

CITATION: *The King v Fred* [2026] NTCCA 3

PARTIES: THE KING

v

FRED, Tamsley

TITLE OF COURT: COURT OF CRIMINAL APPEAL
OF THE NORTHERN
TERRITORY

JURISDICTION: CRIMINAL APPEAL from the
SUPREME COURT exercising
Territory jurisdiction

FILE NO: CA 13 of 2024 (22336567)

DELIVERED: 13 March 2026

HEARING DATE: 16 April 2025

JUDGMENT OF: Grant CJ, Southwood, Kelly,
Huntingford JJ and Riley AJ

CATCHWORDS:

CRIME – Appeals – Appeal against sentence – By Crown asserting
specific error – By Crown against inadequacy

Whether sentencing judge erred in failing to find respondent knew
victim not consenting to sexual intercourse – Recklessness rather than
actual knowledge on part of respondent could not be excluded –
Finding of recklessness ‘reasonably open’ – Whether sentencing judge
erred in assessing objective seriousness of offence by treating absence
of aggravating features as mitigating – No error in the assessment of
objective seriousness – Whether sentence manifestly inadequate –
Sentence outside range for offence of rape with these features and
manifestly inadequate – Whether residual discretion warrants dismissal
of appeal despite manifest inadequacy – Deportation of respondent
warrants exercise of residual discretion – Appeal dismissed

Criminal Code 1983 (NT), s 192(3), s 411, s 414

AB v The Queen [2014] NSWCCA 339; *Azzopardi v R* [2019] NSWCCA 306; *Biddle v R* [2017] NSWCCA 128; *Carroll v The Queen* [2011] VSCA 150; *Cheung v The Queen* (2001) 209 CLR 1; *Clarke v The Queen* (2015) 254 A Crim R 150; *CMB v Attorney General for NSW* (2015) 256 CLR 346; *Cranssen v The King* (1936) 55 CLR 509; *Dinsdale v The Queen* (2000) 202 CLR 321; *Duong v The Queen* (2021) 288 A Crim R 566; *Everett v The Queen* (1994) 181 CLR 295; *Filippou v The Queen* (2015) 256 CLR 47; *Fleming v The Queen* (1998) 197 CLR 250; *Forrest v The Queen* [2017] NTCCA 5; *Frigger v Trenfield (No 3)* [2023] FCAFC 49; *Gilligan v The Queen* [2007] NTCCA 8; *Green v The Queen*; *Quinn v The Queen* (2011) 244 CLR 462; *Griffiths v The Queen* (1977) 137 CLR 293; *Gronow v Gronow* (1979) 144 CLR 513; *Hancock v R* [2025] NSWCCA 213; *Hordern v The Queen* [2019] NSWCCA 138; *House v The King* (1936) 55 CLR 499; *Kentwell v The Queen* (2014) 252 CLR 601; *Kryiakou* (1987) 29 A Crim R 50; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; *Lo Castro v The Queen* [2011] NTCCA 1; *Macdonald v The King* [2023] NSWCCA 253; *Mills v R* [2017] NSWCCA 87; *Norbis v Norbis* (1986) 161 CLR 513; *Ocek v The King* [2023] NSWCCA 308; *Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404; *R v Aoun* [2011] NSWCCA 284; *R v BA* [2014] NSWCCA 148; *R v Benning* [2022] NTCCA 15; *R v Carrall* [2018] QCA 355; *R v Deng* [2007] NSWCCA 216; *R v EG* [2022] NTCCA 10; *R v Hernando* [2002] NSWCCA 489; *R v Hunt* [2024] NTCCA 9; *R v Ibrahim* [2021] NSWCCA 296; *R v Ion* (1996) 89 A Crim R 81; *R v Kahu-Leedie* [2022] NTCCA 4; *R v Kilic* (2016) 259 CLR 256; *R v Lacey; ex parte Attorney-General (Qld)* (2009) 197 A Crim R 399; *R v Liekefett; Ex parte Attorney-General* [1973] Qd R 355; *R v Louizos* [2009] NSWCCA 71; *R v Melano; Ex parte Attorney-General* [1995] 2 Qd R 186; *R v Mills* [2021] QCA 59; *R v Nabegeyo* (2014) 34 NTLR 154; *R v O'Donoghue* (1988) 34 A Crim R 397; *R v Olbrich* (1999) 199 CLR 270; *R v Reeves* [2014] NSWCCA 154; *R v Savvas* (1995) 183 CLR 1; *R v Shortland* [2018] NSWCCA 34; *R v Strbak* [2019] QCA 42; *R v Woods* [2009] NSWCCA 55; *Saddler v R* (2009) 194 A Crim R 452; *Simpson v R* [2019] NSWCCA 137; *Skinner v The King* (1913) 16 CLR 336; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* (1993) 73 ALJR 306; *The King v Singar* [2025] NTCCA 1; *Turnbull v Chief Executive of the Office Environment and Heritage* [2015] NSWCCA 278; *Warren v Coombes* (1979) 142 CLR 531; *Weininger v The Queen* (2003) 212 CLR 629; *Whitehorn v The Queen* (1983) 152 CLR 657; *Whittaker v The King* (1928) 41 CLR 230; *Williams v The King (No 2)* (1934) 50 CLR 551; *Willis v The Queen* (2016) 261 A Crim R 151, referred to.

REPRESENTATION:

Counsel:

Appellant:	P Williams with L Auld and K McIndoe
Respondent:	A Abayasekara with B Durkin

Solicitors:

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

Judgment category classification:	A
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Fred [2026] NTCCA 3
No. CA 13 of 2024 (22336567)

BETWEEN:

THE KING
Appellant

AND:

TAMSLEY FRED
Respondent

CORAM: GRANT CJ, SOUTHWOOD, KELLY, HUNTINGFORD JJ &
RILEY AJ

REASONS FOR DECISION
(Delivered 13 March 2026)

GRANT CJ, SOUTHWOOD J & RILEY AJ:

[1] This is an appeal against sentence on the grounds that:

- (a) the sentencing judge erred in failing to find that the respondent knew the victim was not consenting to the sexual intercourse;
- (b) the sentencing judge erred in assessing the objective seriousness of the offence by taking into account the absence of features which would have made the offending more serious; and
- (c) the sentencing judge erred in imposing a sentence that is manifestly inadequate.

Appellate review of factual findings in a sentencing appeal

- [2] The first ground of appeal involves a challenge to a factual finding made by the sentencing judge. This appeal was referred to an appeal bench constituted by five judges on the basis that there is a divergence in the authorities concerning the standard to be applied where factual findings are challenged in a sentencing appeal. In *Duong v The Queen*, this Court constituted by three judges held that where an appellant seeks to challenge a finding of fact made by the primary sentencing judge, the appellate court need not be satisfied that the factual finding was legally erroneous in the sense of being unreasonable or not open on the evidence. Rather, it is the role of the appellate court to conduct ‘a real review of the plea on sentence and the sentencing remarks to see whether the sentencing Judge erred in fact’, not confined to ‘errors of fact which also constitute errors of law’.¹ Conversely, there are a number of intermediate appellate court decisions from other jurisdictions which adopt the approach that the appellant must establish that the sentencing judge has fallen into legal error, or that the impugned finding of fact was not ‘reasonably open’, in order to disturb a finding of fact on appeal. That presents a more stringent test for the appellant to satisfy.
- [3] The relevant statutory appeal provisions in the various Australian jurisdictions adopt a largely common form wording, but they are not identical. The second point of potential distinction is that the appellate court

¹ *Duong v The Queen* (2021) 288 A Crim R 566 at [24].

decisions from other jurisdictions which deal with this issue are concerned with appeals against sentence by a person found guilty on indictment. The decision in *Duong v The Queen* was also concerned with an appeal against sentence by a person found guilty on indictment. Section 410 of the *Criminal Code 1983* (NT) provides an avenue of appeal by an offender against sentence subject to the leave of the Court. For such an appeal, s 411(4) of the *Criminal Code* confers dispositive powers on the Court in the following terms:

On an appeal against a sentence, the Court must:

- (a) if it is of the opinion that another sentence, whether more or less severe, is warranted and should have been passed – quash the sentence and either:
 - (i) impose another sentence; or
 - (ii) remit the matter to the court of trial; or
- (b) in any other case – dismiss the appeal.

- [4] This proceeding involves an appeal by the Crown against a sentence imposed with respect to an indictable offence. Section 414(1)(c) of the *Criminal Code* creates an avenue of appeal by the Crown against sentence as of right. For an appeal of that type, s 414(1) of the *Criminal Code* confers dispositive powers on the Court in different terms:

... the Court may, in its discretion, direct that the proceedings continue or vary the sentence and impose such sentence or make such a declaration or recommittal order, or make an order quashing the order of the court of trial quashing the indictment, and may make any consequent orders including an order for the arrest of the respondent to the appeal as the Court thinks proper.

[Emphasis by underlining added]

- [5] The reference point ordinarily adopted for the analysis of the standard to be applied where factual findings are challenged in a sentencing appeal is the seminal decision of the High Court in *House v The King*. The plurality in that case stated that although the appeal against sentence was ‘a full one on law and fact’, the imposition of sentence is a discretionary determination which may only be disturbed if ‘some error has been made in exercising the discretion’, in which case the decision should be set aside and ‘the appellate court may exercise its own discretion in substitution’. Leaving aside cases in which the result ‘is unreasonable or plainly unjust’, the types of error which would warrant that result are famously described in the following terms:

If the judge acts upon wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts [or] if he does not take into account some material consideration ...²

- [6] The divergence in the authorities turns essentially on what types of error are comprehended by the formulation ‘mistakes the facts’. That formulation is ambiguous in that it might be a reference to the types of error in the fact-finding process which constitute error of law³ or it might extend to a conclusion by the appellate court that the relevant finding of fact was simply against the evidence. There is no High Court authority determinative of that question, but there are several High Court decisions which trace the history

² *House v The King* (1936) 55 CLR 499 at 504-505.

³ See, for example, *R v District Court of the Metropolitan District Holden at Sydney; Ex parte White* (1966) 116 CLR 644 at 654; *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156; *Haines v Leves* (1987) 8 NSWLR 442 at 469-470.

of the principle expressed in *House v The King* and the history of provisions conferring a right of appeal against sentence on the Crown.

- [7] As in this appeal, the decision of the High Court in *Lacey v Attorney-General (Qld)*⁴ involved a Crown right of appeal against sentence. Section 669A(1) of the *Criminal Code* (Qld) relevantly provided:

The Attorney-General may appeal against any sentence pronounced... and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.

[Emphasis by underlining added]

- [8] The joint majority reasons drew a distinction between appeals in the strict sense, appeals *de novo* and appeals by way of rehearing, and said an appeal by way of rehearing ‘would require demonstration of some error on the part of the primary judge before the powers to set aside the primary judge’s decision were enlivened’.⁵ Although the legislation under consideration in that case conferred supplemental power on the appellate court to receive evidence which was not before the court at first instance, that conferral was subject to the express limitation that ‘[i]n no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at trial’.⁶ The relevant part of the Northern Territory *Criminal Code* is modelled on the *Criminal Code* (Qld) and contains a provision in precisely the same terms.⁷ The joint majority reasons then stated:

⁴ *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573.

⁵ *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573 at [58].

⁶ *Criminal Code* (Qld), s 671B.

⁷ *Criminal Code 1983* (NT), s 419(2).

The appellate jurisdiction conferred by s 669A(1) must be confined at least when the Attorney-General is asserting that the sentence should be increased, to the evidence before the primary judge, including evidence given at trial, what the jury necessarily found and evidence, if any, given at the sentencing hearing. Having regard to the categories of appellate jurisdiction and the confinement of the Court of Appeal to evidence before the primary judge, it is open to construe s 669A(1) as creating an appeal by way of rehearing and conferring appellate jurisdiction to determine only whether there has been some error on the part of the primary judge. Such error having been detected, the Court has a wide power indicated by the words “unfettered discretion” to vary that sentence.⁸

- [9] That statement establishes conclusively that the appeal in the present case is an appeal by way of rehearing and that the sentence may only be varied where there has been error on the part of the sentencing judge.⁹ While that statement does not stipulate the type of error necessary to allow appellate intervention, the preceding discussion in the joint reasons does shed some light on the issue. The question in issue in *Lacey* was whether the conferral by s 669A(1) of the *Criminal Code* (Qld) of an ‘unfettered discretion’ on the appellate court to vary the sentence and impose another allowed the appellate court to come to its own view as to the proper sentence in the absence of any demonstrated or inferred error by the sentencing court. That was clearly the subjective intention of the executive government in sponsoring the legislative amendment.

- [10] The High Court traced the right of appeal against sentence conferred upon a convicted person to s 3 of the *Criminal Appeal Act 1907* (UK), which was

⁸ *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573 at [60].

⁹ The decision in *Lacey* also establishes conclusively that no distinction is properly drawn between Crown and offender appeals against sentence in that respect. That is so notwithstanding the different formulations employed in ss 411(4) and 414 of the *Criminal Code* and regardless of the use of the word ‘discretion’ in that latter provision.

replicated by all the Australian states at various times between 1911 and 1924. Following that original enactment, the decisions of the English courts established that for an appeal against sentence to succeed the sentencing judge must have acted on a wrong principle or given undue weight to some of the facts proved in evidence. It was not enough that the appellate court might have imposed a different sentence.¹⁰ That approach was subsequently adopted by the High Court in *Skinner v The King*, in which Barton ACJ, with whom the other Justices agreed, said:

If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not.¹¹

- [11] The reference in *House v The King* to the circumstance in which the original sentencing judge ‘mistakes the facts’ would appear to be a shorthand adoption of that formulation concerning salient features of the evidence from *Skinner’s Case*. That would in turn appear to be something less restrictive than the type of error in the fact-finding process which would constitute error of law. That a finding is against the evidence or the weight of the evidence or contrary to the overwhelming weight of evidence does not constitute an error of law in the fact-finding process.¹² If there is evidence which, if accepted, would support the finding of fact, there is no error of

¹⁰ *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573 at [11].

¹¹ *Skinner v The King* (1913) 16 CLR 336 at 340.

¹² *Haines v Leves* (1987) 8 NSWLR 442 at 469-470.

law.¹³ It is only where there is no evidence to support a finding of fact which bears on the ultimate determination that there will be an error of law.

[12] The formulation in *Skinner's Case* contemplates that an appellate court may intervene in circumstances where, for example, the original sentencing judge has given more or less weight to a piece of evidence than the appellate court considers warranted, or by some misunderstanding has come to a finding on the evidence different to that which the appellate court itself would have found. On one reading at least, that would seem to invite the approach described in *Duong* as 'a real review of the plea on sentence and the sentencing remarks to see whether the sentencing Judge erred in fact', not confined to 'errors of fact which also constitute errors of law'. Although the passage in *Skinner's Case* is directed to some 'clear' error in the assessment of the evidence, that qualifying adjective does not relieve an appellate court of determining whether the tribunal at first instance has 'overlooked, or undervalued, or overestimated, or misunderstood' the evidence. It is also insufficiently precise to fix a legal standard below which erroneous assessments of the evidence become unreviewable.

[13] The majority in *Lacey* then turned its attention to Crown appeals against sentence on the ground of inadequacy, and traced that form of appeal to the enactment, in 1924, of s 5D of the *Criminal Appeal Act* 1912 (NSW). That section provided, and continues to provide, that 'the Court of Criminal

13 *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465 at 466.

Appeal may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper'. That formulation found its way into the *Criminal Code* (Qld) in 1939 and was subsequently adopted in the Northern Territory *Criminal Code*. Although the provision now appearing in s 414 of the *Criminal Code* is not limited in its operation to appeals on the ground of inadequacy, to the extent that it governs Crown appeals brought on that ground it is to no different effect to its New South Wales analogue.

[14] The first consideration of the New South Wales provision by the High Court was undertaken in *Whittaker v The King*.¹⁴ Chief Justice Knox and Powers J expressed the view that under the terms of the provision 'unlimited judicial discretion is thereby conferred on the Court of Criminal Appeal'. In other words, it was unnecessary to warrant intervention for the appellate court to be satisfied that the trial judge had proceeded on some wrong principle or misunderstanding as laid down in *Skinner's Case*.¹⁵ Justices Gavan Duffy and Stark also appeared to take the view that there was nothing in the words of the section to limit the exercise of discretion, and the Court of Criminal Appeal was entitled to fix sentence 'in accordance with its own considered view of the facts'.¹⁶

[15] Justice Isaacs took a different view, based on the long-standing English practice, which had subsequently been adopted by the courts in New South

14 *Whittaker v The King* (1928) 41 CLR 230.

15 *Whittaker v The King* (1928) 41 CLR 230 at 235.

16 *Whittaker v The King* (1928) 41 CLR 230 at 253.

Wales, that an appellate court will not interfere with a discretion exercised by a judge of first instance unless it has been exercised ‘in a fashion that is not in accordance with settled principle’. That practice was based on what Isaacs J described as the ‘essential requirements of public justice’ that a person not be deprived of a vested interest in a judgment or sentence without proper recognised cause, and that due regard be paid to the advantages enjoyed by the court at first instance. In the particular context of a Crown appeal, the original sentence should not be displaced unless it is ‘not merely inadequate, but manifestly so, because the learned Judge in imposing it either proceeded upon wrong principles, or undervalued or overestimated some of the material features of the evidence’. That was so notwithstanding the statutory conferral of ‘discretion’ on the Court of Criminal Appeal to impose such sentence as it considered proper. Sound practice in the exercise of that appellate discretion did not permit the discretionary order of the primary court to be disregarded. Justice Isaacs concluded that no distinction was properly drawn in that respect between a Crown appeal and an appeal against sentence by a convicted person.¹⁷

- [16] Justice Higgins did not consider it either necessary or appropriate to determine the issue given the manner in which the appeal had been brought to the High Court and acted on the provisional assumption that the practice of the New South Wales Court of Criminal Appeal was correct. That practice was not to interfere with the sentence unless there and been a mistake of

¹⁷ *Whittaker v The King* (1928) 41 CLR 230 at 242-249.

principle on the part of the trial judge. It is clear from his reasons that Higgins J inclined to the view expressed by Isaacs J on the issue.¹⁸

[17] In the subsequent case of *Williams v The King (No 2)*¹⁹, which involved the question whether s 5D of the *Criminal Appeal Act* 1912 conferred a right of Crown appeal against a sentence imposed in respect of Commonwealth offences, Evatt and McTiernan JJ apparently endorsed the view which had been expressed by four Justices of the Court in *Whittaker* to the effect that the provision conferred an ‘unfettered discretion’. However, in the subsequent cases of *House v The King* and *Cranssen v The King*, and without reference to *Williams*, Dixon, Evatt and McTiernan JJ adopted Isaacs J’s analysis from *Whittaker* that courts of criminal appeal could only interfere with sentences on matters of principle; that is, where the discretion was improperly exercised by the court of first instance.²⁰ That difference in approach might possibly be explained by the fact that *House* and *Cranssen* involved avenues of appeal by the convicted person in terms which did not confer a ‘discretion’ on the appellate court.²¹

[18] The right of Crown appeal against sentence under the Queensland *Criminal Code* had originally been conferred in terms similar to s 5D of the *Criminal Appeal Act* 1912, including the vesting of a ‘discretion’ in the appellate

18 *Whittaker v The King* (1928) 41 CLR 230 at 252-253.

