R v Wilson [2011] NTCCA 9

PARTIES:	THE QUEEN
	v
	WILSON, Geoffrey
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 6 of 2011
DELIVERED:	23 AUGUST 2011
HEARING DATES:	12 AUGUST 2011
JUDGMENT OF:	RILEY CJ, KELLY & BLOKLAND JJ
APPEALED FROM:	BARR J

CATCHWORDS:

CRIMINAL LAW – Crown appeals – double jeopardy – whether sentence manifestly inadequate – appeal dismissed.

Criminal Code, s 411(3) & s 414(1A)

R v JW (2010) 77 NSWLR 7, applied.
Director of Public Prosecutions v Chatters [2011] TASCCA 8; *Director of Public Prosecutions (Cth) v De La Rosa* (2011) 273 ALR 324; *Director of Public Prosecutions v Karazisis* [2010] VSCA 350; *R v Tait* and Another (1979) 46 FLR 386, considered.
JKL v The Queen [2011] NTCCA 7; *Kelly v R* (2000) 10 NTLR 39; *Liddy v R* [2005] NTCCA 4; *Pappin v R* [2005] NTCCA 2; *Stuart v R* [2010] NTCCA 16, followed.

REPRESENTATION:

Counsel:

Appellant:	R Coates, S Robson
Respondent:	E Sinoch

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Central Australian Aboriginal Legal Aid Service

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

R v Wilson [2011] NTCCA 9
No. CA 6 of 2011

BETWEEN:

THE QUEEN
Appellant

AND:

GEOFFREY WILSON
Respondent

CORAM: RILEY CJ, KELLY & BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 23 August 2011)

Riley CJ:

[1] This is a Crown appeal against sentence. On 1 March 2011 the respondent pleaded guilty to having unlawfully entered a dwelling house at night with intent to commit the crime of stealing. He also pleaded guilty to having had sexual intercourse by digital penetration with the female occupant of the house without her consent. On 24 May 2011 the respondent was sentenced. In relation to the unlawful entry he was sentenced to imprisonment for a period of four months. In relation to the offence of sexual intercourse without consent he was sentenced to imprisonment for a period of two years and four months. The sentences were ordered to be served concurrently.

[2] The Crown appeals as of right on a number of grounds including that the head sentences were manifestly inadequate in all the circumstances of the case.

The offending

[3] The offending occurred at Yuendumu on 10 October 2007. At that time the respondent was aged 18 years and six months. The victim, who was then aged 59 years, was a schoolteacher in the community.

[4] The unlawful entry occurred at approximately 4:30 am when the respondent, who was intoxicated, entered the house occupied by his victim with the intention of stealing wine. He entered through closed but unlocked security and front doors. The victim was asleep in her bedroom lying face down. The respondent placed his hand on the foot of her bed while searching under the bed for wine. He then positioned himself on the bed near or over the victim and inserted a finger into her anus. She awoke, leapt up and shouted. The respondent then left the premises.

[5] The victim was unable to identify her assailant, however fingerprints were obtained from the foot of her bed. Almost 2 years later, in September 2009, the respondent was arrested in Western Australia for driving offences. He was found to have fingerprints matching those discovered on the bed of the victim. At interview he admitted to having entered the victim's home in 2007, looking for wine. He did not admit the digital penetration but did admit to touching the victim.

[6] At the time of sentencing the respondent had a conviction for an offence contrary to s127 of the *Criminal Code* particulars of which were that he, as an 18 year old, had engaged in sexual intercourse with a girl under the age of 16 years.

[7] The respondent entered a late plea to the offences. The indication of a willingness to enter a plea came on the day that the victim was scheduled to record her evidence. Subsequent to the offending she had moved to Jordan. She was in Australia at the time of the hearing and travelled to Alice Springs for the purpose of giving evidence. She did not have to give evidence.

Crown Appeals

[8] This is the first occasion on which this Court has had the opportunity to consider the effect of s 414(1A) of the *Criminal Code* which commenced operation on 27 April 2011. The legislation was introduced following recommendations made to the Council of Australian Governments and to the Standing Committee of Attorneys-General in 2007.[1] Similar, but differently worded, provisions exist in Western Australia, New South Wales, Victoria, and Tasmania. The provisions in those jurisdictions address the same broad issue.

