Leach v The Queen [2005] NTCCA 18

PARTIES:	LEACH, Martin
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 21 of 2004 (8312499)
DELIVERED:	22 December 2005
HEARING DATES:	18 and 19 August 2005
JUDGMENT OF:	MILDREN, RILEY & SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW – APPEAL – SENTENCE – MURDER – RAPE – LIFE IMPRISONMENT – Sentencing (Crime of Murder) and Parole Reform Act 2003 – refusal to fix a non-parole period pursuant to s 19(5) – whether sentencing judge erred in law – standard of proof – whether test for determining if a person is at risk of reoffending is proof beyond reasonable doubt.

CRIMINAL LAW – EVIDENCE – ADMISSABILITY OF FRESH EVIDENCE ON APPEAL – Whether expert psychological report admissible on appeal – opinion was available but not sought at time of hearing – whether fresh evidence would "very probably have altered the sentence imposed" – material provides a different perspective but does not derogate from conclusions reached

Crimes (Sentencing Procedure) Act (NSW), s 61(1)
Criminal Code (NT), s 410(c), s 419

Criminal Law Consolidation Act (NT), s 5
Parole of Prisoners Act 1979 (NT), s 4, s 4(3)(6), s 5
Parole of Prisoners Ordinance 1976, s 4(3)(b)
Sentencing (Crime of Murder) and Parole Reform Act 2003, s 18(a), s 18(b), s 19, s 19(1)(a)(ii), s 19(3), s 19(5), s 20
Sentencing Act (NT), s 5(1), s 5(2), s 53(3), s 53A, s 53A(4), s 53A(5), s 53A(6)-(8), s 54, s 55, s 55A, s 59(1)(a), s 65(8), s 71

Anderson v R (1997) 92 A Crim R 348 at 357, applied
Babic v R [1998] 2 VR 79, applied
Craig v R (1933) 49 CLR 429 at 439, applied
Dooley v The Queen [2003] NTCCA 6 at [41], applied
Gallagher v R (1986) 160 CLR 392 at 402, applied
R v Barton (unreported, NSWCCA 28 July 1995) applied
R v Cheatham [2000] NSWCCA 282 at [92], applied
R v Gieselmann (unreported, NSWCCA 13 July 1998) applied
R v Kucma [2005] VSCA 58, applied
R v Olbrich (1999) 199 CLR 270, applied
R v Rostom [1996] 2 VR 97, applied

Green v The Queen (2000) 155 FLR 240, followed
R v Merritt (2004) 146 A Crim R 309, 59 NSWLR 557, followed

Bugmy v R (1990) 169 CLR 525, referred to
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, referred to
Deakin v R (1984) 11 A Crim R 88, referred to
Julius v Bishop of Oxford (1880) 5 App Cas 214, referred to
O'Brien v Gillies (1990) 69 NTR 1, referred to
Power v The Queen (1974) 131 CLR 623, referred to
R v Chan (1994) 76 A Crim R 252, referred to
R v Denyer [1995] 1 VR 186 at 193, referred to
R v EO (2004) 8 VR 154, referred to
R v Leach (2004) 185 FLR 189, referred to
R v Oancea (1990) 51 A Crim R 141, referred to
R v Petroff (12 November 1991 NSWCCA per Hunt CJ) , referred to
R v Rajacic [1973] VR 636, referred to
Tepper v Kelly (1987) 45 SASR 340 and (1988) 47 SASR 271, referred to
The Queen v Crabbe (2004) 150 A Crim R 523, referred to
The Queen v Stewart [1984] 35 SASR 477, referred to

REPRESENTATION:

Counsel:

Appellant:	Dr I. Freckelton
Respondent:	R. Wild QC with S. Ozolins

Solicitors:

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

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

Leach v The Queen [2005] NTCCA 18
No. CA 21 of 2004 (8312499)

BETWEEN:

LEACH, Martin
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, RILEY and SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 22 December 2005)

Mildren J:

[1] I have read a draft of the judgments prepared by Riley J and Southwood J. Their Honour's judgments set out the facts and the issues raised by this appeal and I need not repeat them. I agree with the conclusions which Riley J has reached. I also agree with his Honour's ultimate conclusion that the appeal must be dismissed.

[2] The only matter which I wish to address is ground three, which was that the learned judge erred in law by failing to determine beyond reasonable doubt the question of whether the level of culpability of the appellant is so extreme that the community interest in retribution, punishment, community

protection and deterrence can only be met through the imposition of a life sentence with no non-parole period.

[3] Subsection 19(5) of the Sentencing (Crime of Murder) and Parole Reform Act 2003 provides as follows:

> "The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole."

[4] The drafting of this provision is modelled upon s 61(1) of the Crimes (Sentencing Procedure) Act (NSW) which provides as follows:

> "A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence."

[5] In the recent case of *R v Merritt* (2004) 146 A Crim R 309, the New South Wales Court of Criminal Appeal held that a trial judge imposing a sentence of imprisonment for life pursuant to that section was required to be satisfied beyond reasonable doubt that the level of culpability was so extreme as to require the imposition of that sentence.

[6] It is unfortunate that the draftsman of s 19(5) of the Sentencing (Crime of Murder) and Parole Reform Act 2003 modelled this provision on the New South Wales provision because the latter is plainly poorly drafted and is

open to a number of different interpretations. As was pointed out by Wood CJ at CL in *Merritt*, supra at [42] there are at least four possible interpretations of the section. These possible interpretations, so far as. . .s 19(5) is concerned are:

(a) first, that a court may refuse to fix a non-parole period, if the culpability is so extreme that the community interest, in any one of the four indicia is such that is could only be met by such a sentence;

(b) second, that the court may refuse to fix a non-parole period if the culpability is so extreme that the community interest, in each of the four indicia, is such that it could only be met by such an order;

(c) third, that an order refusing to fix a non-parole period is required if the culpability is so extreme that the community interest in the combined effect of such of the four indicia as are applicable, could only be met by such an order. This construction would embrace a circumstance where any one or more of those factors may be of itself insufficient or inapplicable.

(d) fourth, a variation of the third construction, that the court may refuse to fix a non-parole period where the culpability is so extreme that the combined effect of the four indicia, with each contributing to some degree, are such that it could only be met by such an order.

[7] In my opinion, consistently with the decision in *Merritt*, the preferable construction is the third of these four possible interpretations.

[8] In deciding that the standard of proof was proof beyond reasonable doubt the court in *Merritt* thought that it was obliged to reach this conclusion as a result of the High Court's decision in *R v Olbrich* (1999) 199 CLR 270. The decision in *Olbrich* only supports the proposition that a sentencing court may not take into account *facts* in a way which is adverse to the interests of an accused person unless those facts have been established beyond reasonable doubt.

[9] There is no question that Martin CJ, in reaching his findings of fact observed the principle established by *Olbrich*. However, in reaching his final conclusion that he was satisfied that the level of culpability in the commission of the offence was so extreme that the community interest in retribution, punishment, protection and deterrence could only be met if the appellant was imprisoned for the term of his natural life without the possibility of release on parole, the learned Chief Justice in my opinion did not purport to apply a standard of proof beyond reasonable doubt. His Honour concluded that in the context of judgements made by a court as to whether it is satisfied that a particular sentence or course is appropriate, it is inappropriate to attach a standard of satisfaction to the decision. His Honour said (at *R v Leach* (2004) 185 FLR 189 at [34]):

> "The court is either satisfied that a particular course or sentence is appropriate or it is not. These are matters of judgement based upon

> facts proven to requisite standards. I am unable to discern any intention on the part of the Legislature to impose a requirement that the court was satisfied to a particular standard before the orders are authorised by s 19(4) and (5) can be made."

[10] His Honour went on to say (supra at [37]):

> "For the purposes of s 19(5), having made the determinations of fact to which I have referred, the court is then required to make a judgement as to whether it is satisfied that the level of culpability is so extreme that the community interest in the identified factors can only be met if a prisoner is imprisoned for life without possibility of release on parole. That ultimate judgement is not circumscribed by any requirement of satisfaction to a particular degree. Either the court is satisfied that the level of culpability is so extreme that the relevant community interest can only be met if the prisoner is imprisoned without the possibility of release on parole or it is not."

[11] The provisions of s 19(5) use language which indicates that the Court's ability to refuse to fix a non-parole period is limited to extreme cases. By its nature, satisfaction that the level of culpability is *so extreme* that the community interest can *only* be met by imprisonment for life without parole can be reached only in extreme cases. As a matter of ordinary language I agree with Martin CJ that it is difficult to see how a Judge could entertain degrees of satisfaction about such a matter.

[12] A comparison may also be made with the power of the Court to impose an indefinite sentence under s 65 of the Sentencing Act. Subsection 65(8) of the Sentencing Act provides that:

> "The Supreme Court shall not impose an indefinite sentence on an offender unless it is satisfied that the offender is a serious danger to the community…"

[13] Section 71 of the Sentencing Act provides:

> "The Supreme Court may make a finding that the offender is a serious danger to the community only if it is satisfied -
>
> (a) by acceptable and cogent evidence; and
>
> (b) to a high degree of probability,
>
> that the evidence is of sufficient weight to justify the finding."

[14] Section 71 does not impose or seek to impose a standard of satisfaction that an offender is a serious danger to the community to a high degree of probability. Section 71 requires only that the Court be satisfied to a high degree of probability that the *evidence* is of sufficient weight to justify such a finding. In relation to indefinite sentences, it is well established that such orders should only be made in very exceptional cases: *Green v The Queen* (2000) 155 FLR 240 at [67].

