PARTIES	STAATS, Nicholas Adrian v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA9 of 1997
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CATCHWORDS:

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Factors to be taken into account – Factual basis for sentence – Proof and evidence – Victim impact statements – Admissibility of 'harm'

Sentencing Act 1995 (NT) ss104, 106A, 106B

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Factors to be taken into account – Circumstances of Offence – Whether unforeseeable consequences to be taken into account

Sentencing Act 1995 (NT) s5(2)(b) and (d)

R v Boyd [1975] VR 168 discussed
Inkson R (1996) 6 Tas R 1 discussed

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Factors to be taken into account – Factual basis for sentence – Plea of guilty – Court must take plea of guilty into account irrespective of motivation of plea

Sentencing Act 1995 (NT) s5(2)(j)

Jabaltjari (1989) 46 A Crim R 47 distinguished
Wangsaimas, Vanit and Tansakun (1996) 87 A Crim R 149 overruled
Donnelly (1997) 91 A Crim R 550 followed
Hall (1994) 76 A Crim R 454 followed
Miles (1992) 110 FLR 437 followed
Winchester (1992) 58 A Crim R 345 followed

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Discretion of sentencing court to re-open proceedings – Limitations upon discretion – Errors of law – Failure to take relevant fact into account

Sentencing Act 1995 (NT) s112
Statutory Interpretation – Sentencing Act 1995 (NT)
Sentencing Act 1995 (NT) ss5(2)(b), (d), (j), 104, 106A, 106B and 112

REPRESENTATION:

Counsel:

Appellant:	Mr P Priest
Respondent:	Mr R Wild QC with Mr M Carey

Solicitors:

Appellant:	Dalrymple & Associates
Respondent:	Office of DPP

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ang98005

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

No. CA9 of 1997

BETWEEN:

NICHOLAS ADRIAN STAATS
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, ANGEL & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 12 March 1998)

MARTIN CJ:

Background

Application for leave to appeal against sentence. On 10 April 1997, the applicant was sentenced to eight years imprisonment upon each of three counts for that he did have sexual intercourse with another person without the consent of that person. The maximum penalty for that offence is imprisonment for life. He was also sentenced to three years imprisonment for that without legitimate reason, intentionally and unlawfully, he did record by means of a video camera an indecent visual image of a child under the age of sixteen.

The maximum penalty for that is imprisonment for five years. All sentences were directed to be served concurrently and to take effect from the date upon which the applicant was taken into custody.

Facts relating to the offences

The offences all occurred on 26 March 1995, when the victim of the offending, a thirteen year old girl, to whom I will refer as "K", was in the rooms of the applicant, a radiologist. She had gone there for a follow up medical examination after aspiration of a cyst. She was wearing a robe and pants and the applicant told the police that he had administered drugs, which rendered her unconscious, and he carried out a digital rectal examination and vaginal examination by use of an ultrasound probe. Upon K wakening, she said the applicant kissed her on the lips and put his tongue in her mouth about three times, in each of her ears, and after licking it, into her vagina. That penetration of her vagina was the first act of sexual intercourse. The applicant then left the room and after a short time returned and directed her as to how she was to position herself and then put a finger in her anus and moved it around. Having removed his finger, the applicant put something else in her anus, described by K as being "bigger than his finger" and she said he "moved it around in my bottom … I would say it was in for ten to fifteen seconds. Dr Staats kept putting more gel and sticking the thing in my bottom". It hurt her, and his Honour found that it was a vibrator. Penetration of the anus was the second act of sexual intercourse.

The applicant then conducted a medical examination by inserting an ultra-sound probe into K's vagina. No complaint is made about that. However, the third act of sexual intercourse was committed when, having left the room and returning with a video camera, he locked the door, set up the camera on a table at the foot of the bed on which K was lying, caused her to lie on her stomach and raise her bottom and opened her vagina with his hands, on some occasions his fingers penetrated. He did that, said K, on another two or three occasions. After each of those occasions he recorded the image of her vagina on the video camera. That was the fourth offence. K then went to sleep. During the course of this misconduct and afterwards, the applicant had asked K whether she remembered anything.

K did not consent to any of the criminal conduct and she said she was too frightened to ask the applicant what he was doing.

Seriousness of the offending

The seriousness of the offending is to be gauged by paying regard especially to the following matters:

- The maximum penalty for the acts of sexual intercourse is life imprisonment.

- Each act of sexual intercourse was separately defined by its own features, the tongue in K's vagina, the finger and the vibrator in her

anus, the fingers in her vagina.

- Each act was deliberate and involved a degree of preparation or planning, such as kissing, positioning of the body of K, the use of the gel, vibrator and camera. The applicant left the room between the first and second acts.

- Although each act was of short duration, it is relevant to take into account the overall time as well, which his Honour thought was probably less than an hour, in assessing the applicant's culpability.

- The taking of the video record was accompanied by preparation in the positioning of K's body, and repeated.

- The breach of trust by a member of the medical profession.

- The sex and age of the patient.

- K had been affected by the drugs administered to her by the applicant. Because of that she was particularly vulnerable and less able to resist. His Honour found that the applicant believed that she was unlikely to remember what happened to her, or that if she did, it could be explained away as the effects of the drugs upon her.

The applicant took advantage of his position of trust to exploit a girl, who could not resist, doing so in a particularly degrading manner though a succession of deliberate and unlawful acts. The accumulation of aggravating circumstances compounds the applicant's culpability. He is entirely to blame for all of the offences.

Events after the offending

The mother of K picked her up from the doctor's rooms and took her home where K made a complaint and exhibited signs of distress. The police were called, and the following day searched the applicant's home and rooms seizing a number of items which were able to be linked to the offending, including photographs and the vibrator which bore biological matter matched by DNA profiling to that of K. When interviewed by police, the applicant denied the allegations of wrongdoing. He attempted to commit suicide the following day, but afterwards maintained his innocence. His pleas of guilty to all of the charges were entered after a voir dire examination lasting three weeks.

The offender

The applicant was 42 when sentenced and had practised as a competent and dedicated radiologist for 17 years. His Honour said that he appeared to have developed into a generous, conscientious and hard working individual who was prepared to assist others. He had no prior convictions. He had not worked in medicine since 6 February 1995 when he was suspended from practice and his Honour noticed the further consequences of his inevitable loss

of the opportunity to practice his profession. He took those matters into account as bearing heavily upon the applicant.

Proposed grounds of appeal

Other matters taken into account by his Honour are the subject of the proposed grounds of appeal to which I now turn.

Victim Impact Statement

The applicant contends that a victim impact statement received as Exhibit 12:

- should not have been admitted into evidence, and

- once admitted, certain aspects of it should not have been taken into account in sentencing the applicant.

These proposed grounds raise issues which have not previously been the subject of determination in this Court. They raise for consideration, amongst other things, the relationship between ss106A and 106B of the *Sentencing Act* 1995 (NT) which deal with victim impact statements ("VIS") and s5(2) which prescribes the matters to which a court shall have regard in sentencing an offender. The VIS provisions came into operation by way of amendment to the Act. Originally s5(2)(b) provided that a court shall have regard to the nature of the offence and how serious the offence was, including any physical

or emotional harm done to a victim. The VIS provisions define "harm" in wider terms as including:

"(a) physical injury;

(b) psychological or emotional suffering, including grief;

(c) pregnancy; and

(d) economic loss,".

The parliament was aware of s5(2)(b) when it enacted the VIS amendment since it amended s5(2)(b) at the same time by adding "psychological" as a type of harm to which a court was to have regard.

It seems to me that the VIS provisions are designed to serve a purpose other than to inform the court of harm done to a victim to which regard is to be had under s5(2)(b). For example, the definition of "victim impact statement" in s106A relates to a statement prepared for the purposes of s106B not s5(2). All of the definitions in s106A apply only to the VIS provisions. The language of the provisions also indicates the difference in purpose. VIS is to be presented to the court, not tendered, and the VIS may only be presented where the victim consents (s106B(1) a matter requiring separate treatment); the VIS may be presented by a person other than the prosecutor (s106B(3)); the court is to "consider" the VIS (s106B(4)) not "have regard to it"; note also the use of the words "take into account" in s106B(7) as opposed to "have regard to", a distinction having greater importance bearing in mind s5(2)(r) where the court is directed to have regard to "anything else prescribed by this

Act to which the court is required to have regard", not "take into account". Generally speaking, the VIS provisions serve the primary purpose of giving victims of crime, or their relatives in the case of death, an opportunity to place before the courts their own statements either personally or through another as to the impact of the crime upon the victim of the crime. This is the view of Charles JA. expressed in *Dowlan* (1997) 92 A Crim R 305 at 323 with which I respectfully agree. His Honour went on to point out that the procedure "involves victims in the workings of the criminal justice system" and suggests that it also assists in educating Judges. In my opinion the VIS provisions are not primarily intended to fulfil the function of providing the information to which the court is to have regard for the purposes of s5(2)(b).

That is not to say that material contained in the VIS which may be relevant to s5(2)(b) is inadmissible for that purpose. At common law courts took into account harm to the victim of crime as a sentencing factor (*The Queen v P* (1992) 39 FCR 276 at 279). There was no particular way in which the information was required to be placed before the court, and it was often conveyed by uncontested statement by the prosecutor from the bar table, but offenders had and have the right to require proof and to contest evidence. The relevance of harm to a victim in the sentencing process was recognised in s5(2)(b), and s104(1) enables the court to receive such information as it thinks fit to enable it to impose the proper sentence. Subject to proper objections, there is no reason why a court should not inform itself as to the harm to a victim as envisaged in s5(2)(b) by reference to the whole or any part of a VIS.

