

R v Heiss & Kamm [2009] NTSC 26

PARTIES: THE QUEEN

v

DANIEL LOTHAR HEISS

AND

PETER MICHAEL KAMM

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NOS: 9300026 & 9301820

DELIVERED: 22 June 2009

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JUDGMENT OF: MILDREN J

CATCHWORDS:

CRIMINAL LAW – sentencing – murder – life imprisonment – Sentencing (Crime of Murder) and Parole Reform Act s 19(4) – application by DPP – whether longer non parole period should be fixed – application dismissed

Sentencing (Crime of Murder) and Parole Reform Act 2003 (NT) s (4),
s 7(7), s 17, s 18(a), s 19(1), s 19(1)(a)(i), s 19(3), s 19(4), s 53A(2),
Criminal Code s 140(b), s 210(1)

Leach v The Queen (2007) 230 CLR 1; *R v Crabbe* (2004) 145 NTR 50;
(2004) 188 FLR 209, 150 A Crim R 523; referred to

REPRESENTATION:

Counsel:

Plaintiff:	R Wild QC & P Horvat
First Defendant:	S Cox QC
Second Defendant:	R Goldflam

Solicitors:

Plaintiff:	Director of Public Prosecutions
First Defendant:	Northern Territory Legal Aid Commission
Second Defendant:	Northern Territory Legal Aid Commission

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

R v Heiss & Kamm [2009] NTSC 26
Nos. 9300026 & 9301820

BETWEEN:

THE QUEEN
Plaintiff

AND:

DANIEL LOTHAR HEISS
First Defendant

AND:

PETER MICHAEL KAMM
Second Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 22 June 2009)

- [1] This is an application by the Director of Public Prosecutions pursuant to sub-ss 19(1)(a)(i) and (4) of the Sentencing (Crime of Murder) and Parole Reform Act 2003 (NT) to revoke the statutory 20 year non-parole period fixed by sub-s 18(a) of the Act and to substitute a longer non-parole period in accordance with sub-s 19(4) of that Act.
- [2] On 22 December 1990, following a trial before Nader J and a jury of 12, the respondents were found guilty of having murdered Peter Dean Robinson on

or about 14 May 1989 near the Carpentaria Highway on O T Downs Station. On 31 January 1991, as was then required by the Criminal Code (NT), each respondent was sentenced to imprisonment for life for the offence of murder without a non-parole period being fixed. These sentences were deemed to have commenced to be served from 5 August 1989. Concurrent fixed term sentences were ordered in respect of convictions for stealing and for improperly offering an indignity to the deceased body of Peter Dean Robinson, each respondent having been found by the jury to be guilty of those crimes in addition to the crime of murder.

- [3] The Sentencing (Crime of Murder) and Parole Reform Act 2003 (NT) came into operation on 11 February 2004. It applies to the respondents¹.
- [4] Pursuant to sub-s 18(a) of the Act, the respondents' sentences of imprisonment for life for the crime of murder are to be taken to include a non-parole period of 20 years. Pursuant to sub-s 19(1) the Court has a power to revoke the non-parole period fixed by s 18 in respect of each prisoner and fix a longer non-parole period in accordance with sub-s 19(4), on the application of the Director of Public Prosecutions.
- [5] Subsection 19(4) provides:

“The Supreme Court may fix a non-parole period that is longer than a non-parole period referred to in section 18 or subsection (3) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.”

¹ s 17.

[6] The principles to be applied in a case such as the present were considered in detail by B R Martin CJ in *R v Crabbe*². In short, in that case the learned Chief Justice held that the threshold question for the Court in considering whether or not the Court is satisfied that a longer non-parole period is warranted is to be answered by reference to “any objective or subjective factors affecting the relative seriousness of the offence”. Unless the Court is satisfied by reason of those factors that a longer non-parole period is warranted, there is no power to fix a longer non-parole period.

[7] In arriving at an answer to that question, the learned Chief Justice said³:

“Adopting a broad interpretation which I consider will achieve the purposes of the legislation, in my opinion the objective and subjective factors to which the court shall have regard are not limited to those that, literally speaking, have a direct causal connection with the commission of the offence. Factors such as immediate remorse, immediate cooperation with authorities and an early plea of guilty, while not directly linked in a causative way to the commission of the crime, are so closely connected with the offender’s culpability as to amount to factors affecting the relative seriousness of the offence for the purposes of s 53A of the Sentencing Act and s 19(4) of the Act... Such factors may affect the relative seriousness. It is a question of degree and timing.

Having reached that view, the question remains whether the broad interpretation I have adopted can reasonably encompass prospects of rehabilitation or the rehabilitation of an offender that has taken place over many years subsequent to the commission of the crimes. It is here that I have reached the view that the line must be drawn adverse to the respondent.

To find that the legislature intended that the court, in assessing the relative seriousness of the offence, should take into account prospects of rehabilitation or rehabilitation that has occurred over

² (2004) 145 NTR 50; (2004) 188 FLR 209; 150 A Crim R 523.

³ *R v Crabbe* (2004) 145 NTR 50 at 68; (2004) 188 FLR 209 at 229; 150 A Crim R 523 at 543.

many years subsequent to the commission of an offence is to distort the ordinary and natural meaning of the words “affecting the relative seriousness of the offence”. Prospects of rehabilitation or subsequent progress towards rehabilitation cannot reasonably be regarded as factors affecting the relative seriousness of the offence.”

- [8] In *R v Crabbe*⁴ the learned Chief Justice went on to hold that if the discretion is enlivened, in considering whether or not to exercise the discretion and, for that matter in considering the extent of any new non-parole period that the Court considers is appropriate, the ordinary principles embodied in the Sentencing Act and the well established common law principles of sentencing apply. The discretion is not fettered and in particular the Court is bound to take into account “all relevant information capable of bearing upon the assessments required of the Court, including facts that have emerged during the period of incarceration”. As his Honour said⁵:

“The Legislature has chosen not to fetter the discretion and to ensure that the timing of an application by the director pursuant to the transitional provisions will enable the court to receive the benefit of information as to an offender’s progress or otherwise by way of rehabilitation over many years in custody.”

- [9] Another observation made in the *R v Crabbe*⁶ by the learned Chief Justice relates to the provisions of sub-s 53A(2) of the Act which provides that a standard non-parole period of 20 years referred to sub-s (1)(a) represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies.

⁴ (2004) 145 NTR 50; 150 A Crim R 523.

⁵ (2004) 145 NTR 50 at 70 [112]; (2004) 188 FLR 209 at 231; 150 A Crim R 523 at 546 [112].

⁶ (2004) 145 NTR 50; (2004) 188 FLR 209; 150 A Crim R 523.

[10] In *R v Crabbe*, B R Martin CJ said⁷:

“Notwithstanding the absence of the direction in the transitional provisions that the period of 20 years represents the period for an offence in the middle of the range of objective seriousness, in my view it is reasonable to infer that the Legislature intended the court proceed on that basis when determining whether to fix a longer non-parole period pursuant to the transitional provisions.”

