Murray v The Queen [2006] NTCCA 09

PARTIES:	MURRAY, Eric James
	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 11 of 2005 (20320761)
DELIVERED:	10 May 2006
HEARING DATES:	23 February 2006
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & THOMAS JJ
APPEAL FROM:	R v Murray, Sentencing Remarks, Riley J, 18 April 2005

CATCHWORDS:

CRIMINAL LAW
Appeal against sentence – indefinite sentences incorrectly imposed on all counts – appeal allowed – appellant re-sentenced – fixed term imposed.

Sentencing Act (NT), subdivision 4 of Division 5, s 51, s 52, s 53, s 55, s 55A, s 62, s 63, s 65, s 65(1), s 65(8), s 65(9), s 66, s 67, s 70, s 71, s 72, s 73, s 74, s 74(3)(a), s 74(3)(c), s 112

Fox and Freiberg, *Sentencing*, 2nd ed, Oxford University Press, Melbourne, 1999; Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed, Butterworths, Sydney, 2001

Green v The Queen (1999) 9 NTLR 138; applied

Chester v The Queen (1988) 165 CLR 611; *McGarry v The Queen* (2001) 207 CLR 121; *Buckley v The Queen* (2006) 224 ALR 416; *Saxon v The Queen* (1998) 1 VR 503; followed

Pearce v The Queen (1998) 194 CLR 610; referred to

REPRESENTATION:

Counsel:

Appellant:	S Cox QC
Respondent:	D Lewis

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

Murray v The Queen [2006] NTCCA 09
No. CA 11 of 2005 (20320761)

BETWEEN:

ERIC JAMES MURRAY
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 10 May 2006)

Martin (BR) CJ:

Introduction

[1] On 21 January 2005 the appellant was found guilty by a jury of seven crimes committed between 29 September and 2 October 2003. On each count the learned sentencing Judge sentenced the appellant to an indefinite term of imprisonment deemed to have commenced on 3 October 2003. His Honour specified a single nominal sentence of 28 years. In arriving at that period, his Honour indicated he had considered the following provisional periods as appropriate for the individual crimes:

Count 1	Threatening to kill	1 year
Count 2	Deprivation of liberty	3 years and 6 months concurrently with count 1
Count 4	Aggravated Assault	2 years concurrently with counts 1 and 2
Counts 3, 5, 8 and 9	Unlawful sexual intercourse without consent	14 years on each count concurrently with counts 1, 2 and 4 and concurrently with each other to the extent of 7 years on each count (cumulative total 28 years)

[2] The appellant appeals against the indefinite sentences on the basis that indefinite sentences could not be imposed with respect to the crimes in counts 1, 2 and 4. Irrespective of that technical error, the appellant submitted that the imposition of indefinite sentences was not an appropriate disposition. In addition it was contended that the total nominal sentence of 28 years is manifestly excessive.

Facts of offending

[3] The trial before the jury occupied nine days. The appellant was found not guilty of two counts of unlawful sexual intercourse with the victim without her consent, but was convicted on the remaining counts to which I have referred. The factual findings of the sentencing Judge upon which sentence was based were as follows:

> "The circumstances of the offending are clear. At the time you were aged 57 years and your victim was aged 17 years. She was living with a family in Moulden. She had met you through friends and she had been to your unit on a couple of occasions.

On 29 September 2003 she had been at a nearby residence with friends and had gone to your unit to obtain a cigarette. She then returned to her friends at the nearby residence. A little later she went back to your unit to obtain further cigarettes. You invited her in and then locked the door behind her.

Whilst she was in the unit you produced a criminal record which related to yourself and which included convictions for murder and rape. You showed her that record and made her read through the document. She became frightened and asked to go home. You then directed her attention to the final page of the document where she found a handwritten note. The note said, 'Don't make any sound. Don't you try anything. Don't you talk. You just sit there and shut up. If you try anything I will hurt you bad. You go that?'

In the process of producing this material to her you pushed her into a chair and grabbed the handlebar of a bike which was located on the table and pushed it against her neck or cheek. You grabbed her left breast and twisted it. She, of course, was extremely frightened. You left the room and came back with torn pieces of sheet which you used to tie her up. You were also carrying weapons which included sharpened tent pegs. She was tied and gagged.

You then sat next to her and started rubbing her leg on the upper thigh. You were saying dirty things to her. She was unable to respond because she was tied and gagged. You then untied her and told her to take her clothes off. She did so because she was scared. You obtained some baby oil and put that on your penis. You placed her hands above her head and raped her vaginally.

She told you that she was feeling sick and you obtained a bucket in which she could vomit. She then asked if she could have a shower and you permitted her to do so, although you stayed with her. She sat in the shower with her head down being sick.

On the occasion of raping her you had her suck your penis, lick your nipples and lick a scar that you have on your chest. That happened repeatedly during the course of the episodes that followed over the next few days and is part of the context in which the offending occurred.

On that night she made a desperate attempt to escape. You had left her alone in the shower and she ran naked through the back door and

out into the yard. She tried to jump the fence. You chased after her and caught her, pulling her off the fence. You had her on the ground and held something sharp to her throat. You told her, 'If you move I'll kill you'. You then dragged her inside the house and punched her in the face and the head. She described this as 'full on' punching. You hit her with a bar on her legs and stomach area and the injuries suffered in that attack are obvious in the photographs.

You stood her against the wall and grabbed her by the throat and punched her in the face. You said words to the effect of, 'Nobody can hear you. Nobody can see you. Nobody knows where you are. I'll do whatever I want with you'. The impact that had upon her was to be expected. She was terrified. Later you went to sleep. She remained tied up and she did not sleep.

During the course of the following day, 30 September 2003, you again raped her. She was tied up throughout the day. She complained at having been raped upon at least two occasions at your unit on that day, but you have only been charged with and found guilty of one rape. I will deal with you in relation to that offence alone.

Evidence of other acts with which you have not been charged has only been received in order to place all of the occurrences into a context. You will only be sentenced for the offences of which you have been found guilty.

At about 8pm on 30 September 2003 you told your victim that the two of you were going into Mindil Beach on your pushbike. You gathered some things to take with you and then rode off with her on the crossbar of the bike. You rode to the pipeline that runs along the Stuart Highway and you stopped there. This was near to BP Palms. You laid out a blanket and the two of you stayed there overnight.

Ms T alleged that you raped her on that occasion by making her suck your penis, but the jury found you not guilty of that particular charge and the allegation will be ignored for sentencing purposes.

The following morning, being 1 October 2003, the two of you continued on the journey to Darwin on the pushbike. You travelled into St Vincent de Paul in Stuart Park where you had breakfast. At this stage Ms T had bruises all over her face from the beating you gave her. At your insistence she wore, at various stages, a jumper

with a hood over it in order to hide the bruising. You had breakfast at St Vincent de Paul, but your victim did not.

She did not report you to anyone or seek assistance from anyone because she was, understandably, scared. She had by that stage seen your criminal record, including offences of rape and murder; she had seen the threatening note; she had been raped and she had been savagely assaulted. You instilled into her a vivid sense of fear and an overwhelming sense of hopelessness. Her attempt at escape had resulted in a brutal beating. I do not have any difficulty in accepting that she was too frightened to do anything about her situation other than comply with your wishes. This remained the situation throughout her ordeal.

One threat that you made to her included that you would cut her into bits and put her in a bag. She would be placed in a bin where no-one would find her. She said she did as she was told because she did not want to end up being 'another person on the "missing" page'. Throughout the ordeal you offered glimmers of hope that you would set her free. That prospect also contributed to her ongoing compliance with your wishes.

After the breakfast at St Vincent de Paul's you travelled down to the Botanic Gardens. You went to Mindil Beach and you also went to the museum. Ms T made an allegation that you raped her in bushland in that area but the jury found you not guilty of that count. Again, I will ignore that allegation for the purposes of sentencing.

After leaving the bushland you travelled to an area near the Trailer Boat Club where you had a discussion with a social worker who happened to be at the club. He was called to give evidence in the course of the trial. He was, he said, immediately concerned about the condition of Ms T and asked whether she was all right. He described her face as being blue from bruising and said her eyes were closed up with swelling. She was swaying. You told him she had been assaulted by girls and you assured him that you were looking after her and that you would be taking her home. He accepted your assurances.

The man allowed Ms T to use his mobile phone and after one unsuccessful attempt she rang and left a message on the answering machine of her ex-boyfriend. You had told her, on a number of occasions, that if she should be asked she should explain her bruising and condition by saying that she had been mobbed at Casuarina. You

told her she could make the telephone call if she did not tell anyone what had happened to her, but rather said that she had been mobbed at Casuarina. The message she left on the answering machine was consistent with your instruction to her. The information you gave to the social worker was to like effect. The social worker was convinced by you and did not report the matter.

Thereafter you took Ms T to an area near Vesty's Beach and again you laid out your blanket and made your victim lick your nipples and your scars. She was vomiting at this stage, and you told her that if she did not stop being sick you would have to kill her. You said you would hang or stab her.

You stayed at that spot overnight and you were found guilty of one count of rape at that location. This was a penile/vaginal rape. During the course of the night you told her you might sell her as a hooker. She was asking whether she could go home.

