Green v The Queen [2006] NTCCA 22

PARTIES:	GREEN, Harrison 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 3 of 2005 (9721574)
DELIVERED:	23 October 2006
HEARING DATES:	13 July 2006
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ
APPEAL FROM:	NORTHERN TERRITORY SUPREME COURT, 9721574, 14 December 2004

CATCHWORDS:

CRIMINAL LAW
Criminal Law – appeal – appeal against sentence – appellant sentenced to indefinite sentence in 1998 – nominal sentence fixed – indefinite sentence discharged in 2004 – determinate sentence imposed – error in nominal sentence does not affect determinate sentence – 1998 or 2004 sentencing standards – determinate sentence not manifestly excessive – appeal dismissed.

Sentencing Act (NT), s 5, s 65, s 72 and s 74

Poyner v The Queen (1986) 60 ALJR 616, applied.
Green v R (2000) 133 NTR 1; *R v Murray* [2006] NTCCA 9; *R v MJR* (2002) 54 NSWLR 368; *R v Shore* (1992) 66 A Crim R 37; *Yardley v Betts* (1979) 22 SASR 108; *Radenkovic v The Queen* (1990) 170 CLR 623; *R v Riley* [2006] NTCCA 10; *R v Inkamala* [2006] NTCCA 11; *R v*

D (1997) 69 SASR 413; *R v PLV* (2001) 51 NSWLR 736; *R v Lozanovski* [2006] NSWCCA 143; *R v Lane* (1996) 135 FLR 7; *R v Major* (1998) 70 SASR 488; *R v Kench* (2005) 152 A Crim R 294; *R v M WJ* (2005) 92 SASR 371; *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519, considered.
Singh v R (1983) 55 ALR 692, distinguished.
R v Lewfatt (1993) 3 NTLR 41; *Chester v R* (1998) 165 CLR 611, followed.

REPRESENTATION:

Counsel:

Appellant:	Suzan Cox QC
Respondent:	D Lewis

Solicitors:

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

Judgment category classification:	A
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Green v The Queen [2006] NTCCA 22
No. CA 3 of 2005 (9721574)

BETWEEN:

HARRISON GREEN
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, Angel and Southwood JJ

REASONS FOR JUDGMENT

(Delivered 23 October 2006)

Martin (BR) CJ:

Introduction

[1] This is an appeal against a sentence of 14 years imprisonment imposed in December 2004 for the crime of sexual intercourse without consent, in respect of which a non-parole period of 10 years was fixed.

[2] The crime was committed in 1997. In October 1998 the learned sentencing Judge sentenced the appellant to an indefinite term of imprisonment. The indefinite sentence was discharged in December 2004 and the Judge imposed the sentence under appeal.

[3] The appellant complains that error attending the 1998 order has impacted upon the sentence imposed in December 2004 to the extent that the 2004 sentence is affected by error and should be set aside. In addition, the appellant submitted that the sentence of 14 years is manifestly excessive.

Indefinite Sentences – Legislative Scheme

[4] As the grounds of appeal are advanced in the context of the legislative scheme which provides for the imposition and discharge of indefinite sentences of imprisonment, it is appropriate to summarise the essential features of the scheme. The scheme was discussed in *Green v R* (2000) 133 NTR 1 and *R v Murray* [2006] NTCCA 9.

[5] The relevant provisions are s 65 and s 70 -74:

> "**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.

…

70. Onus of proof

The prosecution has the onus of proving that an offender is a serious danger to the community.

71. Standard of proof

The Supreme Court may make a finding that an offender is a serious danger to the community only if it is satisfied –

(a) by acceptable and cogent evidence; and

(b) to a high degree of probability,

that the evidence is of sufficient weight to justify the finding.

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."

[6] The essential features of the scheme may be summarised as follows:

- The power to sentence an offender to an indefinite term of imprisonment only exists if the offender has been convicted of a "violent offence" as defined by s 55(1).

- Procedural provisions ensure that the offender is entitled to be heard before such a sentence is imposed.

- A court may only impose an indefinite sentence if it is satisfied that the offender "is a serious danger to the community" "because of" the matters specified in s 65(8).

- In determining whether an offender is a serious danger to the community, the court is required by s 65(9) to "have regard to" the matters set out in that subsection. Section 65(10) provides that s 65(9) does not limit the matters to which the court may have regard in determining whether to impose an indefinite sentence. The interaction between being satisfied that the offender is a serious danger "because of" the matters identified in s 65(8) and the direction that the court "have regard to" the matters specified in s 65(a) was discussed in *Green*.

- The burden of proving that an offender is a serious danger to the community rests on the prosecution: s 70.

- A court may make a finding that an offender is a serious danger to the community 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".

- A finding that an offender convicted of a violent offence is a serious danger to the community does not require the court to impose an indefinite sentence. If that finding is made, the discretion of the court to impose an indefinite sentence of imprisonment is enlivened: *Murray* at [11].

- If the court imposes an indefinite sentence, it is required to give reasons at the time that the indefinite sentence is imposed: s 69.

- Section 65(4) directs that the court shall not fix a non-parole period in respect of an indefinite sentence. Pursuant to s 65(5), in the order imposing an indefinite sentence the court is required to specify a "nominal sentence" of a period "equal to the period that it would have fixed had it not imposed an indefinite sentence".

- Provision is made for regular review of an indefinite sentence. Section 72 directs that the first review shall be not later than six months after the offender has served fifty percent of the nominal sentence or, if the

nominal sentence is imprisonment for life, after service of 13 years of the nominal sentence. Subsequent reviews shall be at intervals of not more than two years and, pursuant to s 73(1), the offender may apply, with leave of the court, for a further review at any time after the first review on the ground that there are "exceptional circumstances that relate to the offender".

- Upon a review, unless satisfied to a high degree of probability that the offender is still a serious danger to the community at the time when the review is made, the court is required to order that the indefinite sentence be discharged and "sentence the offender under [the Sentencing Act] for the violent offence for which the indefinite sentence was imposed": s 74(1). If the order discharging the indefinite sentence is not made, the indefinite sentence continues in force.

- A determinate sentence imposed following discharge of an indefinite sentence cannot be less than the nominal sentence and "takes the place of the indefinite sentence": s 74(3)(b) and (c).

- The determinate sentence "is taken to have started on the day the indefinite sentence was imposed": s 74(3)(a). In *Murray* I held that s 74(3)(a) should be construed as meaning that the sentence is taken to have started on the day the indefinite sentence commenced [70]. Mildren J, with whose reasons Thomas J agreed, declined to determine this issue [86].

Background

[7] The crime under consideration was committed on 25 September 1997. The victim was a young Aboriginal boy aged 8 years. From about midday on 25 September 1997 the appellant consumed a significant quantity of alcohol at the Wycliffe Well hotel with his brother and friends. At about 4pm he returned to Ali Curung where, at a side show being held in a park, he spoke with his nephew and the victim. The learned sentencing Judge summarised the facts of the offending that then occurred in the following terms:

> "The accused said to the victim: 'Come over here, I fuck you.' The victim tried to run away but the accused picked him up and placed him under his arm. The accused took the victim to the rear of an old school building. The accused then sat down on the ground and the victim's clothes were removed. The accused then removed his clothes and laid on top of the victim inserting his penis into the boy's anus and proceeded to have anal intercourse with him. The victim told police he began to cry, although in the record of interview, the accused told police the boy wasn't crying.
>
> A short time later the accused removed his penis. The victim then punched the accused in the testicles and swore at the accused. The accused told police in the record of interview he then said to the victim, 'Don't swear or I'll fuck you some more.' [The victim] then put his pants back on and ran home. He changed his tracksuit pants from his green ones to his red ones. He went to the toilet and wiped his bottom and told police, 'I see white like cheese with blood'. The forensic examination was conducted of the victim's clothing by Mrs Kuhl, forensic biologist. The green tracksuit pants had a small blood stain on the back buttock area consistent with being blood from [the victim].
>
> At about 2 am on Friday, 26 September 1997 the accused was arrested at Ali Curung after attending at the police station of his own accord. He was lodged in the cells and later conveyed to Tennant Creek. At about 6.17pm on 26 September the accused took part in a videotape record of interview. During the interview the accused made admissions to have anal intercourse with the victim. When

asked his reasons for committing the offence the accused replied, 'I don't know, I was drunk eh?'"

