CITATION:	*The Queen v EG* [2022] NTCCA 10
PARTIES:	THE QUEEN v EG
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 20 of 2020 (21827841)
DELIVERED:	9 June 2022
HEARING DATE:	21 July 2021
JUDGMENT OF:	Southwood, Kelly and Barr JJ

CATCHWORDS:

CROWN APPEAL – whether sentencing Judge erred in assessment of the offending by relying on an apparent lack of harm as a mitigating factor – whether sentencing Judge erred by failing to properly take into account the potential psychological damage arising out of the offences – sentencing Judges entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences – absence of evidence of future psychological harm in child sex cases, inter alia because of the young age of the victim or the fact that the victim was asleep, should not be used as a mitigating factor to benefit the offender – in cases of sexual offending by a parent against a very young child, both the age and vulnerability of the child and the gross breach of trust are aggravating factors – likelihood of future psychological harm is built into the high maximum sentence for sexual offences against children – sentence manifestly inadequate – residual discretion to disallow the appeal not applied – respondent resentenced to 12 years and 3 months with a non-

parole period of 6 years and 8 months – reduced to 10 years and 6 months with a non-parole period of 5 years and 6 months as increased sentence more onerous as a result of the application for parole process having begun

Sentencing Act 1995 (NT) s 5, s 54, s 55A

Arnott v Blitner [2020] NTSC 63; *Cumberland v The Queen* [2020] HCA 21; *DPP (Cth) v Bui* [2011] VSCA 61; *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; *DPP v Grabovac* [1998] 1 VR 664; (1997) 92 A Crim R 258 (VCA); *DPP v O'Neill* [2015] VSCA 325; *Everett v The Queen* [1994] HCA 49; 181 CLR 295; *Filipou v The Queen* [2015] HCA 29; (1915) 89 ALJR 776; 323 ALR 33; *Forrest v The Queen* [2017] NTCCA 2; *Griffiths v The Queen* [1977] HCA 44; 137 CLR 293; *Gumbinyarra v Teague* (2003) NTLR 226; *Hermann v The Queen* (1988) 37 A Crim R 440; *House v The King* [1936] HCA 40; 55 CLR 499; *Mammone v The Queen* [2013] NSWCCA 95; *Mill v The Queen* (1988) 166 CLR 59; *Mills v The Queen* [2017] NSWCCA 87; *R v BJW* [2000] NSWCCA 60; 112 A Crim R 1; *R v BW* [2018] NTSC 21727731, 21750122; *R v GCT* [2018] NTSC 21708184; *R v CTG* [2017] NSWCCA 163; *R v Gavel* [2014] NSWCCA 56; *Rigby v Benfell* [2020] NTCA 9; *R v Kahu-Leedie* [2022] NTCCA 4; *R v JTAC* [2005] NSWCCA 345; *R v JP* [2015] NSWCCA 267; *R v Lomax* [1998] 1 VR 551; *R v Namajbali* [2013] NTSC 21212944; *R v Namarnyilk* [2013] NTSC 21207806; *R v Mossman* [2017] NTCCA 6; *R v Olbrich* [1999] HCA 54; (1999) 199 CLR 270; *R v Osenkowski* (1982) 30 SASR 212; *R v Pearson* [2005] NSWCCA 116; *R v Rankin* [2001] VSCA 158; *R v RG* [2018] NTSC 21754732; *R v Riley* (2006) 161 A Crim R 414; *R v Roe* [2017] NTCCA 7; *R v Simpson* [2020] NTCCA 9; *R v Stanbrook* [1994] 1 VR 391; *R v Storey* [1998] 1 VR 359; (1996) 89 A Crim R 519; *R v Stoupe* [2015] NSWCCA 175; *R v Tennyson* [2013] NTCCA 2; *R v Wilson* [2011] NTCCA 9; *Saddler v The Queen* [2009] NSWCCA 83; *Staats v The Queen* (1998) 123 NTR 16; *Stewart v The Queen* [2012] NSWCCA 255; *SW v The Queen* [2013] NSWCCA 255; *Whitlock v The Queen* [2018] NTCCA 7, referred to

REPRESENTATION:

Counsel:

Appellant:	V Engel
Respondent:	S Robson SC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions

Respondent:	Northern Territory Legal Aid Commission
Judgment category classification:	B
Number of pages:	99

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

The Queen v EG [2022] NTCCA 10
No. CA 20 of 2020 (21827841)

BETWEEN:

THE QUEEN
Appellant

AND:

EG
Respondent

CORAM: SOUTHWOOD, KELLY and BARR JJ

REASONS FOR JUDGMENT

(Delivered 9 June 2022)

THE COURT

[1] The respondent pleaded guilty to 28 sexual offences against four known child victims and seven unidentified child victims. These consisted of:

(a) one offence of possessing 2090 child abuse images over three separate devices, the maximum penalty for which is imprisonment for 10 years;

(b) four offences of aggravated incest against his daughter, a child under 10 years of age, involving four acts of digital penetration, two when the child was aged between one and four, and two when she was between four and five, all of which were captured in photographs taken by the

respondent, the maximum penalty for each offence being imprisonment for 25 years;

(c) six offences of aggravated gross indecency upon the same daughter involving various sexual acts, including skin to skin contact with her genitals, two when the child was aged between two and four, and four when she was between four and five, all of which were captured in photographs taken by the respondent, the maximum penalty for each offence being imprisonment for 25 years;

(d) six offences of aggravated indecent dealing with a child under the age of 10, against two separate victims, one offence against his daughter when she was aged between one and four, and five offences against the respondent's niece, one when she was aged between four and seven, and four when she was aged between six and eight, the maximum penalty for each offence being imprisonment for 14 years;

(e) four offences of producing child abuse material involving two separate victims, one aged between one and three years old and one aged between 11 and 14, in which the respondent manipulated photographs to create sexually explicit images, the maximum penalty for each offence being imprisonment for 10 years; and

(f) seven offences of indecent dealing with seven female children who could not be identified, involving taking photographs covertly of the

children's genital areas while they were in public, the maximum penalty for each being imprisonment for 10 years.

[2] On 24 September 2020, the respondent was sentenced to a total sentence of 6 years' imprisonment commencing on 25 June 2018 with a non-parole period of 4 years.

Grounds of appeal

[3] The Crown has appealed against the sentences imposed on the respondent on grounds that (i) the sentences are manifestly inadequate, and (ii) the learned sentencing Judge erred in finding that the purpose of the respondent's actions against his daughter was to take photographs of her rather than derive immediate sexual gratification.

The facts and charges

[4] The offending was discovered when the respondent's ex-wife (with whom he was co-parenting their daughter, the victim of 12 of these offences) found sexually explicit photographs of their daughter on the respondent's phone. She sent the photographs to her phone and confronted the respondent. He told her he was sorry, but that he did not hurt anyone. He said he took the photographs to share them for money and pleaded with her not to tell anyone.

[5] The respondent's ex-wife reported the matter to police. While at the police station, she made a pretext call to the respondent. During that conversation he made some admissions about his offending. Among other things, he said

that his daughter was asleep at the time and that he took the photographs for money. He said he did not do it anymore and that he had deleted the images.

[6] Police obtained a search warrant and searched the respondent's home and car. They seized mobile telephones and laptop computers.

[7] When these devices were examined, police found 2090 child abuse images, mostly category 1, but some category 2, 3, 4 and 5, including 93 category 4 images (penetrative sexual activity between an adult and a child) and five category 5 images (sadism or bestiality). These images are the subject of count 1. Some of these were images created by the respondent and are the subject of some of the other charges.

[8] Counts 2 to 12 were committed against the respondent's daughter. They all involved the respondent taking photographs of his daughter's genitalia, including the inside of her vagina while she was asleep and after he had posed her in numerous sexualised positions with her underpants pulled down. He took 115 pornographic or child abuse images of his daughter. All but count 6 involved the respondent using his fingers to expose the inside parts of his daughter's vagina. In the case of the aggravated incest charges (counts 2, 3, 7 and 8), he did this by manipulating the outer parts of her vagina, on three occasions by inserting his fingers into her vagina, and on a fourth occasion (count 8) he placed his daughter's fingers inside her vagina. In the case of the aggravated gross indecency charges, he used his fingers to

move nearby parts of his daughter's body to expose her vagina and anus more explicitly.

[9] In the photographs of counts 4 (gross indecency), 5 (gross indecency), 7 (incest) and 8 (incest), the respondent's erect penis can be seen on or near his daughter's genitalia. In count 4, the respondent exposed his erect penis and used his right hand to hold it against the lips of her vagina. In count 5, the respondent placed his exposed and erect penis underneath his daughter's buttocks. In count 7, the respondent placed his exposed scrotum and erect penis between his daughter's buttocks. In count 8, the respondent placed his exposed scrotum and erect penis over the top, slightly behind and very close to his daughter's vagina and anus.

[10] In the photographs of counts 3 (incest), 7 (incest), 10 (gross indecency) and 11 (gross indecency), the respondent placed a clear bubble type substance over or near his daughter's genitalia. In count 3, the respondent placed the clear wet bubble type substance along his daughter's vagina. In count 7, the respondent placed the clear wet bubble type substance along his daughter's anus and vagina and then penetrated her vagina with the index finger of his right hand. In count 10, the respondent spread his daughter's legs apart and placed the clear wet bubble type substance along her vagina. In count 11, the respondent tucked his daughter's knees up to her chest, spread her knees on either side of her body, pushing her buttocks into the air, exposing her anus and vagina, and then placed the clear wet bubble type substance along her vagina and anus.

[11] In the photograph of count 5, the respondent superimposed a picture of an 11 to 14-year-old victim's face over his daughter's face and added lewd pornographic text.

[12] Count 6 involved the respondent taking photographs of his daughter's exposed genitalia and buttocks.

[13] Counts 13 to 17 involved the respondent taking photographs of his niece's groin and buttock areas, sometimes when her legs were apart. At all times she was fully clothed.

[14] Count 18 consisted of the respondent taking a photograph of another child victim, then aged between one and three, and adding a photograph of his erect penis, some clear bubble type substance and pornographic text.

[15] Counts 19 to 21 involved the respondent editing photographs of scantily dressed young girls and superimposing on them pictures of the face of the 11 to 14-year-old victim in count 5 and adding lewd pornographic text.

[16] Counts 22 to 28 involved the respondent covertly taking photographs of the underwear and upper thigh regions of young girls in public places.

[17] Police interviewed the respondent. He told them he started viewing child pornography because he was having trouble maintaining an erection and difficulty ejaculating because he had been using methamphetamine.

[18] He explained how he had removed the clothing from the lower half of his daughter's body and positioned her legs to show her genitalia. He said that

he had placed his erect penis in the photographs but had not touched her vagina with it. He said (falsely) that he had kept his penis about 10 cm away from her. He made other admissions about some details of the offending. Despite what he told his ex-wife, he denied ever sharing or selling the pictures to anyone and he (falsely) denied any contact offending.

The sentencing remarks

[19] After reciting a summary of the facts, the sentencing Judge spoke about the lack of harm done to the victims by the offending. His Honour said:

> It does seem that none of these children were, or are aware of what you did to them. Accordingly, that part of the *Sentencing Act* that requires the court to take into account the harm done to the victims will have a lesser role to play here than it normally has in other cases. That is, other cases, which involve some awareness on the part of the victim of what is happening to him or her, and cases of physical or emotional harm that result from the conduct.
>
> It is likely that [your daughter] *will be upset* when she does learn that you assaulted her and took advantage of your trusted position as her father. It is difficult to speculate as to what effect that will have on her. The extent to which she will be upset and traumatised when she learns about what you did to her will depend largely upon the way in which she is told about it and upon the level of detail that is communicated to her.
>
> It does seem that your primary victims, in particular, [your daughter] and [your niece] and the other young girls, have not suffered any harm as far as we know as a result of your offending. They simply did not know about it.
>
> However, [your daughter's] mother is understandably extremely upset and has been ever since she discovered these images on her (sic) telephone.[1] …

1 This should presumably be "your telephone".

[20] His Honour went on to speak at length about the very significant emotional and psychological effects the respondent's offending had on his ex-wife (the mother of his daughter) to whom he had been married for 16 years and with whom he had had two children. His Honour spoke about the mother's description of the impact the respondent's conduct already had on their two children and the harm likely to occur in the future saying:

> She [the mother] also acknowledges that [your daughter] was and still is far too young to be able to comprehend what you did to her and the total breach of trust on her (sic) part.[2] She said that you had been in [your daughter's] life since her birth. [Your daughter] adored you and when you were first in prison, she would ask for you on certain occasions, such as birthdays and so on.
>
> She says that [your daughter] and her brother both know that you are in gaol, but they do not know why. But, they will have to be told the truth one day and she is worried about [your daughter's] reaction when she is told what happened to her. She says that [your son] is a fantastic brother to his little sister. She says that he too, as he gets older, will be asking more questions and will want to know why his father is in prison. She then talks about the fact that the kids are still young and says the whole thing has resulted in ongoing trauma for herself and is likely to do so for her children.

[21] The sentencing Judge then spoke about the seriousness of sexual offending against children, especially when committed by parents, step-parents and other people trusted with the care of children and added:

> Such offending often has long-term effects on the victim and leaves permanent mental scars on the victim. As I have said, in this particular case, it does seem that your victims were not aware of what you were doing at the time. But, who knows what the effect upon them might be in the future when they do become aware, if they do become aware, of what you have done.

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2 Obviously meaning, "your part".

[22] His Honour spoke of the prevalence of such offences and said:

> General deterrence is a matter of particular importance, together with denunciation by the community through the imposition of condign imprisonment.

