JF v The Queen [2017] NTCCA 1

PARTIES:	JF
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	21438286
DELIVERED:	8 March 2017
HEARING DATES:	30 May 2016
JUDGMENT OF:	SOUTHWOOD ACJ, BLOKLAND and HILEY JJ
APPEAL FROM:	RILEY CJ

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – manifest excess – head sentence appropriate given objective seriousness of offending – non-parole period to be determined in all of the circumstances of the offender and offending – offender's youth, need for treatment and limited criminal history meant non-parole period was manifestly excessive – appeal allowed in part

CRIMINAL LAW – Appeal against sentence – failure to properly apply the principle of totality – no error shown – ground of appeal dismissed

Criminal Code (NT) s 125B(i), s 125E, s 192(3)

Bugmy v The Queen (1990) 169 CLR 525; *Carroll v The Queen* [2011] NTCCA 6; (2011) 29 NTLR 106; *Emitja v The Queen* [2016] NTCCA 4; *Green v The Queen* (2006) 19 NTLR 1; *Hogan v Hinch* (2011) 243 CLR 506;

Inkemala v The Queen [2005] NTCCA 6; *Melpi v The Queen* [2009] NTCCA 13; *Namarnyilk v The Queen* [2013] NTCCA 17; (2013) 236 A Crim R 368; *Noakes v The Queen* [2015] NTCCA 7; *Power v The Queen* (1974) 131 CLR 623; *R v Evans* [2013] NTCCA 9; *R v Goodwin* [2003] NTCCA 9; *R v Inkamala* [2006] NTCCA 11; *R v Moyle* (1996) 186 LSJS 462; *R v JO* (2009) 24 NTLR 129; *R v Oliver* [2003] 1 C App R 28; *R v Riley* (2006) 161 A Crim R 414; *R v Rindjarra* (2008) 191 A Crim 171; *R v Talbot* [2003] NTCCA 13; *R v Tennyson* [2013] NTCCA 2; *The Queen v Shrestha* (1991) 173 CLR 48; *Whitehurst v The Queen* [2011] NTCCA 11, referred to

Arie Frieberg, *Fox and Frieberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014)

REPRESENTATION:

Counsel:

Appellant:	I Read SC
Respondent:	M Nathan SC

Solicitors:

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

Judgment category classification:	C
Number of pages:	36

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

JF v The Queen [2017] NTCCA 1
No. 21438286

BETWEEN:

JF
Appellant

AND:

THE QUEEN
Respondent

CORAM: SOUTHWOOD ACJ, BLOKLAND and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 8 March 2017)

THE COURT:

Introduction

[1] This is an appeal against a sentence of 14 years imprisonment with a non-parole period of 10 years imposed by the Supreme Court following pleas of guilty to one count of sexual intercourse without consent, two counts of use a child to produce child abuse material and one count of possession of child abuse material.

[2] The appeal relies on two grounds. First, that both the head sentence and the non-parole period are, in all of the circumstances, manifestly excessive. Second, that the Learned Sentencing Judge failed to properly apply the

principle of totality. There is some overlap in a number of factors relevant to both grounds. For the reasons that follow, we would uphold ground one in part, solely in respect of the length of the non-parole period, but otherwise would dismiss the appeal.

Proceedings before the Supreme Court

(i) The charges

[3] The appellant pleaded guilty on 27 May 2015 to four counts. The first count was that between 7 November 2012 and 13 December 2012 he had sexual intercourse without consent contrary to s 192(3) of the *Criminal Code*. The maximum penalty for an offence against s 192(3) is life imprisonment. He also pleaded guilty to two counts of use a child to produce child abuse material contrary to s 125E of the *Criminal Code*. The dates of offending for those counts were between 7 November 2012 and 31 December 2012 (count 2) and April 2014 (count 3). The maximum penalty for an offence against s 125E is 14 years imprisonment. The fourth and final count he pleaded guilty to was one of possess child abuse material contrary to s 125B(i) of the *Criminal Code* which provides a maximum penalty of 10 years imprisonment. That offence was committed between March and 20 August 2014. The appellant was arrested on 27 August 2014, shortly after a search was conducted by investigating police.

(ii) Facts of the offending

[4] The circumstances of the offending are grave and disturbing. The following is a summary of the admitted facts read and accepted before the Supreme Court.[1]

[5] The appellant was a 26 year old male who resided in Darwin and was employed as a bus driver. The child complainant (HF) is the appellant's three year old nephew.

[6] With respect to count one, sexual intercourse without consent, at some time in November or December 2012 the appellant babysat his three year old nephew, while his parents went out for the evening. The appellant and the child complainant were in the child's bedroom watching a movie together on his bed. The appellant removed the child's clothes and masturbated his penis using his thumb and forefinger. The appellant then placed his mouth over the complainant's penis and sucked it. The appellant then inserted the tip of his penis into the complainant's anus for a short time. He then applied pressure using his finger against the child's anus before inserting his penis into the child's anus again. He then positioned his erect penis between the child's buttocks and masturbated by moving his pelvis back and forth. He withdrew his penis and took a close-up video of the complainant's anus.