[15] In my opinion for the case of *Olbrich* to apply to the ultimate conclusion in terms of s 19(5) it would be necessary to characterise that conclusion as a finding of fact. In my opinion, it is not; it is the ultimate judgement of the court or conclusion of the court reached upon findings of fact to the necessary standard of proof. That ultimate decision in my opinion is not a finding of fact but a discretionary judgment based upon weighing the combined effect of the indicia required by s 19(5) in the manner described in paragraph [6] hereof and reaching whatever conclusion that requires. Although there remains a residual discretion in the court whether or not to refuse to fix a non-parole period, it is difficult to see how such a discretion

could operate except in one way, depending upon the ultimate finding of the court, as the court will have already considered all of the relevant sentencing factors. Nevertheless, there may perhaps be a case where, notwithstanding that the criteria in s 19(5) have been met, the Court decides nevertheless to fix a non-parole period, although it is difficult to envisage such a case.

[16] I am conscious that I have come to a decision which is different to that of the Court of Criminal Appeal of New South Wales on a similar provision. I acknowledge that it is undesirable for this Court to take a different view of this question unless satisfied that the decision of the Court of Criminal Appeal of New South Wales is wrong. I have given careful consideration to this question. In the case of *Merritt*, apart from referring to the case of *Olbrich*, there is no analysis or explanation as to why the Court arrived at its decision. On two occasions I asked counsel for the appellant to explain to me why *Merritt* was correctly decided on this point. On neither of those occasions was any explanation forthcoming. The lack of an explanation has caused me to hesitate even further. Nevertheless, having carefully considered the matter for myself as well as the reasons of Martin CJ at first instance, I am satisfied that Martin CJ did not err and that the appeal should not be allowed on this ground.

[17] Finally, I should mention that after the hearing of this appeal counsel for the appellant drew our attention to a passage in Martin CJ's judgment in *The Queen v Crabbe* (2004) 150 A Crim R 523 at [101] where his Honour held

that his decision in *Leach* at [64] that an offender's plea of guilty and cooperation with the authorities does not affect the relative seriousness of the crime was incorrect. No argument has been addressed to us as to whether, on this point, his Honour was correct in *Crabbe* or in *Leach*. So far as this appeal is concerned, the correctness or otherwise of this point does not affect any of the grounds of appeal.

[18] Finally, mention should be made of the fact that the appellant is also serving a life sentence imposed by the original trial judge for the rape of one of the two murder victims. It is plain from his Honour's sentencing remarks that he regarded the rape as falling into the worst category. When that sentence was imposed, his Honour did not fix a non-parole period in respect of the life sentence for rape because at that time s 4(3)(b) of the Parole of Prisoners Ordinance 1976 precluded any such order where the Court imposed a life sentence. There has been no appeal against that sentence. The Sentencing (Crime of Murder) and Parole Reform Act 2003 does not apply to life sentences other than for murder. The result is that even if the appellant were to have succeeded on this appeal, the appellant would not be eligible for release on parole because s 59(1)(a) of the Sentencing Act would preclude such a result and because no non-parole period has ever been fixed in respect of the sentence imposed for rape. There are now considerable difficulties in the way of the appellant seeking leave to appeal out of time the sentence imposed for rape. In my opinion, this should have been attempted at the time of the hearing of this appeal. That it has not been will

complicate any further rights of appeal the appellant may have to seek release on parole at some future time.

[19] I would dismiss the appeal.

Riley J:

[1] On 16 May 1984 the appellant was found guilty by a jury of two acts of murder and one of rape arising out of events that took place at Berry Springs near Darwin on 20 June 1983. He was convicted and sentenced to terms of imprisonment for life on each count. At that time the mandatory sentence for murder was imprisonment for life and the court was not empowered to fix a non-parole period.

[20] On 11 February 2004 the Sentencing (Crime of Murder) and Parole Reform Act 2003 (the Act) commenced operation. The Act introduced significant reforms to the sentencing regime applicable to sentences of life imprisonment imposed for the crime of murder. The Director of Public Prosecutions applied to the Supreme Court pursuant to s 19 of the Act seeking orders in relation to the appellant that the court: (a) revoke the non-parole period fixed by reference to s 18 of the Act; (b) refuse to fix a non-parole period in accordance with s 19(5) of the Act or, in the alternative, (c) fix a longer non-parole period in accordance with s 19(4) of the Act. The matter came before the Chief Justice and, on 12 November 2004, he directed that, in respect of both sentences of life imprisonment imposed for the crimes of murder, the non-parole period of 25 years fixed by virtue of the

legislation be revoked and he then refused to fix a non-parole period. In so doing he noted:

> "I am satisfied that, within the terms of the legislation, the respondent's dreadful crimes require the dreadful punishment of imprisonment for life without the possibility of release on parole."

[21] The appellant now appeals against that decision.

The nature of the appeal

[22] Section 20 of the Act provides that in relation to an appeal of this kind a relevant decision fixing or refusing to fix a non-parole period is taken to be a sentence passed by the court. An appeal against sentence is allowed with the leave of the court (s 410(c) Criminal Code). In the present case leave to appeal has been sought and granted.

[23] The general principles applicable to an appeal against sentence are well known. The presumption is that there is no error in the sentence and an appellant must demonstrate that error occurred in that the learned sentencing judge acted on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the facts. It is not enough that the court on appeal may have imposed a different sentence. In applying these principles to submissions that a sentence is manifestly excessive it is for the appellant to show that the nature of the offence itself affords convincing evidence that in some way the exercise of the discretionary sentencing power was unsound. To do so the appellant must show that the sentence was clearly and obviously, and not just arguably, excessive.

[24] In the present appeal the appellant did not allege manifest excess but, rather, identified five matters in relation to which it was submitted the learned judge erred in law in coming to the conclusions set out above. I will address each ground of appeal in turn later in these reasons.

The scheme of the legislation

[25] The Act provided for a new sentencing regime for the crime of murder. Whilst the mandatory sentence of imprisonment for life for the crime of murder was retained, the possibility of release upon parole was introduced. For those persons who had already been sentenced the legislation included transitional provisions by virtue of which a non-parole period could be obtained. The transitional provisions govern the present appeal.

[26] By operation of s 18 of the Act the sentence of a prisoner who, at the commencement of the Act is serving a sentence of imprisonment for life for the crime of murder, will be taken to include a non-parole period of 20 years or, if the prisoner is serving sentences for two or more convictions for murder, each of the prisoner's sentences is taken to include a non-parole period of 25 years. Those non-parole periods may be described as the standard non-parole periods.

[27] In identified circumstances s 19 of the Act permits the Director of Public Prosecutions to apply to the court for an order revoking the standard non-parole period fixed by s 18 (s 19(1)(a)), and to seek orders either fixing a

longer non-parole period (s 19(3) or (4)) or declaring that it refuses to fix a non-parole period (s 19(5)). Section 19 is in the following terms:

> "19. DPP may apply for longer or no non-parole period
>
> (1) The Supreme Court may, on the application of the Director of Public Prosecutions –
>
> (a) revoke the non-parole period fixed by section 18 in respect of the prisoner and do one of the following:
>
> (i) fix a longer non-parole period in accordance with subsection (3) or (4);
>
> (ii) refuse to fix a non-parole period in accordance with subsection (5); or
>
> (b) dismiss the application.
>
> (2) The Director of Public Prosecutions must make the application –
>
> (a) not earlier than 12 months before the first 20 years of the prisoner's sentence is due to expire; or
>
> (b) if, at the commencement of this Act, that period has expired – within 6 months after that commencement.
>
> (3) Subject to subsections (4) and (5), the Supreme Court must fix a non-parole period of 25 years if any of the following circumstances apply in relation to the crime of murder for which the prisoner is imprisoned:
>
> (a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service

and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) at the time the prisoner was convicted of the offence, the prisoner had one or more previous convictions for the crime of murder or manslaughter.

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

(5) The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole."

[28] By reference to s 19(3) of the Act it can be seen that, where the circumstances set out in one or more of pars (a) to (d) of the subsection are found, the court **must** fix a non-parole period of 25 years. However where the circumstances provided for in either s 19(4) or s 19(5) of the Act are found then the court **may,** in the one case, set a longer non-parole period and, in the other, refuse to fix a non-parole period. By contrasting the

wording in s 19(3) with that in s 19(4) and s 19(5) it is clear that the court retains a discretion in relation to the latter provisions.

[29] Referring to s 19(5) of the Act, if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole, then the court may refuse to fix a non-parole period. If it is not so satisfied then a non-parole period must be set. The finding is a necessary precondition to the court refusing to fix a non-parole period. However, having satisfied that precondition, the court retains a discretion as to whether or not it will refuse to fix a non-parole period. The exercise of that discretion will proceed upon the finding that has been made in relation to the matters referred to in s 19(5) but will not be limited to those matters. Consideration must be given to the usual sentencing principles including the matters provided for in s 5 of the Sentencing Act.

[30] The scope for the exercise of any discretion is necessarily limited. This is so because, for s 19(5) to apply, the court must already have determined that the community interest "can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole". Having so determined, it is difficult to see what other sentencing principles would have the effect of making the described sentence inappropriate.

Fresh evidence

[31] At the commencement of the hearing of the appeal the appellant sought to adduce fresh evidence in the form of a report from Professor Ogloff who is the Foundation Professor of Clinical Forensic Psychology and Director of Psychological Services, Victorian Institute of Forensic Mental Health. The respondent opposed the receipt of that evidence.

[32] Professor Ogloff was first approached to provide an opinion in relation to the appellant on 21 June 2005, some seven months after the reasons for judgment in the matter had been delivered. He assessed the appellant at the Alice Springs Gaol on 21 July 2005 and provided a detailed written report dated 9 August 2005. It is that report which the appellant sought to adduce in evidence.

[33] In preparing his report Professor Ogloff had regard to the complete transcript of the proceedings before the Chief Justice, the psychiatric and psychological reports available at that time, a clinical interview conducted by himself with the appellant including the results of psychological testing conducted at the time and, finally, information obtained in a telephone interview with a female friend of the appellant, Ms King. In providing his opinion Professor Ogloff accepted a version of events provided by the appellant which was not accepted by the Chief Justice.

