CEV v The Queen [2005] NTCCA 10

PARTIES:	CEV
	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 22 of 2003 (20109084)
DELIVERED:	18 August 2005
HEARING DATES:	23 June 2005
JUDGMENT OF:	MILDREN, RILEY & SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW – jury trial – direction to jury – whether trial judge erred in direction to the jury in respect of prior inconsistent statements

CRIMINAL LAW – jury trial – direction to jury – question by jury as to whether a majority verdict was possible – appropriate direction given

CRIMINAL LAW – sentence – whether sentences excessive – whether non-parole period excessive – sexual intercourse after victim drugged – whether sentence imposed should have been reduced to avoid double punishment – whether sentences should be totally concurrent – principles relevant to fixing non-parole period – appeal allowed – sentence and non-parole period varied

Criminal Code s 132(2), s 132(2)(a), s 132(4), s 176, s 192, s 192(1), s 192(2)(c), s 192(3) and s 429; *Prisons (Correctional Services) Amendment Act (No 2) 1994* s 6; *Sentencing Act* s 54(1), s 55, s 55A and s 58

Applied
Bugmy v The Queen (1990) 169 CLR 525; *Deakin v The Queen* (1984) 54 ALR 765; *Miles v The Queen* [2001] NTCA 9; *Pearce v The Queen* (1998) 194 CLR 610; *The Queen v Mulholland* (1991) 1 NTLR 1; *The Queen v Muto and Eastey* [1996] 1 VR 336

Referred to
Alford v Magee (1951-52) 85 CLR 437; *Black v The Queen* (1993) 179 CLR 44; *Cheatle and Ors v R* (1993) 177 CLR 541; *Fittock v The Queen* (2001) 11 NTLR 52; *Markarian v The Queen* (2005) 215 ALR 213; *Peers v The Queen* (1999) 154 FLR 270; *Spencer v The Queen* (2002-2003) 172 FLR 471; *Tipiloura v The Queen* (1992) 2 NTLR 216

REPRESENTATION:

Counsel:

Appellant:	T. Berkley (re conviction) S. Cox QC (re sentence)
Respondent:	D. Lewis

Solicitors:

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

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

CEV v The Queen [2005] NTCCA 10
No. CA 22 of 2003 (20109084)

BETWEEN:

CEV
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, RILEY & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 18 August 2005)

The Court:

Introduction

[1] On 18 November 2003 the appellant filed an application for leave to appeal against his conviction and sentence in the Supreme Court of the Northern Territory on 6 May 2003 and 10 June 2003 respectively. The proposed grounds of appeal were contained in an affidavit of Ian Leonard Read sworn on 18 November 2003. On 19 November 2003 the appellant filed an application for an extension of time within which to apply for leave to appeal against his conviction and sentence.

[2] On 19 December 2003 a single judge of the Court of Criminal Appeal refused the appellant's applications for an extension of time and for leave to appeal against conviction. However, the appellant was granted leave to appeal against his sentence on the grounds set out in par 9 of the affidavit of Ian Leonard Read sworn on 18 November 2003.

[3] On 23 June 2005 the applications for an extension of time and for leave to appeal against conviction were heard by three judges of the Court of Criminal Appeal, as was the appellant's appeal against sentence. The applications for an extension of time and for leave to appeal against conviction were refused. The Court of Criminal Appeal reserved its decision in the appeal against sentence.

The application for leave to appeal against conviction

[4] There were two proposed grounds of appeal relied on in support of the applications for an extension of time and for leave to appeal against conviction. The first ground was that the learned trial judge erred in giving an inadequate direction to the jury about the complainant's prior inconsistent statements in that the jury was not instructed as to the use they could or should make of the prior inconsistent statements or how the prior inconsistent statements affected the complainant's evidence and the credibility of the complainant generally. The second ground was that the learned trial judge erred in giving a direction to the jury in response to the question, "If members of the jury cannot make a unanimous decision in

relation to a specific charge, what is the procedure to follow?" The response given by her Honour was that, "Parliament has introduced a provision which in certain circumstances allows the court to take a majority verdict. Those circumstances have not as yet arisen and until they do you should consider your verdict of guilty or not guilty must be unanimous."

[5] The two grounds relied on by the appellant at the hearing were not those deposed to in the affidavit of Mr Read sworn on 18 November 2003 and no further affidavit was filed in support of the proposed grounds of appeal against conviction. However, no objection was raised by counsel for the respondent and we agreed to hear the applications.