[11] However, these comments must not overlook that fact that ultimately the discretion of the Court involves a single process and not a two-staged process. In *Leach v The Queen* Gleeson CJ said⁸:

The provisions of sub-ss (1), (4) and (5) of s 19 call for an exercise of discretionary judgment within a wider context of legislative prescription. They are different aspects of a single decision-making process. They do not require a court to disregard the consequences for the prisoner of the orders that may be made. They do not require a court to disregard events that have occurred over the period since original sentencing, including rehabilitation. They empower the court to set aside the legislatively prescribed non-parole period for the purpose either of increasing the period or of removing the possibility of parole. They condition the power to make orders in substitution for the legislative provision by reference to a judgment made about culpability.”

[12] Gleeson CJ also said⁹:

“Considerations relevant to sentencing, and fixing non-parole periods, are relevant because what is involved in s 19 is a sentencing exercise. Events that have occurred since the original sentencing, to the extent to which they bear upon such considerations, may be taken into account. These considerations and events are taken into account within the framework of s 19.”

⁷ (2004) 145 NTR 50 at 70 [114]; 150 A Crim R 523 at 546 [114].

⁸ (2007) 230 CLR 1 at 11 [18]; (2004) 188 FLR 209 at [114].

⁹ (2007) 230 CLR 1 at 12 [19].

- [13] There is some other guidance to be found in the Act in that sub-s 19(3) provides that in certain circumstances called the “prescribed circumstances of aggravation” the Court must fix a non-parole period of 25 years. Notwithstanding that, the Court may fix a non-parole period that is longer than 25 years if the prescribed circumstances of aggravation exist, pursuant to sub-s 19(4).
- [14] There is no power in relation to the transitional provisions which apply only to prisoners who were currently serving life imprisonment for the offence of murder as at the date of the commencement of the Act to impose a non-parole period of less than 20 years. For offences committed after the commencement of the Act, the Court does have such a power provided that there are “exceptional circumstances sufficient to justify fixing a shorter non-parole period”¹⁰. There are difficulties with the construction to be given to that sub-section, but it is not necessary to canvas them. I mention it only as some indication by the legislature of the sort of factors which might bring a case outside of the midrange of objective seriousness.
- [15] It was not urged upon me that I should take a different view from that expressed in *Crabbe* about the relevance of sub-s 53A(2) to prisoners to whom the transitional provisions apply. For the purposes of this case, I am prepared to accept the principles established in *Crabbe*, although I am by no means convinced that it is proper to have regard to s 53A for these purposes.

¹⁰ See sub-s 7(7).

However, in view of the decision which I have reached nothing turns on this question.

The Facts

[16] One of the difficulties in a case like this is that at the time of sentence the trial Judge, whose responsibility it is normally to find the facts, made no findings of fact for sentencing purposes. A further difficulty is that the Crown case largely depended upon confessional material tendered in evidence at the trial made by each of the accused. At the trial the accused claimed that they were acting in self-defence. Both accused gave evidence. Plainly the verdict of the jury means that each accused's evidence was rejected beyond reasonable doubt. Further, the evidence in so far as it came from each accused was not entirely consistent. This makes my task of fact finding difficult.

[17] In general terms it appears that each of the accused knew each other from school days, although not well. Kamm knew Clifford Heiss, Daniel Heiss' brother. At some time before 14 May 1989, Kamm and Clifford Heiss had arrived in Darwin, apparently in order to find work. After a few weeks they met up with Daniel Heiss, who was at that time living in a caravan at the caravan park at the Acacia Store, some 50 or 60 kilometres south of Darwin. At that stage, Daniel Heiss had gone into a pig shooting partnership with a man called Shannon White. Part of the arrangement involved the use of a Nissan Patrol vehicle which Daniel Heiss would use for the purposes of the

business. Subsequently, Kamm also agreed to take part in the business as a shooter.

[18] Sometime prior to May 1989 the deceased had arrived in Borroloola in his Nissan Patrol four wheel drive motor vehicle. Whilst in Borroloola he had an accident. He decided to arrange for a Mr Quan Sing to deliver his vehicle to Darwin. He had left Borroloola sometime ahead of his vehicle and he also left his dog at Borroloola with a Mr Mitchell saying that he would call back for it in a fortnight. He had told Mr Quan Sing that he had been staying in the Acacia area. The deceased's vehicle arrived in Darwin on 20 May. The deceased had also left his firearms at Borroloola with a Neville Andrews. He had also been told that there were two Nissans at Acacia which might provide a body for his own damaged vehicle.

[19] At some time in May 1989 the deceased arrived at the caravan park and showed an interest in purchasing from the prisoner Heiss one of his Nissan Patrols which was badly rusted out. As a result of that meeting, the deceased also agreed to take part in the venture as a shooter.

[20] A day or so before 14 May 1989, Heiss and Kamm drove to Borroloola with the deceased in order to collect his rifles and presumably his dog. After they arrived in Borroloola they went to where the deceased had left his Nissan vehicle and collected his guns. They then drove back towards the Stuart Highway, but stopped on the way at OT Station in order to go shooting. There were no other persons present at the relevant time. All three men

walked into the bush armed with rifles in order to shoot animals. The deceased walked ahead of the two respondents. The undisputed evidence was that both respondents shot at the deceased and that it was the respondent Heiss who fired first. Heiss fired one shot. The evidence at trial suggested that Heiss' shot missed. The respondent Kamm then fired two shots at the deceased. One bullet passed across the deceased's back causing a transverse wound. The other entered the chin and exited at the back of the neck. The evidence was very strong that the respondent Kamm fired the fatal shot. Both Heiss and Kamm claim to have fired at the deceased in self-defence. The Crown alleged that the murder was carried out by the respondents pursuant to an agreement to shoot and kill the deceased for the purpose of obtaining the deceased's rifles.

[21] There was evidence at the trial that both of the respondents and the deceased had consumed alcohol and smoked cannabis at the time. The trial Judge did not leave intoxication to the jury as relevant to intent to kill or intent to cause grievous harm. The consumption of alcohol and marijuana may provide some explanation for the respondents' conduct, although of course it does not mitigate it.

[22] Both respondents then dug a grave, placed the deceased's body in a sleeping bag, wrapped a rag around the deceased's head, poured petrol over the body and set fire to it. After the flames died down, both respondents covered the body with leaves and other debris and then placed an ant's nest on top of the grave.