19 *Williams v The King (No 2)* (1934) 50 CLR 551 at 567.

20 *House v The King* (1936) 55 CLR 499 at 505; *Cranssen v The King* (1936) 55 CLR 509 at 519.

21 Although that distinction was not addressed in either *House v The King* or *Cranssen v The King*, in *Whittaker* Isaacs J concluded expressly that no distinction was properly drawn in that respect between a Crown appeal and an appeal against sentence by an offender.

court. From shortly after the original enactment of s 669A of the *Criminal Code* in 1939, the Queensland Court of Criminal Appeal drew a distinction between the ‘unfettered discretion’ described in *Whittaker* which governed Crown appeals and the limitations described in *Skinner’s Case* which applied to offender appeals.²² However, in the 1973 decision in *R v Liekefett; Ex parte Attorney-General* the Queensland Court of Criminal Appeal reviewed those previous decisions and came to the conclusion that the formulation from *House v The King* had application to both Crown and offender appeals against sentence²³, in accordance with what Isaacs J had said in *Whittaker* and the approach which was subsequently taken by the Court of Criminal Appeal of New South Wales in *R v Cuthbert*²⁴.

- [19] It was in response to the decision in *Liekefett* that the Queensland Parliament amended s 669A of the *Criminal Code* in 1975 to provide that ‘[t]he Attorney-General may appeal against any sentence pronounced ... and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper’. It is clear from the Second Reading Speech that the subjective intention of the legislature was to restore the position which prevailed prior to the decision in *Liekefett*, and following the amendment the Court of Criminal Appeal proceeded for some time on the understanding that the legislative intention was to impose a standard less

22 That approach commenced with the decision in *R v Beevers* [1942] St R Qd 230 at 232, 233, 236.

23 *R v Liekefett; Ex parte Attorney-General* [1973] Qd R 355 at 366.

24 *R v Cuthbert* (1967) 86 WN (Pt 1) NSW 272.

stringent than whether the sentence was affected by specific error or manifestly inadequate.²⁵

[20] In the meantime, in 1977 the High Court revisited the operation of the New South Wales provision in *Griffiths v The Queen*.²⁶ In that decision, Barwick CJ and Jacobs J rejected the proposition, said to be drawn from *Whittaker*, that s 5D of the *Criminal Appeal Act* 1912 conferred an unfettered or unlimited jurisdiction on the Court of Criminal Appeal. Chief Justice Barwick expressed the view that the proposition did not form part of the *ratio decidendi* in *Whittaker*, and that the majority in that case had considered that the Court of Criminal Appeal could intervene only where the trial judge had exceeded or misused the sentencing discretion. Chief Justice Barwick concluded:

[Section 5D of the *Criminal Appeal Act* 1912] does no more, in my opinion, than give to the Court of Criminal Appeal authority to hear and determine an appeal by the Attorney-General against the sentence erroneously imposed by a trial judge. Its reference to discretion, in my opinion, does no more than ensure that where a proper occasion arises for the allowance of an appeal, the court itself may substitute the sentence which it considers appropriate for that imposed by the trial judge.²⁷

[21] Justice Jacobs adopted a similar view but saw the ‘discretion’ conferred in Crown appeals as one not to interfere even if another sentence should have been passed, unlike the position obtaining in offender appeals. His Honour stated:

²⁵ See, for example, *Adams* (1979) 2 A Crim R 207 at 208-209; *R v Osmond*; *Ex parte Attorney-General* [1987] 1 Qd R 429.

²⁶ *Griffiths v The Queen* (1977) 137 CLR 293.

²⁷ *Griffiths v The Queen* (1977) 137 CLR 293 at 309.

Under s. 5D the Court has a wide discretion whether or not to interfere even though it may reach the conclusion that another sentence should have been passed. In this respect s. 5D gives a wider discretion than s. 6(3) where the Court is bound to interfere once it reaches the conclusion that the sentence was not both warranted in law and one that should have been passed. The trial judge is given a wide discretion from the circumstance that a Court on appeal will not lightly conclude that another sentence should have been passed. The incorrectness of the sentence must be manifest. See *House v. The King* (1936) 55 CLR 499, at p 505. But if it does so conclude it must interfere in the case of a defendant's appeal; it may in its discretion interfere in the case of an appeal under s. 5D. Any different interpretation of *Whittaker v. The King* (1928) 41 CLR 230 is in my opinion wrong.²⁸

- [22] Chief Justice Barwick also expressed the more general proposition that a Crown appeal against sentence should be a rarity, brought only to address error in point of principle and to allow the courts of criminal appeal to lay down principles for the governance and guidance of the sentencing courts lower in the hierarchy.²⁹ That statement was endorsed in the reasons of the plurality in *Everett v The Queen*³⁰, as was the proposition that a provision for a Crown appeal against sentence was to be interpreted on the basis that it represented a departure from traditional standards of what is proper in the administration of criminal justice³¹.

- [23] Following the decision in *Everett*, the Queensland Court of Criminal Appeal revisited the operation of s 669A of the Queensland *Criminal Code* in *R v*

²⁸ *Griffiths v The Queen* (1977) 137 CLR 293 at 327.

²⁹ *Griffiths v The Queen* (1977) 137 CLR 293 at 310. See the similar statements by Jacobs J (at 327) and Murphy J (at 329-330).

³⁰ *Everett v The Queen* (1994) 181 CLR 295 at 300, dealing with the provision for Crown appeals against sentence with leave conferred by s 401(2) of the *Criminal Code* (Tas).

³¹ *Everett v The Queen* (1994) 181 CLR 295 at 305; citing *Malvaso v The Queen* (1989) 168 CLR 227 at 234 in relation to the operation of s 352(2) of the *Criminal Law Consolidation Act 1935* (SA).

Melano; Ex parte Attorney-General. The Court held, with reference to *House v The King*, that the operation of the provision was generally consistent with established principles relating to appeals against discretion. The type of error necessary to warrant appellate intervention was described as where ‘the sentencing judge has erred in principle, either because an error is discernible or demonstrated by a manifest inadequacy’.³²

[24] Similarly, the subsequent decision of the High Court in *Dinsdale v The Queen* determined that the principles expressed in *House v The King* had application to both Crown appeals based upon alleged inadequacy and appeals by offenders based upon alleged excess.³³ The type of error in the fact-finding process necessary to satisfy that standard was not explored beyond the adoption of the *House* formulation ‘mistake as to the facts’. However, the grounds of appeal in that matter complained that the intermediate court had allowed the Crown appeal without identifying any ‘express or implied error of law or fact’. The reasons of the High Court do not take issue with that statement of grounds and speak only in terms of the need to identify error of such a type as caused the discretion of the sentencing judge to miscarry. There is no further exploration of what type of material error in the assessment of evidence will be sufficient to constitute miscarriage.

32 *R v Melano; Ex parte Attorney-General* [1995] 2 Qd R 186 at 189.

33 *Dinsdale v The Queen* (2000) 202 CLR 321, dealing with the operation of s 688 of the *Criminal Code* (WA).

[25] It was against that background that the High Court in *Lacey* came to consider the provision in the Queensland *Criminal Code* creating an avenue of Crown appeal from sentence in terms which, as recently amended, conferred an ‘unfettered discretion’ on the Court of Criminal Appeal to vary the sentence and impose its own. The appeal to the High Court was from a decision of a five-member bench of the Queensland Court of Appeal which had been convened to reconsider the decision in *R v Melano; Ex parte Attorney-General*.³⁴ The Court of Appeal determined that having regard to the legislative history and text there was no room for the appellate court to decline to exercise the discretion conferred on it simply because it did not manifest error in the sense contemplated by *House v The King*.³⁵ The Court of Appeal held that the role of the appellate court was to exercise its discretion having regard to the sentence imposed below, but to come to its own view as to the proper sentence to be imposed.³⁶

[26] The High Court reversed that conclusion and found that the statutory purpose was to be discerned on the basis that the provision conferred jurisdiction on the appellate court to hear and determine an ‘appeal’, with all the recognised incidents of that form of proceeding. It was in that context that the High Court drew a distinction between appeals in the strict sense, appeals *de novo* and appeals by way of rehearing, and said an appeal by way

34 There had, in the interim period, been some *dicta* calling the correctness of *Melano* into question: see *York v The Queen* (2005) 225 CLR 466 at 474-475, 484.

35 *R v Lacey; ex parte Attorney-General (Qld)* (2009) 197 A Crim R 399 at 411-412.

36 *R v Lacey; ex parte Attorney-General (Qld)* (2009) 197 A Crim R 399 at 416.

of rehearing ‘would require demonstration of some error on the part of the primary judge before the powers to set aside the primary judge’s decision were enlivened’. It was only at that point that the discretion became ‘unfettered’ in nature.

[27] That result was said to follow because the interpretation of the provision had to be conducted in full recognition of the principle that Crown appeals against sentence should only be brought in exceptional circumstances, which derived in turn from the common law’s antagonism to double jeopardy. Clear and unambiguous words were required to displace that common-law protection. By a specific application of the principle of legality, in the absence of a clear and unambiguous displacement of the principle of double jeopardy the tenets of statutory interpretation would not prefer a construction allowing for an increase in sentence without the need to show error by the primary judge. Such a construction would also deprive the sentencing judge’s order of substantive finality. As already noted, however, the reasons in *Lacey* do not stipulate the type of error necessary to authorise appellate intervention.

[28] The subsequent decision of the High Court in *Kentwell v The Queen*³⁷ considered the New South Wales provision conferring a right of appeal against sentence on offenders. It cites *Skinner’s Case* as authority which settled at an early stage that the appellate court’s authority to intervene was

37 *Kentwell v The Queen* (2014) 252 CLR 601.

dependent on the demonstration of error. However, the reasons also do not explore what is comprehended by the phrase ‘mistakes the facts’. That was the state of the High Court authority at the time the New South Wales Court of Criminal Appeal came to consider the operation of s 6(3) of the *Criminal Appeal Act* 1912 in *Clarke v The Queen*.³⁸ The sentencing error asserted in that case was that the primary judge had mistaken the facts as to the number of cannabis plants being cultivated by the applicant, and it was in that context that Basten JA considered the type of error in the fact-finding process which would allow appellate intervention.

- [29] That consideration commenced with the observation that the New South Wales Court of Criminal Appeal continued to identify the scope of an offender’s appeal against sentence by reference to the statement from *R v O’Donoghue* that an appeal to the Court of Criminal Appeal was not by way of rehearing with the consequence that:

Error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or if the judge has misdirected himself. ... It is only where the very narrow basis upon which this Court can intervene in relation to a trial judge’s findings of fact has been established that the conviction can be set aside, and then only if the error has led to a miscarriage of justice ...³⁹

- [30] As Basten JA observed, that statement is directed to appeals against conviction rather than appeals against sentence and it is contrary to the High

38 *Clarke v The Queen* (2015) 254 A Crim R 150.

39 *R v O’Donoghue* (1988) 34 A Crim R 397 at 401. That formulation has been applied and restated by the New South Wales Court of Criminal Appeal in *AB v R* [2014] NSWCCA 339, *R v Khouzame* [2000] NSWCCA 505; *R v Aoun* [2011] NSWCCA 284; *Director of Public Prosecutions (NSW) v JG* (2010) 220 A Crim R 19; *Peters v R* [2013] NSWCCA 324 and the other decisions identified in those cases.

Court's finding in *Lacey* that an appeal against sentence is by way of rehearing. Most importantly for these purposes, it effectively requires the appellate court to be satisfied that some error of law has been made in the fact-finding exercise, in the sense of there being no evidence to support a material finding, before it may intervene. Justice of Appeal Basten identified a number of difficulties with that approach.⁴⁰

[31] *First*, as the plurality reasons in *Lacey* stated, intervention in an appeal by way of rehearing depends upon the demonstration of 'some legal, factual or discretionary error' on the part of the primary judge.⁴¹ That would seem to fall short of a requirement that error of law must be demonstrated to find factual error.

[32] *Second*, the formulation from *O'Donoghue* was repeated eight years later in *R v Ion*, in which it was said that the only basis on which an appeal would be allowed from a trial by judge alone would be 'if error had been demonstrated in the sense that there was no evidence to support a particular finding, or that the evidence is all one way, or that the judge misdirected himself or herself, leading to a miscarriage of justice'.⁴² That statement was also directed to an appeal against conviction, notwithstanding its adoption and application to appeals against sentence. In any event, that formulation

⁴⁰ *Clarke v The Queen* (2015) 254 A Crim R 150 at [25]-[36] per Basten JA.

⁴¹ *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [57]; citing *Allesch v Maunz* (2000) 203 CLR 172 at [23].

⁴² *R v Ion* (1996) 89 A Crim R 81 at 85-86.

was challenged as erroneous in *Fleming v The Queen*⁴³ and, although not expressly overruled, the result in that case suggested that the formulation is not necessarily consonant with the scope and purpose of the legislation.⁴⁴ In addition, the statement in *O'Donoghue* cites *Kryiakou* as authority for the proposition that the appellate court will only intervene if there is no evidence to support a finding, or if a judge has applied wrong principles, or if the evidence is all one way.⁴⁵ The question in *Kryiakou* was whether the trial judge had made an error in the finding of fact that the accused's confession was voluntary. An application for special leave to appeal from the decision in *Kryiakou* was rejected, but in so doing a Full Court of the High Court said that 'the judgment of the Court of Criminal Appeal does not accurately express the role of an appellate court when a challenge is made to such a finding of fact by a trial judge'. That special leave determination further suggested that it was incumbent on the Court of Criminal Appeal 'to examine for itself the critical issue of fact'.⁴⁶

[33] *Third*, the proposition that factual error can only be found where there is, in effect, an error of law does not accord with the approach identified in *House v The King*. As has been seen, that formulation states that appellable error

⁴³ *Fleming v The Queen* (1998) 197 CLR 250 at [13]-[15], [18]-[21].

⁴⁴ Although the subsequent decision of the High Court in *Filippou v The Queen* (2015) 256 CLR 47 concluded that a trial judge's finding of guilt is not to be disturbed unless there is no or insufficient evidence to support the finding, or the finding is otherwise unreasonable, or the evidence was all the one way, or the judge has so misdirected himself or herself on a matter of law as to result in a miscarriage of justice, that decision did not concern the proper approach to an appeal against sentence.

⁴⁵ *Kryiakou* (1987) 29 A Crim R 50 at 57.

⁴⁶ *Kyriakou v The Queen* [1988] 9 Leg Rep SL 4.

will include the sentencing judge having ‘mistaken the facts’. Similarly, the formulation in the more recent High Court decision of *Kentwell* accepted that discretionary power would miscarry where the sentencing judge ‘mistakes the facts or does not take into account some material consideration’. That formulation does not suggest that material considerations were limited to mandatory considerations the failure to take account of which would constitute error of law. Those formulations are ultimately derived from *Skinner’s Case*, which is the fountainhead of this principle in Australian authority. The formulation in *Skinner’s Case* was that appellate intervention would be warranted where ‘the Judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence’, which would also seem to fall short of a requirement for error of law in the fact-finding process. That formulation in *Skinner’s Case* is no different in substance to the statement by Isaacs J in *Whittaker* that the exercise of the sentencing discretion would be amenable to appeal if ‘it either proceeded upon wrong principles, or undervalued or overestimated some of the material features of the evidence’. Again, to say that an appellate court’s authority to intervene is dependent upon demonstration of error does not identify or stipulate the type of error.

- [34] In the final analysis, Basten JA concluded that ‘[i]f the court is satisfied that the sentencing judge made a mistake with respect to a particular factual finding, which was material to the exercise of the discretionary power, the

court should identify error and then enter upon its own consideration of the appropriate sentence'.⁴⁷ This approach was subsequently adopted by the New South Wales Court of Criminal Appeal in *Hordern v The Queen*.⁴⁸ That appeal relevantly involved an asserted error in the factual finding by the sentencing judge that there was a degree of planning involved in the offence.

- [35] In his reasons for decision in that matter, Basten JA adopted what he had said in *Clarke*, supplemented by several further matters said to support the conclusion reached in the earlier case. In particular, Basten JA reasoned that it would be inappropriate to read a provision conferring appellate jurisdiction and granting power for that purpose by making implications or imposing limitations which are not found in the express words.⁴⁹ His Honour ultimately concluded:

For the reasons set out in *Clarke*, and elaborated upon above, I am comfortably satisfied that the constrained approach is clearly wrong and should not be followed. In circumstances where the liberty of the individual is at stake, there is no reason to deliberately perpetuate error, once identified. The administration of criminal justice does not require this Court to conclude that an offender must serve a longer sentence than would have been imposed, absent a factual error by the sentencing judge.⁵⁰

- [36] That approach was expressly refuted by a differently constituted Court of Criminal Appeal in *Ocek v The King* in the following terms:

⁴⁷ *Clarke v The Queen* (2015) 254 A Crim R 150 at [34]; (Hamill J agreeing at [130]-[136]).

