CITATION:	*The Queen v Deacon* [2019] NTCCA 22
PARTIES:	THE QUEEN v DEACON, Danny Jack
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 9 of 2016 (21459053)
DELIVERED:	11 October 2019
HEARING DATES:	7 February 2017
JUDGMENT OF:	Grant CJ, Southwood J and Riley AJ

CATCHWORDS:

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

Whether non-parole period of 21 years and six months manifestly inadequate having regard to objective and subjective factors affecting the relative seriousness of the offence – high degree of planning and organisation before commission of offence – motive to prevent victim taking son interstate – elaborate concealment of the crime – no remorse – nature of offending required primacy to be given to purposes of general deterrence, punishment and denunciation – non-parole period fixed not so disproportionate to seriousness of the crime as to shock the public conscience and undermine public confidence in the ability of the courts to play their part in deterring criminal activity – appeal dismissed.

Criminal Code 1983 (NT) ss 157
Sentencing Act 1995 (NT) ss 5, 53A

Bahar v The Queen (2011) 45 WAR 100, *Karim v The Queen* (2013) 83 NSWLR 268, distinguished.

Albert v The Queen [2009] NTCCA 1, *Daniels v The Queen* (2007) 20 NTLR 147, *Director of Public Prosecutions (Vic) v Bright* [2006] VSCA 147, *Director of Public Prosecutions (Vic) v Brown* [2009] VSCA 314, *DPP v Terrick; DPP v Marks; DPP v Stewart* (2009) 24 VR 457, *Emitja v The Queen* [2016] NTCCA 4, *Felicite v R* [2011] VSCA 274, *Forrest v The Queen* (2017) 267 A Crim R 494, *Inge v R* (1999) 199 CLR 295, *Johnson v The Queen* [2012] NTCCA 14, *Leach v The Queen* (2005) 16 NTLR 117, *Muldrock v The Queen* (2011) 244 CLR 12, *Noakes v The Queen* [2015] NTCCA 7, *R v Badanjak* [2004] NSWCCA 395, *R v Bednikov* (1997) 193 LSJS 254, *R v Heiss & Kamm* [2009] NTSC 26, R *v Karabi* [2012] QCA 47, *R v King* (1988) 48 SASR 555, *R v Latif* [2012] QCA 278, *R v Leach* (2004) 14 NTLR 44, *R v Nitu* [2012] QCA 224, *R v von Einem* (1985) 38 SASR 207, *R v Way* (2004) 60 NSWLR 168, *The Queen v Crabbe* (2004) 150 A Crim R 523, *The Queen v Mossman* [2017] NTCCA 6, *The Queen v Pot, Wetangky and Lande* (Unreported, Northern Territory Supreme Court, 18 January 2011), *The Queen v Shrestha* (1991) 173 CLR 48, *Truong v The Queen* (2015) 35 NTLR 186, *Wong v The Queen* (2001) 207 CLR 584, referred to.

REPRESENTATION:

Counsel:

Appellant:	WJ Karczewski QC, Director of Public Prosecutions, with M Chalmers
Respondent	JCA Tippett QC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent	Maleys

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

The Queen v Deacon [2019] NTCCA 22
No. CA 9 of 2016 (21459053)

BETWEEN:

THE QUEEN
Appellant

AND:

DANNY JACK DEACON
Respondent

CORAM: GRANT CJ, SOUTHWOOD J and RILEY AJ

REASONS FOR JUDGMENT

(Delivered 11 October 2019)

THE COURT:

[1] This is a Crown appeal against sentence. The respondent was sentenced to imprisonment for life with a non-parole period of 21 years and six months for the murder of his *de facto* partner. The Crown asserts that the non-parole period fixed by the sentencing judge is manifestly inadequate. The principal complaint is that the sentencing judge failed to give primacy to the sentencing objectives of general deterrence and denunciation in the sentencing synthesis. The secondary complaint is that the sentencing judge erred in his assessment of the respondent's prospects for rehabilitation.

[2] The appeal is dismissed for the reasons which follow.

Background

[3] On 24 September 2015, the respondent pleaded not guilty to the murder of his *de facto* partner. The trial ran between 10 August and 9 September 2016. During the course of the trial the respondent gave evidence and admitted killing the deceased but asserted he had done so under provocation.[1] On 9 September 2016 he was found guilty of murder by majority verdict. Upon conviction the respondent became liable to mandatory imprisonment for life[2] with a standard non-parole period of 20 years unless the sentencing judge fixed a longer non-parole period.

[4] Non-parole periods for the crime of murder are governed by s 53A of the *Sentencing Act 1995* (NT), which provides relevantly:

> **53A Non-parole periods for offence of murder**
>
> (1) Subject to this section, where a court (***the sentencing court***) sentences an offender to be imprisoned for life for the offence of murder, the court must fix under section 53(1):
>
> (a) a standard non-parole period of 20 years; or
>
> (b) if any of the circumstances in subsection (3) apply – a non-parole period of 25 years.
>
> (2) The standard non-parole period of 20 years referred to in subsection (1)(a) represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies.
>
> (3) …

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1 Section 158 of the *Criminal Code* provides a partial defence of provocation to the offence of murder. In circumstances where the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased, and the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased, a defendant liable to be convicted of murder must be convicted of manslaughter instead.

2 *Criminal Code 1983* (NT), s 157.

(4) The sentencing court may fix a non-parole period that is longer than a non-parole period referred to in subsection (1)(a) or (b) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

(5) …

(6) The sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period.

(7) For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period under subsection (6), the sentencing court must be satisfied of the following matters and must not have regard to any other matters:

(a) the offender is:
(i) otherwise a person of good character; and
(ii) unlikely to reoffend;
(b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender.

(8) …

(9) The sentencing court must give reasons for fixing, or refusing to fix, a non-parole period and must identify in those reasons each of the factors it took into account in making that decision.

(10) …

(11) …

(12) …

[5] Under s 53A(4) of the *Sentencing Act* the sentencing judge determined that the longer non-parole period of 21 years and six months was warranted because of the following factors.[3]

3 Appeal Book (**AB**) 82.

(a) The respondent killed the deceased specifically to ensure that she would have no role in their son's upbringing; and in so doing intentionally deprived the child of his mother's love, care and guidance.

(b) The respondent engaged in detailed and calculated planning prior to the killing, and a complex cover-up after the event.

(c) The respondent positively obstructed and misled police investigating the disappearance of the deceased, and in doing so prolonged the stress and anxiety suffered by her family.

(d) The respondent demonstrated no remorse for killing the deceased, and had sought to attribute responsibility for his actions to the deceased.

The operation of s 53A of the *Sentencing Act*

[6] Section 53A(1)(a) of the *Sentencing Act* requires a sentencing court when sentencing an offender for the offence of murder to fix a standard non-parole period of 20 years. That requirement is subject to the following provisions of s 53A.

[7] First, a non-parole period of 25 years must be fixed if any of the circumstances specified in s 53A(3) apply. Those circumstances are: (i) the victim's occupation involves the performance of a public function or the provision of a community service; (ii) the offender's course of conduct included conduct which would have constituted a sexual offence against the victim; (iii) the victim was under 18 years of age; (iv) the offender is being sentenced for two or more unlawful homicides; or (v) the offender has one

or more previous convictions for unlawful homicide.[4] None of those circumstances presented in this case.

[8] Secondly, the sentencing court may fix a non-parole period that is longer than the standard non-parole period (or the 25 year non-parole period where subsection (3) has application), if satisfied that a longer non-parole period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence.[5]

[9] Thirdly, the sentencing court may refuse to fix a non-parole period if the offender's culpability is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met by imprisonment without the possibility of release on parole.[6]

[10] Fourthly, the sentencing court may fix a non-parole period that is shorter than the standard non-parole period if satisfied that there are exceptional circumstances which justify doing so. Those circumstances are limited to cases in which the offender is otherwise of good character and unlikely to reoffend and the victim's conduct has substantially mitigated the conduct of the offender.[7]

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4 *Sentencing Act 1995* (NT), s 53A(1)(b), (3).

5 *Sentencing Act*, s 53A(4).

6 *Sentencing Act*, s 53A(5).

7 *Sentencing Act*, s 53A(6).

[11] In addition to those qualifications, s 53A(2) of the *Sentencing Act* provides that the standard non-parole period "represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies".[8]

The Crown's contention about the operation of s 53A

[12] The Crown contends that the standard non-parole period of 20 years represents the "floor" from which an assessment about the non-parole period is to be made, and is to be reserved for cases falling within the "least serious category" of murders. This is, as far as we are aware, the first time that the Crown has advanced this proposition since the commencement of the *Sentencing (Crime of Murder) and Parole Reform Act 2003* on 11 February 2004.

[13] The contention is based largely on the decisions of the Western Australian Court of Appeal in *Bahar v The Queen* (***Bahar***)[9] and the New South Wales Court of Criminal Appeal in *Karim v The Queen* (***Karim***)[10]. Both cases involved the sentencing of an offender for the Federal offence of bringing into Australia, by seagoing vessel, persons who were not authorised to enter for which a statutory minimum term of imprisonment had been prescribed by s 233C of the *Migration Act 1958* (Cth), which relevantly provided:

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8 *Sentencing Act*, s 53A(2).

9 *Bahar v The Queen* (2011) 45 WAR 100.