[7] In relation to count two, using a child to produce child abuse material, the appellant recorded the incident referred to in count one using his mobile

[1] AB 17 - 20.

phone. During this video, the appellant referred to the child by name. The appellant transferred the files between his devices. Copies of the files were located on another device belonging to him. He renamed the file "me fucking HF's 3-year-old arse MP4" and "me playing with HF's little 3-year-cock MP4". Records on the appellant's computer demonstrated the images had been shared over the Internet using an online peer file sharing program called GigaTribe.[2]

[8] It was explained in the agreed facts that the appellant used an online alias for the peer to peer file sharing program named "PT lover_88", synonymous with "pre-teen lover", a term often used in online searches for child abuse material.[3]

[9] With respect to count three, the further count of using a child to produce child abuse material, during April 2014 the appellant activated certain desktop screen recording software on his personal computer and accessed the online chat platform "Omegal". That platform matches strangers with similar interests and provides facilities with text chat and web-cam within a private space. The appellant was matched with an unidentified pubescent male who stated he was 17. The appellant activated software to load a video file depicting a pubescent girl, of approximately 14 years of age, sitting on a bed, taking all her clothes off and masturbating in front of a camera. The appellant used the video file to pose as a pubescent female under 18 years

[2] AB 17.
[3] AB 18.

and conducted text chats of a sexual nature with a male. In response to the nature of the chats, the male took off his clothes and masturbated in front of his own web-cam. That act was streamed over the Internet. The appellant recorded and saved the image. Similar processes were attempted on other occasions but production was not successful. During one recording the appellant referred to himself as Sarah and on Skype wrote to another user about his name in order to trick a boy on an online chat platform. That video was located by police on the appellant's hard drive during the search on 20 August 2014.[4]

[10] In relation to count four, possess child abuse material, in March 2014 the appellant was in possession of a collection of child abuse material. He was using an account in GigaTribe and was granted access to an account used by Northern Territory Police to monitor users on GigaTribe. The appellant downloaded two files on two separate dates which were assessed to be category four child abuse material as classified by the *Oliver* scale.[5]

[11] Northern Territory Police executed a search warrant at the offender's residence on 20 August 2014 and seized several data storage devices which were later forensically examined.[6] These devices revealed the presence of child abuse material as well as chat logs that contained references to abusing and harming children and sharing child abuse material. The chat logs detailed the appellant's preference for male children aged 4 to 12 years and

[4] AB 18.
[5] *R v Oliver* [2003] 1 CR App R 28.
[6] AB 19.

his desire to abduct and perform sexual acts upon children, as well as fantasies involving the murder of a young boy. Analysis of the seized devices revealed a total of 7248 child abuse material images and 3211 child abuse material videos.[7]

[12] The classification of those images relevant to count four are as follows:[8] 3059 images and 96 videos in category one, commonly including nudity or erotic posing with no sexual activity;[9] 1745 images and 835 videos in category two, non-penetrative sexual acts by child; 608 images and 257 videos in category three, that covers non-penetrative sexual acts between children and an adult; 1614 images and 1734 videos in category four, that includes penetrative sexual acts involving children or a child and an adult; within category five, which involves sadism, bestiality or torture of children, there were 100 images and 289; videos and within category six, which covers animated child abuse material, there were 122 images.[10]

[13] The images of child abuse material found on the appellant's laptop were of predominantly male children within the age range of 6 months to 14 years. The images include highly disturbing examples of child abuse material.

[14] The videos located also involved predominantly male children. These videos also include disturbing examples of children bound and being sexually penetrated and humiliated, and the attempted penetration of a 6 to 12 months

[7] AB 19.
[8] AB 19.
[9] *R v Oliver* [2003] 1 Cr App R 28.
[10] AB 19.

old female child. Another example showed an adult male forcing his penis into the mouth of an infant, causing distress, with the child choking and beginning to struggle. This video was specifically referred to by the appellant in chat logs that were before the Supreme Court and before this Court.[11]

[15] Another example of the chats referred to in the sentencing proceedings included the appellant requesting child abuse material from a GigaTribe user "crying girl 11". The message read: 'Hey, so the description in your profile says you like crying boys and girls. Any chance you got some child rape vids, especially boys?' On 8 May 2014, the appellant wrote to another online user about the material in his collection stating, 'I have a couple, I have one with a girl that is good for a girl vid and I have one of a man face fucking a baby. The baby gags and cries, it's so hot. I have over 500 pics and over 200 vids'.[12] On 24 April 2014, the appellant wrote a message via Kik about offences he committed against his nephew, saying he has touched, sucked and fucked him. Further, the message stated 'I have 4-month old twin nephews, I'm waiting, for twins is a big fetish of mine'. The complainant, HF, has two twin brothers who were aged 4 months at the time of this message. The appellant then sent a photo of the complainant and newborn twins to the user he was communicating with.

[11] Supplementary Appeal Book.
[12] Supplementary Appeal Book.

[16] Further evidence of production of child abuse material was identified on the appellant's personal computer. An autobiographical Word document, dated 14 August 2014, entitled, 'Forbidden Fruit' was found during the forensic search. The following quote was read in the sentencing proceedings:

> My name is JF. I've been dealing with a darkness inside me for most of my life. t has only been the last few years that I've really come to terms with what I am and started to embrace it. I'm a paedophile. I no longer have any illusions about it, I know what I am and I like it. On Saturday night, I met the most beautiful boy I've ever met. His name is [MM] and he is 10 years old. He's a good friend of [RC], the 11 year old son of a friend of mine. Well, on Saturday, I was hanging out with M and R in the hopes that I could get a little peek at the goods or maybe even cop a feel. But instead, we just sat there, playing with Loom bands and having fun. At one point of the night, RY.

[17] The appellant was arrested on 27 August 2014. He declined to participate in an interview with police after seeking legal advice. Bail was refused and he remained on remand until being sentenced on 16 September 2015. The sentence was ordered to commence on 27 August 2014.

