CITATION:	*The Queen v TT* [2021] NTCCA 7
PARTIES:	THE QUEEN
	v
	TT
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	22022514
DELIVERED:	17 November 2021
HEARING DATE:	19 October 2021
JUDGMENT OF:	Southwood and Kelly JJ and Burns AJ

CATCHWORDS:

CRIME – Crown appeal against sentence – Manifest inadequacy – Child sex offences – Indecent dealing with a child – Gross indecency with a child – Sentencing standards – Principles of Crown appeals – No error of principle – Appeal dismissed

Criminal Code 1983 (NT), s 132(2)(a), s 127(1)

R v JO (2009) 24 NTLR 129; *R v Roe* [2017] NTCCA 7; *Tran v The Queen* [2019] NTCCA 12; *Whitehurst v R* [2011] NTCCA 11, applied.

REPRESENTATION:

Counsel:

Appellant:	V Engel
Respondent:	A Abayasekara

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

Judgment category classification:	B
Number of pages:	25

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

The Queen v TT [2021] NTCCA 7
No. 22022514

BETWEEN:

THE QUEEN
Appellant

AND:

TT
Respondent

CORAM: SOUTHWOOD and KELLY JJ and BURNS AJ

REASONS FOR JUDGMENT

(Delivered 17 November 2021)

SOUTHWOOD J AND BURNS AJ

Introduction

[1] On 20 May 2021, following a trial by jury, the respondent was found guilty of four counts on an indictment dated 22 April 2021.

[2] Count 1 on the indictment charged that contrary to s 132(2)(a) of the *Criminal Code 1983* (NT) between 1 February 2007 and 4 April 2008 at Berry Springs the respondent indecently dealt with SC, a child under the age of 16 years. At the time of this offence, the victim was nine or 10 years old. As the Crown failed to prove the date on which the offence occurred, the maximum penalty for this offence is imprisonment for 10 years.

[3] Count 2 on the indictment charged that contrary to s 127(1) of the *Criminal Code* between 1 February 2007 and 4 April 2008 at Berry Springs the respondent committed an act of gross indecency upon SC, a child who was under the age of 16 years. As the Crown failed to prove the date on which the offence occurred, the maximum penalty for this offence is imprisonment for 16 years.

[4] Count 3 on the indictment charged that contrary to s 127(1) of the *Criminal Code* on 19 January 2008 at Darwin the respondent committed an act of gross indecency upon SC, a child who was under the age of 16 years. The maximum penalty for this offence is imprisonment for 16 years.

[5] Count 4 on the indictment charged that contrary to s 127(1) of the *Criminal Code* between 7 July 2008 and 4 February 2009 at Darwin the respondent committed an act of gross indecency upon SC, a child who was under the age of 16 years. The maximum penalty for this offence is imprisonment for 16 years.

[6] On 7 June 2021, the respondent was convicted of each count and sentenced as follows:

1. for count 1, four months' imprisonment,

2. for count 2, 13 months' imprisonment with two months to be served concurrently with the sentence imposed for count 1,

3. for count 3, 15 months' imprisonment with six months of the sentence to be served concurrently with the sentence imposed for count 2,

4. for count 4, two years and six months' imprisonment with six months of the sentence to be served concurrently with the sentence imposed for count 3.

[7] That gave a total sentence of four years' imprisonment. The sentence of imprisonment was backdated to 19 May 2021 to reflect the time that the respondent had been on remand for these offences. The sentence is suspended on supervised conditions after the respondent has served 18 months in prison. An operational period of two years and six months from the date of the respondent's release from prison was fixed.

[8] The Crown has appealed against the sentences imposed on the respondent on the following grounds:

1. The learned sentencing Judge erred in imposing individual sentences which were manifestly inadequate in all the circumstances.

2. The learned sentencing Judge erred in imposing an overall sentence that was manifestly inadequate in all the circumstances.

3. The learned sentencing Judge erred in suspending the sentence after 18 months' imprisonment.

[9] As to ground 3, the Crown's complaint is not that the sentence of imprisonment should not have been suspended but that the time the

respondent was required to serve in actual imprisonment was manifestly inadequate.