[23] His Honour assessed the offending on count 1 (possession of child abuse material) to be below the mid-range of seriousness for offending of that nature and continued to assess the seriousness of the other offending:

> Your other offending, while serious, is less serious than is usually the case for offending of that kind. As I have already said, that is largely because your child victims, particularly [your daughter], were not aware of what you were doing and were not physically or emotionally harmed at the time. It is likely that [your daughter] will inquire of her mother why her father is, or has been, in prison. Depending upon when she makes an inquiry and what her mother tells her, she may or may not experience some distress when she learns that her own father abused her trust and treated her as you did.
>
> I have given some consideration to your motivation when you engaged in this conduct and in particular, whether you did, or intended to, sell any of the child abuse material that you created.
>
> As I said, when [your wife] confronted you about the pictures, particularly those of [your daughter], on 22 June and again during the pre-text call on 25 June, you told her that you "Took the pictures for money". But, you "do not do that anymore" and "you had deleted the images." Also, as I have already mentioned, when you were interviewed by the police later on 25 June, you were asked about that. You told the police that some five years or so before that, a person at your then workplace ... had offered to give you some money in exchange for you obtaining and supplying him with child abuse material in the form of edited images of children.
>
> You told the police that you never in fact took up that suggestion. You said that you never sold any images and you never had any intention to sell images of [your daughter] or of the other named victims. As I mentioned, you also told police that your motivation was to assist you to sexually perform better with your partner. You told them that she had been having sexual encounters with others and that she had introduced and supplied you with methamphetamine. You felt that your sexual performance could be improved if you had seen pornography, including child abuse material.

> I note that you are not being charged with any offence of distributing, selling or offering to distribute or sell child abuse material. I am not satisfied that you did supply child abuse material to anyone, or more importantly that you intended to supply any of the images subject to these charges, to anyone. Rather, I think it likely that your main motivation was to enhance your own sexual performance.

[24] The sentencing Judge went on to talk about each category of offending. In relation to the incest charges (counts 2, 3, 7 and 8) his Honour said:

> That offending was particularly serious for a number of reasons. Firstly, obviously she was a very young child, somewhere between 1 and 5. Secondly, it involved a gross breach of trust on your part. You were her father. She was in your care, particularly when her mother was out. Thirdly, in two of those charges, counts 3 and 7, you placed some liquid along her vagina and anus to make it appear that somebody had ejaculated onto those parts of her body.
>
> Also, in some of those charges, you placed your erect penis between her buttocks. Finally, you took photographs of what you had done, thus creating the possibility of those photographs being viewed again by you and perhaps even by others who might get access to them.
>
> On the other hand, as I have said, it appears that she was asleep at the time of you committing those offences and, therefore, that she did not and still does not know what you did to her. There is no suggestion that she sustained any pain or discomfort. Also, the degree of penetration in her vagina was relatively minor. The purpose of your actions were (sic) to expose her vagina in order for you to take the photographs, not, it would appear, to obtain any immediate sexual gratification by engaging in that act itself.
>
> I consider that the offending, the subject of those counts, 2, 3, 7 and 8 was at the lower end of seriousness for that kind of offending; that is, for the kind of offending covered by s 134(1) of the *Criminal Code*, namely the offence of incest.

[25] As to the gross indecency charges (counts 4, 5, 9, 10, 11 and 12), which carry a maximum penalty of imprisonment for 25 years, after describing the offending conduct, his Honour said:

> Again, I consider that that offending was at the lower end of seriousness for that kind of offending covered by s 127(1).

[26] As to counts 6, 13, 14, 15, 16 and 17, which consist of taking indecent visual images and carry a maximum penalty of imprisonment for 14 years, his Honour said:

> Count 6 involved you actually manipulating [your daughter] and her clothing to expose her buttocks and genitals. But as I have said, [your daughter] was not awake and not aware of what was happening to her, so I regard that offending on your part as falling between the lower and middle levels of seriousness for that particular kind of offending. That is for gross (sic)[3] indecency.
>
> The other counts, that is 13 through to 17, involved your niece. Those images do not appear to have been deliberately posed. Rather, they were taken opportunistically and covertly when [your niece] was unaware of what was occurring. In the main, those images show her underwear and in a couple of instances, her partially exposed buttocks. Again, there was no evidence or suggestion that [your niece] was aware that those images were taken and, therefore, no evidence that she was in any way traumatised or otherwise affected by that offending.
>
> I put the offending in relation to [your niece] at the lower level of seriousness for that kind of offending.
>
> Counts 18 to 21 related to you producing child abuse material by digitally altering images of children and superimposing the faces of other children. That conduct was serious particularly because of the addition of the disgusting texts and again, the possibility of those images and texts being seen by someone else, even those children themselves.
>
> On the other hand, as your barrister points out, no actual child was used by you in the course of producing those images. I agree with him that that offending falls at the lower end of the spectrum of objective seriousness.
>
> The remaining counts: that is counts 22 through to 28, involved you taking indecent visual images of unknown female children under the age of 16. As I said, they all occurred in December 2017 at various shopping centres and other public places in Darwin.

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3 Count 6 was a charge of aggravated indecent dealing contrary to s 132(2)(f) and (4) of the *Criminal Code*.

> They involved the surreptitious capture of images of children's underwear or their thigh, buttock or groin regions. Again, those victims were not aware of that offending and have suffered no harm or trauma. Again, I agree that offending falls into the low range of objective seriousness.

[27] His Honour then made the following remarks about the offending as a whole:

> As I have said, your offending is not as serious as is usually the case for offending of the kind that we normally see. That is because your victims were not aware of what you were doing and did not suffer any physical or emotional harm. However, it is of particular concern that your offending, particularly in relation to your very own, young daughter … was not isolated offending. It took place over a period of three or four years and involved numerous breaches of trust on your part.

[28] The sentencing Judge then went on to describe the respondent's personal background, noting that he was educated in Darwin to Grade 12, and had been consistently employed throughout his adult life, most recently as a store person/truck driver. He met his former partner in 2002, they had two children and separated in 2018. His father passed away in 2018 and he maintains a close relationship with his brother, despite the fact that his brother's daughter was one of the victims of his offending.

[29] His Honour then referred to the psychiatric report of Dr Danny Sullivan tendered by the defence. He noted that Dr Sullivan said the respondent was not suffering from any significant mental disorder apart from difficulties adjusting to incarceration and the fact that he had to move to the Alice

Springs Correctional Centre to get away from assaults that had occurred in Darwin Correctional Centre.

[30] His Honour also noted Dr Sullivan's opinion that the respondent would satisfy a diagnosis of paedophilia, the development of which was likely strongly associated with the respondent's methamphetamine abuse, but he found no evidence of any other mental disorder that was associated with the offending.

[31] In addition, Dr Sullivan's opinion was that the respondent had good prospects of rehabilitation. His Honour agreed with that assessment. He noted that the respondent had no prior criminal history and had a strong work ethic, which suggested that he was of prior good character. His Honour accepted that the respondent was remorseful.

[32] The sentencing Judge also took into account the hardship that the respondent had and may continue to experience in prison. He was assaulted twice, was put into the high security unit for about six to eight months, and when released into the general prison population he was assaulted twice more. His Honour noted Dr Sullivan's opinion that incarceration would weigh more heavily on the respondent given the nature of his offending and the stigma associated with it, and added:

> Of course, that is to be expected. I would expect all prisoners convicted of offending of this kind would be the possible subject of assaults while in prison.

[33] The sentencing Judge then referred to other sentences imposed by the Supreme Court for offending of like kind including *BW*,[4] *GCT*,[5] *Namajbali*[6] and *Namarnyilk*[7] and to Court of Criminal Appeal decisions including *R v Tennyson*[8] and *Forrest v The Queen*[9] and said:

> Those cases are all distinguishable from the present case and involve offending that was effectively more serious than yours.

[34] The sentencing Judge said that the case of *GCT* was to some extent analogous but was distinguishable because the child in that case was awake and fully aware of what the offender was doing to her. His Honour then imposed the following sentences, after allowing a 25% reduction for the respondent's guilty pleas.

Count 1 (possession of child abuse material)	15 months
Count 2 (incest)	45 months
Count 3 (incest)	4 years
Count 4 (gross indecency)	27 months
Count 5 (gross indecency)	27 months
Count 6 (indecent visual image)	18 months

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4 *R v BW* [2018] NTSC 21727731, 21750122 (28 August 2018) sentencing remarks.

5 *R v GCT* [2018] NTSC 21708184 (2 February 2018) sentencing remarks.

6 *R v Namajbali* [2013] NTSC 21212944 (20 June 2013) sentencing remarks.

7 *R v Namarnyilk* [2013] NTSC 21207806 (14 February 2013) sentencing remarks.

8 (2013) NTCCA 2.

9 (2017) NTCCA 5.

Count 7 (incest)	4 years
Count 8 (incest)	4 years
Count 9 (gross indecency)	18 months
Count 10 (gross indecency)	27 months
Count 11 (gross indecency)	42 months
Count 12 (gross indecency)	18 months
Counts 13 to 17 (indecent visual image)	12 months each (all concurrent)
Counts 18 to 21 (produce child abuse material)	9 months each (all concurrent)
Counts 22 to 28 (indecent visual image)	9 months each (all concurrent)

[35] His Honour then said that he considered a total just and proper sentence should be 6 years' imprisonment and directed substantial concurrency for the different groups of offences to achieve that. Starting with the sentence of 4 years' imprisonment for count 3, his Honour ordered that the sentence for count 6 be served wholly concurrently with the sentence for count 3 (4 years); 3 months of the sentence for count 2 be served cumulatively on the sentence for count 3 (4 years 3 months); 3 months of the sentences for each of counts 7 and 8 be served cumulatively (4 years 9 months); 3 months of the sentence for count 1 be served cumulatively (5 years); 3 months of the

sentence for count 4 be served cumulatively (5 years and 3 months); 3 months of the sentence for count 11 be served cumulatively (5 years 6 months); 2 months of the sentence for count 13 be served cumulatively (5 years 8 months); 2 months of the sentences for each of counts 18 to 21 be served cumulatively (5 years 10 months); and 2 months of each of the sentences for counts 22 to 28 be served cumulatively (total sentence: 6 years).

[36] His Honour then fixed the non-parole period in accordance with s 55A and s 54 of the *Sentencing Act 1995* (NT). 67 months of the sentence was attributable to offences caught by s 55A, which requires the Court to fix a non-parole period of 70 percent of the head sentence. 70 percent of 67 months is 46.9 months, which is longer than the minimum non-parole period of 50 percent of the total sentence specified by s 54. Accordingly, the sentencing Judge fixed a non-parole period of 4 years.

Principles governing Crown appeals against sentence

[37] The principles governing Crown appeals against sentence are not in dispute.[10]

(a) Crown appeals against sentence should be a rarity brought only to establish some matter of principle.[11]

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10 See *R v Mossman* [2017] NTCCA 6 at [8]-[18]. The following summary is taken verbatim from *Arnott v Blitner* [2020] NTSC 63 at [75].

11 *R v Roe* [2017] NTCCA 7 at [11]; cf *R v Wilson* [2011] NTCCA 9 at [27] (a); See also *Griffiths v The Queen* [1977] HCA 44; 137 CLR 293 at p 310.

(b) Manifest inadequacy in a sentence amounts to such an error of principle which the Crown is entitled to have the appeal court correct.[12]

(c) The presumption is that there is no error in any sentence passed by the court below. It is incumbent upon the Crown to show that the sentence was clearly and obviously, and not just arguably, inadequate; that is to say, it must be shown that the sentence is so disproportionate to the seriousness of the offending as to shock the public conscience and demonstrate error in principle.[13]

(d) The principles in *House v The King*[14] remain applicable to the determination of manifest inadequacy:

> It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his, if it has the materials for doing so. *It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion*

12 See also *Everett v The Queen* [1994] HCA 49; 181 CLR 295 at p 300.

13 *Whitlock v The Queen* [2018] NTCCA 7; See also *R v Simpson* [2020] NTCCA 9.

14 [1936] HCA 40; 55 CLR 499.

is reviewed on the ground that a substantial wrong has in fact occurred.[15]

(e) The principle expressed by King CJ in *R v Osenkowski*,[16] also remains applicable:

> It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where the judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of an offender's life might lead to reform. The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience. [17]

(f) Even where manifest inadequacy is found, this Court retains a residual discretion as to whether the respondent should be resentenced.[18]

(g) However, in exercising its discretion on an appeal against sentence with respect to an indictable offence, the Court must not take into account any element of double jeopardy when deciding whether to allow the appeal or impose another sentence.[19]

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15 Ibid at pp 504-505 per Dixon, Evatt and McTiernan JJ.

16 (1982) 30 SASR 212.

17 Ibid at pp 212-213.

18 See also *R v BJW* [2000] NSWCCA 60; 112 A Crim R 1 at [29].

19 *Criminal Code*, s 414(1A); *R v Wilson* [2011] NTCCA 9 at [27].

Crown's contentions as to the first ground of appeal

[38] The Crown contends that the sentences imposed on the respondent for counts 1 to 25, *individually and collectively*,[20] were manifestly inadequate and were so disproportionate to the objective seriousness of the offending as to shock the public conscience and demonstrate error in point of principle; the point of principle being to provide further guidance to sentencing courts to ensure that sentences imposed for these types of child sexual offences adequately reflect the criminality involved in the offending.

[39] In paragraph 6 of its written submissions, the Crown provided the following particulars of the first ground of appeal.

i. The learned sentencing Judge erred in his assessment of the offending by relying on an apparent lack of harm as a mitigating factor, and by failing to properly [consider] the inevitable psychological damage arising out of the offences.

ii. The learned sentencing Judge erred in his assessment of the objective seriousness of the offending.

iii. The learned sentencing Judge erred in his approach to the question of totality.