10 *Karim v The Queen* (2013) 83 NSWLR 268.

(1) This section applies if a person is convicted of an offence under section 232A ... unless it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.

(2) The court must impose a sentence of imprisonment of at least:

(a) 8 years, if the conviction is for a repeat offence; or

(b) 5 years, in any other case.

(3) The court must also set a non-parole period of at least:

(a) 5 years, if the conviction is for a repeat offence; or

(b) 3 years, in any other case.

[14] The maximum penalty for the offence was fixed at imprisonment for 20 years by s 232A(1) of the *Migration Act.* The sentencing judge in *Bahar* imposed the minimum term of imprisonment of five years with a non-parole period of three years. In doing so, the sentencing judge rejected the Crown's submission that the mandatory minimum penalty was reserved for offenders whose conduct was at the lowest level of the range of objective seriousness and who were able to establish mitigating factors such as diminished responsibility, significant cooperation, an early plea, youth or other personal factors. The Crown appealed on the ground of manifest inadequacy. In dismissing that appeal, the Court of Appeal made the following observations:[11]

> The statutory language makes it unequivocally clear that the Commonwealth Parliament intended to deprive a judicial officer sentencing an offender for a breach of s 232A of both the power to impose a non-custodial sentence and the power to impose a sentence of less than 5 years. Thus, s 233C is positively inconsistent with s 17A of the *Crimes Act* which requires that consideration be

11 *Bahar v The Queen* (2011) 45 WAR 100 at [53]-[55] per McLure P (Martin CJ and Mazza J concurring).

> given to different types of sentence. However, the later, specific provision (s 233C) must prevail.
>
> Otherwise, there is no positive inconsistency in terms between s 233C and the general sentencing principles in the *Crimes Act* as supplemented by common law principles. In particular, the sentencing principles are intentionally framed at a level of generality for application within the boundaries of power established not only by the maximum statutory penalty but also the minimum statutory penalty. The statutory maximum and minimum also dictate the seriousness of the offence for the purpose of s 16A(1). It would be positively inconsistent with the statutory scheme for a sentencing judge to make his or her own assessment as to the 'just and appropriate' sentence ignoring the mandatory minimum or mandatory maximum penalty and then to impose something other than a 'just and appropriate' sentence (whether as to type or length) in order to bring it up to the statutory minimum or down to the statutory maximum, as the case may be. The statutory minimum and statutory maximum penalties are the floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the general sentencing principles are to be applied.
>
> The suggestion by the Crown to the sentencing judge that the mandatory minimum is for a low level offence in which all mitigating factors are present reflects a lack of understanding of the sentencing process. First, the minimum penalty is for offences within the least serious category of offending and the maximum penalty is for offences within the worst category of offending. I emphasise 'category' of offending. There is no single instance at either extreme. Secondly, whether an offence falls within the least serious category is to be determined by reference to all relevant sentencing considerations, including matters personal to the offender. As I have explained above, a sentencing outcome (the 'bottom line') is not dictated by the presence or absence of one or more mitigating factors.

[15] In making those observations, the Court of Appeal rejected the approach which had been adopted by the Supreme Court of the Northern Territory in *The Queen v Pot, Wetangky and Lande*[12]. The sentencing judge in that case accepted that the section provided the minimum sentence which may be imposed in the identified circumstances, but did not go so far as to reserve that mandatory minimum sentence only for cases at the lowest end of seriousness for relevant offending. The sentencing judge proceeded on the

12 *The Queen v Pot, Wetangky and Lande* (Unreported, Northern Territory Supreme Court, 18 January 2011).

basis that the correct approach was to apply the general sentencing principles set out in the *Crimes Act* and those applicable at common law in order to determine an appropriate sentence, and to impose the mandatory minimum where the appropriate sentence so determined was less than that.

[16] The construction applied in *Bahar* was subsequently followed by the Queensland Court of Appeal on three occasions.[13] In *Karim*, the New South Wales Court of Criminal Appeal also favoured the construction adopted in *Bahar*, including for the following additional reason:[14]

> There is an independent reason that leads me to favour the construction in *Bahar*. Equal justice inheres in judicial power, the fabric of the law and the basal notion of justice that underpins, informs and binds the legal system. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at 608, "[e]qual justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect" (emphasis in original). To approach the matter as in *Pot* would see cases of perceived different seriousness by force of statute given the same penalty. Thus, if a judge thought the relevant offending in one case to be of low seriousness and worthy of a sentence of six months, but in another case to be of significant seriousness worthy of imprisonment for five years, she or he would be obliged to revise the first sentence to five, leaving the second sentence at that point also. The statute, and through it the order of the Court, would be the instrument of unequal justice and, so, injustice: *R v Green* [2010] NSWCCA 313; 207 A Crim R 148 at 156; and *Green v The Queen* [2011] HCA 49; 244 CLR 462 at 466 [4] and 489 [80]. On the other hand, approaching the matter as in *Bahar* permits all usual sentencing considerations, including parity, to be accommodated, though in a more compressed range, and with the consequence of a general increase in the levels of sentences.

[17] One of the appellants in the *Karim* matter subsequently sought special leave to appeal to the High Court on the construction point. Special leave was

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13 *R v Karabi* [2012] QCA 47, *R v Nitu* [2012] QCA 224 and *R v Latif* [2012] QCA 278.

14 *Karim v The Queen* (2013) 83 NSWLR 268 at [45] per Allsop P (Bathurst CJ, McClellan CJ at CL, Hall and Bellew JJ concurring).

refused on the basis that the question of statutory interpretation was not attended with sufficient doubt to warrant the grant of leave.[15] That refusal, and the weight of authority from intermediate courts of appeal in three States of the Commonwealth, must be seen as determinative of the approach properly taken to the sentencing of an offender for a Federal offence for which a statutory minimum term of imprisonment has been prescribed by the legislature.

[18] It is on the basis of those authorities that the Crown contends that the standard non-parole period of 20 years is a mandatory minimum penalty which establishes "the true floor" for offences falling within the least serious category of the crime of murder. The submission follows that when considering whether the objective and subjective factors affecting the relative seriousness of a particular offence require a non-parole period longer than the standard non-parole period to be fixed under s 53A(4) of the *Sentencing Act*, and what that period should be, the sentencing court must proceed on the basis that the standard non-parole period represents offences within the least serious category of offending.

[19] However, as the Courts in both *Bahar*[16] and *Karim*[17] observed, the determination of the operation of a mandatory minimum penalty fixed by statute is ultimately a matter of statutory construction. So too is the

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15 *Bayu v The Queen* [2013] HCATrans 144.

16 *Bahar v The Queen* (2011) 45 WAR 100 at [39], [50].

17 *Karim v The Queen* (2013) 83 NSWLR 268 at [44].

question of the approach properly taken by a sentencing court to fixing a non-parole period under s 53A(4) of the *Sentencing Act*. When regard is had to the text and structure of s 53A it is apparent that the standard non-parole period is not reserved for the least serious category of the crime of murder.

[20] The first thing to notice in the process of construction is that the obligation to fix the standard non-parole period imposed by s 53A(1)(a) of the *Sentencing Act* is expressed to be "[s]ubject to this section". The obligation to fix the standard non-parole period must therefore yield to the application of the other provisions in the section. The operation of those other provisions has already been described above. They permit the sentencing court to fix a shorter or longer non-parole period in the circumstances prescribed. While the power to fix a shorter non-parole period is not at large, the conferral of that power and the circumstances of its exercise comprehend expressly that the standard non-parole period does not represent offences within the least serious category of offending.[18] The standard non-parole period is not a mandatory minimum of the same character as the provision under consideration in *Bahar* and *Karim*, which operated unequivocally and without exception to deprive a sentencing court of the power to impose a sentence and non-parole period of less than the statutory minima.

18 *Sentencing Act*, s 53A(6), (7) and (8).

[21] The second thing to notice is that s 53A(4) of the *Sentencing Act* provides that the sentencing court "may" fix a non-parole period that is longer than the standard period if satisfied that objective or subjective factors affecting the relative seriousness of the offence warrant that course. The extent to which that provision confers a discretion on the sentencing court is discussed further below. Regardless whether the provision is to be given a discretionary or obligatory operation, it is not cast in terms which suggest that in approaching that task the standard non-parole period must be considered to represent offences within the least serious category of offending.

[22] The third matter which must be taken into account is the stipulation in s 53A(2) of the *Sentencing Act* that the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for the offence of murder. The Crown contends that this provision has no bearing on the characterisation that the standard non-parole period is reserved for the least serious category of offending for the purpose of conducting the assessment under s 53A(4) of the *Sentencing Act*. The Crown submits that s 53A(2) operates as a "guidepost" rather than a "yardstick", which, in combination with s 53A(4), operates only to require the sentencing court to impose a longer non-parole period where the objective factors informing the relative seriousness of the offending place it above the middle of the range of objective seriousness for murder. There is an obvious textual difficulty with the proposition that as a matter of

statutory construction the standard non-parole period is reserved for the least serious category of offending in circumstances where, by express statutory prescription, the standard non-parole period represents the middle of the range of objective seriousness for the offence of murder.