- [23] By 14 July 1989 the police knew that the deceased had been declared a missing person and that his father had been enquiring about him. By this time the police also knew that the deceased's firearms had been found at Bamboo Creek under a derelict vehicle.
- [24] On 17 June, Shannon White had complained to the police that Heiss had stolen White's Nissan motor vehicle.
- [25] By 5 August the police had acquired knowledge, none of which was sufficiently cogent to prove a murder, but which was enough to make them suspicious both that the deceased was dead and that the accused Heiss was in some way involved, perhaps. Detective Senior Hambleton was looking for Heiss because it was obvious to him that he may be able to help the police in their investigations into a suspected homicide and some offences of larceny.
- [26] On Saturday 5 August Hambleton sought out Heiss and arrested him at the Salvation Army Hostel, Darwin in the presence of Detective Dickinson. The circumstances of the arrest were that Hambleton and Dickinson had attended at a room in which Heiss was sleeping and advised him that they were investigating the report of a stolen Nissan Patrol motor vehicle about which they wanted to speak to him. On asking for his name the accused gave a false name and declined to answer any questions. He was then arrested for giving a false name to a member of the police force and taken to the police station where he was placed in an interview room in the CIB offices. Whilst at the Berrimah police station, police searched Heiss' backpack finding

amongst other things a receipt for a telescopic sight normally fitted to a firearm and three rounds of ammunition. The sight could have come from one of the deceased's firearms and the ammunition was also thought to be significant because of its rarity and other information possibly linking it to the deceased. He was then questioned about the ammunition found in his possession and shown a photograph of the deceased. Heiss denied knowing him or ever having seen him. He was confronted with other information which might tend to show that he did in fact know the deceased. He replied, "I don't know anything about him. I'm not saying anything else. What are you trying to do?" Hambleton then said, "I'm just trying to find out where young Dean is". And the applicant replied, "I'm not saying anything else."

[27] In a subsequent interview later that day Hambleton showed Heiss a photograph which had been found in Heiss' possessions showing him leaning against a Daihatsu motor vehicle holding two rifles which appeared to be two of the rifles which belonged to the deceased as did other property shown in the photograph. Heiss falsely identified the place at which the photograph had been taken and as to the ownership and possession of guns and other property. In the meantime police had interviewed Kamm who was questioned about the items seized including some ammunition and an ammunition belt. In general terms Kamm denied any knowledge of them or of having any connection with the deceased. Kamm was interviewed by police from 2:00 am until 3:50 am on Sunday 6 August. At that stage Heiss was placed in the cells where he spent the remainder of the night having

been charged with giving a false name. During this interview Kamm told police of Heiss and Kamm's association with the deceased and placed the blame for killing him on Heiss whom he said had shot him and he had described how he and Heiss had disposed of the deceased's body. Kamm agreed to accompany Hambleton with a view to trying to find the grave and in order to make an examination of the crime scene.

[28] At 10:35 am on Sunday 6 August Heiss was interviewed by Detective Sergeant Sodoli. During the course of this conversation Sodoli informed Heiss that Kamm had gone to Borroloola with other police with a view to trying to find the place where the deceased had been buried. The following conversation occurred:

HEISS: Why, has he admitted to killing him?

SODOLI: Yes he has.

HEISS: I don't believe it.

SODOLI: Believe it – he has confessed and has gone out there.

HEISS: What's he said?

SODOLI: He's admitted to being involved but that he did not do the actual shooting.

HEISS: Is that right? I booked the flight and Peter gave him the ticket.

SODOLI: What's that mean?

HEISS: Work it out for yourself – has Peter actually made a statement?

[29] Heiss sought but did not obtain, a copy of what Kamm was alleged to have said, but later in the conversation the following was said:

HEISS: Did Peter really confess?

SODOLI: Yes he did.

HEISS: If he had stuck to the story you would never have got us.

SODOLI: What story?

HEISS: That we left him in Katherine.

[30] Shortly thereafter Heiss gave Sodoli a version of what had occurred in a tape recorded interview. Heiss described how, on the morning of the killing, the three of them went into the bush looking for animals to shoot, and how each of them sighted in the firearm each was carrying. Heiss accused Kamm of saying that he, Kamm, would like to shoot the deceased and how all of the firearms had been cocked for firing as they progressed in a line through the bush. According to Heiss, the deceased turned towards him with a funny look in his eyes whereupon Heiss shot him saying that he would not have done so if he did not think that the deceased was going to “blow me away”. He said he tried to shoot the deceased, he thought the bullet hit him in the shoulder at the back, the deceased fell to the ground onto his left knee with the rifle he was carrying raised to his shoulder. The rifle was pointed at Heiss, who knocked the gun away from him. At about the same time Kamm

shot the deceased. In general terms Heiss painted the picture of his having acted in self-defence, the fatal shots having been fired by Kamm.

[31] At the conclusion of the interview he was arrested for the murder of the deceased. He was asked if he was prepared to take the police to see if the grave could be found and to show them what had happened. Heiss agreed to do this. On Monday 7 August Heiss and police departed by aircraft for Daly Waters. They were joined there by Detective Sodoli and other police in a motor vehicle and set out to travel the considerable distance along the Carpentaria Highway to the scene. Heiss there took part in a re-enactment during the course of which he acted out and he was recorded on audio and video tapes a version of how the deceased met his death and what happened thereafter, conforming generally to what Heiss had told Sodoli on the previous day. The party returned to Darwin by motor vehicle stopping at Katherine overnight. On Tuesday 8 August they departed Katherine and stopped at Adelaide River, Bamboo Creek and Acacia on the way to Darwin. During a short conversation at Bamboo Creek Heiss showed the police a motor vehicle under which the rifles had been hidden. He was then arrested for murder.

[32] In the meantime Kamm had been asked whether he would be prepared to take the police the following day to the place where the killing occurred and have a look for the body. Arrangements were made for Kamm to be flown with police to Borroloola. At 3:48 pm on the Sunday the party stopped at a place where a photograph, identified earlier in the investigation had been

taken and a little later there was a short conversation at the place which Kamm identified as the point at which he and Heiss had parked the Daihatsu before setting out into the bush.

[33] The following morning the party returned to the same place. During the evening the police had spoken to Kamm and informed him that Heiss had made a confession which was substantially different from the version of events put forward by Kamm especially in that the last two shots had been fired by Kamm and not Heiss.

[34] The evidence was that Kamm was cooperative in the search for the remains on the Monday morning. Whilst talking to Kamm about the location of various events at the scene of the killing Kamm said:

“Dean was in front over that way somewhere. Dan hit him once in the back and Dean went down on his knees. I hit him twice with a 6.5, bang bang through the head, and blew him away, and down he went.”

[35] There then followed a lengthy conversation at the scene which was tape recorded. Kamm described how the three of them were going through the bush with the deceased in front, Heiss to his right and Kamm to the left. He said that Heiss brought up the rifle he was carrying and fired it into the deceased's back, the deceased spun around and “as he was going down and I had already fired two shots just before he hit the ground.” (sic) He said that he was certain that he had hit him with one of the shots in the neck but was not sure as to the other. Elaborating on the matter he told how when shot by Heiss the deceased swung around to face him and bring his gun to bear upon

him. Heiss was taking the gun off the deceased and Kamm shot the deceased at about the same time. When asked why he had shot him he replied, "Shooter's frenzy, something like that". He went on to explain that he was in fear of the deceased shooting him because of the way he had gone down to the ground and was looking straight at him and pointing the gun at him. He said that he and Heiss had "conspired to shoot him for the rifles, initially for the Nissan as well. But I told him it was too complicated". A re-enactment then took place. Subsequently Kamm was driven to Daly Waters and thence to Katherine. Eventually on the way back to Darwin the party stopped at Bamboo Creek where Kamm showed Hambleton the vehicle where he said some firearms belonging to the deceased had been hidden. Later, at Acacia, Kamm showed Hambleton some other property of the deceased's which had been hidden.