[40] However, in paragraph 11 of the Crown's written submissions, the Crown stated the following under the heading, **Particular (i)**:

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20 Paragraph 31 of the appellant's written submissions.

> A finding was made that the offending did not result in any harm to the victims. It is contended that this finding was not open on the evidence before the learned sentencing Judge. This finding permeated the sentencing remarks, leading to significant weight being placed on this as a mitigating factor, obscuring the seriousness of the offending.

[41] The sentencing Judge did not make a finding that the offending did not result in harm to the victims. His finding was that they did not suffer harm at the time of sentence. As stated in paragraph 6 of the Crown's written submissions, the issue for consideration was the extent of potential future psychological damage. The sentencing Judge asked Mr Geary, who appeared for the Crown in the court below, if the Crown accepted that the respondent's daughter was asleep during all of the incidents of offending and he said, "Yes, I agree with that." During his submissions, Mr Geary also stated that "In many ways all the children in this matter are lucky that they are not aware to date of the offending".

[42] The digital penetration of the respondent's daughter's vagina was relatively slight and of short duration. On its face, the degree of penetration would not have caused any pain or discomfort. The transcript of the daughter's forensic interview was in evidence. It is apparent from the child forensic interview that the respondent's daughter had no apparent knowledge of what occurred. The Police questioned her about any photographs that the respondent took of her and she could only recall happy everyday images. She was not conscious of the offending. In her victim impact statement, the mother of the respondent's daughter stated that she had been protecting her

daughter from obtaining knowledge about what had occurred until she is of a suitable age to be told, and that:

> The full extent of [my daughter's] emotional and psychological effects is not yet known at this stage as she was and is far too young right now to be able to comprehend his crimes and the total breach of trust from her own biological father.
>
> [My daughter and my son] both know he is in gaol; however, the reason as to why has not been explained to them.

[43] That is to say, there is evidence that the victims did not suffer any harm at the time of the offending and it was open to the sentencing Judge to find accordingly. We accept the respondent's submissions that:

> The learned sentencing Judge's finding that the victims were not aware of the offending when it occurred and were not 'physically or emotionally harmed <u>at the time</u>' [AB79] was, on the evidence, open and entirely correct.

[44] The real issues are whether the sentencing Judge failed to assess the potential of future psychological harm correctly, wrongly took the lack of harm into account as a mitigating factor, and thereby incorrectly assessed the objective seriousness of the offending.

[45] The respondent took the photographs of the other victims surreptitiously. There was no evidence that those victims were aware that the respondent took photographs of them, or that they are going to be told what occurred. Therefore, there is a fair inference that they did not suffer any harm.

[46] To illustrate how the sentences imposed by the sentencing Judge do not adequately reflect the seriousness of the offending, the Crown provided a

table setting out in detail the agreed facts of each offence. These details are not contained in the sentencing remarks but are contained in the Crown Statement of Facts being exhibit P1 in the court below, which his Honour referred to in his remarks. A copy of the table is set out in the Schedule 1 to our Reasons for Judgment.

Particular (i) of the first ground of appeal (The learned sentencing Judge erred in his assessment of the offending by relying on an apparent lack of harm as a mitigating factor, and by failing to properly take into account the inevitable psychological damage arising out of the offences.)

[47] The Crown argued particular (i) of the first ground of appeal on two bases. *First*, the Crown contended that the sentencing Judge erred by taking into account the lack of evidence of psychological harm to the victims as a matter favourable to the offender. Despite the fact that there was no evidence of the primary victims suffering any harm at the time of sentence, or before, the sentencing Judge could not assume that the lack of evidence meant the victims would not suffer any psychological harm at some stage in the future. No evidence of harm is not equivalent to evidence of no harm. The finding of no harm permeated the sentencing remarks leading to significant weight being placed on it as a mitigating factor by the sentencing Judge, thereby obscuring the seriousness of the offending.

[48] *Second*, the Crown contended that the sentencing Judge's finding that the offending did not result in any harm to the primary victims was not open on the evidence. In cases such as this, the Crown argued there is a presumption that the victim will suffer serious psychological harm at some stage in the

future. The sentencing Judge erred in his assessment of the seriousness of the offending by failing to consider the inevitable psychological harm that arises from such offences and would ultimately arise in this case because the mother of the respondent's daughter was going to tell her what he did to her.

[49] The Crown referred to the following extracts from the sentencing Judge's remarks in support of the Crown's submissions that the sentencing Judge treated the lack of evidence of harm as a mitigatory factor and discounted the objective seriousness of the offending (emphasis added by the Crown).

i. It does seem that none of these children were, or are aware of what you did to them. **Accordingly, that part of the *Sentencing Act* that requires the court to take into account to (sic) the harm done to the victims will have a less role to play here than it normally has in other cases.** That is, other cases, which involve some awareness on the part of the victim of what is happening to him or her and cases of physical or emotional harm that results from the conduct.

ii. **It does seem that your primary victims, in particular, [your daughter] and [your niece] and the other young girls have not suffered any harm as far as we know as a result of your offending.** They simply did not know.

iii. It has been said by many others, including myself, that sexual offences and other acts of indecency committed by adults against children are particularly abhorrent. This is all the more so where the acts are

committed by parents, step-parents or other people trusted with the care of children. Such offending often has long-term effects on the victim and leaves permanent mental scars on the victim. **As I have said, in this particular case, it does seem that your victims were not aware of what you were doing at the time.** But, who knows what the effect upon them might be in the future when they do become aware, if they do become aware, of what you have done.

iv. Your other offending, while serious, is less serious than is usually the case for offending of that kind. **As I have already said, that is largely because your child victims, particularly [your daughter], were not aware of what you were doing and were not physically or emotionally harmed at the time.**

v. [As to counts 2, 3, 7 and 8], as I have said, it appears that [your daughter] was asleep at the time of you committing those offences and, therefore, that she did not and still does not know what you did to her. There is no suggestion she sustained any pain or discomfort.

vi. [As to counts 4, 5, 9, 10, 11 and 12], it seems that she was asleep at the time and therefore, although your conduct was offensive, disgraceful and perverted, it did not cause her any distress, because she was not aware of what you were doing.

vii. [As to count 6, your daughter] was not awake and not aware of what was happening to her.

viii. [As to counts 13 to 17], there was no evidence or suggestion that [your niece] was aware that those images were taken and, therefore, **no evidence that she was in any way traumatised or otherwise affected by that offending.**

ix. **As I have said, your offending is not as serious as is usually the case for offending of the kind that we normally see. That is because your victims were not aware of what you were doing and did not suffer any physical or emotional harm.**

[50] In support of particular (i) of the first ground of appeal, the Crown relied on the following authorities: *R v CTG*;[21] *R v Gavel*;[22] *Stewart v The Queen*;[23] *SW v The Queen*;[24] and *R v JP*.[25]

[51] Further support for the Crown's argument about particular (i) is found in the following authorities: *R v Rankin*;[26] *R v Stanbrook*;[27] *R v Lomax*;[28] and *Hermann v The Queen*.[29] However, as to future psychological harm, the authorities provide that, unless there is evidence of ongoing psychological

21 [2017] NSWCCA 163.

22 [2014] NSWCCA 56.

23 [2012] NSWCCA 255.

24 [2013] NSWCCA 255.

25 [2015] NSWCCA 267.

26 [2001] VSCA 158.

27 [1994] 1 VR 391.

28 [1998] 1 VR 551 at pp 559–560.

29 (1988) 37 A Crim R 440.

harm at the time of sentencing, what is to be taken into account by a sentencing court is the potential for future psychological harm.

[52] *R v CTG* was a Crown appeal against a sentence of imprisonment for 9 years with a non-parole period of 5 years and 9 months, for five offences of sexual intercourse with a child under the age of 10 years, for which the maximum penalty was imprisonment for 25 years. The victim was the offender's three-year-old niece. During a search of the residence where the offender in that case lived, police found a Samsung mobile phone belonging to him. On examining the mobile phone, police found photographs of the victim that were taken while the offender was sexually assaulting her. There was no evidence of substantial physical injury to the victim and she had a limited recall of the events. She did remember photographs being taken, the removing of her clothes and that the offender exposed "the part of his body that he goes to the toilet with when he does a pee".

[53] The sentencing judge in *R v CTG* found that the offending was "just below the mid-range of objective seriousness".

[54] One of the grounds of appeal was that "[t]he sentencing judge erred in his assessment of the objective seriousness of the … offences by failing properly to take into account the victim's very young age, vulnerability and the inevitable psychological damage arising out of those offences".

[55] In *R v CTG*, the appellant submitted that when he came to deal with issues such as the complainant's age, lack of recollection of the offending and lack

of psychological harm, the sentencing judge appeared to take them into account as mitigating factors. The appellant relied particularly on a list of "mitigating factors" taken into account by the sentencing judge which included that "... there was no evidence of substantial injury and there was no evidence that the victim has any recall of events", and a statement in the sentencing remarks that the "absence of physical injury, the lack of memory by the victim ... does not lead me to do anything by way of speculation as to whether there is likely to be any lasting effect upon her".

[56] The appellant submitted that his Honour was in error in treating those matters as mitigating factors and that the victim's tender age and inability to remember, or articulate, what had occurred should not have been used in any way to the respondent's advantage.

[57] The appellant also submitted that the sentencing judge had erred in requiring the appellant to adduce some evidence of psychological damage to the victim before a finding could be made that such damage had been suffered. The appellant submitted that because psychological harm in situations such as these may not become apparent for many years, it can be accepted without specific proof that psychological damage of some kind was likely.

[58] When dealing with the issue of manifest inadequacy in *R v CTG*, Hoeben CJ at CL (with whom R A Hulme and Wilson JJ agreed) stated the following.

> As [for] Particular (i), the taking into account by the sentencing Judge of the apparent absence of memory and that there was no evidence at the time of sentencing of psychological harm as mitigating matters,

involved error. Such an error was identified by Price J in *R v JP* [2015] NSWCCA 267 in an appeal involving an offence committed against a six week old baby:

> When offences of this kind are considered, it is often submitted on behalf of an offender that as the young child would not have been in the position to understand or even appreciate what occurred, there could be no evidence of psychological harm. Indeed, the primary judge made such a finding. I do not understand how the fact that a child was unknowing can be seen to reduce the objective seriousness of the offence. An unknowing child is a vulnerable victim, who is unable to take any action to protect him or herself from abuse of any kind...

In relation to psychological harm, the suggested concession by the Crown was more apparent than real. What the Crown was conceding in the oral exchanges on sentence was that he was unable to identify any actual psychological harm at the time of the sentence proceedings, but it was unclear and he was unable to say to what extent there might be ongoing psychological harm in the future. That was a reasonable submission and did not merit the peremptory observation by the sentencing judge that to make such a finding would involve "speculation in the extreme".

In relation to future psychological harm, the Crown referred the sentencing Judge to *R v Gavel* [2014] NSWCCA 56 and set out in its written submissions paragraphs [110]-[112] of that decision. Those and other observations by the Court in that case (Leeming JA, Johnson and Hall JJ) are apposite to this issue:

> This Court has stated that sentencing Judges are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences and that, as a result, care needs to be taken to avoid double counting with regard to the aggravating feature of substantial emotional harm: *Stewart v R* [2012] NSWCCA 183 at [61].
>
> In the area of sex offences committed against young children, s 66A(2) provides for a very substantial penalty. It may be taken that a factor which contributes to the setting of this penalty (and the standard non-parole period) is the expectation that substantial harm will result to a young child victim of sex offences.
>
> This Court has observed that child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: *R v CMB* [2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: *SW v R* [2013] NSWCCA 255 at [52]. In *R v G* [2008] UKHL 37; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the "long term and serious harm, both physical and psychological,

> which premature sexual activity can do". The absolute prohibition on sexual activity with a child is intended to protect children from the physical and psychological harm taken to be caused by premature sexual activity: *Clarkson v R* [2011] VSCA 157; 32 VR 361 at 364 [3], 368-372 [26]-[39].
>
> > This factor no doubt contributes to the setting of the heaviest maximum penalty known to the criminal law for s 66A(2) offences, accompanied by a standard non-parole period of 15 years. It is important that sentences for s 66A(2) offences reflect this grave element implicit in the offence itself.
>
> The effect of the analysis in *R v Gavel* is that built in to the high maximum sentence for offences under s 66A is the likelihood of future psychological harm. It also allows for a finding of actual psychological harm if there is evidence of that before the Court. Here the possibility of future psychological harm could not be excluded but there was no evidence of it. What is clear, however, for the reasons already set out, was that the absence of evidence of future psychological harm could not be used as a mitigating factor to benefit the respondent. The fallacy in this part of the sentence judgment is to equate no evidence of present psychological harm with evidence of no psychological harm.[30]

[59] In our opinion, the following principles emerge from *R v CTG*. *First*, the absence of evidence of future psychological harm does not mitigate the seriousness of a sexual offence. The absence of evidence cannot be used as a mitigating factor to benefit the offender. *Second*, serious sexual offences committed upon children are expected to have future adverse psychological consequences for them. *Third*, the Legislature took into account the second factor when fixing the high maximum penalty of 25 years for the crimes of incest and gross indecency on a child who is under 10 years of age. However, the decision of *R v CTG* is not authority for the existence of a presumption of future psychological harm. Rather, the case is authority for the principle that a sentencing Judge may take the likelihood, or risk, of

30 *R v CTG* [2017] NSWCCA 163 at [73]-[76].

future psychological harm into consideration when sentencing an offender for a serious sexual offence against a child without the need for expert evidence about that risk.