[34] It was submitted on behalf of the appellant that the report was “new in the sense that it is scientifically based psychometric evidence from an

internationally regarded expert in relation to both the diagnosis of the appellant and the significance of it in terms of his ongoing dangerousness". It was submitted that the report provided a fresh perspective upon the issues joined between the appellant and the Crown and, it was argued, there was a significant possibility that had the fresh evidence been available at first instance it would have produced a different result in terms of the assessment of the community interest by reference to the evaluation of the dangerousness of the appellant.

[35] In his report Professor Ogloff noted that the appellant would meet the criteria for a diagnosis of antisocial personality disorder for the purposes of DSM-IV-TR-2000. However, he warned that the diagnosis must be treated with care. He said that, taken alone, the diagnosis was not particularly helpful in determining a person's level of risk for future violence. He also indicated that whilst it may be possible to predict the category of risk for violence into which an individual falls it is important to note that "we are still not at a stage where it is possible to determine with a reasonable degree of accuracy just what would be an individual's likelihood of being violent or reoffending sexually". This view reflected that of Dr Walton who expressed the opinion that the prediction of dangerousness is an exercise that is inherently flawed. In relation to risk assessment processes Professor Ogloff also noted that "relatively little is known about exactly how valid the instruments are in the Australian context".

[36] Professor Ogloff then considered the Psychopathy Checklist – Revised which was an assessment that he administered to the appellant. He noted it was not designed to be a violence risk assessment measure but that it did provide some information which could be considered in such an undertaking. In light of the assessment he considered that the appellant was not a psychopath. He noted that the results of the testing indicated that in comparison to incarcerated offenders (based on North American norms) the appellant's level of risk of reoffending is higher than about 52.4 per cent of offenders. He referred to the behaviour of the appellant as being stable over the past few years and went on to conclude:

> "Thus, while Mr Leach still displays some of the personality traits consistent with psychopathy, the probability of him acting in ways in which he did as a younger man is reduced. Overall the findings on the PCL-R place Mr Leach in a category in which people with similar scores are at a low to moderate level of risk for violence."

[37] The second assessment conducted by Professor Ogloff was the HCR-20 which assesses historical, clinical and risk management factors that have been found to relate to a likelihood of a person reoffending violently. In relation to those factors the appellant's level of risk on the historical sub-scale was said to be high, the clinical factors were more positive and would serve to moderate the assessment of the risk of reoffending and, according to Professor Ogloff, the clinical factors would place him at a low level of risk for reoffending violently. The final element, being the risk management sub-scale, addresses the future. As Professor Ogloff observed, and as is obvious, much depends upon the extent to which a release plan

would be able to satisfy risk management factors. He said: "Only with careful and realistic risk management planning would his overall level of risk be tempered". Professor Ogloff did not address the issue of what, if any, risk management factors would constitute an appropriate release plan in this case or, indeed, whether in the circumstances that the appellant finds himself, an appropriate release plan is achievable. The third factor of the three to be considered in the HCR-20 assessment was not, and perhaps could not be, adequately addressed. The conclusion of Professor Ogloff was expressed as follows:

> "Taken together, considering both the PCL-R, Mr Leach would appear to fall into the moderate category of risk for reoffending violently in the future. … As noted, the likelihood that Mr Leach will reoffend violently if released will depend upon the extent to which his level of risk could eventually be managed in the community and the extent to which he would be responsive to treatment, should that be made available to him. … Should the opportunity present, with a realistic, long-term, gradual release plan, Mr Leach's level of risk might some day be manageable."

[38] Whilst Professor Ogloff adopted a different approach to the issue of the community interest in protection from the appellant, it can be seen that his conclusions are not significantly different from those expressed by Dr Walton, who gave evidence before the learned judge, and differ only in matters of degree from the conclusions the sentencing judge expressed in his reasons for decision.

[39] The learned judge dealt with the evidence related to the mental condition of the appellant and the protection of the community in great detail. In that

process he considered the evidence of Dr Walton, the psychiatrist who examined the appellant in September 2004 and who gave evidence at the hearing. Dr Walton had expressed the view that the earlier diagnosis by others of the accused as a psychopath was a "problematic conclusion". He went on to say:

> "In my opinion it cannot be safely concluded that Mr Leach exhibits an antisocial personality of immutable type implying a high risk of reoffending, where continuing incarceration might thus be justified to protect the community."

[40] Dr Walton considered the changed thinking in psychiatry over the intervening period and expressed reluctance to diagnose the appellant as having an antisocial personality disorder at this time. Whilst the label as currently described might be applied to the appellant in a general sense, Dr Walton felt some reservation regarding the diagnosis because of some circumstances surrounding the appellant.

[41] The learned sentencing judge concluded that Dr Walton was "an impressive witness" although he approached Dr Walton's evidence with a degree of caution because, in the view of the judge, he had "reached the view that the respondent should not be deprived of the opportunity of seeking release on parole". His Honour went on to note that there was nothing in the material before him that suggested that the psychiatrists who saw the appellant in 1983 and 1984 misunderstood the information given to them and he expressed his satisfaction that the conclusion reached by Dr Gauvin and the other psychiatrists was supported by the "motivation and conduct of the

respondent committing the murders and the rape". Those opinions supported the view expressed by the original sentencing judge in 1984 that the appellant had "quite a severe personality disorder of a depressive nature". The Chief Justice concluded, consistent with the opinion of Dr Gauvin that the appellant was suffering from "a severe sociopathic personality disorder of an aggressive type". He concluded that the underlying personality disorder remains although the appellant, in layman's terms, has mellowed. In relation to the future the learned sentencing judge summarised his conclusions as follows:

> "As to the prognosis for the future should the respondent be released into the community, notwithstanding the respondent's progress over the last 21 years I have grave reservations about his capacity in the future to control his impulsive and aggressive responses in a relatively uncontrolled environment. If released, it is likely that the respondent would find himself under stress for a variety of reasons, particularly if he became involved in emotional relationships. If the respondent was released into the community he would be at significant risk of responding in an inappropriate manner to such stressors. I am unable to be more precise as to the degree of risk other than to say that a significant risk exists.
>
> I am similarly unable to say with certainty that the respondent would respond to stressors in a particular manner. I am satisfied, however, that a significant risk exists that the respondent would re-offend in a violent and aggressive manner involving crimes of a type similar to those he had previously committed."

[42] The opinion expressed by the learned judge was not contradicted by the evidence of Professor Ogloff. The opinions expressed by the professor were, in a sense, open-ended. He concluded that the appellant was a "moderate" risk for reoffending violently in the future. However, he went on to say that

"should the opportunity present, with a realistic, long-term, gradual release plan, Mr Leach's level of risk might some day be manageable". This is not a conclusion but rather a speculative expression of possibility. The observation of the sentencing judge as to the potential level of risk posed by the appellant was to similar effect as that expressed by Professor Ogloff. He said that he was "unable to be more precise as to the degree of risk other than to say that a significant risk exists". Taken in the context of the discussion the conclusions are to similar effect. There is no material difference. Indeed, save for the speculative observations of the professor regarding the possibility of effective future management of the appellant there is a substantial coincidence in the conclusions reached.

[43] In my view, whilst the report of Professor Ogloff provides a commentary on the material provided to the court and suggests a different approach to the issues, his conclusions are similar to those reached by the sentencing judge. His is a further expression of opinion by an expert whose opinion was available but not sought at the time of the hearing and does not suggest the conclusions upon which the learned judge relied were deficient.

[44] The court is entitled to receive additional evidence "if it thinks it necessary or expedient in the interests of justice": s 419 of the Criminal Code. Of course the fundamental consideration in an appeal of this kind is whether the admission of the evidence is necessary to rectify a miscarriage of justice: *R v Kucma* [2005] VSCA 58. For the evidence to be admissible it would need to demonstrate the true significance of factors in existence at the time

of sentence: *Dooley v The Queen* [2003] NTCCA 6; *R v Rostom* [1996] 2 VR 97; *Babic v R* [1998] 2 VR 79. To be admissible, fresh evidence would need to shed a new light on matters considered by the learned judge which would "very probably have altered the sentence imposed": *Anderson v R (*1997) 92 A Crim R 348 at 357; *Gallagher v R* (1986) 160 CLR 392 at 402. In *Craig v R* (1933) 49 CLR 429 Rich and Dixon JJ observed, in relation to an application to set aside a conviction (at 439):

> "It cannot be said that a miscarriage of justice has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced. But in judging of the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance."

[45] The evidence of Professor Ogloff does not meet the normal requirements for reception of such evidence. It was evidence that was available at the time in the sense that it was capable of being obtained. The appellant chose to place the available material before another expert, Dr Walton, and also to obtain a report from Dr Perdices who is a neuropsychologist. There was no apparent reason why an approach may not have been made to Professor Ogloff. That now having occurred, Professor Ogloff has provided yet another opinion on the same material. For the reasons addressed above, the evidence of Professor Ogloff, whilst providing a different perspective, does not derogate from the conclusions reached by the sentencing judge. The thrust of the

conclusions of Professor Ogloff are substantially the same as those reached by the sentencing judge: *R v Cheatham* [2000] NSWCCA 282 at [92].

[46] Further, the evidence addressed only one of the criteria upon which the learned sentencing judge relied to reach his conclusion. His Honour reached his conclusion based upon his assessment of the community interest in protection but also upon the other matters referred to in s 19(5) of the Act. The receipt of the evidence would not have affected the result. The evidence that is sought to be led from him does not fit the description of "rare and exceptional" evidence generally applied to the receipt of such evidence: *Dooley v The Queen* (supra at par 41).

[47] In my view the application to receive the evidence of Professor Ogloff should be rejected.

Ground 1

[48] The first ground of appeal was added by way of amendment at the commencement of the hearing and claimed that the learned judge erred in law by concluding, by reference to the appellant suffering from an underlying personality disorder, that his risk of violence is such that the community interest can only be met by his being imprisoned for life without the possibility of release on parole. This ground was linked to the application for leave to adduce fresh evidence.