The Submissions before This Court

[36] It was submitted that the unanimous verdict of the jury can only be interpreted as meaning that they must have accepted the way the Crown put its case, namely, that irrespective of which respondent fired the fatal shot, the murder was carried out by the respondents pursuant to an agreement to shoot and kill the deceased for the purpose of obtaining the deceased's rifles. Further, the verdict meant that the jury rejected each respondent's version that they shot the deceased in self-defence. It was submitted that in these circumstances the murder of the deceased was a malicious and deliberate killing evidenced by the following matters:

- (a) there was a prearranged plan to kill which was still in existence at the time of the killing;
- (b) the respondents developed and discussed a plan in the presence of the deceased conversing in German;
- (c) the deceased was shot from behind;
- (d) the fact that both of the respondents discharged their firearms at the deceased;
- (e) the victim was vulnerable; and
- (f) the crimes occurred in a remote location.

[37] Attention was drawn to the following comments of the trial Judge at the time of sentence:

“But I do take the liberty in this case of reminding those who one day will have to consider that matter, to consider the fact that these two men committed what can only be regarded as cold-blooded murder for the most trivial of motives – they took away the life of a young man in perfectly cold-blood, having planned to take his life to steal from him something like three rifles.

There is something about the mentality of people who would do that, that ought to be considered when their release is being considered, so that a responsible decision is made on that matter, and that the decision to release them is not made lightly when the time comes.”

[38] The learned trial Judge referred to the attempts to conceal the crimes as being carried out in such a way that attracted the abhorrence of the community, noting that the head of the victim had been burned. It was

submitted that the respondents' level of culpability or blameworthiness for the offending was of the highest order; that there were no objective circumstances that mitigated the seriousness of the crimes or the respondents' levels of culpability in the commission of the crimes and there was no evidence of remorse shown by either respondent.

[39] At the hearing before me the Crown read a victim impact statement on the record from the deceased's father, Mr Peter Robinson. Mr Robinson states that the effect on his life was to change him from a very moderate drinker of alcohol into an alcoholic. He says that it took five years before he was able to give up drinking and function soberly. He feels intense hatred towards both of the prisoners and despises them for making him feel that way. There are times, also, when he feels melancholic after thinking about a pleasant situation relating to his son. He also suffers from recurring dreams which he finds very disturbing. He is also suffering from the disappointment of being denied the possibility of grandchildren. I note that even providing the information to the Crown for the victim impact statement was an upsetting thing for Mr Robinson. Clearly Mr Robinson still suffers greatly as a consequence of the murder of his son.

[40] The original sentences imposed on 31 January 1991 included 12 months imprisonment for one count of stealing pursuant to sub-s 210(1) of the Criminal Code and 12 months imprisonment for one count of misconduct with regard to the corpse pursuant to sub-s 140(b) of the Criminal Code. The stealing offence was regarded as comparatively minor. In respect of count 4

the sentencing Judge noted that it is unusual for an accused to be charged with this offence, saying:

“It is proper to look at this offence as part and parcel of the overall criminal conduct... it wasn’t misconduct with regards to a corpse committed for its own sake or for some bizarre and perverted reason. But it was an attempt to conceal the body, having committed a murder upon the person whose body it was.”

[41] Both of those sentences of course were ordered to be served concurrently with the sentence for murder.

Factors Relevant to the Application Concerning Daniel Heiss

[42] Daniel Heiss was born on 29 May 1965 in Adelaide, South Australia. He was therefore at the time of the offending just short of his 24th birthday. He had two prior convictions in 1987, one for hindering police and the other for possession of a small quantity of marijuana for which he was fined \$150 on each charge. Heiss’ father was born in Austria and migrated to Australia in 1960 when he was 21 years of age. His mother is an Australian. His parents married in 1964 and are still married. Heiss is the eldest of three children. Heiss’ father was employed in the mining industry resulting in the family being moved interstate and overseas whilst he was growing up. He lived in Adelaide until he was seven years of age. The family then moved to northwest Western Australia and from there to Darwin. Thereafter the family moved to Europe for six months and then to Canada for two years.

[43] As a child he learned to love the outdoors and enjoyed skiing, fishing and hunting. He also liked to work with his hands.

- [44] As a child he struggled with school work primarily due to undiagnosed dyslexia. His condition was diagnosed by a clinician in Seattle and, as a result of remedial intervention, his reading and writing skills and his school work improved considerably. After the family left Canada they moved back to Australia residing in Canberra for a number of years. Although he enjoyed school in Canberra, he had difficulty making and maintaining peer relationships at school, due to the frequent moves.
- [45] Heiss left home at the age of 17, living with some friends for a period of two years. He left Canberra at the age of 19 and returned to Darwin working in the construction industry and in hotels and in truck driving. He also gained work, building a caravan park in Katherine. He saved money in order to travel overseas for a couple of years on his own through Asia and Europe.
- [46] Heiss returned to Darwin in 1988 in order to make some more money. It was at this time that he went into the pig-shooting business. Shortly after this he was joined by Peter Kamm and they were living in the caravan park at the Acacia store.
- [47] Evidence was given at his trial of his good character by a retired Detective Senior Sergeant in the Australian Federal Police, Mr Peter Zdejelar, who had known the accused since he was about 10 years of age. According to Mr Zdejelar he came from a stable family background and was a very loving son to his parents and had shown no propensity for violence. Similar evidence was given by Leah Heiss, Daniel Heiss' younger sister. Heiss'

mother, Barbara Heiss, gave evidence concerning his dyslexia and the treatment and improvement that he gained as a consequence thereof. Her evidence was that he had also, whilst in Canberra, enrolled for special TAFE classes including a course in gemmology which he had completed in December 1988. Neither of his parents was aware of any propensity for violence.

[48] It was submitted by Ms Cox QC that the offending was out of character. I accept this submission.

[49] So far as the allegation that the victim was shot in the back was concerned, I accept that the evidence does not support the conclusion that the deceased was literally shot in the back. Rather the evidence suggests that the transverse wound across the shoulder indicates that he was shot side on.

[50] I accept also the submission by Ms Cox QC that although there was a vague plan which was still in operation at the time of the offending, the carrying out of the plan occurred suddenly. I accept also that the conviction for murder in the case of Heiss was derivative in that there was no evidence from which it could be inferred that Heiss' shot actually hit the deceased. The evidence from the pathologist, Dr Lee, strongly supported the conclusion that Heiss' shot missed. The trial Judge in his summing up to the jury made it clear that in his view this evidence should be accepted notwithstanding the admissions which Heiss had made and the evidence given by Kamm to the police that Heiss' shot actually struck the deceased.

