CITATION:	*The King v Singar* [2025] NTCCA 1
PARTIES:	THE KING
	v
	SINGAR, Michael
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 12 of 2024 (22332647)
DELIVERED:	20 March 2025
HEARING DATE:	24 February 2025
JUDGMENT OF:	Grant CJ, Kelly & Blokland JJ

CATCHWORDS:

CRIME – Appeals – Appeal against sentence – By Crown against inadequacy

Aggravated unlawful entry, three counts of sexual intercourse without consent and deprivation of liberty – Whether sentence manifestly inadequate – Whether failure to take into account objective seriousness of each individual rape offence – Whether sentence manifestly inadequate – Appeal allowed and respondent resentenced.

Criminal Code 1983 (NT) ss 5D, 68A, 414(1A)

Azzopardi v The Queen (2011) 35 VR 43; *Carroll v The Queen* (2011) 29 NTLR 106; *CMB v Attorney General for NSW* (2015) 256 CLR 346; *Craft v The Queen* [2021] VSCA 66; *Bugmy v The Queen* (2013) 249 CLR 571;

Dinsdale v The Queen (2000) 202 CLR 321; *DPP v Kazarisis* (2010) 31 VR 636; *Everitt v The Queen* (1994) 181 CLR 295; *Forrest v The Queen* (2017) 267 A Crim R 494; *Gillian v The Queen* [2007] NTCCA 8; *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462; *House v The King* (1936) 55 CLR 499; *Kentwell v The Queen* (2014) 252 CLR 601; *Kochai v R* [2023] NSWCCA 116*; Lacey v Attorney General of Queensland* (2001) 242 CLR 573*; McKay v The Queen* (2001) NTLR 14*; Pearce v The Queen* (1998) 194 CLR 610; *R v Bavin* [2001] NSWCCA 167; *R v Bloomfield* [1999] NTCCA 137; *R v Cheung* [2010] NSWCCA 244; *R v Goodwin* [2003] NTCCA 9; *R v Hernando* [2002] NSWCCA 489; *R v Hersi* [2010] NSWCCA 57; *R v Hansel* [2004] NSWCCA 436; *R v Holder and Johnston* [1983] 3 NSWLR 245; *R v Jermyn* (1985) 2 NSWLR 194; *R v JW* (2010) 77 NSWLR 7; *R v McIvor* [2002] NSWCCA 490; *R v O'Connor* [2014] NSWCCA 53; *R v Price* [2004] NSWCCA 186; *R v Reeves* [2014] NSWCCA 154; *R v Riley* (2002) 161 A Crim R 414; *R v Walker* [2023] NSWCCA 219; *R v Wilson* [2024] NTCCA 14; *R v Y* [2002] NSWCCA 191; *R v Woodland* [2007] NSWCCA 29; *R v Yang* [2002] NSWCCA 464; *The King v Benning* [2022] NTCCA 15; *The King v CH* [2024] NTCCA 10; *The King v Hunt* [2024] NTCCA 9; *The Queen v Kahu Leadie* [2022] NTCCA 4; *The Queen v Mossman* (2017) 40 NTLR 144; *The Queen v Nabageyo* (2014) NTLR 154; *Thomas v The Queen* [2017] NTCCA 4; *Yeung v R* [2018] NSWCCA 52, referred to.

REPRESENTATION:

Counsel

Applicant:	PK Williams with LJ Auld
Respondent:	A Abayasekara with B Durkin

Solicitors

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

Judgment category classification:	B
Number of pages:	44

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

The King v Singar [2025] NTCCA 1
CA 12 of 2024 (22332647)

BETWEEN:

THE KING
Applicant

AND:

MICHAEL SINGAR
Respondent

CORAM: GRANT CJ, KELLY & BLOKLAND JJ

REASONS FOR JUDGMENT
(Delivered 20 March 2025)

[1] This is an appeal by the Crown against sentence on grounds of manifest inadequacy and an asserted failure on the part of the sentencing judge to assess the objective seriousness of each individual offence.

Procedural history

[2] On 11 September 2024, the respondent was sentenced for five offences to which he had pleaded guilty. Count 1 charged the offence of unlawful entry with the intention of committing an indictable offence, which attracted a maximum penalty of imprisonment for 14 years. Count 2 charged the offence of penile-oral intercourse without consent, which attracted a maximum penalty of life imprisonment. Count 3

charged the offence of digital-vaginal and digital-anal intercourse without consent, which also attracted a maximum penalty of life imprisonment. Count 4 charged the offence of penile-vaginal intercourse without consent, which again attracted a maximum penalty of life imprisonment. Count 5 charged the offence of deprivation of personal liberty, which attracted a maximum penalty of imprisonment for seven years.

[3] The sentencing judge imposed a sentence of four years' imprisonment for each of the rape offences, with the sentences imposed for counts 3 and 4 each cumulated as to one year on the previous sentence. That constituted a sentence to imprisonment for six years for the rape offences. The sentencing judge imposed a sentence of 18 months' imprisonment for each of the offences in counts 1 and 5, with each of those sentences cumulated as to six months on the previous sentence. The total sentence for the offences charged by indictment was imprisonment for seven years.

[4] Those offences were committed on 6 October 2023. At the time the respondent committed those offences he was already serving a suspended sentence which had been imposed three months earlier on 6 July 2023 for the offence of recklessly endangering serious harm with circumstances of aggravation. The respondent had been sentenced to imprisonment for 18 months for that earlier offence, which was partly suspended subject to conditions. At the time of this further

offending, 14 months and 12 days' imprisonment was held in suspense under the terms of the order suspending sentence. The sentencing judge restored the whole of the period held in suspense but ordered that it be served wholly concurrently with the sentences which had been imposed for the further offending. Accordingly, the total effective sentence was imprisonment for seven years. A single non-parole period of five years was fixed.

Grounds of appeal

[5] The notice of appeal as amended asserts that the individual sentences imposed for each of the rape offences are manifestly inadequate, and that the total effective sentence and non-parole period are also inadequate as a result of those individual inadequacies and/or inadequate accumulation, both as between the individual sentences for the rape offences and with the period of imprisonment which was restored.

[6] At the hearing of the appeal, the applicant also sought and was granted leave to amend the notice of appeal to include a further ground which asserts that the sentencing judge erred in failing to undertake a proper assessment of the seriousness of each offence in accordance with *Pearce v The Queen*.[1]

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1 *Pearce v The Queen* (1998) 194 CLR 610.

Application for an extension of time

[7] The sentence was imposed on 11 September 2024. The 28 day appeal period expired on 9 October 2024. On 28 October 2024, the applicant filed a proposed notice of appeal together with an application for an extension of time within which to bring the appeal. That application is opposed by the respondent.

