CITATION:	*The Queen v Gurruwiwi* [2019] NTCCA 23
PARTIES:	THE QUEEN v GURRUWIWI, Travis
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA 15 of 2019 (21840873)
DELIVERED:	23 December 2019
HEARING DATE:	6 December 2019
JUDGMENT OF:	Southwood, Kelly and Barr JJ

CATCHWORDS:

APPEAL – SENTENCE – Crown appeal against sentence – sexual intercourse without consent – respondent 25 years old – female victim 12 years old – victim subjected to violence – sentence of seven years and six months manifestly inadequate given age and vulnerability of victim – respondent re-sentenced to imprisonment for nine years

Siganto (No 1) (1997) 97 A Crim R 60; *R v Riley* [2006] NTCCA 10, 161 A Crim R 414; G*reen v The Queen* [2006] NTCCA 22, 19 NTLR 1; *R v Inkamala* [2006] NTCCA 11; *Gilligan v The Queen* [2007] NTCCA 8; *Melpi v The Queen* [2009] NTCCA 13; *Forrest v The Queen* [2017] NTCCA 5, 267 A Crim R 494; *R v Tennyson* [2013] NTCCA 2, considered

REPRESENTATION:

Counsel:

Appellant:	D Morters SC
Respondent:	M Aust

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Number of pages:	11

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

The Queen v Gurruwiwi [2019] NTCCA 23
No. CA 15 of 2019 (21840873)

BETWEEN:

THE QUEEN
Appellant

AND:

TRAVIS GURRUWIWI
Respondent

CORAM: SOUTHWOOD, KELLY and BARR JJ

REASONS FOR JUDGMENT

(Delivered 23 December 2019)

The Court

[1] On 23 May 2019, the respondent entered a plea of guilty to the single count that, on 17 December 2018, at an Aboriginal community, he had sexual intercourse with a 12-year-old female victim without her consent and knowing about or being reckless as to the lack of consent.[1] On 25 July 2019, he was convicted and sentenced to a term of imprisonment of seven years and six months, backdated to 27 September 2018. The sentencing judge fixed a non-parole period of five years and three months. The Crown appeals the sentence on the ground of manifest inadequacy.

1 Contrary to s 192(3) *Criminal Code* (NT).

[2] The respondent was born on 25 June 1993 and so was 25 years old at the time of offending in December 2018. He lived with extended family in the same remote community as the victim. On 17 September 2018, the victim and the respondent attended a disco in the community. The respondent asked the victim to come with him to his home. The victim declined, but suggested that they could meet up later in the evening near the shop. The offender then left the disco. Later that evening, the victim walked home and went to bed. However, after a few hours, she woke up and went to the shop, where she met the respondent. After some conversation at the shop, the respondent and the victim returned to the respondent's home. While they were talking on the veranda, the respondent pestered the victim to have sex with him, but she refused. Nonetheless, she went into the respondent's house and lay on a mattress with the respondent with the intention of going to sleep.

[3] Subsequently (the agreed facts do not make clear how much later), the respondent tried to remove the victim's shorts. In response, she kicked out at him and struck him in the groin area. She told him to stop and she started to get to her feet. He pushed her back down, punched her multiple times to the rib area and kicked her in the back. He forced her to have penile/vaginal intercourse with him. During intercourse the respondent bit the victim a number of times on her shoulder blade, collarbone and cheek. The bites left marks on her skin and caused pain. The respondent continued to have sexual intercourse until he ejaculated inside the victim's vagina, at which point she kicked him off her and called him a 'dirty mother fucker'. She quickly

dressed and left the respondent's home just as it was becoming daylight. She walked home, had a shower and then went to sleep.

[4] In the early evening of 18 September, the victim was taken to the community health clinic by her aunt, after complaining of headache and abdominal pain. The following morning she returned to the clinic, at which time she disclosed the sexual assault to the examining doctor. A police investigation ensued, and on 27 September the respondent was arrested. He participated in a formal interview with police in which he made admissions to having sexual intercourse with the victim, but insisted that the intercourse was consensual.