[6] The proposed grounds of appeal gave rise to two principal issues in the application for leave to appeal against conviction. First, was there an arguable case that the learned trial judge erred in that she merely directed the jury about the principles as to prior inconsistent statements and then left the jury to apply the principles to the case before them without telling the jury how the principles applied to the prior inconsistent statements in the case? Secondly, was there an arguable case that the learned trial judge misdirected the jury when she told the jury about the procedure to be followed if the members of the jury could not make a unanimous decision in relation to a specific charge because the direction that she gave was inconsistent with the principles enunciated in *Black v The Queen* (1993) 179 CLR 44? In our opinion the learned trial judge did not err nor did she misdirect the jury. There was no arguable case of error or misdirection. The

learned trial judge did tell the jury about how the principles as to prior inconsistent statements applied to the facts of the particular case and if a jury does ask about what is the procedure to be followed in the event of a deadlock about a specific charge the jury should be told in similar terms to those used by her Honour, what the Criminal Code (NT) provides and what their obligations are in trying to reach a unanimous decision when deliberating upon a verdict.

Factual Background

[7] On 28 April 2003 the appellant before a judge and jury entered a plea of not guilty to 5 counts pleaded in an indictment dated 24 April 2003. Count 1 charged that between 1 June 2001 and 17 June 2001, the appellant had sexual intercourse with SV (the complainant) without her consent contrary to s 192(3) of the Criminal Code. Count 2 charged that contrary to s 132(2)(a) and s 132(4) of the Criminal Code between 1 June 2001 and 17 June 2001, the appellant unlawfully and indecently dealt with the complainant, a child under the age of sixteen years, and the indecent dealing involved the following circumstance of aggravation, namely that at the time of the offence the appellant had the complainant under his care. Count 3 charged that contrary to s 176 of the Criminal Code on or about 16 June 2001, with intent to commit or facilitate the commission of a crime, namely indecent dealing with a child under the age of 16 years, the appellant administered a stupefying and overpowering drug, namely Temazepam to the complainant. Count 4 charged that contrary to s 192(3) of the Criminal Code

on or about 16 June 2001, the appellant had sexual intercourse with the complainant without her consent. Count 5 charged that contrary to s 132(2) and s 132(4) of the Criminal Code on or about 16 June 2001, the appellant unlawfully and indecently dealt with the complainant, a child under the age of sixteen years, and the indecent dealing involved the following circumstances of aggravation, namely that at the time of the offence the appellant had the complainant under his care.

[8] The complainant gave evidence at the trial of the appellant. During the course of her evidence she made statements that were inconsistent with previous statements that she had made to her mother, to police and at the committal. The trial judge gave the jury a detailed direction about prior inconsistent statements.

[9] The direction to the jury about prior inconsistent statements was given at the request of counsel for the Crown. Counsel for the appellant substantially agreed with the submission of counsel for the Crown. He said, "Yes, in my submission it is appropriate. It is when you talk about cross-examination. The usual type of direction is – you know, that is one of the ways you might assess the aspect of demeanour of the witness or how you look at them. You know, whether they seemed evasive. It can all be included in that sort of a direction."

[10] During the course of the trial judge's summing up the following question was received from the jury, "If members of the jury cannot make a

unanimous decision in relation to a specific charge what is the procedure to follow?" The learned trial judge answered the jury's question by stating to the jury that, "Now the direction that is given is that your verdict must be unanimous and when that direction is given it is to be unanimous, not in the sense that you need to necessarily agree as to how the verdict should be reached because each of you may rely on different parts of the evidence or place a different emphasis on parts of the evidence or use a different reasoning process about the evidence. But the word unanimous is in the sense that before you can convict the accused or acquit the accused, you must be agreed and your verdict, whether guilty or not guilty, must be one in which you all agree is the proper verdict. Parliament has introduced a provision which in certain circumstances allows me to take a majority verdict. Those circumstances have not yet arisen and until they do you should consider your verdict of guilty or not guilty must be unanimous." Prior to the direction being given counsel for the appellant had agreed that a direction in such terms was appropriate.