[8] The notice of appeal in this case was filed 19 days out of time. The reasons given for that delay are set out in an affidavit made on 28 October 2024 and filed on behalf of the applicant. They are, in essence, that following sentence the prosecutor with carriage of the matter requested his legal assistant to order the transcript of the sentencing proceedings to allow consideration to be given to whether a Crown appeal against sentence should be instituted. The day that request was made is not specified in the affidavit. On 4 October 2024, the legal assistant in question had a serious medical episode and has been on medical leave since that time. As it transpired, and for reasons which would appear to be unknown, the legal assistant did not order the transcript.

[9] On 18 October 2024, which was nine days after the expiration of the appeal period, the Assistant Director of Public Prosecutions sought an update in relation to the matter. The prosecutor with carriage of the matter advised that transcript had been ordered but not yet received. It would appear that up until that point in time the prosecutor had been

relying on the receipt of the transcript to prompt attention to the matter. On 22 October 2024, the transcription service advised that no order for transcript had been made. An order was placed, and the transcript was then received on 24 October 2024. The transcript was reviewed, and the Crown appeal was instituted four days later.

[10] The principles which govern applications by the Crown for an extension of time within which to bring an appeal against sentence are set out in some detail in the respondent's submissions. Those principles may be summarised as follows:

(a) the statutory time limit is intended to secure finality in litigation and compliance is required in the ordinary case. However, the principle of finality does not provide a discrete reason for refusing to exercise the power to extend the time limit where the sentence is still being served[2];

(b) whether to extend time is a matter for the discretion of the appellate court and the applicant bears both the evidentiary and persuasive onus in such an application;

(c) there needs to both a reasonably satisfactory explanation for the failure to lodge the appeal within time and good reason to extend time;

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2 *Kentwell v The Queen* (2014) 252 CLR 601 at [32].

(d) the longer the delay the more exceptional the circumstances will need to be in order to warrant an extension of time; and

(e) a court will not grant any considerable extension of time unless satisfied that the merits of the proposed appeal are such that it would probably succeed.

[11] The principle underlying these conditions and strictures is that an extension of time for the Crown to bring an appeal against sentence involves a degree of oppression to the offender. That oppression derives from the fact that a Crown appeal against sentence gives rise to a form of double jeopardy where the offender understands that the sentence is subject only to the right of the Crown to appeal within the period of 28 days. It may be accepted that although s 414(1A) of the *Criminal Code* provides that this Court must not take into account any element of double jeopardy in exercising its discretion to allow the appeal and impose another sentence, that prohibition does not operate on the exercise of the discretion to extend the time within which an appeal may be brought.

[12] The respondent submits that the Crown has not advanced any satisfactory explanation for the delay. That is said on the basis that a copy of the transcript was unnecessary to form any view in relation to the adequacy of the sentence. That may well be so in some cases, but it cannot be characterised as unreasonable to defer any decision in

relation to a Crown appeal until transcripts have been received. That is particularly so in circumstances where the Director must make that determination having regard to the evidence adduced and the submissions made during the course of sentencing proceedings, and where the grounds of appeal potentially extend beyond manifest inadequacy to specific error.

[13] The respondent also draws attention to the fact that the failure to receive the transcript did not come to attention within the offices of the Crown until nine days after the appeal period had expired. Although that oversight was both regrettable and in error, it may be explained by the fact that the prosecutor with carriage of the matter was, perhaps unwisely, relying on receipt of the transcript to prompt his attention to the matter. So far as the initial failure to order the transcript is concerned, that was due to default on the part of the legal assistant to make the order in accordance with the direction she had been given, whether or not that default was in any way related to the subsequent medical episode.

[14] While acknowledging the due force of the respondent's submissions, this is a matter in which an extension of time is properly granted. First, the delay and the extension consequently required is only 19 days, and the Crown moved promptly once the default was discovered. That is not properly characterised as a "considerable" extension. Second, the merits of the proposed appeal are relevant on such an application. As is

the usual practice in this jurisdiction, the application for an extension of time and the proposed substantive appeal have been heard together. For the reasons which follow, we have concluded not only that the appeal has prospects of success, but that it would succeed subject only to the requirement for an extension of time. The rigour which the Court properly exercises in ensuring that the Crown institutes appeals against sentences within the time prescribed by statute in service of the principle of finality must be balanced against the countervailing duty to correct manifest inadequacies or inconsistencies in sentencing standards which constitute error in point of principle. Third, there is nothing to suggest that the respondent in this case has been subjected to any actual oppression by reason of the late filing of the notice of appeal. In fact, there is nothing before the Court which would suggest he had any knowledge or comprehension of either the right of Crown appeal or the 28 day limitation on commencement. Although evidence of that nature may not be necessary in circumstances where oppression may be inferred or assumed from the nature or duration of the delay, there is no basis on which to conclude that the respondent in this matter has suffered in any actual or subjective sense. It may also be noted in this respect that the respondent had not been released in the interim period and nor was his release imminent. Under the terms of the sentence imposed by the sentencing judge, the non-parole period does not expire until 8 October 2028.

Objective circumstances of the offending

[15] The objective circumstances of the offending were as follows. The respondent was a 19-year-old male. The victim was a 37-year-old female. The respondent and the victim were unknown to each other. On the night in question the victim was sitting alone on the veranda of her unit. It was dark. The respondent approached the unit. The victim said that she did not know him and told him to go away. She then got up and went into her unit. The respondent followed her, grabbed her from behind, pushed her inside the unit and threw her forcibly to a mattress on the floor of the living room. The respondent's obvious intention at the time was to rape the victim. That conduct, together with the further time the respondent remained in the unit with that intention, constituted the offence charged in count 1.

[16] The respondent then demanded to have sex with the victim and threatened to kill her if she did not comply. The respondent manoeuvred himself so that he placed the victim in a headlock with his legs and forced his erect penis into her mouth despite her struggles in protest. At a later point the respondent followed the victim into the bathroom and forced his erect penis into her mouth as she sat on the toilet. At a later point still, after the respondent had dragged the victim into her bedroom, he forced his erect penis into the victim's mouth and down her throat causing her to vomit and lose consciousness. That

conduct in its totality constituted the offence of penile-oral intercourse without consent charged in count 2.

[17] Immediately following the first act of forced oral intercourse, the respondent lifted the victim's legs up, spat on her anus and inserted his fingers into her anus and vagina at the same time. On the basis of observations subsequently made by the victim, which are recorded in the agreed facts, it would appear that this caused bleeding from one or other of those orifices. After the respondent had dragged the victim into her bedroom, he continued to use his fingers to interfere with her vagina and anus. In the victim's description, it felt like he was trying to "rip her apart". That conduct caused the victim so much pain she started screaming and attempted to wrestle herself away from the respondent. The respondent punched the victim to the head with a closed fist in order to stop her physical resistance. Although the matter is somewhat confused by the order in which the relevant events are described in the agreed facts, that conduct in its totality constituted the offence of digital-vaginal and digital-anal intercourse without consent charged in count 3.