[23] In *Muldrock v The Queen* (***Muldrock***)[19], the High Court considered the operation of the similarly worded provision in s 54A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[20] Section 54B(2) of the New South Wales legislation provided that when determining the sentence for an offence the sentencing court was to set the standard non-parole period unless it determined that there were reasons for setting a non-parole period that was longer or shorter. The High Court found that the section was not framed in mandatory terms for a particular category of offence, but preserved the full scope of the judicial discretion to impose a non-parole period longer or shorter than the standard non-parole period.[21]

[24] The New South Wales provisions were structured differently to the provisions of the *Sentencing Act*, which require a sentencing court to fix the standard non-parole period of 20 years for the offence of murder subject only to the qualifications which are described above. That difference in structure notwithstanding, the High Court in *Muldrock* made certain

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19 *Muldrock v The Queen* (2011) 244 CLR 12.

20 The section provided: "For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division."

21 *Muldrock v The Queen* (2011) 244 CLR 12 at [24]-[25].

observations which are also apposite to the process prescribed by s 53A of the *Sentencing Act*. The Court stated:[22]

> Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.
>
> Nothing in the amendments introduced by the Amending Act requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with an hypothesised offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period.
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> (Emphasis added)

[25] So too, in the process prescribed by s 53A(4) of the *Sentencing Act*, the sentencing court must give content and effect to the statutory direction that the standard non-parole period represents the non-parole period for an offence in the middle of the range of "objective seriousness", without reference to characteristics personal to the offender unrelated to the circumstances of the offence. In *R v Way* (***Way***), the New South Wales Court of Criminal Appeal, when considering the analogue provision in

22 *Muldrock v The Queen* (2011) 244 CLR 12 at [27]-[28].

s 54A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), analysed that distinction in the following terms:[23]

> 76 Unless some understanding is reached as to what is a midrange offence, we are unable to see how any meaningful comparison can be made between the offence at hand, and the offence for which the standard non-parole period is prescribed. Difficult and imprecise it might be, but the reference point identified in s 54A has to be kept in mind if the sentencing exercise is to comply with the legislative intention expressed in the Division.
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> 77 We do not however consider that the exercise which is required will differ, to any material extent, from that which has always been necessary in evaluating the objective seriousness of a subject offence. Judges are well accustomed to considering and stating that a particular case falls into the worst category, or into the category of offences at a lower level of objective seriousness: see *Ibbs v The Queen; Baumer v The Queen* [1988] HCA 67; (1988) 166 CLR 51 at 57, and *R v Moon* (2000) 117 A Crim R 497 at 510.
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> …
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> 79 While it may not be the case that particular attention has been given to the precise process of reasoning involved in this kind of assessment, it would appear to us to depend upon a combination of sentencing experience, which is based upon the range of instances which go to make up cases of the relevant kind that come before the courts, combined with an understanding of the facts which are necessary elements of the offence, as well as those which are concerned with its consequences, and the reasons for its commission.
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> 80 Clearly there will have been offences at one end of the spectrum, of which the court is aware, which can be regarded as wholly exceptional in their seriousness and infrequency of occurrence; just as there will be occasions of trivial conduct in which the necessary elements might, in a technical way, be satisfied, but where the moral culpability is minimal.
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> …
>
> 85 The multiplicity of purposes of sentencing set out in s 3A of the Act, quoted above, do not suggest a narrow perspective as to the range of facts and matters that are to be regarded as "objective" facts and matters which may affect the judgment involved in assessing "seriousness". It is too narrow a perspective to confine attention to the physical acts of the offender and their effects, as those

23 *R v Way* (2004) 60 NSWLR 168 at [76]-[89]. While the High Court in *Muldrock* stated expressly that the categorical two-stage approach to determining the non-parole period which had been adopted in cases subsequent to the decision in *Way* was impermissible, no issue was taken with the statement in *Way* as to the matters properly taken into account in the assessment of objective seriousness.

acts or effects could be observed by a bystander. The inquiry which we consider to have been intended is one that would take into account the *actus reus*, the consequences of the conduct, and those factors that might properly have been said to have impinged on the *mens rea* of the offender (see for example Fox and Freiberg, *Sentencing*, 2nd Edition at paras 3.506 to 3.510).

86 Some of the relevant circumstances which can be said "objectively" to affect the "seriousness" of the offence will be personal to the offender at the time of the offence but become relevant because of their causal connection with its commission. This would extend to matters of motivation (for example duress, provocation, robbery to feed a drug addiction), mental state (for example, intention is more serious than recklessness), and mental illness, or intellectual disability, where that is causally related to the commission of the offence, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected: *Channon v The Queen* (1978) 20 ALR 1 and *R v Engert* (1995) 84 A Crim R 67. Such matters can be classified as circumstances of the offence and not merely circumstances of the offender that might go to the appropriate level of punishment. Other matters which may be said to explain or influence the conduct of the offender or otherwise impinge on her or his moral culpability, for example, youth or prior sexual abuse, are more accurately described as circumstances of the offender and not the offence.

…

89 That there is a comparison which can properly be made, and which has always been made, in the course of sentencing, between an offence in the abstract, and an individual offence, when assessing the relative seriousness of the latter is inescapable as a matter of logic, and it was something which was adverted to in *Walden v Hensler* [1987] HCA 54; (1987) 163 CLR 561 at 577 per Brennan J and at 595 per Dawson J.

(Emphasis added)

[26] We would respectfully concur with the conclusion that some matters which might otherwise be described as subjective are properly taken into account in assessing the objective seriousness of an offence for the purposes of s 53A of the *Sentencing Act*. However, the operation of s 53A(4) of the *Sentencing Act* is contingent on the sentencing court being satisfied that the "objective or subjective factors affecting the relative seriousness of the

offence" warrant a longer non-parole period being fixed. This is, on its face at least, a different formulation to the standard of "objective seriousness" appearing in s 53A(2) of the *Sentencing Act* and considered in *Muldrock* and *Way*.

[27] The first analysis of the phrase "objective or subjective factors affecting the relative seriousness of the offence" in this jurisdiction appears in the judgment of Martin (BR) CJ in *The Queen v Crabbe* (***Crabbe***).[24] However, that analysis took place in a different context.

[28] On 7 October 1985, following a trial by jury, Douglas Crabbe was convicted of five counts of murder and sentenced to imprisonment for life for each of the five counts of murder. At that time the legislation did not permit the court to fix a non-parole period. Imprisonment for life meant imprisonment for the term of an offender's natural life without any possibility of release other than by way of Executive clemency. The *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT) changed this sentencing regime by the introduction of s 53A of the *Sentencing Act*. Transitional provisions were also made in respect of prisoners who were at the time of commencement of that Act serving sentences of life imprisonment for murder.

[29] Section 18 of the *Sentencing (Crime of Murder) and Parole Reform Act* provided that, subject to the other provisions of the Division, the sentence of

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24 *The Queen v Crabbe* [2004] NTSC 63; 150 A Crim R 523.

a prisoner, who at the commencement of the Act was serving a sentence of life imprisonment for murder, "is taken to include a non-parole period of 20 years" or, if the prisoner was serving sentences for two or more convictions for murder, "each of the prisoner's sentences is taken to include a non-parole period of 25 years". Section 19 permitted the Director of Public Prosecutions to apply to the Supreme Court to revoke the non-parole period set by s 18 and to fix a non-parole period longer than the 20 or 25 years specified by s 18, or to refuse to fix a non-parole period. The formulations to be applied by the Court under ss 19(4) and (5) in making those determinations were in terms identical to those identified in ss 53A (4) and (5) of the *Sentencing Act*. Although the particular circumstances in *Crabbe* involved the transitional provision in s 19(4), the question presenting was the same so far as is relevant for this appeal.

[30] After giving detailed consideration to the decision in *Way*, and drawing attention to the fact that the New South Wales legislation expressly authorised the sentencing court to take into account all factors relevant to the imposition of sentence in determining whether to set a non-parole period longer or shorter than the standard period, Martin (BR) CJ went on to consider the content of the phrase "any objective or subjective factors affecting the relative seriousness of the offence" appearing in s 53A(4) of the *Sentencing Act*.

[31] His Honour drew a number of conclusions concerning the operation of that provision. First, the objective and subjective factors to which the sentencing court shall have regard are not limited to those that have a direct causal connection with the commission of the offence. Factors such as remorse, cooperation with authorities and an early plea of guilty, while not directly linked in a causative way to the commission of the crime, are so closely connected with the offender's culpability as to amount to factors affecting the relative seriousness of the offence.[25] Secondly, the words "affecting the relative seriousness of the offence" do not extend to encompass an offender's prospects of rehabilitation.[26] Thirdly, the discretion to fix a longer non-parole period is not enlivened unless the court is satisfied by reference to any objective or subjective factors affecting the relative seriousness of the offence that a longer period is warranted.[27] Finally, once the discretion to fix a longer non-parole period is enlivened it is subject only to the well-recognised principles of sentencing and the matters prescribed in s 5 of the *Sentencing Act*, including the offender's prospects of rehabilitation.[28]

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25 *The Queen v Crabbe* (2004) 150 A Crim R 523 at [101]. In drawing that conclusion, his Honour stated that his general observation in his earlier decision in *R v Leach* [2004] NTSC 60; 14 NTLR 44 that an offender's plea of guilty in cooperation with the authorities do not affect the relative seriousness of the crime was incorrect.

26 *The Queen v Crabbe* (2004) 150 A Crim R 523 at [102]-[103].