[49] In fact the learned judge concluded that the community interest could only be met by imprisonment for life without the possibility of release on parole

based upon a wider consideration of the circumstances of the appellant and the offences of which he was convicted. He considered in turn and in detail the level of culpability of the appellant in the commission of the offences and the community interest in retribution, punishment, protection and deterrence as provided for in s 19(5) of the Act. He concluded that the appellant's level of culpability in the commission of the crimes was "of the highest order" and that it was "so extreme that the community interest in retribution and punishment can only be met if the respondent is imprisoned for life without the possibility of release on parole". He went on to say: "Similarly, I am satisfied that the level of culpability is so extreme that the remaining community interests of protection and deterrence can only be met by such an order". It is clear that his Honour's conclusion that the appellant's "dreadful crimes require the dreadful punishment of imprisonment for life without the possibility of release on parole" was based upon his separate consideration of each of the community interests in retribution, punishment, protection and deterrence. There is no challenge to the findings in relation to the other indicia. It also follows from his conclusions that the community interest in the combined effect of the four indicia could only be met by such a sentence: *R v Merritt* (2004) 59 NSWLR 557.

[50] When discussing the application to adduce further evidence I addressed the findings of the learned judge in relation to the risk of violent reoffending on the part of the appellant. The judge considered the circumstances of the

original crime, the assessments made at the time of the imposition of the sentence, the events of the following years in incarceration and the evidence adduced at the time of the application under s 19(5) of the Act. His conclusion was that the appellant posed a significant risk of violent reoffending. There was a strong evidentiary basis for reaching that conclusion and I see no error on the part of the learned judge.

Ground 2

[51] The second ground of appeal was that the learned judge erred in law by failing adequately to take into account the significance of evidence of the appellant's maturing and mellowing in his personality disorder symptomatology and of his rehabilitation generally.

[52] It was submitted that the learned judge failed to take adequately into account extensive evidence that the contemporary condition of the appellant is significantly different from that at and around the time of his criminal offending. It was submitted that the evidence demonstrated a settled pattern of pro-social behaviour in the difficult environment of custodial detention and the evidence was inconsistent with his Honour's evaluation of the likelihood of the appellant reoffending.

[53] At the hearing of the application of the Director the Court at first instance was provided with detailed evidence covering the appellant's 21 years of incarceration and dealing with his current state. The Chief Justice reviewed that evidence in the course of his reasons for decision, along with the

evidence called at the hearing. He concluded that, at the time of decision, the appellant was not "truly remorseful" and continued to experience a "deepseated indifference". He observed that the appellant had "in lay terms" mellowed and went on to say:

> "The respondent has made the most of his time in custody to improve his education and to undertake worthwhile projects. The respondent's intelligence and insight has enabled him to understand the futility of conflict within the prison environment and to appreciate the need for him to ensure that he is mentally stimulated."

Notwithstanding that, his Honour had grave reservations regarding the capacity of the appellant to control his impulsive and aggressive responses in an environment which was not controlled. He regarded the appellant, who gave evidence before him, as having "not been entirely frank with this Court".

[54] In relation to the present circumstances of the appellant the learned judge acknowledged the mellowing of the appellant, his ability to control his angry impulses in the controlled and disciplined environment of the prison and his efforts to improve his education and undertake worthwhile projects. The contemporary condition of the appellant was taken into account but, in my opinion, nothing in that information was such as to demonstrate any inconsistency with his Honour's evaluation of the likelihood of the appellant reoffending. The findings of the learned judge were made in the context of an acceptance of the mellowing of the appellant and of his pro-social

behaviour. The conclusions were reached notwithstanding those matters. I see no error on the part of the sentencing judge.

Ground 3

[55] The third ground of appeal was that the learned judge erred in law by failing to determine beyond reasonable doubt the question of whether the level of culpability of the appellant is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of a life sentence with no non-parole period.

[56] It was submitted on behalf of the appellant that the learned judge erred in holding that the test for determining whether a person is at risk of reoffending is by reference to "simply whether the sentencing judge is satisfied that this is so". The appellant submitted that his Honour failed to require proof beyond reasonable doubt of the likelihood of recidivism on the part of the appellant and failed to determine that a future probability or possibility is a fact for the purposes of sentencing.

[57] In relation to this ground of appeal I have read the reasons for judgment of Mildren J and I agree with those reasons and the conclusion of his Honour.

In relation to his assessment of the level of culpability of the appellant for the purposes of s 19(5) of the Act the learned sentencing judge did not fall into error. In any event, even if the wrong test was applied by his Honour, the application of a different test would lead to the same conclusion and the appeal must fail.

[58] This ground of appeal should be dismissed.

Ground 4

[59] The fourth ground of appeal was that the learned judge erred in law by failing to undertake a re-sentencing of the appellant by reference to orthodox sentencing principles, including those relating to rehabilitation, instead confining himself impermissibly to the issue under s 19(5) of the Sentencing (Crime of Murder) and Parole Reform Act 2003.

[60] As has been mentioned above, the requirement of s 19(5) of the Act that the court be satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole, is a precondition to the application of that subsection. Once the precondition is satisfied the court retains a discretion as to whether or not it will refuse to fix a non-parole period. The exercise of the discretion will proceed upon the finding that has been made but will also involve a consideration of the usual sentencing principles, including the matters provided for in s 5 of the Sentencing Act. Reference to the judgment of the learned sentencing judge confirms that this approach was adopted by him. His Honour specifically noted that “essentially the Court is required to undertake a sentencing exercise” and, unless excluded by the Act, “the well settled principles and provisions of the Sentencing Act governing the

exercise of the sentencing discretion apply". He noted that the principles enunciated in *R v Olbrich* (1999) 199 CLR 270 have application.

[61] The submission of the appellant in this regard centred upon a suggestion that the learned judge failed to consider the issue of the rehabilitation of the appellant. The submission is not supported by a review of the reasons for decision.

[62] His Honour treated rehabilitation as relevant to the specified community interests and, in addition, noted consideration of rehabilitation "includes evidence reflecting upon the likelihood that an offender will, if released, re-offend." He noted that the learned sentencing judge had, in 1984, expressed the view that the appellant had "no prospects of rehabilitation". His Honour went on to reassess that position. In so doing he conducted a detailed review of the 21 years the appellant had already spent in custody. He noted the fact that the appellant had undertaken and successfully completed studies in a large number of courses which included external studies. He had obtained an associate degree of science by correspondence and had used his skills for the betterment of the community. His involvement in "occasional altercations with other prisoners" was addressed, as was an incident in 1999 when he was charged with threatening a female education co-ordinator. At that time a psychological report was obtained and his Honour reviewed that report. Further, his Honour addressed in detail the psychological and psychiatric evidence that had been placed before him.

[63] The learned sentencing judge considered the issue of remorse and noted that the appellant had given evidence that his actions filled him with "personal disgust and self-reproach". The judge accepted that "intellectually, the (appellant) feels that way but it does not follow that he has experienced true remorse". His Honour reviewed the evidence and concluded that the appellant "is not truly remorseful". He went on to conclude:

> "On balance I am not persuaded that the (appellant) is truly remorseful. While the intellectual recognition and other factors to which I have referred might lead to feelings of sadness and remorse from time to time, I am satisfied that a deepseated indifference remains which is associated with the respondent's underlying personality disorder."

[64] His Honour noted that the appellant had, in lay terms, mellowed during his period in prison which is, of course, a controlled and disciplined environment. In that environment he had learnt to control his angry impulses. He had made the most of his time in custody by improving his education and undertaking worthwhile projects. However, he was not truly remorseful and an underlying indifference to his offending remained. He had not been entirely frank with the court and "endeavoured to place a different complexion upon his mental state and motivation from that which in fact existed at the time of the murders". His Honour contrasted the appellant's apparent progress whilst in custody with the lack of candour demonstrated in the course of the hearing. He rejected the view that this was a "genuinely reformed person who is desperate for an opportunity to be considered for release on parole" and, rather, considered it to be demonstrative of "an

insight into and an underlying indifference to the gravity of his criminal conduct". He concluded that the appellant's primary concern and motivation was for his own needs. These findings are all clearly findings in relation to the issue of rehabilitation.

[65] This ground of appeal must be dismissed.

Ground 5

[66] The fifth ground of appeal was that the learned judge erred in law by rejecting without proper reason the only contemporary, uncontradicted psychiatric evidence, instead preferring psychiatric evidence as to the diagnosis of the appellant that had been given at trial.

[67] Whilst it is true that the learned sentencing judge accepted the diagnosis of Dr Gauvin, it is not correct to say that he did so without proper reason. It is misleading to suggest the contemporary evidence, which came from Dr Walton, was uncontradicted. It was subject to challenge by way of cross-examination. Dr Walton acknowledged the difficulties presented by the appellant having provided different versions of events over time and that different conclusions may follow the acceptance of one of the differing accounts rather than another. It was noted by the sentencing judge that Dr Walton was "careful not to draw dogmatic conclusions" and that his evidence must be considered in the light that he had "reached the view that the (appellant) should not be deprived of the opportunity of seeking release on parole".

[68] The sentencing judge conducted a detailed review of the medical evidence and gave reasons for preferring the opinions of Dr Gauvin over those of Dr Walton. He paid heed to "the note of caution expressed by Dr Walton" but declared himself satisfied by the diagnosis of Dr Gauvin and the other psychiatrists who saw the appellant in 1983 and 1984. There was an evidentiary basis for his conclusions. He exposed his reasoning and I see no error on his part in this regard.

[69] This ground must also be rejected.

[70] The appeal should be dismissed.