⁴⁸ *Hordern v The Queen* [2019] NSWCCA 138.

⁴⁹ *Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421.

⁵⁰ *Hordern v The Queen* [2019] NSWCCA 138 at [20]; (Hamill J agreeing).

The test to be applied to a challenge to factual findings made by a sentencing judge is whether the findings were open on the evidence before the sentencing judge: *R v O'Donoghue* (1988) 34 A Crim R 397; *AB v R* [2014] NSWCCA 339. Although that approach was questioned in both *Clarke v R* [2015] NSWCCA 232; (2015) 254 A Crim R 150 and *Hordern v R* [2019] NSWCCA 138; (2019) 278 A Crim R 353, it remains the approach taken in this Court: *Azzopardi v R* [2019] NSWCCA 306 at [36] to [39] (per R A Hulme J, Bathurst CJ and Fullerton J agreeing) and cases cited. It follows that, where there is a challenge to a finding by a sentencing judge, the relevant question is whether the finding was reasonably open.⁵¹

[37] Despite the suggestion in *Ocek* that the correct approach was settled, there remained two conflicting lines of authority on this issue in New South Wales which had yet to be resolved⁵², and the subsequent decision in *Azzopardi*⁵³ did not purport to resolve that conflict. The dispute lay in ‘the boundary between errors and differences of opinion’.⁵⁴ In an earlier discussion of that question, the New South Wales Court of Criminal Appeal had accepted that the extract from *O'Donoghue* was not a comprehensive statement of the circumstances in which error in the fact-finding process may be shown.⁵⁵ That was done with reference to the very early authorities, and particularly the formulation in *Skinner's Case* which included the undervaluation, overestimation or misunderstanding of some salient feature of the evidence.

⁵¹ *Ocek v The King* [2023] NSWCCA 308 at [116] per N Adams J (Ward P and Stern JA agreeing).

⁵² See *Macdonald v The King* [2023] NSWCCA 253 at [109]. See also *Yin v The Queen* [2019] NSWCCA 217 at [26]-[28]; *TH v R* [2019] NSWCCA 184 at [22]-[24]; *Gibson v R* [2019] NSWCCA 221 at [2]-[6].

⁵³ *Azzopardi v R* [2019] NSWCCA 306 at [36]-[39].

⁵⁴ *R v Aoun* [2011] NSWCCA 284 at [4].

⁵⁵ *AB v R* [2014] NSWCCA 339 at [47]-[59].

[38] On 12 December 2025, following the hearing of this appeal, the New South Wales Court of Criminal Appeal constituted by five judges delivered its reasons in *Hancock v R*.⁵⁶ The relevant ground of appeal was that the sentencing judge had erred in finding that the charged conduct took place against ‘a background of similar offending around a period of about 12 months’. In joint reasons, the Court held that the *O’Donoghue* test should no longer be followed when assessing challenges to factual findings. That is because a requirement that operative error will only be demonstrated ‘if there is no evidence to support a particular finding, or if the evidence is all one way, or if the judge has misdirected himself’ is to describe an error of law.⁵⁷ That would impose a different and more stringent test for appellate review of factual error than asking whether a sentencing judge ‘mistakes the facts’ as described in *House v The King*.

[39] What now must be seen as the settled position in New South Wales may be summarised as follows. The ‘correctness standard’ does not govern appeals against sentence and error must be demonstrated before the appellate court will intervene. Although the appellate court does not conduct a rehearing for the purpose of making its own factual findings, the error which must be demonstrated is not limited to error of law and extends to the correction of factual error. The test for appellate review of a factual finding in a sentencing appeal is whether the finding was ‘reasonably open’. That test

⁵⁶ *Hancock v R* [2025] NSWCCA 213.

⁵⁷ See, for example, *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at [90]-[91].

has application both to findings of primary fact and to inferences drawn from findings of primary fact.

[40] The Court's determination was qualified by a number of well-established principles. First, an approach of appellant restraint is properly taken to demeanour-based credit findings about matters of primary fact made by a sentencing judge. Second, an appellate court should not overly scrutinise *ex tempore* reasons given in sentencing proceedings. Third, it is not to 'mistake the facts' to give little weight to an unsworn assertion made by an offender in a letter tendered to the court or an untested statement made by an offender to a third party such as a doctor, psychologist, psychiatrist or author of a pre-sentence report. Fourth, error will only be established where the impugned finding is material in the sense of having the capacity to influence the sentence or giving rise to the realistic possibility that the decision could have been different.⁵⁸

[41] In *Willis v The Queen*, the Victorian Court of Appeal adopted the position now prevailing in New South Wales, at least in relation to offender appeals against sentence, that an appellate court will not allow a challenge to a finding of fact made by a sentencing judge unless it concludes that the finding made below 'was not reasonably open'.⁵⁹ In the earlier case of

58 *Vaiusu v R* (2022) 305 A Crim R 75; *Newman (a pseudonym) v R* [2019] NSWCCA 157 at [11]; *Benn v R* [2023] NSWCCA 24; *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321; *Button v R* [2025] NSWCCA 191 at [170].

59 *Willis v The Queen* (2016) 261 A Crim R 151 at [94]. In the earlier case of *Carroll v The Queen* [2011] VSCA 150 at [18], that was said to require the appellant 'to show that no other conclusion was reasonably open'.

Carroll v The Queen, that was said to require the appellant ‘to show that no other conclusion was reasonably open’.⁶⁰

[42] The position remains unresolved in Queensland, where the Queensland Court of Appeal has most recently observed that the question remains open and proceeded on ‘the less restrictive view ... which is that a mistake of fact that was material to the sentencing may be sufficient to warrant an appeal, rather than the more restrictive view that an appeal will not result in interference with a sentencing judge’s finding of fact unless the finding was not reasonably open or it was the product of legal error’.⁶¹ That observation was made with reference to McMurdo JA’s earlier suggestion in *R v Strbak* to the effect that the scope for an appellate court’s interference with a factual finding may extend beyond circumstances where the finding was not ‘rationally or reasonably open’.⁶²

[43] Against that background, a number of conclusions may and should be drawn concerning the determination of Crown appeals against sentence in the Northern Territory under s 414(1) of the *Criminal Code*.

[44] *First*, as *House v The King* establishes, sentencing involves the exercise of a judicial discretion.⁶³ A discretionary determination of that type involves

⁶⁰ *Carroll v The Queen* [2011] VSCA 150 at [18].

⁶¹ *R v Mills* [2021] QCA 59 at [31]. Cf *R v Carrall* [2018] QCA 355 at [10], in which it was stated that an appellate court ‘will not interfere with a judge’s findings of fact unless it concludes that the finding was not reasonably open or that it was the product of legal error’.

⁶² *R v Strbak* [2019] QCA 42 at [21].

⁶³ For a more recent characterisation of the sentencing exercise as discretionary by the High Court, see *Dinsdale v The Queen* (2000) 202 CLR 321 at [3]-[6], [21]-[22], [58]-[59].

‘value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right’.⁶⁴ A Crown appeal against sentence under s 414(1) of the *Criminal Code* is confined to the *House v The King* standard because ‘it would be wrong to allow a Court of Appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance’.⁶⁵ The fixing of sentence is not a process which results in but one legally permissible answer to which the ‘correctness standard’ applies. Accordingly, the principle expressed in *Warren v Coombes* to the effect that an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from the primary facts⁶⁶ has no application to sentencing appeals.⁶⁷ That is to say, it is not open to the appellate court to draw a contrary inference on the issue which is the subject of the discretion in a manner that would substitute its own discretionary decision for that of the sentencing court. In particular, an inference by the appellate court that the primary facts warranted a greater or lesser sentence does not suggest that at the sentencing court has made a mistake of fact in the relevant sense.⁶⁸

⁶⁴ *Norbis v Norbis* (1986) 161 CLR 513 at 518; cited in *GLJ v Roman Catholic Church* (2023) 414 ALR 635 at [16].

⁶⁵ *Norbis v Norbis* (1986) 161 CLR 513 at 518.

⁶⁶ *Warren v Coombes* (1979) 142 CLR 531 at 551.

⁶⁷ *Gronow v Gronow* (1979) 144 CLR 513 at 525-526, 539-540. See also *AB v R* [2014] NSWCCA 339 at [60]; *Mobilio v Balliotis* [1998] 3 VR 833 at 837-838.

⁶⁸ That is because questions such as whether the facts as found properly give rise to a conclusion that a party was negligent, or whether a trial will constitute an abuse of process, admit of only

[45] *Second*, the decision of the High Court in *Lacey* establishes that a Crown appeal against sentence is by way of rehearing which, in accordance with the ordinary principles which govern appeals of that nature, ‘would require demonstration of some error on the part of the primary judge before the powers to set aside the primary judge’s decision were enlivened’.⁶⁹ The plurality in *Lacey* went on to explain that intervention in an appeal by way of rehearing depends upon the demonstration of ‘some legal, factual or discretionary error’ on the part of the primary judge.⁷⁰ That principle, together with the *House v The King* standard, governs a Crown appeal against sentence under s 414(1) of the *Criminal Code* notwithstanding the express displacement of any consideration of double jeopardy in an appeal of that type.⁷¹

[46] *Third*, the *House v The King* standard requires the demonstration of either specific error of a certain type or error which may be inferred on the basis that the result is so manifestly unreasonable or unjust even though no

one legally permissible answer in a way that the exercise of the sentencing discretion does not: see, for example, *GLJ v Roman Catholic Church* (2023) 414 ALR 635 at [16]-[17].

69 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [58].

70 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [57]; citing *Allesch v Maunz* (2000) 203 CLR 172 at [23].

71 *Criminal Code*, s 414(1A). Although the result in *Lacey* is based in part on the premise that the principle of double jeopardy militated in favour of a construction which allowed for an increase in sentence only on the demonstration of error by the primary judge, that was directed to an argument that the conferral of ‘unfettered discretion [to] vary the sentence’ by the Queensland amendment allowed the appellate court to conduct its own assessment afresh and without demonstration of error. On proper construction, the right of appeal against sentence conferred by s 414(1) of the *Criminal Code* is by way of rehearing (rather than *de novo* or *stricto sensu*) and so requires the establishment of error to warrant appellate intervention. The reference in s 414(1) of the *Criminal Code* to the appellate court’s ‘discretion’ to vary the sentence and impose such sentence as it thinks proper does no more, as Barwick CJ observed of a similar provision in *Griffiths*, ‘than ensure that where a proper occasion arises for the allowance of an appeal, the court itself may substitute the sentence which it considers appropriate for that imposed by the trial judge’: *Griffiths v The Queen* (1977) 137 CLR 293 at 309.

specific error can be identified. As already extracted above, the categories of specific error were identified in *House v The King* as: (a) acting on a wrong principle; (b) allowing extraneous or irrelevant matters to guide or affect the decision; (c) mistaking the facts; and (d) not taking into account some material consideration.⁷²

[47] *Fourth*, a mistake of fact necessary to satisfy the *House v The King* standard is not confined to an error in the fact-finding process which constitutes error of law. That will only be the result where the right of appeal is expressly confined to questions or errors of law. The conferral of the Crown's right to appeal against sentence under s 414(1) of the *Criminal Code* is not confined in that way, and nor is the formulation in *House v The King*. Accordingly, a Crown appeal against sentence under that provision may be brought on the basis of legal or factual error.⁷³ That reflects the approach adopted in *House v The King* itself, in which the plurality summarised the grounds for appellate intervention, in the absence of manifest unreasonableness or injustice, as 'error of fact or of law, or failure to take into account any material considerations, or from giving undue weight to any circumstance or matter'.⁷⁴ That summary in turn reflects the formulation from *Skinner's Case* that material error extends to circumstances in which the court at first

⁷² *House v The King* (1936) 55 CLR 499 at 504-505.

⁷³ That is consistent with the description in *Lacey* of what is required to warrant appellate intervention in this type of appeal. It is also consistent with the observation made by Mason and Deane JJ in *Norbis v Norbis*, which also involved an appeal against a discretionary determination, that '[a]ccording to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal': *Norbis v Norbis* (1986) 161 CLR 513 at 518-519.

⁷⁴ *House v The King* (1936) 55 CLR 499 at 507.

instance has ‘overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence’.⁷⁵

[48] *Fifth*, having regard to the weight of authority from the intermediate appellate courts in New South Wales and Victoria, the test for appellate review of a factual finding in a sentencing appeal is whether the finding was ‘reasonably open’. A finding of fact will be ‘reasonably open’ if the tribunal of fact could rationally reach that conclusion. The relevant finding will not be ‘reasonably open’ if there is no evidence to sustain it or if it is irrational, arbitrary or based on speculation. That formulation extends to a misinterpretation of the evidence by giving undue weight to one piece of evidence over another⁷⁶, a failure to consider relevant facts by ignoring crucial witness testimony or documentary evidence, and the reliance on incorrect factual assumptions by making findings not supported by the evidence. However, the standard is relatively low and an appellate court will not intervene simply because a different conclusion was also possible,⁷⁷ and a mistake in fact will only constitute error where the impugned finding is

⁷⁵ *Skinner v The King* (1913) 16 CLR 336 at 340.

⁷⁶ It is not enough that the appellate court would be inclined to apportion different weight to the various pieces of evidence involved in the decision making. It must be able to say that the proper exercise of the discretion requires such weight to be attributed.

⁷⁷ The question whether a finding is reasonably open on the evidence echoes the common form ground of criminal appeal against a conviction on the basis that it is ‘unreasonable, or cannot be supported, having regard to the evidence’. According to the ‘authoritative guidance’ provided by the majority in *M v The Queen* (1994) 181 CLR 487 at 494-5, the question this raises for the appeal court is whether it was ‘open to the jury’ to be satisfied of the accused’s guilt beyond reasonable doubt. While the appellate court should ‘mak[e] its own independent assessment of the evidence’ (*SKA v The Queen* (2011) 243 CLR 400 at 408; *Carr v The Queen* (1988) 165 CLR 314 at 331; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 534), it does not substitute its assessment of the significance and weight of the evidence for the assessment which the tribunal of fact was entitled to make: *Carr v The Queen* (1988) 165 CLR 314 at 331. Further, the boundaries of reasonableness within which the tribunal of fact’s function is to be performed ‘should not be narrowed in a hard and fast way’: *R v Baden-Clay* (2016) 258 CLR 308 at 329.

material in the sense of having the capacity to influence the sentence or giving rise to the realistic possibility that the decision could have been different.

[49] *Sixth*, the appellate court will necessarily exercise restraint in determining whether there has been error by the sentencing court in finding primary facts. Where the sentence is imposed following a guilty verdict by a jury, and it is necessary for the sentencing judge to make additional findings of fact for sentencing purposes, this may involve the evaluation of witnesses who gave conflicting accounts as to those facts and the preference of one account to another. It may also involve an analysis of the cogency of oral evidence even in the absence of direct conflict. The advantages of the trial judge may in those circumstances be decisive against appellate intervention based on mistake of fact.⁷⁸ The same may be said where there is a plea of guilty subject to a contested facts hearing. In circumstances where the plea of guilty proceeds solely on the agreed facts, no issue of mistake will arise unless the sentencing judge departs impermissibly from or somehow misapprehends those facts.

[50] The earlier decision of this Court in *Duong v The Queen* is concerned with offender appeals against sentence rather than Crown appeals, but there is no reason why the conclusions drawn above do not also have application to

⁷⁸ It would be more difficult in those circumstances for an appellate court to be satisfied that the sentencing judge had overlooked, undervalued, overestimated or misunderstood some salient feature of the evidence or otherwise misapprehended the facts. In the ordinary course it will be necessary for the appellate court to be satisfied that the sentencing court's factual finding is inconsistent with established facts, glaringly improbable or contrary to compelling evidence.

offender appeals against sentence in the Northern Territory under s 411(4) of the *Criminal Code*. The decision of the High Court in *Dinsdale* effectively compels that result.⁷⁹ There is no inconsistency between the conclusions drawn above and the Court's finding in *Duong* that it is unnecessary for an appellant to establish an error of law or something very close to it in the fact-finding process before the appellate court will intervene.⁸⁰ However, it should not be accepted that appeals against sentence are governed by the ordinary principles which have application to appeals by way of rehearing unqualified by the *House v The King* standard, or that the principle expressed in *Warren v Coombes* has application to discretionary determinations such as the imposition of sentence. To do so would be contrary to High Court authority which is binding on this Court.⁸¹ The decision in *Duong v The Queen* (2021) 288 A Crim R 566; [2021] NTCCA 3 is overruled to the extent that it suggests otherwise.

Knowledge concerning consent

[51] The first ground of appeal is that the sentencing judge erred in failing to find that the respondent knew the victim was not consenting to the sexual intercourse. In accordance with the foregoing discussion, the test for the appellate review of that finding, or that failure to make a finding, is whether it was 'reasonably open' to do so.

⁷⁹ *Dinsdale v The Queen* (2000) 202 CLR 321, dealing with the operation of s 688 of the *Criminal Code* (WA).

⁸⁰ *Duong v The Queen* (2021) 288 A Crim R 566 at [26].

⁸¹ *Dinsdale v The Queen* (2000) 202 CLR 321 at [3]-[6], [21]-[22], [58]-[59]; *Norbis v Norbis* (1986) 161 CLR 513 at 518; *Gronow v Gronow* (1979) 144 CLR 513 at 525-526, 539-540.

[52] At the time of the offending conduct, the offence was created under s 192(3) of the *Criminal Code*, which provided:

A person is guilty of an offence if the person has sexual intercourse with another person:

- (a) without the other person's consent; and
- (b) knowing about or being reckless as to the lack of consent.

[53] The criminal responsibility provisions in Part IIAA of the *Criminal Code* (NT) had application to this offence. Under those provisions:

- (a) the first physical element of the offence was conduct, which was the respondent inserting his penis into the victim's vagina;⁸²
- (b) the fault element in relation to that physical element was that the applicant intended to engage in that conduct;⁸³
- (c) the second physical element of this offence was that the sexual intercourse took place without the victim's consent;⁸⁴ and
- (d) the fault element in relation to that physical element was knowledge or recklessness.⁸⁵

[54] It was plain from the jury's verdict of guilty that it was satisfied beyond reasonable doubt of the elements of conduct, intention and the victim's lack of consent. However, the jury's verdict is inscrutable in relation to the respondent's state of mind concerning the victim's lack of consent. The

⁸² *Criminal Code*, s 1 (definition of 'sexual intercourse'), s 43AE.