[8] At the time he committed the crime, the appellant had an appalling record of prior offending dating back to 1978. In particular, the appellant had repeatedly demonstrated a propensity for violence, including violence of a sexual nature against women and children. I take the summary of the convictions for violence from the reasons for judgment of Bailey J delivered 12 January 2001 following a review of the indefinite sentence:

"(i) September 1978	Assault x 2, unlawful use of a motor vehicle and malicious damage. Sentence: 5 months imprisonment.
(ii) February 1979	Aggravated assault. Assault of a female teacher – intoxicated. Sentence: 6 months imprisonment, suspended after 2 months on 2 year good behaviour bond.
(iii) October 1980	Assault with intent to rape – intoxicated. Victim 12 year old girl. Victim covered by a blanket and struck several times about the face. Sentence: 3 years, non-parole period 12 months.
	Concerns about the suitability of his plans on release delayed grant of parole and eventually he was refused parole after indicating he wanted to return to Ali Curung. Served full sentence. While doing so, he received an additional three months for assault of a Prison Officer.

(iv)	June 1984	Convicted of an assault involving one of his brothers and two juveniles. Sentence: 6 months imprisonment.
(v)	December 1985	Convicted of three counts of assault against females and one count of assault against a male. His mother was the victim in two counts. The other victims were his father and his sister-in-law. Sentence: 13 months, suspended after 2 months on 12 month good behaviour bond including a condition not to travel to, stay or reside at Ali Curung or Wycliffe Well.
(vi)	February 1986	Breached bond by going to Ali Curung. Convicted and ordered to serve the outstanding balance of 11 months imprisonment from the 12/85 sentence. A non-parole period of 3 months was fixed, but he served the full sentence because parole was refused on account of concerns of the Ali Curung Community and previous breaches of court orders.
(vii)	August 1989	Convicted of assaulting Police and sentenced to one month imprisonment. Cumulative upon sentences (6 months) for other offences.
(viii)	November 1990	Convicted of common assault x 2, aggravated assault (male/female) and aggravated assault (aged and disabled person).
(ix)	December 1990	Convicted of assault with intent to have carnal knowledge causing bodily harm. Victim was an 8 year

		old girl. Sentenced to 4 years imprisonment, non-parole period of 2 years. Initially refused to apply for parole – later changed his mind. Parole was refused and he served his full term.
(x)	March 1994	Convicted of aggravated sexual assault. Victim was a 10 year girl. Sentenced to 2½ years' imprisonment with a non-parole period of 18 months. In sentencing, Martin CJ expressly warned the prisoner that further offending of a similar nature might lead to an indeterminate sentence. He refused to co-operate with a psychiatrist and declined to apply for parole. Served full sentence and was released on 8.8.95."

[9] On 1 April 1998 the appellant pleaded guilty to the offence committed on 25 September 1997. Pursuant to s 65 of the Act the Crown sought an order that the appellant be sentenced to an indefinite term of imprisonment. Following receipt of reports and submissions, the Judge was satisfied that the appellant was a serious danger to the community and sentenced the appellant to an indefinite term of imprisonment. As required by s 65(5) her Honour specified a nominal sentence of six years commencing on 26 September 1997. The appellant appealed unsuccessfully to the Court of Criminal Appeal: *Green*.

[10] In accordance with the requirements of s 72 of the Act, in December 2000 Bailey J conducted a review of the indefinite sentence. His Honour was satisfied to a high degree of probability that the offender was still a serious

danger to the community and refused to order that the indefinite sentence be discharged.

[11] Bailey J conducted a second review in December 2002. Again his Honour was satisfied to a high degree of probability that the appellant was a serious danger to the community and declined to discharge the order for the indefinite sentence.

[12] The third and final review was conducted in December 2004 by the Judge who in 1998 imposed the indefinite sentence. At the outset of the review counsel for the Crown advised her Honour that the Crown could not satisfy the Court to a high degree of probability that the appellant was still a serious danger to the community. In those circumstances, s 74(1) of the Act required the Judge to order that the indefinite sentence be discharged and to sentence the appellant for the 1997 crime of sexual intercourse without consent in respect of which the indefinite sentence had been imposed in 1998. After hearing submissions, and having been provided with a number of reports, her Honour adjourned the hearing to consider her decision.

[13] On 14 December 2004 the Judge delivered written reasons and, as required by the Act, ordered that the indefinite sentence be discharged. Her Honour then imposed a sentence of 14 years imprisonment and fixed a non-parole period of 10 years, both commencing on 26 September 1997.

Nominal Sentence - Error

[14] As I have said, at the time of sentencing the appellant to an indefinite term of imprisonment in 1998, the Judge specified a nominal sentence of six years commencing 26 September 1997. In her reasons for specifying that period, her Honour indicated that she was fixing a lighter nominal sentence than the sentence she would have imposed had she not sentenced the appellant to an indefinite sentence. In reaching that decision her Honour relied upon a principle confirmed in *Singh v R* (1983) 55 ALR 692 that when a court makes a declaration that an offender is an habitual criminal, it should impose a light determinate sentence. Both counsel had referred to *Singh* and encouraged her Honour to fix a nominal sentence less than the sentence that would have been imposed in the absence of an order imposing an indefinite sentence. The specifying of a shorter nominal sentence was not the subject of the unsuccessful appeal against the imposition of the indefinite sentence.

[15] The approach of counsel led her Honour into error. In 1983 when *Singh* was decided, the legislative scheme concerning habitual criminals was quite different from the current scheme relating to indefinite sentences. An offender declared an habitual criminal was detained during the pleasure of the Administrator, but the period of detention as an habitual criminal did not commence until after the offender had served the sentence for the offence of which the offender was convicted. It was in those circumstances that courts took a merciful approach of imposing a lighter than usual sentence in order

to enable the offender to commence the indefinite detention as an habitual criminal as early as reasonably possible.

[16] Section 65(5) of the Act directs the court imposing an indefinite sentence to "specify … a nominal sentence of a period equal to the period that it would have fixed had it not imposed an indefinite sentence". The direction in s 65(5) is unequivocal. The court is required to fix a period "equal" to the period that it would have fixed had it not imposed the indefinite sentence. The nature of the directive in s 65(5) does not permit the court to specify a shorter nominal sentence than the sentence that would have been fixed if an indefinite sentence had not been imposed.

[17] No basis can be found in the legislative scheme for specifying a shorter nominal sentence. Unlike the scheme that applied to habitual criminal declarations in 1983, service of the period of indefinite detention is not delayed while the offender serves a sentence for the crime of which the offender was convicted. When an indefinite sentence is imposed, there is no other sentence to be served. The offender commences detention pursuant to the indefinite sentence as soon as the order is made or at any earlier date specified by the court.