[51] It is also relevant to bear in mind that despite the initial denials there was a significant amount of cooperation with the police who were shown the location of the body. Without the admissions made by the accused, the Crown would neither have been able to prove a murder nor that the accused was implicated. I note that Kamm had in fact shown the police where the body was located before Heiss had done so, but Heiss was not aware of this at the time.

[52] So far as remorse is concerned, it was put that Heiss showed remorse at his trial whilst giving evidence and by writing to the deceased's family before the trial. I accept also that in 1990, at the time of this trial, pleas of guilty to murder were almost unheard of in the Northern Territory because, at that time, there was only one sentence which was imprisonment for life without parole. The possibility of being released on licence was not regarded as a real possibility at that time.

[53] Subsequently, as Southwood J pointed out in *Leach v The Queen*¹¹ the Executive in 1991 adopted the policy that prisoners serving a sentence of imprisonment for life for the crime of murder would be considered for release after they had served 20 years of imprisonment and that if a prisoner is not then released, such cases would be reviewed every three years thereafter. The practice of the Executive was made public on 20 August 1992 when the Minister in answer to a question in Parliament acknowledged

¹¹ (2005) 16 NTLR 117 at [96].

the principles adopted by Cabinet the previous year. It is likely to have become known in the community before then.

[54] Between 1991 and 1996 there were five pleas of guilty to murder, four of them occurring in 1991 and one in 1996. Presumably this course of events was related to the Cabinet decision to which I just referred. I am not aware of any pleas of guilty to murder prior to 1991.

[55] I think in the light of the general practices which existed at the time of trial in relation to a charge of murder that it would be harsh to infer a lack of remorse by the failure of Heiss (or Kamm for that matter) to plead guilty at trial.

[56] There is now a considerable body of evidence that Heiss is indeed remorseful¹². There is no evidence to the contrary. I am satisfied that the prisoner Heiss is now and has been for some time truly remorseful and fully aware of the consequences of his actions and the pain he has caused to other people.

[57] Subsequent to his imprisonment, Heiss escaped from custody on two occasions. The first was on 4 May 1991 when he escaped from the Royal Darwin Hospital where he was being treated for a stomach complaint. He was captured later the same evening by police and sentenced to imprisonment subsequently for one year.

¹² See the report of the principle psychologist, Barbara Sampson, Annexure B to Exhibit DH1 at 7-8 and 11; the affidavit of Caroline Wilkinson para 13; the affidavit of the Court and Prison Chaplin, Gary Mark Taylor, paras 4 and 5; the affidavit of Ivor Stanley Cole, para 5; and the psychiatric report of Dr Walton, Exhibit DH6 at 2.

[58] The second escape occurred on 9 December 1995 when Heiss escaped with another prisoner, Baker, who had fashioned a key to unlock the cell doors. This was a well planned escape as the prisoners had to use matting to cover the razor wire on two fences which they scaled. Once they had broken out from Berrimah Prison, they hid in bushland in the Palmerston and Howard Springs areas. Baker was captured on 19 December 1995, but Heiss remained hidden in bushland in the Howard River Park area until he was apprehended on 21 December 1999. During the course of the escapes, Heiss committed a number of minor stealing offences and unlawful entries in order to obtain supplies. When asked his reason for escaping, Heiss replied: “Because there’s no future there. They want to lock me up for twenty years. I don’t want to stay in gaol for the rest of my life.”

[59] He was subsequently sentenced to a total term of three years for this offending.

[60] At the time of his original sentence, Nader J said:

“The prisoner (sic) may be released and, in fact, in practice generally are after some years, by Executive action which has nothing to do with the Courts. The Courts have no say in that. They are not consulted about it, nor do they wish to be consulted about it. But it should be understood that it is no action of the Courts that causes people who have been sentenced to life imprisonment to be release after somewhere between 10 and 20 years, as commonly occurs.”

[61] Although Nader J was a relatively experienced Judge at the time of those remarks, I think it is very doubtful that the Executive did commonly release prisoners on licence for murder within a timeframe of 10–20 years prior to

1990. Neither I nor experienced counsel who have been practising in the Northern Territory for many years have any recollection of any such a case in fact occurring, with the possible exception of the case of Straker.

[62] Be that as it may, it was put that Heiss understood from the trial Judge's sentencing remarks that his case may be reviewed in 10 years. When he was made aware of the policy not to review the sentences for murder until a minimum of 20 years had been served, this motivated him to escape on both occasions. Furthermore in relation to the 1995 escape, there was at the time a Territory election prior to his escape where a major issue was a campaign run by one political party "tough on crime – life means life". The political party used a picture of Heiss during one of the television advertisements during the election campaign. It was put that Heiss was despondent at having to serve for so long before being eligible for parole and having his photograph used in that way.

[63] Attempts have been made by Ms Cox QC to obtain evidence of the political advertisement, but I am satisfied that no record of the actual advertisement now exists. In any event, after both escapes the prisoner spent lengthy periods in maximum security; between 1991 and 1995 and between 1995 and 2004. During the period from 1997 to 2004 Heiss, had been transferred to the Alice Springs Correctional Centre where he was placed in the maximum security "G" block. The conditions in G block are described in the affidavit of Suzanne Dorrington a registered psychologist who has spent nine years

working in the field of forensic psychology and currently is employed with Corrections Victoria.

[64] Ms Dorrington was employed a psychologist by the Northern Territory Department of Corrections from September 1988 until she resigned in November 2000. During this period she met Heiss on a number of occasions in the course of her duties. At that time she was employed in Alice Springs. The area in which Heiss was housed for most of his time in G block held only a small number of prisoners most of whom spoke limited English. Her evidence was that Heiss experienced significant social isolation and there were limits and restrictions on the number of books, photos and personal items that could be kept at any one time by prisoners.

[65] She describes the physical layout of the G block as being styled on a courtyard with cells around the outer perimeter of a relatively small space. There was no external exercise area and no air conditioning or heating. She said that given the climate in Alice Springs the lack of air conditioning or heating was “almost unbearable at times”. The only entertainment available was the library and a television if the prisoner was able to purchase one, but she was unsure as to whether a television set was allowed in G block at this time. Access to telephones was also very restricted and it was extremely difficult to provide programs or emotional support to prisoners experiencing personal issues. At this time she said “notions of rehabilitation in prison were in its infancy and not something that was supported to my knowledge

by many of the prison officers working in the Alice Springs prison during the two years that I was employed”.

[66] Since working in the Victorian correctional system, she says in her affidavit:

“...I am astounded at the punitive environment which denied adequate support or rehabilitation which existed at the Alice Springs system during the period that I was employed with the Northern Territory Depart. of Corrections.”

[67] Ms Cox QC submitted that Heiss and been well and truly punished for his escapes and that since the last escape in 1995 he has not reoffended.

[68] The report of the psychologist, Miss Sampson, dated 27 April 2009, indicates the progress that Heiss has made during his period of imprisonment. She notes that he has kept himself busy undertaking a number of education courses together with developing his artistic and musical talents and that he found it difficult to cope with the harsh conditions as well as the isolation from his family when he was housed in maximum security locations. She refers to a number of prison incidents reported during that period which she says “could be classified as disobedience to officers’ orders or physical attempts on his own person or property in order to gain attention to his plight – feelings of hopelessness and a sense of isolation”.