27 *The Queen v Crabbe* (2004) 150 A Crim R 523 at [104].

28 *The Queen v Crabbe* (2004) 150 A Crim R 523 at [106]-[110]. A similar view was expressed *obiter dicta* by Southwood J concerning the operation of the counterpart provision in s 19(4) of the *Sentencing (Crime of Murder) and Parole Reform Act 2003*, although his Honour did not suggest the discretion was unfettered: see *Leach v The Queen* (2005) 16 NTLR 117 at [111].

[32] We respectfully differ in some of those conclusions. So far as the first and second conclusions are concerned, it can be accepted that the consideration of "any objective or subjective factors" affecting the relative seriousness of the offence extends beyond facts and matters such as the physical acts of the offender, the consequences of the conduct and prevalence. It includes factors personal to the offender at the time of the offence which have a causal nexus with the commission of the crime. As with the assessment of "objective seriousness" under s 53A(2) of the *Sentencing Act*, those matters may include motive, mental state, or mental illness or intellectual disability where that factor is causally related to the commission of the offence. It may also in some limited circumstances include the effect of alcohol, drugs or addiction. However, only this category of "subjective factors" is properly taken into account in assessing the "relative seriousness of the offence" under s 53A(4) of the *Sentencing Act*.

[33] Other "subjective" factors are properly characterised as circumstances of the offender which might go to the appropriate level of punishment, rather than circumstances affecting the relative seriousness of the offence, even where those matters bear on moral culpability. Such matters may include prospects of rehabilitation, prior criminality, character, socio-economic circumstances, age and prior sexual abuse. Similarly, remorse, restitution, cooperation with authorities and an early plea of guilty are behaviours properly taken into account at sentencing, but do not amount to factors affecting the relative seriousness of the offence.

[34] The third and fourth conclusions expressed in *Crabbe* must be considered in light of the remarks made by Gleeson CJ in the subsequent decision of the High Court in *Leach v R* (***Leach***)[29] about the interaction between the legislative directions contained in s 53A of the *Sentencing Act* and the ordinary sentencing process. Before considering those remarks we note there is a difference between the operation of s 53A(4) and the operation of s 53A(5) of the *Sentencing Act*.

[35] Subsection 53A(5) confers a power on the sentencing court to refuse to fix a non-parole period. The power must be exercised when the court is satisfied the offender's "level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole". The word "may" in s 53A(5) is not used to confer a discretion but to confer a power upon the court which must be exercised upon satisfaction of the matter which conditions its exercise.[30] Whereas the word "may" in s 53A(4) confers a discretionary power to fix a non-parole period longer than the standard non-parole period. The length of the non-parole period is to be determined by the sentencing court according to the direction in the subsection about the objective seriousness of the offence and ordinary sentencing principles.

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29 *Leach v R* [2007] HCA 3; 81 ALJR 598.

30 *Leach v R* (2007) 81 ALJR 598 at [37]-[38] per Gummow, Hayne, Heydon and Crennan JJ.

[36] *Leach* involved an appeal against a decision of the Court of Criminal Appeal[31] which had upheld an earlier decision of the Supreme Court[32] refusing to fix a non-parole period pursuant to s 19(5) of the *Sentencing (Crime of Murder) and Parole Reform Act*. The High Court dismissed the appeal, and in doing so Gleeson CJ made observations which have some bearing on the proper construction of s 53A(4) of the *Sentencing Act*. In describing the interaction between the legislative directions contained in s 19 of the *Sentencing (Crime of Murder) and Parole Reform Act* (and, by extension, s 53A of the *Sentencing Act*) and the ordinary sentencing process, Gleeson CJ stated:[33]

> Section 19 confers upon the Supreme Court a power to make an order which substitutes a discretionary judicial decision for the otherwise mandatory effect of s 18. The discretion, like the discretion conferred by certain provisions of s 53A, is not at large. It is confined by statutory prescriptions which, in a number of respects, modify the principles according to which a judge would otherwise fix a non-parole period. Sub-section (3) of s 19, for example, requires that, if the victim of a murder was a police officer, and the death occurred while the officer was carrying out his or her duties, the Court must fix a non-parole period of 25 years, subject to sub-ss (4) and (5). Sub-section (4) empowers the Court, in such a case, to fix a non-parole period of more than 25 years. Sub-section (5) empowers the Court to refuse to fix any non-parole period. Sub-section (3), as qualified by sub-ss (4) and (5), only comes into operation if the Court, on the application of the Director of Public Prosecutions, decides to revoke the non-parole period fixed by s 18. Sections 18 and 19 present a patchwork of legislative prescription and judicial discretion. The exercise of judicial discretion is constrained by legislative direction. A court cannot ignore the legislative context within which the judicial discretion is left to operate. In particular, a conclusion that, after all necessary or appropriate judicial decisions have been made within the scope of s 19, there remains an ultimate question as to the minimum term of incarceration that justice requires the prisoner to serve, is inconsistent with the legislative scheme. (Emphasis added)

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31 *Leach v The Queen* (2005) 16 NTLR 117.

32 *R v Leach* (2004) 14 NTLR 44.

33 *Leach v R* (2007) 81 ALJR 598 at [14].

[37] His Honour then went on to consider the matters which could be properly taken into account in making a determination under s 19 of the *Sentencing (Crime of Murder) and Parole Reform Act*:[34]

> Leaving to one side cases within s 19(3), a decision not to dismiss an application under s 19 will be made if the Court is at least satisfied, in terms of sub-s (4), that a longer non-parole period than that fixed by s 18 is warranted. That state of satisfaction will be reached having regard to any objective or subjective factors affecting the relative seriousness of the offence. … The discretionary power conferred by sub-ss (1)(a) and (4) of s 19 is conditioned upon a certain satisfaction about matters affecting the relative seriousness of the offence. … The Court may revoke the s 18 non-parole period, and fix a longer period, if it is satisfied, because of the matters referred to in s 19(4), that a longer non-parole period is warranted, that is, is called for in all the circumstances. The Court will not revoke the s 18 non-parole period unless it is satisfied that a longer non-parole period is warranted. The relative seriousness of the offence may warrant such a conclusion, or it may not. The Court is entitled to have regard to all relevant circumstances in considering whether the conclusion is warranted. Its attention is directed specifically to the seriousness of the offence, but whether the seriousness of the offence warrants a longer non-parole period depends upon a consideration of all matters relevant to fixing a non-parole period. Sub-section (5) involves a possible further step on the way to a final outcome. It deals with an extreme case: a case where the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met by incarceration for life. The words "can only be met" in sub-s (5) are the reflex of the words "is warranted" in sub-s (4). A non-parole period longer than the s 18 period may be set where the Court is satisfied that the longer period is warranted. However, the Court may conclude, not merely that a longer period is warranted, but that the removal of any non-parole period is demanded, because that is the only way of meeting the community interest. The level of culpability in the commission of an offence may be so extreme that not only is it necessary to intervene to set aside the period fixed by s 18 but, in addition, the community interest demands that there be, not merely a longer non-parole period, but a refusal to fix any non-parole period. (Emphasis added)

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34 *Leach v R* (2007) 81 ALJR 598 at [17]. See also the discussion in *R v Heiss & Kamm* [2009] NTSC 26 at [11]-[15].

[38] Although Gleeson CJ characterised the relevant judicial function as discretionary in nature, his Honour's formulation acknowledged that the discretion was subject to legislative prescription and direction. Having regard to those formulations and the statutory text, the following conclusions can be drawn concerning the exercise of the power under s 53A(4) of the *Sentencing Act*:

(a) The standard non-parole period specified in s 53A(1)(a) is not reserved for the least serious category of the crime of murder.

(b) The power conferred by s 53A(4) is discretionary.

(c) The judgment ultimately to be made is whether a longer non-parole period is necessary.

(d) The discretionary power is conditioned upon a certain satisfaction about matters affecting the relative seriousness of the offence. The relative seriousness of the offence may warrant such a conclusion or it may not.

(e) The sentencing court is entitled to have regard to all relevant circumstances in considering whether a longer non-parole period is warranted.

(f) The sentencing court's attention is directed specifically to the seriousness of the offence, but whether the seriousness of the offence warrants a longer non-parole period depends upon a consideration of all matters relevant to fixing a non-parole period.

(g) The relevant considerations include the stipulation in s 53A(2) that the standard non-parole period represents the non-parole period for an offence in the middle of the range of "objective seriousness" for the offence of murder. However, that matter is not determinative as it takes no account of matters personal to an offender which do not have a causal nexus with the commission of the crime.