[18] The nominal sentence specified in conjunction with the imposition of an indefinite sentence is not a sentence to be served. The purpose of the nominal sentence becomes apparent upon consideration of the provisions for review and discharge of an indefinite sentence. Section 72 of the Act

directs that an indefinite sentence shall be reviewed for the first time not later than six months after an offender has served 50 percent of the nominal sentence (or in the case of a nominal sentence of imprisonment for life, after service of 13 years of the nominal sentence). Thereafter, an indefinite sentence must be reviewed at intervals of not more than two years. Hence the nominal sentence determines when the first review of the indefinite sentence must occur.

[19] It appears that the period of 50 percent of the nominal sentence was probably chosen to equate approximately with a minimum non-parole period. Subject to special provisions relating to sexual offences, if a determinant sentence of imprisonment is imposed, the minimum non-parole period is 50 percent of that sentence.

[20] Pursuant to s 74, on review of an indefinite sentence, unless the court is satisfied to a high degree of probability that the offender is still a serious danger to the community at the time of the review, the court is directed to order that the indefinite sentence be discharged. In that event, the court is required to sentence the offender for the violent offence in respect of which the indefinite sentence was imposed. Section 74(3)(c) provides that when the court sentences for the violent offence following discharge of the indefinite sentence, the sentence imposed "shall be not less than the nominal sentence". Hence the nominal sentence is the minimum sentence which can be imposed for the crime following discharge of the indefinite sentence.

The Legislature contemplated that a sentence longer than the nominal sentence could be imposed.

[21] Acknowledging that a purpose of specifying a nominal sentence is to give an offender a date for the first review, counsel for the appellant submitted that another important purpose is to give an offender an indication that should the indefinite sentence be discharged in the future, the offender can expect a sentence not less than the nominal sentence, but of a period either the same or close to the same period as the nominal sentence. In this way, so the submission proceeded, the fixing of the nominal sentence gives an offender a legitimate expectation as to the approximate length of the determinate sentence that will be imposed should the indefinite sentence be discharged.

[22] As a matter of fact, the specifying of a nominal sentence undoubtedly possesses the potential to raise within an offender an expectation as to the likely approximate length of a determinate sentence should the indefinite sentence be discharged in the future. In my view, however, the primary purpose of specifying a nominal sentence is not concerned with the expectations of an offender who is sentenced to an indefinite sentence. The primary purpose is to create a scheme which provides a means by which the first date of review is fixed thereby ensuring that offenders are not left in indefinite detention beyond the specified period without the approval of the court. In addition, the nominal sentence identifies the minimum sentence that can be imposed upon discharge of the indefinite sentence and provides guidance to the Judge imposing sentence, which may occur many years after

the indefinite sentence was imposed, as to the period considered appropriate by the Judge who imposed the indefinite sentence. The primary purpose is not to give the offender an expectation that the sentence will not be longer or significantly longer than the nominal sentence. The specifying of a nominal sentence does not have the effect of giving rise to an expectation that is capable of founding a legitimate sense of grievance which could establish a basis for interfering with a sentence longer than the nominal sentence.

[23] In expressing these views, I am not excluding the possibility that a sentence imposed following discharge of an indefinite sentence might be so in excess of the nominal sentence as to give rise to such a legitimate sense of grievance that an appellate court would feel compelled to interfere. However, in my view, it would be an extreme case in which interference on this basis alone would be justified.

[24] In the circumstances under consideration, bearing in mind that in 1998 when specifying the nominal sentence the Judge specifically stated that she was specifying a shorter period than the sentence that would otherwise have been imposed, the fact that the sentence is significantly longer than the nominal sentence does not, by reason of a legitimate expectation, in itself require or justify interference by this Court. If the sentence is fair and reasonable, the appellant cannot legitimately complain on the basis that he did not expect such a large increase over the nominal sentence. The observations of King

CJ in a different context in *Yardley v Betts* (1979) 22 SASR 108 can be applied by analogy (114):

> "When a person commits a crime he renders himself liable to the punishment prescribed by law. He suffers no injustice if the punishment imposed is within the statutory maximum and is not excessive having regard to all the circumstances. The notion of a criminal complaining that he experiences a sense of injustice, because he committed his crime on the faith of the current practice of the courts and then got more than he bargained for, strikes me as ludicrous. … I am firmly of the view that an offender has no cause for complaint, if he receives the sentence which is within the legal maximum and is fair and reasonable having regard to all the circumstances of the case, simply because courts have been in the habit hitherto of imposing somewhat lighter sentences."

[25] In my opinion the Judge was in error in 1998 in specifying a nominal sentence shorter than the sentence she would have imposed had she not imposed an indefinite sentence. However, it does not follow that the sentencing discretion exercised in December 2004 was tainted by error. Even if the order for indefinite imprisonment and the specifying of the nominal sentence formed part of a single sentencing decision with the consequence that the entire decision in 1998 was attended by error, an issue which need not be decided, that 1998 sentencing decision is not part of the 2004 decision that is the subject of this appeal. In substance, this appeal is to be determined on the basis of the appellant's complaint that the sentence of 14 years is manifestly excessive.

Sentencing Standards – General Principle

[26] The crime was committed in 1997. As it is today, the maximum penalty was life imprisonment. However, sentencing standards have changed since 1997.

In recent years sentences for sexual assaults, including the crime of sexual intercourse without consent, have increased. This raises the difficult question as to whether this Court should now sentence according to today's sentencing standards or whether it is obliged to apply the standards applicable in about 1997 - 1998.

[27] In *Radenkovic v The Queen* (1990) 170 CLR 623, the appellant had been sentenced in New South Wales at a time when a system of remissions existed. Remissions were subsequently abolished by the Sentencing Act 1989 (NSW) which introduced a new sentencing regime involving fixed and minimum terms. The amending Act provided for re-determination of sentences imposed prior to the commencement of the new scheme. The appellant's sentence was re-determined and the Crown appealed against the inadequacy of the new sentence. The Court of Criminal Appeal allowed the appeal.

[28] On an appeal concerned with the proper approach to be taken by the Court of Criminal Appeal to re-sentencing, Mason CJ and McHugh J addressed remarks to the proper approach of an appellate court when re-sentencing following a change in the applicable law between the initial imposition of sentence and re-sentencing (632):

> "In the context of an appeal against sentence, when a Court of Criminal Appeal is called upon to re-sentence because it has quashed the sentence initially imposed, considerations of justice and equity ordinarily require that the convicted person be re-sentenced according to the law as it stood at the time when he was initially sentenced, particularly when that law was more favourable to him

> than the law as it existed at the hearing of the appeal. The convicted person had an entitlement when he was sentenced by the sentencing judge to a sentence imposed in conformity with the requirements of the law as it then stood. He should not be denied that entitlement simply because the sentencing judge made a mistake, whether that mistake was altered in a sentence that was too harsh or too lenient. In our view it would require a very clear indication of statutory intention to displace that entitlement."

[29] The observations of Mason CJ and McHugh J were made in the context of significant changes in sentencing law which required that the appellant be re-sentenced. However, the underlying principle that considerations of "justice and equity" ordinarily require that sentence be imposed in conformity with the earlier law possesses immediate attraction as a fair and sound principle of general application. In a practical sense, sentencing standards comprise part of the sentencing law at the time of offending.

[30] On the other hand, as the remarks of King CJ in *Yardley v Betts*, to which I have referred demonstrate, there is no requirement in principle for a court to give a warning before increasing the range of penalties applicable to particular types of crimes. The absence of a binding principle requiring a court to give warning before increasing a prevailing standard of sentences for particular crimes was confirmed by the majority in *Poyner v The Queen* (1986) 60 ALJR 616 and both *Yardley v Betts* and *Poyner* were applied by this Court in *R v Lewfatt* (1993) 3 NTLR 41. In *R v D* (1997) 69 SASR 413, Doyle CJ acknowledged that "warnings do have a part to play in the sentencing process", but citing the authorities to which I have referred

observed that "it is not necessary for the court to give a warning before increasing the range of penalties for a particular type of offending (424).

