Grivell & Mackley v The Queen [2008] NTCCA 06

PARTIES:	GRIVELL, Dion John v THE QUEEN AND MACKLEY, Shaun Edward 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 NOS:	CA 16 of 2007 (20606303) and CA 2 of 2008 (20605878)
DELIVERED:	15 MAY 2008
HEARING DATES:	22 APRIL 2008
JUDGMENT OF:	MARTIN (BR) CJ, RILEY AND SOUTHWOOD JJ
APPEAL FROM:	ANGEL J, 27 SEPTEMBER 2007

CATCHWORDS:

APPEAL – CRIMINAL LAW

Appeal against sentence – whether sentence manifestly excessive – assault causing harm - worst category of the offence of this type – personal circumstances in mitigation – non-parole period – appeal allowed – re-sentenced.

Criminal Code Act 2002 (NT), s 188(1), (2)(a)(d)(m); *Sentencing Act 1995* (NT)

CEV v The Queen [2005] NTCCA 10, distinguished.
Bugmy v The Queen (1990) 169 CLR 525; *Deakin v The Queen* (1984) 58 ALJR 367; *Power v The Queen* (1973) 131 CLR 623; *The Queen v Shrestha* (1991) 173 CLR 48, followed.

REPRESENTATION:

Counsel in Grivell v The Queen SCC No: 20606303

Appellant:	R Goldflam
Respondent:	N Rogers

Solicitors:

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

Counsel in Mackley v The Queen SCC No: 20605878

Appellant:	C McDonald QC
Respondent:	N Rogers

Solicitors:

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

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

Grivell & Mackley v The Queen [2008] NTCCA 06
SCC Nos. CA 16 of 2007 (20606303) and CA 2 of 2008 (20605878)

CA 16 of 2007
(20606303)

BETWEEN:

DION JOHN GRIVELL
Appellant

AND:

THE QUEEN
Respondent

CA 2 of 2008
(20605878)

BETWEEN:

SHAUN EDWARD MACKLEY
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 15 May 2008)

Martin (BR) CJ:

Introduction

[1] The appellants pleaded guilty to two offences of assault, both of which occurred in circumstances of aggravation. The appellant Mackley was

sentenced to four years imprisonment on each count with one year of the sentence on count 2 to be served concurrently with the sentence on count 1. The total head sentence was seven years in respect of which a non-parole period of four years and six months was fixed.

[2] The appellant Grivell was sentenced to three years and six months imprisonment on each count with one year of the sentence on count 2 to be served concurrently with the sentence imposed on count 1. The total head sentence was six years imprisonment in respect of which a non-parole period of three years and six months was fixed.

[3] Each appellant appeals on the basis that the individual sentences and periods to be served were manifestly excessive and the learned sentencing Judge erred in giving insufficient weight to matters such as totality and time spent in custody prior to being sentenced. In addition, each appellant complains that the Judge erred in imposing a non-parole period which exceeded the statutory minimum of fifty percent of the total head sentence.

Facts of Offences

[4] During the evening of Friday 27 January 2006 both appellants communicated several times via mobile telephone. They discussed and formed a joint intention to go out and assault someone.

[5] Grivell armed himself with an extendable metal baton. The appellants met in the vicinity of Kurrajong Drive in Alice Springs and walked through the centre of the city to McDonalds where they purchased food. They then

walked to an abandoned house at North Stuart Highway known as the old Elder's staff quarters. The house was a well known drinking location for Aboriginal people.

[6] The appellants entered the residence and walked through it until they located the middle aged Aboriginal male victim who was lying on the floor of a bedroom. The appellants then took turns assaulting the victim by kicking him in the chest, body and head area and by striking him with the metal baton.

[7] Mackley subsequently told a psychologist that Grivell used the baton to strike the victim repeatedly around the arms and legs. He said he was not sure if the baton made contact with the victim's head.

[8] According to the Crown facts with which the appellants agreed, after attacking the victim they left the area and, a short time later, they returned to the same residence and again entered the bedroom of the victim. They took turns in assaulting the victim by kicking him and striking him with the baton before again leaving the area.