(iii) The victim impact statement

[18] The victim's parents provided a joint victim impact statement[13] expressing their shock, ongoing anger, depression and anxiety as a result of being made aware of what had happened to their child. They told the Court of their social isolation and that they were unable to trust anyone with their sons. They described the impact of the crime as profound, with no end in sight. The victim's parents said they felt their lives had changed forever.

[13] AB 45 - 46; 12 March 2015.

(iv) Prior convictions

[19] The Information for Courts revealed the appellant had no previous offending of this kind.[14] In 2010 he was convicted and fined for minor traffic offences.

[20] In 2013 without conviction, he was placed on a good behaviour bond for 12 months for the offence of assault-threat with firearm/weapon. In the same proceedings he was fined, without conviction for damage to property. In the pre-sentence report ordered by his Honour in these proceedings, the appellant told the author of the report that at the time of the previous offending he was employed as a bus driver with Buslink and had experienced abuse from passengers on a regular basis. He could not control his anger when he received poor customer service. He identified work stress as contributing to the offending.[15] In the forensic psychological assessment ordered by the Supreme Court in these proceedings, the appellant told the psychologist the work stress led to a "break down" around mid-2013 during which he was "angry at everything" and took time off and consulted a psychologist.[16] He explained it was during 10 days leave due to work stress that he committed the offences he was dealt with for in 2013.[17]

[21] The sentencing facts relevant to the 2013 offending were outlined by the Crown in the plea proceedings before his Honour in this matter. The appellant had demanded service upon entering the store, there was an argument, he made threats to damage property and punched two separate

[14] AB 47.
[15] AB 67.
[16] AB 51.
[17] AB 52.

screens causing damage of over $1000.[18] The appellant left the store and the manager came out; there was an inference that the manager recorded or took a photo of the appellant. The appellant obtained a knife and held it over his head in a threatening manner, stepping towards the manager. The manager grabbed the appellant's arm. He dropped the knife and left the scene. It was submitted on behalf of the Crown in these proceedings this demonstrated lack of control and an escalation from a trivial incident to the introduction of a weapon.[19] On behalf of the appellant it was submitted it was not a particularly relevant criminal history.[20]

[22] Prior to the remand and sentence in this matter the appellant had not previously been imprisoned.

The personal circumstances of the appellant

[23] The appellant was 24 - 25 years at the time of the offending and 27 at the time of the plea proceedings. His family circumstances were unfortunate, as outlined in submissions made on his behalf,[21] detailed further in the Forensic Psychological Assessment by the psychologist Ms Crawley[22] and in the Pre-Sentence Report.[23]

[24] The appellant was born in Brisbane, the youngest of four sons. He spent his early life in Brisbane and when he was six he moved with his family to

[18] AB 28.
[19] AB 29.
[20] AB 42.
[21] AB 9 - 13; 39.
[22] AB 48 - 64.
[23] AB 65 - 72.

Marrakai in the Northern Territory. Prior to the move to the Northern Territory the family had also lived in South Australia where the appellant attended school at Berri and other places. He was described as being particularly close to his mother who died when the appellant was in year 12 and was aged 16. He did not complete year 12 for that reason. His father was described as mentally disturbed. There were instances of sexual activity between the appellant and a brother within the overall context of a physically abusive environment created by his father. The appellant was encouraged by his father on one occasion to engage in inappropriate sexual activity,[24] although sexual abuse had not become a normal part of his upbringing.[25] The appellant's father abused drugs and the appellant was later told by his mother that the reason the family left Queensland was because his father was in trouble for selling drugs. His father had admissions to the Cowdy Ward mental health treatment facility within the Royal Darwin Hospital. His mother and the children left his father after one such admission.

[25] Since school the appellant had a varied history of employment including working in retail, in security and insurance, and as a service station attendant. He attempted a university bridging course and sought his taxi licence. He was employed as a bus driver at the time of his arrest.[26]

[24] AB 27; 49.
[25] AB 39.
[26] AB 10 - 11; 51.

(v) Reports before the Court

[26] The Supreme Court ordered a Forensic Psychological Assessment and a Pre-Sentence Report.

The Forensic Psychological Assessment

[27] The Forensic Psychological Assessment (the Assessment) provided further details of the physical abuse the appellant said he and other family members suffered at the hands of his father.[27] The appellant was unsure of the relevant diagnosis but believed his father's admissions to Cowdy Ward were related to drug abuse. The appellant described the separation of his parents and the children from his father as an "escape". The appellant had seen his father only once in 2007 and was no longer in contact with him. Since he was 16 years old and left home, the appellant had not spent more than one year in the same residence.[28]

[28] The appellant attended a number of primary schools, both in the Northern Territory and interstate. He told Ms Crawley he was a good student at primary school but was bullied, as he was for some time at high school. In year 10 he attempted to gain friends by bringing alcohol to school and was suspended.

[29] The employment history set out in the Assessment is essentially the same as described to the Court in submissions, however, the Assessment reveals a

[27] AB 49.
[28] AB 50.

history of the appellant leaving employment because he was dissatisfied with or critical of his employment or employer.[29]

[30] The appellant had previously been referred by his employer to a psychologist when he was employed as a bus driver in 2013. Records noted he had decreased tolerance and increased internal anger towards problematic passengers. He was initially observed with moderate depression, extremely severe anxiety and severe stress due to work and a related recent incident. Stress management strategies were employed and it was reported his agitation and other symptoms reduced. The appellant told Ms Crawley he had wanted to talk to the psychologist and seek assistance about his sexual interest in young boys, but chose not to as he was aware his activity would be reported to police.[30]

[31] The appellant's psychosexual history involves a history of sexual experiences at a very young age.[31] The Assessment also describes early exposure to pornography. At the ages of 17 or 18 through to 24 or 25 years the appellant would frequent Vestey's Beach to engage in casual anonymous sex with males. He had a brief relationship with a female work colleague and subsequently with a former male work colleague. The appellant told Ms Crawley he is bisexual with a preference for women around his age and, in relation to males, his preference is for boys between the age of 7 and 12.[32]

[29] AB 51.
[30] AB 52.
[31] AB 52 - 53.
[32] AB 53.