[18] The respondent then had non-consensual penile-vaginal intercourse with the victim. As this was happening the victim pleaded with him to stop. The period over which this took place is not described in the agreed facts. After some time, the respondent stopped what he was doing and left the unit. It is not explicit in the agreed facts whether the

respondent ejaculated during the course of that conduct, but a swab subsequently taken from the victim's vagina confirmed the presence of the respondent's sperm. That conduct constituted the offence of penile-vaginal intercourse without consent charged in count 4.

[19] Once the respondent had left the premises, the victim dressed and called police from the home of a relative. Police attended but were unable to locate the respondent at that time. Three days later the victim saw the respondent entering a nearby unit which she reported to police. Police matched the sperm found in the vulval swab to the respondent and he was arrested on that same day.

Respondent's subjective circumstances

[20] The respondent was 20 years of age at the time of sentencing and will very shortly turn 21 years of age. In addition to the conviction for recklessly endangering serious harm for which the respondent was serving a suspended sentence at the time of this subsequent offending, he also had three convictions for breaching bail. So far as his other personal circumstances are concerned, the respondent was born in Darwin and spent the first eight years of his life living in a public housing estate with his mother. She had problems with alcohol abuse, and he was often unsupervised during those years. When the respondent was nine years old he was given to the care of his uncle and auntie in Peppimenarti, who had three children of similar age. From that point in time, he reportedly had a good upbringing in a close-knit

family environment which was free from alcohol abuse, drug use or violence.

[21] The respondent returned to Darwin to undertake his secondary schooling as a boarder at Kormilda College. He has not been employed since leaving school. His first contact with the criminal justice system occurred when he was 16 years of age when he was warned for receiving stolen property. He received a further warning at 17 years of age for disorderly behaviour in a public place. He was arrested at age 18 for the reckless endangerment offence and spent three and a half months in prison before being sentenced and released on the order suspending sentence. He has a history of persistent non-compliance with bail conditions and the conditions of the suspended sentence.

[22] The respondent started drinking alcohol when he was 18 years of age and started smoking cannabis at 19 years of age. Prior to this offending he consumed alcohol and cannabis daily while in Darwin but did not drink or smoke when on community. At the time the pre-sentence report was prepared, the respondent's social media presence was described by the author as depicting a "pro-criminal persona", with postings of weapons, anti-police slogans and a purported affiliation with a gang in the Daly River region. The pre-sentence report contained the assessment that the respondent had limited insight into the seriousness of his crimes, their impact on his victim or the contribution excessive drinking made to his offending conduct. For that

combination of reasons, the respondent was assessed as presenting a high risk of recidivism. He has not undertaken any form of residential rehabilitation as he has been assessed as unsuitable given the sexual nature of his offending. The respondent otherwise has no physical or mental ailments or conditions.

Principles relating to Crown appeals against sentence

[23] The principles which govern Crown appeals against sentence are well established. Such appeals should be brought only to establish some matter of principle and to afford the Court of Criminal Appeal an opportunity to lay down principles for the guidance of courts in sentencing offenders.[3] The reference to a "matter of principle" encompasses what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which constitutes an error in point of principle.[4]

[24] A Crown appeal against sentence is governed by the principles enunciated in *House v The King*.[5] In the event that some error has been made in the exercise of the discretion, such as acting on a wrong principle, taking irrelevant matters into account, acting on a mistaken understanding of the facts or failing to take into account some material

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3 *The Queen v Mossman* (2017) 40 NTLR 144 at [8] *et seq*; *The Queen v Roe* (2017) 40 NTLR 187 at [11]-[20]; *Griffiths v The Queen* (1977) 137 CLR 293 at 310.

4 *Lacey v Attorney General of Queensland* (2011) 242 CLR 573 at [16]; *Everett v The Queen* (1994) 181 CLR 295 at 300; *Dinsdale v The Queen* (2000) 202 CLR 321 at [61]-[62].

5 *House v The King* (1936) 55 CLR 499.

consideration, the appellate court may exercise its own discretion in substitution. In circumstances where no specific error is evident, but the sentence imposed is unreasonable or plainly unjust, the appellate court may infer that the sentencing discretion has miscarried even in the absence of discernible error. However, in such a case it must be shown that the sentence was clearly and obviously inadequate, and not just arguably inadequate. Appellate intervention on the ground that the sentence is manifestly inadequate is not justified simply because the result arrived at is markedly different from other sentences that have been imposed in other cases. It must be shown that the sentence is so disproportionate to the seriousness of the offending as to demonstrate error in principle.[6]

[25] The assessment of the adequacy of sentence requires consideration of all the matters that are relevant to fixing the sentence, including the circumstances of the offending and the personal circumstances of the offender. The benchmark for manifest inadequacy is a "stringent one, difficult to make good" and an appellate court will "be astute to enforce the stringency of these tests".[7] That is because of the need to preserve the broad discretion of sentencing judges in recognition of the difficulty of having to balance "incommensurable factors bearing on

6 *The Queen v Kahu-Leedie* [2022] NTCCA 4 at [21].

7 *DPP v Kazarisis* (2010) 31 VR 636 at [127]-[128].

the exercise of the sentencing discretion, [with] those factors ... pulling in different, conflicting and contradictory directions".[8]

[26] As the respondent submits, in an inadequacy appeal against sentence the Crown is required to surmount two hurdles. The Crown must first identify an error of the type described in *House v The King*. Even where manifest inadequacy is found, the appellate court retains a residual discretion as to whether the appeal should be allowed, and the respondent resentenced. The Crown must also negate any reason why the residual discretion not to interfere should be exercised.[9] Although the Court must not take into account any element of double jeopardy in making the decision whether to allow the appeal or impose another sentence[10], that provision does not displace or abrogate the residual discretion. As the High Court observed in relation to the analogous New South Wales provision (citations omitted):

> The effect of s 68A was discussed in *R v JW* [(2010) 77 NSWLR 7] in which the Court of Criminal Appeal sat as a bench of five judges. Spigelman CJ, with whom the other members of the Court relevantly agreed, concluded that the section removed from consideration by the Court of Criminal Appeal the distress and anxiety to which respondents to a Crown appeal are presumed to be subject if they have to undergo sentencing for a second time. It prevents an appellate court from basing on such distress and anxiety a decision not to intervene or to impose a sentence less than that which it otherwise believes to be appropriate. Moreover the Court cannot, it was said, have regard to the frequency of

8 *Craft v The Queen* [2021] VSCA 66 at [25].

9 *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [54] citing *Everett v The Queen* (1994) 181 CLR 295 at 299–300 and *R v Hernando* [2002] NSWCCA 489 at [12].

10 *Criminal Code*, s 414(1A).