[9] Mackley told the psychologist that after the first assault they walked around the block and Grivell wanted to return and check the status of the victim. He said he followed Grivell into the premises where, unprovoked, Grivell began attacking the victim with the baton. Mackley told the psychologist that he, Mackley, then "stomped" on the victim "a few times".

[10] Later that night after returning to his home residence, Grivell removed the shoes and trousers worn during the assault and threw them into the rubbish.

[11] The sentencing Judge correctly found that while the injuries sustained by the victim were not life threatening, the victim had been subjected to severe and painful beatings. His Honour summarised the injuries as follows:

> "… [T]he victim sustained two superficial abrasions, one measuring approximately two centimetres in diameter, the other three by one centimetre just above the outer margin of the left eyebrow. There was a ragged abrasion on the bridge of the nose measuring approximately three by two centimetres. Immediately below the midline of the lower lip there was a ragged transverse two centimetre laceration extending into the superficial tissue only.
>
> In the midline of the forehead approximately six centimetres above the bridge of the nose there was an oblique one centimetre ragged superficial laceration. On the left anterior parietal scalp just to the left of the midline and approximately 13 centimetres posterior to the left eyebrow there was a three centimetre laceration. Immediately above the right breast there was an oval area of poorly defined purple bruising measuring approximately nine centimetres by three centimetres. On the left upper flank just below the medial wall of the axilla there was a seven centimetre vertical superficial laceration.
>
> On the right mid postero lateral flank there were three abrasions. The upper most was linear measuring approximately five centimetres in length. Approximately eight centimetres below this there was a further abrasion being somewhat cruciform in shape surrounded by purple bruising. Just lateral to the spinal midline there was a third two centimetre diameter superficial abrasion. There was an oblique one centimetre superficial laceration to the right-hand. On the outer upper tibial surface of the lower right leg there were three crusted abrasions. The uppermost of these was approximately ten centimetres below the knee joint. The other two areas of abrasion being present approximately five centimetres and seven centimetres respectively below the uppermost.
>
> In short, attributable to your assaults the victim suffered abrasions around the left eye and on the bridge of the nose, lacerations to the

forehead, lower lip, left side of the head, bruising to the right upper chest, abrasions on the right flank, and laceration to the left flank, and a laceration at the base of the thumb on the right-hand."

[12] The following remarks of the sentencing Judge correctly describe the gravity of the criminal conduct and the importance of denunciation and general deterrence in the exercise of the sentencing discretion:

> "The present case involves very serious offending. There is a lack of any mitigating circumstance in relation to the offending itself. General deterrence and public condemnation are of the highest importance in the present disposition. These offences are of an exceedingly grave character. They were premeditated. The attack was in company. The attack was wanton and unprovoked without warning upon a stranger. The attack consisted of repeated kicks to the head and the body at a time when the victim was defenceless on the ground. The first attack ended and then after there was time to cool down, you both returned to the site and recommenced the attack.
>
> From the first to the last the victim was vulnerable and incapable of defending himself. He was abandoned in a state which both of you must have realised was one where he required attention. Your actions were callous in the extreme.
>
> I have no doubt great pain and terror was caused to the unfortunate victim. Any sentence must properly reflect the gravity of these attacks.
>
> As I have said on previous occasions, the court must make clear that those of any age who go out in company and take part in violence of this sort using innocent members of the public as targets for unprovoked aggression must expect to receive heavy sentences not only to mark the gravity of the offending but also for the protection of the public and deter any others who may be like minded.
>
> … It's an aggravating feature in the cases of the present kind with the victim lying helpless on the ground at the time of the attacks. …

> The present attacks were carried out with sickening viciousness and brutality. The first assault lasted about a minute on one account, the second perhaps slightly less.
>
> In your case, Mackley, your crime was racially motivated. As courts in the past have said, it cannot be too strongly emphasised by the court that where there is a racial element in an offence of violence that is an aggravating feature.
>
> …
>
> In the present cases, it was only by good fortune and not by any conscious act on the part of either of you that the present victim did not sustain more serious injuries and indeed was even killed by your actions.
>
> As I have said, the crimes call for strong denunciation. Crimes of this nature cause alarm and anger amongst law abiding members of the community. This court will do what it can to denounce such criminal conduct. …"

[13] In a finding challenged by the appellants, the Judge found that the offences fell within the worst category for offences of their type. His Honour said that but for the plea of guilty he would have given Mackley the maximum penalty available at law "because this assault is as bad as they get".