He told her he would like to have an ongoing relationship with a female his own age.[33]

[32] Apart from being exposed to heterosexual pornography at a young age, the appellant divulged a number of incidents of being shown pornography at around 17 years, some of it depicting teenage looking males in sexualised poses. At around this time the appellant was introduced to peer to peer networks with similar material.[34] Although attracted to young boys at that time, he denied it to himself. Over the years he accessed and downloaded illegal material with greater frequency. The appellant told the psychologist he feels ashamed about his attraction to pre-school boys and dislikes himself for viewing the images and videos. He thinks of himself a good person, but this activity does not fit with who he sees himself as being. A level of self-hatred was expressed by the appellant to the extent that he does not pursue constructive relationships.[35]

[33] The appellant's recounting of the facts to Ms Crawley forming the basis of the charges does not differ substantially from those outlined above. As pointed out to the sentencing Judge, there was a slight variation about the immediate circumstances with respect to count 1, as the appellant stated he was initially downstairs and the child upstairs in his room. The child came downstairs to use the bathroom, refused to put his clothes back on and returned upstairs. The appellant went upstairs and they both watched a

[33] AB 53.
[34] AB 54.
[35] AB 54.

movie at the child's request. Nothing significant turns on this variation in terms of the assessment of the gravity of the offending.[36]

[34] The appellant told Ms Crawley he was terrified of all the different possibilities arising from his behaviour and worried the victim would tell his parents. He said he was unsure how the victim might have been feeling and thought sexual activity was something the victim did not know about. He was unsure whether the victim remembered the incident, noting the victim never mentioned it or showed he remembered it. The victim and his family left the Territory in April 2014.[37] When the appellant went downstairs to get his mobile phone, his intention was to film the activities. He told the psychologist he viewed the films 2-3 times because it was "an experience" and to affirm to himself he had done it and confirm the same to online peers, like a "right of passage".[38] He did not think about the consequences on the victim of him making the film and sharing it until after he had done so, acknowledging to Ms Crawley it could hurt him if he saw it.

[35] The appellant gave details of collecting Child Abuse Material and communicating, sharing and trading with other individuals.[39] After many attempts to cease to view such material he acknowledged his sexual attraction towards young boys in mid-late 2013. Of the stories and materials involving sadism and abuse towards children and infants, he told Ms Crawley he would sometimes fabricate stories or interests to obtain

[36] AB 55.
[37] AB 55.
[38] AB 56.
[39] AB 56.

Child Abuse Material for trading or otherwise to communicate with others with similar interests and anxieties. In relation to the story he composed,[40] he said it started as fantasy but turned into a confession. He acknowledged some understanding of psychological harms with respect to some images but thought that some of the images and videos depicted consensual activity. He acknowledged the presence of Child Abuse Material created demand for it.[41]

[36] The Assessment notes the appellant's personality profile suggests the presence of anxiety-ridden and painful memories that are easily reactivated by minor social stressors. Further, it is unlikely the appellant has effective strategies to cope with these emotions, achieve psychic gratification, relieve tension or resolve conflict. The appellant's responses suggested broad social anxiety and fearful guardedness stemming from a desire for acceptance, countered by hesitancy based on anticipation of rejection and humiliation, resulting in distancing behaviour and feelings of personal exclusion.[42] This in turn was related to other negative psychological syndromes detailed in the Assessment. Ms Crawley also suggested that at the time of assessment he was suffering from a major depressive episode.[43] Aside from the fantasy story that may represent the appellant commencing grooming behaviours, the assessment notes there is no evidence of protracted grooming by the appellant in relation to the offending.

[40] Set out in [16] above.
[41] AB 57.
[42] AB 58.
[43] AB 59.

[37] Ms Crawley's opinion was that the appellant met the criteria for Paedophilic Disorder-Sexually attracted to males and boys between the ages of 7 - 12.[44] Ms Crawley considered the appellant's assertions that he had interest in age appropriate females lacked veracity given the objective evidence. Further, it was likely the appellant was able to achieve respect, appreciation and popularity within the online child abuse community and this was likely to lead to perpetuating the behaviours he was engaging in.[45] He embraced his new identity as a paedophile.[46] Ms Crawley described his sexual interest in children as chronic and persuasive.[47] She also noted that since being incarcerated, he had gone to some lengths to record images of children on mainstream television within his prison cell, in order to facilitate future sexual gratification.[48] He divulged this activity to Ms Crawley during an interview.[49] The report concludes the appellant demonstrates little insight into the impact of his offending, downplaying the effect on victims and displaying a lack of understanding of broader issues related to offending behaviour.[50] He also exhibited a tendency to externalise and blame other forces for his behaviour.