(h) The exercise of the power does not involve a two-stage process. The process is a form of intuitive synthesis.[35]

[39] That construction yields a process of a different character to that prescribed in *Bahar*, and has the potential to infringe the principle of equal justice identified in *Karim*. So far as the first matter is concerned, for the reasons already described s 53A(1)(a) of the *Sentencing Act* does not in its terms fix a statutory minimum which also dictates the seriousness of the offence for the purpose of s 53A(4). The language and structure of the statutory scheme require a sentencing judge to make an assessment under s 53A(4) on the basis that the standard non-parole period is reflective of a non-parole period for an offence in the middle of the range of objective seriousness rather than the "floor". So far as the second matter is concerned, there is no doubt the statutory scheme may result in the imposition of the standard non-parole

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35 In the ordinary course, the non-parole period is the marker of the minimum time that the sentencing judge determines that the offender must serve having regard to all the circumstances of the offence. In making that determination the sentencing court takes into account the same considerations which would inform fixing the head sentence, including personal matters and characteristics, antecedents, criminality, punishment and deterrence, although different weightings may be applied to those considerations for the purpose of determining the appropriate duration of the non-parole period: see *The Queen v Shrestha* (1991) 173 CLR 48 at 67-69. See also the discussion in *Albert v The Queen* [2009] NTCCA 1 at [36]-[37] per Riley J (with whom Martin (BR) CJ agreed); and *Leach v The Queen* (2005) 16 NTLR 117 at [85]-[86] per Southwood J.

period to offending of markedly different levels of seriousness. For example, the standard non-parole period may have application to both an offence in the middle range of objective seriousness, after account has been taken of all the personal circumstances of the offender, and one falling within the least serious category of murder which does not meet the criteria in s 53A(6) of the *Sentencing Act*. To the extent that gives rise to unequal justice, and so injustice, that is a consequence of the scheme enacted by the legislature.

[40] As to the requirement to give reasons for a decision to fix something other than the standard non-parole period, the High Court in *Muldrock* stated:[36]

> The reference in s 54B(4) to "mak[ing] a record of its reasons for increasing or reducing the standard non-parole period" is not to be understood as suggesting either the need to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or the need to classify the objective seriousness of the offending. It does require the judge to identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed.

[41] Section 53A(9) of the *Sentencing Act* has the same purpose and operation.

[42] The approach taken by the sentencing judge was consistent with the operation of s 53A(4) of the *Sentencing Act* described above.

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36 *Muldrock v The Queen* (2011) 244 CLR 12 at [29]. Section 54B(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) required the sentencing court to make a record of its reasons for increasing or reducing the standard non-parole period.

Manifestly inadequate – the basis of the claim for appellate intervention

[43] As with other discretionary determinations made in the sentencing exercise, the fixing of a non-parole period may be set aside on the ground of manifest excess or inadequacy, or specific error. By its Notice of Appeal the sole ground identified by the Crown is that "[t]he learned sentencing judge erred in fixing a non-parole period which was manifestly inadequate in all the circumstances".[37] That statement of grounds does not identify or suggest any specific error on the part of the sentencing judge. In its written submissions, the Crown repeated the assertion of manifest inadequacy.[38] That inadequacy was said to derive from the fact that the sentencing judge failed to apply the principles of general deterrence and denunciation which should have assumed primacy in the sentencing process.[39] There was also a reference to error in the assessment of the respondent's prospects of rehabilitation, but only in the sense that the sentencing judge focused on the respondent's work record and lack of relevant criminal history rather than the respondent's conduct following the commission of the offence which was said to demonstrate an absence of remorse.[40]

[44] Properly characterised, those contentions are that the sentencing judge placed inadequate weight on the principles of general deterrence, punishment and denunciation, and excessive weight on the respondent's

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37 AB 83.

38 Appellant's Summary of Submissions at [9].

39 Appellant's Summary of Submissions at [10], [22]-[33], [35].

40 Appellant's Summary of Submissions at [11], [34].

work record and lack of relevant criminal history. As this Court has previously observed, any contention that the sentencing court has accorded inadequate or excessive weight to a factor is properly viewed as a particular of the ground asserting manifest excess.[41] Beyond any inferences which might be drawn from the ultimate determination of whether the sentence fell either within or without the available range, it is neither possible nor necessary for an appeal court to reach any particular conclusion concerning the allocation of weight to a factor.

[45] In its supplementary written submissions the Crown also contended that the sentencing judge's failure to mention general deterrence when discussing sentencing purposes demonstrated a failure to take that purpose into account in the exercise of the power under s 53A(4) of the *Sentencing Act*.[42] The contention that the sentencing court failed to take into account a relevant factor, or took into account an irrelevant factor, is an assertion of specific error which, if made out, permits an appeal court to set aside the determination and substitute its own sentence.[43] However, even leaving aside the fact that this contention goes beyond the ground pleaded in the Notice of Appeal, it should not be assumed or accepted that a failure to make express mention in sentencing reasons of a purpose as basic as general deterrence is demonstrative of a failure on the part of the sentencing judge

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41 *Noakes v The Queen* [2015] NTCCA 7 at [15] citing *DPP v Terrick; DPP v Marks; DPP v Stewart* [2009] VSCA 220; 24 VR 457 at 459-460.

42 Appellant's Supplementary Submissions at [72], [74]-[75].

43 *Johnson v The Queen* [2012] NTCCA 14 at [25].

to take that matter into account. That purpose forms part of the fundamental context in which the sentencing exercise takes place and its consideration is implicit in the conclusion reached by his Honour.

[46] For those reasons, the exercise of the sentencing discretion in this case is not to be disturbed on appeal unless the outcome leads necessarily to the conclusion that there must have been some misapplication of principle which is not apparent from the statement of reasons.[44] That resolves to a consideration of whether the non-parole period fixed was unreasonable or plainly unjust in the sense that it was clearly and not just arguably inadequate. As this Court stated in *The Queen v Mossman* (footnotes omitted):[45]

> 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.

[47] Only sentences which are so inadequate as to indicate error or departure from principle, or sentences which depart from accepted sentencing standards, will constitute error in point of principle which the Crown is entitled to have this Court correct.

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44 *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [58] per Gaudron, Gummow and Hayne JJ.

45 *The Queen v Mossman* [2017] NTCCA 6 at [8].

Accepted sentencing standards

[48] There is no tariff for non-parole periods for the offence of murder. This is because the determination under s 53A(4) of the *Sentencing Act*, just as for the determination of a non-parole period in the ordinary course, requires consideration to be given to circumstances which are personal to the offender. A collation of appropriate sentences may comprise a "standard" for a particular crime, but it is not a fixed range departure from which will necessarily found demonstrable error.[46] A standard of that sort may be created either by the cumulative force of individual sentences or by a deliberate act of policy on the part of a court of criminal appeal, but it can only operate as a general guide.[47] For the reasons and in the manner already described, the stipulation in s 53A(2) of the *Sentencing Act* that the standard non-parole period represents the non-parole period for an offence in the middle of the range of "objective seriousness" for the offence of murder is properly taken into account, but does not operate as a standard in the ordinary sense.

[49] Non-parole periods of longer than 20 years have been fixed by the Supreme Court for the crime of murder. However, it is not possible to discern an accepted or definitive sentencing standard for non-parole periods given that the circumstances of the offender and the offending vary so widely between cases. That variance is seen in matters such as the method by which the

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46 *Emitja v The Queen* [2016] NTCCA 4 at [42]-[45]; *Daniels v The Queen* (2007) 20 NTLR 147 at [29].

47 *R* v *King* (1988) 48 SASR 555 at 557.

murder was committed, whether the conduct was premeditated or spontaneous, whether the offending took place in company, the nature and duration of the offending conduct, the nature and timing of the guilty plea, the age of the offender, the extent to which the offender assisted law enforcement authorities, the nature and extent of the prior criminal history, and the consequences of the conduct. For that reason, an examination of sentences fixed by the Supreme Court for the crime of murder discloses a range rather than a standard. The cases reviewed in the Appendix to these Reasons for Judgment demonstrate the extent of the variance in circumstance and the breadth of the range.

[50] That review of sentencing decisions also discloses that the range and standard for the crime of murder in the Northern Territory are distorted by the fact that the standard non-parole period must be fixed even in circumstances where the ordinary process of intuitive synthesis might warrant a lesser period. For example, a first-time offender of otherwise good character who pleads guilty in circumstances where his participation in the crime places the conduct in the least serious category of offending for murder will still be liable to the imposition of a non-parole period of 20 years. That distortion was recognised by the sentencing judge in the matter of *Zak Grieve*, and in the subsequent exercise of the prerogative of mercy to reduce the non-parole period fixed in that case from 20 years to 12 years.

The objective and subjective circumstances

[51] The sentencing judge in this matter made extensive findings of facts and matters relevant in assessing the seriousness of the offending. Those findings may be summarised as follows.

(a) The respondent and the victim met and formed a relationship in 2003. A son was born of that relationship in January 2011. He was 2 ½ years of age at the time the victim was killed. The relationship between the respondent and the victim deteriorated after the birth of the child. The respondent and the deceased ceased to have a physical relationship in or about October 2012, and the relationship broke down irretrievably over the following six months. During that time, the respondent became obsessed with his suspicion that the deceased was in a relationship with someone else.[48]

(b) In or about May 2013, the respondent became convinced that the victim was planning to move interstate and take their son with her. He was strongly opposed to that course and determined to do something before the deceased left Darwin.[49]

(c) On 29 May 2013, just under three weeks before the respondent killed the victim, he drove into the Darwin rural area with an excavator loaded on his truck. He looked for and found a vacant piece of land in a remote location and used the excavator to dig a hole in which he

48 AB 70-71.

49 AB 71.

intended to bury the body of the deceased. At the time he dug the hole the respondent was overwhelmed with anger as a result of the relationship breakdown and intended to kill the deceased.[50]

(d) After that time the respondent maintained his intention to kill the victim and continued to harbour anger towards her. He became increasingly resentful, jealous, angry and suspicious as time went on. On 12 June 2013, the victim made it plain to the respondent during the course of a telephone call that the relationship was finished. Immediately following that telephone conversation the respondent went to the daycare centre and removed the child without the victim's knowledge. When the victim learned the child had been taken from daycare she was distraught and made contact with the respondent, who falsely denied that he had taken the child. After police intervened the victim collected the child, at which time the respondent screamed at her that she was not taking his son anywhere. That incident highlighted that the tension between the respondent and the victim related specifically to the respondent's concern that the victim was going to leave Darwin and take the child with her; that the respondent continued to harbour significant anger towards the victim; and that the respondent maintained his intention to kill the victim up until the time and opportunity presented itself to do so on 18 June 2013.[51]

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50 AB 71-73.