[14] The victim died within a few days, but his death was not attributable to the assaults committed by the appellants. The victim's body was discovered by police on Tuesday 31 January 2006 in the course of other enquiries. The victim's blood was smeared onto a wall by a finger impression left by Mackley. On Friday 24 February 2006 Mackley had a conversation with two of his friends during which he stated that he had been questioned about the murder and he committed it. He said that he and another bloke had bashed

the victim to death. Mackley also had conversations about the need to leave the Northern Territory and Australia.

[15] On 25 February 2006 Mackley was arrested at the Alice Springs airport where he had boarded a plane to leave Alice Springs. Grivell was arrested on 28 February 2006 and made full admissions to forming an intention to assault a person with Mackley and to committing the assaults upon the victim. When asked his intention when he left the premises to go out, Grivell replied "Just going out to hit someone". When asked why he assaulted the victim, he replied "I guess I was pissed off".

[16] Both appellants were remanded in custody upon a charge of murder. Further the investigation revealed that after the assaults by the appellants, the victim was seen walking around Alice Springs and the appellants did not cause his death. Subsequently an Aboriginal male person pleaded guilty to the crime of Dangerous Act in the aggravating circumstance that the dangerous act caused the death of the victim.

Mackley – Personal Matters

[17] At the time of the offending Mackley was aged 18 years. His biological father having left the family when he was two years old, Mackley was raised by his mother and stepfather. When he was younger he did not get on well with his stepfather and regular conflict occurred including physical and verbal fights.

[18] Mackley grew up in Alice Springs and successfully completed years 9 and 10. After attending for a full year in year 11, he did not receive a pass.

[19] Throughout his schooling Mackley was unable to control his anger. He was regularly suspended for his involvement in physical fights. Primary school was a particularly unhappy time as Mackley had a speech problem which was manifested by stuttering. After physically attacking a class mate in year 8 he attended two sessions of anger management organised by the principal of the school, but ceased when he left for Adelaide with his family. Mackley found it difficult to obtain and maintain friendships throughout his schooling.

[20] Mackley told the psychologist that he noticed becoming prejudiced towards Aboriginal persons at around the age of 17. At this age he regularly verbally abused Aboriginal persons in Alice Springs, sometimes initiating the abuse and other times responding to abusive comments. At around the age of 17 to 18 years, on at least six occasions Mackley briefly exchanged minor punches or kicks with Aboriginal male persons. He listened to racist music. Mackley told the psychologist that he had been well known for his racist attitudes.

[21] The sentencing Judge noted that Mackley had used alcohol regularly since the age of 17, but did not have an alcohol problem. His Honour appears to have accepted that at the time Mackley saw the psychologist in March 2007 the psychometric tests were consistent with him suffering from a major

depressive order which was severe with psychotic features. Mackley also met the criteria for antisocial personality disorder and borderline personality disorder. His Honour observed that the incident and subsequent incarceration had caused Mackley significant distress and impairment in functioning in important areas thereby leading to a diagnosis of major depressive disorder for which Mackley was in need of psychiatric intervention. His Honour found that while Mackley had not been diagnosed as a psychopath, he possessed psychopathic tendencies.

[22] Mackley had only been in trouble with the law previously for two minor social nuisance type offences. Counsel put to the sentencing Judge that Mackley had reached an understanding of his former racist attitude and was ashamed of his behaviour, but the Judge remained "somewhat sceptical" as to this change of attitude and understanding. His Honour concluded that there was "a continuing risk" of re-offending and that was a conclusion open to his Honour.

Grivell – Personal Matters

[23] Grivell was aged 24 at the time of the offending. He had never previously been in trouble with the law. He had a good work history commencing in 1996 when he was aged 14. Significantly, Grivell confessed to police in the absence of any evidence implicating him in the assault. Grivell thought he was confessing to the crime of murder and he provided details of the events

that were unknown to police. The sentencing Judge accepted that he was genuinely remorseful and possessed good prospects of rehabilitation.