[11] Following the direction referred to in paragraph [10] above the jury again retired to deliberate on their verdict. After they did so a further question was sent to the learned trial judge by the jury namely, "If we have made a decision on four counts but are undecided on one count – it looks like a deadlock – what happens and how long are we expected to deliberate if the deadlock cannot be broken?" The learned trial judge then directed the jury by saying, "I am going to answer your question in this way. It is an

important principle of the administration of criminal justice that a jury strive to reach unanimity in their verdict. This important principle is there to ensure that members of the jury listen to each others points of view and you go through those points of view and you go through the difficult process of reasoning and analysis that is necessary in order to reach unanimity. You have now been deliberating for a little over two and a half hours. That is not a very long period of time. The experiences of judges is that by giving more time to listen to each other, to discussing the issues and calmly considering the evidence, it is possible to reach a unanimous decision. It appears that you have already reached a unanimous decision on four counts. You should continue to try and reach a unanimous decision with respect to the fifth count. This is not to suggest that you can, consistent with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one. Ladies and gentlemen, I am going to ask you to retire again and that you conclude your deliberations."

[12] At the conclusion of the trial on 6 May 2003 the jury returned unanimous verdicts of not guilty on counts 1 and 2 and guilty on counts 3, 4 and 5.

The direction as to prior inconsistent statements

[13] Her Honour gave the direction about prior inconsistent statements after she had fully summarised the evidence of the complainant. Her Honour told the jury that she was going to direct the jury about prior inconsistent statements because the credibility of witnesses was very important in the case and that

the Crown case rested on the credibility of the complainant. For that reason it was important for the jury to subject the complainant's evidence to careful scrutiny. Her Honour then identified the prior inconsistent statements including repeating the inconsistencies between what the complainant's mother said the complainant told her and what the complainant told the court, the police, the magistrate and others. Her Honour then said she was required to warn the jury of the danger of accepting the complainant's testimony to the court because prior inconsistent statements can indicate the unreliability of a person's testimony to the court. A prior inconsistent statement goes to the reliability of the complainant's evidence at the trial and is relevant to her credibility as a witness.

[14] It was not necessary for the trial judge to then relate each of the complainant's prior inconsistent statements back to every element of the Crown case to which they were relevant. The authorities do not require this to be done: *Alford v Magee* (1951 -52) 85 CLR 437 at 466; *Spencer v The Queen* (2002-2003) 172 FLR 471 at 477. The learned trial judge clearly and succinctly told the jury what it was necessary to know about prior inconsistent statements, what were the complainant's prior inconsistent statements and about how they should be used to scrutinise the reliability and credibility of the complainant's evidence.

[15] Her Honour accepted the responsibility of deciding what were the prior inconsistent statements of the complainant and of telling the jury about them and what impact they had on the testimony of the complainant and on the

case. She went beyond what fairness required. It was not necessary to warn the jury of the danger of accepting the complainant's sworn testimony to the court. Her Honour's directions were consistent with what the Court of Criminal Appeal said in *Spencer v The Queen* (supra) about the need to explain the required direction in the context of the relevant factual considerations which arise from the evidence. She correctly discharged her duty to sum up by referring to the facts that the jury may find with an indication of the consequences if this or that view of the evidence was taken: *Alford v Magee* (supra) at 466.

The directions as to majority verdicts

[16] The jury's question about what was the procedure to be followed if the jury were deadlocked about a specific charge was not novel. It is an important principle of the administration of criminal justice that a jury strive to reach unanimity in its verdict. An impression should not be created before the time after which a majority verdict must be accepted, that if jurors are unable to arrive at a unanimous verdict, the view of the majority will ultimately prevail. It is for this reason that this Court has said that trial judges should not tell the jury anything about majority verdicts when they first retire: *Tipiloura v The Queen* (1992) 2 NTLR 216 at 218; *Fittock v The Queen* (2001) 11 NTLR 52 at 59. The consensus of all jurors which flows from the requirement of unanimity promotes deliberation and provides some assurance that the opinions of each of the jurors will be heard and discussed.

It reduces the danger of hasty and unjust verdicts: *Cheatle and Ors v R* (1993) 177 CLR 541 at 552-53.

[17] However, if a jury asks what is the procedure for majority verdicts they should be given a direction along the following lines:

> Parliament has introduced a provision which in certain circumstances allows a court to take a majority verdict. Those circumstances have not yet arisen and, until they do, you should consider your verdict of guilty must be unanimous.

[18] Her Honour gave such a direction.