[9] The right of the Crown to appeal against any sentence with respect to a crime is conferred by s 414(1)(c) of the *Criminal Code*. Section 411(4)

[1] Second Reading Speech on the *Criminal Law Amendment (Sentencing Appeals) Bill* 2011.

provides that the Court, if it is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefore and in any other case shall dismiss the appeal.

[10] With effect from 27 April 2011 s 414(1A) of the *Criminal Code* provided:

> (1A) In exercising its discretion on an appeal made under subsection (1)(c) involving a sentence imposed after the commencement of this subsection, the Court must not take into account any element of double jeopardy involving the respondent being sentenced again when deciding whether to do either or both of the following:
>
> (a) allow the appeal;
> (b) impose another sentence.

[11] The nature of double jeopardy was addressed in the Northern Territory case of *R v Tait* [2] where the Court (Brennan, Deane and Gallop JJ) observed:

> Although an error affecting the sentence must appear before the appellate court will intervene in an appeal either by the Crown or by a defendant, a Crown appeal raises considerations which are not present in an appeal by a defendant seeking a reduction of his sentence. Crown appeals have been described as cutting across "time-honoured concepts of criminal administration". A Crown appeal puts in jeopardy "the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal". The freedom beyond the sentence imposed is, for the second time, in jeopardy on a Crown appeal against sentence. It was first in jeopardy before the sentencing court. (References omitted)

[12] In the second reading speech the Attorney-General described the concept of double jeopardy for the purposes of the legislation in the following terms:

[2] *R v Tait* and Another (1979) 46 FLR 386 at 388.

> The principle of sentencing double jeopardy provides that when an appeal court decides whether to allow a prosecution appeal against sentence and to exercise its discretion to re-sentence an offender, it is required to take into account the offender's exposure to a type of double jeopardy; namely, that the offender has to undergo sentencing on the second occasion for the same offending.

[13] The Attorney-General stressed that the amendment was not intended to affect the underlying principles in relation to prosecution appeals, including that prosecution appeals should be rare. It was observed that an appellate court would only intervene where sentencing error is identified and, even if error is established, the discretion vested in the Court to refuse to intervene remains.

[14] Similar provisions have been the subject of consideration in a number of cases around Australia. Notwithstanding differences in the wording of the relevant sections, a degree of consistency of application has emerged.

New South Wales

[15] In the New South Wales the relevant provision is section 68A(1) of the *Crimes (Appeal and Review) Act* 2001 which provides:

> (i) An Appeal Court must not:
>
> (a) dismiss a prosecution appeal against sentence, or
>
> (b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate,
>
> because of any element of double jeopardy involved in the respondent being sentenced again.

[16] The operation of this provision was considered by a five-member bench in *R v JW*.[3] Spigelman CJ analysed the provision in terms with which Allsop P, McClellan CJ at CL, Howie J and Johnson J agreed. In so doing his Honour, for present purposes, equated double jeopardy with "the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject". Following his detailed analysis his Honour concluded:[4]

> The following propositions emerge from the above analysis:
>
> (i) The words "double jeopardy" in s 68A refer to the circumstance that an offender is, subject to the identification of error on the part of the sentencing judge, liable to be sentenced twice.
>
> (ii) Section 68A removes from consideration on the part of the Court of Criminal Appeal the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject.
>
> (iii) Section 68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety.
>
> (iv) Section 68A also prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of such distress and anxiety.
>
> (v) Section 68A prevents the court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case by taking either step referred to in (iii) or (iv), or otherwise.

[17] Spigelman CJ noted that the conduct of the Crown with respect to sentence hearings and Crown appeals may be taken into account in exercising the discretion as to whether to intervene at all.[5] He observed that inappropriate or unfair conduct on the part of the Crown could continue to be taken into

[3] *R v JW* (2010) 77 NSWLR 7.
[4] At [141].
[5] *R v JW* (2010) 77 NSWLR 7 at [91].

account in exercising the power and discretion vested in the Court. Such matters included contribution by the Crown to sentencing error and attempting to conduct an appeal on a different basis to that advanced in the Court below. His Honour went on to say:[6]

> Accordingly, section 68A, whilst removing the double jeopardy element from the exercise of the discretion to intervene, leaves other aspects untouched. On this basis, there remains a residual discretion to reject a Crown appeal, notwithstanding the abolition of the double jeopardy principle. The Court of Criminal Appeal must continue to recognize in a real and practical way the Crown's responsibility for the proper administration of the criminal justice system.