[31] The question of which sentencing standards to apply when a significant delay has occurred between the offending and imposition of sentence has been considered on a number of occasions by the New South Wales Court of Criminal Appeal. In *R v Shore* (1992) 66 A Crim 37, the offender was arrested in 1974 but absconded while on bail. He was again arrested in 1990 and pleaded guilty to a number of offences. Faced with increases in the maximum penalties between 1974 and 1990, the sentencing Judge addressed the difficulties in the following terms (41):

> "Between 1974 and the present time, the maximum penalties provided for offences such as those with which I am required to deal, have increased markedly, for quite understandable reasons *and, moreover, judicial attitudes have strengthened, in the sense that far more severe sentences are now being imposed than was the case in 1974.*
>
> The solicitor appearing for the Crown conceded, properly in my view, that I must approach my present task in the light of the statutory maximum penalties applicable at the time of the offences. He did, however, as I understood him, contend that nonetheless, I should have regard to the intervening strengthening of judicial attitude. *I do not accept that contention.*
>
> In my opinion I should, so far as I am able to do so, seek to impose upon the offender, a sentence appropriate not only to the then applicable statutory maxima *but also to then appropriate sentencing patterns.* That is by no means easy, but in my view I must endeavour to do so." (my emphasis)

[32] In a judgment with which Mahoney JA and Hunt CJ at CL agreed, Badgery-Parker J expressly approved that statement (42):

> "That description of his Honour's task and the way in which the law required him to approach it was, with respect, completely correct …".

[33] The decision in *Shore* was made in the context of statutory increases in the maximum penalties. However, there were two limbs to the decision. First, the requirement that sentencing occur in the light of the maximum penalties applicable at the time of the offending. Secondly, that the strengthening of judicial attitudes in the interim period should be ignored and the offender be sentenced in accordance with sentencing patterns that existed at the time of the offending.

[34] *Shore* was subsequently applied in *R v Watson* [1999] NSWCCA 227 and *R v Moon* (2000) 117 A Crim R 497. However, in *R v PLV* (2001) 51 NSWLR 736, Spigelman CJ, with whom Simpson J agreed, rejected the proposition that sentence should be imposed in accordance with practices at the time the offence was committed (744):

> "[93] The applicant was sentenced to a period of two years with a very short non-parole period of three months. It was submitted that by reason of delay he was exposed to punishment as an adult and to a sentencing regime which it was submitted was 'harsher' than that which existed in New South Wales at the time the offences were committed. The Court was referred to no authority in support of the proposition that sentences should be in accordance with practices at the time an offence was committed, rather than in accordance with practices at the time of conviction. I see no reason why this Court should establish such a principle for the first time.
>
> [94] I do not understand how a Court would go about determining what it would have done twenty years before. The balance between the various objects of sentencing – deterrence, retribution, rehabilitation – does vary over time. The proposition for which the

> appellant contends is both artificial and inappropriate. Sentencing should be based on practices extant at the time of conviction."

[35] The decision in *PLV* was reached without reference to earlier authorities, including *Shore*. As a consequence of the conflicting authorities, in *R v MJR* (2002) 54 NSWLR 368, a specially convened five member New South Wales Court of Criminal Appeal considered the issue. Four of the Judges held that a court sentencing many years after the offence should endeavour to apply sentencing standards applicable at the time of the offending. In particular, their Honours overruled *PLV* and followed *Shore.*

[36] In the course of his judgment, Spigelman CJ observed (371):

> "Where the sentencing practices have increased by reason of greater salience being given to issues of general deterrence, eg, because of increased prevalence, the practice at the time of conviction would appear to be entitled to greater weight."

[37] Mason P dissented. It is noteworthy that Grove J, while agreeing with the Chief Justice, observed that uninhibited by prior authority he would have been minded to reach the same conclusion as the Chief Justice expressed in *PLV*. Sully J expressed a similar view that unconstrained by previous authority he would have been inclined to favour the view expressed in *PLV*. His Honour added that in his view the approach in *Shore* "entails in practice … a selectivity which is, to borrow from the Chief Justice in *R v PLV* (at 744), 'artificial and inappropriate.'" Sully J agreed with the judgment of the Chief Justice in *MJR*, but said that he wished to make it clear that he did so "only for the reason that the decision in *R v Shore* has stood unreversed

since 1993, and has been followed consistently in subsequent decisions of this Court which have considered the correctness in principle of the approach for which *R v Shore* stands as authority" (384).

[38] The decision of the majority in *MJR* has been consistently applied in New South Wales. It is subject to an important practical qualification elucidated by Howie J in *Moon* (511) whose observations were approved in *R v Lozanovski* [2006] NSWCCA 143 at [15]:

> "The nature of the criminal conduct proscribed by an offence and the maximum penalty applicable to the offence are crucially important factors in the synthesis which leads to the determination of the sentence to be imposed upon the particular offender for the particular crime committed. Even after taking into account the subjective features of the offender and all the other matters relevant to sentencing, such as individual and general deterrence, the sentence imposed should reflect the objective seriousness of the offence: … and be proportional to the criminality involved in the offence committed: … Whether the sentence to be imposed meets these criteria will be determined principally by a consideration of the nature of the criminal conduct as viewed against the maximum penalty prescribed for the offence.
>
> When sentencing an offender for offences committed many years earlier and where no sentencing range current at the time of offending can be established, the court will, by approaching the sentencing task in this way, effectively sentence the offender in accordance with the policy of the legislature current at the time of offending and consistently with the approach adopted by sentencing courts at that time."

[39] In *R v Lane* (1996) 135 FLR 7, the offence was committed in 1985 and the offender disappeared while on bail. Following his arrest ten years later he was sentenced and the sentencing Judge applied current sentencing

standards. In a judgment with which Olsson and Williams JJ agreed, Millhouse J observed (9):

> "This appellant stands to be punished by the standards of ten or more years ago when it all happened".

[40] In *R v Major* (1998) 70 SASR 488, the Court was concerned with a series of offences committed over a lengthy period of time dating back to 1984. Recognising that sentencing standards for the types of offences under consideration had "increased significantly in recent years", Olsson J cited *Lane* and observed that the "sentences fell to be arrived at in accordance with the sentencing environment as it existed at or about the time of commission of the offence" (498). Williams J expressed a similar view. However, Doyle CJ doubted whether it was appropriate to depart from the current sentencing standards, but reserved his view as to the proper approach noting that the issue required "careful consideration, in the light of a more detailed review of the authorities than took place in the present case" (490).

[41] In *D* the South Australian Court of Criminal Appeal reviewed sentences for unlawful sexual intercourse with children and determined that in future a heavier range of penalty should be applied. Subsequently in *R v Liddy (No 2)* (2002) 84 SASR 231 that Court had occasion to consider the application by a sentencing Judge of the standards identified in *D* to offences committed many years prior to the delivery of the decision in *D*. Mullighan J ([7] – [9]) and Williams J ([147]) were of the view that the higher standard applied

only to offences committed after the decision in *D*. Gray J did not finally decide the issue having determined that an earlier sentencing standard had not been established and that the sentencing Judge had not treated *D* as prescriptive.