[5] The victim impact statement tendered in evidence read as follows:[2]

> He punched me to my mouth and made me bleed. As I was trying to get away he started biting and hitting me with his fists and kicked me many times. This caused bite marks to my left cheek and on my left breast and back. I had bruises and pain all over from the hitting and kicking. The pain from my back lasted a couple of weeks and for the first week I could not walk upright. As he held me down and choked me he took off my clothes. This caused bruise marks to my throat and gave me pain for a few days. Also I had pain from when I urinated.
>
> I have stopped going to school as I don't feel safe and everyone is picking on me saying nasty things about me being fucked by an older man. I feel angry and I am using bad words that I wouldn't use in the past. I feel always tired and not myself. Girls my age are having boyfriends or are hanging out with boys but I don't feel okay with that. I feel ashamed and I blame myself and thinking what I should have done differently. I ask myself "why did this happen to me?"
>
> I am no longer going to school and I know family has said that they are worried I may kill or hurt myself. I don't want to hurt my family like that but sometimes I feel that killing myself is the only way to stop

2 AB 36-37. It may be noted that the matters asserted go beyond the agreed facts in certain respects, for example, that the respondent punched the victim to the mouth.

> people hurting me. I feel so angry that I start yelling and trying to hurt my family at times.

[6] The victim impact statement was provided in May 2019, some six months after the offence was committed. It can be fairly inferred that the emotional effects of the sexual assault had been significant and were ongoing.

Respondent's background and personal circumstances

[7] The respondent's upbringing may be accurately described as dysfunctional. In his early years he lived at Warruwi community with his parents, both of whom were heavy drinkers. His father was said to have regularly subjected his mother to violence. In his early years, he moved regularly, being passed between families across Arnhem Land. His parents separated when he was about six years old and his father remarried. He went to live with his father and his father's new wife in another community. About two years later, he returned to Warruwi to live with his maternal grandmother. He attended school until the age of 15, but after he speared and killed the teacher's horse, he was sent to yet another community to live with his maternal aunt and her husband. The respondent had a long history of substance misuse, starting with drinking alcohol to excess in the company of his young relatives, then being exposed to cannabis by his older cousins, and subsequently taking up petrol and paint sniffing. At the time of sentencing, he had sniffed for more than 10 years.[3]

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3 Pre-Sentence Report, AB 43.

[8] The respondent had a criminal history which extended to nine pages.[4] His record of offending both as a youth and as an adult comprised mainly property offending: trespass, unlawful entry, property damage, stealing and receiving. However, he had a conviction for an aggravated assault committed in March 2013. In brief, he assaulted his cousin brother with a machete in a drunken rage during an argument over cigarettes.[5] He was sentenced by the Supreme Court to a term of imprisonment of two years, suspended after eight months, on conditions, including supervision.

[9] Testing carried out by a psychologist at the request of the sentencing judge indicated that the respondent's cognitive functioning and intelligence was in the extremely low range, such that he fulfilled the criteria for an intellectual disability under the Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5).[6] Testing also identified deficits in his immediate recall (moderate to severe impairment) and delayed recall (severe impairment).[7]

[10] The sentencing judge explained that the respondent was likely to have trouble remembering things and following directions, in remembering what others had said during conversations, and that his problem-solving skills were impaired. His Honour was unable to identify any direct link between the respondent's offending and his mental impairment. Rather, based on the psychologist's report, his Honour found that the respondent's substance

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4 "Information for Courts" document AB 26-35.

5 Pre-Sentence Report, AB 41.

6 Report Kerry Williams, Forensic Psychologist, AB 54.

7 Ibid, AB 53.

abuse caused him to offend and that his mental impairment did not allow him to properly understand the relationship between his offending, on the one hand, and, on the other, his substance abuse, apparent non-compliance with medication and resistance to attending rehabilitation.[8]

[11] The sentencing judge did not consider that the respondent's intellectual disability reduced his moral culpability for the offending in such a way as to displace the significance of punishment and denunciation as sentencing objectives. Nor did he consider that general deterrence required any significant moderation as a sentencing consideration. However, his Honour allowed some moderation to the component for specific deterrence on account of the respondent's difficulties in understanding the relationship between his patterns of behaviour. In that context his Honour also took into account the respondent's intellectual impairment as a contextual matter having "some general mitigatory effect", while acknowledging that the same impairment was relevant to the community protection objective in sentencing.[9]