[18] In *Director of Public Prosecutions (Cth) v De La Rosa* [7] Simpson J noted that s 68A of the New South Wales Act does not exclude evidence of a respondent's mental condition, even if that mental condition includes distress and anxiety occasioned by the institution of the Crown appeal. The section is directed at the presumption that a respondent is suffering from such distress or anxiety, but does not exclude from consideration the fact that such distress or anxiety is experienced.

Tasmania

[19] In the Tasmanian case of *Director of Public Prosecutions v Chatters*[8] the Court of Criminal Appeal adopted the observations of Spigelman CJ, quoted above, as having application in relation to the relevant Tasmanian legislation. The Court made one reservation being that "we do not want to

[6] *R v JW* (2010) 77 NSWLR 7 at [95].
[7] (2011) 273 ALR 324 at [275] – [278].
[8] [2011] TASCCA 8 at [50].

be taken as agreeing with any proposition that the concept of double jeopardy is confined to presumptive stress and anxiety". In addition the Court held that the residual discretion to dismiss a Crown appeal, in spite of the sentence being manifestly inadequate, on some basis other than double jeopardy survives in Tasmania.[9]

Victoria

[20] The Victorian Court of Appeal considered the Victorian legislation in the case of *Director of Public Prosecutions v Karazisis*.[10] The majority of the five member bench referred to the decision in *R v JW* which, it observed, related to provisions which were essentially indistinguishable from the Victorian legislation. The Court regarded the New South Wales decision as highly persuasive and adopted a similar approach to the Victorian legislation. However the Court did not determine whether the term "double jeopardy" in the Victorian legislation was to be confined to presumed anxiety and distress as discussed in *R v JW*.

[21] The Court concluded that by operation of the Victorian provision:[11]

(a) Double jeopardy was removed as a discretionary consideration when the Court determines whether it is satisfied that a different sentence should be imposed.

[9] [2011] TASCCA 8 at [51].
[10] [2010] VSCA 350.
[11] *Director of Public Prosecutions v Karazisis* [2010] VSCA 350 [52] – [120].

(b) The residual discretion of the Court to refuse to intervene even if sentencing error had been shown remained despite the fact that double jeopardy was removed as one of the bases upon which it could be exercised. Factors that might be relevant to the exercise of the discretion to dismiss an appeal, despite inadequacy of sentence, include considerations of delay, parity, the totality principle, rehabilitation and fault on the part of the Crown.

(c) Where a Court had determined to intervene and impose a different sentence the principle of double jeopardy was removed as a consideration in the fixing of such sentence.

(d) There are continuing discretionary considerations, other than double jeopardy, which may affect the sentence which the Court considers appropriate.

(e) The legislation removed from consideration of the Court the need to approach a Crown appeal as being "rare and exceptional". The burden of determining whether a Crown appeal should be pursued and ensuring that Crown appeals are only instituted in appropriate circumstances rests with the Director of Public Prosecutions.

Western Australia

[22] The legislative regime in Western Australia is similar to that in Tasmania. It has been considered in a series of cases which have been reviewed in the

Tasmanian case of *Director of Public Prosecutions v Chatters*[12] where the Court concluded that "nothing which has been said in any of the West Australian cases impacts on the residual discretion except to the extent that it might be based on double jeopardy considerations".

The Northern Territory

[23] In the second reading speech the Attorney-General stated that the changes introduced by s 414(1A) of the *Criminal Code* (NT) were not intended to alter the principle that prosecution appeals should be rare. In the Northern Territory the Director of Public Prosecutions does not require leave to appeal on matters of sentence. The decision whether or not to appeal a particular matter rests with the prosecuting authority and the courts are reluctant to interfere with prosecutorial discretion.

[24] A similar observation to that of the Attorney-General was made by the relevant Parliamentary Secretary in New South Wales with the introduction of the legislation in that State. In *R v JW*[13] Spigelman CJ observed that the expression of sentiment that prosecution appeals should be rare should be treated as directed towards the approach of the Director of Public Prosecutions in the exercise of the discretion to institute Crown appeals. His Honour noted that it must be a statement directed to the executive and

[12] *Director of Public Prosecutions v Chatters* [2011] TASCCA 8 at [31] et seq.
[13] *R v JW* at [120].

not to the judiciary. Similar observations apply to the Northern Territory provision.