The following morning, 2 October 2003, you went back to the Botanic Gardens and waited until St Vincent de Paul was open. You then went there for breakfast. Ms T continued to feel sick. Thereafter, the two of you travelled on the pushbike along the bike track back out to BP Palms. You stopped at two locations near BP Palms. At the second spot you laid a blanket down and again insisted that she lick your scars and nipples and suck your penis. You then put baby oil on your private parts and raped her again. The rape of which you were convicted was penile/vaginal penetration.

Your victim continued to ask if she could go home. She asked if she could go to BP Palms in order to return to her family. You insisted that you both go to the bus interchange at Palmerston. Prior to your arrival at the bus interchange you again told her that in explanation of her injuries she was to say that she had been mobbed at Casuarina. You threatened that if she said anything of your offending you would come back and kill her. She was extremely frightened of you, and with ample justification.

On the journey from Darwin to Palmerston you had stopped at a Mobil service station where some trainee policemen were buying food. Ms T sought the key to the toilets and went to the toilet to be sick. She did not tell the police or anyone else of her predicament. I accept that she was too frightened and overwhelmed to do so. She did not trust anyone.

> When you were at the bus interchange two of her friends and another girl entered in the waiting room. You seated yourself nearby. The girls were concerned by her condition and asked her what was wrong. She told them that she had been mobbed at Casuarina. They did not find her story convincing. They thought she was about to cry and that she wanted to be somewhere else. She asked them about the next bus and was told that it was about to leave. She then got on the bus, leaving you behind.
>
> She went to where she had been living. When she got home her young friend was present, saw the bruising and asked what had happened. In accordance with your instructions Ms T said that she had been mobbed but then immediately broke down and told her friend that she had been raped. It was only after she had left you behind at the bus interchange and she was in the relatively safe environment of her home that she broke down and first discussed what had occurred."

[4] The gravity of the appellant's total criminal conduct is obvious. The sentencing Judge correctly described the events as "an horrific episode" in the life of the young female victim. As his Honour stated, when the victim tried to escape she was subjected to a "ferocious beating" and, over a period of four days, the appellant raped the victim on four occasions and treated her as his "plaything". The offending caused significant physical injuries and has had long standing and serious psychological effects upon the victim with associated physical impacts. It is unnecessary to canvass these effects.

[5] The Judge correctly identified the appellant's criminal conduct as at the high end of the scale of the serious offending contemplated by the provisions of the Criminal Code under which the appellant was convicted. It was sustained criminal conduct of a type abhorred by the community and in respect of which the appellant has demonstrated no remorse.

Prior record of offending

[6] The appellant was born in November 1946. Of particular significance to the exercise of the sentencing discretion was the appellant's appalling record of prior offending dating back to 1958. As counsel said, the appellant has become institutionalised and will always need to be supervised when at large in the community. After referring to the appellant's distressing background in institutional care from the age of 12 and some of the appellant's prior offending, counsel frankly acknowledged that the appellant has become an angry, violent and hardened criminal.

[7] The record of prior offending discloses an ongoing and unabated propensity for violence, including violence of a sexual nature. The sentencing Judge summarised the prior offending in the following terms:

> "I have been provided with a copy of your criminal history, which stretches back to 1958 in the Children's Court in Queensland. It is a lengthy criminal history, including many offences of a serious kind. As early as 1964 you were sentenced to a term of imprisonment for 18 months for causing actual bodily harm. In the same year you were sentenced to six months hard labour for escaping lawful custody.
>
> In May 1972 you were sentenced to three months' imprisonment for unlawful possession of a concealable firearm. In 1974 you were dealt with for a rape and given a seven year penalty. In 1978 you were sentenced to 12 months' imprisonment for assault occasioning bodily harm and six months' imprisonment for assaulting a prison officer.
>
> In 1982, in New South Wales, you were convicted of murder, escaping lawful custody, threatening to inflict actual bodily harm with intent to have sexual intercourse and kidnapping. The penalty imposed on that occasion appears to have been 14 years for the murder, two years for the escaped lawful custody, eight years for the offence relating to sexual intercourse and five years for the kidnapping. However, it seems the total penalty actually imposed

amounted to 14 years with a non-parole period of 10 years. I do not have detailed information as to the circumstances of that offending or any explanation for the apparently light sentence.

In 1994 you were convicted of assault upon a female child and sentenced to imprisonment for six months. In 1996 you had your parole revoked and you returned to custody. In that same year you were dealt with for two firearms offences in relation to which you received terms of imprisonment of 12 months. In 1999 you were convicted of an offence of false imprisonment relating to a young girl and sentenced to 12 months' imprisonment. In 2001 you had your first conviction in the Northern Territory which was for assault occasioning bodily harm and you were sentenced to imprisonment for two years and six months. You were released on 30 November 2001.

You have spent a substantial part of your life in prison. I have received a summary of the periods for which you have been in prison. As Mildren J noted in sentencing you in 2001, you have spent time in some of Australia's most notorious prisons, including Long Bay, Goulburn, Cessnock, Grafton and Parramatta. From the early 1970s you have spent almost the whole of your life in prison. Up until November 2001 there have been periods of time out of prison, but they were measured in months rather than years. You were then out of prison through to the date of this offending, a period of just under two years. That would seem to be the longest period that you have had out of custody in many years. It is obvious that prison does not offer adequate deterrence to your re-offending."

Statutory Scheme – indefinite sentence

[8] The power to impose an indefinite sentence is found in s 65 of the Sentencing Act ("the Act"):

"**65. Indefinite sentence – imposition**

(1) In this section, "violent offence" means –

(a) a crime –

(i) that, in fact, involves the use, or attempted use, of violence against a person; and

(ii) for which an offender may be sentenced to imprisonment for life; or

(b) [Omitted]

(c) an offence against section 127, 128 or 192 of the Criminal Code.

(2) The Supreme Court may sentence an offender convicted of a violent offence or violent offences to an indefinite term of imprisonment.

(3) An order under this section may be made on the Supreme Court's initiative or on an application made by the prosecutor.

(4) The Supreme Court shall not fix a non-parole period in respect of an indefinite sentence.

(5) The Supreme Court shall specify in the order imposing an indefinite sentence a nominal sentence of a period equal to the period that it would have fixed had it not imposed an indefinite sentence.

(6) Where the Supreme Court imposes more than one indefinite sentence on an offender convicted of more than one violent offence in the same proceeding, the Court shall specify one nominal sentence that shall apply to all the indefinite sentences.

(7) Where an offender is serving an indefinite sentence and the offender is convicted of another violent offence, the Supreme Court shall, if it imposes an indefinite sentence on the offender for the other violent offence, specify one nominal sentence that shall apply to all the indefinite sentences.

(8) 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 because of –

(a) the offender's antecedents, character, age, health or mental condition;

(b) the severity of the violent offence; and/or

(c) any special circumstances.

(9) In determining whether the offender is a serious danger to the community, the Supreme Court shall have regard to –

(a) whether the nature of the offence is exceptional;

(b) the offender's antecedents, age and character;

(c) any medical, psychiatric, prison or other relevant report in relation to the offender;

(d) the risk of serious physical harm to members of the community if an indefinite sentence were not imposed; and/or

(e) the need to protect members of the community from the risk referred to in paragraph (d).

(10) Subsection (9) does not limit the matters to which the Supreme Court may have regard in determining whether to impose an indefinite sentence.

(11) For the purpose of subsection (9), the Supreme Court may order the preparation and provision to the Court of such medical, psychiatric, prison and other reports as the Court considers relevant."

[9] The first question to be determined by a sentencing court is whether the offender has been convicted of a "violent offence" as defined by s 55(1). Subject to compliance with the procedural requirements set out in s 66 and s 67, the next question to be determined by the court is whether it is satisfied that the offender is a serious danger to the community by reason of the criteria identified in s 65(8). In determining whether the offender is a serious danger to the community, the court is directed to have regard to the factors set out in s 65(9).

[10] Sections 70 and 71 provide that the prosecution bears the onus of proving that an offender is a serious danger to the community and that the court may make such a finding only if it is satisfied "by acceptable and cogent

evidence", and "to a high degree of probability", that the "evidence is of sufficient weight to justify the finding".

[11] A finding that an offender convicted of a violent offence is a serious danger to the community does not necessarily result in the imposition of an indefinite sentence. If that finding is made, the discretion of the court to impose an indefinite term of imprisonment is enlivened.

[12] No specific guidance is given by the Legislature as to the factors relevant to a determination as to whether to impose an indefinite sentence. Section 65(**10**) provides that the factors identified in s 65(9) to which the court is required to have regard in determining whether an offender is a serious danger to the community do not limit the matters to which the court may have regard in determining whether to exercise the discretion to impose an indefinite sentence.

[13] If the court imposes an indefinite sentence, the court is required by s 69 to give reasons at the time of the imposition.

[14] Section 65(5) directs the court to specify a "nominal sentence" of "a period equal to the period that it would have fixed had it not imposed an indefinite sentence". Subsection (6) directs that if more than one indefinite sentence is imposed on an offender convicted of more than one violent offence in the same proceeding, the court shall specify only one nominal sentence which will be applicable to all of the indefinite sentences. The court is directed by s 65(4) not to fix a non-parole period in respect of an indefinite sentence.