Harm and Section 5(2)(b)

In sentencing an offender a court shall have regard to the nature of the offence and how serious the offence was, including any physical, psychological or emotional harm done to a victim (s5(2)(b)). That is to be contrasted with the definition of VIS in s106A, in which reference is made to "details of the harm suffered by a victim of an offence arising from the offence", and the definition of harm in s106A. Presumably parliament intended a distinction.

The harm done to a person is not limited to that which is the immediate result of the offence; it may be transitory or enduring. In so far as it falls to be assessed for the purposes of sentencing, it embraces not just that which has been or is, but as well that which will continue or emerge. What it requires is that the harm done to a victim be included in the factors going to make up the seriousness of the offence. The degree of seriousness of an offence is a matter which may have an effect on sentence; it is a factor which may lead to a greater penalty being imposed; there is a potential for an adverse effect upon the offender. Accordingly, before imposing a greater penalty on that account, the court must be satisfied that the harm was an outcome of the offence and that the offender is to be held criminally accountable for it.

In my opinion the VIS should not have been received into evidence if its only purpose was to provide information to which his Honour was to have regard for the purposes of sentencing. Many of the objections to the tender were based upon what seems to have been a misconception as to the nature of

the document prepared for the purposes of ss106A and 106B. In any event, some of his Honour's rulings against those objections were not in contention in this court, but some are pursued. I will treat the material to which objection was taken in the context of a VIS as being material to which objection was taken in the context of s5(2)(b). His Honour clearly treated some of the effects upon the victim described in the VIS as being matters to which he was to pay regard in the sentencing process. The objections presently material were that some matters which were treated as harm for sentencing purposes were neither foreseen nor reasonably foreseeable by the applicant. The author of the VIS, a psychologist, drew attention to K's ethnic origin, which it was asserted had caused her to endure constant speculation regarding herself and her family in that ethnic community, which had placed extra strain on her. Bearing in mind the nature of the assaults upon her, the cultural beliefs of that community had impacted upon her perceptions of being "innocent" versus "spoilt goods". Further, the psychologist said that the high media coverage of the court proceedings meant that the community of Darwin, including K's friends, were aware of the details of the sexual assaults and she had been considerably embarrassed and/or angered by questions and whisperings, the brunt of jokes and different treatment from boys. Clearly, the harm said to have been done to K was psychological and emotional as expressly envisaged in s5(2)(b). It was submitted before his Honour and this court that the applicant should not have been held responsible for those events since they were not consequences which could be held to have been foreseen, or ought reasonably to have been foreseen by him (*R v Boyd* (1975) VR 168 at 172 and see also the discussion in *Inkson v The Queen* (1996) 6 TAS R 1). Counsel for

the respondent accepted that was the test. It is not shown here that those consequences were foreseen by the applicant. Viewed objectively, I am of the opinion that he ought to have foreseen them. He had practised in Darwin for some years, and he must have known that if he was discovered his profession, in particular, would cause significant publicity. He must be taken to have known K's age and her ethnic background. In my opinion, it was entirely predictable that many people would become aware that K was the victim of his offending, and by reason of her age alone, that would create a situation in which psychological and emotional trauma would arise. Had he thought about it, the applicant should have recognised the particular harm that would be done because of the added factors relating to K's ethnic background and publicity. His Honour described the effects of the offending as including nightmares, flashbacks, difficulty in concentrating at school, feelings of depression, feelings of being different from others and of being unclean, anxiety at having to give evidence, embarrassment, and numbing of emotions. His Honour regarded K's cultural background as having caused her to experience some of the effects more severely than would otherwise have been the case. Bearing all those things in mind, his Honour was of the opinion that the effects on K were relatively severe and that made the applicant's conduct more blameworthy, which must be reflected in the sentences to be imposed. I agree.

Before leaving the subject, it was also contended before this court, but not raised before his Honour, that there was no evidence that K consented to the presentation of the VIS to the court (s106B(1)). It seems to me that that subsection governs the prosecutor and does not require the consent to be

proved to the court. If I be wrong about that, then no objection was taken on that ground before his Honour, and it is too late to raise it now.

Apart from the information in the VIS, the prosecutor informed his Honour that medical examination showed certain superficial injury to K's genitalia and anus.

Deterrence

His Honour held that "foremost in the sentence to be fixed must be the element of general and personal deterrence", adding that the community expects the court to provide protection for offences of the kind in question. He also found that the offences were clearly out of character, and that it was probable the applicant would never be able to practise medicine again, by which I take him to mean that the opportunity for this type of behaviour to arise again would be much diminished. Remarking within the context of the making of an order fixing a non-parole period, his Honour said:

> "These are serious offences which warrant a greater minimum term due to its deterrent effect on others. I am unable to conclude that the prisoner would, when released represent a danger to the community. No material was placed before me to justify such a view and his previous good character and lack of prior convictions suggest otherwise."

It was objected that his Honour placed too much weight on the question of personal deterrence. There are obvious inconsistencies in his Honour's remarks, but the preponderance of his comments indicated that he did not consider personal deterrence to be a significant factor. His Honour was not

wrong to place general deterrence as a foremost consideration. Others were not necessarily far behind.

Guilty Plea

Amongst the matters to which a court shall pay regard in sentencing an offender is whether the offender has pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so, or indicated his intention to do so (s5(2)(j)). The learned sentencing Judge gave weight to the plea of guilty for two reasons. Firstly, he inferred that at the time of the plea there was a realistic appraisal by the applicant that he had done wrong and must be punished. The plea came only after a voir dire examination largely related to the DNA evidence, at the conclusion of which rulings were made which were unfavourable to the applicant. Secondly, because the plea spared K from having to give evidence and the embarrassment of knowing that exhibits such as the photographs would have been before the jury. From that his Honour inferred that the applicant was contrite, and despite the lateness of the plea, it was given weight, although, his Honour commented not the same as would have been given had there been an indication of the plea at an earlier date. It was noted that K had to give evidence at the committal. It was not accepted that the applicant was remorseful prior to the plea, the attempted suicide being no more than consciousness of guilt. No objection is made to his Honour's assessments of the facts in relation to the plea.

The complaint is that his Honour erred in failing to give any weight to the plea based upon savings of public expense and inconvenience to police, the

court and so on in relation to trial. In doing so, his Honour relied upon the authority of this Court in *Jabaltjari* (1989) 46 A Crim R 47.

The *Sentencing Act* came into operation after that case was decided. The issue now is whether s5(2)(j) alters the law as to the considerations which a court may bear in mind in having regard to the guilty plea (other than the time at which it was entered or indicated) and if so, whether there are any additional considerations which, if taken into account, should have resulted in a lesser penalty. I have had the benefit of a draft of the judgment of Angel J. on this issue and am in general agreement with it. Notwithstanding the error, I am not persuaded that the penalty should be reduced, bearing in mind all the circumstances including the stage in the proceedings at which the plea was made.

Abolition of remissions

These offences occurred on 4 February 1995, the *Sentencing Act* and *Prisons (Correctional Services) Amendment Act (No 2)* 1994 (NT) commenced operation on 1 July 1996 and the applicant was sentenced on 10 April 1997. In *Siganto v The Queen*, unreported 3 October 1997, this Court held that the repeal of the statutory authority to grant remissions of up to one third of the term of imprisonment imposed was effective notwithstanding that the offence was committed before the amendment and the sentencing took place afterwards. Similarly, the fixing of a statutory minimum of 70% of the head sentence as the non-parole period (in lieu of the unfettered discretion of the court) in respect of some sexual offences applied. Accordingly, the practice in

this jurisdiction of fixing the period prior to which the prisoner would not be eligible to be released on parole as something less than two thirds of the head sentence no longer prevailed.

In fixing the head sentences, his Honour did not consider the effect, if any, of the 1997 amendments relating to abolition of remissions. However, he held that the mandatory minimum non-parole period did not apply. He was aware that *Siganto* was under consideration, and indicated that if this Court's decision was contrary to his views, there was power under s112 of the *Sentencing Act* for the proceedings to be reopened and the error corrected. That was done on application by the Crown after the decision in *Siganto* was delivered, and his Honour substituted for the non-parole period of five years originally ordered a period in conformity with the minimum mandatory requirements.

A submission made to this Court by the applicant that *Siganto* was wrongly decided was noted. No case has been made out to over rule that decision. The views of the High Court on the matter have not yet been received.

The power of the Supreme Court to reopen proceedings to correct sentencing errors is found in subs(1) of s112 of the *Sentencing Act* as follows:

> "Where a court has in, or in connection with, criminal proceedings (including a proceeding on appeal) –
>
> (a) imposed a sentence that is not in accordance with the law; or

(b) failed to impose a sentence that the court legally should have imposed,

the court (whether or not differently constituted) may reopen the proceedings unless it considers the matter should more appropriately be dealt with by a proceeding on appeal."

The substance of the further submissions of the applicant were that his Honour erred in that when he reopened the proceedings both the head sentence and the order fixing the non parole period were open to be corrected. A submission under this heading proceeded upon an assumption that in this jurisdiction Judges bore in mind, prior to the repeal of the remission provisions, that remission was available and therefore imposed sentences which reflected that reality. I reject the assumption. It was also put that s112 did not apply to an order fixing a non-parole period, the period ordered in this case should be treated as being 70% of the head sentence, and the head sentence reduced accordingly. The applicant would then look forward to the opportunity of being released on parole at the time originally ordered, and the relationship between the head sentence and that period would be brought into harmony with the legislation. His Honour rejected those submissions, and was right to do so. In this Court a further argument was based upon the proposition that the application of s112 was limited to the head sentence.