[60] In addition, when applying *R v CTG* it is to be noted that the victim in that case was conscious at the time of the offending.

[61] In *R v Gavel*, the respondent was charged with five sexual offences and a further six offences were taken into account. The sentencing judge sentenced the respondent to a total sentence of 8 years with a non-parole period of 5 years and 4 months. All of the offences were committed against one victim who was eight years of age. The victim was conscious at all material times. The victim described the sexual assaults upon her variously as: "weird and funny" and "weird". The Victim Impact Statement pointed to many psychological consequences affecting the eight-year-old girl who had been subject to a course of abuse by a trusted person over a period of months.

[62] Under the heading, "Harm to the Victim", the New South Wales Court of Criminal Appeal stated:

> This Court has stated that sentencing Judges are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences and that, as a result, care needs to be taken to avoid double counting with respect to the aggravating feature of substantial emotional harm; *Stewart v R* [2012] NSWCCA 183 at [61].
>
> In the area of sex offences committed against young children, s 66A(2) provides for a very substantial penalty. It may be taken that a factor which contributes to the setting of this penalty (and the standard non-

parole period) is the expectation that substantial harm will result to a young child victim of sex offences.

The victim impact statement in this case pointed to many adverse psychological consequences affecting an eight-year-old girl who had been subjected to a course of sexual abuse by a trusted person over a period of months.

The exposure of an eight-year-old girl to images and conduct of the type described earlier over a period of months must inevitably have a significant long-term effect upon her. The victim impact statement made clear that a once "bubbly, outgoing and fun loving eight-year-old girl" had become confused and apprehensive in home and school settings, with friends and others. By the time the victim impact statement was prepared on 8 March 2013, extensive psychological support had been undertaken, with the victim continuing to manifest anxiety, confusion, mistrust, shame, anger and guilt.

This Court has observed that child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: *R v CMB* [2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: *SW v R* [2013] NSWCCA 255 at [52]. In *R v G* [2008] UKHL 37; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the "long-term and serious harm, both physical and psychological, which premature sexual activity can do". The absolute prohibition on sexual activity with a child is intended to protect children from the physical and psychological harm taken to be caused by premature sexual activity: *Clarkson v R* [2011] VSCA 157; 32 VR 361 at 364 [3], 368-372 [26]-[39].

This factor no doubt contributes to the setting of the heaviest maximum penalty known to the criminal law for s 66A(2) offences, accompanied by a standard non-parole period of 15 years. It is important that sentences for s 66A(2) offences reflect this grave element implicit in the offence itself.

This is an important feature in the present case. Young child victims are especially vulnerable. It is important that sentences passed for s 66A(2) offences recognise the harm done to the victim of the crime: s 3A(g) *Crimes (Sentencing Procedure) Act 1999*.[31]

[63] Their Honours made the above statements in a case where the victim was conscious when subject to the sexual assaults upon her, and in which there

31 *R v Gavel* [2014] NSWCCA 56 at [106]-[112].

was evidence of ongoing psychological harm at the time of sentencing. In those circumstances, the New South Wales Court of Criminal Appeal stated that the offending must inevitably have a significant long term effect.

[64] The victim in the case of *Stewart v The Queen* that is referred to in *R v Gavel* was an adult who was also conscious at the time of the sexual assault and there was evidence before the sentencing judge that she suffered significant ongoing psychological harm. Relevantly, the third ground of appeal in *Stewart v The Queen* was that the sentencing judge erred in his consideration of the impact of the offence on the victim.

[65] In his sentencing remarks, the sentencing judge in *Stewart v The Queen* stated:

> Now as far as the complainant is concerned there is a lengthy report from a social worker. I just want to make it clear, as I have to do unfortunately in cases of this nature, as far as I am concerned, cases of sexual assault have significant effects on the victim. There are two particular ways, they result in significant distrust as far as the victim is concerned in forming relationships, particularly with males if the assailant was a male. The other broad area that is affected is the confidence or self-confidence of the victim is significantly damaged, they have concerns about their own self-worth, sometimes that is demonstrated by self-harm but there are other ways in which it is demonstrated. There is no satisfactory material yet available to indicate how long those matters may last. I always proceed on the basis that they will continue to be present for a very long time. One of the reasons for that is that this Court does have to deal with assaults of some age and it is notable that the victims in those cases are still showing signs of the trauma resulting from attacks that occurred many years earlier. There is no way of knowing whether this will diminish in time, if so, to what extent and there is the added concern here that of course there is a child in common between the complainant and the offender and that is just a fact which will trouble I have no doubt the complainant but to be fair, it will also trouble the offender because his acts are bound to have a prejudicial effect on any attempt he might make for contact in relation

> to the child, that is a matter for another jurisdiction but it is something he has acknowledged and is a consequence that he will have to live with.[32]

[66] Counsel for the applicant in *Stewart v R* submitted that the above extract demonstrated that a substantial portion of the sentencing remarks were taken up in discussing the effects of sexual assault on victims. The fact that in the above passage the sentencing judge did not refer to the victim impact statement gives rise to the conclusion, it was submitted, that his Honour took into account presumed harm that was irrelevant to the case. Counsel for the respondent in that case submitted the above portion of the remarks was about the effects on victims of sexual assaults generally.

[67] When deciding the third ground of appeal in *Stewart v The Queen*, Button J stated:

> This Court has held that sentencing judges are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences. [...]
>
> Having said that, it would have been preferable for his Honour not to have expressed himself in terms of generalities in this case. A better course would have been to make findings of fact founded on the evidence tendered in the proceedings. In particular, it was undesirable for his Honour to indicate an approach that his Honour "always" adopted with regard to a finding of fact as to how long psychological sequelae will last.
>
> I consider that this ground may have had some force if there had been evidence that the victim had suffered no psychological injury as a result of the offence, or if there had been no evidence either way.
>
> However, the victim impact statement contained unequivocal, detailed and undisputed evidence about the significant psychological injuries that the victim had suffered as a result of the offence. As I have shown in the passage extracted from it, the victim impact statement concluded

32 Set out in *Stewart v The Queen* [2012] NSWCCA 183 at [57].

> by expressing the opinion that the effects of the offence could last for many years. In short, the actual consequences to the victim of the offence demonstrated by the victim impact statement bore no substantial dissimilarity to the phenomenon being described by his Honour.
>
> In the circumstances, I do not consider Ground 3 has been made out.[33]

[68] *Stewart v R* is not a case that supports the Crown's contention that there is a presumption that child victims of sexual assault will suffer long-term psychological harm. Rather, the case suggests simply that such an inference can be drawn readily where there is clear and cogent evidence of ongoing psychological harm at the time of sentence.

[69] In *SW v The Queen*, the applicant pleaded guilty to having sexual intercourse with a child under the age of 10 years contrary to s 66A of the *Crimes Act 1900* (NSW). The child was five or six years of age. The applicant was sentenced to 7 years and 7 months' imprisonment with a non-parole period of 5 years. The victim was conscious when the act of sexual intercourse occurred. During the sentencing hearing, the respondent tendered a report from a sexual assault counsellor about the impact of the offence on the victim. The sentencing judge found that the victim suffered "very substantial ongoing emotional harm" and that "the impact on his young life had been profound". At [52] Johnson J (with whom the other members of the Court agreed) stated:

> Sexual abuse of children of very tender years will inevitably give rise to psychological damage emanating from (at least) the confusion in the

33 *Stewart v The Queen* [2012] NSWCCA 183 at [60]-[64].

> young mind of the victim of abuse. As *RR v R* at 519 [147] exemplifies, a single act of sexual abuse may have a substantial impact upon the psychological state of a young victim, with the likelihood of long-term adverse consequences. In this case, the very young victim has sustained significant adverse psychological consequences which may be traced back to the applicant's crime.[34]

[70] In *R v JP*, the New South Wales Court of Criminal Appeal considered a Crown appeal against sentence of 1 year and 9 months suspended after 3 months for one count of sexual intercourse (cunnilingus) with a child under 10 years of age, with two further offences of production and dissemination of child abuse material to be taken into account. The child was aged six weeks old. The offender was the mother of the victim. She was suffering from an intellectual disability. The offence was committed at the request of a man with whom she was having an affair, and was the biological father of the child. The offender photographed the offending at his request and sent him copies of the images. The Court of Criminal Appeal held that the sentencing judge had erred in characterising the objective seriousness of the offending as "at the very bottom of the range of crimes of this nature". However, the Court of Criminal Appeal exercised its residual discretion and dismissed the appeal.

[71] The sentencing Judge found that the offence was brief and that the child would not have understood or appreciated what had happened. His Honour nevertheless characterised the action of the respondent as "a gross violation

34 *SW v The Queen* [2013] NSWCCA 255 at [52].

of the child's bodily integrity and was performed by the one person upon whom a child so young was entitled to rely for protection, her mother".

[72] The sentencing judge found that because of the child's age, there was no psychological harm and there was no physical harm, and noted that steps were being taken to ensure that the child was never told about what had occurred. His Honour concluded that if those efforts were successful, the child would suffer no psychological harm as a direct consequence of the offence.

[73] The appellant in *R v JP* submitted that it was not open to the sentencing judge to characterise the objective seriousness of the offence as "at the very bottom of the range of crimes of this nature". Further, sexual interference, of a particularly intimate nature with a helpless infant by her own mother at the request of another to produce child abuse material, involved criminality of a very high level.

[74] As far as psychological harm was concerned, the appellant referred to the risk identified by his Honour that the child would suffer psychological harm if she later found out what her mother had done, and noted that the photographs of the child had not been retrieved from the co-offender. In addition, the child would suffer inevitable psychological harm because of the removal of her mother's care.[35]

35 Upon being charged with these offences, the mother lost custody of the two children.

[75] The Court of Criminal Appeal in *R v JP* (which included Hoeben CJ at CL) accepted that the child had not suffered psychological harm because of the child's young age and did not presume that the child would suffer psychological harm in the future. At [48] Hoeben CJ at CL stated:

> When assessing the objective seriousness of the offending, there were matters which the primary judge had to carefully balance. A major consideration was the harm caused to the victim. In this case, there was no actual harm either psychological or physical. That was a product of the very young age of the child. The other matters of harm, which the primary judge took into account, involved a risk of future harm, rather than harm which had actually occurred, e.g. that someone might later tell the child what had occurred and the possible detriment she would suffer by being deprived of a mother's care.[36]

[76] The Court of Criminal Appeal in *R v JP* disagreed with the sentencing judge's assessment that the objective seriousness of the offence was at the very bottom of the range of seriousness. Price J (who was part of the majority that found that the sentence was manifestly inadequate) stated:

> The cunnilingual abuse of a 6-week-old baby by her mother is a crime of the vilest nature. The depravity of the respondent's offending is enhanced, in my opinion, by her intention to send pictures of her sexual acts to the co-offender for his sexual gratification.
>
> The degree of responsibility of a mother to keep her baby safe is of the highest order. The respondent breached her position of trust towards her daughter in the grossest way.
>
> When offences of this kind are considered, it is often submitted on behalf of an offender that as the young child would not have been in the position to understand or even appreciate what occurred, there could be no evidence of psychological harm. Indeed, the primary judge made such a finding. I do not understand how the fact that a child was unknowing can be seen to reduce the objective seriousness of the offence. An unknowing child is a vulnerable victim, who is unable to take any action to protect him or herself from abuse of any kind, let

36 *R v JP* [2015] NSWCCA 267.

> alone the sexual abuse of a mother. A 6 week old baby is helpless and dependant on the care and protection of his or her parent or guardian. The gross breach of trust and utter vulnerability of the respondent's baby constitute serious aggravating factors on sentence.[37]

[77] The Court of Criminal Appeal of New South Wales in *R v JP* accepted that a lack of harm does not reduce the objective seriousness of a sexual offence against a child and gave considerable weight to the breach of trust and the vulnerability of the child. The two latter factors are of course present in virtually all cases of incest. In addition, unlike s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the *Sentencing Act 1995* (NT) does not expressly provide that vulnerability is an aggravating factor. Subsection 5(2)(b) of the *Sentencing Act* only requires a court to have regard to the nature of the offence and how serious the offence was, including any physical, psychological or emotional harm done to the victim. However, common law sentencing principles about the vulnerability of a victim do apply in the Northern Territory.

[78] *R v Rankin* was an appeal by the offender to the Victorian Court of Appeal against the severity of a sentence of 7 years' imprisonment with a 5-year non-parole period for one count of raping a 15-year-old girl. One of the grounds of appeal was that "[t]he judge erred by making findings about the impact of the rape upon the victim which were inconsistent with information that had been given to her by the prosecutor on the plea". Prior to the sexual assault upon her, the victim had consumed alcohol and become

37 Ibid at [77]-[80].

thoroughly intoxicated to the point of becoming insensible. She was described as being paralytic, and did not recall anything to do with the assault upon her.

[79] The part of the sentencing remarks objected to were the following:

> It is likely that your crime will have a lasting detrimental psychological effect upon your victim. Given her youth and sexual immaturity, it is likely that this experience will seriously damage and inhibit the future development of positive sexual relationships. In addition, the trust and faith she might have placed in adults has been profoundly and possibly irrevocably damaged.

[80] The prosecutor did not place a victim impact statement before the court, and there was no evidence about the psychological impact of the offending on the victim.[38]

[81] On appeal, Winneke P (with whom Vincent JA and O'Bryan AJA agreed) stated:

> Nor, in my view, was her Honour in error in over-emphasising the potential effect on the victim of the events of this night. …… The potential consequences to a 15 year old girl of this type of abuse by a 42 year old man are sufficiently notorious to enable a sentencing judge to take account of them.
>
> …….
>
> ….[I]t was … legitimate for [the sentencing judge] to have regard to the potential impact on an immature victim which the ordinary course of human affairs suggests is likely to flow from this type of crime. Judges in this day and age do not need experts to draw such conclusions. It is commonplace now for courts to take account of the potential impact which sexual abuse is likely to have in moulding the character and personality of its victims. Courts cannot turn a blind eye

38 The applicant contended that the statement by the sentencing Judge was "at odds" with the prosecutor's explanation for the lack of a victim impact statement but no detail is given in the judgment of the Court of Appeal.