> Crown appeals as a sentencing principle. On that view, s 68A is relevant to the exercise and scope of the residual discretion, in s 5D of the *Criminal Appeal Act*, to dismiss a Crown appeal against sentence notwithstanding that the sentence is shown to have been erroneous. It is not necessary for this Court to review the correctness of the construction of s 68A in *JW*. On any view of its operation it does not extinguish the residual discretion. The Crown, in this appeal, did not take issue with that proposition.[11]

[27] Although the Northern Territory provision is not in precisely the same terms as its New South Wales counterpart, there is no material distinction for this purpose. Accordingly, while the appellate court cannot exercise its discretion not to intervene on the basis of the distress and anxiety which a respondent suffers from being exposed to the possibility of a more severe sentence, or for that reason reduce the sentence which it otherwise believes to be appropriate, it is still required to consider the other factors which potentially inform the exercise of the residual discretion. Those other factors are discussed later in these reasons.

[28] Counsel for the respondent in the present matter also submitted that Crown appeals should be a rarity, and that this principle operated as some form of limiting purpose in the exercise of the discretion. It is now broadly accepted that insofar as considerations of "rarity" were intended to guide courts of criminal appeal, that reflected the operation of the double jeopardy principle. In jurisdictions where that principle has been abolished, as it has been in this jurisdiction, rarity is not a

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11 *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462 at [26].

relevant consideration in the exercise of the appellate discretion. The frequency with which Crown appeals are brought is a matter for the prosecuting authority.[12]

Failure to properly assess seriousness of offending

[29] The additional ground of appeal asserts that the sentencing judge committed specific error in failing to undertake a proper assessment of the seriousness of each offence. The substance of this ground is that in the sentencing judge failed to consider and fix appropriate sentences for each individual offence before going onto consider questions of cumulation, concurrence and totality. It is said that approach masked the full seriousness of the offending and resulted in the orders for cumulation and concurrence being made on an erroneous foundation.

[30] It may be accepted that a bare recitation of the facts constituting the offences and a reference to the objective features of the offending does not satisfy the requirements of sentencing. A sentencing judge must assess the objective gravity of the offences. One of the reasons for that requirement is to ensure that the offender is adequately punished for each offence.[13] However, in undertaking that task it is unnecessary for a sentencing judge to attach a specific label to the objective

12 *R v JW* (2010) 77 NSWLR 7 at [124], [129], [141].

13 *Yeung v R* [2018] NSWCCA 52 at [26]-[31] and the cases cited there.

seriousness of each offence in terms of where it might sit on a range of the scale.[14]

[31] The sentencing judge's remarks in this case included that the offending was serious, that the victim had tried to resist the respondent, that the victim had pleaded with the respondent to stop on a number of occasions, and that the respondent had persisted in his sexual assaults upon the victim despite her protestations and physical resistance. The sentencing remarks make express reference to the deliberate nature of the respondent's conduct, his actions in forcing his way into the victim's unit and violently assaulting her, and the threats which he made against her. The sentencing judge observed that the conduct represented an invasion of the victim's security and safety, and that the various acts of penetration were degrading, demeaning and caused significant harm. The sentencing judge observed further that the sexual assaults were accompanied by brutal physical abuse and the attack was sustained and violent. Having regard to those incidents of the offending, the sentencing judge stated that considerable weight was required to be given to both general and specific deterrence and denunciation.

[32] Although no individual attention or gradation of seriousness was allocated to each separate act of penetration, those observations and

14 *Kochai v R* [2023] NSWCCA 116 at [50]-[52] and the cases cited there; *R v Walker* [2023] NSWCCA 219 at [54]-[55].

findings were sufficient to satisfy that requirement that the sentencing judge undertake a proper assessment of the seriousness of the offending. This ground of appeal resolves ultimately to the contention that a proper assessment of the objective seriousness of each individual offence would have required longer sentences in respect of each of the rape offences, and possibly some differentiation in the sentences imposed in respect of each of those offences. The bases of intervention described in *House v The King* are not engaged by an assertion that the sentencing judge erred by failing to properly determine the objective seriousness of the offence, or the seriousness of each offence individually when there is more than one.[15] An assertion of that type is a particular of the ground that the sentence was manifestly inadequate, and is properly dealt with in that context.

Manifest inadequacy

[33] The sentence imposed for each offence of sexual intercourse without consent was imprisonment for four years, reduced from a starting point of imprisonment for five years with the application of the discount for the plea of guilty. That level of discount reflects the fact that although the respondent had entered pleas of guilty, there was a lack of insight and genuine remorse.

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15 *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *R v Tuala* [2015] NSWCCA 8 at [44].

[34] A comprehensive survey of the comparative sentences for the offence of rape was conducted by this Court in the matter of *Gilligan v The Queen*.[16] While first acknowledging that the survey was conducted almost 18 years ago, it concluded that a starting point of nine years' imprisonment before any discount for a guilty plea is within the range of sentences imposed for offences against s 192(3) of the *Criminal Code* in circumstances where the assault is accompanied by violence and degradation beyond the minimum which might be expected in the commission of that offence. Approximately a decade after that review, in 2017, this Court conducted a further review of comparative sentences for rape in the matter of *Forrest v The Queen*.[17] That review disclosed that since the survey had been conducted in *Gilligan* in 2007, the average head sentence imposed for an offence against s 192(3) of the *Criminal Code* involving an adult offender and an adult victim, after excluding the most serious cases, had been six years and five months. That average is broadly consistent with the observation made in the 2014 case of *The Queen v Nabegeyo*[18] to the effect that most of the comparative sentences referred to the court on that occasion involved a starting point of six years or higher for the offence of rape.

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16 *Gilligan v The Queen* [2007] NTCCA 8.

17 *Forrest v The Queen* (2017) 267 A Crim R 494.

18 *The Queen v Nabegeyo* (2014) 34 NTLR 154.

[35] In the more recent decision in *R v Wilson*[19], this court considered a Crown appeal against sentence on the ground of manifest inadequacy. The respondent was charged with two counts of sexual intercourse without consent (counts 1 and 3), property damage (count 2), aggravated assault (count 4) and a summary charge of breaching a domestic violence order. The maximum penalties for those offences were, respectively, life imprisonment (counts 1 and 3), imprisonment for 14 years (count 2), imprisonment for five years (count 4), and imprisonment for two years (breaching a domestic violence order).

[36] On the first day of the trial, the respondent pleaded guilty to counts 2 and 4, and entered pleas of not guilty to counts 1 and 3. The trial proceeded before a jury which returned guilty verdicts on both counts. The trial judge sentenced the respondent to a total effective sentence of imprisonment for nine years and two months, with a non-parole period of six years and five months, backdated to take account of the respondent's time in custody. For each of counts 1 and 3, the trial judge imposed sentences of imprisonment for eight years and ordered that the sentences be served cumulatively to the extent of one year. The Crown appealed against the sentence on the grounds that both the individual sentences imposed for the offences of sexual intercourse without

19 *R v Wilson* [2024] NTCCA 14.

consent charged in counts 1 and 3, and the total effective sentence, were manifestly inadequate.