In my opinion s112 is limited in its application to errors of law in relation to the imposition of the sentence. It does not extend to the correction of reasons or review of the exercise of a discretionary judgment.

As to whether the fixing of a non-parole period is a sentence within the meaning of s112, see s53(1) which obliges the court in prescribed circumstances to fix the non-parole period "as part of the sentence". The amendment of the non-parole order was authorised by s112.

It was also submitted under this heading that there was something unjust or unfair in the amendment of the order fixing the non-parole period. I do not accept that. It was plain when his Honour sentenced the applicant that the issue of the non-parole period was open to be further considered, and the order would be corrected if it were found that an error of law had been made. His Honour made that plain in the presence of the applicant in the course of his sentencing remarks. It can not be held that the court acts unfairly or unjustly when it makes orders in conformity with that which the legislature mandates and by the prescribed procedure.

Manifestly excessive

The proposed ground of appeal that the sentence was manifestly excessive, relies partly upon the assertion that his Honour erred in imposing equal sentences in respect of each of the sexual assaults. The details of each of those offences are set out at the commencement of these reasons. The applicant was sentenced to imprisonment for eight years on each count, to run concurrently. The submission was advanced in reliance upon the proposition that the offences were not of equal seriousness and his Honour had made no attempt to distinguish between them. The argument was centred upon the nature of the physical acts involved in the separate offences and the time

which it was supposed that each took to perform. In my view, it was more the circumstances in which the offending took place and the relationship between the applicant and K which contributed to the seriousness of the criminal conduct. See *L* (1997) 91 A Crim R 270 per Ormiston J. at 277. I am not satisfied that his Honour wrongly treated all acts of penetration as being heinous to the same degree and thus acted contrary to the authority of *Ibbs v The Queen* (1987) 163 CLR 447. In my opinion, in all the circumstances, each act of penetration was as heinous as the other. If there is any distinction to be made it is insignificant. There was nothing to distinguish between the three offences when mitigating circumstances came to be considered.

The sentences imposed for each of the sexual assaults was a matter for discretionary judgment. There were a number of factors falling for consideration and I do not think that such variations as arguably there may have been between the gravity of the acts constituting those offences would cause me to substitute my own opinion for that of his Honour. (For a case involving equal sentences for offences of significantly different gravity see *McDonald v R* (1994) 120 ALR 629, and generally *L* at pp281-283). If I am wrong in that, I would not conclude that the effective head sentence of eight years imprisonment was outside the range appropriate for this collection of offences.

As these reasons show there is no substance in the argument that his Honour was unduly influenced by a suggestion made by counsel before him that a head sentence of seven years would be appropriate.

The sentence of three years imprisonment on the remaining charge is manifestly excessive. The digital penetration of the vagina was treated as a sexual assault and dealt with separately, and must be excluded from consideration of the circumstances surrounding the recording of the indecent visual images. The maximum penalty for the offence is five years imprisonment. Notwithstanding the circumstances in which the images were recorded and the other circumstances going to aggravate the seriousness of the offending, I conclude that a penalty of 60% of the maximum for a first offender is too much.

Proposed Orders

I would grant leave to appeal, dismiss the appeal in relation to the sexual assault sentences, but quash the sentence in respect of the recording of the visual images, impose a sentence of imprisonment for one year and six months in lieu thereof, and order that it be served concurrently with the other sentences.

ANGEL J:

The other members of the Court have set out the circumstances of this application and of the applicant's offending.

The effective head sentence of eight years imprisonment fixed by Mildren J was in my view well within his sentencing discretion. The first three counts carried a maximum penalty of life imprisonment. The fourth count carried a maximum penalty of five years imprisonment. The criminal conduct of the applicant, a medical practitioner, constituted grave examples of the offences to which he pleaded guilty. It was criminal conduct which deserved condign punishment. Crimes of this kind are calculated to give rise to a deep sense of public disquiet, if not outrage. For sentencing purposes this can not be left out of account and requires that lesser weight be given to subjective mitigatory matters. There is a clear need in such cases that the punishment be seen to fit the crime. In the present case a sentence was called for which vindicated the law, denounced the applicant's abuse of trust, denounced the applicant's outrages upon his victim, a thirteen year old female patient, and clearly indicated that future like offending by medical practitioners would result in substantial gaol terms. The protection of the vulnerable called for no less. Far from being manifestly excessive or crushing, as was argued, each of the sentences passed by his Honour properly reflected these matters. There has been no miscarriage of justice.

Being of this view it is unnecessary that any concluded view be expressed on the scope of s112 *Sentencing Act* or as to whether consequences which have

not been foreseen or could not reasonably be foreseen can be taken into account when sentencing.

Nevertheless I desire to make some remarks on these and some other matters.

I agree with the other members of the Court that Mildren J did not err in adjusting the non parole period pursuant to s112 of the *Sentencing Act*. That section gives a sentencing judge the power to re-open proceedings where the Court has "imposed a sentence that is not in accordance with the law" or has "failed to impose a sentence that it should legally have imposed". The section is somewhat akin to a slip rule. Its purpose appears to be to reduce the number of appeals against sentences. It should, in my opinion, be given a broad interpretation. The section does not employ the expression "error of law". The section does not empower the Court to re-open a case merely because it has changed its mind as to the appropriate sentence. It is not necessary in the present case to decide the limit of a sentencing judge's jurisdiction to re-open the case. It at least includes errors of law. It may well include judicial oversight of a fact obviously material for sentencing purposes, ie. in a case where the Court makes clear findings of fact, plainly applies the correct law to those facts, but overlooks a further fact, which, had it been taken into account, would obviously have affected the result. I would wish to hear argument on the issue before reaching any concluded view on the limits of the section.

In the present case it was not argued that *R v Boyd* [1975] VR 169 is wrong in so far as it was held by Gowans J, with whom Nelson and Murphy JJ concurred, that (at 172)

> "if the consequences of a prisoner's acts are not such as would reasonably have been foreseen by him, then such consequences ought not to be used against him; but if they ought to have been foreseen by him they are relevant circumstances".

The correctness of this view was discussed at some length by the members of the Tasmanian Court of Criminal Appeal in *Inkson v The Queen* (1996) 6 Tas R 1. Underwood J concluded that *Boyd* was wrong. Crawford J expressly left the issue open for another day. Zeeman J approved *Boyd*. *Inkson* was the subject of comment by Professor K Warner in (1997) 21 Criminal Law Journal 163. As the learned professor said, the different views of what a sense of fairness and justice requires in this context is striking. Underwood J was of the view that deterrence and retribution required consideration to be given to unforeseen and unforeseeable consequences. The other members of the Court looked at justice rather from the view point of the offender. Although it is unnecessary to decide the point in the present case, as a matter of principle I respectfully incline towards the view of Underwood J, and that of Goodhart (80 LQR 18), particularly given that crimes are public wrongs not just wrongs against the individual victim. Defendants are responsible for unforeseen and unforeseeable damage arising from the tort of deceit, *Doyle v Olby*

(Ironmongers) Ltd [1969] 2 QB 158. As Lord Denning MR said (at 167) "… it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen". This statement was expressly approved by the High Court of Australia in *State of South Australia v Johnson* (1982) 42 ALR 161 at 170. This strand of the law of torts is at odds with the view that a person's moral or legal responsibility for a deliberate act ought not be measured by the unforeseeable consequences of that act.

Any question as to the relevance, for sentencing purposes, of unforeseeable consequences is primarily to be resolved having regard to the terms of the *Sentencing Act*, rather than as a matter of general principle. In sentencing an offender the Court is bound to have regard to, inter alia, "any damage, injury or loss caused by the offender": s5(2)(d) *Sentencing Act*. The *Sentencing Act* makes no mention of the issues of foresight or foreseeability.

Section 5(2)(b) expressly provides the seriousness of the offence is to be measured, inter alia, by the harm done to the victim. This is irrespective of whether the harm done is an element of the offence.

Under the *Sentencing Act* provisions, the issue of foreseeability, is relevant, if at all, to causation. The matters which must be taken into account in s5(2) are to achieve one or more of the purposes referred to in s5(1). Those purposes embrace the traditional purposes of sentencing, viz. punishment (which includes retribution), denunciation, deterrence both personal and general, protection of the community and rehabilitation of the offender. Those

purposes may be said to be served by holding an offender to account for unforeseen and unforeseeable consequences of the offence.

In the course of the argument there was some discussion concerning the purpose of victim impact statements presented to the Court pursuant to the new Subdivision 2 of Part VI of the *Sentencing Act* introduced by the *Sentencing Amendment Act* 1966 (No 47 of 1996). This new Subdivision, consisting of ss106A and 106B, requires a prosecutor to present to the court a victim impact statement or alternatively a victim report containing details of the harm suffered by the victim of the offence. As Professor Warner pointed out in the case comment previously referred to (at 166), the recent legislation authorising evidence of the impact of crimes on victims and the victims' family create tensions with the view that a greater value should not be placed on one life more than on another. What was previously inadmissible, is now expressly admissible, cf *Miller* [1995] 2 VR 348. The harm suffered by the victim of an offence arising from the offence is often not an element of the offence.