> to the state of knowledge which is available to them and which is now well recognised by the community at large. There is nothing, I think, in the sentence which was imposed by her Honour which suggests to me that she was unduly influenced by this aspect of the applicant's crime or had given it more weight than it deserved in the sentencing process.[39]

[82] *R v Stanbrook* is a decision of the Victorian Court of Appeal. The respondent was convicted of aggravated rape and attempted murder. At the time of the rape, the victim had been rendered unconscious by the blows the respondent inflicted on her. When sentencing the respondent, the sentencing judge stated that because the victim was unconscious at the time of the rape, she was not traumatised and that this constituted a mitigating factor. On appeal, Marks J (with whom Southwell and Harper JJ agreed) stated:

> In his reasons for sentence, his Honour said: "The aggravated rape was most serious, but having regard to the unusual circumstance that the victim was not traumatised by the event, indeed was probably comatose at the time, a sentence significantly less than the maximum is deemed appropriate." In my opinion, this statement also reflects an error. It constitutes a mistaken view of the facts of sufficient magnitude to constitute a sentencing error. That is because, in my opinion, his Honour in effect said that, because the victim was unconscious albeit, having been rendered so by the respondent's horrendous attack at the time that her body was violated, she was not traumatised. I do not accept that the conclusion is correct. In any event, there was before the court a victim impact statement which suggested very much the contrary. The mere fact that the victim was not conscious throughout the ordeal may have some relevance, but it is not, in my opinion, a mitigating circumstance of which the offender may obtain advantage. If I am wrong and some advantage is to be accorded him, it must be very slight; certainly very slight in the circumstances of the present case, to which in a moment I will turn.
>
> It is a matter to be resolved, I should think, by credible evidence whether the victim was less traumatised by the subject circumstance (the rape) than she would have been if she had not lost consciousness. There is persuasive material that she has been much traumatised by

39 *R v Rankin* [2001] VSCA 158 at [9]-[10].

> both the rape and the attempted murder. There is a feasible view that the comatose state has had a more adverse effect on the victim than if she were aware of precisely what happened by being conscious at the relevant time. It is suggested, with some force, that she has suffered the more because she was not conscious and does not know for herself what the respondent did. These are very difficult matters on which persons such as judges, who have not had the experience and who cannot be thought to be fully empathetic with it, should pass judgment without hearing from the victim herself and other relevant evidence. [40]

[83] *R v Lomax* was a decision of the Victorian Court of Appeal. It concerned a father who committed numerous sexual assaults against his young daughter who was conscious at all material times. The case supports the proposition that where the victim of a sexual offence such as incest is very young, a court may assume from the nature of the seriousness of the offence that there is a real possibility of very severe psychological repercussions. At pp 559 to 560 Ormiston JA said:

> There was no victim impact statement from the daughter in this case but that is hardly likely in circumstances where the child is still under 10. The precise consequences of such behaviour cannot presently be predicted but one **cannot** fairly assume that such an introduction for a daughter, at so tender an age, to sexual relations carried out by her father would **not** create **a real possibility** of the most severe psychological repercussions. .... Even in the absence of direct evidence no other view can presently be taken of the possible effects of behaviour of the kind here described. Doubtless it was this kind of assumed consequence which among other matters led Parliament to resolve that this class of sexual interference should be characterised as "penetration". It was conceded to the judge on the plea that there would be repercussions of this kind.
>
> Consequently, I would conclude that this behaviour by the applicant must be classified as a serious invasion of his daughter's person and of a kind which justifies condign punishment… In this class of offence, it is not so much the physical injury **but the potential psychological harm** and psychiatric consequences which the sentencing judge must

40 *R v Stanbrook* [1994] 1 VR 391 at 394.

> primarily address. Consequently, the learned judge was entitled to view these as repeated serious unnatural breaches of parental trust by the applicant in order to satisfy his own sexual urges and, as such, deserving of severe punishment. [41]

[84] *Hermann v The Queen* was a decision of the New South Wales Court of Criminal Appeal involving a defence appeal against sentence. The appellant was convicted of having carnal knowledge of his de facto step-daughter. The offence was not an isolated offence and sexual relations continued for some three years. There was no evidence of long-term harm to the victim. The appeal was dismissed. During the course of his reasons, Lee J (with whom McInerney J agreed) stated:

> Finally it is said the girl appears not to be affected. But we do not have evidence from the victim and it is not to be forgotten that the applicant's conduct drove her from her rightful home. Before the applicant receives the benefit of a submission that the victim has not been affected, the Court should have clear and positive evidence to that effect and such is wholly lacking in the present case. Indeed, it will rarely be available because adverse consequences to the girl may appear much later on in her life. [42]

[85] *Hermann v The Queen* is arguably authority for the principle that for a sentencing court to find that a child victim of a sexual offence has not suffered harm there must be evidence led by the defence to that effect.

[86] It is common for judges of the Supreme Court of the Northern Territory to make sentencing remarks to the effect that sexual assaults on children are

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41 [1998] 1 VR 551 at pp 559-560.

42 (1988) 37 A Crim R 440 at p 448.

assumed to have longstanding impacts on child victims. For example, in *R v RG*[43] Grant CJ stated:

> As the Court of Criminal Appeal has previously observed, sexual assaults against children are abhorrent crimes which cause disquiet in the community. Crimes of that nature involve personal violation, which is assumed to have longstanding impacts on child victims. That is particularly so of victims who are abused in domestic circumstances.

[87] The facts in the above case were as follows. The victim was 13 years old. She was the offender's niece. The victim went to sleep on a mattress in the house she shared with the offender. The offender saw her there and locked the doors to the house. He turned off all the lights and lay down next to her. The offender then placed her on his stomach, rubbed her breasts and pushed her back and forward across his penis. At some point, he ejaculated and his ejaculate made contact with the victim's underpants. The Chief Justice described the impact of the offending on the victim as devastating. The victim was angry and felt the offender had taken her childhood from her. She was scared of men because she thought that something like this might happen to her again. She did not go to school much anymore and she felt unwanted.

The respondent's submissions about particular (i)

[88] As to particular (i) of the first ground of appeal, the respondent acknowledged that it would be wrong to exclude the possibility of future

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43 [2018] NTSC 21754732 (14 September 2018) sentencing remarks. Sentencing remarks to the same general effect are to be found in numerous NT sentencing remarks for child sexual offences.

psychological harm to the victim or to use the lack of evidence of harm as a mitigating factor. However, the respondent points out, correctly, that the sentencing Judge made no finding that future harm would not occur to the primary victims and did not exclude that possibility. The respondent stated, by reference to the transcript of the sentencing hearing, that the parties were in essential agreement. The respondent's daughter in particular had suffered no actual trauma at the time of sentencing, but at some time in the future, she would experience trauma, as she would eventually find out about the respondent's offending against her because her mother would tell her.

[89] However, the sentencing Judge's finding that the victims were not aware of the offending when it occurred and were not physically and emotionally harmed at the time was, on the evidence, open and entirely correct. There was no basis on the Crown facts, and the concessions made, for a contrary finding. Furthermore, the Crown made no submission to the effect of the argument now advanced.

[90] The respondent submitted that the sentencing Judge did not discount the prospect that the offending may have a future effect on the victims. His Honour took into account the vulnerability of the victims and the prevalence of such offences. He did not find that future harm would not occur and he did not use the lack of evidence of future harm as a mitigating factor.

Consideration of particular (i) of the first ground of appeal

[91] As to the first limb of particular (i) of the first ground of appeal, it is settled that the absence of evidence of psychological harm to a child victim of a sexual offence does not operate in mitigation of penalty.[44] The absence of features that would elevate the offending into a different category of objective seriousness does not determine the objective gravity of an offence.[45] Positing hypothetical offences of greater objective gravity does not assist in determining where a particular offence lies on the scale of objective gravity. The assessment must be carried out according to what is known, rather than by conjecture about factors that may have made the offences more objectively serious. To do otherwise is akin to reasoning that an "offence is less serious because it could have been more serious". The absence of a factor does not make what an offender has done less serious because it could have been worse.[46]

[92] The absence of evidence of future psychological harm in child sex cases, because of the young age of the victim or the lack of consciousness of the victim, should not be used as a mitigating factor to benefit the offender.[47]

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44 *R v CTG* [2017] NSWCCA 163 at [76]; *R v JP* [2015] NSWCCA 267 at [79]; *R v Gavel* [2014] NSWCCA 56 at [73].

45 *Mammone v The Queen* [2013] NSWCCA 95 at [35].

46 *R v CTG* [2017] NSWCCA 163 at [60]-[63] citing *Bravo v The Queen* [2015] NSWCCA 302 at [45] and *Mills v The Queen* [2017] NSWCCA 87 at [57]; *Saddler v The Queen* [2009] NSWCCA 83 at [3]; *Mammone v The Queen* [2013] NSWCCA 95 at [35].

47 *R v CTG* [2017] NSWCCA 163 at [76]; *R v JP* [2015] NSWCCA 267 at [79]; *R v Gavel* [2014] NSWCCA 56 at [73].

[93] As to this case, the sentencing Judge did not explicitly state either that the absence of proven physical or psychological harm, or the fact that the victims were unaware of the offending, were mitigating factors, but it is evident that his Honour used these factors in the respondent's favour, in particular from the following passages in the sentencing remarks:

> Your offending, while serious, is less serious than is usually the case for offending of that kind. As I have already said, that is largely because your child victims, particularly [your daughter], were not aware of what you were doing and were not physically or emotionally harmed at the time.
>
> As I have said, your offending is not as serious as is usually the case for offending of the kind that we normally see. That is because your victims were not aware of what you were doing and did not suffer any physical or emotional harm.

[94] In addition, the overall tone of the sentencing remarks demonstrate that his Honour heavily discounted the prospect of future harm as a factor in favour of the respondent in assessing the seriousness of the offending.

[95] This, it seems to us, is demonstrative of error: the sentencing Judge has impermissibly used the absence of evidence of future psychological harm because of the young age of the primary victim and her lack of awareness of the offending at the time as a mitigating factor to benefit the offender.[48] It is immaterial that his Honour did not explicitly state that these were mitigating factors; they were used to the benefit of the offender on sentencing.

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48 *R v CTG* [2017] NSWCCA 163 at [76]; *R v JP* [2015] NSWCCA 267 at [79].

[96] As to the second limb of particular (i) of the first ground of appeal (failing to properly take into account the inevitable psychological damage arising out of the offences), the authorities establish the following relevant principles.

(1) There can be no finding of matters adverse to an offender unless established beyond reasonable doubt. This was considered by a five members of the Supreme Court of Victoria in *R v Storey*.[49] The judgment of the majority stated:

> [T]he judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts are established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities.[50]

(2) Sometimes disputed facts cannot be found either beyond reasonable doubt adversely to an accused or on the balance of probabilities in favour of an accused. In such cases, the court will sentence an offender on the basis that the fact is simply unknown. As the High Court held in *Filipou v The Queen*:[51]

> [A] sentencing judge may not take facts into account in a way that is adverse to an offender unless those facts have been established beyond reasonable doubt and, contrastingly, the offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour. Where, therefore, the prosecution fails to prove a fact or circumstance which is adverse

49 *R v Storey* [1998] 1 VR 359; (1996) 89 A Crim R 519.

50 Ibid at p 369 and pp 530-531.

51 [2015] HCA 29; (1915) 89 ALJR 776; 323 ALR 33.

> to the offender, but the judge is not satisfied on the balance of probabilities of an alternative version more favourable to the offender, the judge is not bound to sentence the offender on a basis which accepts the accuracy of the more favourable version. If the prosecution fails to prove beyond reasonable doubt a possible circumstance of the offending which, if proved, would be adverse to the offender but the offender fails to establish on the balance of probabilities a competing possibility which, if proved, would be favourable to the offender, the judge may proceed to sentence the offender on the basis that neither of the competing possibilities is known.[52]

(3) However, when sentencing an offender for a child sexual offence, a sentencing Judge must address the potential for future psychological harm and psychiatric consequences.[53]

(4) Sentencing Judges are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences.[54]

(5) In cases where the child victim is conscious at the time of the offence and there is evidence of psychological harm prior to sentence, the New South Wales Court of Appeal has observed, "child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives" and "sexual abuse of children will inevitably give rise to psychological damage".[55]

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52 *Filipou v The Queen* [2015] HCA 29 at [64]; (1915) 89 ALJR 776; 323 ALR 33 citing *R v Olbrich* [1999] HCA 54; (1999) 199 CLR 270 at 281 [25]-[27] per Gleeson CJ, Gaudron, Hayne and Callinan JJ.

53 *R v Lomax* [1998] 1 VR 551 at pp 559-560; *R v Rankin* [2001] VSCA 158 at [9]-[10]; See also *R v RG* [2018] NTSC 21754732 (14 September 2018) sentencing remarks.

54 *Stewart v The Queen* [2012] NSWCCA 183 at [61] and the cases cited therein; *R v Gavel* [2014] NSWCCA 56 at [106] approved in *R v CTG* [2017] NSWCCA 163 at [75].

55 *R v Gavel* [2014] NSWCCA 56 at [110].