⁸³ *Criminal Code*, ss 43AH, 43AI.

⁸⁴ *Criminal Code*, s 43AE.

⁸⁵ *Criminal Code*, s 43AH.

respondent had ‘knowledge’ of the victim’s lack of consent if he was aware of that lack of consent.⁸⁶ The respondent was ‘reckless’ in relation to the victim’s lack of consent if he was aware of a substantial risk that the victim was not consenting, and having regard to the circumstances known to him it was unjustifiable to take that risk.⁸⁷ Actual knowledge of the victim’s lack of consent involves a higher level of moral culpability than recklessness. For that reason, it was necessary for the sentencing judge to determine whether the respondent had knowledge of that lack of consent or was reckless as to whether the victim was consenting.

[55] The assessment of whether the respondent had knowledge of the victim’s lack of consent is not an objective assessment of what a reasonable person in the respondent’s circumstances would or should have known. A finding that the respondent had knowledge of the victim’s lack of consent requires the tribunal of fact to be satisfied beyond reasonable doubt that the respondent actually and subjectively knew that the victim was not consenting. The sentencing judge’s finding in that respect was as follows:

At trial, you admitted that sexual intercourse took place between yourself and [the victim], who was a woman you met on a dating app, and that you were with her after your second date at the time of the intercourse. You did not give evidence, but your case was that the sex was consensual and [the victim] gave you every indication during your encounter that she was consenting to the sex.

⁸⁶ *Criminal Code*, s 43AJ.

⁸⁷ *Criminal Code*, s 43AK(2). Section 192(4A) of the *Criminal Code* provided an alternative way in which recklessness might be established, being ‘not giving any thought to whether or not the other person is consenting to the sexual intercourse’. That third way in which the fault element in relation to the lack of consent might be established is not relevant for present purposes.

[The victim's] evidence was, essentially, that she had made clear to you via text communications in the lead-up to, and on the previous day, that sex before marriage or living together was non-negotiable for her. She said she accompanied you to your hotel room after your date. You kissed her and she kissed you back, and you embraced her and she embraced you back. You tried to pull up her shirt, and she pulled it back down. She then asked you to walk her back to her car, and you said, "No, let's keep going." She said that she wanted to go back to her car, and you began to intensify your actions, kissing her neck, pushing your hips towards hers and pulling up her shirt. You put her hand into your pants and told her to fiddle with you. Her hand was in your pants and around your penis, and you were thrusting your hips against her hand. At that point, she felt that she could not leave because you were holding her in a bear-hug, you were between her and the door, and she felt scared. You then pulled her shorts and underpants down, guided her to the corner of the bed with your hand on her shoulder, put your hands under her thighs, and pushed her up the bed. You undressed and then you put your penis into her vagina. At some point, you asked if she wanted you to give her oral sex, and she shook her head. You continued having sex with her. She said she wanted to go home, and you said, "No, babe. Just let me finish." She said, "No. I want to go home," and you continued having sex with her until you ejaculated. She said that she felt scared and unsafe and that she could not get up off the bed and leave during the sex, as you were physically between her and the door and she was naked from the waist down. When you got up to go to the bathroom, she got dressed, grabbed her things and left. You subsequently sent text messages, asking where she had gone and you tried to call her. She responded with text messages, saying you knew she did not want to have sex with you, so why did you force yourself on her and that she said no multiple times, but you continued. You responded with a text message, saying you were sorry, "but we were already there and I just had to finish." When you were arrested the next day, you told Police that in the middle of intercourse, she wanted to go to her car, and you just thought you had to finish before you could go, and that was what you said to her. So from your point of view, the sex was consensual. I find that the offending proceeded in accordance with [the victim's] evidence, as I have just described.

...

As to the issue of your subjective state of mind, I find on the evidence given by [the victim] that you were reckless as to whether she was consenting, because either you were aware of a substantial risk that she was not consenting and unjustifiably took that risk or you did not turn your mind to whether she was consenting or not.

Her requests before and during the intercourse that she wanted to go to her car, in addition to the text messages from the day before made

apparent the risk she was not consenting. Your text messages to her immediately after she left and your statements to police indicate that you were aware of those requests but dismissed them because the sex had commenced and you wanted to finish.

Despite the submissions made by the Crown to this effect, I am not satisfied beyond reasonable doubt that you were subjectively aware that [the victim] was not consenting to the sex. Such a finding is inconsistent with the texts you sent her immediately after the offending, which indicated you did not know why she left the hotel room and your perception, repeated to police, that as far as you were concerned, she had been consenting.

Given her ostensible participation in the sexual activity and the lack of any overt clear protestations, either verbally or physically, I consider that your state of mind did not rise as high as that of actual knowledge of a lack of consent.

- [56] The appellant's contention is that the only finding reasonably open in relation to the respondent's state of mind at the material time was that he actually and subjectively knew that the victim was not consenting. To put it the other way, the appellant's contention is that the finding of recklessness was not reasonably open having regard to the evidence. The first point to be made in this respect is that the material time for assessing the respondent's state of mind was immediately prior to and during the act of sexual intercourse. While the exchange of text messages in the days leading up to that point are no doubt important in the contextual sense and might assist in determining the respondent's state of mind at the material time, they are not determinative. It is well understood in the human experience that a person may genuinely express a position or intention on an issue at one point in time but may for a variety and complex of reasons depart from the previously expressed position or intention at a later point in time.

[57] A similar observation may be made in relation to the appellant's reliance on the victim's evidence that while they were engaged in consensual kissing on the night in question the respondent pulled her shirt up on a number of occasions and she pulled it back down, the respondent pulled her shorts down on a number of occasions and she pulled them back up, and that at one point she asked the respondent to walk her back to her car. That evidence is also not determinative of the respondent's state of mind at the material time in light of the victim's further evidence that the respondent eventually removed her pants without further vocal or physical protest by her, and that she lay on the bed while the respondent engaged in penile-vaginal intercourse with her.

[58] The evidence which provides the strongest support for the appellant's contention is that at one point during the sexual intercourse and in response to a question from the respondent about whether she wished to engage in a different form of sexual intercourse, the victim said, 'No, I wanna go home.' The respondent replied, 'No babe, just let me finish', and the victim repeated, 'No I wanna go home.' In a text exchange the following day, in response to the victim's question why he had continued when she had said no, the respondent replied, 'Am sorry but we were already there and I had to just finish.'

[59] As is apparent in the foregoing discussion concerning appellate review of factual findings in sentencing proceedings, the requirement that a finding be 'reasonably open' is a relatively low standard. At the same time, a

sentencing court must be satisfied beyond reasonable doubt of a factual matter before it may operate to an offender's detriment in sentencing. Where there are two alternatives, as here, that requires a satisfaction that there is no other reasonable hypothesis consistent with recklessness as the respondent's operative state of mind. The sentencing court would need to be satisfied that recklessness was fanciful, impossible, incredible or too tenuous. That is essentially the same enquiry as whether the finding of recklessness was not reasonably open because it was irrational, arbitrary or based on speculation.

[60] While there can be no doubt that the victim was not consenting, it cannot be said that the finding of recklessness was not reasonably open or available as a reasonable alternative hypothesis to actual knowledge of that fact on the part of the respondent. It was open for the sentencing judge to have entertained a reasonable doubt as to the respondent's subjective state of mind. The text exchanges in the lead-up to the meeting suggest that the respondent considered consensual sexual intercourse was in prospect. That prospect would almost certainly have been strengthened in the respondent's mind by the victim's preparedness to go to his hotel room, the consensual kissing in which they engaged once there and the fact that the victim did not remove her hand from his penis once he had placed it there. As already noted, the victim did not object when the respondent ultimately removed her shorts, and she then voluntarily sat down on the bed. Nor did the victim make any verbal or physical protest during the initial period of intercourse.

The respondent's question to the victim whether she wanted him to perform cunnilingus on her suggests that his state of mind was one of recklessness, at least to that point in time.

[61] The victim's response that she wanted to go home might on one analysis be seen as an overt and unambiguous withdrawal of consent. However, when the respondent said that he wanted to 'finish', the victim lay on the bed without further physical or verbal protestation while the intercourse continued and he did so. That conduct might be considered consistent with the respondent's state of mind being one of recklessness as to the issue of consent. It is reasonably possible that the respondent considered the victim's responses to be equivocal rather than a frank withdrawal of consent. Neither the victim's conduct nor the respondent's persistent importunity necessarily prove an understanding on the part of the respondent that the victim was not consenting or that consent had been withdrawn.

[62] The exchange of text messages later that night and the following day are equivocal and also did not preclude a finding of recklessness. In the immediate aftermath of the incident the respondent expressed confusion as to why the victim had left the hotel. Although at one point in those exchanges the respondent might be seen to acknowledge that the victim had said no but that he 'just had to finish', another part of those exchanges suggests that the respondent thought the victim's complaint was her lack of enjoyment of the episode rather than any lack of consent. Finally, the

respondent's spontaneous response when questioned about the matter by police was that he did nothing against the victim's will.

- [63] In the application of the proper approach to challenges to factual findings made by a sentencing judge, there was no specific error in the finding that the respondent's state of mind was one of recklessness. Accordingly, this ground of appeal should be dismissed.

Assessment of objective seriousness

- [64] The second ground of appeal is that the sentencing judge erred in assessing the objective seriousness of the offence by taking into account the absence of features which would have made the offending more serious. The appellant submits that error is apparent from the following passage in the sentencing remarks:

I note that you did not use any excessive physical force or threats against the victim. She did not suffer any physical injury from your actions, nor pregnancy, nor STD. Further, the intercourse was not prolonged and the victim was not terrorised. There was no use of a weapon or threats of violence, as I have said. I consider this offending to be at the lower end of seriousness for this kind of offending.

- [65] It is uncontroversial that the absence of an aggravating factor which would elevate the seriousness of the offending is not a matter which operates in mitigation.⁸⁸ As Grove J observed in *Saddler v R*:

It is a well-established common law sentencing principle that the absence of a factor which would elevate the seriousness of offending in a particular case is not a matter of mitigation. In plain language, it does

⁸⁸ See, in the recent Northern Territory cases, *R v Benning* [2022] NTCCA 15; *R v Kahu-Leedie* [2022] NTCCA 4; *R v EG* [2022] NTCCA 10.

not make what has been done by an offender less serious because it could have been worse.⁸⁹

[66] The principal reasons for that approach are that the absence of certain aggravating factors cannot be allowed to obscure or divert the court from an assessment of those features of the offending which are relevant to objective seriousness, and because it does not follow from the fact that a matter of aggravation is not established beyond reasonable doubt (as it must be) that a matter of mitigation is thereby established⁹⁰. However, this is not to say that a sentencing court must necessarily approach the possible incidents of a particular category of offence as either aggravating or mitigating and disregard the absence of factors which are classified as aggravating circumstances when considering the objective seriousness of the particular offending under consideration. In *Weininger v The Queen* the plurality said:

The matters that must be taken into account in sentencing an offender include many matters of and concerning human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.⁹¹

[67] The approach taken by the sentencing judge in this case was one commonly adopted in this jurisdiction, by which the objective seriousness of the offending is assessed by reference to matters including the nature of the offender's behaviours during the commission of the offence and the

⁸⁹ *Saddler v R* (2009) 194 A Crim R 452 at [3].

⁹⁰ *Filippou v The Queen* (2015) 256 CLR 47 at [66]-[69]; *Mills v R* [2017] NSWCCA 87 at [57].

⁹¹ *Weininger v The Queen* (2003) 212 CLR 629 at [22].

consequences of those behaviours.⁹² On proper characterisation, that is not necessarily to say that the offending is less serious because it could have been worse. As the New South Wales Court of Criminal Appeal observed in *Simpson v R*:

In some cases, the only way an adequate explanation can be provided for where an offence lies in the range of objective criminality, is to note not only what factors are present but also what factors are absent. That is not to conclude that the absence of some factors will mitigate the offending, but only to help to place the offending correctly on the spectrum.⁹³

[68] That approach only becomes problematic in circumstances where: (a) a sentencing judge expressly or implicitly treats the absence of aggravating features as mitigating; and/or (b) a sentencing judge fails to assess objective seriousness having regard to the features of the offending which were present, and/or (c) a sentencing court adopts a mechanistic approach by which the objective seriousness of the offending is incrementally lowered with the absence of each potentially aggravating factor⁹⁴; and/or (d) where the nature of the offence is such that its objective seriousness is necessarily unaffected by the absence of a particular aggravating factor⁹⁵. To take one obvious example of the latter type of circumstance:

... [a]n aspect of the seriousness of sexual offences committed against young children is that their youth and inexperience deprives them of the capacity to resist or protect themselves. The fact that an adult entrusted

⁹² See, for example, *R v Nabegeyo* (2014) 34 NTLR 154 at [14]-[15]; *Forrest v The Queen* [2017] NTCCA 5 at [68].

⁹³ *Simpson v R* [2019] NSWCCA 137 at [27] (per Davies J, Leeming JA and Button J agreeing).

⁹⁴ *R v Woods* [2009] NSWCCA 55 at [52].

⁹⁵ *R v Louizos* [2009] NSWCCA 71 at [90]-[95].

with the care of a child is able to prey upon the child's trust and vulnerability to commit sexual offences without resort to the use of force is hardly a mitigating factor. It speaks of a pernicious abuse of trust.⁹⁶

[69] In a similar vein, the approach taken by the sentencing judge in this case was quite different to the circumstances considered by this Court in *R v EG*.⁹⁷ In that case, the sentencing judge fell into error by treating the absence of proven physical or psychological harm, and the fact that the victims were unaware of the offending, as factors that militated in favour of a reduced penalty for the convicted offender. In addition, the overall tone of the sentencing remarks demonstrated that the sentencing judge had heavily discounted the prospect of future harm as a factor in favour of the offender. It was in those circumstances that this Court found:

... the sentencing Judge impermissibly used the absence of evidence of future psychological harm because of the young age of the primary victim and her lack of awareness of the offending at the time as a mitigating factor to benefit the offender. It is immaterial that his Honour did not explicitly state that these were mitigating factors; they were used to the benefit of the offender on sentencing.⁹⁸

[70] The error found by this Court in *R v Benning*⁹⁹ was more explicit in nature, in that the sentencing judge stated expressly: 'In mitigation, you were holding the scissors, but did not use them as a weapon or inflict harm on the victim'. In the matter of *R v Kahu-Leedie*¹⁰⁰ there was no complaint about

⁹⁶ *R v BA* [2014] NSWCCA 148 at [33].

⁹⁷ *R v EG* [2022] NTCCA 10.

⁹⁸ *R v EG* [2022] NTCCA 10 at [95].

⁹⁹ *R v Benning* [2022] NTCCA 15.

¹⁰⁰ *R v Kahu-Leedie* [2022] NTCCA 4.

the process by which the sentencing judge had conducted the assessment of objective seriousness. That was so despite the sentencing judge referring to the fact that the attack was not prolonged, and that the offender did not use a weapon or ‘any additional gratuitous violence beyond that involved in the sexual intercourse’. The sole ground of appeal was manifest inadequacy. It was in response to the respondent’s submission that the objective seriousness was limited by reference to a range of aggravating features not present in the offending that the Court observed that ‘the absence of an aggravating feature is not a mitigating feature’.¹⁰¹

[71] The appropriate approach to the sentencing exercise is to conduct an intuitive evaluation of the objective seriousness of the offence by looking to those matters, both aggravating and mitigating, that relate to the offence. Although matters which form part of what is usually termed ‘the subjective case’ of the offender are not relevant to the assessment of objective seriousness, the offender’s state of mind might be. In the circumstances of this case, the fact that there was no application of physical force, no physical injury and no threat of violence was also relevant to the offender’s subjective mental state at the time, and so to the assessment of both objective seriousness and moral culpability.

[72] The sentencing judge’s approach in this case commenced with finding the facts in relation to the offending. In conducting that task the sentencing

101 *R v Kahu-Leedie* [2022] NTCCA 4 at [34].

judge found that the offending proceeded in accordance with the victim's evidence, as described in the passage from the sentencing remarks extracted above concerning the respondent's knowledge or recklessness. Those findings of fact included the victim's previous indications that she was not prepared to engage in sexual intercourse, the various ways in which the victim demonstrated her reluctance during the incident, the victim's feelings of entrapment and fear, and the respondent's physical insistence. The sentencing judge then dealt with the victim impact statement, including the emotional and psychological impacts of the offending on the victim. Those impacts included disturbed sleep, emotional disconnection and difficulties with social interaction. The victim also blamed herself for what happened, which the sentencing judge observed was a 'not uncommon but entirely unfounded reaction for victims of sexual offending'. The sentencing judge also found that the offending was aggravated by the breach of trust involved in the respondent's intimations in the lead up to the incident that he was prepared to wait for sex and only go so far as the victim was comfortable. The finding that the offending was towards the lower end of the scale of seriousness for the offence commonly known as 'rape' was made with implicit reference to all those features of the offending.

- [73] Having regard to those matters, the sentencing judge found expressly that this was objectively serious offending and that there was no evidence of remorse on the part of the respondent. That passage of the sentencing remarks with which the appellant takes issue must be read in its full context.

That brief passage does not reflect the complex of factors taken into account by the sentencing judge in assessing the objective seriousness of the offending. Nor, when read in context, does it indicate that the sentencing judge considered the absence of those aggravating factors to operate in mitigation, or that the offender's conduct was less serious because it could have been worse. The reference to those matters recognised only the incontrovertible fact that although every offence of sexual intercourse without consent is a serious offence, some are more serious than others because, for example, the degree of violence and physical hurt inflicted and the circumstances of humiliation are much greater.

- [74] There was no specific error in the sentencing judge's assessment of the objective seriousness of the offending. The question whether that assessment was correct is properly dealt with in the ground of appeal asserting manifest inadequacy. Accordingly, this ground of appeal should be dismissed.