[42] In *R v Kench* (2005) 152 A Crim R 294, Doyle CJ, with whose reasons Besanko and Vanstone JJ agreed, determined that the sentencing standard identified in *D* should be imposed only in respect of offences committed after the decision in *D*, but his Honour left open the possibility that the new standard could be applied to earlier offences if "good grounds" to do so existed. The Chief Justice observed [27]:

> "To apply the standard of sentencing foreshadowed in *D* to offences that occurred before that decision, amounts to a retrospective change in the approach to sentencing. It also produces the result that an offender sentenced today for offences committed before 1997 [the date of the decision in *D*], is treated more harshly than an offender whose like offences were committed before 1997, but who was sentenced before the decision in *D*. *It is open to the Court to apply a newly formulated sentencing standard to offences committed before the change occurs, but there should be good grounds to ignore the considerations just referred to by me, before one does so.* To the extent that the need to deter offenders was a fact influencing the decision in *D*, that element of deterrence is achieved by applying the highest standard of sentencing to persons who offended after that decision." (my emphasis)

[43] In *R v M, WJ* (2005) 92 SASR 371, Sulan J, with whom Debelle and Besanko JJ agreed, reviewed a number of the New South Wales and South Australian authorities to which I have referred. Noting that it was not necessary to finally decide the question as he had concluded that no discernable pattern of sentencing at the time of the offending had been

established, his Honour left open a qualification to the general approach applying sentencing patterns at the time of the offending [47]:

> "However, I agree with the Chief Justice that there can be circumstances where it is appropriate to have regard to current sentencing standards in approaching the sentence of a particular offender. There can be no inflexible rule that sentencing patterns at the time of the offending are the starting point for determining an appropriate sentence".

[44] It is apparent from this summary of various authorities and views expressed by Judges in different jurisdictions that there are competing considerations and a flexible approach is required to satisfy both general principle and practical issues. On one view, the discretion of a sentencing court should not be fettered to the application of sentencing standards of years past which have subsequently been recognised as inadequate and which, if applied to current circumstances, will result in inconsistent sentences and will fail to achieve the current objects of sentencing. As King CJ said in the remarks in *Yardley v Betts* to which I earlier referred, "the notion of a criminal complaining that he experiences a sense of injustice, because he committed his crime on the faith of the current practice of the courts and then got more than he bargained for, strikes me as ludicrous …". On the other hand, as Doyle CJ noted in *Kench*, to apply a newly created standard to offences that occurred before the decision announcing such a new standard was delivered "amounts to a retrospective change in the approach to sentencing" and produces the result that an offender sentenced after the change is treated more harshly than an offender sentenced before the change notwithstanding

that their offences were both committed at about the same time. Equality of treatment of offenders is an important consideration.

[45] As is not unusual in the criminal law, the considerations founded in public policy do not all point in the same direction. There is a tension between those considerations which requires resolution through the application of fundamental principles of "justice and equity" while retaining sufficient discretion in a sentencing court to resolve practical issues which necessarily arise when sentencing many years after the commission of an offence. Balancing the competing interests, and applying those fundamental principles, in my opinion, speaking generally, when changing sentencing standards have resulted in penalties increasing between the commission of the crime and the imposition of sentence, and in circumstances where the delay is not reasonably attributable to the conduct of the offender, a sentencing court should, as far as is reasonably practicable, apply the sentencing standards applicable at the time of the commission of the offence. As Mason CJ and McHugh J said, the offender has "an entitlement" to be sentenced "in conformity with the requirements of the law as it then stood".

[46] The view I have expressed is subject to important qualifications. First, the general principle is not an "inflexible rule". If good grounds exist, it may be appropriate to apply current sentencing standards. Secondly, the general principle can be applied only if it is reasonably practicable to do so. If the available evidence fails to establish a change in sentencing standards

between the commission of the offence and the time of sentencing, the court will be left with no alternative but to apply current standards.

[47] There is a third qualification. Statutory changes in sentencing regimes can complicate the application of the general principle as a matter of practicality and they might dictate that the general principle has been qualified or is inapplicable. In the circumstances of the appellant, the question to be determined is whether the general principle has been qualified in any way by the legislative scheme of indefinite sentences which necessarily involves deferring the fixing of a determinate sentence for the crime committed until discharge of an indefinite sentence.

General principle qualified by legislative scheme

[48] The principles which govern the exercise of a sentencing discretion when sentencing for a criminal offence, and the purposes for which such sentences are imposed, stand in stark contrast to the principles underlying and purposes of the scheme authorising the imposition of indefinite sentences. This contrast exists notwithstanding that both are concerned with the protection of the public.

[49] At the heart of sentencing for a criminal offence is the requirement that the sentence be proportionate to the gravity of the criminal conduct. As the High Court observed in *Chester v R* (1998) 165 CLR 611 at 618, "the fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely

for the purpose of extending the protection of society from the recidivism of the offender … ". The legislative scheme for indefinite sentences creates an exception to this fundamental principle. The scheme vests in the court an exceptional power which permits the court to impose a sentence of greater severity than a sentence which is proportional to the gravity of the criminal offending and, subject to the discharge of an indefinite sentence, to later impose sentence for the crime committed.

[50] The only purposes for which a court may sentence an offender for a criminal offence committed are specified in s 5(1) of the Act. In arriving at sentence, the court is required to have regard to the matters set out in s 5(2). However, when a court is considering the imposition of an indefinite sentence, the court is not concerned with the purposes of sentence identified in s 5(1). Nor is it concerned to have regard to the matters set out in s 5(2). The court is concerned solely with determining whether the offender has been convicted of a violent offence and whether it is satisfied that because of the limited factors identified in s 65(8) the offender is a serious danger to the community. The matters to which the court is directed to have regard pursuant to s 65(9) fall far short of the factors identified in s 5(2).

[51] The purposes of sentencing identified in s 5 can be summarised as punishment, rehabilitation, personal and general deterrence, demonstrating community disapproval and protection of the community. An indefinite sentence is concerned with protection of the community, but it is not a sentence imposed for the purpose of punishing the offender, rehabilitation of

the offender, personal or general deterrence or community disapproval. The purpose of an indefinite sentence is "preventative detention … in the interests of community protection": *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 per Gleeson CJ [19]. As Gummow J observed, "the detention which the Act provides is preventative, not punitive, in nature" [68].

[52] In *Fardon,* the High Court was concerned with the provisions of the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld). The appellant had been sentenced to 13 years imprisonment for rape. After serving eight years, he was released on parole, but within a short time of release he committed further sexual offences for which he was subsequently sentenced to 14 years imprisonment. Prior to the expiration of the sentence, an application was made to the Supreme Court for an order that the appellant be detained in custody for an indefinite period.

[53] In the context of provisions which required that the offender serve a sentence of imprisonment for the crime before being detained in custody for an indefinite period, Gummow J observed that the continuing detention order after service of the sentence for the crime committed did not punish the offender twice or increase the punishment for the offences of which he had been convicted [74]. The Northern Territory scheme is different because both the imposition and service of a sentence for the crime committed are deferred if an indefinite sentence is imposed. Unless an indefinite sentence is discharged, the offender is never sentenced for the

crime. Sentencing for the crime only occurs upon discharge of the indefinite sentence.

[54] As with the Queensland scheme, an offender in the Northern Territory is not punished twice. The indefinite sentence is not imposed as a punishment for the crime. While it is a pre-condition of the imposition of an indefinite sentence that the offender be convicted of a relevant violent offence, and while it might be said that in fact the imposition of an indefinite sentence punishes an offender, the purpose of the indefinite sentence is not to punish the offender for committing the crime. The purpose is protection of the community through preventative detention.