One purpose of the victim impact statement provisions is, I think, to address the retributive aspect of sentencing. A victim impact statement gives the victims of crime an opportunity to be heard as to the harmful consequences of that crime. It brings to the notice of the offender certain consequences of his or her crime. He or she may otherwise have been ignorant of the consequences. This may initiate or augment remorse, and aid rehabilitation. The topic of harm suffered by the victim relates to a number of sentencing purposes. The Court is obliged to consider and take account of the contents of

the victim impact statements once presented: s106B(4) and (7). S5(2) of the *Sentencing Act* obliges the Court to have regard to "the nature of the offence, how serious the offence was, including any physical, psychological or emotional harm done to a victim" (paragraph (b)), "any damage, injury or loss caused by the offender" (paragraph (d)), and "any other relevant circumstance" (paragraph (s)). Pursuant to s104(1) the Court may receive such information as it thinks fit to enable it to impose a proper sentence. Victim impact statements and victim reports which contain details of the harm suffered by the victim of an offence arising from the offence are receivable as proof of their contents. That this is so is evident from, inter alia, the fact that the victim can be cross-examined: s106B(9). No distinction is made between foreseeable and unforeseeable harm. I would wish to hear argument before reaching any concluded view on the limits of the use of victim impact statements.

In considering the applicant's plea of guilty as a mitigating factor the learned sentencing judge applied *Jabaltjari* (1989) 46 A Crim R 47. In so doing, I think, with respect, he erred. I am of the opinion that as a consequence of the enactment of the *Sentencing Act, Jabaltjari*, supra, no longer represents the law in the Northern Territory. In that case this Court held that a plea of guilty per se could not be taken into account as a mitigating factor by reason of the saving of time and cost involved in a trial. As Asche CJ said (at 62), however an accused pleads, "the court's attention ultimately must focus on the factors personal to him in determining whether to mitigate the objective sentence. It should not focus on whether he has or has not saved the community trouble or expense"; and as I said in the same case (at 81) "…

it is for the legislature rather than the courts to encourage pleas of guilty if the consequent saving in court time is to be regarded as in the public interest". Section 5(2)(j) *Sentencing Act* provides that in sentencing an offender the court shall have regard to whether the offender pleads guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so. The provision is similar to s5(2)(e) of the *Sentencing Act* 1991 (Vic). In *Hall* (1994) 76 A Crim R 454, Crockett and Southwell JJ said (at 469-470):

> "A plea of guilty is a mitigatory factor. Moreover, it is statutorily stated to be so. See s4(1) of the *Penalties and Sentences Act* 1985 (Vic) replaced by s5(2)(e) of the *Sentencing Act* 1991 (Vic). The latter provision (which is that now in force) states that:
>
> > 'In sentencing an offender a court must have regard to –
> >
> > …
> >
> > (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so.'
>
> Both provisions were obviously intended to act as an inducement to an offender to enter a plea, furthermore, an early plea, in return for a lesser penalty than otherwise might have been expected to have been passed: see *Morton* at 867; 437. A court may (although such a case would be rare) elect to give no weight to such a plea. For instance a plea which is no evidence of remorse, is entered at the "eleventh hour" and is made in a case of overwhelming strength may attract no reduction in sentence. But it will not fail to do so because it is cancelled or outweighed by other considerations of an aggravating nature. A plea of guilty is a mitigating factor. It cannot cease to be so because there are aggravating features. A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which

> the court is to be concerned is what weight should be given to it in the circumstances.".

Morton is reported at [1986] VR 863. See also *Donnelly* (1997) 91 A Crim R 550; *Winchester* (1992) 58 A Crim R 345 and *Miles* (1992) 110 FLR 437. These cases demonstrate that provisions such as s5(2)(j) are statutory statements that a plea of guilty is a mitigatory factor intended to act as an inducement to an offender to enter a plea in return for a lesser penalty than otherwise might have been expected to have been passed. The plea of guilty is a factor that the court is bound to have regard to independently of the other matters referred to in s5(2). Those other matters include (paragraph (f)) "the presence of any aggravating or mitigating factor concerning the offender". Thus a plea of guilty is to be taken into account as a mitigating factor independently of other mitigating factors concerning the offender. To my mind this means that consistently with s16A(2)(g) of the *Crimes Act* 1914 (Cwealth) a plea of guilty is to be taken into account as a mitigating factor in its own right independently of matters such as contrition and saving the victim having to give evidence, for the cooperation in saving the time and cost involved in a trial – ie for what have been called 'utilitarian considerations'; see *Winchester*, at 350, per Hunt CJ at CL. On this point, *Wangsaimas, Vanit and Tansakun* (1996) 87 A Crim R 149 at 168, 169 is in error and should be overruled. Of course none of this is to say that a plea of guilty must always result in a sentencing discount, cf *Wangsaimas, Vanit and Tansakun*, supra, at 171; *Donnelly*, supra, at 555. The extent of any discount will depend upon the

circumstances. Even given his Honour's error, and that greater credit ought to have been given than was given to the applicant's plea, I would nevertheless confirm his Honour's sentence.

I would grant leave to appeal but dismiss the appeal.

THOMAS J:

This is an Appeal against sentence imposed by Mildren J on 10 April 1997.

The appellant, consequent upon a plea of guilty, was convicted of the following three counts on indictment:

(1) On 4 February 1995, at Darwin in the Northern Territory of Australia, did have sexual intercourse - that is, cunnilingus - with K. without her consent, contrary to s192(3) of the *Criminal Code*.

(2) On 4 February 1995, at Darwin in the Northern Territory of Australia, did have sexual intercourse - that is anal penetration - with K. without her consent, contrary to s192(3) of the *Criminal Code*.

(3) On 4 February 1995, at Darwin in the Northern Territory of Australia, did have sexual intercourse - that is digital and vaginal penetration - with K. without her consent, contrary to s192(3) of the *Criminal Code*.

The maximum penalty in respect of each of these offences is life imprisonment.

He was further convicted on count 4 following a plea of guilty to a charge that he:

> "on 4th February 1995 at Darwin in the Northern Territory of Australia without legitimate reason intentionally and unlawfully did record by means of a device, namely a video camera, an indecent visual image of

K., a child under the age of 16, contrary to Section 132(2)(f) of the *Criminal Code*."

The maximum penalty for this offence is five years imprisonment.

The facts found by his Honour are set out in his reasons for sentence as follows:

> "The Crown facts are as follows. At the relevant time, the prisoner was a radiologist in practice in Darwin. The charges to which he has pleaded guilty, concern offences committed on 4 February 1995 against a patient, 13 year old K. The girl had gone to the prisoner's rooms at Darwin Private Hospital on the understanding that she was to have an ultrasound to determine whether she had an internal cyst and in the event of discovery of a cyst, to have it aspirated if necessary.
>
> In the ultrasound room, the prisoner administered injections to the complainant as she lay on a bed and she soon lost consciousness. At this time she was wearing pants and a robe. The next thing the complainant remembers is waking cold and crying. She described her position as: 'Lying on my back with my head to the left side and both my legs were up. My knees were up in the air and my feet were on the bed'. Her pants were no longer on and she was unsure about the robe.
>
> The prisoner told her that she had wet her pants and he had removed them to get them washed. At her request, he put blankets on her. The prisoner then leaned over the complainant and kissed her on the lips. He told her: 'Open your mouth' and she did. He put his tongue in her mouth about three times. He told her to stick out her tongue, but she did not do it. He asked her whether she liked it, but she did not answer. The prisoner put his tongue in her right ear and licked inside and then did the same to her left ear. He asked her whether she liked it and she did not answer.
>
> The prisoner then moved away from the girl's face and told her to put her legs up, which she did. He pushed the blankets up off her legs and licked her vagina. She described it: 'He licked a couple of times with his tongue, licking the outside of my vagina and the inside of my vagina'.
>
> The prisoner left the room for a short time and when he returned he told the complainant to lie on her left side. She did this and he told her to put her knees up to her chest and she complied. He put a finger in her anus,

moved it around and then removed it. The girl does not know whether he was wearing gloves.

The prisoner then said: 'This is going to hurt a bit', or similar and he penetrated the complainant's anus with something which the Crown is unable to specify. The girl described it: 'I felt something else going in my bottom. It was much bigger than his finger and he moved it - and he put it in slowly. He was using his right hand to put whatever it was in, as his left was laying on my hip, sort of holding me. I told Doctor Staats that it was hurting and asked him to stop. He said: "Just a couple of more seconds."'

The complainant said: 'Doctor Staats was moving around the thing in my bottom, I could feel it moving around. I would say it was inside for about 10 to 15 seconds. Doctor Staats kept putting more gel and sticking the thing in my bottom. When he was doing that I was screaming out to him to stop.' At the committal she said: 'Something big and fat went into my anus and it really hurt.'

After he ceased the anal penetration, the prisoner inserted an ultrasound probe into the complainant's vagina and told her that she had a cyst and needed an operation. During this time he asked her whether she remembered anything. The prisoner removed the probe and left the room. He returned and soon the complainant saw that he had a video camera. The prisoner locked the door and set up the camera on a table at the end of the bed. He had the girl turned around on her stomach with her head on a pillow and her bottom in the air. He lifted the blankets and used both hands to open the complainant's vagina. She said: 'Doctor Staats did this for a few seconds and then he went back to the camera. This happened another two or three times, where he would open up my vagina and then go back to the camera and look through the viewfinder.'