[12] His Honour's assessment of the seriousness of the offending was clearly stated in sentencing remarks addressed to the respondent:

> … Mr Gurruwiwi, this rape was very serious. This is particularly so given that the girl was so young, that you beat her and kicked her during the course of the assault, that you bit her during the course of the assault, that it was obviously clear to you that she was not consenting, and because of the emotional damage this has done to this

8 Sentencing remarks AB 60; Report Kerry Williams, Forensic Psychologist, AB 55, par 23.

9 Sentencing remarks AB 61.

> girl. The violence that you inflicted on this girl went well beyond the violence which is inherent in all offending of this kind. You also had unprotected intercourse with her. She was vulnerable because of her age and because she was at your house. Offending of this kind is prevalent, including, unfortunately, against young girls. It is degrading to women and girls and it causes alarm and upset in the community.
>
> Your barrister says this is not as bad as the most serious type of rape cases. It did not involve you stalking an unknown victim. The victim did not sustain any internal injuries or pregnancy or suffer from any sexually transmitted disease as a result. You did not use a weapon during the course of the assault. It was a single act of intercourse. You did not try and keep her there afterwards. None of these things operate in mitigation but I accept that they do assist in assessing where the offending lies on that scale of seriousness and this does not lie at the very top of that scale.

[13] After referring to the discount to be allowed for the respondent's guilty plea, his Honour referred to the survey of comparative sentences conducted by the Court of Criminal Appeal in *Gilligan v The Queen*,[10] noting that the survey suggested that a head sentence of nine years imprisonment before any discount for a guilty plea was within the range of sentences for offences contrary to s 192(3) *Criminal Code* in circumstances where the assault is accompanied by violence and degradation beyond the absolute minimum which might be expected and is inherent in all cases of rape. His Honour also referred to the survey of comparative sentences set out in the decision of the Court of Criminal Appeal in *Forrest v The Queen*.[11]

[14] In *Gilligan*, the appellant had contended that concurrent terms of imprisonment each of nine years in respect of two counts of sexual intercourse without consent rendered the sentence manifestly excessive.

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10 *Gilligan v The Queen* [2007] NTCCA 8 at [39] – [41].

11 *Forrest v The Queen* [2017] NTCCA 5; 267 A Crim R 494.

None of the three members of the Court of Appeal considered that manifest excess was made out. In his separate judgment, Riley J expressed this view that the sentence was comfortably within the range of sentences which would be expected in all the circumstances. Those circumstances included the use of scissors to threaten and obtain the co-operation of the victim and the fact that the assault only came to an end when other persons heard the victim's cries for assistance. Riley J referred to the Court's earlier decision in *Siganto (No. 1)* for the following proposition:[12]

> General and personal deterrence undoubtedly play the most significant part in fixing an appropriate sentence for crimes of this type. After all, the maximum penalty is imprisonment for life. The Parliament intends that the offence be seen at the top end of the scale of gravity of criminal conduct. The head sentence of nine years imprisonment is not excessive. It is within the range of sentences imposed in this court in recent years for offences of rape where the accused is convicted after trial, and the assault is accompanied by violence and degradation beyond the minimum which might be expected. It is a sentence warranted by the objective facts measured against the maximum.

[15] However, there are some necessary qualifications which in our view attach to the observations of Riley J in *Gilligan*. First, the decision concerned the violent rape of an adult female. Depending on the circumstances, very different considerations will apply in sentencing for the violent rape of a female child. Second, although some endorsement was given to the head sentence of nine years, that sentence was arrived at by the sentencing judge by deducting one year from a nominal sentence of 10 years to reflect a late plea of guilty. Therefore, to the extent that *Gilligan* remains relevant, it

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12 *Siganto (No 1)* (1997) 97 A Crim R 60 at 68. Like *Gilligan*, this decision concerned the rape of an adult female.

establishes a starting point of 10 years for the violent rape of an adult female in the circumstances of that case.