[37] The background to those offences was that the offender was the victim's former domestic partner. They were in an "on-again, off-again" relationship for about six years. That relationship was marred by violence, sexual assault and coercive control. The main object of the offender's violent and controlling behaviour towards the victim was his own sexual gratification.

[38] The offender would regularly make threats to harm the victim and her family. The victim lived in constant fear for her life due to the ongoing threats made by the offender. Throughout their relationship the offender regularly threatened to inflict violence on the victim, and did in fact regularly inflict physical violence on her. The victim was aware that the offender had previously been convicted of the manslaughter of his former domestic partner by beating her to death with a digeridoo after she said she did not want to have sex with him. The offender had been sentenced to five years and 10 months' imprisonment for that manslaughter, and the offender made repeated threats to the victim that she would end up like his former partner if she did not do what the offender said.

[39] In summary, the facts on counts 1 were as follows. The victim was staying at a women's shelter. She received text messages and telephone

calls from the offender promising to repay her $150 he had withdrawn from her bank account. The offender told her to catch a taxi and go to a house at Ilparpa Camp, and he would give her the $150. The victim said that she did not want to do that, but the offender told her she would not receive her money unless she did. When she arrived at the house, the offender paid the driver, made the victim get out of the taxi and forced the victim to follow him into a house at Ilparpa. She did as he said because she was scared of him.

[40] Once inside the house, the offender produced a syringe filled with crystal methamphetamine. He told the victim to take the methamphetamine to "take the pain away", but she refused. The offender then forcibly injected the drug into her arm. After that, the offender forced the victim to suck his penis and then had forcible penile-vaginal sexual intercourse with her. The victim repeatedly told the offender that she did not want to have sex with him. The offender became angry and told her that if she did not have sex with him, she would end up like his ex-partner. When the victim said, "No," the offender punched her in the head and told her to be quiet. He did not wear a condom and he ejaculated inside her vagina.

[41] The facts on count 3 related to a later occasion and were as follows. The offender and the victim were in a house in Alice Springs. At about 6 am on that day, the offender woke the victim in order to have sexual intercourse with her. She did not want to do that and told the offender

that she was too tired. The offender then took off his clothes and told the victim to take off her panties or he would rip them. He also threatened to hit her with a steel fan and to hurt her if she did not acquiesce, and threatened to kill her. She said, “Please don’t,” and the offender became angry. The victim was scared and took off her clothes. The offender forced his penis into her mouth, and then had penile-vaginal sexual intercourse with her without her consent. The offender did not wear a condom and ejaculated inside her vagina.

[42] The Crown facts also recited the facts of a number of uncharged acts which involved the offender assaulting the victim and having sexual intercourse with her without her consent on occasions between the incidents charged in counts 1 and 3. On one of those occasions, the offender had smashed the victim’s phone to prevent her from communicating with a police officer who was trying to help her. The victim impact statement made it plain that the offending had had lasting psychological effects on the victim, including that she sometimes felt suicidal.

[43] The offender showed no remorse and had no insight into the seriousness of his offending and its impact on the victim. The sentencing judge did not allow a discount for the two guilty pleas on the basis that they were of “negligible” utilitarian value as they were entered on the first day of the trial and did not spare the victim the stress of giving evidence at the trial of counts 1 and 3.

[44] The Court of Criminal Appeal allowed the Crown appeal against sentence on the ground of manifest inadequacy. The offender was resentenced to a term of imprisonment for 12 years on count 1 and imprisonment for 12 years on count 3, with four years of the sentence for count 3 be served cumulatively on the sentence for count 1. The total effective sentence was imprisonment for 16 years with a non-parole period of 11 years and three months. In coming to this conclusion and resentence, this Court referred to *Forrest* and the other serious cases of sexual intercourse without consent reviewed by the Court of Criminal Appeal in *Forrest.* The starting points adopted in those serious cases before any reduction for guilty pleas or remorse were 13 $^{2}/_{3}$ years (*Massilas Ganambarr aka Rogers*), 11 ½ years (*Wilfred Thomas*), 11 years (*ZP, Jonex Finlay & Hyuntae Kim*), 10 years (*Preston Andy*) and eight years and nine months (*Clancy Ryan*).

[45] In ordering that degree of cumulation between the sentences, the Court of Criminal Appeal referred to its earlier judgment in *McKay v The Queen.*[20] In that case the appellant was found guilty following a trial by jury and sentenced to an aggregate sentence of 14 years with a non-parole period of 10 years for two offences of sexual intercourse without consent. The appellant contended, *inter alia*, that the sentence

20 *McKay v The Queen* (2001) NTLR 14.

was manifestly excessive and that the sentencing judge had erred in imposing an aggregate sentence contrary to s 52 of the *Sentencing Act*.

[46] The offending consisted of one act of vaginal intercourse without consent and one act of anal intercourse without consent committed after the applicant had locked the victim in a bedroom and continued despite her screaming and physical resistance. During the commission of the second offence, the offender had had placed a pillow over the victim's head when she screamed and then knocked the victim unconscious. The victim suffered severe pain and significant long term psychological consequences. The sentencing judge described the two offences as "very serious offences, albeit not at the top of the range".

[47] The Court of Criminal Appeal in *McKay* found that the sentence of 14 years with a non-parole period of 10 years was not manifestly excessive but allowed the appeal on the ground that the sentencing judge had erred in imposing an aggregate sentence. The appellant was re-sentenced to imprisonment for eight years on the first count and 10 years on the second count. The Court of Criminal Appeal ordered that six years of the sentence on the second count be served cumulatively on the sentence on the first count, bringing the total effective sentence to the same as that ordered by the sentencing judge, which had been imprisonment for 14 years with a non-parole period of 10 years.

[48] Of course, there is a limited utility in comparing the relative seriousness of individual cases involving violent rapes committed by strangers in the course of a home invasion with individual cases involving rapes committed in a setting of controlling and abusive domestic violence sometimes extending over many years. What is ultimately disclosed in those reviews is that there is no fixed sentencing range for the offence of sexual intercourse without consent. It is an offence which is very fact-sensitive in terms of both the objective seriousness of the offending and the subjective circumstances of the offender. Although the sentences imposed for the rape offences in this case fell well below the average and usual dispositions identified in those reviews, and even further below the sentences ordinarily imposed in cases involving a significant degree of violence and degradation, the determination of inadequacy or excess will always turn on the circumstances of the individual case.

[49] However, given the egregious nature of this offending – particularly the offences of sexual intercourse without consent – and the need to protect the community from such offending, both the individual sentences imposed for the rape offences and the total sentence imposed on the respondent were plainly and obviously inadequate even after full and appropriate accommodation is allowed for the respondent's relative youth and relatively modest criminal history.