[97] In cases such as the present, where the primary victim was unconscious and the evidence suggests that there has been no psychological harm at the time of sentencing, the authorities do not support the contention that there is a presumption of future psychological harm. However, a sentencing Judge must take into account the prospect of future psychological harm if there is a likelihood that the child victim will eventually become aware of the offending behaviour against the child.

[98] In this case, we find that the sentencing Judge failed to give adequate weight to the potential that the respondent's daughter would suffer psychological harm.

[99] In our opinion, there is a very real potential that the respondent's daughter will suffer very significant psychological harm for an extended period. There was evidence before the sentencing Judge that at some future time the child's mother would have to tell the respondent's daughter about the offences that he committed against her. The respondent committed 12 sexual offences against her over a period of about three years. The sexual offences were despicable offences that violated the child in a most degrading manner. Consequently, it will not be possible for the child's mother to tell her what occurred in a way that is unlikely to cause significant psychological harm. The situation is made more precarious by the fact that the child will have been separated from her father for a significant period of time when she is told what occurred and will only have the support of her mother in circumstances where the child will have

suffered considerable separation anxiety. There is evidence that the child is starting to experience separation anxiety in her mother's victim impact statement. No doubt, the child will be able to receive appropriate professional assistance and support when she is told what occurred. However, there was no evidence from an expert before the sentencing court that the available expert assistance and support could significantly reduce the potential for psychological harm.

[100] Any psychological harm that the respondent's daughter does suffer after she is told what occurred will be caused by the offences that the respondent committed against her. The fact that the daughter will receive the information from her mother does not break the line of causation.

[101] We accept that, at the time the respondent was sentenced, his daughter had not suffered any physical or psychological harm. The sentencing Judge did not err in that regard. We also accept that if the respondent's daughter had consciously experienced the 11 sexual assaults upon her over a period of three years, it is likely that she would have suffered significant psychological harm by the time the respondent was sentenced and she would suffer very serious ongoing psychological harm. That is, in those circumstances, it is likely that she would suffer greater future psychological harm than she is likely to suffer now. While such factors may place the offending in those hypothetical circumstances at a higher level of offending within the overall range of offending for such offences, they do not lessen

the seriousness of the offences committed against the respondent's daughter. They are not mitigatory factors.

[102] It is most unlikely that any of the other victims will suffer future psychological harm. The offences committed against the other victims are much less serious offences. They are not nearly as degrading as the offences committed against the respondent's daughter. The other victims remain unaware of the crimes the respondent committed against them, and there is no evidence to suggest that anyone is going to tell them about the offences that the respondent committed against them.

Particular (ii) (The sentencing Judge erred in his assessment of the objective seriousness of the offending.)

[103] The Crown submits that the sentencing Judge's finding that the offending on the counts committed against his daughter fell towards the lower end of the scale of objective seriousness for this type of offending was not open.

[104] In addition to the individual acts that constituted the offending against the respondent's daughter, the Crown pointed to the following features of the offending which, the Crown contended, precluded a finding that the offending was at the lower end of the range of seriousness:

(a) the particularly young age of the victim contrasted with the age range of "under 10" for the offences;

(b) the extreme vulnerability of the victim, including the fact that the offending happened in the child's own home (in her or her mother's bed);

(c) the gross breach of trust;

(d) the level of planning;

(e) that the respondent recorded his offending and retained the photographs for a period of about 14 months; and

(f) that the offending persisted over a period of three years or thereabouts.

[105] The Crown submitted that the term "victim" should be construed broadly for the purpose of having regard to any physical, psychological or emotional harm done to a victim under s 5(2)(b) of the *Sentencing Act*: *Staats v The Queen*[56] and *Gumbinyarra v Teague*.[57] Consequently, weight must be given to the psychological harm suffered by the mother. The Crown relies on her victim impact statement, which showed that the offending had a very significant effect on her. A report from a psychologist about the trauma the mother experienced was also in evidence. The report states that the mother suffers from mild depressive symptoms, extreme severe anxiety and severe stress that are consistent with post-traumatic stress disorder.

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56 (1998) 123 NTR 16.

57 (2003) NTLR 226.

[106] The Crown also submitted that the sentencing Judge's finding that the respondent did not appear to obtain any immediate sexual gratification by engaging in the acts in question was unreasonable having regard to the established fact that the respondent had an erection in the photographs he took.

[107] The Crown submitted that the sentences for the offences in counts 13 to 17 were manifestly inadequate for the following reasons. The sentencing Judge found that this offending fell at the lower level of seriousness, placing considerable emphasis on the apparent lack of harm. The Crown contends that this finding was not open as the victim (the respondent's niece) was aged four to seven in count 13 and six to eight in counts 14 to 17, and was at the respondent's home and under his care at the time the offences were committed. The Crown contends that the sentences fail to reflect adequately the age of the victim, the relationship between the respondent and the victim, the breach of trust and the predatory nature of the offending and erroneously assumes a lack of harm to the victim.

[108] The Crown makes no complaint about the sentences for counts 18 to 28.

The respondent's submissions about particular (ii)

[109] The respondent submitted that the assessment of the objective gravity of an offence is a discretionary judgment and the Court should be slow to interfere with such an assessment by the sentencing Judge. The sentencing Judge took into account all relevant sentencing considerations in making the

finding that the offending was in the lower range of seriousness. His Honour's assessment was not unreasonable or plainly unjust.

[110] The respondent submitted that the finding that the respondent did not seem to derive sexual gratification from the actual acts of aggravated incest and gross indecency against his daughter was open. The sentencing Judge made the finding in the context of the three acts of vaginal penetration by the respondent, and the act of penetration constituted by the respondent placing his daughter's fingers in her vagina, being incidental to the taking of the photographs and was a matter on which reasonable minds may differ.

Consideration of particular (ii)

[111] In our opinion, the sentencing Judge erred in assessing the objective seriousness of counts 2 to 12 on the indictment being the sexual offences committed against the respondent's daughter. We find each of the crimes against the respondent's daughter to be at least in the mid-range of objective seriousness. The crimes of gross indecency are equally as serious as the crimes of incest.

[112] The sexual assaults the respondent committed against his very young daughter involved persistent extremely degrading invasions and violations of her person over a period of three years to take child abuse photographs so he could improve his sexual performance with the victim's mother. The sexual assaults were committed in circumstances where the victim was in his sole care when he committed each offence and was highly vulnerable

because she was unconscious and of a very young age. The respondent's moral culpability is very high because of the premeditated and persistent manner in which he sexually exploited his highly vulnerable young daughter at his leisure for a very lengthy period in circumstances where he was in a position of trust.

[113] The respondent committed 11 sexual assaults upon his daughter. Those assaults variously involved the removal of his daughter's underpants; the positioning or manipulation of her body in highly sexualised positions that the respondent found sexually arousing, and on one occasion involved him placing some of her fingers inside her vagina; the manipulation of her genitals so the inside of her vagina was graphically exposed, which on three occasions involved him inserting his fingers into her vagina; the placing of his erect penis, on a number of occasions, near his daughter's anus and vagina; the placing of a clear bubble type substance on her anus and genitals to make it look as if someone had ejaculated on her anus and genitals; and the taking of photographs. He created 115 child abuse images of his daughter that he stored on various electronic devices.

[114] A fair inference is that the respondent was only able to engage in these criminal acts over such an extended period because his daughter was asleep on each occasion and he had access to her at times of his choosing.

[115] In addition, there is a real potential that the respondent's daughter will suffer future psychological harm that must be considered when assessing the objective gravity of the respondent's offending against his daughter.

[116] We do not accept that the sentencing Judge found that the respondent did not appear to obtain any immediate sexual gratification by engaging in the offending against his daughter. His Honour found:

> The purpose of your actions were to expose her vagina in order for you to take the photographs, not, it would appear, to obtain any immediate sexual gratification by engaging in that act itself.

That finding is a finding about the purpose of the respondent's acts. It does not exclude the possibility that the respondent might, or did, become sexually aroused while engaging in those activities for the purpose identified by the sentencing Judge. It is apparent that on a number of occasions that the respondent became sexually aroused. Sexual arousal is not the same thing as sexual gratification.

[117] The purpose of the respondent's criminal conduct involving his daughter was to create child abuse material that he intended to use to improve his sexual performance with his daughter's mother. Although his main purpose in sexually assaulting his daughter was so he could take child abuse photographs of his daughter in poses that appealed to his sexual desires, he also became sexually aroused while he was positioning his daughter and taking the photographs.

[118] While the respondent did not sell or distribute any of the photographs that he took of his daughter, the respondent told the child's mother that he first became interested in child pornography because a person had suggested to him that he would be interested in purchasing child pornography from the respondent if he had access to it. The type of photographs that the respondent took of his daughter are of a similar nature to many photographs that are presented to the Court in child abuse material proceedings.

[119] The fact that the respondent's purpose in offending against his daughter was not to obtain immediate sexual gratification but was to obtain sexual gratification from viewing the photographs later in order to enhance his sexual performance with his daughter's mother does not seem to us to matter when it comes to assessing the objective seriousness of the offending. The latter purpose is at least equally morally culpable, and the purpose does not alter the extent to which he violated his daughter.

[120] We agree with the sentencing Judge's assessment of the objective seriousness of the offences against all of the other victims.

[121] Various tensions have arisen in the assessment of the level of objective seriousness of the offences against the respondent's daughter in this case because of the following matters:

(a) the lack of harm suffered by the victim to date;

(b) the fact that virtually all sexual offences by a parent against a child involve a gross breach of trust and a vulnerable victim; and

(c) the purpose of the offending was not for the respondent to obtain immediate sexual gratification.

[122] While the extent of harm suffered by a victim of a crime is a seminal consideration in evaluating the objective seriousness of an offence, there are a number of other factors that also weigh heavily in that assessment. One such factor is the moral culpability of the offender. The moral culpability of an offender is capable of demonstrating just how evil an offence may be. The degree of vulnerability of a victim goes directly to the level of moral culpability of an offender. In this case, the respondent's daughter was especially vulnerable. She was well under 10 years of age. That is, she was more vulnerable than the threshold level of vulnerability specified in the elements of the offences. If a victim is more vulnerable than the threshold level of vulnerability in the elements of the offence, then the penalty can be aggravated for that reason.[58] She was a very deep sleeper and was asleep when the respondent committed each of the offences against her. She was under the respondent's total control. She was powerless and could do nothing to protect herself against him. She is now at great risk of suffering future psychological harm. If she does suffer future psychological harm, it is likely to be significant and long lasting. It could ruin her life. The

58 *R v JTAC* [2005] NSWCCA 345; *R v Pearson* [2005] NSWCCA 116.

victim's vulnerability meant that the respondent could sexually assault her at his choosing with ease and he did so in a graphically degrading manner on numerous occasions. The respondent had time to reflect on the serious nature of his crimes against his daughter yet he persisted in exploiting and abusing his daughter, because she was vulnerable, until his ex-partner discovered his offending.

[123] The Legislature intends that vulnerable children be protected from such crimes. That is why the crimes of incest with a child under 10 years of age and gross indecency on a child under 10 years of age carry maximum penalties of 25 years' imprisonment.

Particular (iii) (sentencing Judge erred in his approach to the question of totality)

[124] The Crown contends that, in addition to erring in the assessment of the objective seriousness of the offending, the sentencing Judge erred in his approach to the question of totality.

[125] While acknowledging that questions of accumulation and concurrency are discretionary, the Crown contends that the modest degree of accumulation in relation to some of the offences fails to comprehend the total criminality involved against multiple victims, and discrete episodes of offending have resulted in almost no additional penalty imposed for sexual offences against more than one child victim.

[126] The respondent contends that the Crown has not pointed to any particular error of principle in the way the sentences were structured, a contention that may be accepted. However, degree of accumulation is simply cited by the Crown, as a particular of the general ground of appeal that the aggregate sentence imposed is manifestly inadequate.

[127] Subject to the overarching principle that a crushing sentence should not be imposed, a suitable degree of accumulation should be ordered where sentences are imposed for offences which represent separate episodes of offending, separate decisions to engage in criminal conduct and separate victims.[59]

[128] The general principle is expressed in *Mill v The Queen*[60] in the following terms:

> The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is 'just and appropriate'.
>
> ……..
>
> Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making the sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a

59 *DPP v Grabovac* [1998] 1 VR 664; (1997) 92 A Crim R 258 (VCA).

60 (1988) 166 CLR 59.

number of sentences are being imposed. Where practicable, the former is to be preferred. [61]

[129] Where an offender is being sentenced for numerous offences, the application of that principle may involve ordering concurrency between sentences in a manner that does not adequately reflect the separate criminality involved in each of the offences in order to avoid a sentence which is crushing.

Consideration of particular (iii) of the first ground of appeal

[130] We agree that the total sentence imposed by the sentencing Judge is manifestly inadequate. The total sentence imposed is plainly disproportionate to the seriousness of the whole of the respondent's offending conduct which involved 28 counts of sexual offences against 11 children – so disproportionate as to be plainly unjust, and this Court can infer that in some way there has been a failure to properly exercise the sentencing discretion. In part, this is due to the failure to properly characterise the objective seriousness of the offending against the daughter and may, in part, also be reflective of an inadequate degree of accumulation of the sentences to reflect the separate criminality involved in the various offences and the fact that there are multiple victims.

Conclusion of the first ground of appeal

[131] We find that the individual sentences imposed on the respondent for counts 2 to 12 against his daughter are manifestly inadequate, as is the total

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61 Ibid at p 63.

sentence imposed on the respondent. We would allow the appeal on the first ground of appeal.