The prisoner then had the complainant lie on her back and open her legs. Her knees were up and the prisoner used his hands to open her vagina. He went to the camera and looked at her through it. The prisoner then told the complainant to roll over onto her stomach and put her bottom in the air. She did this and felt the prisoner pushing her legs towards her stomach, so that her bottom was higher in the air. He touched her around her vagina and opened and it and there was some digital penetration.

At the committal the complainant said: 'Sometimes his fingers would go in and open it.' She says that he was not wearing gloves. The complainant then lay fully on her back and went to sleep. When she woke the prisoner was putting a needle in her arm. He removed the needle, did something behind a monitor and told the complainant to get dressed.

Completely naked the complainant got off the bed. The prisoner left the room and returned with her clothes. He rubbed her breasts while assisting her don a T-shirt. After she was dressed the prisoner asked her whether she remembered anything.

The complainant left the hospital with her mother, who had accompanied her there, left and returned for her. The prisoner told the mother to hold onto the complainant as she might be a bit woozie, but the girl says that she did not feel that way. The complainant asked the prisoner whether she could look at the fluid which she believed had been aspirated from the cyst. He said that he had sent it down south. On a note he wrote his phone number and gave this to the complainant's mother. At or about this time he again asked the girl whether she remembered anything.

The complainant did not consent to any conduct by the prisoner which was not necessary and not part of a legitimate medical examination. In evidence she said that she was too frightened to ask him what he was doing.

Soon after returning home, K. complained to her sister and exhibited signs of distress. That evening she complained to the police and the conversation was recorded on video tape. When seen by a doctor the same evening the girl was tearful and upset. Medical examination of the vaginal opening showed a slightly swollen fold of hymeneal tissue, but no evidence of tears. She felt uncomfortable being touched in that area. There was a very superficial abrasion on the inside of the right labia.

There were two superficial tears at 12 o'clock and 6 o'clock, they were both slightly less than one centimetre long and stretched to approximately three millimetres wide. They were not inflamed, there was no evidence of bleeding and there was no bruising in the area. The tears were very tender to touch.

Doctor Adams reported that: 'The examination shows evidence of the anus having been penetrated by a blunt object with a small, not large, amount of force. The swelling of the hymeneal tissue suggests some friction could have taken place, such as with the use of a vaginal probe for a pelvic ultrasound.' Semen was not detected on swabs taken and submitted for forensic examination. The girl had showered before the examination.

At about 5 pm on 5 February 1995 police searched the prisoner's home and also his place of practice. From his home they took possession of a video camera, a cartridge from a video printer and later the printer itself, a sex aid vibrator and other articles. The vibrator was in a bag near the

camera and the prisoner later told police that he sometimes used the bag as a camera bag.

When first seen by police the camera was connected to a television set and/or to the video printer. A cassette tape in or near the camera was visually blank except for a date, 4 February 1995 at the beginning. There was audio noise on the tape and the presence of the date indicated that the visual footage had been erased on 4 February 1995.

Later from the video printer cartridge, photos of the vaginal and anal area of a female were developed and printed by police. The Crown case is that these are photographs of the complainant, that is still photos of footage from the video camera. Apart from what was discovered from the cartridge, no indecent photographs or films were discovered at the prisoner's residence or at his place of practice.

Biological examinations of the vibrator showed that on a plastic ring near its base blood and/or other biological matter had DNA profiling the major component of which matched the DNA profile of the complainant. The Crown case is that this establishes to a very high degree of probability that the complainant's blood and/or other biological matter was on that part of the vibrator.

On the voir dire, Doctor Adams gave evidence that the anal tears could have been caused by the vibrator. The Crown submits that this is an available finding of fact, that the vibrator was used to penetrate the complainant's anus.

The prisoner was interviewed on the evening of 5 February 1995 and he denied the complainant's allegations. In substance he said that the complainant's visit of 4 February was for a follow up check following an aspirated cyst operation he carried out on her the previous December. He intended again aspirating a cyst if necessary. As it turned out it wasn't necessary. He administered drugs, Midazalam and Valium and injected a local anaesthetic into her perineum. He did a digital/rectal examination and then examined her internally in the vagina, using an ultrasound probe. Having discovered that there was no cyst requiring aspiration, he ceased any further examination and/or treatment.

The prisoner spoke of the effect of the drugs and said that the complainant went to sleep and woke up cold and agitated. He indicated that she would have been still under the influence of the drugs when interviewed by police. He said that he did not use his video camera in his job, did not have it at his place of practice on 4 February, and the only time he had taken it to the Private Hospital was for a party at the previous Christmas. Asked how long he had had the camera, he said: 'A few

weeks', later he said: 'It's a new camera.' And later: 'I've had the video camera for some years.' He said: 'I haven't used the video for a while.'

He said that he uses the video printer for taking still photographs from the video and that he sometimes transfers video footage into still photos. The prisoner denied putting anything into the girl's anus except his finger for a legitimate examination. He said that the only things he put in her vagina were the ultrasound probe and his fingers at one stage. The prisoner admitted that he owned a vibrator.

The prisoner was charged on 5 February and admitted to bail, conditional upon his attending court the following day. On 6 February he attempted to commit suicide by administering a drug overdose. After treatment and recovery he told a fellow practitioner of his pending court case and also spoke of financial concerns. He maintained his innocence of the offences. The prisoner has no prior convictions and has been on bail since his arrest.

Some of the facts are in dispute. Some facts are disputed on the basis that they are not the subject of any count on the indictment, not pleaded as a circumstance of aggravation in the indictment and are extraneous discreditable acts. This objection was taken in relation to the kissing, licking of the ear and rubbing of the breasts.

Mr Bannon QC for the Crown submitted that these matters were not relied upon as a circumstance of aggravation, but as background to set the context of the offences to which the accused has pleaded guilty.

These facts are not circumstances of aggravation in the sense that proof of them would expose to the accused to a greater maximum penalty. It would not be possible to charge the accused in the indictment with any of these matters as a circumstance of aggravation of any of the offences in the indictment. Compare with the definition of circumstance of aggravation in section 1 and see also section 305(4) of the Criminal Code.

The acts in question could well amount to an aggravated assaulted under section 188 or perhaps indecent dealing with a child under section 132(1). It is well established that facts of this kind cannot be taken into account so as to punish a prisoner more severely if the facts could be the subject of separate charges on the indictment unless the accused admits his guilt in respect of them as to do so would deprive the accused of his right to a trial in respect to them. See R v De Simoni (1980-1981) 147 CLR 383 at 389-90, Gibbs CJ, and at page 396 per Wilson J.

The facts in this case are not admitted and therefore I cannot take them into account for that purpose. However, I am entitled to take them into

account as part of the context and surroundings circumstances of the crimes of which the accused has pleaded guilty "in considering whether or not to extend leniency so as to reduce what would otherwise be a proper sentence but the commission of other crimes not asked to be taken into account cannot be used in order to increase what would otherwise be a proper sentence."

And I was quoting there from R v Reiner, R-E-I-N-E-R, (1974) 8 SASR, 102 at page 105 per Bray CJ.

The facts as alleged by the Crown are the subject of sworn evidence given by the victim at the committal hearing. Counsel for the accused did not seek to cross-examine her and called no evidence from the accused. Accordingly, I have proceeded on the basis that these facts are established. See R v Maitland, (1963) SASR 332 at pages 334-5.

Other facts alleged by the Crown are disputed as matters of fact. These facts include whether or not the prisoner had told the victim that she had a cyst, whether he had told her that he had aspirated the cyst and whether he had said to her that he had sent the results down south and the length of time he had had the camera in question.

However, except in relation to the camera, the remaining facts - I take that back. In relation to all of these matters of fact, none of them if established would effect the sentence which I am about to impose and I propose to ignore them.

It is clear that the offences involved are a series of acts, all of which occurred on a single occasion, over a period of time which it is impossible to fix with precision but probably less than a period of an hour.

So far as the anal penetration is concerned, I am satisfied that the object used was the vibrator. The offences are aggravated by the facts that they involved a breach of trust by a doctor towards his patient. They are aggravated by the fact that the victim was only 13 years of age at the time and also by the fact that the offences occurred at a time when the victim had had drugs administered to her by the prisoner for the purposes of anaesthetic."

His Honour imposed the following sentence, Appeal Book 120:

> "In relation to count 1 there will be a sentence of imprisonment for eight years. In relation to count 2 there will be a sentence of imprisonment for eight years, and in relation to count 3 there will be a sentence of

imprisonment for eight years. In relation to count 4 there will be a sentence of imprisonment for three years, all sentences to be served concurrently."

His Honour then proceeded to deal with the issue of a non-parole period. His Honour considered that the provision of s55(1) of the *Sentencing Act* did not apply in this case. He indicated that if the Court of Criminal Appeal, whose decision in the matter of *Siganto v R* (CCA No. 15 of 1996), which was then pending, was decided differently he would have to reconsider the matter. His Honour then fixed a non-parole period of 5 years.

Following the delivery of the decision of the Court of Criminal Appeal in *Siganto v R* (supra), the matter was brought back before his Honour on 18 November 1997. His Honour fixed a non-parole period in accordance with the provisions of s55(1) of the *Sentencing Act* and in accordance with the law as stated in *Siganto v R* (supra). The non-parole period was increased from 5 years to 5 years 7 months and 6 days.

The consolidated Grounds of Appeal prepared by Mr Dalrymple, solicitor for the appellant, and dated 4 December 1997, are as follows:

"1. The sentence was vitiated by error.