Motivation

[24] Grivell has worked amongst Aboriginal persons and had Aboriginal friends. While the sentencing Judge found that Mackley was racially motivated in committing the crimes, his Honour found that Grivell was not racially motivated. Grivell was motivated by personal anger directed at no-one in particular rather than by a specific racist desire to bash an Aboriginal person. In reaching this finding his Honour apparently accepted the submissions of counsel for Grivell which were based upon Grivell's confession to the police that he had copped "so much shit" that, at the time, it felt like "a good thing … to go out and beat someone up just for the hell of it sort of thing …".

[25] The finding by the sentencing Judge as to Grivell's motivation was open to his Honour. While the Crown was initially minded to challenge that finding, during submissions counsel for the Crown properly conceded that there was no basis upon which this Court could interfere with the finding.

[26] The existence of Mackley's racial motive was an aggravating feature in his case that was not present in Grivell's offending. Nevertheless, as the Judge observed, to bash an innocent third party because of anger aimed at no-one in particular was appalling conduct and was conduct to be condemned strongly. His Honour accepted the Crown submission that Grivell's training

as a security officer was at odds with his offending and he had deliberately used his work baton in committing the offence.

Mackley - Manifestly Excessive

[27] While accepting that the offences were very serious examples of assaults accompanied by aggravating circumstances, counsel submitted that they were not in the worst category and that the Judge was in error in viewing the gravity of the assaults as being "as bad as they get". The Crown contended that the aggravating circumstances placed the offending within the worst category of offending of this type and, correctly, pointed out that in order for the offending to fall within the worst category it is not necessary for the offence to have been committed in the worst imaginable circumstances. The Crown relied upon the following features of aggravation:

- The offences were premeditated, even to the event of picking a locality where it was probable that a vulnerable and defenceless victim would be found.

- The offences were committed in company.

- To the knowledge and with the concurrence of Mackley, Grivell was armed with an offensive and dangerous weapon.

- The offences involved significant physical violence, including kicking and the use by Grivell of the weapon.

- Mackley was motivated by racial hate.

- The victim was vulnerable and incapable of defending himself.
- The victim was a stranger to the appellants.
- The victim did nothing to provoke the assaults.
- After giving the victim a savage beating and leaving him injured and defenceless, and after an opportunity to cool down and reflect upon their conduct, the appellants returned and delivered a further vicious beating to the injured and defenceless victim.

[28] In my opinion the sentencing Judge was correct in characterising the offending as within the worst category for offending of this type. There were no mitigating circumstances whatsoever accompanying the offending and the beatings were both premeditated and vicious. It is possible to imagine longer beatings and greater harm being caused falling short of the next category of serious harm, but those factors do not necessarily remove the offending from the worst category. The combination of factors supported the finding by the Judge.

[29] There were a number of mitigating features personal to Mackley. First, at the time of the offending he was a young person aged only 18 years. In substance, while Mackley was prone to becoming involved in angry confrontations, he was a first offender. Although personal deterrence remained a relevant consideration, a number of references tendered on behalf of Mackley established that he was a good worker which, coupled

with his acceptance of responsibility, demonstrated the existence of prospects of rehabilitation. In this regard the report of the psychologist provided a helpful insight into Mackley's psychological state and supported a finding that Mackley possessed prospects of rehabilitation.

[30] Prior to making allowance for a plea of guilty, the sentencing Judge was required to determine an appropriate sentence in the light of the objective circumstances of the crimes and matters personal to the offenders. In addition to reaching the view that the maximum penalty of five years imprisonment appropriate for each of the crimes in view of the objective seriousness of each crime, in the case of Mackley his Honour determined it was not appropriate to mitigate the sentence by reason of any matters personal to Mackley. His Honour's view and approach in this regard is apparent from the following passage in his Honour's sentencing remarks:

> "As I have said, there is no aspect of these crimes *or of your personal circumstances* that merit leniency. But for your plea of guilty, Mr Mackley, I would have given you the maximum penalty available at law, because this assault is as bad as they get." (my emphasis).

[31] The sentence of four years imprisonment imposed upon Mackley was reached after his Honour allowed a reduction of 20 per cent from the maximum of five years in order to reflect Mackley's plea of guilty.