[69] She notes that in recent years Heiss has been housed in the Living Skills Unit of the Darwin Correctional Centre and since then there have been no serious prison incidents reported. She notes that he gets on well with prison

officers and is gainfully employed in both the prison garden and the prison library. She concludes:

“After such a lengthy period in prison, there is clear evidence that Mr Heiss has ‘adjusted’ to the system he finds himself in. In many respects his long incarceration has made it necessary to ‘close down’ and show very little of his real self to others. Furthermore, Mr Heiss is a naturally introverted personality who baulks at the idea of having lots of people around him and prefers his own space or only a select one or two people to associate with. He is well aware that he needs to work through his suspiciousness of others’ intentions and his ‘paranoid’ thinking style in order to genuinely achieve release for self; release from the ‘prison’ he has built around himself, in order to engage fully with others to achieve the goals he has set for his life.”

- [70] The report of the Chief Prison Officer, dated 18 May 2009, indicates that Heiss has been accommodated in the Living Skills Unit since 12 June 2007. The report indicates that he has been compliant and has a good work ethic. A similarly positive report by the Northern Territory Correctional Services officers dated 18 May 2009 is also in evidence.
- [71] There is also evidence from Ivor Stanley Cole, an artist who has worked and exhibited both nationally and internationally for 40 years, who has been visiting Heiss since early 2007 on a weekly basis. Mr Cole’s opinion is that Heiss’ work has real artistic merit; he has “an excellent technique in pastel and acrylic application. He could, once released, use his artistic skills as a graphic artist”.
- [72] Mr Cole opened an art exhibition of works by Heiss at the Darwin Entertainment Centre Gallery on 20 May 2009 which Mr Cole says is “indicative of Daniel’s diligence in his artistic pursuits”.

[73] A report of Lester Walton, a psychiatrist, dated 10 February 2009 indicates that Heiss is mentally well, that he is “understandably somewhat confused and frustrated in the current context of uncertainty about his sentence being extended but he is greeting that with fortitude and has not fallen back into previous habits of dealing with stress with hunger strikes and the like. There does seem to be evidence of increased psychological maturation, perhaps attributable to no more than the passage of time, but Mr Heiss certainly does suggest that he has been putting in some effort to rehabilitate himself.” Mr Walton notes that from a psychiatric perspective there are no issues to be dealt with and Heiss does not require psychiatric treatment. In his opinion there are no impediments to his being released to the community so far as clinical psychiatric issues are concerned.

[74] Currently Heiss’ security rating is L1 and as a matter of Northern Territory Correctional Services policy cannot be lowered until the outcome of this application is known. The General Manager of the Darwin Correctional Centre, Mr Raby, advises that this restricts prisoners in this category to access to reintegration programs and that the prison is not prepared to take the risk of lowering a prisoner’s security rating when there is chance that the sentence could be extended significantly. He concludes:

“As for Daniel’s behaviour, there is no question that he performs to the level required and that placement in the LSU has been a great benefit to him and that if his end of date of sentence was clear he would be a L2 rated prisoner heading towards an open rating.”

[75] So far as his future plans are concerned, it is to be noted that Heiss has a Support and Awareness Group of people which comprises Ms Wilkinson, Mr Cole, a local shop operator, two journalists, his parents, his brother and his sister. Upon his release he intends to live with Ms Wilkinson in her house in Howard Springs and would like to start a family. His backup plan if this were to fail would be to live with his parents, his brother or his sister. So far as work is concerned, he would like to develop a graphic design business. He also has an interest in gemmology. If he is unable to make enough money from these pursuits he would pursue work as a meat packer or landscape gardener. His long terms goals are to develop his art and put on bigger and better art exhibitions as well as spending time on further developing his musical talents.

[76] The affidavit of Ms Wilkinson indicates that she has been in close contact with Heiss since 1 November 1996. She has made frequent visits to Heiss since then. When Heiss was held at the Alice Springs prison, she still managed to attend on a regular basis and was financially assisted to travel to Alice Springs and to and from the prison (which located approximately 20 kms outside of Alice Springs town centre) by Heiss' parents. She was only able to speak to him on the telephone for 10 minutes once a month whilst he was in Alice Springs. During the period of seven years whilst he was in the Alice Springs prison she says "we wrote over 3,000 letters to each other". Since his transfer back to Berrimah prison, she says that she was able to visit him twice a week for one hour and from October 2004

telephone access was daily. She confirms that she has discussed with Heiss that when he is released he would reside at her property, “We have discussed him establishing a vegetable garden, maintaining the house and being a handyman on the block all of which Danny was keen to do.” She confirms also that he is keen to use his artistic skills to become a graphic designer and that he is keen to work. She states that she is convinced that Heiss would do nothing to jeopardise his freedom when released back into the community and that she has no hesitation in having him reside with her and in continuing their relationship.

[77] I am satisfied that over the last 14 years Heiss has rehabilitated himself to a stage where he is ready to be released back into the community once he has completed his reintegration programs which have been on hold now since this application was made. I am satisfied that he has good prospects of further rehabilitation once released back into the community by virtue of his ongoing family support, his relationship with Ms Wilkinson and his community support group.

[78] Ms Cox QC submitted that I should also take into account that the current application was not filed promptly in the 12 month period before the 20 years of his sentence was due to expire. It was submitted that the delay in filing the application was substantial which caused his reintegration program to be suspended. This has prevented him from taking programs because his current classification has not been able to change pending this application. The delay it was submitted has caused stress and anxiety by reason of the

fact there is no determined release date. Further it was submitted that the delay has effectively increased Heiss' minimum term as he will be unable now to complete his reintegration programs and achieve the L2 classification by his earliest release date. In any event, his release can only be sanctioned by the unanimous decision of all members of the Parole Board once he has obtained his minimum security classification.

[79] Counsel for the Director of Public Prosecutions, Mr Wild QC, pointed out that the Act provides in sub-s 19(2)(a) that the application cannot be made "earlier than 12 months" but that there was no fixed time for the making of the application thereafter. Notwithstanding that, Mr Wild QC was unaware, and was not aware that the Director was aware, that the delay in making the application caused a problem with the reintegration plans.

Conclusions Concerning Heiss

[80] The objective circumstances of the offending were undoubtedly serious. There was some planning involved although, as Ms Cox QC pointed out, it was relatively minimal and the actual shooting took place suddenly. The evidence strongly suggests that Heiss' bullet in fact missed. He was convicted derivatively. The motive for the killing seems to have been the stealing of the guns, although I note that the killing appears to have taken place in circumstances when Heiss and Kamm were both under the influence of alcohol and marijuana which provides some explanation, although no excuse, for their behaviour. The evidence is that the deceased met his death suddenly. There were no features such as torture or a prolonged and painful

death to be considered. On the other hand, the body was mutilated and buried in order to hide the crime.