[25] In my opinion s 414(1A) of the *Criminal Code* (NT) has, and is intended by the legislature to have, a similar impact upon Crown appeals as the equivalent legislation in New South Wales, Victoria and Tasmania. The reasoning revealed in the cases from those jurisdictions is persuasive in determining how the Northern Territory provision is to be applied to Crown appeals in this jurisdiction.

[26] The expression "double jeopardy" in s 414(1A) of the *Criminal Code* (NT) means the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject. I would leave for another day any determination of whether, for the purposes of the section, the concept is necessarily confined to that element.

[27] In my opinion s 414(1A) of the *Criminal Code* has the following effect upon Crown appeals in the Northern Territory:

(a) The section removes any need for the Court of Criminal Appeal to give consideration to ensuring that Crown appeals are "rare and exceptional". Responsibility in that regard rests with the Director of Public Prosecutions.

(b) The Court must not take into account any element of double jeopardy involving the respondent being sentenced again when deciding whether or not to allow a Crown appeal.

(c) The Court must not take into account any element of double jeopardy involving the respondent being sentenced again when deciding whether to impose another sentence.

(d) The Court must not reduce the sentence which it otherwise believes to be appropriate on the basis of double jeopardy arising from the respondent being sentenced again.

(e) Apart from double jeopardy considerations, the Court retains a residual discretion to determine that, despite error having been established and being satisfied that a different sentence ought to have been passed, a Crown appeal should be dismissed or a reduced sentence should be imposed.

(f) Factors that may be relevant to the exercise of the residual discretion to dismiss an appeal, despite inadequacy of sentence, include the presence of unfairness arising from such matters as delay, parity, the totality principle, rehabilitation and fault on the part of the Crown.

The grounds of appeal

The learned sentencing Judge erred in:

(a) failing to give sufficient weight to the principles of general

deterrence, personal deterrence and denunciation in light of the nature of the offences;

(c) giving insufficient weight to the objective circumstances of the offending and excessive weight to the factors in mitigation in favour of the respondent.

[28] The appellant acknowledged that the learned sentencing Judge characterised the offending as "very serious" but submitted that his Honour did not expressly indicate where the offending was considered to fall within the range of seriousness. It was submitted that the unlawful entry was not minor in nature and that the sexual assault was more serious than other examples of the offence involving digital penetration.

[29] The learned Judge did address the seriousness of the offending. In relation to the unlawful entry it was noted that this occurred with the intent of stealing alcohol and not for the purposes of the sexual assault. Had the intention of the respondent in entering the premises been to sexually assault the occupant this would have constituted a more serious example of such offending. His Honour noted the circumstances of aggravation, being that the unlawful entry was to a dwelling house and occurred at night time, and also observed that the maximum penalty for the offence was imprisonment for 20 years.

[30] In relation to the sexual assault his Honour noted the maximum penalty for the offence was imprisonment for life. It was observed that the assault was "conscious and deliberate" and his Honour accepted the description of the offending provided by the prosecutor being that the offending was "very

serious". It involved an incursion into the victim's home at night and then the "quite bizarre and disturbing decision to digitally penetrate the anus of the sleeping victim". The offending was not premeditated and occurred in circumstances where the offender was disinhibited by alcohol. The sentencing Judge observed that the potential for "a very bad outcome" was avoided by the victim waking and shouting, causing the offender to quickly depart the premises. His Honour concluded that whilst the conduct was very serious it was a "less serious kind of offending for this offence, than that which comes before this court usually, and I note was not accompanied by violence or threats of violence".

[31] It was submitted that the learned sentencing Judge considered only "worse case examples in diminution of the gravity of the offending, to the exclusion of less serious examples which might otherwise have placed the offending higher in the range of objective seriousness".

[32] The submission must be rejected. It is readily apparent that the learned sentencing Judge gave consideration to the level of seriousness of the offending and did so by analysing the offending and determining both that it was "very serious" but not as serious as many offences of its kind. Those remarks are unexceptional in the circumstances of this case.

[33] It was also submitted that the learned Judge placed excessive weight on factors in mitigation and gave insufficient weight to the objective circumstances of the offending. A review of the sentencing remarks makes

it plain that his Honour did consider and give weight to the seriousness of the offending and also to the matters in mitigation. This was what was required and I see no error in the approach taken by his Honour.