Southwood J:

Introduction

[71] On 20 June 1983 the appellant raped and murdered 18 year old Janice Michelle Carnegie and murdered her 15 year old friend Charmaine Jean Aviet. The crimes were horrible crimes. The naked bodies of the two young victims were found bound and gagged in the Berry Springs Nature Reserve. Ms Carnegie sustained two stab wounds. She sustained a stab wound to the left side of her body a few inches above her hip and another stab wound at the inner aspect of her left breast which had entered her chest cavity causing her lung to collapse. The appellant raped Ms Carnegie after he had stabbed her in the left side of her body and, for a time, had left the knife embedded in her side up to its hilt. After the appellant raped Ms Carnegie he stabbed Ms Aviet and then he stabbed Ms Carnegie for the second time. At the time

of her rape and murder Ms Carnegie was naked and gagged. Her hands were bound tightly behind her back. The pathologist who examined her body said that Ms Carnegie would have survived for between five and ten minutes, possibly longer, following the stab wound to her chest. The stabbing and rape of Ms Carnegie were committed in front of Ms Aviet who was also naked, gagged and tightly bound by her hands and feet. Ms Aviet sustained a single stab wound to the chest which penetrated at least 16 centimetres into her body and pierced her heart. She died very quickly.

[72] On 16 May 1984 after a trial before a jury the appellant was twice sentenced to imprisonment for life for the two crimes of murder he committed. On 18 June 1984 the appellant was sentenced to imprisonment for life for the crime of rape. A sentence of imprisonment for life is a mandatory sentence for the crime of murder. At the time the appellant was sentenced, imprisonment for life meant imprisonment for the term of the natural life of a person without any possibility of release other than by way of Executive clemency.

[73] The appellant was 24 years of age when he committed the cruel and pitiless crimes for which he was sentenced to imprisonment for life. He is now 46 years of age. He has been in prison for more than 22 years for the crimes of murder he committed on 20 June 1983. For these and other crimes the appellant has been in prison for more than half of his life. Assuming a life expectancy of about 77 years, his current sentence of imprisonment is for all practical purposes one of 53 years.

[74] On 11 February 2004 the Sentencing (Crime of Murder) and Parole Reform Act 2003 (the Act) commenced operation. Subsection 18(b) of the Act provides that if a prisoner is serving multiple sentences of imprisonment for life for two or more crimes of murder each of the prisoner's sentences of imprisonment is taken to include a non-parole period of 25 years. The enactment of s 18(b) of the Act meant that on 11 February 2004 each of the appellant's two sentences of imprisonment for life for the crimes of murder were taken to include a non-parole period of twenty-five years. The appellant's sentence of imprisonment for life for the crime of rape remained unaltered by the Act. That is, it remained a sentence of imprisonment for the term of his natural life without the possibility of release on parole.

[75] On 4 March 2004 pursuant to s 19(1)(a) of the Act the Director of Public Prosecutions made an application to the Supreme Court seeking an order that each of the appellant's non-parole periods of 25 years fixed by the Act for his sentences of imprisonment for life for the crimes of murder be revoked; and an order refusing to fix non-parole periods or, alternatively, an order fixing non-parole periods longer than 25 years. On 12 November 2004 the Supreme Court revoked each of the appellant's non-parole periods of 25 years that were fixed by the Act and refused to fix non-parole periods. The effect of the orders made by the Supreme Court was to deprive the appellant of the opportunity of being considered for release on parole.

The appeal

[76] The appellant has appealed the decision of the Supreme Court revoking each of the two 25 year non-parole periods fixed by the Act and the refusal to fix non-parole periods. He has done so pursuant to s 20 of the Act. Leave to appeal was granted on 21 January 2005.

[77] It is submitted by the appellant that the Supreme Court fell into error in five respects. First, the Supreme Court wrongly concluded by reference to the appellant suffering from an underlying personality disorder that the risk of his violence is such that the community interest can only be met by his being imprisoned for life without the possibility of release on parole. Secondly, the Supreme Court failed to adequately take into account the significance of the evidence of the appellant's maturing and mellowing in his personality disorder symptomatology and of rehabilitation generally. Thirdly, the Supreme Court failed to determine beyond reasonable doubt the question of whether the level of culpability of the appellant is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of a sentence of imprisonment for life with no non-parole period. Fourthly, the Supreme Court failed to undertake a re-sentencing of the appellant by reference to orthodox sentencing principles, including those relating to rehabilitation, instead of confining the exercise of its discretion impermissibly to the issue raised under s 19(5) the Act. Fifthly, the Supreme Court rejected without proper reason the only contemporary, uncontradicted

psychiatric evidence and wrongly preferred the psychiatric evidence as to the diagnosis of the appellant that had been given at the time that he was sentenced to imprisonment for life for the crime of raping Ms Carnegie.

[78] At the hearing of the appeal an application was also made by the appellant to tender a medical report of Professor James Ogloff dated 5 August 2005 as fresh evidence.

[79] The general principles applicable to an appeal against sentence are applicable in this appeal: s 20 the Act, s 410(c) Criminal Code. The appellant must demonstrate that error occurred in that the Supreme Court acted on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the facts.

[80] As to the first, second and fifth grounds of appeal and the application to tender the report of Professor Ogloff, I agree with the reasons for decision of Riley J. No misunderstanding or wrong assessment of the evidence has been demonstrated by the appellant. It was open to the Supreme Court to make the findings of fact that were made. It is not enough that the Court of Appeal may have made a different assessment of the evidence. As to the third ground of appeal I agree with Mildren J and with the Supreme Court below that the standard of proof beyond reasonable doubt as explained by the High Court in *R v Olbrich* (1999) 199 CLR 270 does not apply to the final conclusion contemplated by s 19(5) of the Act. That conclusion involves a matter of judgment, not a finding of fact. As such the ultimate

judgment required by s 19(5) is not attended by satisfaction to a particular degree: *Tepper v Kelly* (1987) 45 SASR 340 and (1988) 47 SASR 271.

Issues on appeal

[81] The principal issue in the appeal is, did the Supreme Court err in that it misunderstood the nature of the discretion granted to it pursuant to s 19(1)(a)(ii) of the Act? This issue arises by virtue of the fourth ground of appeal. In my opinion the Supreme Court did misunderstand the nature of the discretion granted to it pursuant to s 19(1)(a)(ii) and it wrongly confined itself to the issue raised under s 19(5) of the Act. The appeal should be allowed.

[82] In order to understand the nature of the Supreme Court's discretion pursuant to s 19(1)(a)(ii) of the Act and to resolve the fourth ground of appeal it is necessary to have regard to the nature of parole, the purpose of a court fixing a non-parole period when sentencing an offender, the history of the current system of release of prisoners on parole, the subject matter of the Act and the objects it seeks to achieve: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

The nature of parole and the purpose of non-parole periods

[83] The Parole of Prisoners Act provides for the release of prisoners on parole before the expiry of their sentence of imprisonment. Parole is a form of conditional release of offenders who have been sentenced to imprisonment by a court. After serving an initial minimum period of detention in custody

and only on an order of the Parole Board the prisoner is permitted to be at large for the unexpired portion of the sentence of imprisonment. While on parole a prisoner is still subject to his original sentence of imprisonment. The prisoner's liberty depends upon satisfactory compliance with conditions imposed by the Parole Board. These usually include some form of supervision by the Department of Correctional Services. If a prisoner does not comply with the conditions of his parole or the terms of his supervision his parole may be cancelled and he may be returned to prison for the remaining period of his sentence of imprisonment.

[84] The Sentencing Act enables a court to fix non-parole periods: s 53 Sentencing Act. A court that sentences an offender to prison may prevent the possibility of parole for part or the whole of a sentence of imprisonment. This is done by the court fixing a non-parole period at the time of sentence or by declining to do so: s 53 Sentencing Act. The non-parole period fixed by a court serves to specify the minimum time that a prisoner must spend in custody. The Sentencing Act prescribes minimum non-parole periods that a court must fix when a prisoner is sentenced for various offences: s 53A (murder), s 54 (all offences other than those referred to in s 53A, s 55 and s 55A), s 55 (sexual offences) and s 55A (offences against children under the age of 16 years) Sentencing Act.

[85] The purpose of a non-parole period is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the

minimum term of imprisonment that justice requires he must serve having regard to all of the circumstances of the case: *Deakin v R* (1984) 11 A Crim R 88 at 89; *Bugmy v R* (1990) 169 CLR 525; *R v Oancea* (1990) 51 A Crim R 141; *The Queen v Stewart* [1984] 35 SASR 477 at 479.

[86] The non-parole period fixed by a court when sentencing an offender to serve a term of imprisonment should be the minimum term of imprisonment that justice requires an offender must serve having had regard to all of the circumstances of the case: *Power v The Queen* (1974) 131 CLR 623 at 629; *Deakin* (supra) at 89. When fixing the non-parole period the sentencing judge should determine the minimum period for which in his judgment, according to the accepted principles of sentencing, the prisoner should be imprisoned. A purpose but not the only purpose in fixing a non-parole period is to assist the prisoner's rehabilitation through conditional freedom. However, the non-parole period also has a punitive aspect: *R v Chan* (1994) 76 A Crim R 252 at 255. In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such punishment: *Power* (supra) at 627 - 628. The punitive aspect of fixing a non-parole period is sometimes referred to as the penal element: *R v EO* (2004) 8 VR 154 at 169. This element must appropriately reflect the importance of such principles as retribution, protection of the community and specific and general deterrence: *R v EO* (supra) at 169. The penal element is not the only element to be considered by a court when fixing a non-parole period. The assessment of what is an

appropriate non-parole period is made at the time the non-parole period is fixed by the court.

[87] The non-parole period is part of the sentence; it is not a separate sentence: *R v Rajacic* [1973] VR 636. Fixing a non-parole period does not serve to determine the date upon which the offender will be released on parole. It operates to fix a time when the Parole Board may decide to order that a prisoner be released on parole: *Chan* (supra) at 255. Imprisonment after the non-parole period has expired remains punishment. The sentence of imprisonment does not become converted from a punishment to an opportunity for rehabilitation by the passing of the non-parole period: *Power* (supra) at 627.