[16] In *Forrest*, the survey of comparative sentences was undertaken with a view to determining whether there was a range or standard for the offence of rape involving adult victims. The Court ultimately determined that there was not, for reasons set out in the following extract:[13]

> In cases involving child victims of sexual intercourse without consent this Court has observed that the starting point will generally be somewhere between 12 and 16 years. It is not possible to identify with such specificity a range or standard for offending involving adult victims. The survey conducted above of sentences imposed between 2012 and 2015 may even suggest that sentencing practices in respect of the offence of sexual intercourse without consent have changed since *Siganto*, and then *Gilligan*, were decided. Matters which might be broadly described as "rape" cases are particularly fact-sensitive, such that the determination whether a sentence falls within or without the relevant range is often fraught with difficulty.

[17] In support of its observation extracted in [16], that the starting point in cases involving child victims of sexual intercourse without consent will generally be somewhere between 12 and 16 years, the Court in *Forrest* cited *R v Tennyson*.[14] However, some caution must be exercised in relation to applying that range to the present case on appeal, because of the extreme facts in *Tennyson* and the context in which the Court's statement was made. The respondent in *Tennyson* was a 22-year-old male, who had led his three-year-old niece away to the backyard of premises occupied by him and engaged in penile/vaginal penetration of the child, causing severe pain and

13 *Forrest v The Queen* [2017] NTCCA 5; 267 A Crim R 494 at [102].

14 *R v Tennyson* [2013] NTCCA 2 at [28].

serious injuries. The Crown successfully argued that a sentence of imprisonment of eight years was manifestly inadequate. The reference to a range of 12 to 16 years was made by Mildren ACJ and Blokland J in the following passage (citations omitted):[15]

> In *Rindjarra*, the Court accepted that decisions of this Court in *Green v The Queen*, *R v Inkamala* and *R v Riley* provide empirical standards of comparison for very serious examples of digital/vaginal sexual intercourse with a child without consent and provided a valid indication of the prevailing range of sentences for comparative conduct. To those decisions might be added *Melpi v The Queen*. These cases demonstrate that, although there is no fixed range or tariff, this Court has set a standard for this kind of offending where the starting point at first instance is usually somewhere between 12 years and 16 years.

[18] In *Green*,[16] the offender was an adult male who engaged in the penile/anal penetration of an eight-year-old boy without consent. In *Inkamala*,[17] the offender was an 18-year-old male who digitally penetrated a seven-month-old female child, causing serious injuries to her vagina. In *Riley*,[18] the offender was a 26-year-old male who digitally penetrated the vagina and anus of a two-year-old female child, causing significant injuries. In *Melpi*,[19] the offender was an 18-year-old male who engaged in the penile/anal penetration of a two-year-old male child, causing injuries. It can therefore be seen that the approximate 12 to 16 year range referred to in *Forrest*

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15 Ibid.

16 *Green v The Queen* [2006] NTCCA 22; 19 NTLR 1 at [7].

17 *R v Inkamala* [2006] NTCCA 11 at [30].

18 *R v Riley* [2006] NTCCA 10; 161 A Crim R 414 at [5].

19 *Melpi v The Queen* [2009] NTCCA 13 at [5].

derived from cases involving the egregious sexual abuse of infants and young children.

[19] In support of the sole ground that the sentence was manifestly inadequate, senior counsel for the appellant submits that the sentencing judge's apparent reliance on *Gilligan* to identify the relevant range of sentences was misplaced because the victim in *Gilligan* was an adult. That submission may be accepted.

[20] Senior counsel for the appellant then submits that the sentencing judge should have taken as his starting point the range of sentences identified in *Tennyson*. That submission cannot be accepted without qualification, for reasons explained in [16] – [18] above. We are nonetheless of the view that his Honour's starting point and consequently the sentence was manifestly inadequate because it did not properly take into account the age and vulnerability of the child victim, and did not sufficiently reflect the sentencing objectives of punishment, denunciation and general deterrence.

[21] The appeal is allowed. Having regard to all of the circumstances of the case, including the appellant's cognitive impairment, we take as our starting point a term of imprisonment of 12 years. We would then allow a discount of three years to reflect the guilty plea. The respondent is convicted and sentenced to a term of imprisonment of nine years, backdated to 27 September 2018. We fix a non-parole period of six years and four months, to run from 27 September 2018.