[10] Crown counsel submitted that the Crown appealed because there was no guidance from this Court about sentencing offenders for the crimes the respondent committed, in particular, the crime of gross indecency. By "guidance", Crown counsel meant a reconsideration of the sentencing standard for the crimes under consideration, an issue that this Court last considered in *R v JO*[1] in 2009. This submission is difficult to accept in light of what this Court said in *R v JO*,[2] namely:

> As to the individual sentences and the question of suspension, there is no tariff for crimes involving sexual assaults. This much is demonstrated by the schedule of sentences provided to the Court. Such crimes are committed in a wide variety of circumstances and by a wide variety of offenders. The appropriate sentence must be determined according to the individual circumstances of the offending and the offender.

The facts

[11] The learned sentencing Judge found the facts as follows.

[12] The victim's father was the respondent's close friend. He had separated from his wife who was the mother of the victim. The victim and her younger sister would spend weekends with their father. When they did, the three of them would stay at the respondent's home in Berry Springs, and subsequently at his home in Karama. The respondent lived with his de facto

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1 (2009) 24 NTLR 129.

2 Ibid at [86].

partner and his sons. The adults would usually consume alcohol, and it was common for the victim's father to fall asleep after doing so.

[13] The offending, the subject of *count 1*, is that the respondent was sitting on a chair in the lounge room while the victim's father was asleep. The respondent asked the victim to give him a hug. The respondent embraced her and then told her he would show her how to kiss. He kissed her three times, putting his tongue in her mouth. The victim said, "It was not a kiss you would give a kid". The victim pulled away and tried to wake her father and the respondent desisted.

[14] The offending, the subject of *count 2*, is that while the victim was asleep on the edge of a mattress on the floor in the respondent's bedroom with her sister and her father, the respondent lay down beside her. He pressed his body against hers and then put his hands under her t-shirt, skin to skin, cupped her breasts and nipples and rubbed them for five to 10 minutes. The victim pretended to be asleep, hoping that he would stop. He did not, so she rolled over her sister and lay in between her father and her sister. The respondent then desisted.

[15] The offending, the subject of *count 3*, is that while the respondent's partner remained in hospital for about two weeks after giving birth to their third son, the respondent drove the victim and the baby back to his home. The victim was sitting in the front passenger seat. The respondent pulled the car over, took his erect penis out of his pants and asked her to touch it. She

refused. The respondent then said that she should at least put it away. She again refused. The respondent then put his penis away and continued driving.

[16] The offending, the subject of *count 4*, is that while the victim was asleep on the lounge, the respondent came up behind her. He put his hands down her t-shirt, skin to skin, cupped her breasts and nipples and then slid his hand down the front of her underpants, skin to skin, and placed his hand on her vulva and clitoris area. She stayed still, pretending to be asleep, and hoping that the respondent would stop. After some time, he stopped.

[17] The victim read a victim impact statement to the Court. She stated that the respondent took advantage of her extremely vulnerable situation; a young girl whose parents were separating, and he placed her in an untenable position. The respondent was her father's best friend, a man he called ‘brother’, and she and her sister called ‘uncle’. The victim said that the respondent took away her innocence and drove a wedge between her and her father because she felt that she could never tell him what the respondent had done.

[18] Due to the respondent’s crimes, the victim suffered from anxiety, stomach pain, panic attacks and flashbacks as she grew from child to adult. When she thinks about herself as a little girl, the victim feels sick and full of sorrow but also angry that the respondent’s conduct has affected so many years of her life. Once she had children herself, she found the courage to speak out

about the respondent's conduct. When she did so, she was further hurt, because the respondent did not take responsibility for his crimes but denied the conduct.

Objective seriousness

[19] The Crown submitted that the objective factors of particular significance in this case are:

1. the age of the victim at the time of the offending; (She was 10 years old for counts 1 to 3 inclusive and 10 or 11 years old for count 4.)

2. the age of the respondent at the time of the offending; (He was 33 to 35 years old.)

3. counts 2 and 4 involved skin-to-skin contact and in count 4 the respondent touched the victim's genital area;

4. the respondent was in a position of trust and the victim was particularly vulnerable because of her family situation; and

5. the respondent's offending conduct persisted over a significant period and involved an element of predatory conduct.