Manifest inadequacy

- [75] The third ground of appeal is that the sentencing judge erred in imposing a sentence that is manifestly inadequate. The respondent was found guilty following a trial by jury and was not entitled to a reduction in sentence on account of any remorse, acceptance of criminal responsibility or willingness to facilitate the course of justice. The sentencing judge fixed a head sentence of imprisonment for four years which was suspended after the respondent had served 18 months, subject to an operational period of two years and six months. The conditions of the order suspending sentence were

only that the respondent have no contact with the victim and that the respondent leave the Northern Territory following his release.

[76] The nature and objective seriousness of the offending and its impact on the victim have already been described in the context of the first two grounds of appeal. So far as the respondent's subjective circumstances are concerned, he was 39 years old at the time of the offending and had no criminal history. He was born in Papua New Guinea and raised in a family together with three siblings. Following secondary schooling he obtained tertiary qualifications in mining engineering and worked in that field in his home country. He has three children from previous relationships in Papua New Guinea. The respondent came to work in Australia in 2022, initially in Queensland before transferring to a mine in the Northern Territory and working on a fly-in fly-out basis. His earnings in that employment were used in part to support his children, his mentally handicapped brother and his aged grandmother. The sentencing court received a number of character references which spoke to the respondent's generosity, integrity, humility and positive contribution to the community. The sentencing judge accepted that the respondent was a person of prior good character and that he had excellent prospects of rehabilitation.

[77] Although there is no tariff for the crime of sexual intercourse without consent because it is so fact specific, a broad sentencing standard can be discerned. This Court has recently made the following observations concerning that standard:

A comprehensive survey of the comparative sentences for the offence of rape was conducted by this Court in the matter of *Gilligan v The Queen*.¹⁰² While first acknowledging that the survey was conducted almost 18 years ago, it concluded that a starting point of nine years' imprisonment before any discount for a guilty plea is within the range of sentences imposed for offences against s 192(3) of the *Criminal Code* in circumstances where the assault is accompanied by violence and degradation beyond the minimum which might be expected in the commission of that offence. Approximately a decade after that review, in 2017, this Court conducted a further review of comparative sentences for rape in the matter of *Forrest v The Queen*.¹⁰³ That review disclosed that since the survey had been conducted in *Gilligan* in 2007, the average head sentence imposed for an offence against s 192(3) of the *Criminal Code* involving an adult offender and an adult victim, after excluding the most serious cases, had been six years and five months. That average is broadly consistent with the observation made in the 2014 case of *The Queen v Nabegeyo*¹⁰⁴ to the effect that most of the comparative sentences referred to the court on that occasion involved a starting point of six years or higher for the offence of rape.¹⁰⁵

[78] Given that the head sentences commonly imposed for the crime of rape exceed five years, and the minimum 70% non-parole period for the offence of sexual intercourse without consent fixed by s 55 of the *Sentencing Act*, the non-parole period will commonly exceed three years and six months. For offending which by its features attracts a head sentence of five years or less, an order is available which suspends sentence after the offender has served the minimum period of actual imprisonment which the objective seriousness of the offending requires. While it is no doubt true, as the respondent submits, that suspended sentences are not unusual in cases of this kind, the requirement that an offender serve only 18 months or some lesser period of

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

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

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

105 *The King v Singar* [2025] NTCCA 1 at [34].

actual imprisonment for the crime of penile-vaginal rape, particularly after a plea of not guilty, is decidedly unusual. The matter of *Willcocks* (SCC 21728562) is a case in point.¹⁰⁶ A disposition involving a relatively short period of actual imprisonment might also be warranted in cases involving a less invasive form of sexual intercourse in combination with other features.¹⁰⁷

[79] In the ordinary course, however, the suspension of sentence after the offender has served 18 months for the crime of penile-vaginal rape without a guilty plea will involve a disproportionality with the objective seriousness of the offending. In the present case, the sentencing judge relied on a sentence imposed the previous year in *Phalaphon* (SCC 22130963) under which the term of imprisonment for four years which was suspended after the offender had served 18 months. Although that sentence was not subject to a Crown appeal, the sentencing judge had explicitly treated the absence of aggravating features as operating in mitigation. Even leaving that aside, the fact that an order suspending sentence after 18 months for the crime of rape

106 In that case the offender was a guest at a buck's party at which the victim had been engaged to perform as a stripper. At the commencement of the performance the victim had advised guests that they were not to touch her unless invited. During the show, the victim invited and had a number of guests insert dildos into her vagina, including the offender. In the course of that activity the offender inserted the neck of the beer bottle he was holding into the victim's vagina. The offender had a strong subjective case on the basis of his personal circumstances. The offender received a head sentence of imprisonment for three years and six months which was to be suspended after he had served nine months.

107 See, for example, *Swan* (SCC 22041202). The offender and the victim were known to each other and had been drinking together on the night in question. The victim passed out drunk, following which the offender undid the victim's jeans and briefly performed fellatio on him. The victim woke up and pushed the offender away. Although the form of intercourse is not the sole consideration, and objective seriousness is to be assessed according to the entirety of the facts and circumstances, there is no implication that each category of sexual penetration is as heinous as another if done without consent: see *Ibbs v The Queen* (1987) 163 CLR 447 at 452.

had recently been made by the same sentencing judge does not establish either a range or that a subsequent sentence in the same terms falls within range.

[80] The offending in this case was characterised by the following features. The respondent was aware of an expressed reluctance on the part of the victim to engage in sexual intercourse but was highly persistent in his efforts to do so despite her protestations. In those circumstances, the level of recklessness was of a high order. The victim was fearful during the episode and felt trapped and unable to leave. The offending involved penile-vaginal intercourse which was relatively prolonged in duration. The respondent did not use a condom and ejaculated into the victim's vagina, giving rise to the risks of sexually transmitted disease and pregnancy. The offending involved a breach of trust in the manner already described. The victim suffered disturbed sleep and other psychological and emotional consequences as a result of the offending. The fact that there was no great disparity in age between the victim and the respondent was immaterial in determining the objective seriousness of the offence in these circumstances.¹⁰⁸

[81] Having regard to the entirety of the facts and circumstances, and even allowing for the offender's personal circumstances, the sentence imposed was manifestly inadequate. In the exercise of the restraint, caution and moderation properly applied by an appellate court when interfering with a

108 *R v Shortland* [2018] NSWCCA 34 at [15]; see also *R v Ibrahim* [2021] NSWCCA 296 at [51].

sentence, a head sentence of five years which was suspended after the offender had served two years and six months should have been imposed.

Residual discretion

[82] The conclusion that the sentencing judge erred in imposing the sentence gives rise to a consideration of whether this Court should intervene to re-sentence the respondent or decline to do so in the exercise of its residual discretion. This Court has recently dealt with the considerations which govern the exercise of the residual discretion in *The King v Singar*¹⁰⁹, and we largely adopt what was said there. Even where manifest inadequacy is found the appellate court retains a residual discretion as to whether the appeal should be allowed and the respondent resented. The Crown bears the onus of negating any reason why the residual discretion not to interfere should be exercised.¹¹⁰ That determination is made with regard to the limiting purpose of Crown appeals, which extends to correcting sentences so disproportionate to the seriousness of the offending as to constitute an error in point of principle.¹¹¹

[83] The first question is whether this Court should decline to allow the appeal even though the sentence imposed is erroneously inadequate. If this Court determines to allow the appeal, the second question is to what extent the

109 *The King v Singar* [2025] NTCCA 1 at [59]-[68].

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

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

sentence should be varied. In determining the first question, it is open to the appellate court to look at the facts available at the time of the hearing of the appeal, including events that have occurred after the original sentencing.¹¹² At the time the sentencing exercise in this case took place the respondent was in Australia on a temporary work visa, and it was accepted that the respondent would be deported from Australia as a consequence of the conviction. However, in accordance with authority from this Court, the sentencing judge did not speculate about the consequences of that deportation to the respondent.¹¹³

[84] Following the hearing of this appeal the respondent was given leave by consent to file further evidence in relation to his circumstances. That evidence took the form of an affidavit sworn by him on 11 December 2025. That affidavit disclosed the following material matters.

(a) On 23 January 2025, which was after sentencing but before the hearing of this appeal, the Department of Home Affairs advised the respondent in writing that the Temporary Skill Shortage Visa under which he had been permitted to reside and work in Australia had been cancelled because his conviction for the offence of sexual intercourse without consent meant he did not pass the character test under s 501 of the *Migration Act 1958* (Cth).

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

113 *The Queen v Calica* [2021] NTSCFC 2 at [140]-[160].

- (b) On 12 February 2025, the respondent requested that the Minister for Immigration and Citizenship ('the Minister') revoke the cancellation of the respondent's visa.
- (c) On 27 June 2025, a delegate of the Minister determined not to revoke the cancellation of the respondent's visa.
- (d) On 2 July 2025, the respondent applied to the Administrative Review Tribunal ('the ART') for a review of the decision.
- (e) From the time the respondent's visa was first cancelled, his expectation that he will be deported back to Papua New Guinea has taken a significant emotional and psychological toll on him due to the more limited employment opportunities in his home country and the consequential impact on his children's education. In addition, the process of representing himself before the ART has been stressful and burdensome for the respondent, and his time in prison generally has been intensely isolating given the lack of family in Australia and the difficulties making contact with family in Papua New Guinea.

[85] The solicitors for the respondent have subsequently advised that his application for a review of the decision not to revoke the cancellation of his visa was unsuccessful. As a consequence, the cancellation remained on foot and the respondent was deported from Australia on 17 February 2026.

[86] The period of imprisonment imposed by the sentencing judge was backdated to 22 July 2024 to be suspended after the respondent had served a total

period of 18 months. That 18-month period of imprisonment expired on 21 January 2026 and the suspension took effect on that day. The respondent was held in immigration detention at the Darwin Correctional Centre until his deportation on 17 February 2026.

[87] Although the category of factors that bear upon the exercise of the residual discretion are not closed, rarity, the frequency of Crown appeals and the distress and anxiety which the respondent might suffer from being exposed to the possibility of a more severe sentence are no longer relevant considerations following the abolition of double jeopardy. Moreover, the consequences of deportation on such matters as the respondent's financial position, the loss of the opportunity to settle permanently in Australia and the hardships and increased burden he may have suffered while in prison because of the impending deportation, are matters which go to the length and structure of the sentence rather than the exercise of the residual discretion. Those matters also do not alter the conclusion that the sentence imposed in this case was manifestly inadequate.

[88] A factor which is recognised as relevant to the exercise of the residual discretion is the expiry of the non-parole period imposed at first instance, or the offender's imminent release on parole.¹¹⁴ That is not the precise position obtaining in this case, but the principles are the same. The respondent has already been released from the period of imprisonment and deported after a

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

period of further detention. In the ordinary course, an offender's imminent or actual release on parole or some other form of conditional liberty might enliven the exercise of the residual discretion because to extend the sentence in those circumstances would adversely impact on the offender's rehabilitation and operate cruelly on his or her expectations. That consideration also arises in this case because the respondent's return to his family in Papua New Guinea might be expected to enhance his prospects of rehabilitation and he has already been reunited with his family.

- [89] In the circumstances of this case, there is another reason why immigration detention and subsequent deportation might enliven the exercise of the residual discretion.¹¹⁵ That is because after the suspension of the sentence took effect the respondent was held in detention in the same correctional facility, with the effect that the period of imprisonment before release which had been fixed by the sentencing judge was effectively increased. Moreover, the respondent's deportation will have both a punitive and a protective effect as he will be unlikely to qualify for a visa in the future which would allow his return to Australia. In those circumstances, this is an appropriate case for the exercise of the residual discretion.

Order

- [90] The appeal is dismissed.

115 See *R v Shortland* [2018] NSWCCA 34 at [155].

KELLY J:

[91] On 4 September 2024, following a trial by jury, the respondent was found guilty of one count of having sexual intercourse with EM (“the complainant”) without her consent contrary to s 192(3) of the *Criminal Code 1983* (NT). On 14 October 2024, the respondent was sentenced by Brownhill J on that single count to four years imprisonment, suspended on conditions after serving a total period of one year and six months.

[92] By notice of appeal dated 7 November 2024 the Crown has appealed against that sentence on three grounds.

Ground 1: The sentencing judge erred in failing to find that the respondent knew the victim was not consenting to the sexual intercourse, being the only finding that was available on the evidence.

Ground 2: The sentencing judge erred in assessing the objective seriousness of the offence by taking into account the absence of features which would have made the offending more serious.

Ground 3: The sentencing judge erred in imposing a sentence that is manifestly inadequate

The Crown case

[93] The respondent was a 33-year-old Papua New Guinean non-citizen Australian resident working in mines on a fly-in fly-out basis. The complainant was a 30-year-old Australian who lived in Nightcliff and who

worked as an audiologist. In October 2023, they met on the dating application “Bumble”. They had a first date on 15 October 2023, meeting at a “neutral” location at the complainant’s suggestion. They continued to exchange messages in the period that followed. The Crown asserts that, during that time, the complainant made it clear that she was religious, that she was a member of the Baptist Church, and that she wanted to take things slowly. In the face of messages from the respondent suggesting that they could have sex on their second date scheduled on 9 November 2023, the complainant said that she believed in no sex before marriage, and that was “non-negotiable” for her. The respondent assured the complainant that he was “not after sex honestly”, and in those circumstances the date proceeded.

- [94] However, when they ended up at the respondent’s hotel after having dinner, the respondent sexually assaulted the complainant by way of penile-vaginal intercourse. After fleeing the location, the complainant promptly reported the matter to police and underwent a sexual assault examination. The Crown alleges that the respondent made admissions in text messages to the complainant. For instance, in response to the complainant’s text, “*I said no multiple times and yet you continued. Why??*”, the respondent said, “*Am sorry but we were already there and I had to just finish.*”

The issues at trial

- [95] To a large extent, the facts and circumstances leading up to and surrounding the offence were not in dispute. At trial, defence counsel accepted that

sexual intercourse had occurred between the respondent and complainant.

The sole issues at trial were:

- (a) whether the complainant consented to intercourse, and
- (b) if not, whether the respondent knew or was reckless as to whether the complainant was not consenting.

Appellant's summary of evidence

[96] The appellant provided the following summary of the relevant evidence at trial.¹¹⁶

First date on 15 October 2023

- (a) In October 2023, the respondent and complainant met on the dating application “Bumble”. On 15 October 2023, the complainant provided the respondent with her mobile phone number and they began exchanging text messages. It was clear that the respondent already knew that the complainant was religious and attended church,¹¹⁷ which she later confirmed to be the Baptist Church.¹¹⁸ The respondent said that he was at his hotel and suggested that she come over and have drinks.¹¹⁹ The complainant suggested that they meet at a “neutral place” in the city.¹²⁰ The respondent suggested that they meet somewhere for a drink however the complainant indicated that she was

116 Appellant's Written Submissions, paras [6]-[23].

117 Appeal Book (“AB”) 189.

118 AB 197.

119 AB 190, 192.

120 AB 192.

“not a massive drinker”.¹²¹ In a later message, the respondent again suggested that they get drinks and attend his room.¹²² The complainant suggested that they meet at “The Reserve”, a restaurant on Smith Street in Darwin City.¹²³ The respondent agreed.¹²⁴ They had a first date at The Reserve after which they parted ways without any physical intimacy.

Messages between the first date and second date

- (b) The respondent and complainant continued to exchange messages until their second date on 9 November 2023. During that time, the respondent sent messages of an increasing intensity. For instance, during the period 15 October 2023 to 30 October 2023, the respondent started calling the victim “dear”,¹²⁵ “darling”,¹²⁶ “babe”,¹²⁷ and “hun”,¹²⁸ asked her to send pictures of herself on WhatsApp,¹²⁹ suggested that he could give her “a good shoulder massage for some relaxation”,¹³⁰ said things like, “[w]ish I could see u this evening”,¹³¹ suggested that they

121 AB 194-195.

122 AB 198.

123 AB 199.

124 AB 199-201.

125 AB 203.

126 AB 209, 217 and 220.

127 AB 216, 219-220 and 228.

128 AB 232.

129 AB 208.

130 AB 209.

131 AB 210.

could “grab dinner and have a few drinks at mine”,¹³² suggested that “We could netflix and chill and you head back tomorrow morning”,¹³³ and said “Wish I could massage u while u rest on bed”.¹³⁴ The complainant ignored many of those messages, and provided short and neutral responses.

- (c) On 2 November 2023, the complainant agreed to a date on Thursday, 9 November 2023, which was the day after the respondent was to fly in from Queensland where he had been working.¹³⁵ The respondent suggested, “Maybe a light dinner together and a few drinks at mine”. The complainant responded, “I mentioned before, not a big drinker and wouldn’t on a weeknight”, and suggested that she “Would be up for ice-cream though”.¹³⁶ The respondent then said, “I’d love to walk along the beach but depends. Would be nice to chill over at mine after”.¹³⁷ The complainant did not respond to that message.
- (d) On 3 November 2023, the complainant indicated that she was babysitting and a discussion about children ensued. In that context, the respondent asked the complainant if she wanted children in the near future. The complainant said that “I’d wanna be in a stable marriage first” and that she did not “want kids to be without a firm

132 AB 211.

133 AB 212-213.

134 AB 228.

135 AB 234.

136 AB 234-235.

137 AB 235.

foundation”.¹³⁸ The messages that followed demonstrate the increasing intensity of the respondent’s messages and the complainant’s comparative reserve in response to them:¹³⁹

RESPONDENT: I love that. Would love [to] have 3 or 4 ... Will always look forward to my breaks.
Having stable marriage is something I love to do
My eyes are on u now

RESPONDENT: I want us to get into a stable relationship
Got a job in Qld which pays better but will move up Darwin and we can work out something

COMPLAINANT: Cool, let’s see how we go

RESPONDENT: Yes, we can plan a baby in the near future Not now lol..
I would love to settle down as soon as practical

RESPONDENT: I want us to take this relationship a bit further than just meeting out in the streets
Would be nice to settle down as soon as practical

RESPONDENT: I want us to take this relationship a bit further then just meeting out in the streets
Would be nice to enjoy some romance together

COMPLAINANT: Yeah I [don’t] rush into that sort of thing.