[38] In terms of his capacity to engage in the Sex Offender Treatment Program, the Assessment states the appellant was interested in and wished to participate in programs to assist him extinguish his deviant sexual

[44] AB 60 - 61.
[45] AB 60.
[46] AB 60.
[47] AB 61.
[48] AB 61.
[49] AB 58.
[50] AB 61.

preferences.[51] Although there may be difficulties engaging with treatment due to the appellant's inherent personality structure, the assessment notes this should not prevent him from access to a sex offender treatment program. Such programs may assist him to identify techniques and behaviours to avoid re-offending and achieve the goal of managing his risk within the community.[52]

[39] The appellant's risk of re-offending at the time of the assessment was determined as high risk, however caution was expressed as the assessment instruments assessing risk are insensitive to change over time.[53] The dynamic risk factors include deviant sexual preferences and lifestyle, impulsivity, intimacy deficits, criminal personality pattern, cognitive distortions and problematic insight.[54] The appellant had few protective factors that might serve to mitigate the risk of re-offending, however it was noted some factors could be modified with treatment programmes both whilst incarcerated and in the community.[55] The report emphasized the fluctuating nature of risk and the importance of monitoring and reassessing the appellant at regular intervals after sentence in both a treatment context and when there is a change in his circumstances.[56]

[51] AB 61.
[52] AB 62.
[53] AB 62.
[54] AB 62.
[55] AB 62 - 63.
[56] AB 63.

The pre-sentence report

[40] Similar background material as contained in the Forensic Psychological Assessment is in the pre-sentence report. Given the seriousness of the offending and the high risk of re-offending, it is unsurprising that no options other than imprisonment were recommended by the author of the report. The author of the pre-sentence report deferred to the Forensic Psychological Assessment, recommending a term of imprisonment be imposed to give the appellant an opportunity to be assessed and participate in offence specific treatment in the prison to address the underlying issues of the offending.[57]

(vi) Sentencing

[41] In the remarks on sentence, his Honour reviewed the facts of offending, noting the facts constituting counts one and two revealed a series of assaults within the one episode. His Honour commented that the circumstances of the offending made for "quite disturbing reading" and drew attention to the profound impact upon the parents that would continue throughout their lives.[58]

[42] His Honour acknowledged the appellant's criminal history was not for offending of this kind, and commented that it happened in unusual circumstances, which suggested a total lack of control on the appellant's part.

[57] AB 71.
[58] AB 75 - 76.

[43] The appellant's personal history was also acknowledged, including his age at the time of offending, his father's mental instability and his mother's death when he was 16 years. Thereafter, his Honour said the appellant fended for himself.[59] The employment history and the stress of his employment as a bus driver was summarised. The Forensic Psychological Assessment was referred to, particularly the observations concerning the appellant's emotionally abusive childhood, sporadic employment history and that he meets the criteria for paedophilia disorder. His Honour also noted the new identity and environment the appellant had forged involved communicating with like-minded individuals in a particular environment in which violent thoughts and fantasies emerged and were shared.[60] The conclusion that the appellant's sexual interest in children is chronic and pervasive was considered, as was the observation that prison did not prevent the appellant from pursuing deviant interests.

[44] His Honour acknowledged the appellant has the capacity to engage in the sex offender treatment programme but has not been able to do so through no fault of his own and that it would be in the interests of the appellant to engage in that programme or any other programmes that become available to him. It was concluded the risk of re-offending must be regarded as very real, however with assistance the appellant may be helped to modify the risks while in custody. His Honour concluded that at the time of sentence, the prospects for rehabilitation must be regarded as poor and the sentence must

[59] AB 76.
[60] AB 77 - 78.

emphasise the need for both general and personal deterrence, punishment and the protection of the community.[61]

[45] It was confirmed the offending was extremely serious given the age of the victim, the position of trust, the abuse of that trust and the recording and sharing of the footage with others online. His Honour also referred to the dishonest manipulation of another victim and the possession of a large quantity of child abuse material which the appellant shared. His Honour acknowledged the appellant pleaded guilty, accepted responsibility and gave him credit for the plea.

[46] On each of the counts the appellant was convicted and sentenced as follows:

- Count one: but for the plea of guilty his Honour indicated he would have sentenced the appellant to 14 years imprisonment, however given the plea, he was sentenced to 10 years and six months imprisonment;

- Count two: it was indicated the sentence would have been four years imprisonment, however given the plea, the appellant was sentenced to imprisonment for three years;

- Count three: but for the plea of guilty the sentence would have been imprisonment for two years and eight months, however given the plea the appellant was sentenced to two years imprisonment;

[61] AB 78.

- Count four: the sentence would have been imprisonment for 16 months, however in light of the plea the appellant was sentenced to imprisonment for 12 months.

[47] As the offending was part of a course of conduct undertaken over a period of time, his Honour had regard to the need for concurrency and to the totality principle. It was directed that the sentence in relation to count two be served cumulatively upon the sentence for count one to the extent of two years, giving a head sentence of imprisonment of 12 years and 6 months for those two counts. The sentence for count three was directed to be served cumulatively upon that sentence to the extent of 18 months giving a total head sentence for the three counts of imprisonment for 14 years. It was directed that the sentence for count four be served concurrently with the remaining sentence.

[48] After those adjustments were made by his Honour, the total sentence was set for a period of imprisonment for 14 years, with a non-parole period of 10 years.