2. In all the circumstances the sentence:

(i) was manifestly excessive;
(ii) was a crushing sentence;
(iii) included an excessive head sentence;
(iv) included an excessive non-parole period.

3. The learned sentencing judge failed to have regard to the abolition of remissions as a "relevant circumstance" for the purposes of Sub-section 5(2)(s) of the Sentencing Act.

4. The learned sentencing judge erred in imposing equal sentences in respect of each of the 4 offences in respect of which convictions were recorded, despite their varying degrees of seriousness.

5. The learned sentencing judge was unduly influenced by a submission made by Senior Counsel for the Applicant appearing before him to the effect that a head sentence of 7 years imprisonment would be "appropriate" - a submission which was not reflective of the relevant circumstances of the offences nor of the relevant sentencing authorities.

6. The decision of this Honourable Court in Siganto v R (No. CCA 15 of 1996) applied by the learned sentencing judge at the time of increasing the Applicant's non-parole period on 18/11/97 was wrongly decided, and therefore the Applicant's non-parole period was wrongly increased.

7. Even if the decision of this Honourable Court in Siganto v R was not wrongly decided, the learned sentencing judge was in error in ruling that he did not have power under Section 112 of the Sentencing Act to recast the whole of the Applicant's sentence (as opposed to only adjusting the Applicant's non-parole period), and that he was also in error in ruling that the length to a prisoner's minimum non-parole period is an irrelevant consideration when fixing a head sentence."

I will deal with the Grounds of Appeal in chronological order.

Ground 1

The sentence was vitiated by error. There are a number of subheadings under this ground.

1.1 & 1.2 The victim impact statement should not have been admitted into evidence and, once admitted, certain aspects of it should not have been taken into account by the sentencing Judge.

In particular, Mr Priest, counsel for the appellant, submitted that under s106B(1) of the *Sentencing Act*, the victim impact statement may only be received by a court "where the victim consents to its presentation." The appellant's counsel argued that there is nothing on the material to suggest such consent.

During the course of submissions on the plea of guilty before his Honour, no objection was taken to the admission of the victim impact statement on the ground that there was no consent of the victim. The victim impact statement was tendered as Exhibit P12 in the proceedings before the sentencing Judge. There is an implicit consent contained in the victim's participation in the preparedness of the statement and the role of the prosecutor, as an officer of the Court, in presenting the impact statement to the Court as an exhibit in the proceedings. His Honour was entitled to assume that the Crown Prosecutor had instructions to tender the victim impact statement. See also *The Queen v P* (1992) 39 FCR 276 at 279.

1.3 The victim impact statement may only relate to "harm" done to the victim:

Counsel for the appellant further argues that the victim impact statement may only relate to "harm" done to the victim. Reference was made to s5(2)(b)

of the *Sentencing Act*, and to the provisions of ss106B(2), 106B(4) and 106B(5) of the *Sentencing Act*. Section 5(2)(b) of the *Sentencing Act* provides as follows:

> "In sentencing an offender, a court shall have regard to -
> …
> (b) the nature of the offence and how serious the offence was, including any physical, psychological or emotional harm done to the victim;"

The essential argument is that "harm" is "physical or emotional harm" [s5(2)(b)] or, inter alia, "psychological or emotional suffering, including grief" [s106A]. Counsel for the appellant submitted that, anything in a victim impact statement not relating to harm done is not admissible; any material relating to consequences not flowing from the appellant's conduct should not have been included.

The sentencing court was obliged, under the provisions of s5(2)(b), to take into account relevant harm to the victim and to inform itself appropriately.

Section 106B(2) provides as follows:

> "The prosecutor shall present to the court, before it sentences an offender in relation to an offence, a victim report in relation to each victim of the offence where -
>
> (a) the victim has not consented to the presentation to the court of a victim impact statement in relation to him or her and has been informed of the contents of the victim report and does not object to its presentation; or

(b) the victim cannot, after reasonable attempts have been made by the prosecutor, be located,

and there are readily ascertainable details of the harm suffered by the victim arising from the offence that are not already before the court as evidence or as part of a pre-sentence report prepared under section 105 in relation to the offender."

Section 106B(4) provides as follows:

"Subject to subsections (7) and (8), the court shall consider each victim impact statement and each victim report, if any, in relation to an offence before determining the sentence to be imposed in relation to the offence."

Section 106B(5) provides as follows:

"A victim impact statement or a victim report may contain details of the harm caused to the victim of the offence to which the statement or report relates arising from another offence -

(a) for which the offender has already been sentenced, or will be sentenced in the proceedings then before the court; or

(b) which, under section 107, has already been taken into account in a sentence or which may be taken into account under that section in the proceedings then before the court."

The power of the Court to receive a victim impact statement does not depend solely on the provisions of s106B of the *Sentencing Act*. Section 104 provides as follows:

"(1) A court may, before passing sentence on an offender, receive such information as it thinks fit to enable it to impose the proper sentence.

(2) A court may, before making an order for restitution or compensation under Division 1 of Part 5, receive such information as it thinks fit to enable it to make the proper order."

Section 104 of the *Sentencing Act* gives statutory recognition to the practice of the Court prior to the commencement of the *Sentencing Act*, to receive, amongst other matters, relevant details as to the impact of the crime upon the victim, and such other information as it thinks fit to enable it to impose the proper sentence.

This statutory power is of course subject to the sentencing Judge ruling out any irrelevant or inadmissible material in a victim impact statement, and dealing with objections by defence counsel to the admission of such material. Defence counsel in this matter had a right to cross-examine the author of the victim impact statement, Megan Simmons, and chose not to exercise such right.

His Honour was entitled to receive the impact statement and to have regard to those aspects of the victim impact statement relevant to the consequences of the crime upon the victim.

In his reasons for sentence, his Honour stated:

> "I now deal with the affects on the victim. In this case a Victim Impact Statement, Exhibit P12, has been tendered by the Crown. The report is prepared by Ms Megan Simmons, the acting co-ordinator of the Sexual Assault Referral Centre who is qualified in psychology. Ms Simmons states that the sources for the Victim Impact Statement are as follows, [and I'm sorry, I just need the Victim Impact Statement please, P12,] quote:

> This Victim Impact Statement is based on the client file recordings made since 6 February 1995 by Janice Carter, Susanne Wellesley, Leisha Townson and myself. Information relating to the sexual assault is based on the medical examination findings of Dr Tine Adams. This VIS reflects the affects of the sexual abuse on Poppy observed during counselling sessions at the Sexual Assault Referral Centre during the past two years.
>
> During the last 12 months, I have seen Poppy on 12 occasions for counselling and have also given support by telephone on 10 occasions. I have seen Poppy's mother, Kathy, on three occasions. During these sessions, Kathy has discussed some of the ongoing problems Poppy has been experiencing since the sexual abuse and where relevant, this information is included in this statement.
>
> In addition to the above mentioned occasions, Poppy has attended SARC a total of nine times for ongoing counselling support in addition to support phone calls and court support by the counsellor.

Counsel for the prisoner, Mr Ramage QC, took objection to much of what is in the statement. He had no objection to most of those parts of the Victim Impact Statement which reported what the victim claimed were her experiences and which she attributed to the offences. His main objections were as follows; first, he maintained that statements of opinion even by an expert were inadmissible. I do not agree. I interpret Ms Symonds (sic) approach as being no more than to record the complaints to see if they accord with the literature written by experts on the subject and if so, to offer a conclusion that it is proper to attribute cause and effect.

That is a proper function of expert evidence. That such reports should be prepared by experts was impliedly if not expressly approved in the case of P, which is reported in Volume 64 A Crim R at page 381.

Mr Ramage QC submitted that section 106A of the Sentencing Act does not permit expert opinion but should be confined to the complaints made by the victim. Section 106A does not support this contention. The section does not specify what may or may not be included in a Victim Impact Statement. The only criteria is the definition of 'Victim Impact Statement' which is given the meaning of, 'An oral or written statement prepared for the purposes of section 106B(1) containing details of the harm suffered by the victim of an offence arising from an (sic) offence.'

The word 'harm' is defined to include physical injury and psychological or emotional suffering including grief. There is no requirement that the Victim Impact Statement must be prepared by the victim or by anybody else. No inference can be drawn that an expert may not express an

opinion if it is relevant to establishing what harm was caused. Of course, the opinion must be soundly based. If the facts upon which the opinion rests are wrong, the opinion may carry little or no weight.

An opinion can only be based on facts. So an opinion which is based not on what the victim complains of but what is commonly complained of by other victims would carry no weight and of course the expert must not assume the role of an advocate. The material to be presented must not be presented in such a way as to promote the interests of the victim at the expense of the interests of justice. See again the case of P which I have referred to previously, at pages 386-7. And it may be that in some cases, no expert opinion would strictly be admissible because the court is able to link cause and effect by relying upon its knowledge of human nature about which expert evidence cannot be given. But I do not think that this generally applies to all of the consequences of sexual assaults particularly when the consequences are far-reaching.

Secondly, Mr Ramage QC objected to opinion evidence as to the likely future consequences. He submitted that the definition of 'Victim Impact Statement' limited the harm to that already suffered and did not include that yet to be suffered. In support of this contention, he relied upon the past tense of the verb 'suffered.' I do not accept this contention. The expression 'harm suffered' does not necessarily indicate the use of the past tense. It could mean harm which has been suffered. It could also mean harm which has been and to be suffered. As a matter of common sense, I see no reason to confine the harm to that suffered at the time of sentence.