[32] Some offending is so serious that features such as punishment and general deterrence not only prevail over matters of mitigation personal to an offender, but they render such personal matters of little or no weight. In my

opinion, however, Mackley's offending was not so serious as to deprive personal matters of mitigation of any weight whatsoever. The combination of mitigating features personal to Mackley to which I referred, particularly his youth and absence of relevant prior offending, were matters of sufficient weight to require reflection in the sentence before allowance for the plea of guilty. In failing to give any weight to these matters, and in failing to reflect the weight of such matters by reaching a sentence less than the statutory maximum, in my view the sentencing Judge fell into error. As a consequence Mackley's appeal against sentence should be allowed and this Court should exercise the sentencing discretion afresh.

Grivell – Manifestly Excessive

[33] The offending by Grivell was not motivated by racial hatred. To that extent, a significant feature associated with the offending by Mackley is absent, but it is to be borne in mind that Grivell brought the offensive weapon to the criminal enterprise and used it.

[34] The sentencing Judge specifically mentioned that unlike Mackley, Grivell made an early confession. His Honour referred to the early offer to plead guilty and to genuine remorse evidenced by the plea and confession. His Honour specifically found that Grivell had good prospects of rehabilitation. These matters appear to be the principal features of distinction drawn by his Honour between Mackley and Grivell, but it is not clear from the sentencing

remarks whether his Honour allowed a reduction greater than 20 per cent for Grivell's plea of guilty coupled with remorse.

[35] It is difficult to determine how the sentencing Judge arrived at the sentence of three years and six months imprisonment for each offence. It would not have been appropriate to start with the maximum penalty of five years, reduce the period by 20 per cent to reflect the plea and then to allow a further reduction of six months on account of the personal circumstances of mitigation applicable to Grivell. The correct approach is first to arrive at the appropriate sentence without regard to a reduction by reason of the plea. In that process the plea may be relevant to an assessment of matters such as remorse and prospects of rehabilitation. Having reached a determination as to sentence, that period is then reduced by the period appropriate to reflect the plea of guilty.

[36] In assessing whether the individual sentences were manifestly excessive or affected by error, in my opinion it is appropriate to assume a reduction of 25 per cent in order to adequately reflect Grivell's plea of guilty. Given Grivell's cooperation with police through his full confession, without which police had no evidence implicating Grivell in the crimes and no information as to the details of the events, and given that the plea was early and coupled with genuine remorse, a reduction of 20% would be an inadequate reduction. In addition, Grivell would be entitled to experience a legitimate sense of grievance if he received only the same reduction as Mackley because, unlike

Mackley, his plea was preceded by valuable co-operation with the police and was accompanied by genuine remorse.

[37] In order to arrive at a sentence of three years and six months imprisonment after an allowance of 25 per cent to reflect the plea, the sentence reached before allowance for the plea would be 56 months. In other words, if the objective circumstances considered alone justified the maximum penalty of five years imprisonment, the matters personal to Grivell would mitigate that sentence by a period of only four months. In my opinion, that extent of mitigation gives insufficient weight to the matters personal to Grivell and would amount to an error requiring that the appeal be allowed and Grivell be re-sentenced.

Re-Sentencing

[38] In exercising the sentencing discretion afresh, in my opinion the individual offences by both appellants should be viewed as falling within the worst category of offending of this type. As I have said, the offences do not involve the worst imaginable circumstances for offences of this type, but by reason of the combination of aggravating circumstances to which I have referred they fall within that category.

[39] It does not follow, however, that the culpability and gravity of the criminal conduct of both appellants were identical. In my opinion Mackley's culpability and the gravity of his conduct was significantly greater because he was motivated by racial hatred. In addition, the element of general

deterrence looms larger in Mackley's offending by reason of that motivation. Men like the appellant who perpetrate acts of violence by reason of racial hatred must understand that their violence is reprehensible and completely unacceptable to the reasonable members of our community. Victims of such violence are deserving of such protection the law can provide and a clear message must be sent that this type of violence, even when committed by young persons, will be met with significant terms of imprisonment.

[40] In arriving at the appropriate sentence, the appellants submitted that the Court should make allowance in mitigation for the period spent in custody by each appellant on remand. Notwithstanding that the sentences will be backdated to reflect the individual periods in custody, counsel submitted that the appellants experienced particular hardship while in custody on remand that justified an allowance by way of mitigation.