Ground 1: that both the head sentence and the non-parole period imposed are in all of the circumstances, manifestly excessive

[49] It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error is shown. The presumption is that there is no error. The appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it is shown that the sentencing judge was in error. The error may

appear in what the sentencing judge said in the proceeding or the sentence itself may be so excessive as to manifest such error. It must be shown that the sentence was clearly and not just arguably excessive.[62]

[50] It is plain that the offending was a serious example of offending of this kind for the reasons advanced on behalf of the respondent, both before his Honour and this Court. In relation to counts one and two those factors included the young age of the victim, the position of trust the appellant held in relation to both the victim and his parents and that count one represented three acts of sexual offending. The offending was aggravated by being filmed, transferred, stored and shared over the internet. The impact of the offending was plainly severe as has been summarised. The sharing of the footage compounded the harm. Although senior counsel for the appellant substantially agreed with the characterisation of the offending as very serious, balanced against those aggravating circumstances it was pointed out that unlike some cases of sexual harm to children, there was no gratuitous violence or threats made to the victim. No physical injuries were sustained by the victim. The offending was relatively spontaneous, of relatively short duration and not committed in company. There was no grooming behaviour. While that is the case, balanced against those factors, the offending must still be regarded as extremely grave for the reasons already outlined.

[62] *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *Noakes v The Queen* [2015] NTCCA 7 at [23]; *Emitja v The Queen* [2016] NTCCA 4 at [39].

[51] Count three involved the dishonest manipulation of another victim for the appellant's own sexual gratification. The charge of possession of child abuse material involved a significant number of images and videos, some in the most serious categories of child abuse material, in some instances surrounded by highly disturbing communication between the appellant and others online. The lack of insight and downplaying of the effect of his offending reported by Ms Crawley, informed the Assessment of the high risk of reoffending and justified the conclusion that the prospects of rehabilitation at the time of the Assessment and sentence were poor.

[52] Balanced against those considerations however is the broader sentencing context of the relatively young age of the appellant, the lack of similar previous offending and no previous experience of imprisonment. His childhood could plainly be described as deprived and at the time of the offending he was socially isolated. It is clear he suffered from paedophilia, a common factor in all of the offending. He had not previously been diagnosed with or treated for the condition. The psychologist's conclusion that the appellant was willing to engage in sex offender treatment programmes, the fluctuating nature of the risk, and the opinion that some of the negative factors could be modified with treatment programmes were also relevant factors.

[53] The objective seriousness of the overall offending clearly justified the imposition of the head sentence of imprisonment for 14 years. There are a

number of cases decided by this Court that set out the relevant principles and demonstrate their application in particular cases.

[54] In *R v JO*,[63] the primary principles were described as follows:

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

[55] In *R v Tennyson*,[64] after reviewing a number of cases of non-consensual sexual intercourse involving child victims, this Court confirmed there is no tariff applicable to such crimes,[65] however offences of this kind are to be treated as extremely serious crimes.[66] In *R v Tennyson* it was observed that

[63] (2009) 24 NTLR 129 at 146 [82] - [83].
[64] [2013] NTCCA 2.
[65] [2013] NTCCA 2 at [24].
[66] [2013] NTCCA 2 at [27].

in *R v Rindjarra*[67] the Court had accepted that the decisions in *Green v The Queen*[68], *R v Inkamala*[69] and *R v Riley*[70] provided empirical standards of comparison for serious examples of digital/vagina sexual intercourse with a child without consent and provided a valid indication of the prevailing comparative conduct.[71] It was concluded that although there was no fixed range, the Court had set a standard for offending of this kind where the starting point will usually be somewhere between 12 years and 16 years imprisonment.[72] It was also observed in *Tennyson* that notwithstanding an offender's youth, there is a point at which the seriousness of the crime overrides the mitigating factor of youth.[73] At the same time it was confirmed that this does not mean no weight is given to youth and immaturity in the case of serious offending.[74]

[56] The respondent offender in *Tennyson* was aged 22 at the time of the offending. The victim was just over three years. The young age of the victim and the fact the respondent was in a position of trust as he was related to the child were aggravating features. The offender in *Tennyson* continued to brutally penetrate the child victim notwithstanding her cries and screams. He gave false information to the police, and the child was physically injured to the extent of lacerations, abrasions and bruising to the genital area. The

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[67] (2008) 191 A Crim R 171 at 182 [54], 183 [59], 189 [93].
[68] (2006) 19 NTLR 1.
[69] [2006] NTCCA 11.
[70] (2006) 161 A Crim R 414.
[71] *R v Tennyson* [2013] NTCCA 2 at [28].
[72] *R v Tennyson* [2013] NTCCA 2 at [28].
[73] *R v Goodwin* [2003] NTCCA 9 at [11]; *R v Talbot* [2003] NTCCA 13 at [20]; *R v Tennyson* [2013] NTCCA 2 at [30].
[74] *R v Tennyson* [2013] NTCCA 2 at [30]; *Melpi v The Queen* [2009] NTCCA 13 at [30].

offence was committed shortly after the respondent was released from prison after serving a 14 month term of imprisonment for the aggravated unlawful indecent assault on a 15 year-old girl. Additionally, he had previously been sentenced to imprisonment in May 2007 for aggravated indecent dealing with a child and had breached a partially suspended sentence on numerous occasions. He had been examined and had no psychiatric illness, although there was a diagnosis of anti-social personality disorder. He tended to minimise his offending. This Court allowed a Crown appeal on the basis of inadequacy. The re-sentencing was somewhat tempered due to deficiencies in the proceedings in the Court below. Ultimately the starting point for the re-sentencing in *Tennyson* was 14 years, reduced as a result of the plea of guilty to 11 years and 3 months. A non-parole period of 8 years and 11 months was set.

[57] There are some broad parallels between *Tennyson* and this matter. Although *Tennyson* did not involve additional counts, it was a brutal episode of offending in circumstances where the respondent offender had been dealt with and imprisoned on a number of occasions for sexual offending previously.