There is no specific direction with respect to a non-parole period in connection with the nominal sentence. The general power to fix a non-parole period is found in s 53 of the Act, but that power is conferred only when the court "sentences an offender to be imprisoned" for nominated periods. In specifying a nominal sentence, the court is not sentencing an offender to a period of imprisonment and s 53 does not apply. In my opinion there is no power to fix a non-parole period applicable to the nominal sentence.

[15] An indefinite sentence does not necessarily mean that an offender will be imprisoned for the remainder of the offender's natural life. Provision is made for periodic review of indefinite sentences. On review the court may discharge the sentence. In that situation the court is required to impose sentence for the offence that resulted in the indefinite sentence. The review provisions are as follows:

> "72. Review – periodic
>
> (1) Where the Supreme Court imposes an indefinite sentence, it –
>
> (a) shall for the first time review the indefinite sentence not later than 6 months after an offender has served –
>
> (i) 50% of the offender's nominal sentence; or
>
> (ii) if the offender's nominal sentence is imprisonment for life, 13 years of the nominal sentence; and
>
> (b) shall review the indefinite sentence at subsequent intervals of not more than 2 years from when the last review was made.
>
> (2) Subject to section 73, the Director of Public Prosecutions shall make the application that is required to be made to cause the reviews referred to in subsection (1) to be carried out.

73. Review – application by offender

(1) An offender imprisoned on an indefinite sentence may apply to the Supreme Court for the indefinite sentence to be reviewed at any time after the Supreme Court makes its first review under section 72(1)(a), if the Supreme Court gives leave to apply, on the ground that there are exceptional circumstances that relate to the offender.

(2) The court shall immediately forward a copy of the application to the Director of Public Prosecutions.

(3) Not later than 14 days after the making of the application, the court shall give directions to enable the application to be heard.

(4) Subject to any directions given by the court, the application shall be heard not later than 28 days from the day on which it is made.

74. Discharge of indefinite sentence

(1) Unless it is satisfied to a high degree of probability that the offender is still a serious danger to the community when a review is made under section 72 or 73, the Supreme Court shall –

(a) order that the indefinite sentence is discharged; and

(b) sentence the offender under this Act for the violent offence for which the indefinite sentence was imposed.

(2) Where the Supreme Court does not make an order under subsection (1)(a), the indefinite sentence continues in force.

(3) A sentence imposed under subsection (1)(b) –

(a) is taken to have started on the day the indefinite sentence was originally imposed;

(b) takes the place of the indefinite sentence; and

(c) shall be not less than the nominal sentence."

[16] It is apparent that the legislative scheme contemplates the discharge of an indefinite sentence if, at the time of review, the evidence does not satisfy the court to a high degree of probability that the offender is still a serious danger to the community. If the court is not so satisfied, the court is directed to discharge the indefinite sentence and sentence the offender for the violent offence in respect of which the indefinite sentence was imposed.

[17] Section 74(3)(c) directs that the sentence imposed following discharge of the indefinite sentence shall not be less than the nominal sentence specified at the time the indefinite sentence was imposed. When sentence is imposed following discharge of an indefinite sentence, the provisions of the Act concerning the fixing of a non-parole period apply. The sentence is backdated as s 74(3)(a) directs that the sentence "is taken to have started on the day the indefinite sentence was imposed". The question of commencement dates is discussed later in these reasons.

[18] If on review the court is satisfied that the offender is still a serious danger to the community, there is no power to discharge the indefinite sentence.

Appellant's case

[19] Counsel for the appellant frankly conceded that the sentencing Judge was correct in finding that the appellant is a serious danger to the community for the purposes of s 65 of the Sentencing Act. As it is the appellant's case that the sentencing discretion was attended by error and miscarried, counsel

extended that concession to an acknowledgement that if this Court re-sentences counsel did not contend that this Court should not make the same finding that the appellant is a serious danger to the community. I understood the concession by counsel that the appellant is a serious danger to the community for the purposes of s 65 to amount to a concession that the appellant is now a serious danger to the community and, subject to deteriorating health and advancing age, will remain a serious danger to the community for the foreseeable future.

[20] Notwithstanding the concession that the appellant is a serious danger to the community, counsel for the appellant submitted that the sentencing Judge erred in exercising his discretion to impose indefinite sentences. At the heart of the appellant's submission was the proposition that by reason of the appellant's age and ill health, and bearing in mind the length of a finite sentence that would otherwise be imposed, the imposition of an indefinite sentence was not "demonstrably necessary" to protect society from physical harm.

Principles

[21] In determining whether an offender "is a serious danger to the community", the court is required to have regard to the issue of danger at the time of sentencing, but also to make an assessment of future risk. In *Green v The Queen* (1999) 9 NTLR 138, this Court approved of the following remarks of

Pincus JA in *R v Wilson* (unreported Queensland Court of Appeal 28 November 1997) as applicable to the Northern Territory scheme:

> "It is my opinion that the primary question is dangerousness at the time of sentencing; but it seems to me evident that dangerousness at later points in time is made relevant by s 163(4)(d). Under that paragraph the Court must have regard, in determining whether the offender is a serious danger to the community, to –
>
> > '… the risk of serious physical harm to members of the community if an indefinite sentence were not imposed …'
>
> "The hypothesis that there is no indefinite sentence does not direct the Court's consideration to the possibility that no custodial sentence at all is imposed; since a very serious offence must be in issue, it appears that, as in the present case, if there is no indefinite sentence there will be a sentence of determinate length – the sentence referred to in s 163(2). Therefore, in deciding whether the offender is a serious danger to the community the court must have regard to the risk of serious physical harm to members of the community if a determinate sentence of the appropriate length were imposed, instead of an indefinite sentence.
>
> "If such a sentence were imposed, the offender might be released on parole at the half-way point or later, or might serve the full term. Of course, there are other possibilities, such as a release to work. It is my opinion that s 163(4)(d) compels the conclusion that in determining whether the offender 'is' a serious danger the Court has to consider among other matters what danger would be presented to the community if there were, rather than an indefinite sentence, a determinate one; this is a difficult task, because the Court cannot know whether the offender will be released before the end of the determinate sentence hypothesised, and if so, when.
>
> "If the offender is regarded as a serious danger to the community at the time when he becomes eligible for parole under a determinate sentence he would not, other than in error, then be released on parole. But the possibility of an offender who is still regarded as a serious danger earning remissions, so as to obtain release earlier than the end of the determinate sentence, cannot be ignored.

> "In my view, the result of para (d) (with ancillary provisions, para (e)) of s 163(4) is that the Court must consider the danger at the precise time of sentencing but also, and at least as importantly, look to the future; if it does not, the Court cannot carry out the mandatory requirement of par (d) and that of par (e). What the Court has to do, then, is to look at the present danger and also consider the extent of the risk of serious physical harm to people, if there is a determinate sentence instead of an indeterminate one.".

[22] As to the exercise of the discretion following a finding that the appellant is a serious danger to the community, it is necessary to bear in mind that the power to fix an indefinite sentence is an exceptional power which permits a court to impose a sentence of greater severity than a sentence which is proportional to the gravity of the criminal offending. In *Chester v The Queen* (1988) 165 CLR 611 the High Court observed that such an extraordinary power "is to be exercised with the object of protecting the public from the commission of further crimes" by the offender (617). However, having referred to the fundamental principle of proportionality, the Court further confined the exercise of the power "to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm" (618). The Court also said (618 – 619):

> "The exercise of the power should be reserved for those very exceptional cases … in which the sentencing judge is satisfied by acceptable evidence that the convicted person is … so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community."

[23] The decision in *Chester* was given in the context of Western Australian legislation which provided no guidance as to the circumstances in which an order that an offender be detained during the Governor's pleasure could be

made other than by requiring the Court to have regard to "the antecedents, character, age, health, or mental condition of the person convicted, the nature of the offence or any special circumstances of the case." Nevertheless, the underlying rationale of the decision is applicable to the legislative scheme under consideration: *Green v The Queen* (1999) 9 NTLR 138.

[24] In confining the exercise of the power to those cases where it is demonstrably necessary to protect society from physical harm, the Court distinguished serious but non-violent crimes such as larceny, obtaining money by false pretences and the infliction of malicious damage to property. Of the non-violent offending their Honours said [618]:

> "But the indeterminate detention of offenders who have a propensity to commit crimes of this kind involving financial loss and property damage is a disproportionate response to that need for protection."

[25] The High Court also emphasised the significance of the gravity of the harm in *McGarry v The Queen* (2001) 207 CLR 121. The Court was concerned with Western Australian provisions different from those applicable in *Chester*. The Western Australian provisions considered in *McGarry* directed that indefinite imprisonment must not be ordered unless the Court is satisfied on the balance of probabilities that when the offender would otherwise be released the offender would be a danger to society or part of it because of a number of specified factors, including "the risk that the offender will commit other indictable offences". In a joint judgment,

Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ held that upon a proper construction of the legislation a conclusion could not be reached that an offender would be a danger to society or part of it unless the Court was satisfied that on release "the offender would engage in conduct, the consequences of the commission of which could properly be called "grave" or "serious" for society as a whole, or some part of it" ([23]).