[20] The Crown submitted that each of the above factors elevated the level of seriousness of the offending in the scale of gross indecency to mid-level offending.

[21] In our opinion, all of the above factors save for the predatory aspect of the offending, are relevant. We do not accept the Crown's submission that the offending was predatory. However, it is important to focus on what actually happened. Count 1 involved the respondent tongue kissing the victim three times. Count 2 involved the respondent touching the victim's breasts. Count 3 involved the respondent exposing his penis to the victim for a short time. The offending that constitutes counts 1 to 3 on the indictment is towards the lower level of offences of this kind. Our conclusion is supported by what the Court of Criminal appeal held in *R v JO* at [85]. Count 4 is the most serious offence. On that occasion, the offending persisted for some time and the respondent touched the victim's genital area in addition to touching her breasts. Count 4 is in the mid to low level of such offences.

[22] The respondent's moral culpability is high. He committed the offences for his own sexual gratification. The respondent is not remorseful. The offending is aggravated by the young age of the victim, the significant difference in age between the victim and the respondent, and the breach of trust involved on each occasion. There was a breach of trust in the sense that the only reason the respondent had access to the victim was because the victim's father trusted the respondent. At no stage was the victim in the care of the respondent. Counts 1, 2 and 4 were committed in the respondent's home while the victim's father was asleep. Count 3 was committed when the victim was travelling in the respondent's car with the only other person present being a newborn baby. The victim felt trapped because her father

had separated from her mother and the respondent was a close friend of her father's. The number of offences shows that the respondent had a persisting sexual interest in the victim, but there were gaps in the offending in circumstances where the victim was present in the respondent's home on numerous occasions. The offending did not amount to a course of conduct in the sense the offences were committed every time the respondent had dealings with the victim.

[23] The following matters qualify the objective seriousness of the offending. The conduct on each occasion was of relatively short duration. The offending did not involve the use of force or threats and the victim did not suffer physical harm. There was no emotional manipulation of the victim and there was no attempt to conceal the offending. Count 3 did not involve any physical contact. The offending was opportunistic. There was no premeditation. There was a level of persistence on each occasion but the respondent desisted of his own accord. Although the respondent was in a position of trust because the victim's father trusted him, the victim was not in his care.

[24] There are no mitigating circumstances *attaching* to any of the crimes that the respondent committed. The absence of mitigating circumstances is compounded by the respondent's failure to acknowledge his guilt and accept responsibility for his conduct. That is not to say there were no mitigating circumstances of the offender at the time of sentence.

[25] We agree with counsel for the respondent's submission that, in circumstances where there is no tariff for a particular offence, a sentencing court should not place too much emphasis on characterising the offending on a linear scale. This is because the appropriate sentence will depend upon the particulars of each case, including the objective seriousness of the offending and the subjective circumstances of the offender. Nevertheless, to apply the sentencing principle that a sentencing court must have regard to the maximum penalty for the offence, and for maintaining sentencing standards, it is useful to form a view of the level of seriousness of the particular offence along a rough scale from lower to mid to upper level of seriousness. There is a scale of seriousness according to the particular circumstances of each offence. As was pointed out by the Court of Criminal Appeal in *R v JO*, not to recognise the level of seriousness of an offence may result in the sentencing court concentrating too much on an offender's subjective circumstances and failing to give due weight to any aggravating circumstances.

[26] We also agree with Crown counsel that if the level of offending for counts 1, 2 and 3 were properly characterised as mid-level offences, the individual sentences imposed for those offences and the time to be actually served in prison would have to be considered low, if not manifestly inadequate.

Subjective circumstances

[27] When sentenced, the respondent was 47 years old. At the time of the offending, he was 33 to 35 years old.

[28] The respondent has a criminal history in New South Wales. That includes:

1. a conviction for stalking committed in April 2009 against his former de facto partner, for which he was given a two-year good behaviour bond requiring compliance with an apprehended violence order in favour of his former de facto partner;

2. two convictions for assault committed in July 2009 against his then four-year-old son and a conviction for contravening an apprehended violence order, for which he was sentenced to six, eight and 12 months imprisonment respectively, suspended on entering into a bond with supervision for 12 months;

3. a conviction for stalking and a conviction for assault committed in August 2009, for which he was sentenced to four and eight months imprisonment respectively, with supervision for eight months; and

4. a conviction for breach of bail committed in August 2009.