RESPONDENT: We won’t rush anything but I want us to get to know each other closely and be comfortable with ourselves. We may have few intimate moments but with control

COMPLAINANT: Cool cool

COMPLAINANT: So do you get shorter hours over the weekend or is it as per usual?

RESPONDENT: Am not gonna get u pregnant without your consent. We can control if we get intimate. I want us to plan things properly and know what to expect

138 AB 237-238.

139 AB 238-240.

- (e) The following further messages in relation to the prospective date on 9 November 2023 were exchanged later on 3 November 2023:¹⁴⁰

RESPONDENT: We can crash over at mine on Thursday after going for a walk n dinner. Lemme know when you've thought about it.

COMPLAINANT: ... I wouldn't stay over but perhaps see how we feel on Thursday as to whether we hang at yours for a bit.

- (f) During the early morning on 8 November 2023, the respondent messaged the complainant and suggested that she could spend the night with him following their date the following day. In response, the complainant made it unambiguously clear that she was not interested in having sex before marriage and suggested that if that was what the respondent was looking for, perhaps they were not a good fit. Although the respondent continued to push the point and made clear that he wanted to have sex with the complainant, he assured her that he was not after sex and would respect her boundaries. He did, however, ask if they could "go as far as kissing", to which the complainant agreed. The messages relevantly included the following (emphasis added):¹⁴¹

RESPONDENT: We could overnight and you head back in the morning for work. Think about it n lemme know

...

COMPLAINANT: **Yeah the sex before/living together before marriage is a non-negotiable no for me. Maybe we are just looking for different things?**

140 AB 233.

141 AB 276-278.

RESPONDENT: We can find out fits babe. Not a real big issue. Am after marriage.
We'll go as far as you allow if we gonna be intimate in bed.

RESPONDENT: [I] have based all my life on that principle and started so late. Am prepared to change some things to make it happen and settle now.
If we have sex, we will control so u don't get pregnant unplanned. Am happy we are heading towards marriage and I like that

RESPONDENT: **If it happens, let it be. If not, I will still hang on till I make u my wife.**
All couples do it so we may somewhere along the way

RESPONDENT: **But am not after sex honestly.** Got no time to waste n wanna settle down with a family of my own

...

COMPLAINANT: **Thanks for understanding. I appreciate that I am blunt but I value both our time and chances for both of us to be happy in a relationship.**
 Enjoy your flight and take a photo if you like. See you tomorrow.

RESPONDENT: Thanks babe. **Are u comfortable with us having a some time together at mine? Maybe we can go as far as kissing** ... I do understand the principles but I have been there n done it till I hit my late 20s.
 Wanna bend the rules a bit

COMPLAINANT: **Yep looking forward to a kiss.**

Second date on 9 November 2023

(g) At approximately 6:00pm on Thursday, 9 November 2023, the respondent and complainant met on The Esplanade in Darwin City, walked to the Darwin Waterfront, and had dinner at Chow. Neither consumed alcohol. Following dinner, they walked to the Palms City Resort and went to the respondent's room as they had previously

agreed. It was there that the respondent sexually assaulted the complainant. The following summary is taken from the complainant's evidence-in-chief at trial. Her cross-examination is addressed further below.

- (h) When inside the room, the complainant sat down on a chair, and the respondent got her a bottle of water and turned on the television. After a short period of time, the respondent approached the complainant, leaned down, and started kissing her. He then pulled the complainant up into a standing position and continued to kiss her with his arms around her. That conduct was consensual and in line with what they had discussed and agreed to on the previous day.
- (i) As the respondent continued kissing the complainant, he started trying to pull her shirt up.¹⁴² The complainant tried to get his hands off her shirt and pulled her shirt back down.¹⁴³ She then asked the respondent, "Can you walk me back to the car?"¹⁴⁴ The respondent said words to the effect of, "Come on, let's keep going".¹⁴⁵ At that point, the respondent was kissing the complainant quite forcibly. The complainant told the respondent twice, "No, I don't want this, let's go, walk me to the car".¹⁴⁶ The respondent ignored the complainant. He grabbed her right hand, placed it in his pants on his penis, and asked

142 AB 322.

143 AB 322 and 331.

144 AB 322.

145 AB 330.

146 AB 322. See also Crown closing at AB 91.

her to fiddle with it.¹⁴⁷ The complainant froze.¹⁴⁸ She did not fiddle with his penis; however, he thrust it against her hand.¹⁴⁹

- (j) The respondent then tried to pull the complainant's shorts down. The complainant pulled them back up a couple of times; however, the respondent then pulled them off together with the complainant's underwear and sat her down on the single bed in the corner of the room with his hands over her shoulders.¹⁵⁰ The respondent took his clothes off, lifted the complainant up, and commenced having penile-vaginal intercourse with her.¹⁵¹
- (k) At one point during the sexual intercourse, the respondent asked, "Do you want me to go down on you?"¹⁵² The complainant said, "No, I wanna go home," to which he said, "No babe, just let me finish."¹⁵³ The complainant again said, "No, I wanna go home," but the respondent pushed her back on the bed and continued to penetrate her.¹⁵⁴ The respondent attempted to kiss the complainant however she kept her mouth closed.¹⁵⁵ He proceeded penetrating the complainant until he ejaculated, which started inside the complainant but ended up on the

147 AB 322 and 331.

148 AB 322.

149 AB 322 and 373.

150 AB 322 and 332.

151 AB 322 and 334.

152 AB 322.

153 AB 322.

154 AB 322.

155 AB 322.

sheets as he pulled his penis out of her vagina.¹⁵⁶ Without saying anything to the complainant, the respondent got up and went to the bathroom.¹⁵⁷ The complainant put her shorts on, got her bag, left the unit, and walked directly to her car.¹⁵⁸

- (1) In cross-examining the complainant, defence counsel did not challenge critical parts of her version of events. For instance, the complainant was not challenged as to twice saying, “No, I don’t want this, let’s go, walk me to the car,” in response to the respondent saying, “Come on, let’s keep going,” (after the complainant had already asked the respondent to walk her to her car after trying to pull her shirt up). Nor was the complainant challenged as to her evidence that, when the respondent attempted to pull her shorts down, she pulled them back up a couple of times.¹⁵⁹ Instead, it was put to the complainant that she was at liberty to leave at any time, that the respondent had not threatened her, that she had not been physically restrained, and that she was actively engaged in sexual activity with the respondent.¹⁶⁰ The complainant rejected the suggestion that she engaged in sexual activity with the respondent, and reinforced that she made it clear that she did not consent by virtue of her advance communication, and words and actions in the hotel room.

156 AB 335.

157 AB 322 and 336.

158 AB 322.

159 See, for example, AB 367.

160 See, for example, AB 367-370.

Subsequent contact from the respondent (admissions)

(m) The respondent called the complainant four times shortly after she left; at 9:48pm, 9:50pm, 9:55pm and 9:59pm.¹⁶¹ The following messages were then exchanged during the period 10:03pm to 10:29pm, during which the respondent made admissions to the offending:¹⁶²

RESPONDENT: Hun where are u??

COMPLAINANT: **You knew I was angry and didn't want to have sex with you at all, why did you force yourself on me?**

RESPONDENT: Why were u angry? It all started with a good kiss?

RESPONDENT: Can we talk?

RESPONDENT: Am still outside

RESPONDENT: We just started a good relationship and why are u mad with me? Am here to stay and u are the only one I will be dating here

RESPONDENT: You are one of the reasons am moving here. Cool down and we can talk later. Am not after one night thing

COMPLAINANT: **I said no multiple times and yet you continued. Why??**

RESPONDENT: **Am sorry but we were already there and I had to just finish. Am sorry if I didn't make u enjoy. We can be better next time.**

I see us settling together and was keen on having a relationship with u. Please don't run away like that

RESPONDENT: Can u come see me tomorrow before I go? I apologize for making u upset. Let's be better next time.

161 AB 337.

162 AB 288-290.

- (n) At 6:39am on 10 November 2023, the respondent sent a further text message in which he said, **“Am sorry for what happened, will never happen again”**.¹⁶³

Royal Darwin Hospital and contact with police

- (o) Immediately after the offending, the complainant drove to the Nightcliff Police Station however found it to be unattended. Thereafter, she went home, got a change of clothes, and attended the Royal Darwin Hospital where she underwent a sexual assault examination conducted by Nurse Ann Flynn, and briefly spoke to Detective Senior Constable Tanya Holliday (“DSC Holliday”). In speaking to Ms Flynn and DSC Holliday, the complainant gave consistent albeit brief versions consistent with her evidence.¹⁶⁴
- (p) At 12:17pm on 10 November 2023, the complainant gave a recorded statutory declaration to police. Although the complainant did not know the respondent’s full name or address, she was able to describe his tattoos and was aware that he was flying out of Darwin that evening.

Respondent’s arrest and comments to police

- (q) Following further investigations, police identified and arrested the respondent at the Darwin Airport that evening. During the course of

163 AB 291

164 AB 60 and 305

his arrest, the respondent was asked how long he had been in Darwin.

In response, he said the following (emphasis added):¹⁶⁵

Oh, I've um, been here like two months now. So I, I, we will speak at the station, but I sort of met this girl, uh, we were talking for a bit and then she agreed to go with me, um, to the hotel. Um, and we, we started like making out, making out. And actually we were having intercourse, um, but **she sort of decided at the middle of intercourse, but she, she wanted to like get to the car** and I just told her I had to finish before we can, we can go. That's all I, I, I said to her.

- (r) The respondent was subsequently conveyed back to the Palmerston Watch House. A police officer there began to outline some of the steps that would be taken in relation to the investigation when the respondent said:¹⁶⁶

Can, we can sort of, um, have a look at it. 'cause it, I don't think it's, I don't think so against [her] will. 'cause we on the message, we, we sort of agreed first and she, she actually agreed to like, for us to be together, um, like have a bit of intimacy and all that. Yeah. Um, and her complaint came after like we've, we've been through it and in the mid, mid, mid during the, um, activity. **Um, she decided to stop. So from, from, from my point of view, I don't see this being against their will.** Okay, um she was upset about something and she sort of stopped.

Respondent's contentions on the evidence

- [97] The respondent did not, in general, take issue with the summary of the evidence provided by the appellant, but contended that it placed undue emphasis on some parts of the evidence over other, important parts of the evidence. The respondent referred to the following additional matters

¹⁶⁵ AB 319.

¹⁶⁶ AB 319-320.

arising from the evidence which the respondent contended were relevant to the issues on the appeal.

(a) From 15 October 2023, the respondent and complainant had been messaging after meeting on the dating application, Bumble. The nature of those messages is as detailed in general terms in the appellant’s summary of the evidence which is extracted above. The respondent rejected the characterisation of those messages as being of an “increasing intensity” and the implication that the communications were one-sided. The respondent contended that the messages were consistent with a natural and mutual progression in the relationship between the respondent and complainant. The respondent contended that during those messages, the complainant expressed interest in the respondent, including:

- ‘was just thinking about you actually’,¹⁶⁷
- that she was enjoying their ‘nice chats’,¹⁶⁸
- offering to accompany the respondent to housing inspections,¹⁶⁹ and
- agreeing with the respondent that it would be better if they spent more time together, because ‘you’ve got class’.¹⁷⁰

167 AB 221.

168 AB 223.

169 AB 250.

170 AB 265.

(b) In those messages, the respondent made clear that he desired to have a sexual relationship with the complainant. On one occasion, he asked whether ‘we could netflix and chill and you head back tomorrow morning’.¹⁷¹ The complainant’s reply to that proposition at that time was neutral: ‘nah talk tomorrow and work out from there the plan’.¹⁷² The respondent later said, ‘We may have few intimate moments but with control.’¹⁷³ The respondent also pointed to the following exchange:¹⁷⁴

RESPONDENT: Am not gonna get u pregnant without your consent. We can control if we get intimate. I want us to plan things properly and know what to expect

...

COMPLAINANT: Rightio good to know

(c) Later in that text exchange, the complainant indicated that she was ‘Looking forward to seeing you again’.¹⁷⁵ In subsequent messages, the respondent stated there would be a possibility of ‘...living together before getting married, if get a baby on the way’, ‘But we’ll control for now until we are properly engage’.¹⁷⁶ The two later said:¹⁷⁷

RESPONDENT: ... we can be intimate but with protection

171 AB 213.

172 Ibid.

173 AB 239.

174 AB 240.

175 AB 243.

176 AB 268.

177 AB 269.

We'll wait for the right time

RESPONDENT: Use some family planning strategies lol

COMPLAINANT: I mean I like the open communication we are having, important bit scary also exciting

(d) The day before intercourse on the morning of 8 November 2023, the two had the exchange reproduced above which culminated in the complainant agreeing to kissing. During that interaction, the complainant, for the first time, indicated that ‘... sex before/living together before marriage is a non-negotiable no for me’.¹⁷⁸ The respondent replied to those messages indicating ‘we’ll go as far as you allow if we gonna be intimate in bed’.¹⁷⁹ He further said, ‘if we have sex, we will control so u don’t get pregnant unplanned ... if it happens, let it be,’¹⁸⁰ and, ‘I do understand the principles but I have been there n done it till I hit my late 20s. Wanna bend the rules a bit.’¹⁸¹

(e) Immediately after that exchange on the morning of 8 November 2023, the following communication took place:¹⁸²

COMPLAINANT: And I would be a hypocrite to say that I haven’t done it before it’s just it didn’t work out and was more difficult to move forward post.

COMPLAINANT: Yep the future is ours!

COMPLAINANT: And the present

178 AB 277.

179 AB 277.

180 AB 277.

181 AB 278.

182 AB 279.

RESPONDENT: I know where you are coming from and what u wanna get out of relationship n its not different from my experience. We can bend a rule n end up together! At least the goal is same.

(f) In relation to the events of 9 November 2023 during which intercourse took place, the following “salient aspects of the evidence” need to be emphasised.

- After going on a date, the complainant attended the respondent’s hotel room. The respondent and complainant engaged in intimate activity, including kissing and embracing. She asked the respondent to walk her to the car. The respondent said words to the effect of, “Come on, let’s keep going.”¹⁸³ The respondent attempted to pull the complainant’s shirt up¹⁸⁴ but “some of the time” the complainant “pulled down my shirt again.”¹⁸⁵ At this time the respondent’s tongue was in the complainant’s mouth and the complainant was kissing him back.¹⁸⁶
- The respondent then sought to progress sexual intimacy by placing the complainant’s hand in his pants and telling her to fiddle with him. The complainant’s hand was in his pants and around his penis.¹⁸⁷ The complainant did not, at this stage, verbally protest or

183 AB 330.9.

184 AB 330.5.

185 AB 331.2.

186 AB 331.2-10.

187 AB 332.2.

take any physical action to indicate that she did not consent to that conduct.¹⁸⁸ The complainant accepted that, during the period when her hand was in his pants, she could have pulled her hand out of his pants and left, but did not do so.¹⁸⁹ The complainant said in re-examination that when she had her hand in his pants she was kissing him at that time.¹⁹⁰

- Around this time, the respondent attempted to pull down the complainant's shorts.¹⁹¹ The complainant 'would sort of pull it back up'¹⁹² but the respondent took off the complainant's shorts and underwear¹⁹³ and the complainant sat down on the bed.¹⁹⁴ The complainant accepted that she was not restrained when she was sitting on the bed.¹⁹⁵ The respondent then took his clothes off and took hold of the complainant's thighs.¹⁹⁶ The complainant lay back on the bed, and penile-vaginal intercourse commenced.¹⁹⁷ During the initial period of the intercourse, the complainant did not

188 AB 365-366.

189 AB 366.5.

190 AB 373.7.

191 AB 322.6.

192 Ibid.

193 AB 332.4.

194 AB 366.7.

195 AB 366.7.

196 AB 367-368.

197 AB 368.2.

verbally protest or take any physical action to indicate that she did not consent to the intercourse.¹⁹⁸

- At one point during intercourse, the respondent asked whether she wanted him to give her oral sex. The complainant shook her head.¹⁹⁹ The intercourse resumed in the same position.²⁰⁰ The respondent was kissing the complainant but her mouth was shut.²⁰¹ At some stage during the intercourse, the complainant stated, ‘No, I need to go to my car.’²⁰² She sat up at that point,²⁰³ although in cross-examination she said that she stood up.²⁰⁴ The respondent replied, ‘No, let me finish.’²⁰⁵ She said nothing at all in response to him.²⁰⁶ She then lay back on the bed.²⁰⁷ In relation to how she got back down on the bed, the complainant said that the respondent had his hand on her shoulder, but said, ‘I would be reluctant to say he pushed me,’ and did not elaborate any further.²⁰⁸ The respondent ejaculated, stood up and went to the bathroom.²⁰⁹

198 AB 367-368.

199 AB 368.7.

200 AB 369.4.

201 AB 322.

202 AB 369.8.

203 AB 335.2.

204 AB 369.8.

205 AB 369.8.

206 AB 370.7.

207 AB 369-370.

208 AB 369-370.

209 AB 335.

(g) After the intercourse, the complainant dressed, left the room, entered her car and drove back to Nightcliff.²¹⁰ The respondent attempted to call the complainant three times.²¹¹ The complainant did not answer any of those calls.²¹² The respondent also sent the complainant a number of messages. Those messages are as follows:²¹³

RESPONDENT:	Darling where are u?
RESPONDENT:	Can we talk before u go? Please
RESPONDENT:	Am at car park .. Where are u?
RESPONDENT:	Am still looking for u in front. Please come n we talk babe
RESPONDENT:	Hun where are u??
COMPLAINANT:	You knew I was angry and didn't want to have sex with you at all, why did you force yourself on me?
RESPONDENT:	Why were u angry? It all started with a good kiss?
RESPONDENT:	Can we talk?
RESPONDENT:	Am still outside
RESPONDENT:	We just started a good relationship and why are u mad with me? Am here to stay and u are the only one I will be dating here
COMPLAINANT:	I said no multiple times and yet you continued. Why??
RESPONDENT:	Am sorry but we were already there and I had to just finish. Am sorry if I didn't make u enjoy. We can be better next time. I see us settling together and was keen on having a relationship with u. Please don't run away like that

210 AB 336.

211 AB 287-288 and AB 337.

212 AB 336.

213 AB 288-291.

RESPONDENT: Can u come see me tomorrow before I go? I apologize for making u upset. Let's be better next time.