[26] The exceptional nature of the power to impose an indefinite sentence was again emphasised by the High Court in *Buckley v The Queen* (2006) 224 ALR 416. In the following passage, the Court also emphasised that in the context of a prisoner facing a long finite sentence, a sentencing court must consider carefully the "protective effect" of the finite sentence ([6] and [7]):

> "[6] … On any view of the matter the appellant was facing a long sentence. Even so, it is important to bear in mind what was said in *Chester* and *McGarry* about the imposition of an indefinite sentence. Such a sentence involves a departure from the fundamental principle of proportionality. The statute assumes that there may be cases in which such a departure is justified by the need to protect society against serious physical harm; but a judge who takes that step must act upon cogent evidence, with a clear appreciation of the exceptional nature of the course that is being taken. Furthermore, as was pointed out in *McGarry*, [(2001) 207 CLR 121 at 129-130 [22]-[23]] the assessment of risk required by the statute may involve temporal issues requiring careful examination.
>
> [7] In *R v Leitch*, [[1998] 1 NZLR 420 at 429] the New Zealand Court of Appeal said that, when considering the exercise of its discretion, a sentencing court "will ordinarily consider whether the protective purpose of preventive detention could reasonably be met by an available finite sentence of imprisonment". Similarly, in the recent Victorian case of *R v Davies*, [(2005) 153 A Crim R 217 at 238] Charles and

> Nettle JJA said that, before answering the critical question whether the case was of such exceptional rarity that an indefinite sentence should be imposed, it was necessary first to consider what fixed term of imprisonment would have been appropriate. The Queensland legislation applied in the present case requires a judge to specify a nominal sentence, which becomes relevant for purposes of review and for the consequences of decisions made on review. The significance of the nominal sentence, however, goes beyond that. In the first place, where a judge, sentencing a dangerous offender, is deciding whether the protection of society requires an indefinite sentence, the protective effect of a finite sentence, fixed according to ordinary sentencing principles, including the need to protect the public, [*Veen v The Queen [No 2]* (1988) 164 CLR 465] is a matter to be weighed carefully. An indefinite sentence is not merely another sentencing option. Much less is it a default option. It is exceptional, and the necessity for its application is to be considered in the light of the protective effect of a finite sentence. Secondly, the available finite sentence sets the time frame by reference to which the temporal issues earlier mentioned are to be examined. As will appear, in this case the sentencing judge set a nominal sentence of 22 years, having rejected a prosecution submission that it should be life. Since it was clear that, even if an indefinite sentence were not imposed, the appellant would be in custody for many years, estimations of future risk were being undertaken in a temporal context that necessarily gave rise to substantial uncertainty."

[27] Later in the judgment the Court observed that the proper exercise of the power "involves an understanding of why it is exceptional, and careful attention to the considerations that call for its exercise". The Court then returned to the significance of the protective effect of a finite sentence ([42] – [43]):

> "42. Serious violent offenders will commonly present a danger to the community. Protecting the community may be one of the purposes of the imposition of a lengthy custodial sentence. Such custodial sentences remain the norm for the punishment of offenders convicted of serious offences of violence. Indefinite sentences are not the norm. Part 10 of the Act

> proceeds upon the basis that there may be certain cases where the extraordinary step of imposing an indefinite sentence may be justified as a response to the risk of serious danger to the community. The risk to be weighed is the risk "if an indefinite sentence were not imposed" (s 163(4)(d)). Where the appropriate finite term, according to ordinary sentencing principles, is 22 years, then it is necessary to consider whether the protective purpose in contemplation could reasonably be met by such a term. If it were otherwise, the consequence would be the banalisation of indefinite imprisonment.
>
> 43. … The reasoning of the sentencing judge did not deal with the issues, including issues of predictability, involved in deciding why a sentence of 22 years should not have been imposed, having regard to relevant sentencing considerations, including the need to protect the community. One of the matters of particular difficulty in a case such as the present is the uncertainty that is necessarily involved in estimating the danger to the community of a person who, on any view, will be incarcerated for such a long time. The operation of the parole system, and the possibility of treatment while in prison, are matters that call for close attention. In a particular case, it may be that the system of review under Pt 10 provides the only appropriate method of relating the interests of the community to the requirements of justice to an individual offender. Nevertheless, the protective potential of the ordinary sentencing regime needs to be examined first and most closely before deciding to depart from it."

[28] The appeal was allowed in *Buckley* on the basis that the sentencing Judge had fallen into error and the majority of the Court of Appeal had erred in not independently reconsidering the exercise of the sentencing discretion. Noting that on an independent exercise of the discretion the Court of Appeal could have upheld the order for indefinite detention, but also observing that such an outcome was by no means inevitable, the Court concluded by again emphasising the exceptional nature of the power ([44]):

> "It is important to say once again, as Hayne JA said in *Moffatt*, that the power to impose an indefinite sentence is one 'to be sparingly exercised, and then only in clear cases'. This Court has repeatedly endorsed those remarks. From the reasons of the sentencing court it must be evident that they have been given their full weight whenever a sentence of indefinite detention is imposed."

[29] Although there are differences between the Western Australian provisions considered in *Chester* and *McGarry* and the Northern Territory legislation, as I have said the underlying rationale for the proper approach to this type of legislation is the same. The discretion to exercise the power to impose an indefinite sentence is confined to those cases where the exercise of the power is "demonstrably necessary" to protect society from the commission of offences by the offender, the consequences of which can properly be called "grave" or "serious". Usually this will result in the exercise of the discretion being confined to protecting society from violence causing physical harm.

Appellant's circumstances

[30] The appellant suffers from type one diabetes and in 2000 he underwent triple by-pass surgery. He continues to suffer from recurring angina. The psychiatrist who examined the appellant observed that a sentence of lengthy duration will effectively amount to a "death sentence" in the sense that the appellant "seems to be suffering from progressively worsening heart disease which is likely to lead to somewhat premature demise". Apart from that observation by the psychiatrist, there was no evidence that the appellant's

medical condition might impair his physical capacities or shorten his life expectancy.

[31] Counsel submitted that a total sentence of the order of 16 years would be appropriate. If that sentence was reached by a partial accumulation of sentences in respect of the offences of unlawful sexual intercourse without consent, the minimum non-parole period would be 70 percent, namely, a little over 11 years (s 55). If the minimum non-parole period was fixed the appellant would be eligible for parole in October 2014 when he would be aged almost 68 years. If parole was denied, the appellant would not be released until October 2019 when he would be aged almost 73 years. Counsel contended that given the appellant's poor prognosis with regard to his health, at the age of 73 years he would no longer pose a significant danger to the community and, therefore, it is not "demonstrably necessary" that an indefinite sentence be imposed.

[32] The appellant's physical capacities when he reaches his 70's cannot be predicted with any certainty. As the sentencing Judge remarked, the appellant's advancing age and existing health problems did not prevent him from committing a series of particularly serious crimes of violence over a significant period. His Honour noted that there is no evidence that the appellant's propensity for criminal offending will abate with increasing age or deteriorating health, although age is likely to reduce the appellant's physical capacity to commit violent crimes. His Honour was of the view that

the danger of re-offending will remain, "tempered" by considerations of the appellant's physical capacity.

Approach of the sentencing Judge

[33] Having referred to the facts of the offending and the appellant's record of prior offending, the sentencing Judge turned to the application for the imposition of indefinite sentences. His Honour referred to the requirements of s 65 and to the observations of Angel J in *Green* that the finding required is that an offender is a serious danger to the community in that the offender is liable or likely or predisposed to re-offend not that an offender will, in fact, at some future time re-offend. His Honour noted that in *Green* Mildren J said the provisions of the kind under consideration "are to be used sparingly and in a clear case".

[34] The sentencing Judge then discussed the appellant's personal background and information provided by a psychiatrist and a psychologist:

> "The psychological report records that you have a history of sporadic contact with psychiatrists, psychologists and counsellors, almost all of which took place within the prison system. The majority of the contacts were prompted by acts of aggression towards prison staff or acts of deliberate self-harm. The history includes an incident in the 1960s when you assaulted the Governor of the Brisbane prison because of your perception that he had a condescending attitude. In the 1970s you wrapped toiled paper around yourself and set it alight.
>
> It was noted that you were missing the distal joints of three fingers, one on one hand and two on the other, and that you have given different explanations for this. One explanation is that you cut off the tops of each of your fingers on the one occasion when you wished to be transferred from isolation in Long Bay Prison back into the general population of the prison. Another explanation is that you

injured yourself because you were bored with work at the Bathurst Prison. The third explanation is that you injured yourself at the Parramatta Prison when you were refused permission to attend a dental clinic. The consistent part of the history is that the injuries to your fingers were self-inflicted in a prison environment.

In 1999, you were referred to the Forensic Mental Health Services in the Northern Territory following a request to undergo surgical castration. At that time you reported a 20 year history of sexual interest in young girls which resulted in two previous convictions for child molestation. A review of your criminal history as provided to me does not support that there were two such convictions.

You sought castration as a way of preventing yourself from further offending. You threatened that if the request was denied you would castrate yourself in the same way as you had severed your finger joints. Those threats did not continue after a period of time.

At that time, there was no suggestion of mental illness. It is not clear whether you sought castration in order to influence the court in relation to a sentence, whether indeed you were serious or whether there is some other explanation. The requests were not pursued after a while.

Your next referral to the Forensic Mental Health Services was in December of 2001. You had been sentenced for an aggravated assault involving a woman and it was a part of a condition of the suspended sentence that you attend anger management counselling. You were supervised by the psychologist over a period of months and you consistently denied any episodes of angry mood or aggressive behaviour.