[29] The respondent has a criminal history in the Northern Territory that includes a conviction for aggravated assault (using a weapon) which he committed in September 2000. He was sentenced to a good behaviour bond. In 2016, the respondent was convicted of supplying a commercial quantity of cannabis in

2015, for which he was sentenced to 18 months' imprisonment. The sentence was almost wholly suspended on supervision.

[30] The respondent has no prior convictions for sex offences. Apart from the conviction for supplying a commercial quantity of cannabis, the respondent has not committed any other offences since 2010.

[31] The respondent was born in Darwin and raised by his parents in the Darwin suburbs and then the rural area. He had two older siblings, but his brother to whom he was close died in a car accident eight years ago.

[32] The respondent was educated at Nightcliff High School and Casuarina Senior College, where he completed years 11 and 12. He worked as a labourer until he was 24 years old. When he was 24, he had a motorbike accident and suffered severe burns to 60 per cent of his body. He was taken to Adelaide for surgery. He was in hospital there for two months before returning to Royal Darwin Hospital for a further two months. He had to have major skin grafts and lifelong physiotherapy.

[33] The respondent was unable to work and received a disability support pension for about 12 years. He then gained qualifications permitting him to operate large machinery and trucks. He has been working as a truck driver since 2012.

[34] Seven years ago, the respondent started his own business working as a contractor on civil construction projects. He worked about five months per

year, as the work is seasonal. The Disability Support Pension supplements his income. When working, he usually works six days per week.

[35] The respondent has obviously made considerable progress in his life since committing these offences. However, the respondent has not accepted responsibility for his offending, and it was necessary for the victim to give evidence and be cross-examined at trial. The respondent lacks remorse, and has not shown any empathy for the victim.

Remarks of the sentencing Judge

[36] The sentencing Judge made the following remarks before passing sentence.

> […] I have nothing before me to suggest that you feel any remorse for the harm done to SC by your offending. […]
>
> This is objectively serious offending. […]
>
> […] You exposed a very young girl to sexual offending. You were 33 to 35 years old. She was the daughter of your best friend. You were in a position of trust. She called you 'uncle'. She came to your home with her father and sister. She was entitled to feel safe and free from harm, particularly sexual exploitation.
>
> Instead, you abused and destroyed that trust. You took advantage of SC whilst her father was sleeping or when she was alone without her father's presence. She was vulnerable and defenceless.
>
> […] She was afraid that if she told someone about what you had done, like her father, she would not be able to see him anymore. She was caught in that situation and you exploited it on four occasions, […].
>
> The offending escalated in seriousness across the period of two years. It ended when you and your de facto partner moved interstate.
>
> The consequences for the victim, SC, have been traumatic and have affected her life since childhood, […]. The offending was brazen, being committed in the presence of other adults and children, but always when SC's father was not capable of protecting her.
>
> […]

[…] You have a good employment history. I am told you have a strong and supportive immediate family group in your parents particularly your father.

The offending conduct is unexplained, save that it can be inferred that it was done for sexual gratification and that you were intoxicated. The offending is historical. There is no suggestion in your criminal history of repeat offending of this nature, but that offending did involve the infringement of the personal security and liberty of those around you for a period of about two years.

I note that you have been subject to bail conditions since your arrest on 17 July 2020 and have not breached those through offending or otherwise. This is indicative of suitability for supervision on a suspended sentence. The supervision report I received noted that you indicated you are motivated to undertake whatever counselling and treatment programs are required. […]

The Crown is opposed to the imposition of a partially suspended sentence, subject to supervision by Community Corrections, on the basis that the appropriate sentencing disposition would make a suspended sentence unavailable, as only sentences for terms of 5 years or less can be suspended.

The Crown submits that there is no information as to what might deter you from continuing to offend against children when released. The difficulty with that submission is that your criminal history does not disclose any sexual offending against children [before or] since the time of these offences, some 12 years ago.