[50] The rapes were committed during what was effectively a home invasion that occurred at night-time while the dwelling was occupied by a woman who was alone and vulnerable for those reasons. Although the sentencing judge found that that the offending was spontaneous in nature, it was premeditated to at least some degree in the sense that the respondent approached the woman and followed her into the dwelling with the intention of raping her. At the time he did so, he was enjoying the privilege of conditional liberty for earlier offending characterised by a reckless disregard for the welfare of other people in the community.

[51] Once the respondent had entered the dwelling house with that intention, he then raped the victim in a manner which involved a high degree of violence and degradation. The rape was persistent and involved three separate categories of penetration, all of which were highly invasive and committed with flagrant disregard for the victim's vulnerability and right to personal autonomy. The respondent threatened to kill the victim. The respondent placed the victim in a headlock using his legs. The respondent forced his erect penis into the victim's mouth and down her throat on multiple occasions, the last of which caused the victim to vomit and lose consciousness. The acts of digital penetration were such as to cause the victim excruciating pain. When the victim attempted to wrestle herself away from the respondent, he punched her to the head with a closed fist to subdue her

resistance. The rapes involved a degree of deprivation of the victim's liberty. As is apparent from the victim impact statement, the psychological consequences for the victim have been significant and long-standing. Having regard to these features, the individual sentences imposed for the rape offences were so disproportionate to the objective seriousness of the offending as to demonstrate error in point of principle.

[52] Counsel for the respondent submitted that those features notwithstanding, the sentences imposed for the rape offences were proportionate and within range having regard to the significance of rehabilitation and the call for moderation when sentencing a relatively young offender. That submission was made with reference to the well-understood principles that youthful offending is often a product of immaturity, that young offenders are typically still at a stage of mental and emotional development which renders them more susceptible to positive change, and that incarceration is harsher and more detrimental for young offenders.[21] Those principles may be accepted as general propositions, but they are subject to some necessary qualifications.

[53] Rehabilitation will ordinarily carry less weight in respect of a young offender who has previously been afforded opportunity to modify his behaviours but has failed to do so and gone on to commit a very

21 See generally *Azzopardi v The Queen* (2011) 35 VR 43 at [25]-[36].

serious criminal offence. As the seriousness of the criminality increases, there will be "a corresponding reduction in the mitigating effects of the offender's youth".[22] These were crimes of considerable gravity. Given the sexual motivation for and content of the crimes, and the high level of violence and degradation inflicted upon the victim, they cannot be characterised as "childlike" in some manner which might reduce the respondent's criminal culpability. As this Court observed in *R v Goodwin*:

> It is well established that if a young offender commits a criminal offence like an adult then that justifies sentencing him or her in a fashion more akin to an adult. Where crimes of considerable gravity are committed the protective function of the criminal Court would cease to operate unless denunciation, general deterrence and retribution are significant sentencing considerations even in respect of juveniles. [23]

[54] In our assessment, the most serious of the three rapes was the digital penetration charged in count 3. Having regard to the objective circumstances and incidents of the offending, and the survey of sentences conducted above, the appropriate starting point for this particular rape is imprisonment for 10 years. The appropriate starting point for each of the rapes charged in counts 2 and 4 is imprisonment for nine years. No complaint is made in relation to the discount of 20 percent adopted by the sentencing judge and we would not depart from

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22 See Fox & Freiberg, *Sentencing: State and Federal Law in Victoria* (Third Edition), Law Book Company, 2014, p 355. See also *R v Bloomfield* [1999] NTCCA 137 at [21], [34]; *R v Goodwin* [2003] NTCCA 9 at [10]-[11].

23 *R v Goodwin* [2003] NTCCA 9 at [11].

that rate of discount. In the application of that discount, the sentence properly imposed in respect of count 3 is imprisonment for eight years, and the sentence properly imposed for each of the offences in counts 2 and 4 is imprisonment for seven years and two months.

[55] In addressing the orders for cumulation made by the sentencing judge, it may be accepted that the different acts of criminality should be reflected in an accumulation between the sentences imposed for the individual offences. As this Court observed in *The King v Benning*, although the offences in that case were committed during the course of what might be described as a single episode of offending, the unlawful entry at night with the intent to steal should not have been made wholly concurrent with the sentences for sexual offending because they were separate and differently motivated.[24] The sentencing judge clearly afforded that principle some operation, because 12 months' accumulation was ordered between each of the rape offences and six months' accumulation was ordered in relation to each of the sentences imposed for the offences of burglary and deprivation of liberty.

[56] The degree to which individual sentences are made concurrent is part of the sentencing discretion, and reasonable minds may differ as to the appropriate degree of cumulation. There will often be no clearly correct answer. What is necessarily required in every case is a sound

24 *The King v Benning* [2022] NTCCA 15 at [134].

discretionary judgment as to what extent there should be cumulation or concurrency.[25] The sentencing judge in this case ordered cumulation between the sentences because of the different types of criminality involved. It is certainly arguable in this case that having regard to the total sentence, inadequate cumulation was allowed between the sentences imposed for the rape offences. While it is true that multiple acts of sexual violence in one episode of offending may call for a greater degree of cumulation[26], the countervailing consideration is that a greater degree of concurrency will ordinarily be warranted where an offender has engaged in a course of conduct over a relatively short period of time involving the commission of offences of the same general type[27].

[57] Although the level of cumulation allowed by the sentencing judge conformed generally with that latter approach, and did not give rise to inadequacy in and of itself, it might be inferred that the sentencing judge adopted artificially low head sentences for the rape offences in order to avoid a total sentence which the sentencing judge considered would be disproportionate to the totality of the respondent's offending conduct. For the reasons we have given, that resulted in a

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25 *Carroll v The Queen* (2011) 29 NTLR 106 at [42]-[44].

26 *Carroll v The Queen* (2011) 29 NTLR 106 at [43].

27 *Thomas v The Queen* [2017] NTCCA 4 at [41]. See also *Flynn v The Queen* [2020] VSCA 173 at [114]-[118], [130], where it was observed that the close temporal proximity of acts giving rise to multiple charges of sexual offending may warrant a substantial degree of concurrency, and that in some cases it may be necessary to order little or no cumulation.

disproportionately low total sentence. The increased sentences we have indicated give rise to different considerations concerning the degree of cumulation properly allowed. Given the increase to the individual sentences imposed for the rape offences which we will be ordering, the total head sentence will be increased to the point where a lesser cumulation between the sentences imposed for the rape offences is warranted.