When interviewed for the purposes of the present psychological assessment, you presented as a man who was appropriately groomed, pleasant, relaxed and articulate. You displayed little emotion. You made a number of comments which were taken to be thinly-veiled threats to commit suicide. In view of your history of self-harm, I take those threats seriously and I recommend to the authorities that they regard you as a prisoner at risk for a time following the sentencing process.

Your Supreme Court file will be marked ‘at risk’.

When questioned about guilt feelings you indicated that you felt guilty about the murder you had committed in New South Wales and that you felt sorry for the victim's family. In relation to the matters with which I am concerned, you indicated that the allegations were false and that as a consequence you now hated women and when you see them on television you call them 'scumbags' and 'sluts' and various other terms of denigration.

The psychologist made the following observations:

'As noted above, Mr Murray has extensive although very sporadic contact with helping professionals and on two occasions has been admitted to forensic psychiatric facilities for brief periods. For the most part these contacts have been triggered by acts of aggression or self-injury.

There is nothing to suggest that any of the mental health professionals who have seen him over the years have diagnosed any mental illness underlying these behaviour problems.

From the history he has given, it seems that these behaviours are better construed as manifestations of his personality. It would appear that as a young man he was prone to anger and that, in prison at least, aggression was his principal means of dealing with interpersonal conflict.

It would appear that his acts of self-injury, rather than reflecting depression or self-loathing, were all directed at achieving clearly identified institutional goals. They were designed to manipulate a prison system that he saw as uncaring and unfair into acceding to his wishes.

It would appear moreover that this method was generally quite effective, although obviously very costly'.

The psychologist went on to conclude:

'On the basis of the historical information outlined above and my examination of his current mental state, I am confident that Mr Murray does not suffer from any persisting or serious mental

illness. In itself, the latter statement does not of course provide any indication as to Mr Murray's overall risk to the community.

However it does make it clear that (a) mental illness is not one of the factors that contribute to his risk, and (b) there is no need for mental health treatment to be included in any plan to reduce his risk to the community.

I also received a report from the psychiatrist, Dr Walton. That report provides some useful insights for the purposes of the sentencing process.

You told Dr Walton that you did engage in sexual intercourse with Ms T but that it was consensual and that she became upset when a demand for payment was not met. This suggestion was not made in the course of the trial. There is no evidence to support it and I reject it.

You do not accept responsibility for your actions even now.

When you were asked about remorse, you said to Dr Walton, 'It's hard to say it to someone else. It can't be said to the person concerned. They say I don't feel remorse. If I could, I'd say I'm sorry. They are going for a big sentence. It doesn't really matter what I say, really'.

In his conclusions, Dr Walton observed that you could not be described as a person who is meaningfully sorry and he noted a striking lack of victim empathy. I see no sign of remorse at all and no sign of any acceptance of responsibility on your part.

Dr Walton asked you about the partial amputation of your fingers. You told him that these episodes all occurred in custody because 'I just get moody. I was frustrated in gaol'. You acknowledged to Dr Walton that you were a person who is easily slighted and you are inclined to ruminate about your situation and get agitated.

Dr Walton concluded that you are a man of normal intelligence and you suffer from no discernable mental illness. You would, he said, attract a label of an anti-social personality disorder but as he also

> observed, that means little more than that you have an established criminal history.
>
> Dr Walton indicated that there was little that he could offer in understanding why you engaged in the serious sexual offending on this occasion. He saw no reason for psychiatric intervention. He went on to observe, '*The most reliable of a number of unreliable indicators of risk of future aggression is a well-established history of such behaviour in the past and Mr Murray's prior criminal history speaks for itself in that regard*'" (my emphasis).

[35] The sentencing Judge then considered the relevance of the appellant's age and explicitly recognised the "unfortunate reality" that the appellant might spend the whole or the major part of the rest of his life in imprisonment. His Honour discussed the essence of the offending and described the criminality involved as at the "highest level". He then put aside the question of an indefinite sentence and considered the finite sentences that would otherwise be appropriate. In this way, and having regard to the question of totality, his Honour reached the total period of 28 years as the period of finite imprisonment that he would otherwise have regarded as appropriate.

[36] The sentencing Judge then turned to the question of indefinite sentences and expressed his conclusion in the following passage:

> "I turn now to consider whether I should impose an indefinite sentence. I have considered the matters referred to in s 65 of the Sentencing Act and in particular those referred to in s 65(8) and (9). The offending in this case involved significant violence. It can in all the circumstances be characterised as exceptional.
>
> Bearing in mind your antecedents, age and character and having regard to the psychological and psychiatric reports, I have no hesitation in concluding that you pose a risk of serious physical harm to members of the community if an indefinite sentence is not

> imposed in relation to each of the offences. There is a clear need to protect members of the community from that risk of serious physical harm.
>
> Yours is one of those rare cases that satisfies the requirements of s 65 of the Sentencing Act. Those observations apply to each of the matters in relation to which you were convicted."

[37] The sentencing Judge having determined that the appellant is a serious danger to the community, in my opinion it was open to his Honour to exercise his discretion to impose indefinite sentences. Even without regard to the evidence of the psychiatrist that "the most reliable of a number of unreliable indicators of risk of future aggression is a well established history of such behaviour in the past and Mr Murray's prior criminal history speaks for itself in that regard", as a matter of drawing reasonable inferences from the evidence, the appellant's record of prior offending, coupled with the circumstances of the offending under consideration, plainly established that the appellant has an ongoing propensity to commit violent crimes involving serious physical danger to members of the community.

[38] As I have said, on the evidence presented before the sentencing Judge, counsel for the appellant acknowledged that the appellant has become an angry, violent and hardened criminal who is institutionalised and will always need to be supervised when at large in the community. Counsel conceded that, subject to deteriorating health and advancing age, the appellant will remain a serious danger to the community for the foreseeable future. In my opinion, those concessions were properly made. There is no

material to suggest that the appellant's propensity for violent crime, including violent crime of a sexual nature, will decrease with increasing age or deteriorating health while incarcerated. To the contrary, the psychiatrist reported that he knows of "no psychiatric intervention which is likely to be of assistance in ameliorating Mr Murray's established antisocial tendencies". The psychiatrist added:

> "Demonstrably, on a repeated basis, incarceration confers minimal, if any, specific deterrence upon this individual".

[39] I am unable to discern any error in the approach of the sentencing Judge to his task of determining whether to exercise the discretion to impose an indefinite sentence. During submissions his Honour was referred to a number of authorities concerning indefinite sentences, including the decisions of the High Court in *Chester* and *Lowndes v The Queen* (1999) 195 CLR 665. His Honour was also referred to the decision of this Court in *Green* and to the decision of the Victorian Court of Criminal Appeal in *R v Moffatt* [1998] 2VR 229, a decision cited with approval by the High Court in *Buckley*. His Honour recognised the exceptional nature of the power and concluded that this was one of those "rare cases" that satisfies the requirements of s 65. While his Honour did not specifically refer to the exercise of the discretion, there is nothing in his Honour's remarks to suggest that he did not appreciate that having found that the appellant is a serious danger to the community, he was then required to exercise a discretion in determining whether to impose an indefinite sentence. The

Judge's reasons are sufficient to identify the basis upon which he exercised that discretion.

[40] The sentencing Judge did not refer specifically to the protective effect of a finite sentence. However, in my opinion there is no reason to doubt that his Honour had that question in mind when he assessed what would otherwise be the total period to be served if finite sentences were imposed. His Honour specifically looked to the future and the possible effects of age and deteriorating health on the appellant's propensity and capacity to commit relevant crimes. In this way, in substance his Honour was addressing the question of the protection of the public if finite sentences were imposed rather than indefinite sentences.

Technical Error

[41] As mentioned, the sentencing Judge imposed an indefinite sentence on each count. His Honour erred in doing so.

[42] The power to impose an indefinite sentence exists only if an offender is convicted of a "violent offence" or "violent offences". A "violent offence" is defined in s 65(1)(a) as a crime that involves the use, or attempted use, of violence against a person and for which the offender may be sentenced to imprisonment for life. The offences in counts 1, 2 and 4 of threatening to kill, deprivation of liberty and aggravated assault did not carry a maximum penalty of life imprisonment.

[43] Section 65(2) does not specifically state that the court may only impose an indefinite term of imprisonment in respect of violence offences. That provision states that the court "may sentence an offender convicted of a violence offence or violent offences to an indefinite term of imprisonment". Read literally, it might be argued that if an offender is convicted of a "violent offence" and other offences, it is open to the court to imposed indefinite sentences with respect of all offences.

[44] In my opinion, however, upon a proper construction of the legislative scheme the power to impose an indefinite sentence is limited to imposing such a sentence in respect of "violent offence" as defined in s 65(1). This view is consistent with s 65(6) and (7). Section 65(6) speaks of the court imposing "more than one indefinite sentence on an offender convicted of more than one violent offence". Section 65(7) provides that where an offender is serving an indefinite sentence and is convicted of another violent offence, the court shall, "if it imposes an indefinite sentence on the offender for *the* other violent offence", specify one nominal sentence applicable to all the indefinite sentences.

[45] The Crown conceded that his Honour was in error in imposing an indefinite sentence on those counts that did not carry penalty of life imprisonment. That concession was properly made.