Ground 2 – (the sentencing Judge erred in finding that the purpose of the offender's actions against his daughter was to take photographs of her rather than derive immediate sexual gratification)

[132] The sentencing Judge's sentencing remarks were broken up into the following parts: a description of the counts on the indictment, the facts of the counts on the indictment including the background facts, the effects of the crimes on the victims, the seriousness of the respondent's offending, the respondent's subjective circumstances, the respondent's mental state and post conduct behaviour, the respondent's prospects of rehabilitation, comparative sentences, and the sentences that were imposed on the respondent.

[133] In the part of the sentencing remarks dealing with the facts of the offending, the sentencing Judge made the following remarks that are of relevance.

> Counts 2 to 12 all involve you taking photographs of [your daughter's] genitalia while she was asleep. In most cases, she was asleep on her own bed or on her mother's bed. You had pulled down her underwear and arranged her body and legs so as to expose her vagina and buttocks.
>
> In all but the offending subject of count 6, you used your fingers to expose inside parts of her vagina. In some cases (counts 2, 3 7 and 8) you did this by actually manipulating the outer parts of her vagina with your finger or fingers, and in other cases (counts 4, 5, 9, 10, 11 and 12) by using your fingers to move nearby parts of her body in order to better expose her vagina. Whilst all of that conduct was grossly indecent conduct, the conduct subject of counts 2, 3, 7 and 8 amounted to sexual intercourse as defined by the *Criminal Code*. That definition includes the insertion of any part of a person's body into the vagina of another person. In some cases, your erect penis could be seen near

> [your daughter's] genitals (counts 4, 5, 7 and 8), and in some cases you had placed clear liquid over and near her genitals.

[134] It is apparent from the above findings of fact, none of which are challenged, that the purpose of the respondent inserting his fingers into his daughter's vagina was to expose the inside parts of her vagina to capture child abuse images. The respondent only inserted his fingers into his daughter's vagina in four out of 11 offences and he only had an erect penis in four out of 11 offences.

[135] In the part of the sentencing remarks dealing with the seriousness of the respondent's offending, the sentencing Judge made the following remarks that are relevant to the second ground of appeal.

> I have given some consideration to your motivation when you engaged in this conduct and in particular, whether you did or intended to sell any of the child abuse material that you created.
>
> [...]
>
> [...] As I mentioned, you told the police that your motivation was to assist you to sexually perform better with your partner. [...] You felt that your sexual performance could be improved if you had seen pornography, including child abuse material.
>
> [...] Rather, I think it is likely that your **main** motivation was to enhance your own sexual performance.
>
> Most, if not all of your offending in relation to [your daughter] involved you using your fingers to partly remove her clothing and then to manipulate her body so as to expose her genitalia. In some cases, that manipulation involved you actually touching and penetrating her genitalia.
>
> As I said, that is sexual intercourse and that forms the basis of four charges, counts 2, 3, 7, and 8. In other cases, you have used your fingers to push areas immediately adjacent to her genitalia in order to achieve the same objective; that is to expose her genitalia for your photograph.

> Your most serious offending is that charged in counts 2, 3, 7, and 8. I say that for a number of reasons. One is that it carries the possible penalty of 25 years imprisonment and secondly, it involved you inserting your finger or fingers into parts of [your daughter's] vagina so as to expose her vagina so you could take photographs.
>
> [...]
>
> [...] There is no suggestion that she sustained any pain or discomfort. Also, the degree of penetration in her vagina was relatively minor. The purpose of your actions were (sic) to expose her vagina in order for you to take the photographs, not, it would appear, to obtain any immediate sexual gratification by engaging **in the act itself**.

[136] No challenge is made to any of the sentencing Judge's findings set out above other than the findings contained in the last paragraph of the quote from his Honour's remarks. The above remarks establish that the respondent did not engage in digital/vaginal sexual intercourse with his daughter to obtain direct or immediate satisfaction from those acts. He did not engage in those acts for their own ends and incidentally photograph them. He was not "having sex" with his daughter in the sense that that phrase is commonly understood. The respondent's purpose in inserting his fingers into his daughter's vagina on those four occasions was to expose the inside parts of her vagina so he could capture or obtain child abuse images that he found sexually arousing and intended to use them to improve his sexual performance with his daughter's mother. Inferentially, any sexual satisfaction was to be obtained by the respondent from viewing the photographs of his daughter later. That, of course, is not to say that the respondent did not become sexually aroused on four occasions. That is not what the sentencing Judge found. But, importantly, the fact that the respondent became sexually aroused on four occasions does not mean that

the respondent's purpose was to obtain direct or immediate sexual satisfaction by inserting his fingers into his daughter's vagina. Nor does it mean that the sentencing Judge did not take into account the fact that the respondent became sexually aroused on four occasions. He expressly states that the respondent placed his erect penis near his daughter's genitals. Nor does it mean that digital penetration for the purpose identified by the sentencing Judge is less objectively serious than digital penetration that is engaged in to obtain immediate sexual gratification.

[137] Ground 2 of the appeal is dismissed. It cannot be sustained. The sentencing Judge correctly found that the purpose of the respondent's actions was to expose his daughter's vagina so he could take photographs of the inside of her vagina. His purpose was not to obtain immediate sexual gratification by engaging in the act itself.

The residual discretion

[138] The principles involved in the application of the residual discretion have recently been articulated by this Court in *R v Kahu-Leedie*:[62]

> Where a sentence has been found to be manifestly inadequate, this Court retains a residual discretion as to whether the respondent should be resentenced. In *The Queen v Mossman*,[[2017] NTCCA 6 at [16]-[17] per Grant CJ, Southwood and Hiley JJ this Court cited with approval from *The Queen v Wilson*, [(2011) 30 NTLR 51 at [27] per Riley J] where the Court held that 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

62 [2022] NTCCA 4.

> Crown appeal should be dismissed, and that 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.[63]

[139] The Crown bears the burden of negating any reason why the Court should exercise the residual discretion, and factors that support the exercise of the residual discretion will not be put aside lightly. The Court will be slow to intervene if there is a factor that might warrant the exercise of the residual discretion.[64]

[140] The respondent submits that the Court should exercise the residual discretion to dismiss the appeal.

[141] In written submissions dated 14 July 2021, the respondent stated that the following matters were potential factors in favour of the exercise of the residual discretion:

(a) the Crown's failure at first instance to make submissions, or sufficiently express submissions, to the effect of the matters argued on appeal in relation to the issue of harm;

(b) whether the error (latent or patent) raises a point of principle that needs to be addressed for the governance and guidance of sentencing courts, as opposed to the correction of error relating only to a particular case;

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63 *R v Kahu-Leedie* [2002] NTCCA 4 at [49] per Kelly, Blokland and Brownhill JJ.

64 *R v Mossman* [2017] NTCCA 6 at [17].

(c) that the primary purpose of a Crown appeal may still be served by the judgment of this Court where it declines to intervene;[65] and

(d) evidence of the respondent's actual distress and anxiety.[66]

[142] In addition to the above submissions, the respondent relies on the following additional matters in support of the exercise of the residual discretion:

(a) the respondent's current state of anxiety and frustration; and

(b) the delay in the appeal process.

[143] As to the respondent's current state of anxiety, the respondent relies on an affidavit he made on 13 April 2022. In that affidavit, the respondent deposes to the following matters:

(a) as he had not heard about the outcome of the appeal, he believed the proceeding had been finalised in his favour and he had taken steps in preparation for parole, including the undertaking of relevant rehabilitation programs in prison and meeting with relevant providers about accommodation and employment upon release from prison on parole;

(b) he is halfway through the Sex Offender Treatment Program and the Intensive Alcohol and Other Drugs Program, and he had completed other rehabilitation programs and VET programs;

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65 *DPP v O'Neill* [2015] VSCA 325 at [111]; *Rigby v Benfell* [2020] NTCA 9 at [49].

66 *R v Wilson* [2011] NTCCA 9.

(c) the discovery that he may still receive an increased sentence has made him feel extremely frustrated, it made him feel that he had got right to the end then been sent right back to the start, it feels like he has been returned to being a remand prisoner rather than a sentenced prisoner;

(d) when he found out that the appeal had not been resolved, he felt instantly depressed and he is concerned that he may need to go back on medication for anxiety; and

(e) he had told his family that he would be released shortly.

[144] As to the delay in the appeal process, the respondent relied on *Cumberland v The Queen*.[67] At [6] in that decision, the High Court stated:

> As explained in the joint reasons in *Green*, Crown appeals are distinguished from offender appeals against sentence in that their primary purpose is not directed to the correction of error in the particular case, but rather, to laying down principles for the guidance of sentencing judges. And as their Honours also explained, the circumstances may be such that any guidance provided to sentencing judges is limited, while allowing the appeal may occasion injustice. Among the circumstances that their Honours identified as enlivening the residual discretion is delay in the appeal process. Another circumstance that may enliven the discretion is the imminence of the offender's release from custody, on parole or otherwise.[68]

[145] The respondent submitted that in *Cumberland* there was a period of some 11 months between the hearing and the publication of the Court's judgment. At [33] the High Court observed that the delay was 'marked' and

67 [2020] HCA 21.

68 *Cumberland v The Queen* [2020] HCA 21 at [6] per Bell, Gageler and Nettle JJ.

necessitated consideration of the residual discretion to dismiss the Crown appeal at a time when the appellant was within one week of being released under the original order suspending the sentence. This was so even though the Court at the conclusion of the hearing of the appeal made it clear that the appeal was to be allowed.

[146] It was submitted that the delay in the appeal process meant the respondent may be resentenced close to becoming eligible for parole in circumstances where he had worked diligently towards his rehabilitation and parole, and this may occasion injustice.

[147] In addition, the unfairness to the respondent must be considered and weighed in light of whether the disposition of this appeal comes down to the correction of error in the particular case, rather than laying down principles for guidance of sentencing courts. The respondent submitted that no point of principle or guidance arises in this case. If error is to be found in relation to the sentencing Judge's assessment of the harm occasioned to the victim, it will have been an error associated with the giving of too little weight to matters of future harm. If error is to be found in relation to other matters, it will have been an error relating to an evaluative judgment or a finding of fact.

[148] Finally, the respondent submitted that if the Court considers that no particular factor or combination of factors warrants the exercise of the residual discretion to dismiss the appeal, the Court may take the factors

relied on by the respondent into account in moderating the sentence imposed by the Court.[69]

[149] The Crown opposes the exercise of the residual discretion either to dismiss the appeal or to reduce the sentence that this Court may impose on the respondent.

[150] In support of the Crown's submission on the exercise of the residual discretion, counsel for the Crown has spoken to the Probation and Parole Officer, who is managing the respondent's application for parole, and recorded by hand the history and status of the application. The Probation and Parole Officer has advised the Crown that:

(a) the respondent will not be released on parole on 27 June 2022;

(b) the Parole Board's consideration of the respondent's application for parole has been adjourned for four months and is unlikely to be considered prior to the September 2022 meeting of the Board;

(c) it is for the Parole Board to determine whether the respondent should be released on parole;

(d) the respondent was first interviewed by a Probation and Parole Officer on 1 March 2022;

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69 *R v Wilson* [2011] NTCCA 9 at [27](e); *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 at [175] and [275]-[278]; *DPP (Cth) v Bui* [2011] VSCA 61 at [90].

(e) the collateral enquiries, which include enquiries about such matters as accommodation, employment and community support were commenced on 9 March 2022;

(f) the Probation and Parole Officer who has been allocated to work with the respondent first met with him on 16 March 2022;

(g) on 5 April 2022, the respondent's Probation and Parole Officer advised him that she was going to ask the Parole Board to defer consideration of his parole for four months because at that stage she was not able to recommend to the Parole Board that he be released;

(h) on the available material at that time, it was the Probation and Parole Officer's opinion that the Parole Board would decline parole;

(i) the respondent was "a bit disheartened" when the Probation and Parole Officer recommended that she was going to ask the Parole Board to defer consideration of his parole;

(j) the Probation and Parole Officer did not tell the respondent that he should expect to be released when he was first eligible to apply for parole;

(k) the Probation and Parole Officer's recommendations about parole are due in August 2022;

(l) if parole is recommended, the earliest time for the respondent to be released on parole is September 2022;

(m) the Probation and Parole Officer was seeking an up to date report on the respondent's required treatment for parole from "offender programs and services" and it is anticipated that the updated report will not be provided until sometime in June 2022;

(n) to date the respondent has not secured accommodation; Mission Australia can only provide case management, not accommodation; and

(o) while the respondent has completed the Addictive Behaviours Program, he is still to complete the Sex Offender Treatment Program and the Intensive Alcohol and Other Drugs Program.

[151] Whether the Probation and Parole Officer will recommend the respondent for parole will depend on whether the final reports about his completion of the Sex Offender Program and the Intensive Alcohol and Other Drugs Program are satisfactory, and whether the reports indicate his risk of re-offending has been reduced, and do not recommend any further treatment. It will also depend upon whether the respondent is able to obtain suitable accommodation.

[152] In the above circumstances, the Crown submitted the following.

(a) The fact that the respondent has only recently started the Sex Offender Treatment Program and the Intensive Alcohol and Other Drugs Program does not suggest that the respondent has been working diligently on his rehabilitation.

(b) The available evidence falls short of the type of evidence that demonstrates that the respondent has made substantial progress towards his rehabilitation.

(c) There is no evidence that the respondent has made an effort to address the criminogenic factors that led to him sexually assaulting his own daughter.

(d) The respondent is unlikely to be resentenced close to a time when he is eligible for parole; it is unlikely that, at the earliest, he will be eligible for parole prior to September 2022. This case is distinguishable from *Cumberland v The Queen* where the offender, who was serving a suspended sentence, was to be released from prison within a week of the decision. It is also distinguishable from cases where the offender is on parole, or is at the end of his sentence. The respondent's release on parole in September 2022 is not guaranteed, far from it.

