[12] On the morning of 21 August 2001 whilst the respondent was asleep Ms A left the room. On the afternoon of the same day the respondent was at the outstation when a number of people visited from Maningrida. At about 3pm he became upset when Ms A tried to leave the outstation to return to Maningrida in a vehicle driven by friends. He obtained a single barrel 12

gauge shotgun. After telling Ms A not to leave he fired the weapon once into the air. Ms A then returned to his side and remained with him as she feared for the safety of her friends and herself if she did not comply with the directions he gave.

[13] On 22 August 2001 police attended at the outstation and the respondent was conveyed to the Maningrida police station. He made an electronic record of interview. When asked why he had sexual intercourse with Ms A who was only 15 years of age he replied "she is my promised wife I have rights to touch her body". When asked if he was aware that it was an offence to have sexual intercourse with a 15 year old girl he replied "yes I know; it's called carnal knowledge, but it's Aboriginal custom – my culture. She is my promised wife".

[14] When asked why he fired the shotgun he said "I was trying to get her towards me and I wanted her to know that I was serious". He said that he thought the firing of the shotgun caused fright to others. He said, "the others were frightened too. They got a little bit upset".

[15] At the time of the offending the respondent was a 49 year old male living at an outstation situated 120 kilometres east of Maningrida by road. The outstation can be fairly described as a remote location. The respondent was born in that area and has strong cultural ties to his homeland. He was educated at Maningrida and also at Kormilda College in Darwin. He is described as having a high level of literacy and numeric skills relative to the

standard of his peers. He has a good employment record and has held jobs both in Darwin and Maningrida.

[16] The respondent has a criminal record including a conviction for the manslaughter of his wife in 1994. He was sentenced to imprisonment for 7 years with a nonparole period of 3 years and 6 months in respect of that offence.

[17] When the matter came before Gallop AJ further evidence was admitted. There is no challenge to that evidence which provided an anthropological overview of customary marriage practices among the Burarra people of North Central Arnhemland. The following conclusion was expressed:

> "The enjoining of sexual relations between a significantly older man and his promised wife (often under the age of 16) or, indeed, between such a man and any socially legitimated post-menarche (ie after first menstration) female spouse is not considered aberrant in Burarra society. Rather, it is the cultural ideal, sanctioned and underpinned by a complex system of customary law and practice. That such behaviour may be at variance with contemporary western sensibilities, mores and laws (and may indeed be subject to increasing pressure to conform to such standards from elements and influences situated both within and external to the local society), in no way diminishes the fact that it is regarded as entirely appropriate – indeed, morally correct – conduct within the traditional parameters of the Burarra life-world."

[18] Fresh evidence having been introduced before Gallop AJ the issue for our consideration is not whether his Honour erred in allowing the appeal from the sentencing Magistrate in relation to the offence against s 129 of the Code, but rather whether his Honour erred in sentencing the respondent as he did in relation to that offence.

[19] A preliminary argument centred upon the submission made on behalf of the respondent that the appeal should not be allowed because of the conduct of the prosecutor in the court below. It was said that during the course of submissions before his Honour the prosecutor proposed the sentence that his Honour subsequently imposed in respect of the offence against s 129 of the Criminal Code ie a sentence of imprisonment for 24 hours. In my view a fair reading of the transcript does not support the submission. It is clear that the prosecutor reminded his Honour that a suspended sentence was available as part of the disposition in this matter and also informed his Honour of the requirement of s 78BB of the Sentencing Act that an actual term of imprisonment must be imposed. Counsel informed the learned Judge that other courts in the Northern Territory had, in other cases, satisfied the requirements of s 78BB by imposing a sentence of imprisonment limited in duration to the rising of the court. It is not correct to submit, as counsel for the respondent did, that the Crown position was that no actual term of imprisonment should be imposed.