[46] As to the consequence of the error by the sentencing Judge, it is well recognised that not every error in the exercise of a sentencing discretion will

result in a finding that the sentencing discretion miscarried. It might be said with considerable persuasion that the technical error committed by the sentencing Judge was exactly that, a technical error of no significance to the sentencing process. However, as counsel for the appellant pointed out, in the joint judgment in *McGarry* their Honours observed that "… the decision to make an order for indefinite imprisonment, and the decision fixing the nominal sentence, form part of a single sentencing decision" and that if a sentencing Judge's discretion miscarried in fixing the nominal term of imprisonment, the whole of the sentence, including the order for indefinite imprisonment, should be set aside ([8] and [9]).

[47] Applying the principle identified in *McGarry*, counsel for the appellant submitted that the technical error in imposing indefinite sentences on counts 1, 2 and 4 requires a conclusion that the sentencing discretion miscarried. In those circumstances counsel urged that all sentencing orders should be set aside and this Court should re-sentence the appellant.

[48] The technical error made by the sentencing Judge could not have had any influence on his Honour's decision to impose an indefinite sentence. The error could, and probably should, have been corrected in the exercise of the power contained in s 112 of the Sentencing Act. In that event, his Honour would have imposed the indefinite sentences only in respect of the offences of unlawful sexual intercourse without consent and would have imposed finite sentences for the other offences. In these circumstances there is considerable force in the view that on the basis of the technical error alone

the appeal should be allowed only for the purposes of correcting the technical error in the same way that the Judge would have amended the orders if acting pursuant to s 112. However, as this issue was not the subject of full submissions with reference to authorities, and as I have decided that the sentencing discretion miscarried on another basis, it is unnecessary to finally determine this question.

Sentencing error

[49] As I have said, the sentencing Judge specified a single nominal sentence of 28 years having incorrectly fixed indefinite sentences with respect to counts 1, 2 and 4. It follows that his Honour was erroneously fixing a single nominal sentence in respect of seven indefinite sentences rather than four such sentences. This error was significant in the sentencing process and for this reason the sentencing discretion miscarried. In these circumstances this Court must exercise its own discretion and re-sentence the appellant.

Re-sentencing

[50] There was no challenge to the individual periods identified by the sentencing Judge as appropriate on counts 1, 2 and 4 for the crimes of Threatening to Kill (1 year) Deprivation of Liberty (3 years and 6 months) and Aggravated Assault (2 years). Although I regard the sentence of 3 years and 6 months as a lenient sentence for the crime of deprivation of liberty, bearing in mind that this appeal was not concerned with the sentences on

counts 1, 2 and 4, exercising my own discretion I would impose the same sentences on counts 1, 2 and 4 as were imposed by the sentencing Judge.

[51] I turn to the question of indefinite sentences with respect to the crimes of unlawful sexual intercourse without consent. As I have said, counsel for the appellant frankly conceded that, for the purposes of s 65(8), the appellant is a serious danger to the community. On the basis of all the material to which I have referred, I am satisfied that the concession was well made and that the appellant is a serious danger to the community. In these circumstances, I must determine whether to exercise the discretion to impose indefinite sentences.

[52] In considering whether to impose indefinite sentences, I must have regard to the "protective effect of the finite sentence that would otherwise be imposed". For this purpose I must consider the total period that would be served if finite sentences were imposed. It is appropriate to have regard to the total period on the assumption that upon completion of a non-parole period the appellant would not be released on parole if he remained a serious danger to the community.

[53] In the process of determining the total finite period, in my opinion it is of assistance to provisionally identify appropriate periods for each of the individual crimes. In this way, attention is drawn not only to the offending involved in each individual crime, but also to the gravity of the total criminal conduct. The relationships between the sentences appropriate for

the individual crimes, the total criminal conduct and the total period achieved by the accumulation or concurrency of sentences is highlighted. This is the same process that can, but not necessarily must, be adopted when fixing a single aggregate sentence for multiple crimes pursuant to s 52 of the Sentencing Act: *R v Major (1988) 70 SASR 488; R v Gale (1999) 74 SASR 235; Pearce v The Queen (1998) 194 CLR 610 [45]*.

[54] In arriving at provisional finite sentences for each of the relevant crimes, and in provisionally identifying sentences otherwise appropriate for the crimes of unlawful sexual intercourse without consent, it is necessary to avoid an overlapping of factors common to both sets of crimes.

[55] Each of the crimes of unlawful sexual intercourse without consent falls within the upper end of the scale of seriousness for crimes of this type. The maximum penalty is imprisonment for life. There are no mitigating circumstances. The appellant has a long history of violent offending. Both general and personal deterrence are of particular importance in the exercise of the sentencing discretion. In my opinion, the appropriate sentence for each of the crimes of unlawful sexual intercourse without consent would be 14 years imprisonment.

[56] The direction in s 65(5) that the court shall specify "a nominal sentence of a period equal to the period that it would have fixed had it not imposed an indefinite sentence" is a reference to the total period of imprisonment that an offender would have been liable to serve either as a result of a single

sentence or as a consequence of the imposition of multiple sentences. In the case of multiple sentences it is, therefore, necessary to consider the question of totality. Having reached a view as to the total period to be served, in order to achieve that total period the preferable course is to fix appropriate sentences for the individual crimes and to reach the total period by adjusting the concurrency and accumulation of sentences rather than by using the artificial and potentially distorting process of adjusting the individual sentences.

[57] In my opinion, having regard to the question of totality, if finite sentences were being imposed the appropriate total period proportionate to the gravity of the total criminal conduct would be 24 years. In that event, the minimum non-parole period would be a little under 17 years and the appellant would not be eligible for parole until he was aged nearly 74 years. If parole was refused, the appellant would be aged almost 81 years before the expiration of the sentence.

[58] Bearing in mind the finite period of 24 years that would be served, I turn to the discretion to impose indefinite sentences It is for the Crown to prove that the imposition of indefinite sentences is demonstrably necessary for the protection of the community from the appellant committing crimes of violence with grave or serious consequences involving physical harm.

[59] In my opinion, the Crown has made out its case that the imposition of indefinite sentences is demonstrably necessary for the protection of the

community in the relevant sense. The appellant's propensity to commit particularly violent crimes involving grave physical harm has not abated and shows no signs of abating. Given the appellant's history and age, I am satisfied that a further lengthy period of incarceration will not have an ameliorating effect on the appellant's propensity to commit such crimes.

[60] It must be acknowledged that it is impossible to predict with any certainty the state of the appellant's health should he live to the age of 81 years. However, given the appellant's propensity as discussed, unless his health deteriorates markedly, in my opinion it is highly likely that even at the advanced age of 81 years the appellant would remain capable of committing crimes of violence with grave consequences. If the appellant remained so capable, it is highly likely that he would commit such crimes. Neither the strength of his motivation to do so, nor the gravity of the physical harm likely to be caused, should be underestimated.

[61] In the context of the appellant's advancing age, it is appropriate to bear in mind that the imposition of indefinite sentences does not mean that the appellant will necessarily be incarcerated for the remainder of his life. If a single nominal sentence of 24 years is imposed commencing 3 October 2003, s 72 of the Act would require a first review of the indefinite sentences at the expiration of 12 years when the appellant would be aged nearly 69 years. If the indefinite sentences are not discharged, subsequent reviews would take place at intervals of not more than two years. On review, if by reason of the appellant's health or age or because of any other factors a

court is not satisfied to a high degree of probability that the appellant remains a serious danger to the community at the time of the review, the indefinite sentences will be discharged and finite sentences imposed for the four crimes. Those finite sentences will involve a total period of imprisonment of not less than the period of the nominal sentence.

[62] In all the circumstances, I am satisfied that an order imposing an indefinite sentence is demonstrably necessary for the protection of the community from the appellant committing crimes of violence involving grave or serious physical harm. The appellant is precisely the type of person in respect of which the Legislature expects the court to exercise its discretion to impose an indefinite sentence.

[63] For these reasons, I would impose an indefinite sentence with respect to each of the four crimes of unlawful sexual intercourse without consent. As I have said, in my view if finite sentences were being imposed a total period to be served of 24 years would be appropriate. In that situation, bearing in mind that the sentences for the four crimes of unlawful sexual intercourse without consent would have been fixed without taking into account those aggravating circumstances encompassed by the other three crimes, I would have directed that the sentences for the other crimes be concurrent with each other and that the sentences for the crimes of unlawful sexual intercourse be cumulative upon the sentences for the other three crimes, but sufficiently concurrent with each other to ensure that the total period to be served was 24 years.

[64] As indefinite sentences are being imposed, the same result of 24 years could be achieved if the finite sentences on counts 1, 2 and 4 commenced on 3 October 2003 and the indefinite sentences commenced at the expiration of the finite sentences together with a nominal sentence of 20 years and 6 months. On the basis that the finite sentences would commence on 3 October 2003, the nominal sentence of 20 years and 6 months would commence on 3 October 2007. In that event, the first review of the indefinite sentences would occur at the expiration of 10 years and 3 months from 3 October 2007 when the appellant would be aged a little over 70 years. That disposition would work to the disadvantage of the appellant in comparison with a nominal sentence of 24 years commencing 3 October 2003.