[41] Mackley was held in custody at Alice Springs for nine months and 21 days. After two months in protective custody, he was placed with the general prison population for a few months before moving back into protective custody. At that time the appellant was charged with murder and believed that he was the subject of many "mind games" by other prisoners which he attributed to the fact that he was young and charged with murder. The appellant told the psychologist that on a few occasions he was seriously threatened in a physical sense. The appellant also said that he experienced

intense sadness, anger and lethargy during a period in isolation without privileges.

[42] Grivell was in custody for nine months and 18 days. He had never been in custody before. From his perception, fifty or so inmates "just hated him being there" and he lived in fear of retaliation. Members of the deceased's extended family within the prison system threatened Grivell. These threats included threats to Grivell's family. During this period the appellant was charged with murder and believed that he and Mackley killed the deceased. Counsel urged that the time on remand was more onerous than usual.

[43] It is well recognised that in some respects prisoners on remand awaiting trial or sentence or at a greater disadvantage than sentenced prisoners. For example, generally speaking prisoners on remand are not provided with the same opportunities to participate in educational and vocational courses or work details. However, in this regard there is no evidence that the disadvantages experienced by the appellants were sufficiently significant to warrant an allowance by way of mitigation.

[44] As to the individual matters to which I have referred, in my view they are not unusual and do not justify an additional allowance by way of mitigation. No doubt many persons on remand experience sadness, anger, distress and depression. Many would be afraid. These are not unusual consequences or custody following the commission of crimes. No doubt in severe cases some

allowance would be appropriate, but neither appellant has made out such a case.

[45] As to Mackley, before making allowance for the plea of guilty, in respect of the first offence I would impose a sentence of four years and six months imprisonment. After allowance for the plea of guilty, I would impose a sentence of three years and six months imprisonment.

[46] As to the second offence, in my opinion a longer sentence is appropriate. This second episode of criminal conduct was not, as the appellants submitted, a second offence committed "in a single course of criminal conduct". Nor did it arise, as suggested by the appellants, "from substantially the same act or circumstances or a closely related series of circumstances." The second offence was committed after the appellants, having committed the first offence, walked away from the premises. There was simply no occasion for a return to the premises or the victim. This was not a case in which, from the appellants' perspective, there was reason to return other than to deliver an additional gratuitous violent beating. The appellants had ample time to cool down and reflect upon their criminal conduct. Notwithstanding that they had delivered a vicious beating to a vulnerable and defenceless Aboriginal man, the appellants chose to return and repeat their criminal conduct upon the defenceless victim who was now injured and even more vulnerable.

[47] In respect of the second offence, but for Mackley's plea of guilty I would impose a sentence of four years and nine months imprisonment. After making allowance for the plea, I would impose a sentence of three years and nine months imprisonment.

[48] As to Grivell, with respect to count 1, before allowance for the plea of guilty I would impose a sentence of four years and three months imprisonment. After making allowance for the plea, I would impose a sentence of three years imprisonment.

[49] As to count 2, before allowance for the plea I would impose a sentence of four years and six months imprisonment. After allowance for the plea, I would impose a sentence of three years and three months imprisonment.

[50] I turn to the question of the total period to be served by each appellant. This involves consideration of accumulation of sentences and it is necessary to have regard to the gravity of the total criminal conduct and the issue of totality. All of the matters relating to the objective seriousness of each crime and matters of mitigation personal to each appellant must be considered again in determining an appropriate total period to be served by each appellant.

[51] As I have said, I do not agree with the submission that the appellants engaged in a single course of criminal conduct. While there was a connection between the two crimes because they involved the same victim in the same locality, they were separate criminal enterprises and total

concurrency of sentences is inappropriate. The individual sentences do not adequately reflect the gravity of the total criminal conduct.

[52] As to Mackley, I would order that one year and nine months of the sentence imposed on count 2 be served cumulatively upon the sentence imposed with respect to count 1, giving a total sentence of five years and three months.

[53] As to Grivell, I would direct that one year and six months of the sentence imposed on count 2 be served cumulatively upon the sentence imposed with respect to count 1, resulting in a total sentence of four years and six months.

[54] As to the minimum period to be served by each appellant, I have given anxious consideration to the question of partial suspension of Grivell's sentence. However, in my view of the objective seriousness of the crimes and total course of criminal conduct, I have concluded that it is appropriate to fix a non-parole period.