[88] Once the non-parole period has expired, it is the function of the Parole Board to determine if and when an individual prisoner is suitable for release on parole for the balance of his unserved sentence of imprisonment. The parole system allows for review of the offender's case after he or she has served a significant part of a custodial sentence. The Parole Board considers a broad range of material when deciding whether or not to release a prisoner on parole including a parole report prepared by an assigned parole officer, an institutional report prepared by prison staff, a police record of prior convictions, transcript of the Supreme Court sentencing remarks, psychological and/or psychiatric assessments and reports, reports from substance misuse and treatment facilities, letters from the victim and letters from the prisoner. When considering whether to release a prisoner who is

serving a sentence of imprisonment for life on parole, the Parole Board must have regard to the principle that the public interest is of primary importance and, in doing so, must give substantial weight to the protection of the community as the paramount consideration, the likely effect of the prisoners release on the victim's family, if the prisoner is an Aboriginal or Torres Strait Islander who identifies with a particular community of Aboriginals or Torres Strait Islanders – the likely effect of the prisoner's release on that community: s 3GB Parole Act.

History of parole for prisoners sentenced to imprisonment for life

[89] There has been a system of parole of prisoners in the Northern Territory for more than 30 years. The modern system of parole was introduced in the Northern Territory by the Parole of Prisoners Ordinance 1971. The Ordinance commenced operation in the Northern Territory on 10 May 1972. The Parole of Prisoners Ordinance 1971 did not establish a Parole Board. The decision to order the release of a prisoner on parole was made by the Governor-General. An attempt to establish a Parole Board appears to have been made in 1973 with the enactment of the Parole of Prisoners Ordinance 1973. However, that Ordinance was repealed by the Parole of Prisoners Ordinance 1976 which commenced operation on 1 December 1976. The latter Ordinance established a Parole Board that was constituted by the Senior Judge of the Supreme Court of the Northern Territory and four other members appointed by the Administrator in Council.

[90] Since 1 December 1976 a Parole Board has determined whether or not prisoners serving a sentence of imprisonment in respect of which a non-parole period has been fixed by a court should be released from prison on parole. Today the Parole Board is constituted by the Chief Justice or a judge of the Supreme Court nominated by the Chief Justice, the Director of Correctional Services, a member of the Police Force nominated by the Commissioner of Police, a person who is a medical practitioner or a psychologist, a person who represents the interest of victims of crime and five persons who reflect the composition of the community at large. For a matter relating to a prisoner who is serving a term of imprisonment for life for the crime of murder, a quorum of the Parole Board is constituted by the Chairman and seven other members of the Parole Board.

[91] On 3 September 1979, following the grant of self-government to the Northern Territory, the Parole of Prisoners Ordinance became the Parole of Prisoners Act 1979. The Parole of Prisoners Act comprises the Parole of Prisoners Ordinance 1971 and amendments made by other legislation. The Parole of Prisoners Act as amended remains in force today.

[92] Until the Act was passed on 27 November 2003 the Legislature in the Northern Territory took the view that murder was such a serious crime that the mandatory minimum period of imprisonment that a person who committed the crime of murder should serve was the whole of his natural life. It was only when the Act commenced operation on 11 February 2004

that the system of parole became applicable to prisoners serving a sentence of imprisonment for life for the crime of murder. Parole became available to prisoners sentenced to imprisonment for life for crimes other than the crime of murder when the Sentencing Act commenced on 1 July 1996: s 53 Sentencing Act.

[93] At the time the appellant was sentenced by the Supreme Court for the crimes of murder that he committed, imprisonment for life meant imprisonment for the term of the natural life of a person without any possibility of release other than by way of Executive clemency. Section 5 of the Criminal Law Consolidation Act required that a person convicted of murder be sentenced to imprisonment for life with hard labour. Section 4(3)(b) of the Parole of Prisoners Act 1979 directed that the provisions of that Act which enabled the fixing of non-parole periods by a court did not apply where the offender was sentenced to imprisonment for life. Section 5 of the Parole of Prisoners Act only granted the Parole Board power to direct that a prisoner serving a sentence of imprisonment in respect of which a non-parole period had been fixed by a court be released from prison on parole. This meant that the Parole Board had no power to order that a prisoner serving a sentence of imprisonment for life be released on parole.

[94] The legislation governing the release of prisoners on parole changed slightly when the Sentencing Act commenced operation on 1 July 1996. The Sentencing Act consolidated the law relating to the sentencing of offenders. Section 53 of the Sentencing Act permitted a court to fix a non-parole period

where a court sentenced a prisoner to more than 12 months imprisonment. However, s 53(3) of the Sentencing Act provided that the provisions of s 53 of the Sentencing Act did not apply to or in relation to the sentencing of an offender for the crime of murder. Section 4 of the Parole of Prisoners Act which previously had enabled courts to fix non-parole periods was repealed by the Sentencing (Consequential) Amendments Act 1996. Section 164 of the Criminal Code, which provided for a mandatory sentence of imprisonment for life for a person convicted of the crime of murder, was amended by the Sentencing (Consequential) Amendment Act to provide any person who commits the crime of murder is liable to imprisonment for life which cannot be mitigated or varied under any law in force in the Northern Territory.

[95] Section 54 of the Sentencing Act prevents courts from fixing non-parole periods that are less than 50 per cent of the sentence of imprisonment that was imposed on an offender by a court. Sections 55 and 55A of the Sentencing Act provide that for certain sexual offences and for certain offences involving children courts are required to fix a non-parole period of not less than 70 per cent of the term of imprisonment imposed on an offender by a court.

[96] From 1991 the Executive adopted a policy that prisoners serving a sentence of imprisonment for life for the crime of murder would be considered for release (clemency) after they had served twenty years of imprisonment and if a prisoner was not released such cases would be reviewed every three

years thereafter. On 20 August 1992 the practice of the Executive was acknowledged by the Minister for Correctional Services. In answer to a question in Parliament he stated that, "Under principles adopted by Cabinet last year, life sentence prisoners will spend a minimum of twenty years in prison in the Northern Territory before being considered for parole (sic). Prisoners not accepted for parole (sic) (not granted clemency) after twenty years will have their sentences reviewed on a three yearly basis, and recommendations from the Parole Board that life sentence prisoners be released will be considered by Cabinet before being passed to the Administrator." By "parole", the Minister meant that such prisoners would be considered for Executive clemency.

[97] Presumably the reasons for the Executive reviewing the situation of prisoners who were serving sentences of imprisonment for life included the dreadful and indeterminate nature of the punishment of imprisonment that is for the term of a person's natural life without the possibility of release on parole: *R v Denyer* [1995] 1 VR 186 at 193, the cost of keeping people in prison for life, the difficulty in managing such prisoners within the prison system particularly once they are of old age: *R v Petroff* (12 November 1991 NSWCCA per Hunt CJ), and the benefit to the community if such prisoners are rehabilitated back into the community.

The Act

[98] The primary purpose of the Act is to permit the fixing of a non-parole period for the crime of murder. The Act maintains mandatory sentences of imprisonment for life for prisoners convicted of committing the crime of murder. However, the Act recognises and implements (with some modification) the previous policy of the Executive of considering the release of prisoners sentenced to imprisonment for life after they have served 20 years of imprisonment.

[99] The legislative structure that permits the fixing of non-parole periods for the crime of murder is the same as that for other offences. The Supreme Court has the power to fix non-parole periods for sentences imposed for the crime of murder in accordance with the Sentencing Act (s 5, s 53A). The Parole Board determines if and when a prisoner sentenced to imprisonment for life for the crime of murder is to be released on parole. The decision of the Parole Board must be unanimous. The Act achieves its purpose by amending s 164 of the Criminal Code, introducing s 53A of the Sentencing Act and by amending various provisions of the Parole of Prisoners Act.

[100] Section 164 of the Criminal Code as amended provides as follows:

> "(1) Any person who commits the crime of murder is liable to imprisonment for life, which penalty is mandatory.
>
> (2) Subsection (1) does not prevent a court fixing a non-parole period in accordance with section 53A of the Sentencing Act as part of a sentence for the crime of murder.

(3) Subsection (1) applies subject to section 39(2) of the Juvenile Justice Act."

[101] Section 53A of the Sentencing Act as introduced by the Act provides as follows:

"(1) Subject to this section, where a court ("the sentencing court") sentences an offender to be imprisoned for life for the crime of murder, the court must fix under section 53(1) –

(a) a standard non-parole period of 20 years; or

(b) if any of the circumstances in subsection (3) apply – a non-parole period of 25 years.

(2) The standard non-parole period of 20 years referred to in subsection (1)(a) represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies.

(3) The circumstances referred to in subsection (1)(b) are any of the following:

(a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the offender that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) if the offender is being sentenced for 2 or more convictions for unlawful homicide;

(e) if the offender is being sentenced for one conviction for murder and one or more other unlawful homicides are being taken into account;

(f) at the time the offender was convicted of the offence, the offender had one or more previous convictions for unlawful homicide.

(4) The sentencing court may fix a non-parole period that is longer than a non-parole period referred to in subsection (1)(a) or (b) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

(5) The sentencing court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

(6) The sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period.

(7) For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period under subsection (6), the sentencing court must be satisfied of the following matters and must not have regard to any other matters:

(a) the offender is –

(i) otherwise a person of good character; and

(ii) unlikely to re-offend;

(b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender.

(8) In considering whether the offender is unlikely to re-offend, the matters the sentencing court may have regard to include the following:

(a) whether the offender has a significant record of previous convictions;

(b) any expressions of remorse by the offender;

(c) any other matters referred to in section 5(2) that are relevant.

(9) The sentencing court must give reasons for fixing, or refusing to fix, a non-parole period and must identify in those reasons each of the factors it took into account in making that decision.