(b) The learned sentencing Judge erred in effectively treating the respondent as a first offender.

[34] The respondent was convicted in April 2010 of the offence of having had sexual intercourse with a child under the age of 16 years. The offending took place in March 2007 and therefore predates the current matter, which occurred in October 2007. At the time of sentencing the respondent had not been found guilty of any offence and he was, in that sense, a first offender.

[35] In any event the learned sentencing Judge did address the offending. His Honour considered the agreed facts placed before the Youth Justice Court and concluded that the offending in March 2007 was of a very different nature from the offending in October 2007. His Honour noted that the offending "was consensual and something which might be expected to happen between young people". The prosecutor conceded to the Judge that the offending was "a matter that doesn't weigh heavily on the sentencing exercise" and "has some relevance to specific deterrence, but I don't press that as a particularly weighty matter". Counsel before his Honour went on to say that the factual circumstances of the offending did not "command that much weight be given to that prior instance of offending".

[36] At the hearing before this Court counsel presented the ground as being pertinent to the question of whether a term of imprisonment involving a non-parole period should have been imposed rather than a partially suspended sentence. I deal with that ground below.

(d) The learned sentencing Judge erred in allowing a sentencing discount of 33% for the pleas of guilty.

[37] The sentencing remarks do not reveal the basis upon which the discount of 33% was made. The weight given to a plea will, of course, vary according to the circumstances. An early plea accompanied by true remorse with identifiable utilitarian benefits will be rewarded with a greater discount than a late plea not accompanied by remorse.

[38] In this case the plea came at a late time, being shortly before the complainant was to give her evidence. There was no suggestion in the material placed before the Court that the respondent felt remorse and, whilst his plea reflected an acceptance of responsibility, some of his observations recorded in the pre-sentence report suggested he was not fully accepting of responsibility, rather blaming alcohol for his conduct.

[39] In *JKL v The Queen*[14] this Court observed that the value to be placed on a guilty plea will depend upon: the circumstances of the particular case and the extent to which it demonstrates remorse; the acceptance of responsibility and resipiscence; the willingness to facilitate the course of justice; the

[14] [2011] NTCCA 7 at [28].

extent to which a witness who may find the procedure painful has been spared the necessity to give evidence; and the utilitarian benefits that flow from the plea. The Court said that the value to be attributed to a plea remained discretionary, however "a reduction of 25% will normally be given in circumstances where there has been an early guilty plea which is indicative of true remorse and resipiscence".

[40] The Court in *JKL v The Queen* was not seeking to lay down a tariff as to the weight to be given to a plea of guilty as a mitigating factor. As was observed in *Kelly v R*[15] it is not possible to lay down such a tariff. The weight to be given to the plea will vary according to the circumstances and any allowance for the plea may be reflected in different ways in the sentence imposed.

[41] In my opinion the discount allowed by the learned sentencing Judge was in excess of the maximum that might be expected in a case such as the present. The plea was late, there was limited remorse shown, and there was not a complete acceptance of responsibility on the part of the respondent. Whilst opinions may differ, I would have expected a discount in the order of 20% in all the circumstances.

[15] (2000) 10 NTLR 39 at [27].

(e) The learned sentencing Judge erred in giving too much weight to the respondent's intoxication as a mitigating factor in the offending.

[42] It was submitted on behalf of the appellant that the learned sentencing Judge referred to the respondent's intoxication as a mitigatory matter and did not provide sufficient weight to reflect the aspects of denunciation and general deterrence.

[43] His Honour accepted that the respondent was intoxicated at the time and characterised the offending as "a disinhibited acting out of sexual curiosity in a young man just over the age of 18" who was "so affected by alcohol that (his) judgment was impaired". These conclusions were open to the sentencing Judge on the basis of the information provided to the Court. The observations of his Honour were a description of the circumstances as his Honour found them to be and reflected the explanations provided to the Court for the conduct of the respondent on this occasion. The learned Judge went on to conclude that there was "no fully satisfactory explanation" for the conduct of the respondent which he described as "bizarre and disturbing".