[55] In requiring the discharge of an indefinite sentence unless the court is satisfied to a high degree of probability that an offender is still a serious danger to the community at the time of review, the Legislature has recognised that preventative detention should cease if the court is not so satisfied. In those circumstances, specific direction is given to the court to sentence the offender under the Sentencing Act "for the violent offence for which the indefinite sentence was imposed": s 74(1)(b). When the sentencing Judge came to sentence the appellant in December 2004, her Honour was required to impose a sentence proportionate to the gravity of the crime committed and to apply s 5 of the Act. In substance her Honour was, for the first time, punishing the appellant for the crime he committed in 1997. Pursuant to s 74(2), the Judge was required to impose a sentence not less than the nominal sentence. Section 74(3)(a) and (b) specifically

provide that the sentence imposed by the Judge "is taken to have started on the day the indefinite sentence was originally imposed" and "takes the place of the indefinite sentence".

[56] Analysed in this way, it is apparent that the Legislature intended that punishment for the commission of the crime should be deferred. The scheme recognises that an offender might never be punished through the imposition of a sentence proportionate to the crime committed. Alternatively, punishment might be delayed for anything between a short period and many years. Unlike the Queensland scheme considered in *Fardon* which has the effect of requiring an offender to serve a period of preventative detention in addition to the period served by way of punishment for the crime, the Northern Territory scheme works to the advantage of the offender to the extent that the period served in preventative detention is retrospectively "converted" into time served by way of punishment for committing the crime.

[57] The competing considerations are apparent. On one view, it can be said that it is unfair to an offender to impose sentence many years after the offending according to increased standards which were not applicable at the time the crime was committed, particularly in circumstances where the offender is not directly responsible for the delay. Such an approach will result in an offender receiving a heavier sentence than would have been imposed if the determinate sentence for the crime had been imposed rather than an indefinite sentence. In the case of co-offenders of otherwise equal

culpability in the commission of the crime, it could result in sentences so disparate as to amount to an error of principle had they been imposed at about the same time. To apply the increased standards amounts to a retrospective application of those standards to crimes committed many years earlier.

[58] On the other hand, the legislative scheme necessarily contemplating that punishment for the crime might be delayed for many years, it can be said with considerable force that it is unlikely that the Legislature intended to constrain the exercise of the sentencing discretion by requiring that the court undertake the artificial process of applying past sentencing standards which have been rejected as inadequate and which are divorced from the requirements of the community that exist at the time of sentencing. In the intervening years, community attitudes to the type of crime committed by the offender, and to questions such as the effects on victims and the role of punishment and retribution, may have changed significantly. If rejected standards are applied, the sentence will be inconsistent with the current level of sentences giving the undesirable appearance of inconsistency and promoting the view that the court has failed to provide the level of protection expected according to contemporaneous standards.

[59] It can also be said with considerable force that the fundamental principle identified by Mason CJ and McHugh J in *Radenkovic* that an offender is entitled to be sentenced according to the law as it stood at the time of offending has necessarily been qualified by the legislative scheme.

Although the appellant was not sentenced in 1998 for committing the crime, he was afforded his entitlement according to the law as it stood at that time when an indefinite sentence was imposed and a nominal sentence was fixed. The appellant's later entitlement is to have the indefinite sentence discharged and a sentence by way of punishment for the crime imposed with retrospective effect as to service of the sentence. In my view, the scheme did not endow the appellant with an entitlement that should the indefinite sentence be discharged at some unknown time in the future, possibly many years after the commission of the offence, a determinate sentence will be imposed in conformity with the sentence standards that existed at the time of the offending. On this view, through his violent conduct and disposition, the appellant caused his indefinite incarceration and the deferral of punishment. He cannot complain if, prior to the imposition of sentence as punishment for his offending, sentencing standards for the type of crime committed have increased.

[60] It is also appropriate to recognise that notwithstanding the possible delay of many years in the imposition of sentence for the crime, the Legislature chose to require that the sentence be not less than the nominal sentence, but chose not to curtail the exercise of the discretion to impose a sentence longer than the nominal sentence. The minimum period applies regardless of the fact that, at the time of sentence, it is to be assumed that the evidence is incapable of proving to a higher degree of probability that the offender continues to be a serious danger to the community. The minimum applies

notwithstanding that in the intervening period of custody pursuant to the indefinite sentence the offender may have been successfully rehabilitated. From a practical point of view, a construction that requires the court to apply sentencing standards of many years earlier is likely to create the difficulty of ascertaining the relevant standard at the time the crime was committed. Although the sentencing Judge will have a guide in the length of the nominal sentence, the value of the guide obviously depends upon the Judge specifying the nominal sentence acting in accordance with the legislation and sentencing standards then applicable. Necessarily, the nominal sentence can be a guide only because it represents the view of the individual Judge and it cannot assist the sentencing Judge many years later as to the range of sentences appropriate at the time the nominal sentence was specified.

[61] Finally, regard must be had to the direction in s 74(1)(b) that when imposing the determinate sentence, the Supreme Court "shall … sentence the offender under [the Sentencing Act] for the violent offence for which the indefinite sentence was imposed". This is a direct instruction to the court to apply the provisions of the Act at the time of imposing the determinate sentence. The Legislature has chosen to apply the sentencing law found in the Sentencing Act at the time of the imposition of sentence rather than the sentencing law as it stood at the time the offence was committed.

[62] Having regard to the individual provisions and scheme in its entirety, and to the principles and competing considerations to which I have referred, in my

view, upon a proper construction of the statutory scheme, the effect of the scheme is to qualify the general principle that a sentencing court should apply, as far as is reasonably practicable, the sentencing standards applicable at the time of the commission of the offence. The Legislature did not intend that the court undertake an artificial process, divorced from the current law and requirements of the community, of punishing an offender by endeavouring to apply standards that have been rejected as inadequate. Alternatively, if the contrary view is taken that the scheme does not qualify the general principle, in my opinion, by reason of the nature and effect of the statutory scheme, "good reason" exists for departing from the general principle.

[63] For these reasons, in my view when a court is required to impose sentence following the discharge of an indefinite sentence, the court is required to apply the sentencing standards that exist at the time of imposing the sentence.

Sentence

[64] The sentence of 14 years is undoubtedly a heavy sentence. The Judge allowed a discount for the plea of guilty in the order of 10 – 15 percent which means that her Honour's starting point before allowance for the plea was in the order of 16 years. As there is no apparent error in the approach of the Judge, the question to be determined is whether the starting point and sentence are so outside the proper range of the sentencing discretion as to be

manifestly excessive and demonstrate that her Honour must have erred in some unspecified manner.

[65] The appellant's crime was particularly serious. The victim was only eight years of age and was in a public place which left him vulnerable to the predatory activities of the appellant. Notwithstanding the attempts of the victim to escape, in effect the appellant abducted the victim and took him to a deserted area for the purposes of the sexual assault. In that way, there was a significant element of premeditation. The appellant committed the crime notwithstanding the victim's distress.

[66] There were no mitigating circumstances attending the commission of the crime. In addition, there were no personal circumstances capable of attracting mitigation. As Angel J noted in the course of the appeal, when the appellant was under the influence of alcohol he was violent and aggressive and unable to control his sexual instincts. In the past he had refused parole on a number of occasions because he would not accept vigilant supervision. There was nothing in the appellant's history to indicate that he had the capacity or the will to change his ways.

[67] The Judge was required to sentence on the basis of the information before her concerning the appellant's conduct and progress towards rehabilitation since 1998. Her Honour made the following findings:

- The appellant had undertaken courses in education and music and courses designed to develop his skills. He had completed a range of courses

designed to address those aspects of his behaviour which had led him to be a frequent offender. In particular, the appellant had undertaken programs to address his problems with alcohol.