[19] As the Court of Appeal of Victoria has unanimously said,

> "The advantages of a direction such as that to which we have referred are threefold. First, it is frank with the jury. Second it does not confuse them with premature and largely irrelevant information about the effect of section 47 of the Juries Act (s 368 Criminal Code (NT)). Third, it makes it clear that their verdict should be unanimous and encourages them to put the possibility of a majority verdict out of their minds": *R v Muto and Eastey* [1996] 1 VR 336 at 339.

[20] With the agreement of counsel for the appellant, the learned trial judge gave the jury a direction consistent with the above principles. Furthermore, when subsequently told that the jury may be deadlocked in relation to one of the counts her Honour gave a direction that was in strict conformity with *Black v The Queen* (1993) 179 CLR 44. In the circumstances there was no error. There was no hasty and unjust verdict and the jury must have understood the importance of coming to a unanimous verdict without the minority or any member of the jury being subject to undue pressure: *Peers v The Queen* (1999) 154 FLR 270.

The appeal against sentence

[21] An extension of time within which to appeal against sentence and leave to appeal against sentence was granted previously by a single judge pursuant to s 429 of the Criminal Code on two grounds:

(1) that the learned sentencing judge fell into error in categorising the relative seriousness of the counts; and

(2) that the sentence imposed upon Count 3 of administering a stupefying drug with intent to commit a crime of indecent dealing of seven years was of itself manifestly excessive.

[22] At the hearing of the appeal, Ms Cox QC who appeared for the appellant on the sentencing appeal, abandoned ground (1) and sought leave to add two further grounds as follows:

(3) that the learned sentencing judge erred in making the sentence for Count 4 wholly cumulative on the sentence for Count 3; and

(4) that the learned sentencing judge erred in setting a non-parole period of 7 years and 9 months.

[23] No objection was raised by counsel for the Crown, Mr Lewis, to the additional grounds. In those circumstances it was appropriate to grant leave to add those additional grounds and we heard argument in respect thereof accordingly.

Ground 2

[24] It as submitted on behalf of the appellant that the sentence of 7 years imprisonment imposed in relation to Count 3 was manifestly excessive. The maximum penalty which is available for a breach of s 176 of the Criminal Code is imprisonment for life. However, whilst careful attention to maximum penalties will always be required, it is not appropriate for this Court to look just to a maximum penalty and to then proceed by making a proportional deduction from it. As was said by Gleeson CJ, Gummow, Hayne and Callinan JJ in *Markarian v The Queen* (2005) 215 ALR 213 at par [31]:

> "…careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. That having been said, in our opinion, it will rarely be …appropriate for [the Court] …to look first to a maximum penalty, and to proceed by making a proportional deduction for it."

[25] An offence against s 176 can be committed in a wide variety of circumstances involving differing drugs (the dangerousness of which will vary) and differing purposes. The purpose is always "with intent to commit a crime", but the nature of the crime intended to be committed will vary. Obviously if the intent is to commit a very serious crime, the offence against the section is likely to be more grave than if the criminal intent was of a less serious kind.

[26] In the present case the drug administered was Temazepam. According to the evidence, the appellant mixed the Temazepam in his step-daughter's hot chocolate drink shortly before she went to bed. The drink made her feel drowsy but she did not fall asleep. There was evidence that a sample of the victim's blood taken approximately 20 hours later revealed a concentration of the drug at 0.47mgs per litre of blood and that a therapeutic concentration of that drug was between 0.30 and 0.90mgs per litre. Temazepam is used as a sedative and relaxant. There was no evidence relating to the rate at which the drug is dissipated from the body, except that it is "short acting". The evidence of Professor Ravenscroft was that, based on these findings and the victim's age, sex, weight and height, "the response to its administration would be either drowsiness or sleep". There was no suggestion from him that the administration of the drug in this case was potentially dangerous to the victim. Evidence was given by Dr Whybourne, a paediatrician that Temazepam is not prescribed for children under 16 years and is "a potentially very dangerous drug", but Dr Whybourne did not explain the circumstances under which the drug might become dangerous, or why the drug is not prescribed for children and did not opine that the dose administered to the victim was in any way dangerous to her. The victim gave no evidence of any adverse consequences to her from the administration of the drug apart from drowsiness.

[27] However, as the learned trial judge observed, this was a serious offence because the administration of the drug not only took away the victim's

ability to resist the appellant's unwanted advances, but also because it made it more difficult for her to recollect exactly what had occurred and to relate this at a later time. Although the sentence imposed of 7 years was a severe one, we are unable to say that it was manifestly excessive.