[58] In *Namarnyilk v The Queen*[75] this Court again confirmed the standard for sentencing in cases of this kind, penile penetration of a child, as somewhere between 12 and 16 years imprisonment.[76] The appellant in *Namarnyilk*

[75] [2013] NTCCA 17; (2013) 236 A Crim R 368.
[76] [2013] NTCCA 17 at [21]; (2013) 236 A Crim R 368.

unsuccessfully appealed against a head sentence of imprisonment for a term of 14 years and 4 months. The appeal was however successful in respect of the non-parole period of 11 years. The offending in *Namarnyilk* involved the maintenance of a sexual relationship with a child. The offending took place over two and a half years and involved a continuing course of forced sexual intercourse and other sexual offending. This Court confirmed the principles of denunciation, general deterrence and punishment were proper matters to be taken into account in fixing the non-parole period, just as they were in determining the head sentence. It was noted that the non-parole period of 11 years was fixed at 76 per cent of the overall head sentence. The appellant was 58 years old with no prior history of sexual offending. Given the age of the appellant upon release, community protection was considered a less relevant consideration than it otherwise would have been. It was said it might be assumed that he would participate in one or more sex offender rehabilitation programs before being considered for parole. The assessment of the likelihood of re-offending was considered to be a matter for assessment by the parole board, given his age.

[59] In *Namarnyilk*, it was held that even when denunciation, general deterrence and punishment are properly taken into account, as they must be in fixing a non-parole period, they ought not be permitted to dominate the considerations to the exclusion of prospects of rehabilitation.[77] The Court

[77] [2013] NTCCA 7 at [53]; (2013) 236 A Crim R 368 at 376 [53].

drew attention to the remarks of Crockett J, which were quoted with approval in *Bugmy v The Queen*:[78]

> …"it seems to me to be inappropriate, and possibly counter-productive, to a prisoner's possible rehabilitation, and so to the community interest, if an inordinately long period, every day of which must be served, is fixed as a non-parole period. This, of course, is not to say that in fixing a minimum term the elements of deterrence and retribution are to be disregarded".

[60] In *Namarnyilk*, the non-parole period of 11 years was reduced on appeal to 10 years and 1 month.

[61] Although the head sentence for the overall offending here is clearly what might be expected as demonstrated by the cases discussed, the matter of the non-parole period requires further consideration. A number of the relevant authorities have recently been reviewed in *Emitja v The Queen*[79] in the context of the question of the circumstances in which it is appropriate to decline to set a non-parole period. The majority in *Emitja*, Grant CJ and Kelly J,[80] drew attention to *The Queen v Shrestha*[81] where Deane, Dawson and Toohey JJ discussed the "basic theory of parole":

> The basic theory of the parole system is that, notwithstanding that a sentence of imprisonment is the appropriate punishment for the particular offence in all the circumstances of the case, considerations of mitigation or rehabilitation may make it unnecessary, or even undesirable, that the whole of the sentence should actually be served in custody … the parole system allows for a review of the offender's case after he has actually served a significant part of a custodial

[78] (1990) 169 CLR 525 at 538 per Dawson, Toohey J and Gaudron JJ.
[79] [2016] NTCCA 4.
[80] *Emitja v The Queen* [2016] NTCCA 4 at [56].
[81] (1991) 173 CLR 48 at 67 - 69.

> sentence, for the purpose of deciding whether he should be released on parole at that stage.
>
> …
>
> All of the considerations which are relevant to the sentencing process, including antecedents, criminality, punishment and deterrence, are relevant both at the stage when a sentencing judge is considering whether it is appropriate or inappropriate that the convicted person be eligible for parole at a future time and at the subsequent stage when the parole authority is considering whether the prisoner should actually be released on parole at or after that time … the legislative intent to be gathered from the terms of the parole legislation applicable in that case … was to provide for possible mitigation of the punishment of the prisoner only when the stage is reached where "the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence". This approach has been consistently accepted in subsequent cases in this court.

[62] In *Power v The Queen*[82] it was said the legislative intention with respect to parole is to "provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence". A useful summary of the relevant principles and factors generally applied when setting the non-parole period provided in Fox and Freiberg's sentencing text is as follows (footnotes omitted):[83]

> The non-parole period must be proportionate to the head sentence and to the gravity of the crime. Proportionality cannot be reduced to a mathematical formula and will depend upon the circumstances of

[82] (1974) 131 CLR 623 at 629 per Barwick CJ, Menzies, Stephen and Mason JJ; confirmed in *R v Bugmy* (1990) 169 CLR 525 at 536.
[83] Arie Frieberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 858 - 859.

> the case and subject to the judicial discretion. As a general rule there should not be too great a disparity between the head sentence and the non-parole period. In the absence of statutory authority, there is no usual or fixed rule regarding the relationship between the head sentence and the non-parole period and the length of the period on parole is a matter of discretion that will depend upon all of the circumstances of the case including the offender's prospects of rehabilitation, age (both young and old), criminal record and past parole history, and protection of the community. Because some of these circumstances are personal to the offender, there may be more scope for variation in the length of non-parole periods than there may be in setting head sentences ...

[63] The non-parole period is the minimum to be determined in all of the circumstances of the offending, although personal factors may at times assume significance in setting a non-parole period. As pointed out in *R v Moyle*[84] by Perry J:

> There can never be a tariff for non-parole periods for any offence. The fixation of a non-parole period commonly involves an allowance for purely personal factors which have less relevance to the head sentence as opposed to the non-parole period. For that reason, it has always been accepted that there is much more scope for the exercise of a wide discretion in the fixation of the non-parole period as opposed to the determination of an appropriate head sentence in those cases where the fixing of the head sentence is in the hands of the Court.