- The courses undertaken by the appellant were very positive steps towards rehabilitation.

- The appellant had indicated he was prepared to participate in recommended offence related and offence specific treatment.

- The appellant had made some progress in addressing his behavioural problems, but there was an ongoing need for supervision.

- The appellant was still in the medium – high risk of re-offending.

- The appellant has accepted that it would not be appropriate to return to Ali Curung. Upon his release the appellant planned to move to Darwin where he has family members who are able to provide support.

- The appellant was prepared to accept supervision on parole.

[68] The sentence of 14 years was imposed in December 2004. At the invitation of this Court, the appellant placed additional and up to date material before the court concerning the appellant's personal circumstances and progress towards rehabilitation. The Court has been provided with a very detailed and helpful psychological assessment together with a prisoner services report summarising the numerous programs in which the appellant has

participated and studies undertaken by the appellant during his period of incarceration.

[69] The appellant is a 46 year old initiated Warlpiri man. He was born at Ali Curung and is the fourth of eight children. He grew up and was educated at Ali Curung. It appears that when he was a child the appellant's parents were heavy drinkers and his mother was violent towards his father. As a child the appellant was regularly in trouble and often got into fights as "the leader of a gang". He gave up "his gang" in his teens when he commenced drinking.

[70] The appellant told the psychologist that he began drinking alcohol at the age of 16. Eventually a cycle developed of drinking flagon wine and port and getting drunk every "pay day". The appellant emphasised to the psychiatrist that he only ever offended after drinking. However, a 1998 report of a psychiatrist noted that the contention that all the difficulties of offending were simply attributed to alcohol abuse is "simplistic". The psychiatrist noted that while alcohol consumption is relevant in disinhibiting any tendencies towards aggression, it fails to explain why "the person may be afflicted by the underlying aggressive proclivity".

[71] The appellant told the psychologist that after every offending he felt guilty and ashamed. He freely acknowledged having a bad temper and a short fuse and told the psychologist that he can "stay angry for a couple of days". The psychologist drew the following conclusion:

> "The description given by Mr Green indicates that anger pervades his emotions. When aroused he either reacts outwardly with aggression and violence or inwardly with shame and self loathing. His acceptance and remorse for his offences further emphasise this negative self perception and emotional volatility".

[72] The psychologist dealt with the appellant's history of offending and it is unnecessary to canvass those details. He also elicited from the appellant a detailed background of his relationship with his ex wife which was marked by considerable violence.

[73] As a child the appellant was raped during separation from his family and while staying in single men's quarters in preparation for initiation ceremonies. The psychologist observed:

> "Mr Green conceded that he was angry when he assaulted people and when he sexually assaulted the children. He conceded that his anger and constant recollection of his humiliation at being raped was why he sodomised both his male and female victims."

[74] Shortly after being raped, the appellant was involved in a tractor accident in which he was severely injured and saw his best friend crushed to death. As a consequence of his subsequent hospitalisation s the appellant missed the "sorry business" for his friend and his initiation was delayed for a year. He experiences misplaced guilt for the accident and grief for his lost friend. This is compounded by the recollection of shame and teasing he experienced for missing his initiation into manhood with his peers.

[75] Over the years the appellant has been involved in incidents at the prison. It appears that the bulk of these occurred prior to the successful application in

2004 for the discharge of the indefinite sentence. The appellant has noted that his behaviour changed when he realised he had a chance at parole. The psychologist commented:

> "It is notable that Mr Green has demonstrated sufficient self-awareness to demonstrate restraint when it is in his long-term interests. It demonstrates that, when sober, he has the capability, level of insight and future orientation to override his violent impulses".

[76] The psychologist administered a number of psychometric tests, but cautioned that none of the tests have established norms for Aboriginal Australians and the results must be viewed with caution. From those tests, the psychologist concluded:

> "Psychometric testing has shown that Mr Green carries a very high level of anger that is expressed in a strong outwardly aggressive manner. To counter the situation, Mr Green dedicates a high level of energy to suppressing his anger and maintaining his behaviour. People with this pattern of responses may exhibit periods of violent and aggressive behaviour followed by a great deal of self-punishing guilt and repression.
>
> Mr Green produced a very low score for psychopathy including a score of zero in the Factor 1 items measuring "selfish, callous, and remorseless use of others". STATIC and STABLE instruments show Mr Green as being a high and moderate risk of sexual recidivism respectively."

[77] The psychologist drew the following conclusions:

> "Risk factors include his untreated traumatic injury manifesting itself as ongoing, barely controlled anger and his high level of institutionalisation. These factors contribute to high levels of stress and make him vulnerable to further stressors in the community.

> After consideration of these factors, I regard Mr Green to pose a moderate risk of re-offending. This risk would be ameliorated if he was to receive professional treatment for his psychological injury and an effective, considered reintegration plan was undertaken."

[78] During his period of incarceration, the appellant has undertaken the sex offender treatment program in Alice Springs. In a report dated 23 May 2006, the principal psychologist states that the appellant was able to complete and return all tasks required of him with little or no assistance and his group participation was good. The psychologist concluded that the appellant appears to have gained a "good level of insight into his offending behaviour and demonstrated adequate level of understanding of the concepts presented". The appellant showed motivation to achieve an offence-free lifestyle. The psychologist reached the following conclusion:

> "Prior to Mr Green's program participation, he was considered as a 'Medium-High risk offender based upon his score on the Static-99'. It is the writer's opinion that Mr Green would still appear to be falling in the Medium-High risk category of re-offending if he does not actively seek professional assistance to address his excessive substance use and commit to change his lifestyle upon release from incarceration.

[79] From the material provided to this Court, it is apparent that the appellant has taken significant steps in rehabilitation, but it is equally apparent that he has a long way to go before he is fully rehabilitated and no longer poses a risk to the community, particularly to women and children.

[80] Personal deterrence remains a significant factor in the exercise of the sentencing discretion. Given the appellant's appalling record of prior

offending and the assessment of the risk of re-offending, and bearing in mind that previous terms of imprisonment have not acted to deter the appellant, the sentence must reflect the importance of this element.

[81] General deterrence is also a factor of particular importance. Crimes of violence, including sexual violence, against children in Aboriginal communities have been prevalent for many years. The victims are particularly vulnerable. The law must do what it can to protect these vulnerable victims.

[82] In addressing the length of the sentence, counsel for the appellant referred to a number of authorities which she suggested demonstrated that the sentence is manifestly excessive. As has often been said, however, there is no tariff applicable to crimes of sexual assault, including the crime of which the appellant was convicted. Individual cases are of limited assistance.

[83] Counsel relied particularly upon the recent decisions of this Court in *R v Riley* [2006] NTCCA 10 and *R v Inkamala* [2006] NTCCA 11. Both were Crown appeals against sentences imposed for the crime of sexual intercourse without consent. The victims were aged two years and seven months respectively. Each victim suffered serious injuries. The offenders were aged 26 and 18 at the time of the offending. *Riley* had a record of prior offending, but no convictions for sexual offending or offences of violence. At the age of 15 years *Inkamala* had committed the crime of attempted rape.