[81] I note that the prisoner whilst initially uncooperative assisted the police in their enquiries and was prepared to show the police where the body had been hidden. He also assisted the police in showing them where the guns had been hidden afterwards. The case against him depended on his own admissions.

[82] I am satisfied that he has been punished sufficiently for the escapes. His prospects of rehabilitation are now very good. He has shown remorse for his crimes and accepted responsibility for them. His behaviour in the last 14 years has not resulted in any further charges against him and has improved dramatically since he has been released from maximum security. He has completed a number of courses and he has the skills in order to obtain employment when he is released. I note too that he has the support of Ms Wilkinson and his support group and it is likely that but for this application he would be ready for reintegration into the community. I take into account also that at the time of his offending he was almost 24 years of age with no history of violence and a history of only very minor offending. At that time he was considered to be a person of good character; certainly the offence was out of character. There appear to be no psychiatric issues.

[83] As Southwood J said in *Leach v the Queen*¹³, the purpose of fixing a non-parole period is to provide for mitigation of the punishment of the prisoner

¹³ (2005) 16 NTLR 117 at 135 [85]-[86].

in favour of rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum term of imprisonment that justice requires he must serve having regard to all of the circumstances of the case. The non-parole period fixed by the Court when sentencing an offender to serve a term of imprisonment should be the minimum term of imprisonment that justice requires an offender must serve having regard to all of those circumstances. There is also a penal element to fixing a non-parole period; this element must appropriately reflect the importance of such principles as retribution, protection of the community and specific and general deterrence.

[84] Of course, once the non-parole period has expired it is the function of the Parole Board to determine if and when a prisoner is suitable for release and to determine the conditions under which he or she will be released back into the community. Those conditions remain for the rest of a prisoner's life, and if breached, his parole can be breached.

[85] Having regard to all of those factors, the conclusion I have reached is that the application should be dismissed.

Circumstances Relating to Peter Michael Kamm

[86] Peter Michael Kamm was born on 23 January 1965. As at the date of the offence he was 24 years of age. Kamm was born in Canberra. His parents are both German born, having migrated to Australia in the 1960s. Kamm has a younger sister.

- [87] Kamm attended Torrens Primary School in Canberra between Years 1 and 5 and then moved to Village Creek Primary School where he completed year 6. He completed his schooling at Kambah High School, Canberra. He did not obtain his high school certificate, leaving school partway through Year 10. He was not academically motivated, preferring more practical life skills, and subsequently he pursued employment in the areas of labouring, carpentry and driving, beginning with a relatively long stint employed in a fruit and vegetable shop upon leaving school.
- [88] Kamm left the family home whilst still a teenager and spent a period of time experimenting with drugs, working and “having a good time”. He became addicted to heroin, sought treatment in the ACT and then a few years later had a subsequent problem with amphetamines. He voluntarily attended rehabilitation and overcame his drug problems.
- [89] Prior to coming to the Northern Territory, he had a conviction in 1978 for shoplifting for which he received a 12 month suspended sentence. He was also convicted in NSW for supply/possession of cannabis for which he was fined and received a suspended sentence. As he did not pay the fine he was imprisoned at Goulburn gaol for failure to pay and served 13 days.
- [90] His home upbringing was not unusual. He got along well with his parents and his sister until the age of approximately 12 , when as a teenager he began rebelling against his parents’ authority. He did this by truanting from school, petty stealing and smoking cigarettes.

[91] Kamm has no previous record of violence and has not been convicted of any offences since being imprisoned.

[92] His position in relation to the assistance he gave to the authorities is similar to that of Heiss. He showed the police where the body was buried and the case against him depended on admissions at his trial.

[93] There is evidence that Kamm was remorseful. During the record of interview on Monday 7 August 1989, he was asked by Detective Hambleton:

HAMBLETON: ... is it true to say that prior to whole incident taking place it was your intention that between you and Dan that morning Dean Peter Robinson was going to be killed.

KAMM: Yeah, that was the intention.

HAMBLETON: Alright, and why was that?

KAMM: I can't really answer that question, I mean at first it was for, for the rifles and the Nissan and I mean up until now since the incident I have thought to myself why, because I believe for what we wanted to do originally it wasn't never fucking worth it. Straightaway after we done it I said it was fucking, what for. I mean the bloke was quite willing to help us with what we wanted to do in a business venture, I mean we didn't have to kill him to fucking, for him to help us he was an all right bloke, I mean I thought to myself you know why the fuck did I do it, why the fuck did I take any part in it you know why didn't I just sit in the fucking car and let them two go off. Or why the fuck did I come to Borroloola in the first place you know, I mean I just can't answer that, to me it makes no sense. Like a childish prank you know, why did you smash the window – I don't know why I smashed the window.

HAMBLETON: Is there anything else at all you would like to tell me about this matter?

KAMM: Well ever since the incident I've had a really bad conscience, I mean several years ago I never had, through the use of drugs I never had a conscience and I went, I was rehabilitated you know and someone put morals in me, you know I have always held down, fucking been, kept my same attitude of being an asshole. But um I felt like shit afterwards. I mean at first he's dead you know and then you think about his mother, what about his father, what about his brothers and sisters, what are they thinking you know. You know like I got a family too, we didn't have to fucking do it.

[94] At the trial, during the voir dire he gave evidence about how he felt during the course of that Sunday when he was being interviewed by Hambleton. He said that he was tired and was upset, but “myself I was very ashamed, actually.”

[95] During cross examination at the voir dire he said that the reason that he told Hambleton that he had also shot Robinson that was that he had decided to own up to his own responsibility for the matter, that he was glad to get it off his conscience and that a large part of his motivation in talking to the police was a desire on his part to get the whole thing off his chest. In dealing with the admissibility of the confessions, Nader J found that Kamm “gave a very strong impression that he was rather anxious to get the whole investigatory procedure over with. His Honour noted that the accused wished to carry on even though the police had offered to delay things in case he was overtired. He expressly took into account what he found to be the anxiety of the accused himself to assist with the investigation”¹⁴.

¹⁴ *Heiss v The Queen; Kamm v The Queen* (1992) 2 NTLR 150 at 178.

- [96] Since being incarcerated Kamm has undertaken numerous courses all aimed towards to his possible release. His goal upon release is to work in the cabinet making trade. He has obtained qualifications which include: Certificate III Metal Engineering 2002; Certificate III Horticulture 2002; Certificate IV Train Small Groups 2002; Certificate IV Plan, Conduct and Review 2002; Certificate II Furniture Making 2006; Certificate II GEN/Construct/Carpentry 2006; Certificate III GEN/Construct/Carpentry 2007. In 2008 he was undertaking Certificate IV Building and Construction whilst working in the carpentry and maintenance section of the prison.
- [97] A letter from Charles Darwin University signed by the Head of School, School of Trades, Faculty of Technology and the Trade Program Manager, School of Trades Alice Springs, Faculty of Technology indicates that by the end of 2007 he will have completed Certificate III in general construction and progressed to some of the theory component of Certificate IV in building.
- [98] Certificate IV in building is a one year full time external course which requires a student have access to a variety of building sites, both residential and commercial and internet access to be able to understand onsite issues and become knowledgeable on product and materials technology in construction techniques. This certificate is the minimum requirement for a builder's license in most states of Australia.