[58] That leaves the applicant's challenge to the degree of cumulation allowed between the sentences imposed for the offending committed on 6 October 2023 and the restoration of the sentence imposed on 6 July 2023 which was held in suspense at the time of the subsequent offending. The sentencing judge ordered full concurrency between the sentence to imprisonment which was restored and the sentences imposed for the subsequent offending. The respondent says that order is not susceptible to challenge in the context of the present appeal, because it has been brought in relation to, and is therefore restricted to, the sentence imposed on file 22332647, while the restoration operated exclusively in the context of the sentence imposed in file 22228407. It is unnecessary to decide that issue. As a general proposition, the integrity of sentencing orders made by the Supreme Court must be protected by appropriate cumulation between a sentence which is newly imposed and the restoration of any sentence previously imposed which remains in suspense at the time of the subsequent offending. However,

that imperative will always be subject to totality considerations. In the present circumstances, the total head sentence will be increased to the point where full concurrency between the fresh sentence and the restored sentence is appropriate.

The residual discretion

[59] As already described in the discussion concerning the principles which govern Crown appeals, even where manifest inadequacy is found the appellate court retains a residual discretion as to whether the appeal should be allowed and the respondent resentenced. The Crown bears the onus of negating any reason why the residual discretion not to interfere should be exercised.[28] Although the Court must not take into account any element of double jeopardy in making the decision whether to allow the appeal or impose another sentence, that provision does not displace or abrogate the residual discretion.[29] However, the abolition of the double jeopardy principle means that the extent to which Crown appeals should be a "rarity" is a matter for the prosecuting authority rather than a relevant consideration in the exercise of the appellate discretion.[30] We have also addressed the limiting purpose of Crown appeals to lay down sentencing principles, which extends to correcting sentences so disproportionate to the

28 *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [54] citing *Everett v The Queen* (1994) 181 CLR 295 at 299–300 and *R v Hernando* [2002] NSWCCA 489 at [12].

29 *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462 at [26].

30 *R v JW* (2010) 77 NSWLR 7 at [124], [129], [141].

seriousness of the offending as to constitute an error in point of principle.[31]

[60] Counsel for the respondent submits that some recent decisions of this Court have approached the exercise of the residual discretion in a manner inconsistent with those principles, in that they have effectively reversed the onus to require the respondent to demonstrate why they should not be resentenced. A number of observations may be made in relation to that submission.

[61] First, it is founded in part on the assertion that this Court has elsewhere "described the non-exercise of the discretion as 'exceptional'." That assertion is made with reference to the decision of this Court in the *King v Hunt*[32], and proceeds from a misunderstanding of the relevant passage. What the Court relevantly stated in *Hunt* was that the exercise of the residual discretion had to be considered carefully to determine "whether this is one of those exceptional cases in which the Crown appeal should be allowed and the respondent resentenced". As the accompanying footnote makes plain, that was in turn a reference to the principles governing Crown appeals which had been described in *R v Riley*[33], concerning the need to establish inadequacy of such a degree as

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31 *Lacey v Attorney General of Queensland* (2011) 242 CLR 573 at [16]; *Everett v The Queen* (1994) 181 CLR 295 at 300; *Dinsdale v The Queen* (2000) 202 CLR 321 at [61]-[62]; *The Queen v Kahu-Leedie* [2022] NTCCA 4 at [21].

32 *King v Hunt* [2024] NTCCA 9 at [38].

33 *R v Riley* (2002) 161 A Crim R 414 at [18]-[20].

to constitute error in principle. The reference to "exceptionality" was directed to that limitation, in recognition of the fact that cases in which a sentencing judge is found to have imposed a disposition so far outside the permissible range as to bespeak error will indeed be an exception. The reference to "exceptionality" was not to condition the exercise of the residual discretion. That is an inquiry which falls to be conducted after the threshold requirement of error in principle has been established. The factors properly balanced in that determination do not resolve to the reductive proposition that the residual discretion not to interfere should be exercised in all but "exceptional" circumstances.

[62] Second, the respondent's submission takes issue with the proposition that "[i]t is important that inadequate sentences are not permitted to stand that may undermine confidence in the administration of justice, unless there is some compelling reason to do so arising from such matters as delay, parity, the totality principle, rehabilitation and fault on the part of the Crown".[34] That is not to reverse the onus or suggest that it is not incumbent on the Crown to negate any reason why the residual discretion not to interfere should be exercised. It is only to say that where a sentence is so inadequate as to constitute error in point of principle, there must be some significant factor or factors warranting the exercise of the discretion. In that event, the Crown will fail to

34 *The King v CH* [2024] NTCCA 10 at [83].

discharge the onus. That does not mean that the exercise of the discretion is, or should be, the default position.

[63] It must also be recognised that there is a distinction between the legal and evidential onus. The legal onus of negating any reason why the discretion should be exercised will remain always on the Crown. In some cases, the facts and circumstances relevant to that issue will be evident from the material already before the appellate court. In other cases, the Crown will have an attendant burden of adducing the evidence necessary to negate any reason for the exercise of the discretion. In some cases, the respondent to such an appeal may, depending upon the preponderance of the evidence, also carry an evidential onus of adducing or pointing to evidence which demonstrates that the discretion should be exercised in his or her favour.

[64] Third, the respondent's submission asserts that the authorities from this Court to which attention is drawn suggest that a "sense of injustice" occasioned by an inadequate sentence will, in itself, justify the non-exercise of the residual discretion. The submission continues that the exercise of the discretion only falls for consideration in circumstances where a finding of manifest inadequacy has been made, such that the discretion could and would never be exercised if a "sense of injustice" or the maintenance of public confidence were to be adopted as the determining criterion. Again, this submission misunderstands or

misstates the result in those cases. In *King v Hunt*[35], for example, this Court prefaced its determination with a consideration of whether the finding that the sentence was manifestly inadequate was sufficient in itself for the purpose of providing guidance to sentencing courts in relation to the offence in question, without need to proceed to resentence. In addition to that matter, this Court also had regard to the fact that the respondent in that case had already been released from prison, which gave rise to a concern that returning the respondent to prison would give rise to unfairness and impact adversely on his rehabilitation.

[65] Ranged against those considerations, this Court referred to the decision of the New South Wales Court of Criminal Appeal in *R v O'Connor*, in which that Court stated:

> Although the principal purpose of the determination of a Crown appeal is to give guidance to sentencing judges, the sentence actually imposed on the respondent is still of considerable importance. The need for specific deterrence in the present case would not be served by an exercise of the residual discretion.
>
> Nor indeed would the need for general deterrence be fulfilled were the residual discretion to be exercised. The general deterrence of a sentence is not to be measured solely by reference to its effect on putative respondents. One of the purposes of incorporating an element of general deterrence in a sentence is to ensure that sentences accord with legitimate community expectations and that public confidence in the administration of justice is maintained:

35 *King v Hunt* [2024] NTCCA 9 at [38]-[41].