[84] In *Riley*, after allowance for the principle of double jeopardy applicable to re-sentencing following successful Crown appeals, and after appropriate reduction for the plea of guilty, a sentence of seven years imprisonment was imposed. I indicated that had I not been constrained by the principle of double jeopardy, and before making allowance for the pleas of guilty, I would have regarded a sentence of 12 years imprisonment as appropriate for the crime of sexual intercourse without consent. In *Inkamala*, after allowance for the principle of double jeopardy and plea of guilty, a sentence of nine years imprisonment was imposed. I indicated that having regard to the principle of double jeopardy, but before making allowance for the plea of guilty, I would have regarded a sentence of 11 years as appropriate.

Conclusion

[85] The sentence is undoubtedly a severe sentence, but I am not persuaded that it is manifestly excessive. The crime was particularly serious and there are no circumstances, either personal to the appellant or accompanying the commission of the crime, which are capable of mitigating the gravity of the appellant's offending. As I have said, both general and personal deterrence are of particular importance. There was a range of sentences properly available to the sentencing Judge and I am not persuaded that the sentence is outside that proper range. I would dismiss the appeal.

Angel J:

[86] I agree that this appeal by leave against severity of sentence should be dismissed.

[87] I agree that upon a proper construction of the Statutory Scheme relating to indefinite sentences for violent offenders under Division 5 Sub–division 4 Sentencing Act (NT) sentences imposed pursuant to s 74(1)(b) should be based on sentencing practices extant as at the time of passing sentence rather than at the time of the commission of the offence or at the time the indefinite sentence was imposed.

[88] The lapse of time between the appellant's offending in 1997 and the learned sentencing judge passing sentence in 2004 was attributable to the criminal conduct of the appellant and his lawful incarceration as a consequence and there was no occasion for the learned sentencing judge to have applied 1997 sentencing standards.

[89] The submission that 1997 sentencing standards ought to have been applied principally rested on the decision of the New South Wales Court of Criminal Appeal in *R v MJR* (2002) 54 NSWLR 368. In that case a majority held that sentencing should be based on practices extant as at the time of the commission of the offence rather than at the time of conviction. The Court followed *Shore* (1992) 66 A Crim R 37 and declined to follow *R v PLV* (2001) 51 NSWLR 736. In *R v PLV* the Court held sentencing should be based on practices extant at the time of conviction.

[90] In *R v MJR*, at 370 [7], Spigelman CJ said "the principle approved in *R v Shore* – that a sentencing judge should have regard to the range of sentences imposed at the time of the commission of the offence" had received approval in subsequent cases. *Shore* and *R v PLV* were described by Mason P (dissenting) as "competing authorities".

[91] I, with respect, doubt that a broad inflexible principle "that a sentencing judge should have regard to the range of sentences imposed at the time of the commission of the offence" was approved in *Shore*. In that case Badgery–Parker J with whom Mahoney JA and Hunt CJ at CL agreed, expressly approved the following statement by a trial judge:

> "In my opinion I should, so far as I am able to do so, seek to impose upon the offender a sentence appropriate not only to then applicable statutory maxima but also to then appropriate sentencing patterns. That is by no means easy, but in my view I must endeavour to do so."

However that statement must be seen in context. In *Shore* the statutory maximum penalty had increased during the period between the date of the offending and the date of sentencing. That being the case the only sentencing patterns possibly relevant were those under the applicable former statutory regime. *Shore* is authority for the proposition that in sentencing one is to look at the maximum penalty applicable to the offending and have regard to sentencing practices given that maximum penalty. *Shore* is not authority for the proposition – or so it seems to me as presently advised, and the matter was not fully argued before us – that one inflexibly takes account of former sentencing practices and ignores current sentencing practices

where the maximum statutory penalty applicable has not changed. *Shore* does not, it seems to me, conflict with the decision in *R v PLV* or the reasoning of Spigelman CJ in that case.

[92] In *R v PLV* Spigelman CJ said at 744 [93] and [94]:

> "[93] The applicant was sentenced to a period of two years with a very short non–parole period of three months. It was submitted that by reason of delay he was exposed to punishment as an adult and to a sentencing regime which it was submitted was 'harsher' than that which existed in New South Wales at the time the offences were committed. The Court was referred to no authority in support of the proposition that sentences should be in accordance with practices at the time an offence was committed, rather than in accordance with practices at the time of conviction. I see no reason why this Court should establish such a principle for the first time.
>
> [94] I do not understand how a Court would go about determining what it would have done 20 years before. The balance between the various objects of sentencing – deterrence, retribution, rehabilitation – does vary over time. The proposition for which the appellant contends is both artificial and inappropriate. Sentencing should be based on practices extant at the time of conviction."

[93] In *MJR*, Mason P (dissenting) agreed with *PLV*, as did Grove and Sully JJ, each of whom regarded themselves as constrained by prior authority to decide otherwise. The conclusion is inescapable that but for their consideration of *Shore* the judges comprising the majority of the court in *MJR* would have approved of the decision in *PLV*.

[94] It is unnecessary on the present appeal to decide the correctness of the competing views. I note that in *MWJ* (2005) 92 SASR 371, Sulan J, Debelle and Besanko JJ agreeing generally, after discussing the New South Wales cases, said at 380 [47]:

> "[47] However, I agree with the Chief Justice that there can be circumstances where it is appropriate to have regard to current sentencing standards in approaching the sentence of a particular offender. There can be no inflexible rule that sentencing patterns at the time of the offending are the starting point for determining an appropriate sentence."

[95] To have regard to current as opposed to former sentencing standards is, it seems to me, consistent with what King CJ said In *Yardley v Betts* (1979) 22 SASR 108 at 113–114:

> "It was argued before us that an offender who has to suffer a penalty greater than the hitherto observed norm would be justified in entertaining a sense of injustice. I cannot accept the argument so formulated. When a person commits a crime he renders himself liable to the punishment prescribed by law. He suffers no injustice if the punishment imposed is within the statutory maximum and is not excessive having regard to all the circumstances. The notion of a criminal complaining that he experiences a sense of injustice, because he committed his crime on the faith of the current practice of the courts, and then got more than he bargained for, strikes me as ludicrous. Is the same criminal justified in entertaining a sense of injustice, if the warming, although given, was not published by the media or not by the section of the media which he sees or hears? He might perhaps have been out of the State when the warning was given. I am firmly of the view that an offender has no cause for complaint, if he receives a sentence which is within the legal maximum and is fair and reasonable having regard to all the circumstances of the case, simply because courts have been in the habit hitherto of imposing somewhat lighter sentences."

See also *Jabaltjari* (1989) 64 NTR 1 at 32, 33; *Lewfatt* (1993) NTLR 41at 44.

[96] The maximum penalty for an offence fixed by Parliament indicates the policy of the legislature at the time the offence was committed. That maximum penalty prescribes the limit of the Court's discretion. In assessing

the criminal conduct in question it is the Court's task to consider where in a range of conduct covered by the statutory offence a particular criminal conduct committed by the offender falls: *Baumer* (1988) 166 CLR 51 at 57; *Ibbs* (1987) 163 CLR 447 at 452. As Howie J said in *Moon* (2000) 117 A Crim R 497 at 510–511, this will generally indicate the appropriate range of sentences available which will reflect the objective seriousness of the offence committed and set the limits within which a sentence proportional to the criminality of the offender will lie. This "steering by the maximum", as Walters J called it in *Nash v Whitford* (1972) 2 SASR 333 at 334, is flexible and appropriate and a surer guide than past and since rejected sentencing patterns.

[97] The imposing of a sentence pursuant to s 74(1)(b) Sentencing Act (NT) upon the appellant for rape was to be done in accordance with sentencing practices at the time of passing sentence. The sentence under appeal was not manifestly excessive having regard to those practices and the appeal should be dismissed.

Southwood J:

[98] I agree with the Reasons for Decision of Martin CJ.