[64] In *Emitja v The Queen*,[85] Grant CJ and Kelly J observed that in setting the non-parole period, although the same considerations apply which inform setting the head sentence, different weightings may be applied to those sentencing considerations in respect of the duration of the non-parole period.

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[84] (1996) 186 LSJS 462, 465, as cited in Arie Frieberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) at 859.
[85] [2016] NTCCA 4 at [57].

[65] It is the case that at the time of the Assessment and at sentence the appellant's prospects of rehabilitation were poor. Balanced against that consideration, is that through no fault of his own, the appellant had not commenced treatment for the obviously pervasive condition of paedophilia. The appellant had however participated in the only program available to him, the “Safe Sober and Strong” program,[86] which although not directed to treating paedophilia, indicated some willingness to engage in treatment at an early stage while on remand. Further, the Court was told after the offending comprising counts one and two, the appellant restricted his own opportunities to be alone with the victim.[87]

[66] The conclusion in the Assessment of the high risk of re-offending came with a very important qualification: that the risk assessment was a matter of fluctuation and was only valid until the finalisation of sentencing matters. After sentencing, it is plain, the appellant was to serve a lengthy period of imprisonment. It is not possible in these particular circumstances to make any relevant forecast concerning the appellant’s future behaviour. A more informed assessment could be made at a later time.

[67] As the appellant offended when he was 24-25, it was appropriate that his relative youth be reflected in the sentence, more appropriately in the non-parole period. The mitigating effect of youth may well persist beyond

[86] AB at 11; 40.
[87] AB 13.

18 years of age. For example, in *R v Evans*[88] this Court found no error in treating a 26 year-old offender as youthful for sentencing purposes. In the circumstances, a sentence that encouraged timely engagement with programmes to treat the paedophilia may be thought to go some way towards rehabilitation and serve the overarching sentencing purpose of community protection. The importance of this sentencing consideration was emphasized by French CJ in *Hogan v Hinch*:[89]

> Rehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest.

[68] In *R v Bugmy*[90] it was said "[t]he practical effect of fixing a minimum term is that thereafter the Parole Board may, but of course need not, grant the prisoner parole". In these circumstances the Parole Board at a future time is best placed to make the assessment after the appellant has served a significant part of the custodial sentence. The decision would be informed on the basis of assessments, the effect of treatment and punishment on the appellant and the relevant risk.

[69] With respect to count one, by operation of s 55A of the *Sentencing Act*, the learned sentencing judge was required to set a non-parole period that was 70 per cent of the head sentence. The non-parole period was not required to be set at 70 per cent for all of the offences.[91] In any event 70 per cent of

[88] [2013] NTCCA 9.
[89] (2011) 243 CLR 506 at 537 [32].
[90] (1990) 169 CLR 525 at 536 per Dawson, Toohey and Gaudron JJ.
[91] *Inkemala v The Queen* [2005] NTCCA 6 at [20] - [27] per Martin (BR) CJ.

14 years is just below 10 years. On behalf of the appellant it was submitted that having regard to the 70 per cent requirement for the non-parole period that was required for count one and what was required for the overall sentence, the minimum non-parole period that could have been set would have been around 7 years and 4 months. There is no obligation to set the non-parole period at the statutory minimum, but rather, as the authorities make clear, it must be set at the minimum time that justice requires.[92] His Honour was not obliged to set the minimum non-parole period at 70 per cent of the total sentence, however given the circumstances of the appellant, especially the factors of youth, the need for treatment and little in the way of criminal history, a non-parole period that was just over 70 per cent for the overall offending was in our respectful opinion, manifestly excessive. The sentencing remarks do not disclose the reasons why the non-parole period was this extensive.

[70] In re-sentencing the appellant we would set a new non-parole period of eight years.

Ground two: That the learned sentencing judge failed to properly apply the principle of totality.

[71] The principle of totality requires a sentencing judge to have a final look at the potential total sentence and consider whether it is proportional to the whole of the offender's conduct. The principle of totality guards against sentences that when accumulated are greater than what is proportionate to

[92] *Power v The Queen* (1974) 131 CLR 623 at 629 [10].

the whole of the offending. In *Carroll v The Queen*[93] the principles were summarised as follows:

> The following principles are well established. First, s 50 of the *Sentencing Act* creates a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders". There is no fetter on the discretion exercised by the Court and the prima facie rule can be displaced by a positive decision. Secondly, it is both impractical and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively. The assessment is always a matter of fact and degree. Reasonable minds might differ as to the need for cummulation. Often there will be no clearly correct answer. Thirdly, an offender should not be sentenced simply and indiscriminately for each crime he is convicted of but for what can be characterised as his criminal conduct. The sentences for the individual offences and the total sentence imposed must be proportionate to the criminality in each case…
>
> [T]he overriding concern is that the sentences for the individual offences and the total sentence imposed be proportionate to the criminality of each case. Concurrency may be appropriate because the crimes which gave rise to the offender's convictions are so closely related and interdependent. What is necessarily required in every case is a sound discretionary judgment as to whether there should be cummulation or concurrency.

[72] His Honour was mindful of the principles of totality and modified the overall head sentences accordingly. The ultimate head sentence was not manifestly excessive. Reasons for that conclusion have been discussed with respect to ground one.

Conclusion

[73] We would not uphold ground two. We would uphold ground one in part in respect of the non-parole period and order by way of re-sentencing a non-

[93] [2011] NTCCA 6 at [42] and [44]; (2011) 29 NTLR 106 at 117 - 118 [42] and [44].

parole period of eight years be fixed. We would otherwise dismiss the appeal.