Markarian v The Queen (2005) 228 CLR 357 at [82] per McHugh J.[36]

[66] Again, that statement does not seek to reverse the onus and nor does it advance the proposition that the discretion will not be exercised in cases of manifest inadequacy. It reflects the orthodox proposition that the question whether the discretion should be exercised involves balancing the need to satisfy the requirements of the sentencing exercise in the individual case at hand against any unfairness to the respondent arising from such matters as delay, parity, the totality principle, rehabilitation and fault on the part of the Crown. That necessitates a highly subjective assessment of the circumstances of the case at hand.[37] In the conduct of that assessment, the Court in *O'Connor* determined that the need for specific deterrence in the circumstances of that case would not be served by the exercise of the residual discretion. That is not to say that an inadequate sentence will, in itself, justify a refusal to exercise the residual discretion.

[67] We turn then to consider the exercise of the discretion in the present case. That consideration involves two questions. The first is whether this Court should decline to allow the appeal even though the sentences imposed for the rape offences are erroneously inadequate. If this Court determines to allow the appeal, the second question is to what extent

36 *R v O'Connor* [2014] NSWCCA 53 at [88]-[89].

37 *R v Holder and Johnston* [1983] 3 NSWLR 245 at 256.

the sentence should be varied. In determining whether to exercise the residual discretion, it is open for the appellate court to look at the facts available as at the time of the hearing of the appeal, including events that have occurred after the original sentencing.[38] The sentencing exercise in this case took place only six months ago, and there has been no material change or development in that time which would bear on the sentencing exercise. Neither party has sought to adduce further evidence of any matter arising since the original sentencing exercise.

[68] Although the category of factors that bear upon the residual discretion are not closed, rarity, the frequency of Crown appeals and the distress and anxiety which the respondent might suffer from being exposed to the possibility of a more severe sentence are no longer relevant considerations following the abolition of double jeopardy. The factors which remain well-recognised as relevant considerations include:[39]

(a) delay by the Crown in lodging the appeal;[40]

(b) where the Crown has conducted the case on appeal on a different basis from that pursued at first instance, and particularly where

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38 *R v Reeves* [2014] NSWCCA 154 at [12]; *R v Deng* [2007] NSWCCA 216 at [28].

39 Judicial Commission of New South Wales, *Sentencing Bench Book,* para [70-100].

40 *R v Hernando* [2002] NSWCCA 489 at [30]; *R v JW* at [92]; *R v Bugmy (No 2)* [2014] NSWCCA 322 at [19], [101].

the Crown requests the appellate court to set aside the sentence on a ground conceded in the court below;[41]

(c) delay in the resolution of the appeal;[42]

(d) the fact a non-custodial sentence was imposed on the offender at first instance;[43]

(e) the fact the non-parole period imposed at first instance has already expired, or the respondent's release on parole is imminent;[44]

(f) the fact the offender has made substantial progress towards rehabilitation and/or any identifiable deleterious effect of resentencing on progress towards the respondent's rehabilitation;[45]

(g) where resentencing would create disparity with a co-offender;[46]

(h) the deteriorating health of the respondent since sentence;[47]

(i) where any increase to the sentence would be so slight as to constitute "tinkering";[48]

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41 *R v JW* (2010) 77 NSWLR 7 at [92]; *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [38], [64], [68]; *R v Jermyn* (1985) 2 NSWLR 194 at 204.

42 *R v Price* [2004] NSWCCA 186 at [60]; *R v Cheung* [2010] NSWCCA 244 at [151]; *R v Hersi* [2010] NSWCCA 57 at [55].

43 *R v Y* [2002] NSWCCA 191 at [34]; *R v Tortell* [2007] NSWCCA 313 at [63].

44 *R v Hernando* [2002] NSWCCA 489 at [30]; *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462 at [43].

45 *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [69]; *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462 at [43].

46 *R v Bavin* [2001] NSWCCA 167 at [69]; *R v McIvor* [2002] NSWCCA 490 at [11]; *R v Cotter* [2003] NSWCCA 273 at [98]; *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462 at [37].

47 *R v Yang* [2002] NSWCCA 464 at [46]; *R v Hansel* [2004] NSWCCA 436 at [44].

(j) where the guidance provided to sentencing judges will be limited, for example, because the proceedings are subject to non-publication orders, and the re-sentence will result in injustice;[49] and

(k) where the general circumstances of the case or the category of offence is unlikely to arise again.[50]

[69] We have already dealt with the delay in lodging the appeal in the context of the Crown's application for an extension of time for that purpose. For broadly the same reasons for which we have granted the extension of time, the delay in this case is not such as to give rise to injustice. While it may be accepted that the respondent is a relatively youthful offender, there is nothing to suggest that allowing the appeal and resentencing the respondent would somehow disrupt any progress he has made towards rehabilitation to this point in time. To say that a longer period of incarceration may have an adverse effect on a youthful offender's ultimate rehabilitation simply raises the same issues which inform the determination of what length of sentence should be imposed in the proper application of sentencing principles and standards. Any resentence will provide the same finality, framework and structure as

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48 *Dinsdale v The Queen* (2000) 202 CLR 321 at [62]; *R v Woodland* [2007] NSWCCA 29 at [53].

49 *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [69]; *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462 at [2].

50 *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [69].

are provided under the original sentence. Finally, there is no substance to the respondent's contention that the Crown somehow failed in its duty of assisting the sentencing judge to avoid error in the level of cumulation allowed. There is otherwise no reason calling for the exercise of the residual discretion in the present case which would militate against the quashing of plainly inadequate sentences and the imposition of sentences which properly reflect the high level of seriousness involved in the offending, and which adequately serve the sentencing purposes of punishment, denunciation and deterrence.

Resentence

[70] We make the following orders.

1. The time within which to bring the appeal against sentence is extended by 19 days to 28 October 2024.
2. The appeal is allowed, the sentence imposed by the sentencing judge on 11 September 2024 is set aside and the respondent is resentenced as follows.
3. For the offence in count 3, the respondent is sentenced to imprisonment for eight years commencing on 9 October 2023.
4. For the offence in count 2, the respondent is sentenced to imprisonment for seven years and two months, six months of which is to be served cumulatively on the first sentence.
5. For the offence in count 4, the respondent is sentenced to imprisonment for seven years and two months, six months of

which is to be served cumulatively on the sentence imposed for count 2.

6. For the offence in count 1, the respondent is sentenced to imprisonment for 18 months, six months of which is to be served cumulatively on the sentence imposed for count 4.

7. For the offence in count 5, the respondent is sentenced to imprisonment for 18 months, six months of which is to be served cumulatively on the sentence imposed for count 1.

8. The whole of the sentence held in suspense in file number 22228407 is restored and is to be served concurrently with the sentences imposed in file number 22332647.

9. The total period of imprisonment is 10 years commencing on 9 October 2023.

10. A non-parole period of six years and four months is fixed.

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