51 AB 73-74.

(e) At some time between digging the hole on 29 May 2013 and 18 June 2013, the respondent placed plastic sheeting under one of the containers in the yard of his business preparatory to killing the victim, demonstrating ongoing planning and preparation.[52]

(f) On the evening of 18 June 2013 the victim was in the yard of the business premises. The respondent took the victim by surprise, punched her to the temple to render her unconscious, dragged her onto the plastic sheeting, straddled the victim's body, placed his thumbs around her throat, and then choked her to death in a cold and calculated fashion intended to cause the death of the victim.[53]

(g) The respondent did not act under provocation when he engaged in the conduct which caused the death of the victim. In particular, the victim did not say anything to the respondent at the yard on the evening of 18 June 2013 which caused him to lose self-control and kill her.[54]

(h) After the respondent had killed the deceased he "mummy-tied" her body in a tarpaulin and put into effect the plan which he had devised. Before the respondent took the victim's body to the hole he had previously dug he left his mobile phone hidden at a bus exchange so that he could not be traced by the signals. The respondent took a change of clothes so that he would not appear to have dirt or soil on his

52 AB 74-75.

53 AB 75-77.

54 AB 77-79.

clothing when filmed on the closed circuit television at the service station he later visited in an attempt to cover his activities.[55]

(i) For 18 months after the murder the respondent maintained to the victim's family, police, friends and associates that the deceased had walked out of the business premises and simply not returned. The details of the crime were only revealed after the respondent made a series of admissions to covert police operatives he thought were part of a criminal organisation in anticipation that they would remove the residual evidence of the victim's remains.[56]

[52] Against that background, it fell to the sentencing judge to determine whether a longer non-parole period was warranted under s 53A(4) of the *Sentencing Act*. As we have stated above, the sentencing judge found that a longer non-parole period was warranted because: (i) the respondent killed the victim to ensure that she would have no role in their son's upbringing; (ii) he engaged in detailed and calculated planning prior to the killing and a complex cover-up after the event; (iii) he positively obstructed and misled the police investigation, thus prolonging the stress and anxiety suffered by the victim's family; and (iv) he had demonstrated no remorse for killing the deceased.[57]

[53] The behaviour of the respondent after the commission of the offence is properly taken into account in assessing the objective seriousness of the

55 AB 79-81.

56 AB 81.

57 AB 82.

offending as it formed part of the commission of the crime and was a matter relevant to the consequences of the conduct. The lack of remorse was not something which went to the assessment of the objective seriousness of the offence, or which operated as an aggravating circumstance, but was a matter which could be taken into account in assessing whether the objective and subjective factors affecting the relative seriousness of the offence warranted a longer non-parole period than the standard period. In this regard it is important to note the purposes identified by Southwood J in *Leach v The Queen*:[58]

> The purpose of a non-parole period is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum term of imprisonment that justice requires he must serve having regard to all the circumstances of the case: *Deakin v The Queen; Bugmy v The Queen; The Queen v Stewart*.
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> The non-parole period fixed by a court when sentencing an offender to serve a term of imprisonment should be the minimum term of imprisonment that justice requires an offender must serve having regard to all the circumstances of the case: *Power v The Queen; Deakin v The Queen*. When fixing the non-parole period the sentencing judge should determine the minimum period for which in his judgment, according to the accepted principles of sentencing, the prisoner should be imprisoned. A purpose but not the only purpose, in fixing a non-parole period is to assist the prisoner's rehabilitation through conditional freedom. However, the non-parole period also has a punitive aspect: *R v Chan*. In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such punishment*: Power v The Queen*. The punitive aspect of fixing the non-parole period is sometimes referred to as the penal element: *R v EO*. This element must appropriately reflect the importance of such principles as retribution, protection of the community and specific and general deterrence: *R v EO*. The penal element is not the only element to be considered by a court when fixing a non-parole period.

58 *Leach v The Queen* (2005) 16 NTLR 117 at [85]-[86].

[54] Consistent with the remarks of Gleeson CJ in *Leach* which are extracted above, the objective seriousness of the offence (or the penal element) is not the only element to be considered when exercising the power granted under s 53A(4) of the *Sentencing Act*. As his Honour stated, "[t]he Court is entitled to have regard to all relevant circumstances" in considering whether a longer non-parole period than the standard period is warranted. Those circumstances include an offender's prospects of rehabilitation.

[55] In our opinion, the sentencing judge was no doubt correct in determining that a longer non-parole period was warranted because the objective and subjective factors affecting the relative seriousness of the crime placed the offending above the middle of the range of objective seriousness even allowing for mitigating factors.

[56] The question is whether the non-parole period fixed as part of that assessment was manifestly inadequate. In our opinion it was not. The crime committed by the respondent did not involve the use of a weapon; it was not committed in company; the attack upon the victim was relatively swift and did not involve a prolonged physical assault upon her; the victim was not mutilated; the victim was not psychologically tormented prior to being killed; and the victim was not made to suffer physically prior to being killed. The respondent's lack of remorse did not operate as a ground for increasing the length of the non-parole period. Rather, it was not a mitigating factor and did not warrant any reduction in sentence. The same

may be said of the respondent's lies to police and the failure to provide any assistance to authorities. Nor did the respondent's antecedents and personal circumstances have any aggravating effect. He had no relevant criminal history. In particular, he had no convictions for crimes of violence or for breaches of domestic violence orders of any kind. He had a good work history as both an employee and a self-employed person, and possessed trade skills in hospitality and construction. While the gravity of the offence for which the respondent was found guilty largely displaced any mitigatory effect of prior good character, he did not stand to be sentenced as a person who had previously demonstrated dangerous propensities or a continuing attitude of disobedience of the law.

[57] The respondent's age was another subjective factor properly taken into account in determining the non-parole period for a head sentence of indeterminate length. As King CJ observed in *R v von Einem*:[59]

> A sentence of imprisonment for life means a sentence of imprisonment for the term of the prisoner's natural life. This is the only sentence which the law, which Parliament has enacted, permits for the crime of murder. The stringency of this mandatory sentence is mitigated to some extent by the power entrusted to the courts to fix a non-parole period, having the effect that the prisoner will be released on parole at the expiration of that period if he accepts the conditions attached to his parole by the Parole Board. A non-parole period should always bear a relation, which is appropriate in the circumstances, to the head sentence. Where the head sentence is the term of the prisoner's natural life, regard should be had, in my opinion, in fixing the non-parole period, not only to the number of years which will be spent in prison by reason of the non-parole period, but to the relationship of the non-parole period to the normal span of life. This involves some consideration of the age of the prisoner. To ignore the last-mentioned factor, would be to fix the non-parole period as though it were related to a

59 *R v von Einem* (1985) 38 SASR 207 at 220.

> determinate sentence and would to that extent negate the mandate of Parliament that the sentence for murder is imprisonment for life.

[58] Although that statement was sometimes misapplied in a manner that counted against young offenders,[60] age remains a relevant factor in relation to older offenders. As Olsson J explained in *R v Bednikov*:[61]

> It cannot be stressed too strongly that, in adverting to a need to consider the age of the person sentenced, King CJ was not implying that a non-parole period was to be arrived at simply by some broad mathematical formula. Indeed, to do so would not only be to ignore the fundamental principles [of sentencing] ... and a balanced application of them, but also would produce quite capricious and anomalous comparative tariffs for crimes of a similar nature committed by persons of widely differing ages. ...
>
> The question of age of the offender is but one consideration. It may be of critical practical importance in the case of older offenders, where a merciful approach may warrant some moderation of an otherwise justified non-parole period.

[59] The acknowledgement that each year of a custodial sentence for an older offender represents a substantial proportion of the remaining life expectancy also has application to the consideration of the non-parole period properly fixed in the case of an indeterminate sentence of life imprisonment. While that consideration cannot be allowed to obscure the objective seriousness of the offending, it remains relevant to an assessment of the proportionality between the head sentence and the non-parole period. The respondent in this case was almost 46 years of age at the time of sentencing and the non-parole period was backdated to commence from a time when he was 44 years

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60 See discussion in *Inge v R* [1999] HCA 55; 199 CLR 295.

61 *R v Bednikov* (1997) 193 LSJS 254 at 284.

of age. Under the period fixed by the sentencing judge, the respondent will become eligible for parole when he is about 66 years of age.