(10) The failure of the sentencing court to comply with this section when fixing, or refusing to fix, a non-parole period does not invalidate the sentence imposed on the offender.

(11) This section applies only in relation to an offence committed –

(a) after the commencement of the Sentencing (Crime of Murder) and Parole Reform Act 2003; or

(b) before the commencement of that Act if, at that commencement, the offender has not been sentenced for the offence.

(12) In subsection (3) –

"unlawful homicide" means the crime of murder or manslaughter."

[102] Section 53A of the Sentencing Act creates a range of sentencing options where a court sentences an offender to be imprisoned for life for the crime of murder. Subject to certain minimum non-parole periods, the court has discretion to fix the minimum term of imprisonment that justice requires an offender must serve having had regard to all of the circumstances of the case. Merely because the provisions of s 53A of the Sentencing Act speak with more particularity than the other provisions of the Sentencing Act fixing minimum non-parole periods it is not intended that the section contains an exhaustive statement of the factors or elements to be considered prior to fixing a non-parole period for the crime of murder. Nor is it intended that s 53A of the Sentencing Act oust the provisions of s 5 of the sentencing Act or exclude the accepted principles of sentencing. Section 5 is the primary provision of the Sentencing Act to which a court must have regard when sentencing an offender. Subject to certain express constraints,

the text of s 53A of the Sentencing Act contemplates the Supreme Court exercising its ordinary sentencing discretion. Section 53A has been introduced into the Sentencing Act which requires the Supreme Court to have regard to various purposes and factors when sentencing an offender: s 5 Sentencing Act. The purpose of amending the Sentencing Act was to permit the fixing of a non-parole period for the crime of murder. Clearer words would be required for the provisions of s 5 of the Sentencing Act and the accepted principles of sentencing to be wholly excluded. Subject to the express constraints of the section, the provisions of s 53A of the Sentencing Act and the provisions and principles to which I have just referred can be applied in a complementary manner: *cf O'Brien v Gillies* (1990) 69 NTR 1 at 7. Subsection 5(2)(r) of the Sentencing Act requires that regard be had to provisions such as those contained in s 53A.

[103] There is a standard minimum non-parole period of 20 years for the crime of murder. It is referred to in s 53A of the Sentencing Act as a standard non-parole period. A court may only fix a non-parole period less than the standard non-parole period of 20 years in exceptional circumstances. There is a minimum non-parole period of 25 years that the Supreme Court must fix if certain aggravating circumstances are proven. However, the Supreme Court has a discretion in accordance with the provisions of s 5, s 53A(4), s 53A(5) and s 53A(6) to (8) to impose non-parole periods lesser or greater than the minimum non-parole periods specified by s 53A.

[104] When deciding whether or not to fix a non-parole period greater than the minimum non-parole periods specified by s 53A the Supreme Court must decide what is the minimum term of imprisonment that justice requires an offender must serve having had regard to all of the circumstances of the case. It is likewise when the Supreme Court decides whether or not to refuse to fix a non-parole period for a sentence of imprisonment for life for the crime of murder. The Supreme Court is required to have regard to the provisions of s 5(1) and (2) and to the provisions of s 53A(4) and s 53A(5) of the Sentencing Act and to the accepted principles of sentencing. The factors the court is required to have regard to include rehabilitation, the maximum and minimum penalty prescribed for the offence, the offender's character, age and intellectual capacity, the presence of any mitigating factors concerning the offender, the time spent in custody by the offender for the offence and any other relevant circumstance.

The discretion granted to the Supreme Court by Section 19 of the Act

[105] When construing the provisions of s19 of the Act it is necessary to have regard to the matters that I have referred to above. Section 19 of the Act is in similar terms to s 53A of the Sentencing Act. Regard should be had to the construction of s 53A of the Sentencing Act, to the provisions of the s 5 of the Sentencing Act and to the accepted principles of sentencing an offender. Regard should also be had of the more immediate statutory context of s19 of the Act and to the text of the section.

[106] Importantly in s 18 of the Act Parliament has specified non-parole periods for prisoners who at the commencement of the Act were already serving a sentence of imprisonment for life for the crime of murder. Rather than provide for the Supreme Court to consider individually if and if so what non-parole period should be fixed for each prisoner already serving a sentence of imprisonment for life for the crime of murder at the time the Act commenced, Parliament has stipulated a 20 year non-parole period for those prisoners who have committed a single murder and a 25 year non-parole period for those prisoners who have committed multiple murders. Parliament has been merciful. By granting the non-parole periods stipulated in the Act, Parliament has provided for mitigation of the punishment of a prisoner serving a sentence of imprisonment for life for the crime of murder in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the time stipulated by s 18(a) or s 18(b) of the Act. Parliament has left it to the Director of Public Prosecutions to make an application to the Supreme Court for orders that the non-parole period fixed by the Act be revoked and either increased or declined in cases where the Director of Public Prosecutions considers that the non-parole period set by the Act is inappropriate and not in the public interest.

[107] Section 19 of the Act provides as follows:

> "(1) The Supreme Court may, on the application of the Director of Public Prosecutions –
>
> (a) revoke the non-parole period fixed by section 18 in respect of the prisoner and do one of the following:

(i) fix a longer non-parole period in accordance with subsection (3) or (4);

(ii) refuse to fix a non-parole period in accordance with subsection (5); or

(b) dismiss the application.

(2) The Director of Public Prosecutions must make the application –

(a) not earlier than 12 months before the first 20 years of the prisoner's sentence is due to expire; or

(b) if, at the commencement of this Act, that period has expired – within 6 months after that commencement.

(3) Subject to subsections (4) and (5), the Supreme Court must fix a non-parole period of 25 years if any of the following circumstances apply in relation to the crime of murder for which the prisoner is imprisoned:

(a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) at the time the prisoner was convicted of the offence, the prisoner had one or more previous convictions for the crime of murder or manslaughter.

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

> (5) The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole."

[108] When hearing an application made by the Director of Public Prosecutions to revoke a non-parole period fixed by s 18 of the Act, the Supreme Court may revoke a non-parole period granted by s 18 of the Act and fix a non-parole period longer than that fixed by s 18 of the Act, or it may revoke a non-parole period fixed by s 18 of the Act and refuse to fix a non-parole period. Alternatively, the Supreme Court may dismiss the application. The Supreme Court cannot fix a shorter non-parole period than that set by s 18 of the Act. To revoke in the context of s 19 of the Act means to reverse or overturn the non-parole period fixed by s 18 of the Act.

[109] A consequence of Parliament stipulating the non-parole periods it has in s 18 of the Act is that the first question to be considered when determining an application pursuant to s 19 of the Act is whether or not the non-parole period that has been set by s 18 of the Act is the minimum term of incarceration that justice requires the prisoner must serve in the particular case having regard to all of the circumstances of the case: *Power* (supra) at 629, *Deakin* (supra) at 89. Only if the Supreme Court decides that the non-parole period set by s 18 of the Act is not the minimum period of imprisonment that justice requires the prisoner must serve does the question more broadly become what is the minimum term of imprisonment that

justice requires a prisoner must serve. Apart from s 19(3) and s 19(6) of the Act which affect minimum non-parole periods and the matters to which I have referred in paragraph [108], there are no provisions of s 19 of the Act that substantially alter the accepted approach to fixing the appropriate non-parole period in a particular case.

[110] The power to revoke the non-parole period set by s 18 of the Act and either increase or refuse to set a non-parole period is conferred on the Supreme Court by s 19(1) of the Act not by the other subsections of s 19 of the Act. Save for the circumstances stipulated in s 19(3) of the Act there is nothing in s 19 which makes it obligatory for the Supreme Court to revoke the non-parole period set by s 18 of the Act and either increase the non-parole period or to refuse to set a non-parole period.

[111] Subsection 19(4) of the Act does not prevent the Supreme Court from having regard to the provisions of s 5 of the Act. To do so would require clear words. On the contrary s 5 of the Sentencing Act requires the Supreme Court to have regard to the elements of rehabilitation, mercy and all of the other accepted principles of sentencing that are ordinarily considered by the Supreme Court when fixing the appropriate non-parole period in a particular case.

[112] The provisions of s 19(5) of the Act are discretionary not mandatory. In contrast to s 19(3) the Legislature has chosen to use the word “may” instead of the word “must”. The exercise of the discretion is to be guided by the fact

that the Supreme Court can only refuse to fix a non-parole period if it is satisfied that the level of culpability in the commission of an offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his natural life without the possibility of release on parole. While specifying the level of the penal element required before the Supreme Court may refuse to fix a non-parole period, the provisions of the subsection do not require the Supreme Court to disregard the non-penal elements of sentencing that are considered by a court when deciding the minimum period of imprisonment that an offender should serve in a particular case. The subsection does not exclude consideration of the rehabilitative element involved in setting a non-parole period, the element of mercy, the maximum and minimum penalty, the offender's character, age and intellectual capacity, the presence of any mitigating factor concerning the offender, the prevalence of the offence, how much assistance the offender gave to law enforcement agencies in the investigation of the offence, time spent in custody by the offender or any other relevant circumstance.

[113] Subsection 19(5) states the level of culpability the Supreme Court must find before the Court may refuse to set a non-parole period. The fact that the level of culpability in the commission of the offences may be found to be so extreme does not mean that the Supreme Court must refuse to set a non-parole period. The question remains what is the minimum period of imprisonment that justice requires a prisoner must serve having had regard

to all of the circumstances of the case. The subsection merely requires that before the Supreme Court may refuse to set a non-parole period it must be satisfied that the culpability of the offender in the commission of the offence is so extreme that the community interest in the penal element of setting a non-parole period can only be met if the prisoner is imprisoned for the term of his natural life. However, the Supreme Court is not obliged to refuse to set a non-parole period in such circumstances. The discretion to act granted to the Supreme Court by s 19(1)(a)(ii) of the Act is not by virtue of s 19(5) of the Act rendered obligatory if the factors contemplated by that subsection are established. There is no duty to refuse to set a non-parole period in such circumstances. The discretion granted to the Supreme Court by s 19(1)(a)(ii) is distinguishable from the kinds of discretions considered in cases such as *Julius v Bishop of Oxford* (1880) 5 App Cas 214 at 222 - 3 where the decision to act is rendered obligatory once certain factors are established.