Ground 3

[28] It was submitted in support of this ground that the learned trial judge erred in making the sentence of 4 years for the offence against Count 4 wholly cumulative upon the sentence for Count 3.

[29] In *Miles v The Queen* [2001] NTCA 9, Riley J, with whom Mildren and Bailey JJ agreed, said, at par [36]:

> "Whilst s 50 of the Sentencing Act does create a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders" there is no fetter upon the discretion exercised by the court. The prima facie rule can be displaced by a positive decision. In *Attorney-General v Tichy* (1982) 30 SASR 84 Wells J observed (at 92):
>
> > "It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively… what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identifiable crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal

> conduct may coincide with technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been (found) guilty… Where consecutive sentences are imposed it may be thought that they are kept artificially apart where they should, to some extent, overlap. Where concurrent sentences are imposed, there is the danger that the primary term does not adequately reflect the aggravated nature of each important feature of the criminal conduct under consideration."

[30] In this case, the administration of the drug meant that the victim did not give her consent to the digital penetration which was the act of sexual intercourse relied upon in Count 4. Clearly the victim could not consent if she was so affected by a drug as to be incapable of freely agreeing: s 192(1) and s 192(2)(c) of the Criminal Code. Lack of consent was an element of the offence which the Crown had to prove in relation to Count 4, and although it was not suggested that consent was in issue, nevertheless the inducement of the drug was a relevant fact in relation to an element which the Crown had to prove in relation to Count 4.

[31] Secondly, her Honour clearly took into account the administration of the drug as making the offence in relation to Count 4 more serious, because, as her Honour observed, it showed that the offences in relation to Counts 4 and 5 were not committed on the spur of the moment or without any forethought. It was open for her Honour to have reached this conclusion even though the intent relating to Count 3 was limited to committing or

facilitating the crime of indecent dealing with a child under 16 (and not unlawful sexual intercourse). A sentence of 4 years in respect of the offence against s 192 is in the circumstances of this case appropriate if that offence stood alone from the conviction against s 176.

[32] In those circumstances there is an element of double punishment involved in the sentences imposed in respect of Counts 3 and 4: see *Pearce v The Queen* (1998) 194 CLR 610 at 623 per McHugh, Hayne and Callinan JJ; at 629 per Gummow J; at 650 per Kirby J; (a point conceded by Mr Lewis for the Crown). Further, the sentence on Count 4, by being wholly cumulative on Count 3, did not properly reflect the fact that the offences were all "manifestations of one criminal enterprise" (per Kirby J at 650). As noted already, the offence against s 176 was used as in effect a matter aggravating the s 192 offence in as much as it showed forethought and planning.

[33] In these circumstances the sentence in respect of Count 4 should be reduced to 3 years and there should be only partial cumulation to the extent of 2 years in addition to the sentence of 7 years. The total of the sentences, thus adjusted is 9 years.

Non-parole period

[34] As the total sentence has been reduced by 2 years it is necessary to adjust the non-parole period and it is not necessary to consider the appellant's submission that the learned sentencing judge erred in the fixing of the non-parole period.

[35] The starting point is to bear in mind that s 55 and s 55A of the Sentencing Act require a minimum of 70 per cent of the head sentences imposed in respect of Counts 4 and 5, but in respect of Count 3, s 54(1) requires only a minimum of 50 per cent of the head sentence. Where, as here, there is some concurrency in the head sentences in respect of which the Act imposes differing minima, the Court must fix a total minimum term which allows for the greater minimum term to take priority to the extent of any concurrency. Therefore, in this case the minimum terms are 3 years in respect of Count 3 and 2.1 years in respect of Counts 4 and 5, a total of 5.1 years.

[36] Having regard to the appellant's prior good character, lack of previous convictions and excellent work history, it was submitted that there were no factors warranting a departure from what was said to be the normal rule of practice in this jurisdiction of fixing whatever the statutory minimum term might be.

[37] The relevant factors involved in the fixing of the minimum term are discussed in *Bugmy v The Queen* (1990) 169 CLR 525 at 536-538 (per Dawson, Toohey and Gaudron JJ). The task of a sentencing court is to fix an appropriate minimum term in all of the circumstances. The minimum term should not be seen as the shortest period of time required for the Parole Board to form a proper view of a prisoner's prospects for rehabilitation. As was said in *Deakin v The Queen* (1984) 54 ALR 765 at 766:

> "The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the

> prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence."