[44] The Courts have pointed out that the intoxication of an offender through the consumption of alcohol may constitute an aggravating factor or a mitigating factor depending upon the circumstances of the case.[16] There is no general rule that such intoxication need be one or the other. In some circumstances it may be a neutral factor. In the present case the intoxication of the

[16] *Pappin v R* [2005] NTCCA 2.

respondent provided some explanation for his conduct although, as his Honour noted, it did not provide a fully satisfactory explanation. His Honour proceeded to sentence on that basis. In my opinion the sentencing remarks do not suggest that his Honour gave undue weight to the mitigatory aspects of the intoxication of the respondent nor that his Honour failed to accord weight to denunciation and general deterrence. I see no error in the approach of the sentencing Judge to the respondent's intoxication.

(f) The learned sentencing judge erred in imposing a sentence of imprisonment partially suspended in respect of Count 2 rather than a sentence of imprisonment with a non-parole period.

[45] The appellant submitted that a non-parole period should have been imposed in relation to the offence of sexual assault because of the seriousness of the offence, the fact that the respondent had a prior instance of sexual offending and the desirability of allowing the Parole Board to make an assessment of the respondent's circumstances at a future time "rather than the Court essentially making a prediction based on limited material before it".

[46] The learned sentencing Judge acknowledged the force of those submissions but, nevertheless, imposed a partially suspended sentence. His Honour concluded that the earlier sexual offence, which was not then the subject of a conviction, was of a very different nature to the offending before the Court. That observation was consistent with concessions previously made on behalf of the appellant.

[47] His Honour gave detailed consideration to the changed circumstances of the respondent between the date of the offending and the time of sentence. The respondent had entered into a marriage and moved in to live with his wife's family. He had assumed the obligation of supporting his wife and her family. He was the father of a 17-month-old son. Since the time of the offending he had worked and continued to work to support the family. He had strong family support from his own family and that of his wife. His prospects for rehabilitation were assessed as "good, if not very good" and his Honour concluded that:

> It is in the interest of the community that I partially suspend your sentence to enable you to return to your family and community and thus facilitate your rehabilitation.

[48] The conclusion of his Honour was to be expected. There was no suggestion that the respondent would be other than a satisfactory prisoner and he did not need the incentive of a non-parole period to be of good behaviour whilst in prison. The appellant acknowledged that the respondent had good prospects for rehabilitation. Further, there was no suggestion that the respondent required time to prove himself as being capable of resuming a responsible attitude to life.[17] The information before his Honour pointed to the desirability of allowing certainty as to the date of release and allowing the respondent to return to circumstances of family life which were most likely to enhance his prospects for continued rehabilitation. I see no error on the part of the learned Judge.

[17] *Stuart v R* [2010] NTCCA 16 at [65] – [68].

(e) The learned sentencing Judge erred by imposing head sentences that were manifestly inadequate in the circumstances of the case.

[49] It was submitted on behalf of the appellant that the head sentences of four months imprisonment for the unlawful entry offence and two years and four months imprisonment for the offence of sexual intercourse without consent were manifestly inadequate.

[50] In my opinion the sentence imposed in relation to the offence of unlawful entry was manifestly inadequate. However it is to be noted that this sentence was to be served wholly concurrently with the sentence imposed in relation to the sexual assault and therefore any alteration to the sentence would not affect the ultimate sentence imposed. The appellant conceded that concurrency was appropriate in the circumstances of this case.

[51] The principles applicable to grounds of appeal alleging manifest excess and manifest inadequacy are well established and need not be repeated on this occasion.[18] In my opinion, whilst the sentence for the sexual offence may be said to be at the lower end of the available range, it was not manifestly inadequate.

Conclusions

[52] In my opinion error has been demonstrated in relation to the sentencing discount allowed for the plea of guilty and also in relation to the sentence imposed for the offence of unlawful entry of premises. However, in my

[18] *Liddy v R* [2005] NTCCA 4 at [12].

view, it has not been demonstrated that some other sentence is warranted in law and should have been passed. In all the circumstances the sentence imposed by the learned sentencing Judge was within the range and was not such that this Court should interfere.[19]

[53] I would dismiss the appeal.

Kelly J:

[54] I agree that the appeal should be dismissed for the reasons given by the Chief Justice.

Blokland J:

[55] I agree with the reasons of the Chief Justice and agree the appeal should be dismissed.

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[19] Section 411(3) of the *Criminal Code*.