Well before parliament introduced formal Victim Impact Statements into the Sentencing Act, the courts took into account the consequences of crimes to victims and this included future consequences. Of course, no-one can accurately predict the future but courts are routinely used to arriving at conclusions of fact which include the future. Ms Symonds (sic), in any event, does not purport to express an opinion about the future. She says that it is difficult to predict but the fact that the victim is still suffering consequences some two years later would have to be taken into account and viewed with concern and she lists some of the more long-term effects indicated in the literature.

I am not able to find with any precision what long-term effects there will be to the standard of proof required by law in this case. I am only able to say that there is a risk of long-term effects which having regard to all the circumstances is a significant one, those long-term effects being a continuance of her present symptomatology. But for how long and whether they will substantially dissipate with time I cannot say.

> The burden of proof is upon the Crown to establish these facts. To the extent that the facts are not established, I do not take them into account. I cannot sentence the prisoner on the basis of speculation."

The appellant has not demonstrated any error in his Honour's reasoning process. I reject the argument on behalf of the appellant on this issue.

1.4 The sentencing Judge erred in taking into account as an aggravating factor, the effect of media and community publicity upon the complainant.

Counsel for the appellant argued that the sentencing Judge took into account as an aggravating feature, the effect of media and community publicity upon the complainant. The submissions for the appellant are that his Honour erred and the appellant should not be responsible for any consequences of his acts that could not have been reasonably foreseen by him and that the appellant could not reasonably have foreseen the effect upon the victim of the media publicity.

I reject this submission. Darwin is a small centre of population. The victim is a member of the Greek community. That this matter would receive a great deal of media publicity was inevitable. Dr Staats, by his very occupation as a medical practitioner, is in a relatively high profile position in the community. Offences of this nature, particularly when committed by a

medical practitioner, are inevitably matters that receive the full scrutiny of the media, and are the subject of much public comment.

The appellant must have realised, had he thought about the matter, that the identity of the victim of a sexual offence by a practising medical practitioner would have been the subject of comment and speculation by members of the community. It was foreseeable that this publicity would be a source of distress to his victim.

I do not accept, in this instance, that the consequence to the victim of his acts, being the attendant media publicity and the distress such publicity could cause his victim, could not have been reasonably foreseen by the appellant.

The sentencing Judge found that the appellant must bear some responsibility for the effects of the media publicity. I agree with this finding and with the test applied by his Honour which he stated at Appeal Book 114:

> "It is not necessary for harm to be caused that it is solely caused by the offences. It is sufficient if it is a cause. As to whether the matters complained of are caused by the crimes or not or whether they are the result of some intervening act which breaks the chain of causation, the test to be applied is whether they were the very kind of thing likely to happen as a result of the prisoner's crimes."

March v Stramere Pty Ltd (1990-1991) 171 CLR 506. See also *Royall v R* (1990) 172 CLR 378 at 387-8, 411-412, 423, 428; *R v Boyd [*1975] VR 168 at 172.

1.5 & 1.6 Personal Deterrence. His Honour erred by including personal deterrence as the "foremost consideration". In his reasons for sentence, the learned sentencing Judge stated at, Appeal Book 111:

> "In my judgment, this conduct deserves to be severely punished and foremost in the sentence to be fixed must be the element of general and personal deterrence. The community expects the court to provide protection from offences of this kind and this must mean a deterrent sentence."

This is the only reference by his Honour to the aspect of personal deterrence. His Honour was bound to pay account to the aspect of personal deterrence pursuant to s5(1)(c) of the *Sentencing Act* as follows:

> "The only purposes for which sentences may be imposed on an offender are:
> …
> (c) to discourage the offender or other persons from committing the same or a similar offence."

The submission by counsel on behalf of the appellant is that by including personal deterrence in the "foremost" considerations, the judge erred. It is submitted that personal deterrence is a factor to be taken into account where there is some prospect the offender may offend again unless deterred. Counsel for the appellant argues that the aspect of personal deterrence should have been given little, if any, weight in view of the finding that the offences were "clearly out of character" (Appeal Book 117), and that it is "improbable" that the applicant will ever be able to practise medicine again.

A full reading of his Honour's reasons for sentence indicate that he attached the greatest weight to the aspect of general deterrence (Appeal Book 123). His Honour also referred to the requirement to fix an appropriate sentence. His reasons for sentence do not indicate that his Honour allocated undue weight to the aspect of personal deterrence, and I do not accept the argument for the appellant on this issue.

1.6 Guilty plea. His Honour erred in his reasons for sentence in that the learned sentencing Judge refused to give any weight to the plea of guilty, based upon economic considerations, and for saving the Territory and the Police and the witnesses money and inconvenience. His Honour's statement is at Appeal Book 118-119:

> "The prisoner said that he attempted suicide because although he was innocent his career was ruined. He had a large insurance policy which covered suicide and did not want to leave his mother destitute. This is also inconsistent with remorse. It was also put that I should give weight to the plea because it is specifically recognised as a factor in the Sentencing Act, section 5(2)(j) because it has saved the Territory and the police and the witnesses money and inconvenience and results in significant benefits to the criminal justice system. This has not been the approach of this court, see the case of Jabaltjari (1989) 46 A Crim R 47 and the case of Wangsaimus (sic), Vanit and Tansakun (1996) 87 A Crim R 168-9."

The appellant's submission is that s5(2)(j) of the *Sentencing Act* provides that a bare plea of guilty should be given some weight [compare the

Commonwealth *Crimes Act* s16A(g), considered in *Wangsaimas v The Queen* (1996) 87 A Crim R 149)]. The *Sentencing Act* s5(2)(j) provides as follows:

> "In sentencing an offender, a court shall have regard to:
> …
> (j) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so."

The decisions of this Court, prior to the commencement of the *Sentencing Act*, have specifically refuted submissions that the length of loss of liberty can turn on facts such as economic considerations for the state, or on matters of administrative convenience (*Jabaltjari* (1989) 46 A Crim R 47.

Prior to the *Sentencing Act*, courts always took into account a plea of guilty for other reasons such as an expression of remorse, or that it spared the victim the shame and embarrassment of giving evidence.

The provisions of the *Sentencing Act* s5(2)(j) changed the basis on which the Court gives consideration to a plea of guilty by expanding these considerations to enable a court to take into account economic and administrative considerations. However, in the particular circumstances of this case, the failure by his Honour to take account of these factors is not an error of such a nature as to call for a reconsideration of the sentence.

It is relevant to note that the accused entered a plea of guilty consequent upon rulings made by his Honour at the conclusion of a hearing on the voir dire largely relating to DNA evidence. The ruling related to the admissibility of certain evidence which was the subject of challenge in the voir dire hearing. The appellant was facing a very strong Crown case. It is appropriate, in this instance, for the sentencing Judge to pay little regard to the plea of guilty, because it resulted only from a recognition of the inevitable (*Inkson v The Queen* (1996) 6 Tas R 1).

Ground 2 - Manifestly excessive sentence

In all the circumstances the sentence:

(i) was manifestly excessive;
(ii) was crushing;
(iii) included an excessive head sentence;
(iv) included an excessive non-parole period.

The main thrust of the appellant's argument is by reference to comparative cases for offences of rape involving acts of violence. The submission on behalf of the appellant is that the sentence in this matter is equal to or greater than sentences given in this jurisdiction for offences of rape involving significant acts of violence or the use of weapons. Counsel for the appellant states that in this matter the activity was cunnilingus (count 1) and penetration with a vibrator (count 2) and digital/vaginal penetration (count 3). No violence was involved. It was further submitted that the appellant has a legitimate sense of grievance because his sentence is equal to or greater than

sentences for rape involving brutality and violence. I accept that Courts should be at pains to ensure a parity of sentencing for like offences, and that there can be an injustice done to an individual who is sentenced more harshly than others in the community for a like offence. Uniformity of sentence is important (*Bugmy v The Queen* (1990) 169 CLR 525), however, there are limits to which comparisons can be made between cases. I refer to oft quoted remarks of King CJ in *Yardley v Betts* at (1979) 22 SASR 108 at 112-113:

> "To say that the criminal law exists for the protection of the community is not to say that severity is to be regarded as the sentencing norm. Times and conditions change, and the approach of judges to their task must be influenced by contemporary conditions and attitudes. But public concern about crime, however understandable and soundly based, must never be allowed to bring about departure by the Courts from those fundamental concepts of justice and mercy which should animate the criminal tribunals of civilized nations. They are summed up, in the aspects relevant to the present discussion, by Napier C.J. in *Webb v O'Sullivan*, [1952] S.A.S.R. 65, at p66:
>
> > "The courts should endeavour to make the punishment fit the crime and the circumstances of the offender, as nearly as may be. Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest."
>
> The protection of the public must remain our first concern, but if, consistently with that, we can, in our compassion, assist another human being to avoid making ruin of his life, we ought surely to do so.
>
> How are these principles to be applied to offences of assault? Assaults vary very greatly in seriousness. Some result in injury to the victim and some do not. Some are committed under provocation in the heat of the moment and others are wanton and premeditated attempts to impose the offender's will on the victim by force. Some are mere man to man altercations and others are terrifying and cowardly examples of mass violence. Many other variations could be mentioned. The offenders vary from the normally law-abiding person who is caught up in a situation of stress which erupts into violence, to the habitual bully and thug. In some

> cases a term of imprisonment may enhance rather than diminish the prospects of the offender avoiding crime in the future. In other cases, a term of imprisonment may turn a usefully employed person into a frustrated unemployed person, may deprive the offender of the best and most stabilizing influences in his life by disrupting a good family situation, and may increase a propensity to crime by placing him in the company of criminals. The need for deterrent punishment will vary according to the circumstances of the offence.
>
> A consideration of these factors leads to the conclusion that cases of assault require individual assessment and treatment. In my opinion there can be no presumption one way or the other as to whether imprisonment is the appropriate way of dealing with any particular case. A judicial policy which were to embody such a presumption in respect of assaults generally, or assaults which could be characterized as "serious", or assaults where "some injury is caused to the victim", would not, in my view, be justified. It is worth pointing out that the degree of injury suffered by the victim is not in every case a satisfactory measure of the gravity of the offence or the culpability of the offender."