[20] The submission made on behalf of the respondent was that, although the conduct of the respondent amounted to the commission of an offence against the law of the Northern Territory, it was not inconsistent with the standards of his community and, to the contrary, was conduct which was positively encouraged within that community. It was not the submission of the respondent that traditional or customary law was to be preferred over the law of the Territory. The contrary was clearly acknowledged by the plea of

guilty entered by the respondent. However it was submitted that the information regarding the context in which the offending occurred was vital to the sentencing process.

[21] The courts have addressed issues of this kind on many occasions. By way of example Mildren J said in *R v Minor* (1991-92) 79 NTR 1 at 14:

> "In my opinion, a sentencing Judge is entitled to have regard not only to the interests of the wider community, but also to the special interests of the community of which the respondent is a member. Indeed, this frequently occurs. It is often said that one of the main purposes of the sentencing process is the protection of the community. In *Channon v R* (1978) 20 ALR 1 at 5, Brennan J spoke of the necessity and ultimate justification for criminal sanctions as 'the protection of society from conduct which the law proscribes'. This means not only the wider community, but those members of it most likely to be affected. There are numerous occasions when the court has had regard to the wishes of the particular Aboriginal community of which a prisoner is a member in order to consider the need to protect that community: see, for example, *Mamarika v R* and the cases referred to by the Australian Law Reform Commission Report (supra) para 570. And so long as the wishes of the community do not prevail over what might otherwise be a proper sentence, it is my opinion that no criticism can be directed to a sentence which gives appropriate weight to those needs."

[22] In *Neal v The Queen* (1982) 149 CLR 305 Brennan J said (at 326):

> "The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or the Court of Criminal Appeal."

[23] The principles that apply to a Crown appeal are well understood and have been addressed in many decisions of this court. It is not necessary to refer to those principles in detail. The 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 in 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: *R v Tait & Bartley* (1979) 24 ALR 473. In order to establish the existence of an unidentified error the Crown must show that the sentence was not just arguably inadequate but so very obviously inadequate that it was unreasonable or plainly unjust: *Raggett, Douglas & Millar v R* (1990) 50 A Crim R 41.

[24] The offence created by s 129 of the Criminal Code has as its maximum penalty imprisonment for 7 years. Such an offence falls within the ambit of s 78BB of the Sentencing Act which provides, inter alia, that where a court finds an offender guilty of such an offence the court must record a conviction and must order that the offender serve a term of actual imprisonment or a term of imprisonment that is suspended by it partly but not wholly. Clearly the intention of the legislation is to emphasise the seriousness with which an offence against s 129 of the Criminal Code is to be regarded.

[25] A purpose of the provision is to protect young females from sexual exploitation. A female below the age of 16 years is to be treated as being

unable to consent to sexual intercourse. However for sexual intercourse with a female under that age to be unlawful the parties to the act must not be husband and wife. In the present case there was evidence to the effect that Ms A was the "promised wife" of the appellant but the plea of guilty makes it clear that the appellant did not contend that he and Ms A were, in any relevant sense, husband and wife.

[26] At the time of the offending the parties were not in a legal marriage and neither were they in a traditional marriage. The situation was described in the pre-sentence report in the following way:

> "The arrangement does not portend a future relationship but establishes a relationship between the parties. Mutual obligations are created and met over the years".

[27] The relationship was said to be in "transition" and the parties were at the outstation "to help her become accustomed" to the appellant. Members of her family were there "in case she needed comforting, they would be there for her support."

[28] Issues of consent do not arise under s 129 of the Criminal Code. If it was to be alleged that Ms A did not consent to the act of sexual intercourse then the appropriate provision under which to proceed would have been s 192 of the Code which deals with sexual intercourse without consent. Whilst the facts placed before the court, including the victim impact statement, may suggest some reluctance on the part of Ms A, the acceptance of a plea to an offence against s 129 of the Code means that the appellant is to be dealt with on the

basis that the sexual intercourse was consensual and that the relationship between them was voluntary. The victim impact statement recorded Ms A as stating that she was "sad and upset" as a result of the events and, by virtue of s 106B of the Sentencing Act, that is something which the court is required to consider before determining the sentence to be imposed.