A significant gap in detected offending does not mandate a finding that you are rehabilitated or have good prospects of doing so. I take it into account, along with the other matters relevant to your rehabilitation, to which I have referred.

Given your employment history, your supportive family, your willingness to participate in programs, treatment or counselling and the other matters I have referred to, I am prepared to accept that you have moderate prospects of rehabilitation.

I have considered the comparative sentences from the five cases handed up by your barrister.

My review of those sentences and the sentences imposed for this kind of offending discloses that a partially suspended sentence is a common disposition. That was the disposition in each of the comparative sentences referred to by defence.

In deciding whether to impose a partially suspended sentence or a non-parole period, I have taken into account the matters referred to by the Court of Criminal Appeal in *Tran v The Queen* [2019] NTCCA 12 at [39].

> The offences are "sexual offences" within s 78F of the *Sentencing Act* as they are listed in Sch 3 of that Act. By s 78F, I must record a conviction and order that you serve a term of actual imprisonment or a term of imprisonment that is suspended partly but not wholly.
>
> [...]
>
> I am sentencing you for four offences. I consider that the sentences for each count should be partly cumulative to reflect the fact that the offending conduct was not interdependent and could not be considered part of a single episode of criminality, given that it involved different conduct separated in time and, save for counts 1 and 2, in place. The offences clearly constitute separate invasions of the community's right to peace and order.
>
> In my view, the partial accumulation will ensure the sentences individually and the total sentence imposed reflect the totality of your criminal conduct.
>
> Pursuant to s 103 of the *Sentencing Act*, I have been provided with a report about your suitability for supervision on a suspended sentence. That report has assessed you as suitable and recommended for general supervision and identifies a number of conditions for your management. The report says those conditions have been explained to you, Mr TT, and that you are willing to comply with them.

Crown appeal

[37] In *R v Roe*[3] the plurality of the Court of Criminal Appeal summarised at length the principles applicable to Crown appeals against sentence. Their Honours stated:

> Crown appeals against sentence should be a rarity brought only to establish some matter of principle, and to afford an opportunity to the Court of Criminal Appeal to perform its proper function in this respect; namely, to lay down principles for the guidance of courts sentencing offenders. The reference to a "matter of principle" must be understood as encompassing what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which constitutes an error in point of principle.
>
> As to what will constitute an error in point of principle, in *R v Riley* this Court stated:

3 [2017] NTCCA 7 at [11]-[20].

In *R v Barbara* (NSW Court of Criminal Appeal, unreported judgment number 60638 delivered 24 February 1997), Hunt CJ at CL, with whom the other members of the Court agreed, pointed out that the passage from the judgment in *Everett* cited by Thomas J was not limited to laying down some new point of principle. His Honour said:

> It is usually overlooked by respondents that the High Court has at the same time also clearly indicated that sentences which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards, constitute error in point of principle which the Crown is entitled to have this Court correct.

These remarks do not operate to displace the principle expressed by King CJ in *R v Osenkowski*, namely:

> 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 the judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for leniency which has been traditionally 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 an 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 principles enunciated in *House v R* remain applicable to the determination of manifest inadequacy. [...]

In *Hili v R* , the plurality reasons contain the following observations concerning the assessment of manifest inadequacy, in the absence of any assertion of specific error, on the basis that the sentence subject to appeal was unreasonable or plainly unjust:

> [A]ppellate intervention on the ground that the sentence is manifestly excessive or manifestly inadequate "is not justified simply because the result arrived at is markedly different from other sentences that have been imposed in other cases". Rather as the plurality went on to say (72) in *Wong*, "[i]ntervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes there must have been some misapplication of principle, even though where and how is not apparent from the statement of the reasons.