[65] The Act does not contain any specific provision dealing with the commencement of an indefinite sentence. In my opinion, however, as the court is imposing a sentence of imprisonment, the general provisions of the Act apply. If the offender has been in custody on arrest for the offence in respect of which the indefinite sentence is imposed, the court may backdate the sentence to commence on the day the offender was arrested or on any day between the arrest and the day of imposition of sentence (s 63(5)). Pursuant to s 51, the court may direct that the indefinite sentence commence either at the expiration of a sentence already being served or a sentence imposed on the same occasion, or prior to the expiration of such other sentence. In other words, the court may direct that an indefinite sentence be

served cumulatively upon another sentence or fully or partially concurrently with such other sentence. In the absence of orders under s 51 or s 63, the indefinite sentence commences on the day it is imposed (s 62(1)).

[66] The general powers concerning commencement of imprisonment applicable to indefinite sentences do not apply to the specification of a nominal sentence pursuant to s 65. Unlike the order for indefinite imprisonment, when specifying a nominal sentence the court is not imposing a sentence of imprisonment or sentencing the offender to imprisonment. It is merely specifying a nominal sentence for future purposes while ordering that the offender serve an indefinite sentence. In these circumstances, as the powers contained in s 51 and s 63 apply only when the court is sentencing an offender to serve a term of imprisonment, they have no application to the specification of the nominal sentence.

[67] It is necessary to have regard to the practical effect of the specification of a nominal sentence. Two issues require consideration. First, if on review a court discharges an indefinite sentence, the court is required to sentence the offender for the violent offence for which the indefinite sentence was imposed. Section 74(3)(c) directs that the sentence imposed for the violent offence shall not be less than the nominal sentence. Secondly, s 74(3)(a) directs that the sentence imposed to take the place of an indefinite sentence is "taken to have started on the day the indefinite sentence was originally imposed".

[68] As to the direction in s 74(3)(c) that a sentence imposed upon discharge of the indefinite sentences "shall not be less than the nominal sentence", a potential difficulty is presented by the operation of s 52 of the Act. That section prohibits the imposition of a single term of imprisonment for all the crimes of unlawful sexual intercourse without consent. On one view it might be said that the court in the future would be required to fix individual sentences of 24 years on each count of unlawful sexual intercourse without consent to be served concurrently. In my opinion, however, the preferable view is that the court is required in the future to impose sentences which will result in a total period of imprisonment that is not less than the period specified as the nominal sentence. For this purpose, therefore, the expression "a sentence imposed" in s 74(3) should be construed as a reference to the total period of imprisonment liable to be served as a consequence of the imposition of the individual sentences for the violent crimes in respect of which the indefinite sentences were imposed. This construction achieves the objects of the Act in a sensible manner whereas the alternative would lead to absurd and unintended consequences.

[69] As to the direction in s 74(3)(a) that the sentence is "taken to have started on the day the indefinite sentence was imposed", if s 74(3)(a) was construed literally, even if an indefinite sentence was backdated for a considerable period prior to the day on which it was imposed because an offender had been in custody, when the court subsequently imposes a sentence on discharge of the indefinite sentence the court would not be empowered to

backdate the sentence to the day on which the indefinite sentence commenced. The sentence would commence on the later date when the indefinite sentence was imposed. In addition, by reasons of s 74(3)(c), the court could not make allowance for the absence of backdating by reducing the sentence below the nominal sentence.

[70] On this literal view of s 74(3)(a) a significant injustice could be occasioned to the offender. Parliament cannot have intended to inflict such an injustice upon an offender when, years after the indefinite sentence is imposed, that sentence is discharged and a finite sentence is fixed. Upon a proper construction of the legislative scheme, for the purposes of s 74(3)(a) the words "is taken to have started on the day the indefinite sentence was originally imposed" should be construed as meaning that the sentence imposed to take the place of an indefinite sentence is taken to have started on the day the indefinite sentence commenced.

Appropriate orders

[71] As I have said, if finite sentences were being imposed, I would order that the sentences on counts 1, 2 and 4 be served concurrently with each other and that the sentences for the crimes of unlawful sexual intercourse be cumulative upon the sentences for the other three crimes, but sufficiently concurrent with each other to ensure that the total period to be served was 24 years. However, although the same result could be achieved by directing that the indefinite sentence commence on 3 October 2007 at the expiration

of the finite sentences on counts 1, 2 and 4 and by specifying a nominal sentence of 20 years and 6 months which would, by the operation of s 74(3)(a), commence on 3 October 2007, as set out in para [64] of these reasons such an order would work to the disadvantage of the appellant. If a single nominal sentence of 24 years is specified commencing on 3 October 2003, the first review will occur in about October 2015. If a nominal sentence of 20 years and 6 months commencing on 3 October 2007 is specified, the first review will occur in about January 2018.

[72] In all the circumstances, I would direct that the indefinite sentences commence on 3 October 2003 and I would specify a single nominal sentence of 24 years. If such orders were made, for the purposes of the first review pursuant to s 72, the appellant would have served 50 percent of the nominal sentence on 3 October 2015. In addition, for the purposes of imposition of sentence should the indefinite sentences be discharged on review, the sentence imposed to take the place of the indefinite sentence would be taken to have commenced on 3 October 2003.

[73] As mentioned, the court is directed not to specify a non-parole period in respect of the indefinite sentences. As to the finite sentences on counts 1, 2 and 4, in view of the imposition of indefinite sentences it is inappropriate to fix a non-parole period (s 53(1)).

Nominal sentence – suggested maximum

[74] In addition to submitting that the nominal sentence of 28 years was manifestly excessive, a question which need not be determined, the appellant submitted that the power to specify a nominal sentence was limited to specifying a period of 26 years or less. Section 72 of the Act provides that where the nominal sentence is imprisonment for life, the first review of the indefinite sentence shall take place after the offender has served 13 years. Counsel contended that as Parliament fixed the period of 13 years as the period to be served before review where the nominal sentence is imprisonment for life, Parliament must have intended that 13 years would be the maximum period to be served before a review of an indefinite sentence. Where the nominal sentence is other than life imprisonment, as the review must take place after the offender has served 50 percent of the nominal sentence, it follows that the nominal sentence cannot be longer than 26 years.

[75] At first blush the appellant's argument has some attraction. A sentence of imprisonment for life is normally regarded as the most severe sentence. If the Legislature has seen fit to require a review after 13 years has been served where the nominal sentence is imprisonment for life, it might be expected that the Legislature intended that the maximum period before review when serving an indefinite sentence would be 13 years. Notwithstanding that superficial attraction, in my opinion a proper construction of the legislative scheme dictates otherwise.

[76] Section 65(5) directs the court to specify a nominal sentence "of a period equal to the period that it would have fixed had it not imposed an indefinite sentence". Where more than one indefinite sentence is imposed, subs (6) directs the court to specify one nominal sentence that shall apply to all the indefinite sentences. Similarly, if an offender is serving an indefinite sentence and is convicted of another violent offence, and the court imposes an indefinite sentence for the other violent offence, the court is required by subs (7) to specify a single nominal sentence applicable to all the indefinite sentences.

[77] Two factors of significance are apparent. First, the court does not determine the nominal sentence by reference to the period that must be served prior to the first review. The court is directed to specify a nominal sentence of a period "equal" to the period of the actual sentence it would have fixed had it not been imposing an indefinite sentence. If the court reduced the nominal sentence in order to avoid the period before the first review exceeding 13 years, it would be acting contrary to the direction in s 65(5).

[78] Secondly, the court may be specifying a single nominal sentence in respect of multiple crimes of violence committed at disparate times. In that situation, it commonly occurs that none of the individual crimes of violence warrant a sentence of life imprisonment. The court is required to assess the total gravity of the criminal conduct and specify a total period that is proportionate to the gravity of the total criminal conduct. That period may exceed 26 years.

[79] In my opinion, the review provisions should not be construed as limiting the power of the court with respect to the specification of a nominal sentence which s 65(5) requires be a period equal to the period that the court would have fixed if imposing a finite sentence. If the consequence is that the review will not take place until the expiration of a period of greater than 13 years, that is a consequence of the Legislature determining an arbitrary figure of 13 years for review where the nominal sentence is imprisonment for life. It is not a demonstration of a legislative intention that 13 years is to be the maximum period before a review is to take place. Such construction would undermine the direction in s 65(5) by imposing a 26 year limit on the nominal sentence. In this context I note that fixing 50 percent of the nominal sentence as the time for review accords with the general minimum non-parole period of 50 percent of an actual sentence.

[80] For these reasons I would allow the appeal and set aside the orders of the sentencing Judge. I would impose the following sentences in respect of counts 1, 2 and 4 to be served concurrently and commencing on 3 October 2003:

Count 1	Threatening to kill	1 year
Count 2	Deprivation of liberty	3 years and 6 months concurrently with count 1
Count 4	Aggravated Assault	2 years concurrently with counts 1 and 2

[81] I would impose indefinite sentences in respect of each of the four crimes of unlawful sexual intercourse without consent commencing 3 October 2003. That is, the indefinite sentences should be served concurrently with the sentences on counts 1, 2 and 4. A single nominal sentence of 24 years should be specified.

Mildren J:

[82] The facts and issues raised by this appeal have been set out in detail in the judgment of the Chief Justice, a draft of which I have had the benefit of reading.

[83] Subject to three matters which I will mention shortly, I agree with the Chief Justice's construction of the provisions of subdivision 4 of Division 5 of the Sentencing Act dealing with indefinite sentence for violent offences.