RESPONDENT: We just started a good relationship and why are u mad with me? Am here to stay and u are the only one I will be dating here

RESPONDENT: Thinking of u. You have a good night. when you are free tomorrow, I want us to talk please

RESPONDENT: Good morning darling. Woke up thinking of u

You may be angry with me but I am here to be yours forever. We will make it to marriage and I believe we can. Am sorry what happened, will never happen again. You have a great day today. I wanna call u when you are free please. Love u

RESPONDENT: I love you

Have a great day at work

RESPONDENT: Have a great lunch hour

[98] The respondent contends that the appellant relies selectively on part only of this exchange.

Findings by the sentencing judge

[99] The sentencing judge made the following findings of fact.²¹⁴

To the extent that the jury's verdict is in any way ambiguous or inscrutable in relation to the factual basis for that finding, it is now the task of this Court to find the facts relevant to the sentence consistent with the jury's verdict. The primary issues on sentencing for the offence relate to your subjective state of mind about EM's lack of consent to having sexual intercourse with you.

At trial, you admitted that sexual intercourse took place between yourself and EM, who was a woman you met on a dating app, and that you were with her after your second date at the time of the intercourse. You did not give evidence, but your case was that the sex was

214 AB 177-178.

consensual and EM gave you every indication during your encounter that she was consenting to the sex.

EM's evidence was, essentially, that she had made clear to you via text communications in the lead-up to, and on the previous day, that sex before marriage or living together was non-negotiable for her. She said she accompanied you to your hotel room after your date. You kissed her and she kissed you back, and you embraced her and she embraced you back. You tried to pull up her shirt, and she pulled it back down. She then asked you to walk her back to her car, and you said, "No, let's keep going." She said that she wanted to go back to her car, and you began to intensify your actions, kissing her neck, pushing your hips towards hers and pulling up her shirt. You put her hand into your pants and told her to fiddle with you. Her hand was in your pants and around your penis, and you were thrusting your hips against her hand. At that point, she felt that she could not leave because you were holding her in a bear-hug, you were between her and the door, and she felt scared. You then pulled her shorts and underpants down, guided her to the corner of the bed with your hand on her shoulder, put your hands under her thighs, and pushed her up the bed. You undressed and then you put your penis into her vagina. At some point, you asked if she wanted you to give her oral sex, and she shook her head. You continued having sex with her. She said she wanted to go home, and you said, "No, babe. Just let me finish." She said, "No. I want to go home," and you continued having sex with her until you ejaculated. She said that she felt scared and unsafe and that she could not get up off the bed and leave during the sex, as you were physically between her and the door and she was naked from the waist down. When you got up to go to the bathroom, she got dressed, grabbed her things and left. You subsequently sent text messages, asking where she had gone and you tried to call her. She responded with text messages, saying you knew she did not want to have sex with you, so why did you force yourself on her and that she said no multiple times, but you continued. You responded with a text message, saying you were sorry, "but we were already there and I just had to finish." When you were arrested the next day, you told Police that in the middle of intercourse, she wanted to go to her car, and you just thought you had to finish before you could go, and that was what you said to her. So from your point of view, the sex was consensual. I find that the offending proceeded in accordance with EM's evidence, as I have just described.

...

As to the issue of your subjective state of mind, I find on the evidence given by EM [the complainant] that you were reckless as to whether she was consenting, because either you were aware of a substantial risk that she was not consenting and unjustifiably took that risk or you did not turn your mind to whether she was consenting or not.

Her requests before and during the intercourse that she wanted to go to her car, in addition to the text messages from the day before made apparent the risk she was not consenting. Your text messages to her immediately after she left and your statements to police indicate that you were aware of those requests but dismissed them because the sex had commenced and you wanted to finish.

Despite the submissions made by the Crown to this effect, I am not satisfied beyond reasonable doubt that you were subjectively aware that EM was not consenting to the sex. Such a finding is inconsistent with the texts you sent her immediately after the offending, which indicated you did not know why she left the hotel room and your perception, repeated to police, that as far as you were concerned, she had been consenting.

Given her ostensible participation in the sexual activity and the lack of any overt clear protestations, either verbally or physically, I consider that your state of mind did not rise as high as that of actual knowledge of a lack of consent.

Standard to be applied in appeal against factual finding

[100] In Ground 1, the appellant challenges the learned sentencing judge's factual finding that the respondent was reckless to the complainant's lack of consent. That raises the question of what standard of review is to be applied where factual findings made on sentence are challenged on appeal. I agree with and adopt the reasons given by Grant CJ, Southwood J and Riley AJ in relation to that issue. The test for appellate review of a factual finding in a sentencing appeal is whether the finding was 'reasonably open'. That test has application both to findings of primary fact and to inferences drawn from findings of primary fact. That formulation does not provide any broad scope for challenging factual findings in sentencing proceedings. It requires the appellant to show that no other conclusion was reasonably open, and it is necessary for the appellate court to be satisfied that the sentencing court's

factual finding is inconsistent with established facts, glaringly improbable or contrary to compelling evidence.

Ground 1 - principles

[101] It was the task of the sentencing judge to determine the facts for sentencing in accordance with “the ... principle that a sentencing judge may form his or her own view of the facts so long as it does not conflict with the jury’s verdict.”²¹⁵ When fact-finding, it is well-established that findings of fact made against an offender by a sentencing judge must be arrived at beyond reasonable doubt.²¹⁶ There is no general requirement that an accused must be sentenced on the most favourable basis.²¹⁷ The respondent contended that if the learned sentencing judge was unable to find beyond reasonable doubt that the respondent had actual knowledge of the complainant’s non-consent, then the learned sentencing judge was obliged to sentence him on the basis that he was reckless, that being the only finding available consistent with the jury’s verdict.²¹⁸ However, if the prosecution fails to prove a fact or circumstance adverse to an offender (in this case actual knowledge of lack of consent) beyond reasonable doubt, but the sentencing judge is not satisfied on the balance of probabilities of the alternative version more favourable to the offender (in this case recklessness as to lack of consent), the judge is not bound to sentence the offender on the basis which is more

215 *Cheung v The Queen* (2001) 209 CLR 1 at [12] quoting *R v Savvas* (1995) 183 CLR 1 at [8].

216 *R v Olbrich* (1999) 199 CLR 270 at [27].

217 *Cheung v The Queen* (2001) 209 CLR 1 at [14].

218 *Ibid* at [9].

favourable to the offender; the judge may sentence on the basis that neither of the competing possibilities is known.²¹⁹

[102] Here that issue does not arise. The sentencing judge could not be satisfied beyond reasonable doubt that the respondent had actual knowledge of lack of consent and did make a positive finding that the respondent was reckless as to lack of consent, giving reasons for that finding.

[103] In assessing the evidence on which the sentencing judge based her finding, this Court must observe its natural limitations and make allowances for the advantages of the trial judge. Unlike the trial judge, ‘a court of appeal does not usually have the opportunity to assess the worth of a witness’s evidence by seeing and hearing that evidence given’.²²⁰

[104] Further, the trial judge has the advantage, ‘subtle but real’, in ‘being able to assess and place all the evidence in its context as it unfolded and as witnesses (truthful, reliable, or not) dealt with it’.²²¹ The explanation of the nature of this advantage was stated by Kirby J in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)*,²²² as follows:

The true advantages in fact-finding which the trial judge enjoys include the fact that the judge hears the evidence in its entirety whereas the appellate court is typically taken to selected passages, chosen by the parties so as to advance their respective arguments. The trial judge hears and sees all of the evidence. The evidence is generally presented

219 *Filippou v The Queen* (2015) 256 CLR 47; [2015] HCA 29 at [64].

220 *Whitehorn v The Queen* [1983] HCA 42; (1983) 152 CLR 657 at 687 (Dawson J).

221 *Frigger v Trenfield (No 3)* [2023] FCAFC 49 at [136].

222 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at [90].

in a reasonably logical context. It unfolds, usually with a measure of chronological order, as it is given in testimony or tendered in documentary or electronic form. During the trial and adjournments, the judge has the opportunity to reflect on the evidence and to weigh particular elements against the rest of the evidence while the latter is still fresh in mind. A busy appellate court may not have the time or opportunity to read the entire transcript and all of the exhibits. As it seems to me, these are the real reasons for caution on the part of an appellate court where it inclines to conclusions on factual matters different from those reached by the trial judge. ...

Ground 1 – sentencing judge ought to have found actual knowledge of lack of consent: appellant’s contentions

[105] The appellant submitted that the only reasonable finding was that the respondent knew that the complainant was not consenting and that the finding by the sentencing judge that the sexual intercourse occurred essentially as given in evidence by the complainant was not consistent with the finding of recklessness. In support of this submission, the appellant placed heavy reliance on the text messages sent to the respondent by the complainant before the evening in question which, the appellant contended, made it clear to the respondent that the complainant was religious and a member of the Baptist Church; that the complainant wanted to take things slowly; that the complainant believed in the principle of no sex before marriage; that the complainant did not want to have sex on their second date, that being a “non-negotiable” for her; and that the complainant made plain that if that is what the respondent wanted, perhaps they were not suited for one another. Further, the text exchange made plain that the complainant had agreed to only go as far as kissing when they attended his hotel room following their date. The appellant contended that the respondent’s text

messages, by contrast, demonstrated that the respondent wanted to have sex with the complainant, and that he was willing to continue to push the boundaries in attempting to procure sex from her.

[106] Against that background, the appellant relied on the following facts which the appellant contended were established by the evidence.

- (a) While the complainant and respondent were consensually kissing, as had been agreed to prior to the date as the furthest the complainant was willing to go, the respondent tried to pull up the complainant's shirt.
- (b) The complainant made it clear that she did not want him to do so. She stopped the respondent from pulling her shirt up, pulled it back down, and asked him to walk her back to her car.
- (c) The respondent, having heard her request by which she wished to end the proceedings, said, "No, let's keep going."
- (d) The complainant told the respondent twice, "No, I don't want this, let's go, walk me to the car."
- (e) The respondent ignored her and intensified his actions, kissing her neck, pushing his hips towards hers, pulling her shirt up (which she had already once stopped him from doing), placing her hand into his pants and thrusting his penis against it. The complainant froze in a state of fear.

- (f) The respondent then attempted to pull the complainant's shorts down, but she pulled them back up a couple of times. However, the respondent nonetheless proceeded to remove her pants.
- (g) He physically guided her to the bed, took his clothes off, and had penile-vaginal intercourse with the complainant.
- (h) When the respondent tried to kiss the complainant, she had her mouth closed.
- (i) When the respondent asked the complainant if she wanted him to go down on her, the complainant shook her head and said, "No, I wanna go home."
- (j) The respondent, having clearly heard and understood that sentiment, said, "No babe, just let me finish."
- (k) The complainant again repeated, "No I wanna go home."
- (l) The respondent nonetheless proceeded to penetrate the complainant until he ejaculated.
- (m) Following the offending, the complainant sent the respondent a message saying, "I said no multiple times and yet you continued. Why??" in response to which the respondent admitted to having done so: "Am sorry but we were already there and I had to just finish." The following day, the respondent sent a further message saying, "Am sorry for what happened, will never happen again."

Ground 1 – respondent’s contentions

[107] The respondent submitted that there was ample evidence to support the finding that there was reasonable doubt as to whether the respondent had actual knowledge of whether the complainant was consenting to intercourse and contended that, at the very least, it was open for the sentencing judge to have entertained a reasonable doubt as to the respondent’s subjective state of mind. The respondent points to the following aspects of the evidence.

- (a) At a very early stage in their relationship, the respondent had communicated that he was interested in having a sexual relationship. The day before intercourse, the complainant indicated that she did not wish to have sex before she lived with the respondent. However, even after that indication, the respondent continued to text about the possibility of having intercourse, indicating that, ‘if we have sex, we will control’ and ‘if it happens, let it be’²²³ and a desire to “bend the rules”²²⁴. During those exchanges the complainant admitted that she had “done it before”.²²⁵ Plainly, the respondent thought that consensual intercourse was a real possibility on the night of 9 November.
- (b) The complainant attended the respondent’s hotel room with an awareness that the respondent was interested in a sexual relationship.

223 AB 277.

224 AB 278 and 279.

225 AB 279.

There was acknowledgment by the complainant²²⁶ and the Crown²²⁷ that this action provided the appearance of a willingness to engage in sexual activity.

- (c) The complainant initially consensually engaged in kissing the respondent which continued when the respondent progressed the intimacy further. Both at the time that he was attempting to lift up her shirt²²⁸ and whilst she had her hands in his pants,²²⁹ she was kissing the respondent back.
- (d) Following discussions about returning to the car, the respondent sought to progress the sexual intimacy by placing her hand into his pants. The complainant did not say anything or take any overt action to indicate that she did not want to progress the intimacy in that manner (by, for example, removing her hand from his pants), despite the fact that, on the complainant's own evidence, such action was open to her.²³⁰ The complainant continued to kiss the respondent at this time. That lack of protestation and continued participation is consistent with the respondent's state of mind being one which was reckless, as opposed to having knowledge of the lack of consent.

226 AB 343.9-344.1.

227 Oral submissions at AB 159.7; Crown Submissions on Sentence [45] AB 388.

228 AB 331.2.

229 AB 373.7.

230 AB 366.

- (e) While the complainant ‘sort of’ twice pulled her shorts back up,²³¹ the respondent ultimately took off the complainant’s shorts and underwear, and the complainant did not verbally object.²³² The complainant then sat down on the respondent’s bed prior to intercourse occurring.²³³ The act of voluntarily sitting on the bed was again consistent with the respondent’s state of mind being reckless, as opposed to having actual knowledge.
- (f) During the initial period of intercourse, the complainant did not verbally or physically protest or otherwise signal her lack of consent. During intercourse, the respondent paused and asked the complainant if she wanted him to ‘go down’ on her, to which she indicated that she did not, but did not verbalise her lack of consent to the penile/vaginal intercourse continuing, and the intercourse otherwise continued in the same position. That lack of protestation where other communication was made is again consistent with a mindset of recklessness as opposed to actual knowledge.
- (g) Relatedly, the act of asking the complainant about whether she desired oral sex was consistent with a person whose state of mind was reckless, as opposed to knowing of her non-consent. It would be unusual for a person, aware of their sexual partner’s non-consent, to ask their partner what they desired in a sexual experience. It is also consistent with the

231 AB 366.

232 AB 332.

233 AB 366.

respondent's text messaging when she confronted him after leaving the hotel, "I am sorry if I didn't make u enjoy. We can be better next time."²³⁴

- (h) During a pause in intercourse, the complainant either sat up or stood up and indicated that she wanted to return to her car. The respondent stated he wished to 'finish'. The complainant returned to lying on the bed and intercourse continued without further physical or verbal protestation. That action of returning to lie on the bed is again consistent with the respondent's state of mind being reckless, rather than knowledgeable, as to the issue of consent.
- (i) The complainant's comments to the respondent — that she wanted to go to the car and wanted to go home — can fairly be described, from the respondent's perspective, as equivocal as to her consent to intercourse. Those statements are not an express rejection or denial of intercourse. That is especially so when allowance is made for the likely 'understated' nature of her expression.²³⁵ In those circumstances, it was reasonable to conclude that 'those requests were not expressed in ways that might indicate to him, without any doubt or any reasonable doubt ... that she was not consenting'.²³⁶

234 AB 290.

235 AB 157.

236 AB 154.

- (j) After each of the requests to go home or to go to the car, the complainant either engaged in, or at least did not physically or verbally protest, further sexual activity.
- (k) Immediately after intercourse, the respondent messaged the complainant expressing confusion as to why she had left the hotel. The complainant indicated that she was ‘angry’ with the respondent, and the respondent stated that he did not know why she was angry with him. He maintained that they had ‘just started a good relationship’. Those are all comments indicative of a person who did not have knowledge of the complainant’s non-consent. His apology of, “I am sorry if I didn’t make u enjoy. We can be better next time,”²³⁷ rather, indicates that even at that time he misunderstood that she was unhappy because she did not enjoy the sexual intercourse (rather than not consenting to it).
- (l) In comments to police (which the sentencing judge appeared to accept as the respondent’s honest account), the respondent indicated that he did not have knowledge about the complainant’s lack of consent: ‘from my point of view, I don’t see this being against their will’.²³⁸ From those interactions with police, it is clear that:
- (i) the respondent’s account was spontaneous, unrehearsed, and made before he had spoken to a lawyer; and

237 AB 290.

238 AB 319.

- (ii) the respondent gave an account that was generally accurate and reliable, in that he identified that: (1) he and the complainant had been talking for a bit; (2) they agreed to go to a hotel; (3) they had discussed ‘intimacy’ via text, and then at the hotel; (4) they were consensually kissing; (5) the complainant had indicated during the ‘middle of intercourse’ that ‘she wanted to like get to the car’; and (6) he said, at that point, I have to finish before we can go, and in those circumstances he did not ‘see this being against their will’, and wanted the authorities to ‘have a look at it’.

Ground 1 - consideration

[108] I agree with the respondent’s submission that there was ample evidence for the sentencing judge’s conclusion that she was ‘not satisfied beyond reasonable doubt that [the respondent] was subjectively aware that [the complainant] was not consenting to sex,’ and that the respondent was reckless as to lack of consent either because he was aware of a substantial risk that she was not consenting and unjustifiably took that risk or he did not turn his mind to whether she was consenting or not. That finding was made after the sentencing judge had presided over the respondent’s trial, had assessed the relevant witness’ demeanour and evidence, and had carefully considered the totality of that evidence for the purposes of determining the factual basis relevant for sentencing. That consideration included the following matters.