> […] But what reveals manifest excess, or inadequacy, of sentence is consideration of all the matters that are relevant to fixing the sentence. The references made by the Court of Criminal Appeal to the circumstances of the offending and the personal circumstances of each offender were, therefore, important elements in the reasons of the Court of Criminal Appeal.
>
> The applicants' submissions criticising the sufficiency of the reasons given by the Court of Criminal Appeal pointed out that the Court of Criminal Appeal identified no specific error in the sentencing judge's findings of fact or reasons. That is right, but because the only ground advanced by the Director was the ground of manifest inadequacy, it had to be assumed that the Director alleged no specific error. That the Court of Criminal Appeal identified no specific error is, therefore, unsurprising. *The absence of identification of such an error does not bespeak error on the part of the Court of Criminal Appeal.*

Even where manifest inadequacy is found, this Court retains a residual discretion as to whether the respondent should be re-sentenced. In R v BJW the New South Wales Court of Criminal Appeal stated:

> The right of the Crown to appeal against a sentence on the grounds of inadequacy is exceptional. However, where sentences imposed are so inadequate as to indicate error or departure from principle, or depart from accepted sentencing standards, they demonstrate error in point of principle which the Crown is entitled to have this Court correct. The case must be a compelling one before this Court will interfere. It is not sufficient that this Court would itself, in the position of the sentencing judge, have imposed a more severe sentence. However, sentences outside the permissible range of those the product of a properly exercised sentencing discretion prima facie manifest error. Even so, in the case of a Crown appeal, there remains a residual discretion as to whether the Court will interfere. (Footnotes omitted)

As to the exercise of the residual discretion, in *Green v R* the plurality of the High Court stated:

> A primary consideration relevant to the exercise of the residual discretion is the purpose of Crown appeals under s 5D which, as observed earlier in these reasons, is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons." That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion.

That principle has been accepted and applied by this Court in *R v Hitanaya* and *R v Wilson*. [...]

> […]
>
> Accordingly, the principle of double jeopardy no longer requires this Court to ensure that appellate intervention is rare and exceptional in the manner spoken of in *Hitanaya*. It remains the case, however, that this Court will not intervene where no point of principle arises, and will be slow to intervene where there is a countervailing factor which may warrant the exercise of the residual discretion.

Principles applicable to the imposition of a suspended sentence

[38] In *R v JO* the Court of Criminal Appeal stated the following about the suspension of sentences of imprisonment in cases such as these.

> There is no tariff in the sense that, for crimes of the type committed by JO, suspension of all but a nominal period of a sentence can never be justified. However, given the serious and repeated criminal offences against a very young child, being offences of a sexual nature, suspension could only be justified if powerful mitigating circumstances exist either in respect of the offence or the offender or both. In view of the gravity of the total criminal conduct, the requirements of retribution, denunciation and general deterrence must be given great weight and, usually, such considerations will prevail over matters personal to an offender. This view is reinforced by a consideration of the schedule of sentences provided by the Crown which demonstrates the rarity of suspension after service of a nominal period. Suspension after service of a nominal period was ordered in only two matters, one of which involved an offender aged 17 who suffered from a cognitive impairment. Both offenders pleaded guilty and the criminal conduct of the adult offender was far less serious than that of JO.
>
> In the matter under consideration, there were no matters of mitigation, either relating to the offence or to JO, capable of justifying suspension after service of imprisonment for only one day in the face of such serious and repeated criminal conduct. In this respect the sentencing discretion miscarried to the extent of demonstrating error in point of principle.

[39] In *R v JO*, the Court of Criminal appeal resentenced the respondent to a total sentence of three years and three months' imprisonment and ordered that the

sentence of imprisonment be suspended after the respondent had served one year in prison.

[40] In *Whitehurst v R*[4] Riley CJ stated the following about the decision to suspend a sentence of imprisonment.

> It was submitted on behalf of the applicant that the sentencing Judge erred in setting a non-parole period rather than partially suspending the sentence. It was contended that the failure to partially suspend the sentence reflected a failure to apply the sentencing principles contained in s 4 of the *Youth Justice Act*.
>
> Further it was submitted the fixing of a non-parole period rather than the imposition of a partly suspended sentence made the sentence incommensurate with sentences imposed on other youths for similar offending. This is to misunderstand the issues involved in determining whether to impose a non-parole period or a suspended sentence. The decision to fix a non-parole period or grant a suspended sentence may give rise to considerations of parity with other offenders. However, the issue is one of what is appropriate for the particular offender then before the court in the particular circumstances of both the offender and the offending.
>
> The parole system "represents an important influence for the reform and rehabilitation of those in gaol". Dual purposes of parole are to "lessen the burden of punishment upon prisoners and to provide for their earlier release from gaol in those cases which merit it and to provide for the rehabilitation under supervision of the prisoners so released". In *R v Shrestha* it was said that:
>
> > The basic theory of the parole system is that, notwithstanding that a sentence of imprisonment is the appropriate punishment for the particular offence in all the circumstances of a case, considerations of mitigation or rehabilitation may make it unnecessary, or even undesirable, that the whole of the sentence should actually be served in custody.
>
> The parole system provides an incentive for prisoners to behave whilst in prison and encourages prisoners to actively engage in rehabilitation.
>
> The first task of the sentencer is to impose a sentence which is appropriate to the offending in light of all of the relevant circumstances of the offence and the offender. Thereafter it is necessary to determine