The appellant has not persuaded me that on the facts of this particular case the sentence was manifestly excessive. Ultimately, the sentencing Judge must arrive at an appropriate sentence. The breach of trust involved in this matter, the position of the appellant and the responsibilities he had as a professional man in respect of the victim, make this a most serious offence. The effects of the offence on the victim, a 13 year old girl, are well documented by his Honour. The offences called for sanction in the strongest of terms.

Counsel for the appellant submitted that offences under Count 1, 2 and 3 were not all of the same degree of seriousness, and that his Honour was in error in imposing a sentence of 8 years imprisonment for each of these

offences. This Court was referred to the decision of *L (Lomax)* (1997) 91 A Crim R 270 and I accept as correct the statement by Winneke P at p272:

> "Having said that, however, it seems to me to be essential, in the interests of maintaining proper sentencing standards for individual offences, that sentencing judges seek to grapple with and apply the sentencing regime which has been laid down by Parliament. It is not appropriate for sentencing judges to simply ignore the difficulties posed by the sentencing legislation in this State in an endeavour to take what amounts to a "short-cut" towards what is seen to be an effective total sentence. Such a practice, if it endures, will lead to the erosion of proper sentencing standards in fixing appropriate sentences for individual offences and will ultimately result in the mischief to which Ormiston JA has referred. Notwithstanding the difficulties to which I have referred, sufficient discretion remains with the sentencing judge pursuant to s5A(b) so as to enable him to impose sentences which do not offend the fundamental principle of proportionality (see *Connell* [1996] 1 VR 4365 at 443; (1995) 83 A Crim R 249 at 256, per Charles JA) and, by appropriate directions for concurrency pursuant to s16(3A), to tailor an overall sentence which will not offend the sentencing principle of totality."

I accept the force of Mr Priest's argument and agree that it was in his Honour's discretion to impose a lesser sentence on count 1 and 2 than on count 3. However, on a full reading of his Honour's reasons for sentence, I do not consider he imposed sentences of 8 years on each offence as a "short cut to a total effective head sentence" as referred to in *L (Lomax)* (supra). His Honour clearly considered an appropriate sentence for each offence. The aspect of breach of trust was of equal significance in each of the offences. Each of the three offences involved an intrusion into the victim's body and a violation of body integrity. The argument for the appellant is that the distinction between the seriousness of the facts of the offences calls for varying sentences, although the total effective head sentence remain the same.

The submission is that his Honour fell into error, and that on this basis the Court of Appeal should review all of the sentences. I do not accept this submission. It may be that in the exercise of a discretion a Judge could properly impose different sentences for each offence. However, the issue on appeal to this Court is not whether this Court would have given a different sentence, but whether his Honour fell into error. I am not persuaded that he did. In the exercise of his discretion, his Honour considered each of the offences warranted a sentence of 8 years imprisonment. The appellant has not persuaded me this exercise of discretion was in error. It is the ultimate submission for the appellant that if this Court does review the sentences then the total head sentence will be substantially reduced. As there has been no demonstrated error, these sentences will not be reviewed.

Reference was made by counsel for the appellant to the concession made by the appellant's counsel at the time of submissions on sentence (Appeal Book 93):

> "And I am constrained to say that it would be our respectful submission that a sentence of 7 years with a 4 year minimum parole period would be an appropriate sentence in this case."

This was volunteered by counsel for the appellant. Although not done in the majority of submissions on a plea of guilty, it is not uncommon for counsel to suggest an appropriate sentence, or at least an appropriate range. Ultimately however, it must be for the Judge to determine an appropriate

sentence. There is nothing in his Honour's remarks on sentence to support the contention by counsel for the appellant that his Honour relied on such a submission in determining an appropriate sentence, to the extent that it affected his own objective assessment of the case. In my opinion the submission by counsel for the appellant during the course of submissions on sentence for a head sentence of 7 years with a minimum to serve of 4 years, would have been too lenient a sentence. Apparently his Honour was of the same opinion.

Finally, counsel for the appellant submitted that if an imposed sentence "leaps at you from the page" as being manifestly excessive, then it is, and should be reduced.

In my opinion, this is not such a sentence. I am not persuaded the sentence was manifestly excessive.

Ground 3

The learned sentencing Judge failed to have regard to the abolition of remissions as a 'relevant circumstance' for the purposes of s5(2)(s) of the Sentencing Act.

Section 5(2)(s) provides as follows:

"In sentencing an offender, a court shall have regard to -
(s) any other relevant circumstance."

This issue was the subject of a recent decision of the Court of Criminal Appeal (*Siganto v R* (unreported), delivered 3 October 1997 CA15/96). In this decision the Court of Criminal Appeal held that there was no error on the part of the primary Judge in failing to take into account the abolition of remissions in imposing a sentence and non-parole period.

I do not intend to canvas this issue again. For the reasons given in *R v Siganto* (supra), I am satisfied that the Judge rightly took the view that the abolition of remissions was not to be taken into account.

Ground 4

The learned sentencing Judge erred in imposing equal sentences in respect of each of the 4 offences in respect of which convictions were recorded, despite their varying degrees of seriousness.

Equal sentences of 8 years imprisonment were imposed in respect of the three offences which carried a maximum sentence of life imprisonment. In respect of the fourth offence the sentence imposed was 3 years imprisonment. This matter was argued in association with Ground 2 of this appeal and dealt with by me under Ground 2. For the reasons already stated, I would dismiss this ground of appeal.

Ground 5

The learned sentencing Judge was unduly influenced by a submission made by Senior Counsel for the applicant to the effect that a head sentence of 7 years imprisonment would be "appropriate" - a submission which was not reflective of the relevant circumstances of the offences nor of the relevant sentencing authorities.

This ground of appeal is dismissed for the reasons set out under Ground 2.

Ground 6

The decision of this Honourable Court in Siganto v R (supra) applied by the sentencing Judge at the time of increasing the Applicant's non-parole period on 18 November 1997, was wrongly decided, and therefore the Applicant's non-parole period was wrongly increased.

In dealing with the submissions under Ground 3, I have ruled that I do not intend to review the correctness of the Court of Criminal Appeal in *Siganto v R* (supra). I consider I am bound by that decision. I am not persuaded that the appellant's non-parole period was wrongly increased. In my opinion, his Honour did what he was required to do and applied the law. This ground of appeal is dismissed.

Ground 7

Even if the decision of this Honourable Court in Siganto v R (supra) was not wrongly decided, the learned sentencing Judge was in error in ruling that he did not have power under section 112 of the Sentencing Act to recast the whole of the Applicant's sentence (as opposed to only adjusting the Applicant's non-parole period), and that he was also in error in ruling that the length to a prisoner's minimum non-parole period is an irrelevant consideration when fixing a head sentence.

Section 53(1) of the *Sentencing Act* provides as follows:

> "(1) Subject to this section and sections 54 and 55, where a court sentences an offender to be imprisoned -
>
> (a) for life; or
>
> (b) for 12 months or longer, that is not suspended in whole or in part,
>
> it shall, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate."

I do not accept the submission of counsel for the appellant that the sentence to be reopened pursuant to s112 of the *Sentencing Act* is only the head sentence and not the non-parole period.

Section 55 provides as follows:

> "(1) Subject to this section, where a court sentences an offender to be imprisoned for an offence against section 192(3) of the Criminal Code that is not suspended in whole or in part, the court shall fix a period under section 53(1) of not less than 70% of the period of imprisonment that the offender is to serve under the sentence.
>
> (2) Subsection (1) does not apply where under section 53(1) the court considers that the fixing of a non-parole period is inappropriate."

The sentence imposed includes the non-parole period fixed pursuant to s55.

A head sentence is arrived at after a proper consideration of the nature of the offences and the proportionality of the sentence to its gravity (*Veen v R* (1988) 164 CLR 465, 477; *Morgan and Morgan* (1980) 7 A Crim R 146, 154; *Bugmy v R* (supra) 525, 538).

Good sentencing practice dictates that the head sentence be fixed as discussed above, and then an appropriate non-parole period is fixed. This is the correct process in respect of the original sentencing process and any re-opening pursuant to s112.

At the time of sentencing the appellant on 4 April 1997, the learned sentencing Judge was alert to the fact the fixing of the non-parole period may be the subject of possible re-considerations, Appeal Book 96 and 123 where his Honour stated:

> "As I have previously indicated to counsel, if the Court of Criminal Appeal's pending decision in another case which is to decide that

> question, decides that question differently from what I have decided, there is power under section 112 of the Sentencing Act for these proceedings to be re-opened and any error which I have made to be corrected."

The appellant was on notice of the reasons why a correction may have to be made to the non-parole period.

On 18 November 1997, his Honour fixed a new non-parole period as he was required to do in accordance with the law.

This ground of appeal is dismissed.

In respect of the whole appeal I would give leave to appeal but dismiss the appeal.