[38] In *Bugmy*, their Honours said, at 536:

> "In *Iddon and Crocker v The Queen* (1987) 32 A Crim R 315, at 325-326, the Court of Criminal Appeal of Victoria said of the legislation with which this appeal is concerned: "The scheme of the legislation is plain enough. The intention of the legislature is that a minimum term is a benefit to the prisoner ..." That benefit lies in providing the prisoner a basis for hope of earlier release and in turn an incentive for rehabilitation: see *Wardrope v The Queen*, referred to in *Iddon and Crocker*, at 327-328."

[39] In *The Queen v Mulholland* (1991) 1 NTLR 1 at 9, Gallop J said:

> "The starting point must be the minimum period which the prisoner must serve before being eligible for parole, which will be arrived at by taking into account the nature of the crime and its gravity in the scale of crimes of its type, the need to give close attention to the danger which the offender presents to the community, the prospects of the future progress of the offender and the danger he would present to the community, and all the subjective factors, including his prospects of rehabilitation."

[40] All of the factors relevant to the fixing of the head sentence are relevant to the fixing of the minimum term and must be given their proper weight. As to the practice of fixing minimum terms of 50 per cent of the head sentence in cases which fall outside of s 55 and s 55A of the Sentencing Act, the reason for that practice may be traced back to the time when prisoners were usually entitled to earn one third remissions on their head sentences for good behaviour: see *The Queen v Mulholland* (supra) at 9 per Gallop J.

[41] After the abolition of remissions in 1994 by s 6 of the Prisons (Correctional Services) Amendment Act (No 2) 1994, the practice has to some extent continued: *c.f.* s 58 of the Sentencing Act which applies only to sentences of less than 12 months. Although it cannot be pressed too far, uniformity of sentencing is a matter of importance: *Bugmy* (supra) at 538; but now that remissions have been abolished, the reason for the practice no longer exists.

[42] There is no doubt that her Honour, quite rightly, considered the offences to be serious. She found that the offending involved a degree of planning and premeditation. She noted that by administering the Temazepam, it not only took away the ability of the complainant to resist the appellant's unwanted advances, but also made it more difficult for her to later recollect exactly what had occurred and to relate this at a later time. Her Honour noted that although there were no accompanying threats, the complainant was very young at the time and under the protection of the appellant. Her Honour also referred to the traumatic consequences of the offending to the complainant and to her mother which, so far as the complainant was concerned, she described as "devastating". None of these findings are challenged. So far as the appellant's prospects of rehabilitation are concerned, her Honour referred to the appellant's age, lack of prior convictions, his previous work history and the references tendered on his behalf which she accepted were positive factors in assessing his rehabilitation prospects. Nevertheless, she concluded that "other aspects of rehabilitation are not so easy to quantify. [The appellant] has not made any expression of remorse for the

consequences of his offending on others. He has not acknowledged any wrong doing on his part or acknowledged that the nature of his offending may require him to consider treatment or counselling." Of course, the appellant had pleaded not guilty and as her Honour recognised, he was not to be punished more severely for this, but on the other hand it meant that he could not be given a discount for his plea "which can be an indicator of good prospects of rehabilitation". Although there was no finding adverse to the appellant as to his prospects of rehabilitation, there was no specific finding that his prospects were good either. There is no finding that the appellant was likely to re-offend in the future.

[43] Ms Cox QC submitted that there is no reason to discount the appellant's rehabilitation prospects merely because he has, as is his right, entered a plea of not guilty. The difficulty with this submission is that the appellant has not shown any remorse nor has he acknowledged his own wrong doing.

[44] In all the circumstances we consider that the minimum term should be 6 years.

Orders

[45] The formal orders of the Court are: (1) leave to appeal against conviction refused; and (2) the appeal against sentence is allowed and the sentence imposed in respect of Count 4 is set aside.

[46] In lieu thereof we impose the following sentencing orders:

Count 4: imprisonment for 3 years, 2 years of which are to be served cumulatively upon the sentence for Count 3.

[47] We have not interfered with the learned sentencing judge's disposition of Counts 3 and 5. The sentences in relation to Counts 3 and 5 having already been backdated to take effect from 6 May 2003 to take into account time already spent in custody, the non-parole period of 6 years fixed is to commence from 6 May 2003.