[55] In connection with the non-parole period, the appellants submitted that the sentencing Judge had erred in fixing a non-parole period greater than 50 per cent of the head sentence. The appellants contended that there were no factors with respect to either appellant "warranting" a departure from "the normal practice" of fixing the statutory minimum period. That period is 50 per cent of the head sentence.

[56] The appellants' contentions amounted to a proposition that it is the "normal practice" to fix the statutory minimum non-parole period and, before a

longer non-parole period can be fixed, there must exist factors which justify a departure from that "normal practice". In advancing this proposition, counsel relied exclusively upon the decision of this Court in *CEV v The Queen* [2005] NTCCA 10. In my view, that authority does not support the appellants' proposition and it should be rejected.

[57] In *CEV*, the appellant was convicted of a number of sexual offences. For reasons not relevant to the circumstances under consideration, the Court of Criminal Appeal allowed the appeal against sentence and reduced the total period to be served by two years. In adjusting the non-parole period, the Court specifically noted that it was not necessary to consider the appellants' submission that the learned sentencing Judge had erred in fixing an excessive non-parole period.

[58] In response to a submission that there were "no factors warranting a departure from what was said to be the normal rule of practice in this jurisdiction of fixing whatever the statutory minimum term might be", the Court appears to have accepted that such a practice had previously existed. The Court said:

> "… As to the practice of fixing minimum terms of 50 per cent of the head sentence in cases which fall outside of s 55 and s 55A of the Sentencing Act, the reason for that practice may be traced back to the time when prisoners were usually entitled to earn one third remissions on their head sentences for good behaviour: …
>
> After the abolition of remissions in 1994 by s 6 of the Prisons (Correctional Services) Amendment Act (No 2) 1994, the practice has to some extent continued: *c.f.* s 58 of the Sentencing Act which

> applies only to sentences of less than 12 months. Although it cannot be pressed too far, uniformity of sentencing is a matter of importance: … but now that remissions have been abolished, the reason for the practice no longer exists." (citations omitted)

[59] In my opinion, the decision in *CEV* does not support the view that, absent specific factors justifying the fixing of a non-parole period longer than the statutory minimum of 50 per cent of the head sentence, a sentencing court is required to fix the statutory minimum. No such rule or principle exists. It would amount to an error of principle for a sentencing Judge to approach the fixing of a non-parole period by asking whether there are factors which warrant the fixing of a period in excess of the statutory minimum. Leaving aside special cases where the legislature has directed the fixing of a minimum period longer than 50 per cent of the total sentence and the influence of that statutory direction upon the approach to the fixing of a non-parole period, in the general run of cases the fundamental task of the sentencing Judge is to determine the minimum period that justice requires the offender serve. In *Power v The Queen* (1973) 131 CLR 623, the following passages appeared in the joint judgment of Barwick CJ and Menzies, Stephen and Mason JJ (628 and 629):

> "In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention.
>
> …
>
> To read the legislation in the way we have suggested fulfils the legislative intention to be gathered from the terms of the Act, ie 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*". (my emphasis)

[60] This approach was confirmed by the High Court in a joint judgment in *Deakin v The Queen* (1984) 58 ALJR 367:

> "The intention of the legislature in providing for the fixing of minimum terms 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*: see *Power v The Queen* (1974) 131 CLR 623 at 629." (my emphasis)

[61] The passage from *Deakin* was cited by the Court in *CEV* [37]. The fundamental concept that the offender serve "the minimum time that a judge determines justice requires that [the offender] must serve having regard to all the circumstances of [the] offence" has been consistently approved: *Bugmy v The Queen* (1990) 169 CLR 525 at 531 and 536; *The Queen v Shrestha* (1991) 173 CLR 48 at 62 and 69.

[62] Applying these principles, in respect of Mackley I would fix a non-parole period of three years. In respect of Grivell, I would fix a non-parole period of two years and three months.

[63] The sentences should be backdated to take into account that prior to being sentenced by the sentencing Judge, Mackley had been in custody for nine months and 21 days and Grivell for nine months and 18 days.

Riley J:

[64] I agree.

Southwood J:

[65] I agree.