[60] The Crown points to a number of factors which it says mark out the crime as one above the middle of the range of objective seriousness calling for a longer non-parole period than was fixed by the sentencing judge. These include: the extent of planning and organisation before the commission of the offence; the context and character of the crime as a spousal homicide; the "clinical execution" by which the respondent killed the victim; and the elaborate concealment of the crime. We have already dealt with the behaviour of the respondent after the commission of the offence, its place in the sentencing calculus, and the sentencing judge's treatment of that matter. The respondent's planning and premeditation leading up to and in the immediate aftermath of the commission of the crime clearly operated to increase the gravity of the crime and operated as a circumstance of aggravation. So much was clearly acknowledged by the sentencing judge. While a domestic relationship between offender and victim does not necessarily aggravate the offence, it is no doubt correct to say that domestic murder is abhorrent, particularly in circumstances where the motive relates to an impending separation[62], and that the taking of a domestic partner's life undermines the foundations of personal relationships in a manner that calls for primacy to be given to the principles of general deterrence, denunciation

62 *R v Badanjak* [2004] NSWCCA 395 at [31].

and just punishment[63]. As the sentences extracted in the Appendix demonstrate, murder in the domestic context is prevalent in the Northern Territory. Again, the sentencing judge expressly recognised the context in which the respondent's crime took place and his motive for it.

[61] There can be no doubt that in this sentencing exercise primacy was required to be given to the purposes of general deterrence, punishment and denunciation. That is reflected in a *prima facie* sense in the fact that the legislature has prescribed a mandatory penalty of imprisonment for life and a standard non-parole period of 20 years. The sentencing judge's attention to those purposes was demonstrated by his careful consideration of the nature of the respondent's offending and the fixing of a longer non-parole period. No purpose is served in this context by searching for points of similarity or distinction between this case and other cases in which non-parole periods of shorter or longer duration have been fixed for the crime of murder. While one set of circumstances may, for example, involve a higher level of planning and premeditation than another, that other case may involve a higher degree of ferocity and brutality in the manner of the killing. To take another example, while appropriate weight must be given to the abhorrence of murder in the domestic context, it cannot be said that the cold-blooded murder of a stranger will necessarily be less objectively serious. As the courts have repeatedly observed, consistency in sentencing requires consistency in the application of the relevant legal principles and

63 *Felicite v R* [2011] VSCA 274 at [20], and the cases cited in that passage.

does not resolve to numerical equivalence. It requires only that like cases are to be treated in like manner within the legitimate bounds of the sentencing discretion.[64]

[62] The question which presents on this appeal is whether the fixing of a non-parole period of 21 years and six months over a head sentence of life imprisonment is "so disproportionate to the seriousness of the crime as to shock the public conscience and undermine public confidence in the ability of the courts to play their part in deterring criminal activity".[65] That question must be answered in the negative.

Disposition

[63] The appeal is dismissed.

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64 *Forrest v The Queen* [2017] NTCCA 5; 267 A Crim R 494 at [66]; *Truong v The Queen* [2015] NTCCA 5; 35 NTLR 186 at [23]-[30].

65 *Director of Public Prosecutions (Vic) v Brown* [2009] VSCA 314 at [23]; *Director of Public Prosecutions (Vic) v Bright* [2006] VSCA 147 at [10].

APPENDIX

1. In *Evelyn Namatjira* (NTSC, 17 December 2012) the 48-year-old offender was convicted after trial of the murder of her sister. The offending was alcohol-related. The offender stabbed the victim once in the chest and twice in the back with a kitchen knife having a 20 cm long blade. The sentencing court found that having regard to the offender's character and the victim's conduct in placing demands on the offender over an extended period, exceptional circumstances existed to justify fixing a shorter non-parole period of 15 years.

2. *Darren Halfpenny* (NTSC, 3 July 2012), *Zak Grieve* (NTSC, 9 January 2013) and *Christopher Malyscho* (NTSC, 9 January 2013) were sentenced for the murder of the same victim. Malyscho's mother had procured the offenders to murder her *de facto* spouse. Halfpenny pleaded guilty to the crime of murder, demonstrated remorse and provided substantial assistance to the authorities. The sentencing judge fixed a non-parole period of 20 years subject to a recommendation to the Administrator that he should be released on parole after a period of not less than 14 years in recognition of the assistance provided to authorities. Grieve was found guilty at trial. He was involved in the planning of the murder but pulled out of any participation in the physical act. The sentencing judge fixed a non-parole period of 20 years subject to a recommendation to the Administrator that he should be released on parole after a period of not less than 12 years in recognition of the unusual circumstances of his involvement. Malyscho was found guilty following a trial. The sentencing judge fixed a non-parole period of 18 years having regard to the offender's character and the fact that the victim's conduct over the course of his relationship with the offender's mother constituted provocation which substantially mitigated the offender's conduct.

3. In *Wayne Roberts-Barlow* (NTSC, 9 May 2012) the 22-year-old offender was convicted after trial. The victim was a young woman who accompanied him to his house on the night in question. The victim was intoxicated but the offender was not affected by alcohol to any significant extent. At some point the offender took the victim outside the house and told her to leave. He then went back into the house and seized a knife, came after the victim as she was walking away from the house, attacked her from behind, and cut her throat from ear to ear in what was described as a "commando-style wound". There was no rational explanation for the offender's conduct. The Crown submitted that a non-parole period longer than the standard period should be fixed having regard to the aggravating circumstances. The sentencing court declined to do so and fixed a non-parole period of 20 years.

4. In *Francis Martin* (NTSC, 15 September 2008) the 23-year-old offender was convicted after trial of the murder of his domestic partner. The offending was alcohol-related and took place when the offender was alone with the victim. The victim's death was the result of a prolonged physical assault. The offender had previously been convicted of assaulting the victim. The Crown did not put any submission for an increase to the standard non-parole period, and a period of 20 years was fixed.

5. In *Godwin Ladd* (NTSC, 8 October 2008) the offender was convicted after trial of the murder of his domestic partner. The offending was alcohol-related. The offender had without apparent reason or provocation punched the victim in the chest causing her to fall to the ground and then stabbed the victim in the chest. The offender had a long criminal history including several convictions for violent offending against his first wife and four previous convictions for assault against the victim. A non-parole period of 20 years was fixed.

6. In *Jason Robinson* (NTSC, 26 February 2010) the offender was convicted after trial of murdering his wife. The offending was alcohol-related. During the course of an argument at a service station the offender beat his wife to death with a heavy glass bottle. The standard non-parole period of 20 years was fixed.

7. In *Freddy Mugarra* (NTSC, 30 November 2011) the 46-year-old offender was convicted after trial of murdering his wife. The offending was alcohol-related. During the course of a prolonged argument the offender accused the victim of having a sexual interest in another man. That argument culminated in the offender pushing the victim up against the wall of the residence they shared and stabbing her in the heart. The offender had a history of violent offending, including three breaches of domestic violence orders for the protection of the victim. A non-parole period of 20 years was fixed.

8. In *Stanley Scrutton* (NTSC, 17 June 2016) the 41-year-old offender was convicted after trial of murdering his domestic partner. The offending was alcohol-related. There had been some antagonism involving sexual jealousy between the offender and the victim earlier in the evening. They came together later that night and went to the room they shared. The offender then engaged in a vicious and prolonged assault on the defenceless victim using his feet to kick and stomp on her. The victim suffered more than 40 blows of moderate to severe force which caused injuries to her brain and chest leading to her death. The offender had a long history of violent offending against women. The sentencing court assessed the objective seriousness of the offending as at the top end of the middle range and fixed a non-parole period of 20 years.

9. In *Robert Morton* (NTSC, 16 May 2017) the 41 year old offender was convicted after trial of murdering his wife. The offence was alcohol-related. For unknown reasons the offender attacked the victim with a tomahawk and knife causing at least 28 impacts spread over her body. She sustained a fractured arm, a stab wound to the right thigh, an axe wound to the frontal bone of the forehead, fractures to three ribs, and blows to her scalp, torso, arms and legs. The victim died from the combined effect of the injuries she received. A non-parole period of 20 years was fixed.

10. In *Baden Flash* (NTSC, 18 July 2018) the 35-year-old offender was convicted after trial of murdering his domestic partner. The offender bashed the victim to death using a brick. The victim died as a result of multiple blunt force injuries to her head, chest, abdomen and lower limbs. A non-parole period of 20 years was fixed.

11. In *Ralph Ebatarinja* (NTSC, 26 September 2008) the offender pleaded guilty to the charges of murdering one man and unlawfully causing serious harm to another. The offending was alcohol-related. In the context of long-standing conflict between two family groups, the offender armed himself with a knife 55 centimetres in length and fatally stabbed the first victim in the back twice, slashing his aorta in the process, and stabbed the second victim twice but not fatally. The offender had an extensive criminal history including crimes of violence and an intellectual disability. The standard non-parole period of 20 years was fixed across the sentences for both offences.

12. In *Yvette Bennie* (NTSC, 12 November 2015) the offender was convicted after trial of murder. The offending was alcohol-related. During the course of the evening in question the offender had been involved in a physical altercation with the female victim. After that time the offender armed herself with a knife having a 16 cm blade and put it in her pocket. At some later point she started fighting with the victim again and inflicted a fatal wound with the knife. The prisoner had a criminal record which demonstrated problems with alcohol misuse and a tendency to violence in the family context. The sentencing judge assessed the offending to be in the lower middle of the range of objective seriousness and fixed the standard non-parole period of 20 years.

13. In *Michael Mooney* (NTSC, 15 October 2009) the offender was convicted after trial of murdering an associate with whom he was travelling from South Australia to the Northern Territory. An altercation took place between the offender and the victim during which the offender struck the victim with a machete several times causing his death. The offender had an extensive criminal history, including offences of violence. A non-parole period of 20 years was fixed.