- (a) The sentencing judge clearly accepted that both the text messages sent immediately after the complainant left the hotel room and the respondent's statements to police, that were made spontaneously and without receiving legal advice, reflected the honestly held beliefs of the respondent at the time they were made. The text messages expressed puzzlement as to why the complainant had left and, later, why she was angry, and also expressed the view that the trouble might have been that the complainant did not enjoy the sexual experience, promising it would be better next time. In the respondent's statements to police, he expressed the view that the complainant was consenting. Having accepted these as the respondent's honest beliefs, her Honour was correct in holding that both the text messages and the statements to police were inconsistent with the respondent having actual knowledge of lack of consent.
- (b) The evidence also supports the sentencing judge's finding that there had been ostensible participation in the sexual activity on the part of the complainant; that there had been a lack of any overt and clear protestations, either verbally or physically, on the part of the complainant; and that this supported the conclusion that the respondent's state of mind did not rise as high as actual knowledge of lack of consent. That lack of overt and clear protest included the following matters.

- (i) Although the complainant pulled her shirt down “a couple of times” when the respondent tried to lift it, and “sort of” twice pulled her shorts back up, she did not offer any verbal or physical resistance when he actually undressed her.
- (ii) When the respondent placed the complainant’s hand in his shorts, she did not withdraw it or pull away or protest. Her hand was around his penis and she continued kissing him.
- (iii) After the respondent undressed her, the complainant sat on the respondent’s bed before intercourse occurred.
- (iv) During intercourse, the complainant either sat or stood up and said she wanted to go to her car, but when the respondent said he wanted to “finish” she did not protest further and lay back on the bed where intercourse continued.

[109] These matters all support the sentencing judge’s conclusion that the respondent was reckless as to the lack of consent rather than having actual knowledge as to the lack of consent. Ground 1 must be dismissed.

Ground 2 – using absence of aggravating features as mitigating features: appellant’s contentions

[110] In sentencing the respondent, the sentencing judge said:²³⁹

I note that you did not use any excessive physical force or threats against the victim. She did not suffer any physical injury from your actions, nor pregnancy, nor STD. Further, the intercourse was not

239 AB 180.

prolonged and the victim was not terrorised. There was no use of a weapon or threats of violence, as I have said. I consider this offending to be at the lower end of seriousness for this kind of offending.

[111] In ground 2, the appellant contended that the sentencing judge erred in this part of the sentencing remarks by assessing the objective seriousness of the offence by reference to the absence of aggravating features that, if present, would have made the offending more serious.

[112] The appellant relied on the decisions of this Court in *R v Benning*,²⁴⁰ *R v Kahu-Leedie*²⁴¹ and *R v EG*,²⁴² as well as numerous intermediate appellate court decisions in other jurisdictions, in particular, New South Wales, for the proposition that it is erroneous to take into account the absence of aggravating features in determining the objective seriousness of an offence.

[113] *Kahu-Leedie* was a Crown appeal against a sentence for two counts of sexual intercourse without consent which the Court of Criminal Appeal ultimately found to be manifestly inadequate. The respondent contended²⁴³ that the objective seriousness of the offending was qualified by nine factors:

- (a) The assault was not prolonged and was characterised by the sentencing judge as “moderate” in length. It was not committed in the context of

²⁴⁰ [2022] NTCCA 15 (“*Benning*”)

²⁴¹ [2022] NTCCA 4 (“*Kahu-Leedie*”)

²⁴² [2022] NTCCA 10

²⁴³ *Kahu-Leedie* at [33]

continuing emotional/physical abuse over an extended period of time (as in *Lo Castro v The Queen*).²⁴⁴

- (b) The initial trip to the remote location where the crime was committed was equally consistent with a desire to have consensual sexual intercourse.
- (c) The offences were not committed in the course of an abduction.
- (d) There was no use of a weapon.
- (e) There was no gratuitous violence employed above that involved in the sexual intercourse.
- (f) There was no evidence of planning in relation to the offences, albeit that the sentencing judge found an element of planning in “luring” the victim into the truck and driving to the remote locations.
- (g) The respondent was heavily intoxicated at the time of the offending.
- (h) The respondent was not in a position of trust to the victim.
- (i) The respondent did not engage in any emotional manipulation of the victim or threats to her to avoid detection.

[114] The Court of Criminal Appeal²⁴⁵ said of this submission:

These features can best be characterised as the absence of further aggravating features of the offending, and the absence of an aggravating feature is not a mitigating feature. We agree with the appellant’s submission that the absence of other extremely serious

²⁴⁴ [2011] NTCCA 1 (“*Lo Castro*”)

²⁴⁵ *Kahu-Leedie* at [34] and [37] per Kelly, Blokland and Brownhill JJ.

factors, such as detaining the victim or threatening to kill her (which may themselves have amounted to separate offences), do not mitigate the seriousness of the subject offending. Not every horrific factor or combination of factors imaginable must be present for the offending to be regarded as extremely serious and in the high or very high range of seriousness for this kind of offending.

...

The objective seriousness of the offending must be assessed in each case considering all of the circumstances. Here, the seriousness of the injuries, the degree of force that must have been necessary to inflict those injuries in what can only be described as a brutal attack, the callous treatment of the victim by the respondent both during and after the attack, and the fact that there were four acts of sexual intercourse without consent make this offending extremely serious.

[115] In *Benning*, Southwood J said:²⁴⁶

In addition, the Crown submitted that the sentencing Judge relied on a number of matters in mitigation that her Honour could not rely on in such a way. During her sentencing remarks, the sentencing Judge stated:

In mitigation, you were holding the scissors, but did not use them as a weapon or inflict harm on the victim. The sexual offending did not involve ejaculation into or on the victim, and the sexual offending was impulsive and unsophisticated. It did not involve any significant planning on the respondent's part. I also note that the physical harm suffered by the victim was not life threatening and that the property stolen had a value of \$70.

As the Court noted in *The Queen v Kahu-Leedie*,²⁴⁷ the absence of an aggravating feature is not a mitigating feature. Further, not every horrific factor or combination of factors must be present for offending to fall into a high range of seriousness.

[116] In the same case, Kelly and Barr JJ said:²⁴⁸

The learned sentencing judge relied on a number of matters in mitigation of the offending, such as that the respondent did not use the scissors to inflict harm on the victim and further that he did not use them as a weapon, and that the physical harm was not life-threatening.

²⁴⁶ *Benning* at [46].

²⁴⁷ *Kahu-Leedie* at [34].

²⁴⁸ *Benning* at [124].

As this Court found in *The Queen v Kahu-Leedie*, the absence of an aggravating feature is not a mitigating feature.

[117] However, although all three judges in *Benning* found that the sentencing judge had underestimated the objective seriousness of the offending, it was not as a result of treating the absence of an aggravating feature as a mitigating feature, but rather that the sentencing judge had underestimated the objective seriousness of a number of the offences and erred in not ordering sufficient cumulation of the sentences for a number of the offences.

Ground 2 – respondent’s contentions

[118] The respondent acknowledged that the absence of an aggravating feature is not a mitigating feature, and that the objective seriousness of offending must be assessed by reference to the offending before the Court “rather than by conjecture about factors that may have made the offences more objectively serious:²⁴⁹ that is to say that a sentencing court would fall into error if it used the mere absence of an aggravating feature to mitigate, or reduce, the sentence.”

[119] However, the respondent contended that this is not what the sentencing judge did and that mere reference to the absence of an aggravating feature will not constitute an error of this kind. The sentencing judge did not use the absence of any aggravating feature to mitigate or reduce the sentence. Rather, her Honour made reference to the absence of aggravating features

249 *R v Kilic* (2016) 259 CLR 256

“noting” their absence in order to place the offending in context on a scale of objective seriousness.

Ground 2 - consideration

[120] I agree with the respondent’s submission that this is a permissible form of reasoning in sentencing, and one that is routinely engaged in by sentencing judges in order to assess the objective seriousness of offences by placing them on a scale of seriousness. Such reasoning has also been engaged in by this Court in assessing the objective seriousness of offences for the purposes of an appeal.

[121] In *R v Nabegeyo*,²⁵⁰ the Court,²⁵¹ after listing a number of aggravating factors, stated (at [14]-[15]):

The objective seriousness of the offending is qualified by the following factors. The offending was spontaneous and unplanned. The offending did not involve gratuitous violence beyond the non-consensual sexual intercourse itself. The victim did not suffer further harm or physical pain. The offending was not prolonged or repeated and was not committed in company.

[122] Similarly, in *Forrest v The Queen*²⁵² the Court said:

The objective gravity of the offending is qualified by the following factors. Although involving three acts of sexual intercourse, the overall offending episode was moderate in length. The sentencing judge concluded as much. In addition, the levels of attendant violence did not result in serious or significant harm to the victim; nor were weapons used; nor was there extended deprivation of liberty; and nor was the offending committed in company.

250 (2014) 34 NTLR 154; [2014] NTCCA 4 (“*Nabegeyo*”)

251 *Nabegeyo* at [14]-[15] per Southwood, Barr and Hiley JJ

252 [2017] NTCCA 5 at [68] per Grant CJ, Blokland and Barr JJ

[123] As the respondent contended in written submissions, such an approach is entirely orthodox. Ground 2 must be dismissed.

Ground 3 – manifest inadequacy principles

[124] The principles to be applied to Crown appeals against sentence alleging manifest inadequacy are well settled. They were recently set out by this Court (Grant CJ, Brownhill and Burns JJ) in *R v Mamarika*²⁵³ and need not be repeated here.

Sentencing judge’s consideration

[125] The sentencing judge assessed the objective seriousness of the offending at the lower end of seriousness for this kind of offending, accepted that the respondent was a man of prior good character, that he had a good work history and good prospects of future employment and that he had abided by his bail conditions since 22 December 2023, and, given all those matters, that he had excellent prospects of rehabilitation.

[126] Her Honour referred to comparative sentences provided by defence counsel in which sentences for more serious offences of sexual intercourse without consent had ranged from four years and 10 months to eight years and six months and said:

The only matter that involved a situation even remotely similar to this was the matter of *The Queen v Phalaphon* in which I sentenced the offender to 4 years suspended after the offender served 2 years imprisonment. That case involved sexual intercourse without consent by a man against a female friend who was too drunk to consent. A

253 [2024] NTCCA 5 at [6]

significant part of the seriousness was the breach of trust between him and the complainant. Here, I accept the Crown's submission that there was also a breach of trust, in that you and the victim had developed a prior relationship via online communications, in which you told her you were interested in a long term relationship with her and you were prepared to wait for sex and only go as far as she was comfortable. She believed you and trusted you, such that she went into your hotel room and engaged in intimacy with you, kissing and hugging you. You then breached that trust by taking things much further than she intended or wished to go and beyond what she was willing to consent to.

Comparative sentences referred to in defence submissions

[127] The sentencing judge was referred to a table of comparative sentences by defence counsel during sentencing submissions. With the exception of *R v Gordon* (SCC 22139047), which was a momentary penetration of the victim's mouth by the offender's penis while the victim was asleep for which the offender was sentenced to imprisonment for 18 months suspended forthwith after serving 11 months, all of the comparatives involved more serious offending than the instant offending. The starting point for the sentences (assuming a 20% reduction for guilty pleas where not specified) ranged from 23 months (*R v Gordon*) to eight years six months in *R v Strathdee* (SCC 22234760), a not guilty plea in which the offender drove the intoxicated victim to a park after offering her a lift, raped her with some force and left her there in the middle of the night. Most had a starting point of around six years. In *R v Rogers* (SCC 22100032) Grant CJ noted that since 2007 the average head sentence imposed for offences against subs 192(3) involving an adult offender and an adult victim after excluding the most serious and heinous of cases has been about six and a half years.

[128] In *R v Wilson* (SCC 22218837), the offender and victim were known to each other, having had a prior relationship in their teens. They had been drinking together and went to a friend's house to sleep. The victim was lying on her side. The offender lay behind her, pulled her pants down and penetrated her vagina with his penis from behind. She told him to stop. He took hold of her hands, and held them tightly, then punched her in the head and pressed a hand against her throat, causing her difficulty in breathing and threatened to hit her again if she did not comply. He continued to have sexual intercourse with her for approximately 15 further minutes until he ejaculated inside her vagina. The victim was in pain and had a number of injuries to her face. Burns J assessed the offending as upper mid-range of seriousness and sentenced the offender to imprisonment for four years and 10 months after a 20% reduction for a guilty plea (from a starting point of six years).

[129] In *R v Phalaphon* (SCC22130963), which the sentencing judge rightly referred to as the most comparable to the present offending, the offender had pleaded not guilty. The heavily intoxicated victim woke up to find the offender lying next to her with his finger or fingers in her vagina. The offender then climbed on top of her, moved her legs out and put his penis inside her vagina. The victim was frozen and did not do anything except move her face away from the offender's attempts to kiss her until he got the message and got off. She then asked where her phone was and immediately left the apartment, distressed and upset. The offender was sentenced to imprisonment for 4 years suspended after 1 year and 6 months.

Ground 3 – appellant’s contentions

[130] The appellant’s submissions on this ground are largely predicated on the correctness of the appellant’s rejected submissions on ground 1 that the sentencing judge ought to have found that the respondent had actual knowledge of lack of consent.

[131] The appellant contended that the offending was objectively serious and fell beyond the “lower-end”, and made the following submissions in support of that contention.

- (a) The victim was a member of the Baptist Church and believed in the notion of no sex before marriage. To sexually assault the victim in those circumstances aggravated the offending.
- (b) The respondent was clearly motivated to have sex with the victim. Despite the victim’s clear text messages about her beliefs and boundaries, the respondent continued to suggest having sex.
- (c) As asserted by Ground 1, the respondent knew that the victim did not consent and completely disregarded her wishes for his own sexual gratification. However, if the Court is against the appellant in that regard, the appellant submitted that the level of recklessness was of such high order as to be tantamount to knowledge in any event. The victim had made it very clear that she did not consent to having sexual intercourse both via text in advance of the date, and at the hotel room, by her verbal statements and physical actions. That included stopping

the respondent from lifting her shirt up, asking to be walked back to the car, telling the respondent “no” and that she wanted to leave, pulling her shorts back up when he attempted to pull them down, keeping her mouth closed as the respondent tried to kiss her and saying “no” during intercourse and that she wanted to leave. The respondent was physically persistent and not dissuaded by the victim’s rejection of what was happening, saying “no babe just let me finish”.

- (d) The victim was fearful throughout the offending and felt trapped.
- (e) The offending was prolonged and, on the victim’s estimate, in the realm of 20 minutes.
- (f) The respondent did not use a condom and partially ejaculated inside the victim’s vagina, exposing her to the risk of a sexually transmitted disease and possible pregnancy.
- (g) The offending involved a breach of trust. The victim had developed a prior relationship with the respondent via text message, in which he told her that he was interested in a long-term relationship with her and that he was prepared to wait for sex and only go as far as she was comfortable. The victim believed and trusted the respondent, such that she went to his hotel room and engaged in intimacy with him, to the extent of kissing. In breach of that trust, the respondent sexually assaulted the victim.

- (h) As a result of the offending, the victim had difficulty sleeping for months following, with some improvement at the time of sentence. She avoids her emotions concerning the offending, making her feel disconnected. When meeting new people, she is more guarded than previously and has difficulty trusting others. She feels like her life is separated into periods “before” and “after” the offending, and that she has lost time and the capacity to form significant connections with others.

Ground 3 - consideration

[132] The appellant’s submissions concerning the objective seriousness of the offending cannot be accepted for the following reasons.

- (a) The fact that the victim was a member of the Baptist church and believed in the notion of no sex before marriage does not aggravate the offending. That is tantamount to saying that it is less serious to sexually assault a woman who is not a Baptist (or does not adhere to any religion) and has different views about sexual relations outside marriage. Such a contention is clearly and obviously erroneous.
- (b) That the respondent was clearly motivated to have sex with the victim and that he continued to suggest having sex despite the victim’s text messages about her beliefs and boundaries is not relevant to an assessment of the seriousness of the offending. It is not an offence to suggest having sex or even to try to persuade someone to have sex. The

criminal misconduct consists in having sexual intercourse with a person without their consent.

- (c) For the reasons already given in the consideration of ground 1, I do not accept the appellant's submission that the respondent knew that the victim did not consent for the reasons set out above. Nor do I accept that the respondent's level of recklessness was of such high order as to be tantamount to knowledge. It is open to infer from the respondent's statements to police, which the sentencing judge accepted were honestly made, that the respondent's recklessness as to lack of consent began after intercourse had already commenced. This is also consistent with the respondent's text message to the complainant afterwards when she asked why he continued when she said no. Although the sentencing judge did not make an explicit finding to this effect, such a view is consistent with her Honour's reference to the complainant's "ostensible participation in the sexual activity and the lack of any overt clear protestations either verbally or physically" and her Honour's assessment of the offending as at the lower end of seriousness for this kind of offending. It is also consistent with the following passage in the sentencing remarks:

"Her requests before and during the intercourse that she wanted to go to her car in addition to the text messages from the day before made apparent the risk that she was not consenting. Your text messages to her immediately after she left and your statements to

Police indicate that you were aware if those requests but dismissed them because the sex had commenced and you wanted to finish.”²⁵⁴

(d) The sentencing judge was aware of and appropriately took into account the effect of the offending on the victim and accepted the submission by the Crown that the offending involved a breach of trust.

[133] The sentencing judge was not in error in assessing the objective seriousness of the offending as towards the lower end.

[134] The sentencing judge also took into account the respondent’s previous good character, good work history and prospects of employment and assessed the respondent’s prospects of rehabilitation as excellent. In my view, while the sentence imposed may be considered lenient, it is not clearly and obviously inadequate, unreasonable or plainly unjust.

[135] The sentence is not manifestly inadequate. Ground 3 must be dismissed.

HUNTINGFORD J:

[136] I agree with and adopt the reasons given by Grant CJ, Southwood J and Riley AJ in relation to standard of review which is to be applied where factual findings made on sentence are challenged on appeal and their conclusions in relation to grounds 1 and 2 of the appeal. However, for the reasons given by Kelly J, I do not consider that the sentence imposed was manifestly inadequate and the appeal should be dismissed on that basis.

²⁵⁴ This passage of the sentencing remarks is perhaps best construed as saying that the earlier emails gave notice of the possibility of a risk that the complainant may not consent, but that the respondent became aware that there was a substantial risk that she was not consenting after intercourse had commenced.