[84] The first of these matters relates to whether or not an indefinite sentence of imprisonment may be directed to be served cumulatively on the term of imprisonment for another offence *vide* s 51 of the Sentencing Act. Strictly speaking that question does not arise in this case and therefore does not need to be answered. We have heard no submissions thereupon as the Crown conceded before the sentencing Judge that the indefinite sentences should be served concurrently with the sentences imposed on counts 1, 2 and 4. However, without deciding the question, I doubt whether it is possible to impose an indefinite sentence cumulatively upon another sentence. Unless the Court, pursuant to s 74 discharges the indefinite sentence, it operates in

effect as a life sentence. In the case of life sentences, other sentences are always made concurrent with them irrespective of the order in which the sentences are imposed: see Fox and Freiberg, *Sentencing*, 2nd ed, para 9-628. However, I would prefer to leave the resolution of that question to another day.

[85] Secondly, s 74(3)(c) which requires that a sentence imposed upon discharge of the indefinite sentences shall be not less than the nominal sentence. Therefore, *prima facie* four sentences each of 24 years would be required. As the Chief Justice points out, that result does not sit well with s 52 of the Act which prohibits an aggregate sentence for crimes of unlawful sexual intercourse without consent. Nor does it conform with the requirements of the general law relating to proportionality in sentencing: *Pearce v The Queen* (1998) 194 CLR 610. However, it is open to the legislature to make special provisions which do not conform with other established statutory or common law principles. We have heard no argument on this question which does not strictly arise in this case. It does not now need to be resolved.

[86] Thirdly, as to the direction in s 74(3)(a) that the sentence is "taken to have started on the day the indefinite sentence was imposed", I agree with the Chief Justice that a considerable injustice could be occasioned to an offender if this provision is given its literal meaning rather than the meaning "is taken to have started on the day the indefinite sentences commenced". To some extent that injustice can be tempered by taking the time already spent into account when fixing the nominal sentence. However, there is still a risk

that at some future time when the Court is called upon to fix a non-parole period s 55 and s 55A of the Sentencing Act, which require a minimum non-parole period of not less than 70 per cent of the head sentence, could work to the prisoner's disadvantage. There is also a difficulty in substituting words used by the Legislature for other words merely because the Court believes the Legislature has made a mistake, when the words actually chosen are quite capable of being given their ordinary meaning without leading to absurdity: see the discussion on Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed, paras 2.4 and 2.24. Again that question of construction was not argued and need not be resolved.

[87] However, these three questions of interpretation are matters which do need to be resolved soon. As things presently stand there is such uncertainty in the scheme of the Act that I would suggest that Judges invited to make orders of indefinite detention should exercise considerable caution before doing so. These are matters which in my opinion need the urgent attention of the legislature.

The "technical error"

[88] For the reasons express by the Chief Justice, the sentencing Judge erred in imposing an indefinite sentence on each count. However, as his Honour points out, that error may not have had any influence on the decision to impose an indefinite sentence on each of the four counts of unlawful sexual intercourse without consent and could have been corrected by the sentencing

Judge under s 112 of the Sentencing Act. An error of the kind which can be addressed by the sentencing judge does not usually lead to the result that all of the sentences imposed are vitiated: see for example, *Saxon v The Queen* (1998) 1 VR 503. However, as I also consider that the appeal must be allowed on other grounds, I agree that it is not necessary to decide this question.

The sentencing discretion miscarried

[89] Before imposing an indefinite sentence, the sentencing judge must be satisfied that the Crown has proved:

(a) that the offender is guilty of one or more "violent offences" as defined by s 65(1);

(b) that the procedural requirements of s 65 have been met (see s 66 and s 67);

(c) that the offender is a serious danger to the community in terms of s 65(8) and s 65(9), having regard to the standard of proof required by s 71;

(d) if yes to (a), (b) and (c), that the Court should exercise its residual discretion to sentence the offender to an indefinite term.

[90] In this case, there is no complaint that the Crown failed to prove (a), (b) or (c). The real question is whether the evidence the Crown led should have satisfied the Court as to (d).

[91] When deciding whether or not to exercise the discretion, it is essential to consider the length of the sentence or sentences which would otherwise have been imposed (and hence the length of the nominal sentence). It is also necessary to consider whether or not there is a substantial or real risk that the offender will remain a danger to the community at the time of his release assuming a definite sentence were to have been imposed: *Green v The Queen* (1999) 9 NTLR 138 at [28] per Angel J. The time of release is, for these purposes, the end of the finite sentence, the assumption being that the offender has not in the meantime been released on parole. The relevant danger is from committing a further "violent offence" as defined. This is because the purpose of the legislation is to protect the community from persons who would otherwise be liable to commit violent offences at the time of their release from prison having served their sentences in full.

[92] The learned sentencing Judge concluded that the length of the sentences, and the length of the nominal sentence, should be 28 years. It is not clear to me that the learned sentencing Judge turned his mind to the question of risk to the community of the offender committing a further violent offence at that time. Indeed, because the learned sentencing Judge said that his conclusion "applies to each of the matters to which you were convicted" it appears that, to the extent that the learned Judge may have considered this question, he did not confine his considerations to violent offences. In my opinion that demonstrates error.

[93] Further, in my opinion, there was no evidence which justified a conclusion that in 28 years' time there is a substantial or real risk that the offender would remain a danger to the community in the relevant sense. The nominal sentence was backdated to 3 October 2003. Assuming that the 28 years total sentences were similarly backdated, this would mean that the appellant would have been released on 3 October 2031. At this time he would be almost 85 years of age. At the time of sentence on 18 April 2005, the appellant was aged 58. According to the latest life tables for Australia (2002-2004), published by The Australian Bureau of Statistics, a male person aged 58 has a life expectancy of 23.5 years. Therefore, it is more likely than not that the appellant will not survive past age 81.5 years. It is difficult to see how it could be concluded that a person who is most probably already dead could be a danger to the community at the time of his projected release.

[94] Further, there was evidence referred to by the Chief Justice that the appellant was suffering from Type I Diabetes and a worsening heart condition which was likely to lead to a "somewhat premature demise". It therefore seems unlikely that he would even reach his statistical probable life expectancy.

[95] If, in the unlikely event that the appellant were to be still alive at aged 85, there is no evidence that he would have the physical capacity to commit a violent offence (especially a sexual offence) at that time. The Crown bears the onus of proof on this question. No medical evidence, apart from the

evidence Dr Walton, a psychiatrist whose report was tendered on behalf of the appellant, was led on these questions and Dr Walton's report, to the extent that it touched on these matters, was unfavourable to the Crown's case.

Re-sentencing

[96] It was not contended by counsel for the appellant that a sentence of 14 years imprisonment for each count of sexual intercourse without consent was manifestly excessive. However, that submission was made in the context of an argument that the total sentence of 28 years was manifestly excessive. I do not understand counsel for the appellant to have conceded that on re-sentencing by this Court that a head sentence of 14 years on each count is appropriate. On the contrary, counsel submitted that on re-sentencing, the sentences are at large.

[97] Nevertheless, I agree with the Chief Justice that the appropriate sentence for each of the crimes of sexual intercourse without consent would be 14 years imprisonment. Although this is a severe sentence, there was violence used, the appellant had weapons in the form of sharpened tent pegs, the victim was physically overpowered and held prisoner, the acts of sexual intercourse included vaginal penetration and fellatio, the victim was very frightened and physically ill and suffered severe degradation. The offending was made worse by the fact that the appellant has previously been convicted of rape and murder and was not deterred by lengthy sentences previously imposed

upon him. There were no mitigating circumstances. I also agree with the Chief Justice that a total sentence of 24 years concurrent with the sentences on counts 1, 2 and 4 would be appropriate for the four counts of unlawful sexual intercourse without consent.

[98] The next question is whether in the exercise of this Court's discretion, an indefinite sentence should be imposed. If the appellant were to be given a fixed term of 24 years backdated to commence from 3 October 2003, he would not be released until 3 October 2027. By that time he would be aged almost 81 years. For the reasons previously expressed I think it is unlikely that he will live to that age. Even if he were to be still alive at that time the evidence does not support a finding that there is a substantial or real risk that he will remain a danger to the community in the relevant sense at that time. In those circumstances, I consider that it would be proper to decline to exercise the discretion to impose an indefinite sentence.

[99] I would therefore allow the appeal. I agree with the sentences proposed by the Chief Justice in respects of counts 1, 2 and 4. In relation to the other counts I would impose the following sentences.

Count 3	Unlawful sexual intercourse without consent	14 years concurrent with counts 1, 2 and 4
Count 5	Unlawful sexual intercourse without consent	14 years partly concurrent as to 10 years with count 3
Count 8	Unlawful sexual intercourse without consent	14 years partly cumulative as to 4 years upon count 5
Count 9	Unlawful sexual intercourse without consent	14 years partly cumulative as to 2 years upon count 8

[100] I would fix a non-parole period of 18 years 6 months. This is greater than the minimum required but having regard to all of the circumstances of the offence and the offender I consider that this is the minimum period required to be served before the appellant is eligible to be considered for parole.

Thomas J:

[101] I have had the opportunity to read the draft Judgments prepared by Martin (BR) CJ and Mildren J. I agree the appeal should be allowed for the reasons outlined by Mildren J. I agree with the sentence as proposed by Mildren J. I have nothing to add.