4 [2011] NTCCA 11 at [23]-[30].

whether to wholly or partially suspend the sentence or, alternatively, to set a non-parole period. If a non-parole period is to be set then the sentencer must consider the duration of that period. If the sentence is to be partially suspended then the sentencer must consider the actual term of imprisonment, to be served prior to the suspension of the sentence.

In choosing whether to proceed by way of a suspended sentence or a non-parole period the sentencing Judge must consider many things including any relevant legislative provisions, the nature of the offending, the minimum period of imprisonment which must be actually served to reflect the seriousness of the offending, and the personal circumstances of the offender including any prospects for rehabilitation. Consideration of the personal circumstances of the offender and his prospects for rehabilitation is likely to involve determining how any prospects for rehabilitation may be addressed and enhanced; whether there is a need for supervision and, if so, the nature of that supervision; the existence of, and the nature of, any support mechanisms available to the offender outside the custodial setting; the identification of impediments and risks to rehabilitation and so on.

The question of whether to impose a non-parole period or to suspend a sentence must be answered in light of all of the circumstances surrounding both the offence and the offender. Such considerations do not give rise to an expectation (as was suggested here) that for a particular type of offence a suspended sentence would result.

In the present case the sentencing Judge had good reason to impose a non-parole period in preference to a suspended sentence. The reports available to his Honour suggested that attempts to supervise the applicant when he was at liberty in the community had not been successful. Immediately before committing this offence he had served a period of detention for breaching the terms of earlier suspended sentences. He reoffended within a very short time of his release. In light of this history it was doubtful that he would comply with the terms of any order for supervision. The sentencing Judge sensibly adverted to the need for the sentence to involve an incentive for the applicant to earn his release rather than simply serving out his time prior to release.

[41] The sentencing Judge's decision to suspend the sentence of imprisonment imposed on the respondent was consistent with the above decisions of the Court of Criminal Appeal. Her Honour specifically referred to *Tran v The*

Queen[5] at [39] which applies the passages in *Whitehurst* that we have set out above. The sentencing Judge took into account the following matters: (i) the minimum period of imprisonment which must be actually served to reflect the seriousness of the offending, (ii) the respondent's prospects of rehabilitation and the fact that he had not committed a similar offence for a period of 12 years, (iii) the supervision assessment report which found the respondent to be suitable for supervision in the community, (iv) his supportive family, and (v) his employment.

[42] The Crown has not established any error of principle in the sentencing Judge's decision to suspend the respondent's sentence after 18 months' imprisonment.

Consideration

[43] In our opinion, the appeal should be dismissed. In all of the above circumstances, the total sentence of four years' imprisonment suspended after 18 months is proportional to the whole of the respondent's offending. The sentences imposed by the sentencing Judge do not shock the public conscience. The sentences are not plainly unjust. No error in principle has been demonstrated.

[44] While the sentences are towards the lower end of the range of sentences for such offences, there was a basis for the sentencing Judge exercising some leniency. We think her Honour formed the opinion that there was a moderate

5 [2019] NTCCA 12.

prospect that leniency at this particular stage of the respondent's life might lead to reform. She was entitled to do so. Apart from the offence of supplying a commercial quantity of cannabis in 2015, which is not relevant to this offending, the respondent has not offended since 2010. He had committed no other sexual offences. He had support in the community and was in meaningful employment.