14. In *Darin Clare* (NTSC, 17 April 2013) the 37-year-old offender pleaded guilty to the murder of his neighbour. There was a history of ill feeling between the offender's sister and brother-in-law on the one hand and the victim on the other. On the day in question there had been an altercation following which police were called. After police had left, the offender took a jerrycan of petrol, went to the neighbour's house, said words to the effect of, "you have got to stop fucking with my family", poured petrol on to the victim, and ignited it using a lighter. The victim suffered extensive second-degree burns to 90% of his body and died as a result of his injuries. Having regard to the offender's limited criminal record and the assessment of the offending as being at the upper limit of the middle of the range of objective seriousness, the sentencing judge fixed the standard non-parole period of 20 years.

15. In *R v Heiss & Kamm* [2009] NTSC 26 the offenders had been found guilty after trial of murdering an associate. The offenders had driven to Borroloola with the deceased in order to collect his rifles. On the way back they stopped in order to go shooting. There were no other persons present at the relevant time. All three men walked into the bush armed with rifles. The deceased walked ahead of the two respondents. Heiss fired one shot at the deceased which missed. Kamm then fired two shots at the deceased which killed him. Both offenders then dug a grave, placed the deceased's body in a sleeping bag, wrapped a rag around the deceased's head, poured petrol over the body and set fire to it. After the flames died down, both respondents covered the body with leaves and other debris and then placed an ant's nest on top of the grave. The Director of Public Prosecutions made applications pursuant to the transitional provisions for the fixing of longer non-parole periods. The applications were dismissed with the consequence that the standard 20 non-parole period applied.

16. In *Darren Ashley* (NTSC, 8 March 2017) the 46-year-old offender was convicted after trial of the murder of his *de facto* wife. The victim had moved out of the marital home and made it plain to the deceased that she did not wish to continue the relationship. The offender suspected the victim was having an affair and attempted to make contact with her by phone or text almost 300 times in the short period prior to her death. When the offender's attempts to reconcile with the victim failed he developed a deep anger towards her. On the day prior to the offence the offender was served with an application for a domestic violence order in relation to an altercation he had with the victim approximately one week earlier while discussing division of the property of the relationship. On the day in question the offender went to the house where the victim was staying, entered through the back door, and attacked her with a knife he had brought with him for that purpose. The victim died during the course of a sustained and ferocious attack which involved blunt force trauma to her nose, ear, cheek, jaw and the

base of her skull, defensive cuts to her hands and fingers, and six stab wounds to the torso which included a fatal wound to her heart. The sentencing court found that the murder was premeditated and motivated by his failure to control and manipulate the victim. After the murder, the offender attempted to avoid detection by disposing of all items that might link him to the murder and by seeking to implicate others. The offender had some prior convictions for violent offending and offences of dishonesty. He demonstrated no remorse. The sentencing judge fixed a non-parole period of 22 years.

17. In *Matej Vanko* (NTSC, 20 March 2014) the 35-year-old offender was convicted after trial of murder, unlawful entry to a building with the intent to commit an offence, deprivation of liberty, unlawful assault with circumstances of aggravation, and threats to kill with intent to cause fear. The offender in that case had a strained relationship with his workplace supervisor. Approximately nine days before the offending he travelled to the residence his supervisor shared with her brother to check the layout of the premises and to determine whether they had dogs and how many. On the day in question the offender rode his motorcycle to a car rental business and collected a hire car. He drove the car to the supervisor's residence, killed the two dogs there, and then murdered the supervisor's brother by stabbing him between the base of the skull and the first vertebra with a knife designed primarily as a stabbing weapon. The offender remained at the premises and when the supervisor returned home that afternoon the offender confronted her with a pistol, bound and handcuffed her, and threatened to kill her. He then left the premises for an hour, during which the supervisor was able to escape and alert police. The offender attempted to dispose of any incriminating items prior to his arrest, including a pump action shotgun and the knife used to kill the supervisor's brother. The sentencing judge imposed a non-parole period of 23 years over the sentences imposed in respect of all offences, noting that the offender would be approaching 60 years of age by the time he became eligible to apply for parole.

18. In *Gary Miles* (NTSC, 6 December 2013) the 41-year-old offender was convicted after trial of murder, causing serious harm, deprivation of liberty and arson. The offender had invited the victim, who was an old friend, to stay at his flat. On the night in question the victim had offended another friend of the offender. After the victim had gone to sleep, the offender went into his bedroom punched him three or four times in the face, dragged him from the bedroom, put him in the boot of a vehicle, drove with the victim in the boot to Winnellie, poured petrol onto the roof of the vehicle and set fire to it. The victim was burnt alive. Having regard to the objective and subjective factors going to the relative seriousness of the offence, the sentencing judge fixed a non-parole period of 25 years across all the offences.

19. In *Rodney Kenyon* (NTSC, 17 March 2017) the offender was convicted after trial of murder and deprivation of liberty. The offender had been involved in chasing a vehicle driven by the victim. While the vehicles were stationary and alongside each other the offender shot the victim in the head with a shotgun. The offender had an extensive criminal history. At the time of his conviction for the murder he was serving a long sentence for a series of crimes including sexual intercourse without consent. The offender demonstrated no remorse, very poor prospects of rehabilitation, and an escalating pattern of extremely serious criminal behaviour. A single non-parole period of 25 years was fixed across all the sentences the offender was to serve.

20. In *Joachim Golder* (NTSC, 2 September 2010) the offender was convicted after trial of murdering his domestic partner. The offending was alcohol-related. The offender launched a vicious and sustained attack on his partner using a number of large rocks before fleeing the scene. The offender had previous convictions for manslaughter and unlawfully causing serious harm, the former of which attracted a standard non-parole period of 25 years for the subsequent offence of murder. The standard non-parole period of 25 years was fixed.

21. In *Ernest Mulkatana and Grant Mulkatana* (NTSC, 15 October 2009) the offenders were convicted after trial of entering a dwelling house at night with the intention to commit an offence, and in that house murdering a male victim and assaulting two female victims in circumstances of aggravation. Both offenders had prior convictions for crimes of violence. Ernest Mulkatana had a previous conviction for manslaughter which attracted a standard non-parole period of 25 years for the subsequent offence of murder. The Court imposed a non-parole period of 25 years over the sentences imposed in respect of all offences. Grant Mulkatana was a secondary offender in relation to all of the offences, including the murder. The Court imposed a non-parole period of 20 years over the sentences imposed in respect of all offences.

22. In *Ronald Djana* (NTSC, 26 August 2008) the 46-year-old offender was convicted after trial of murder and sexual intercourse without consent. Both offences attracted a maximum penalty of life imprisonment. The victim was his domestic partner. The offender assaulted the victim by punching, kicking and hitting her with a stick over a prolonged period. While she was unconscious as a result of that assault, but before the victim's death, he thrust a stick deep into the victim's vagina. He had a history of five aggravated assaults and breaches of restraining orders involving the same victim. The Court imposed a non-parole period of 27 years over the two life sentences imposed in respect of both offences.

23. In *The Queen v Rostron* [2013] NTSC 3 the offender had been found guilty after trial of five counts of murder. On a Sunday in 1988 he had shot and killed his wife, his father-in-law and mother-in-law, and his two infant children aged two and one. The offender's conduct took place in a fit of rage after a series of family arguments, and there was a degree of premeditation involved. The Director of Public Prosecutions made application pursuant to the transitional provisions for the fixing of a non-parole period longer than the standard 25 year period which had application both by reason of the multiple murders and because two of the victims were infants. The court fixed a non-parole period of 28 years.

24. In *The Queen v Crabbe* [2004] NTSC 63 the offender had been found guilty after trial of five counts of murder. In the early hours of the morning the respondent had driven his 25 ton Mac Truck into a crowded bar of the Inland Hotel at Yulara. Earlier that night he had been refused service and ejected from the bar for causing trouble. Five persons were killed and 16 were injured. The respondent had a criminal record which included a number of offences of a relatively minor nature. The Director of Public Prosecutions made application pursuant to the transitional provisions for the fixing of a non-parole period longer than the standard 25 year period which had application by reason of the multiple murders. The court fixed a non-parole period of 30 years, making the offender eligible for parole at 66 years of age.

25. In *The Queen v Leach* [2004] NTSC 60 the offender had been found guilty after trial of two counts of murder and one count of rape. The crimes had the following objective features. They were opportunistic and premeditated. The victims were vulnerable young female persons in a public place of recreation. The victims were abducted at knifepoint. The offender cut the victims' clothing from their bodies. The treatment of the victims while alive was brutal in the extreme, cruel and entirely pitiless. The offender raped one of the victims after he had stabbed her and had left the knife embedded in her side up to its hilt. At the time of the rape the victim was naked and gagged with her hands bound tightly behind her back. The stabbing and the rape of the older victim were committed in front of the younger victim, who was also naked, gagged and tightly bound by her hands and feet. The offender was completely indifferent to the suffering that he caused to the victims and to the taking of their lives. There were no mitigating factors. The Director of Public Prosecutions made application pursuant to the transitional provisions for the revocation of the standard 25 year period which had application by reason of the multiple murders. The court revoked the standard period and refused to fix a non-parole period having regard to the extreme level of the respondent's culpability.

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