[29] In sentencing the respondent his Honor acknowledged that the courts may have regard to Aboriginal law in sentencing Aboriginal and he accepted that Aboriginal customary law was relevant to the sentencing process undertaken by him. He expressed surprise that the respondent had been charged at all with the offence against s 129 of the Criminal Code and concluded that this occurred because of the firearms offence.

[30] The learned sentencing Judge took into account the submissions made on behalf of the respondent that none of the offences involved actual violence, the victim consented to the relationship and that there was no evidence before the court of coercion prior to the act of sexual intercourse taking place. I note that, to the extent that pressure was placed upon Ms A to continue with the relationship, it was not alleged that such pressure came from the respondent. Indeed some pressure had been placed upon the respondent himself in that it was submitted that the grandmother and the uncles of Ms A had requested that he take her. However, the respondent did have a choice. He was not acting under compulsion. According to the unchallenged evidence of Mr Djordila the respondent was able to "marry his promised wife or he can marry the girl that he fell in love with or he can

have both." On the other hand the "promised girl" would be in "big trouble" if she did not fulfil the obligations entered into on her behalf.

[31] It was emphasised before his Honour that this was not a case where the respondent had committed an offence both against the law of the Northern Territory and customary law but, rather, the respondent had not committed any offence according to customary law and was acting in a manner which was regarded by his community "as entirely appropriate and morally correct conduct." It was submitted that, in that sense, the traditional Aboriginal law is in conflict with the law of the Northern Territory. If that be so then the law of the Northern Territory must prevail and the respondent acknowledges this by his plea of guilty. The real issue is how the other pressures on the respondent arising from his membership of a traditional Aboriginal community are to be brought to account. It is not an easy exercise.

[32] The offence itself was serious, although the circumstances of the matter place it at the lower end of the scale of seriousness for offences of its kind. However, it was an offence made the more serious by virtue of the respondent deliberately choosing to offend. He knew that to proceed as he did constituted an offence and he described that offence as "carnal knowledge". Notwithstanding his level of awareness he chose to proceed. Whilst it may be said that he has done so in part believing he had a right and, possibly, some level of obligation under his culture, it is not suggested in any of the material before the court that there was any reason why he could not wait until Ms A had turned 16 years of age at which time his

conduct would have been lawful. He may have been under some cultural pressure to proceed as he did, but it was not suggested that he was under any cultural imperative to proceed as he did, when he did. The respondent was able to comply with the law of the Northern Territory and with obligations imposed upon him under customary law. He deliberately chose not to do so. He acknowledged that he proceeded on the basis that he thought he would not be caught.

[33] The penalty imposed by the learned sentencing Judge was imprisonment for one day. That was effectively the minimum penalty that could be imposed. It is a penalty which, in my view, fails to recognise the seriousness of the offending. It pays no account to either general or specific deterrence. Whilst proper recognition of claims to mitigation of sentence must be accorded, and such claims will include relevant aspects of customary law, the court must be influenced by the need to protect members of the community, including women and children, from behaviour which the wider community regards as inappropriate.

[34] In my view his Honour erred in imposing a sentence of imprisonment of one day. Such a sentence is manifestly inadequate. It does not reflect the seriousness of the offending nor does it recognise the community expectation reflected in the legislation that young females ought to be protected. A significantly greater head sentence was called for.

[35] In my opinion the appeal on this issue should be allowed. In that regard I agree with the orders proposed by the Chief Justice.

[36] In resentencing the respondent in relation to the firearms offence his Honour imposed a sentence of imprisonment of 14 days to be served concurrently with the other sentence of imprisonment imposed at the same time. The appellant says that this sentence was manifestly inadequate.

[37] The circumstances in which the offence occurred are set out above. It seems the respondent intended to frighten Ms A and her friends and he achieved that aim. There was no suggestion in the agreed facts that there was any actual danger to Ms A or to any member of the public. His Honour proceeded to sentence on that basis.

[38] In my opinion it has not been demonstrated that error occurred. Whilst the sentence may be at the lower end of the scale, it cannot be said to be manifestly inadequate. I would dismiss the appeal in this regard.