[45] In reaching the above conclusions, we have taken into account the following statements by the Court of Criminal Appeal in *R v JO* at [82] and [83].

> Every offence against a child is a serious offence. In 2004 the maximum penalty for the offences of which JO was convicted was increased from 10 to 14 years and sentencing courts must respond accordingly. Sexual assaults against children are abhorrent crimes which cause grave disquiet throughout the community. In recent years the community has come to recognise that these offences are far more prevalent than previously was thought to be the situation. The community has reached a more enlightened understanding of the nature of sexual crimes and the personal violation involved in all such crimes, including those previously regarded as relatively minor offences. The impacts of these types of crimes are now better recognised and understood, particularly the long term effects upon victims who were children at the time of the offending.
>
> Children are among the most vulnerable members of our community and are entitled to the full protection of the law. Children in domestic circumstances are particularly vulnerable to abuses of trust by a trusted family member. Penalties imposed by the Criminal Court in recent years have increased in recognition of both the increased maximum penalties for crimes of the type committed by JO and of their prevalence and harmful effects. General deterrence is a matter of particular importance, together with denunciation by the community through the imposition of condign punishment.

[46] However, while every crime of sexual assault against a child is a serious crime, there is a scale of seriousness according to the particular circumstances of each case.

KELLY J

[47] I agree with the reasoning and the result in the judgment of Southwood J and Burns AJ and would add the following remarks.

[48] I agree with the submission by counsel for the appellant that in determining whether offending of this nature is low level or mid-range or in the upper range of seriousness for offences of this nature, one must compare like with like and not, for example, compare offences of indecent dealing or gross indecency with offences of sexual intercourse committed upon children.

[49] I also agree with the observation by counsel for the respondent that one ought not put too much emphasis on characterising offending along a linear scale as the appropriate sentence (or range of available sentences) depends on the whole of the circumstances of the offending including the subjective circumstances of the offender. Nevertheless, for the purpose of applying the sentencing principle of having regard to the maximum penalty for the particular offence, it is useful to form a view as to the objective seriousness of the offending along a rough scale from lower to mid to upper range of seriousness for offences of the kind under consideration when establishing a starting point. This is not to suggest that it is in any way a two stage process but, subject to any mitigating factors and subjective circumstances that might call for a lower sentence, if a sentence is accurately described as around the mid-range of seriousness for offences of that nature, one might expect a starting point, before application of any reduction for a guilty plea,

remorse and co-operation with authorities, of somewhere around the mid-range of available sentences, taking into account the maximum. (Another way of expressing the same concept is that characterisation of the offending as in the mid-range of seriousness fixes an approximate upper limit beyond which a sentence will be greater than would be justified by the objective seriousness of the offending.)

[50] For these reasons, I agree with the contention by counsel for the appellant that if the characterisation of the offences as around the mid-range of seriousness were correct, the individual sentences imposed in this case, and the 18 months to be served, would have to be considered low, if not manifestly inadequate. Counsel relied on these factors as indicating the correctness of that characterisation.

(a) The victim was only 10, the lowest age for an offence of this nature (i.e. under 16). If the victim had been younger than 10 years old, the offences would have been aggravated and would have carried a higher maximum penalty.)

(b) Counts 2 and 4 involved skin on skin contact which is more serious than charges of the same offence involving touching over the clothes.

(c) Count 4 involved skin on skin touching of the child's genitals and fell just short of sexual intercourse.

(d) There was a large age discrepancy between the respondent and the victim.

(e) The victim was vulnerable and the offending involved a breach of trust.

(f) The offending involved a degree of persistence in the face of the child's refusals.

(g) These offences were not isolated incidents but occurred over a period of between one and two years.

[51] Counsel for the respondent pointed out that if all of these factors were absent (the example given was momentary indecent touching above the clothing of a 15 ½ year old girl by an 18 year old boy not in any position of trust) the offending would almost certainly not amount to gross indecency. All in all, I consider that the offending in all counts falls below the mid-range of seriousness for offences of gross indecency.

[52] I agree that although the sentences are towards the lower end of the range of sentences that would be considered proportionate, they are not plainly unjust: they do not shock the public conscience. No error in principle has been demonstrated. I would dismiss the appeal.