[114] The objective seriousness of the prisoner's culpability in the commission of the offence is not the sole determining factor when determining whether to decline to set a non-parole period. The decision to decline to set a non-parole period must not only be made according to s 19(5) but according to all other accepted principles of sentencing: *Power* (supra) at 627 - 629. Regard must still be had to whatever degree of mercy the offender may claim without injustice and to rehabilitation. Consideration of the prisoner's rehabilitation and prospects of rehabilitation since he has been incarcerated

and changes in other subjective factors may make it undesirable for the offender to spend the whole term in prison. Parliament has opted for mitigation in the first instance.

[115] To consider solely the matters contained in s 19(5) is to adopt a more restrictive approach to sentencing than is accorded to a prisoner who is being sentenced for the crime of murder pursuant to s 53A Sentencing Act and that is not the intention of Parliament.

[116] Whether the Supreme Court should refuse to fix a non-parole period is a matter of discretion. The question that the Supreme has to determine remains what is the minimum term of incarceration that justice requires the prisoner must serve having regard to all of the circumstances of the case: *Power* (supra) at 627 - 629. The provisions of s 19(5) of the Act that require the Supreme Court to be satisfied as to the level of culpability of the offending create a necessary but not sufficient pre-condition to the exercise of the Supreme Court's power to refuse to fix a non-parole period.

[117] Although s 19 is in similar terms to s 53A Sentencing Act its application is quite different. Section 53A is concerned with the imposition of a sentence of imprisonment while s 19 is concerned with considering whether the minimum term of imprisonment that Parliament has determined a prisoner should serve should be reversed or overturned. Parliament has already enacted the relevant non-parole period which is the subject of an application pursuant to s 19 of the Act. The task of the Supreme Court is not simply to

embark on a re-sentencing exercise. The effect of s 18 is to have already set a non-parole period which Parliament deems appropriate and consideration needs to be given to whether the non-parole period should be reversed or overruled. Consideration also needs to be given to factors such as the offender may have already served a considerable time in prison and the prospects of the prisoner being rehabilitated may have been enhanced as a result of that experience, over time the prisoner may have accepted responsibility for his conduct and he or she may have become contrite and the risk of re-offending may be considerably reduced even if merely as a result of aging and the passing of time.

Ground 4

[118] In my opinion the Supreme Court erred in that it misunderstood the nature of the discretion granted to it pursuant to s 19(1)(a)(ii) of the Act. The Supreme Court interpreted s 19(5) as if its provisions were exhaustive and as if it was under a duty to refuse to set a non-parole period if the elements of s 19(5) of the Act were established. In his reasons his Honour the Chief Justice stated:

> "[24] As to the power to refuse to fix a non-parole period on an application by the Director, pursuant to s 19(5) of the Act the Legislature has set for the court a different test to be applied from that by which the court decides whether to impose a longer non-parole period. Section 19(5) provides that the court may refuse to fix a period:
>
> 'if satisfied the level of culpability in the commission of the crime is so extreme the community interest in retribution, punishment,

protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole'.

[25] The terms of s 19(5) are identical to s 53A(5) of the Sentencing Act which empowers a court to refuse to fix a non-parole period in respect of sentences of life imprisonment imposed after the commencement of the Act. These provisions focus on the "level of culpability in the commission of the crime". The court is directed to determine whether that level of culpability is "so extreme" that the specified community interests can only be met if the offender is imprisoned for life without the possibility of release on parole. The meaning of "culpability" in this context is discussed later in these reasons."

and

"[67] There is nothing in the wording and context of the legislation which suggests a legislative intention to deprive the court of relevant material that has emerged since an offender was sentenced. Section 19(5) of the Act requires the court to consider not only the level of culpability in the commission of the offence, but also the community interest in retribution, punishment, protection and deterrence. There is no reason why that community interest should not be assessed as at the time that the court makes the decision on the application by the Director. It is a community interest which may, for various reasons, have changed over the period during which the prisoner has been serving the life sentence. It would be illogical, and potentially misleading, to attempt to assess that community interest solely as it stood when sentence was imposed."

and

"[71] For these reasons, on an application by the Director pursuant to s 19 of the Act, evidence of matters occurring or emerging since the imposition of sentence is admissible if relevant to the seriousness of the offence, to a prisoner's culpability in the commission of the crime or to an assessment of the community interest in retribution, punishment, protection and deterrence as at the date of the hearing of the Director's application. Primary amongst material that is likely to be relevant to the specified community interests will be evidence of the progress or otherwise of the prisoner towards rehabilitation which includes evidence reflecting upon the likelihood that an offender will, if released, re-offend."

and

"[227] In the context of community protection, as I have said I am satisfied that if the respondent was to be released into the community there would be a significant risk of re-offending in the same or similar manner.

[228] The other factor to which the court is directed is the community interest in deterrence. This involves general deterrence. Those who are minded to commit crimes of murder should understand that not only are they certain to spend at least 20 or 25 years in custody, in some circumstances they face the prospect of imprisonment for the term of their natural life without the possibility of release on parole. In appropriate cases that come within the terms of the legislation, the community expects the court to send a message by refusing to set non-parole periods.

[229] The court is entrusted with an exceptionally heavy responsibility. The Legislature has recognised that there are competing interests. As was said in Coulston, it is a dreadful punishment to sentence a person to the term of that person's natural life without the possibility of release on parole. For that reason alone, it is an order that will only be made in the clearest of cases.

[230] Having made those observations, it is also appropriate to recognise that the community, through the Legislature, has determined that in some circumstances dreadful crimes require dreadful punishment. The court must apply the directions of the Legislature.

[231] As I have said, the community interests may change over the years. I must assess those interests as they now exist. Obviously, I must determine the level of culpability as it existed at the time the crimes were committed.

[232] I am satisfied that, within the terms of the legislation, the respondent's dreadful crimes require the dreadful punishment of imprisonment for life without the possibility of release on parole.

[233] For the reasons I have given, I am satisfied that the level of the respondent's culpability in the commission of the crimes of murder is so extreme that the community interest in retribution and punishment can only be met if the respondent is imprisoned for life without the

> possibility of release on parole. In arriving at this decision I have paid careful regard to the respondent's conduct during the last 21 years while in custody. Notwithstanding the passage of time and a degree of progress to which I have referred, I am satisfied that the culpability is so extreme that, assessed today, these aspects of the community interest can only be met by imprisonment for life without the possibility of release on parole.
>
> [234] Similarly, I am satisfied that the level of culpability is so extreme that the remaining community interests of protection and deterrence can only be met by such an order.
>
> [235] In respect of both sentences of life imprisonment imposed for the crimes of murder, by order I revoke the non-parole period of 25 years fixed by s 18 of the Act and refuse to fix a non-parole period."

[119] A consequence of the approach adopted by the Supreme Court was that the Supreme Court failed to consider what was the minimum term of imprisonment that justice required the appellant should serve having regard to all of the circumstances of the case. The Supreme Court failed to have regard to the provisions of s 5 of the Sentencing Act in an unfettered manner. Consideration of factors such as the rehabilitative element involved in setting a non-parole period, the element of mercy, the maximum and minimum penalty, the offender's character age and intellectual capacity, the presence of any mitigating factor concerning the offender, the prevalence of the offence, how much assistance the offender gave to law enforcement agencies in the investigation of the offence, time spent in custody by the offender and any other relevant circumstance was wrongly confined by the Supreme Court to the issue raised under s 19(5) the Act which it found was

to be determined having regard to the circumstances surrounding or causally connected with the crime: see par [63] *The Queen v Leach* [2004] NTSC 60.

Re-sentence

[120] Having determined that the Supreme Court erred in that it misunderstood the nature of its discretion and that the appeal should be allowed it is necessary to re-sentence the appellant. In my opinion the non-parole period specified by s 18(b) of the Act is not the minimum period of imprisonment that justice requires that the appellant should serve having regard to all of the circumstances of the case. The non-parole period provided by s 18(b) does not adequately reflect the importance of the principles of retribution, protection of the community and deterrence. I would fix a non-parole period of 40 years. This means that the appellant would be 64 years of age before he could even be considered for parole.

[121] I agree with the findings of the Supreme Court about the objective seriousness of the crimes committed by the appellant and the appellant's failure to demonstrate true remorse for his criminal conduct. It is difficult to assess the likelihood that the appellant may re-offend. Importantly this is a matter which must be assessed prior to the Parole Board making an order that the appellant be released on parole. The majority of experts were of the opinion that the appellant was not a psychopath. What also ought to be considered is the age of the offender at the time that he committed these terrible crimes, the attempts the appellant has made to reform himself while

in prison and his substantially good behaviour while in prison. He has achieved a C1 security classification in prison which is a low risk classification and he needs very little to nil supervision. He has also done work which contributes to the community while in prison. During the late 1980s through to the early 1990s he established a toy making venture, working predominantly with wooden products, of which the finished articles such as rocking horses and motor cycles were donated to charity. He has obtained an Associate Diploma of Applied Science (Library Technology) and he has done work developing database systems for community organisations. These factors indicate that there is some prospect of the appellant being rehabilitated. In addition regard must be had to the following mitigatory factors: the appellant's deprived and disturbed childhood and his frank cooperation with police after some initial attempt to avoid detection.

[122] While the appellant would become entitled to parole after 40 years of imprisonment this does not mean he would be granted parole and imprisonment pending the grant of parole remains punishment. For the appellant to be granted parole requires a unanimous decision of a meeting the Parole Board constituted by eight of its members.

Conclusion

[123] I would allow the appeal and fix a non-parole period of 40 years.