[99] He will not be able to complete a Certificate IV within the prison environment as the prison cannot offer sufficient variety and complexity to meet the skills requirements and knowledge base for the certificate. It will be necessary in the future for him to obtain a structured full time work placement as part of an apprenticeship. The authors of the letters note that Kamm already produces high quality work.

[100] Kamm has been offered full time permanent employment with a cabinet making and shop fitting company in Alice Springs in order to complete his qualifications.

[101] The University has further noted in relation to the quality of his work in a letter dated 1 May 2009 that Kamm “has always taken the extra effort and is not one to take shortcuts in his quality of work... anything I have seen Peter be involved in has been of extremely high quality, and would certainly put other quality tradespersons to shame.”

[102] From August 2008 he undertook a course in hospitality kitchen operation and completed Certificate I in that course and has commenced Certificate II. Certificate I involved units such as Organise and Prepare Food and Use Basic Methods of Cookery. The units are aimed at providing an introduction to the hospitality and cookery fields. His lecturer reports:

“I have found Peter works well with others and is able to work within time constraints. He is organised and listens to instructions and is able to carry them out to exact specifications. He approaches not only his practical but also his theory component of his studies with interest and enthusiasm.

During the last 10 months of teaching Peter I have found him to be intelligent, hardworking and approachable. He has always displayed respect for other class members, officers and myself.”

[103] A parole report that was to be considered by the Board in May 2008 referred to his attitude whilst in prison as follows:

“Kamm states he accepts the penalty imposed by the Courts. He informed prison staff he is grateful to be given the opportunity to now have a release date. Kamm further states he accepts full responsibility for his actions, and he hopes this is recognised by the relevant agencies involved.

Kamm is considered to be a very capable prisoner, who came to terms with his crime and length of sentence very quickly. He has taken it upon himself to look forward and plan for the possibility of being released on parole. Kamm has undertaken numerous courses, all with intent of providing qualifications to assist him in finding full time employment upon his release. Kamm hopes that he can undertake an adult apprenticeship with a certified cabinet maker in Alice Springs, upon his release. His longer term goals are to complete his apprenticeship and then open his own business in carpentry/cabinet making. Kamm is currently employed in a position of trust with access to the whole prison, and is classed as a prisoner who is reliable, with an excellent work ethic.”

[104] The same report refers to the details of a report from a Mr Ward, the principal psychologist, to the effect that Kamm accepted full responsibility and showed remorse for the offence:

“He also appeared to exhibit a good understanding of the impact of his offence upon his victim’s family, his family and himself. He appeared honest and forthcoming in disclosing his offence details and personal information suggesting that he did not attempt to utilise cognitive distortions such as denial, minimization and justification to alleviate his responsibility of the offence. In addition, Mr Kamm also seemed to exhibit a reasonable level of insight in relation to the degree of the reintegration process that he is required to attain prior to be considered for release on parole.”

[105] The report also indicates that he has strong family support.

[106] The evaluation of the four signatories to the parole report for the 28 May 2008 meeting accepted him as a man who appeared to be genuinely remorseful and observed that he “has shown that he is ready and able to focus his efforts in the right direction and he should be encouraged to continue”.

[107] There are no psychological factors which would prevent him from being released into the community.

[108] A reintegration plan has been prepared for Kamm by the Correctional Services Department.

[109] A report from the Department of Justice dated 8 May 2009 indicates that during Kamm’s imprisonment he has progressed through the security classification process and consistently held a medium security rating between 26 August 1993 and 9 April 1999. There were two upgrades to maximum security during this period, but these were not a reflection on Kamm’s conduct or industry, but due to legislative requirements or instructions from the then Commissioner of the Northern Territory Correctional Services. Neither of the security rating upgrades lasted for any length of time.

[110] Kamm has been classified as a low security rating prisoner since 9 April 1999. There was one security rating upgrade to medium in this period

ordered by the then Superintendent, but again this was no reflection on Kamm's conduct or behaviour, but was the result of a policy decision. This medium security period was for 14 months from 23 January 2003 to 13 April 2004.

[111] It cannot be said that Kamm was entirely a model prisoner. The Department of Justice's report indicates that Kamm was charged with prison misconduct in 1993 in relation to "a condom full of heroin" which he ingested during visit whilst in prison "Her Majesty's hard labour gaol" located on the corners of Telegraph and Stuart Terraces. The report says that this information was unable to be verified. For Kamm, Mr Goldflam has advised that Kamm was given a condom which he thought was full of heroin by a visitor and that he reported it, in any event, to prison authorities.

[112] During the period from 1994 to 2003 there are seven records relating to drug/drug paraphernalia offences whilst there are five other minor misconduct offences. There have been no offences since then.

[113] Kamm is currently employed at the Cottages facility conducting general maintenance, maintaining vehicles and fabricating items for a community support program. The report observes:

"Since Kamm's move to ASCC in 2003 he has demonstrated a good level of conduct and industry shown by his periodic Classification Security Review Assessments and the distinct lack of any disciplinary issues. His work ethics and conduct within the Industries section have been of a high standard.

Kamm has been security rated as an L2 (Low 2) prisoner since 18 September 2006 and housed in the Medium Security section of ASCC. Current government policy does not allow Life sentenced prisoners to be housed at the Cottage facility.”

[114] According to a security assessment review dated April 2009:

“In a positive manner prisoner Kamm expressed some frustration with having started a reintegration program last year and then having had it suspended... Prisoner Kamm’s most recent block and work reports are good and indicate that he is a hard worker requiring no supervision. The panel notes the prisoner Kamm is on the list of ‘public interest prisoners’ and there is a probable DPP application to revoke Kamm’s non-parole period before the courts. The panel recommends that prisoner Kamm’s security rating remains L2 and that he continue to be housed in the Management Zone. The panel recommends that should prisoner Kamm’s 20 year N.P.P. not be extended by the Supreme Court prisoner Kamm should be re-considered for a security rating reduction and housing at the Cottages.”

[115] All in all, the conclusion that I have reached is that Kamm has, whilst being imprisoned, shown himself to be industrious, reliable, capable and trustworthy and has made the most of the limited opportunities afforded to him. I accept that he is appropriately remorseful and that he has a low risk of reoffending. He also has an offer of employment to complete his building qualifications and good support from his family.

Conclusions Concerning Peter Kamm

[116] Peter Kamm’s responsibility for the death of the deceased was somewhat higher than that of Heiss in that he was the person who fired the fatal shot. I do not intend to repeat the comments that I have made concerning the objective seriousness of the offence to which I have referred in relation to Heiss. Undoubtedly the offence was a serious one, but Kamm has shown

remorse and is not considered to be a risk or least a significant risk upon release. Again there are no psychiatric factors to be considered and in recent times his behaviour in the prison has been exemplary.

[117] Taking into account all of the relevant factors I consider that the application of the Director of Public Prosecutions should be dismissed.