(e) On 5 April 2022, the respondent's Probation and Parole Officer informed him that he would not be released on 27 June 2022. Therefore, the respondent should not have had any expectation that he would be released from parole on the expiry of his non-parole period.

[153] The Crown's submissions referred to at [152] (a) and (c) cannot be sustained. It is notorious that the provision of programs such as the Sex Offender Treatment Program and the Intensive Alcohol and Other Drugs Program in prison are under resourced and they may only have recently

become available to him. The Probation and Parole Officer was not asked when those programs became available to the respondent. In addition, it is difficult to see what programs other than the Sex Offender Treatment Program and the Intensive Alcohol and Other Drugs Program could address the respondent's criminogenic needs. In our opinion, those programs are tailored to address the crimes that he committed and the fact that he committed those crimes while misusing "Ice".

[154] In addition to the submissions at [150] to [153], the Crown also submitted the following.

(a) None of the delay that has occurred is the fault of the Crown. The Crown has prosecuted the appeal in a timely manner.

(b) The respondent's assumption that the appeal had been resolved in his favour does not [of itself] warrant the exercise of the residual discretion.

(c) The evidence called in aide of the respondent's distress and anxiety is limited. There is scant detail of the distress and anxiety.

(d) The evidence of the respondent's rehabilitation is marginal.

[155] We accept the above submissions of the Crown.

[156] As to the purpose of the appeal, the Crown submitted that the appeal concerned significant points of principle, the resolution of which was

necessary for the guidance of sentencing courts, namely, the issue of harm, and the sentences to be imposed for offences of incest.

Consideration of the exercise of the residual discretion

[157] We agree that the residual discretion should not be exercised in this case to dismiss the appeal. The Crown has demonstrated that there is a point of principle that needs to be addressed for the guidance of sentencing courts in offences of this nature.[70]

[158] As this Court said in *R v Mossman*:[71]

> The reference to a "matter of principle" must be understood as encompassing what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which constitutes an error in point of principle.[72]

[159] In *R v Riley*,[73] this Court stated:

> In *R v Barbara* (NSW Court of Criminal Appeal, unreported judgment number 60638 delivered 24 February 1997), Hunt CJ at CL, with whom the other members of the Court agreed, pointed out that the passage from the judgment in *Everett* cited by Thomas J was not limited to laying down some new point of principle. His Honour said:
>
> > *It is usually overlooked by respondents that the High Court has at the same time also clearly indicated that sentences which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards,*

70 See also *R v Kahu-Leedie* [2022] NTCCA 4 at [61]-[63].

71 [2017] NTCCA 6.

72 *Everett v The Queen* [1994] HCA 49; (1994) 181 CLR 295 at p 300. *R v Mossman* [2017] NTCCA 6 at [8] per Grant CJ, Southwood and Hiley JJ; see also *R v Kahu-Leedie* [2022] NTCCA 4 at [61]-[63].

73 [2006] NTCCA 10; (2006) 161 A Crim R 414.

> *constitute error in point of principle which the Crown is entitled to have this Court correct.*[74]

[160] It is also important that inadequate sentences are not permitted to stand that may undermine confidence in the administration of justice. In *Everett v The Queen*,[75] McHugh J said:

> Uniformity of sentencing is a matter of great importance in maintaining confidence in the administration of justice in any jurisdiction. Sentences that are higher than usual create justifiable grievances in those who receive them. But inadequate sentences also give rise to a sense of injustice, not only in those who are the victims of the crimes in question but also in the general public. Inadequate sentences are also likely to undermine public confidence in the ability of the courts to play their part in deterring the commission of crimes. To permit the Crown, as well as convicted persons, to appeal against sentences assists in maintaining confidence in the administration of justice.[76]

[161] This passage was cited by the New South Wales Court of Appeal in *R v Stoupe*[77] and Johnson J (with whom Hoeben CJ at CL Beech-Jones J agreed), added:

> It is in the public interest that an appropriate sentence be imposed upon the Respondent, given the clearly erroneous sentence imposed at first instance. An important part of the jurisdiction to hear Crown appeals is to ensure that there will be uniformity of sentencing, which is of great importance in maintaining public confidence in the administration of justice.
>
> …
>
> The present judgment will serve to lay down or emphasise a number of sentencing principles. However, it is appropriate for the Court to

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74 Ibid at [19].

75 [1994] HCA 49; 181 CLR 295.

76 Ibid at [3].

77 *R v Stoupe* [2015] NSWCCA 175.

> proceed to resentence the Respondent. This will serve to maintain public confidence in the due administration of justice.[78]

[162] However, although the matters raised by the respondent do not warrant this Court exercising the residual discretion not to allow the appeal, we consider that the delay in determining the appeal until a time when the application for parole processes had begun will make the extended sentence to be imposed on the respondent more onerous than it would have been had the appeal been determined at an earlier time. Accordingly, we intend to reduce the sentence we would otherwise have imposed to take account of the additional hardship to the respondent.

Resentence

[163] As we have stated above, we consider the sentences for counts 2 to 12 are manifestly inadequate and, accordingly, the total effective sentence is manifestly inadequate. As far as the sentences for the remainder of the respondent's crimes are concerned, although we consider some of them to be lenient, we do not consider any of those sentences to be manifestly inadequate and are, therefore, disinclined to interfere with the head sentences imposed by the sentencing Judge for those offences. However, we consider that the total sentence imposed on the respondent is also manifestly inadequate. The degree of accumulation resulted in a total sentence that is not justly proportionate to the whole of the respondent's criminal conduct. The degree of accumulation does not adequately reflect the number of

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78 Ibid at [11]-[117].

offences committed by the respondent or the number of children that are victims of his conduct.

[164] Before any reduction because of the exercise of the residual discretion, we consider the appropriate sentences to be as follows. For the purposes of this appeal, we accept the sentencing Judge's finding of remorse, and will apply the same reduction of 25%.[79]

Counts 2 to 12: the offending against the respondent's daughter

- **Count 3** – We treat **count 3 as the index offence**, as did the sentencing Judge. On count 3, we consider an appropriate starting point would have been imprisonment for 8 years. Applying a reduction of 25%, on count 3, the respondent will be convicted and sentenced to imprisonment for **6 years**; (The same applies to each of counts 2, 4, 5, 7, 8, 10 and 11.)

- **Count 2** – convicted and sentenced to imprisonment for 6 years. Six months is to be served cumulatively on the sentence imposed for count 3; **(6 years and 6 months)**

- **Count 4** – convicted and sentenced to imprisonment for 6 years. Six months is to be served cumulatively on the sentence imposed for count 2; **(7 years)**

79 The respondent continued this offending for three years or thereabouts and lied about it when caught. Nevertheless, findings such as the presence of remorse are matters for the sentencing Judge. In any event, there has been no appeal against this particular finding.

- **Count 5** – convicted and sentenced to imprisonment for 6 years. Six months is to be served cumulatively on the sentence imposed for count 4; **(7 years and 6 months)**

- **Count 6** – On count 6, we consider an appropriate starting point would have been imprisonment for **4 years**. Applying a reduction of 25%, on count 6, an appropriate sentence would be conviction and imprisonment for 3 years. Three months is to be served cumulatively on the sentence imposed for count 5; **(7 years and 9 months)** (The same applies to counts 9 and 12.)

- **Count 7** – convicted and sentenced to imprisonment for 6 years. Six months is to be served cumulatively on the sentence imposed for count 6; **(8 years and 3 months)**

- **Count 8** – convicted and sentenced to imprisonment for 6 years. Six months is to be served cumulatively on the sentence imposed for count 7; **(8 years and 9 months)**

- **Count 9** – convicted and sentenced to imprisonment for 3 years. Three months is to be served cumulatively on the sentence imposed for count 8; **(9 years)**

- **Count 10** – convicted and sentenced to imprisonment for 6 years. Six months is to be served cumulatively on the sentence imposed for count 9; **(9 years and 6 months)**

- **Count 11** – convicted and sentenced to imprisonment for 6 years. Six months is to be served cumulatively on the sentence imposed for count 10; **(10 years)**

- **Count 12** – convicted and sentenced to imprisonment for 3 years. Three months is to be served cumulatively on the sentence imposed for count 11 **(10 years 3 months)**.

TOTAL SENTENCE FOR COUNTS 2 TO 12 **10 YEARS AND 3 MONTHS**

Possession of child abuse material

Count 1 – The conviction and sentence to imprisonment of 1 year and 3 months imposed by the sentencing Judge is confirmed. Three months of the sentence is to be served cumulatively on the sentence imposed for count 12.

SUBTOTAL **10 YEARS AND 6 MONTHS**

The offending against the respondent's niece (head sentences unchanged)

Counts 13 to 17 – The convictions and each of the sentences of 1 year imprisonment imposed by the sentencing Judge for counts 13 to 17 are confirmed. Six months of the sentence imposed for count 13 is to be served cumulatively on the sentence imposed for count 1. Each of the sentences imposed for counts 14, 15, 16 and 17 is to be served concurrently with the sentence imposed for count 13.

SUBTOTAL **11 YEARS**

Count 18 – The conviction and the sentence of 9 months' imprisonment imposed by the sentencing Judge for count 18 is confirmed. Three months of the sentence

imposed for count 18 is to be served cumulatively on the sentence imposed for count 13.

SUBTOTAL **11 YEARS AND 3 MONTHS**

Production of child abuse material

Counts 19 to 21 – The convictions and the sentences of 9 months' imprisonment imposed by the sentencing Judge for counts 19 to 21 are confirmed. Six months of the sentence of imprisonment imposed for count 19 is to be served cumulatively on the sentence imposed for count 18. Each of the sentences imposed for counts 20 and 21 is to be served concurrently with the sentence imposed for count 19.

SUBTOTAL **11 YEARS AND 9 MONTHS**

The offending against unknown female children

Counts 22 to 28 – The convictions and each of the sentences of 9 months' imprisonment imposed for counts 22 to 28 are confirmed. Six months of the sentence imposed for count 22 is to be served cumulatively on the sentence imposed for count 19. Each of the sentences imposed for counts 23 to 28 is to be served concurrently with the sentence imposed for count 22.

TOTAL SENTENCE **12 YEARS AND 3 MONTHS**

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[165] Had we not exercised the residual discretion to reduce the sentences that we are going to impose on the respondent, the total sentence would be imprisonment for 12 years and 3 months. Section 55A of the *Sentencing Act* requires the Court to impose a non-parole period of not less than 70% of the head sentence in relation to the sentences for all of the offences except counts 1 and counts 18 to 21. That portion of the sentence to which s 55A relates is 9 years and 6 months. Seventy percent of 9 years and 6 months is 79.8 months. That is more than half the total sentence required by s 54 for fixing a total non-parole period. We consider an appropriate non-parole period to be 80 months (i.e. 6 years and 8 months).

[166] As the increased sentence is likely to be more onerous because of the parole process had already begun, and will be further delayed, we reduce the total effective sentence to 10 years and 6 months. The portion of that sentence to which s 55A applies is 93 months. 70% of that is 65.1 months. We fix a non-parole period of 5 years and 6 months (66 months). Because it is not permissible to impose an aggregate sentence for these offences, for resentencing, we have reduced the individual sentences for the offending against the respondent's daughter in the manner set out in Schedule 2. The sentences and periods of accumulation for all the other offences remain as set out above.

Schedule 1

Count	Offence	Maximum Penalty	Brief Description	Age of Victim	Sentence	Accumulation
1	Possess child abuse material (CAM)	10 years imprisonment	Possession by the offender of 2090 child abuse images, over three separate devices, ranging from category 1 to 5, including: images of bestiality with children; images of children bound and gagged; images of children performing fellatio including one image of a child as young as seven; images of children engaged in penile/anal intercourse, and engaged in penile/vaginal intercourse.	Various	1 year 3 months	3 months cumulative
2	Aggravated incest (child under 10)	25 years imprisonment	Penetration (digital) of offender's daughter's vagina by him, after having partially removed her underwear. Offending occurred in the family home, while the daughter was in her mother's bed. Offence depicted in series of 11 photographs taken, and	1-4 years old	3 years 9 months	3 months cumulative

			kept, by the offender, and involved the offender exposing the inside of the daughter's vagina, and clitoris, to the camera, and touching her buttocks near her anus to achieve this.			
3	Aggravated incest (child under 10)	25 years imprisonment	Penetration (digital) of offender's daughter's vagina by him, and placing of clear wet bubbly substance across the daughter's vagina. Offence depicted in series of nine photographs taken, and kept, by the offender involving the offender propping the daughter's pelvis up on a pillow and spreading her legs apart, before inserting his finger/s into her vagina over a number of photographs, and exposing the inside of her vagina to the camera.	1-4 years old	4 years	Index offence
4	Aggravated gross indecency (child under 10)	25 years imprisonment	Offender placed his exposed erect penis against the lips of his daughter's vagina, after	2-4 years old	2 years 3 months	3 months cumulative

			having partially removed her underwear and positioning her legs to expose her genitals. Offending occurred in the family home. Offence depicted in two photographs taken, and kept, by the offender.			
5	Aggravated gross indecency (child under 10)	25 years imprisonment	Offender placed his exposed erect penis underneath his daughter's buttocks, with her placed on top of him (her back to his torso) while he was sitting semi-reclined and naked from the waist down. Offending occurred in the family home. The daughter had no underwear on, and the offender opened her legs with his hands, exposing her anus and vagina. Offence depicted in photograph taken, and kept, by the offender. At a later time the offender superimposed	2-4 years old	2 years 3 months	Concurrent with index offence

			the face of another female child, a friend of the family (aged 11-14 years) onto the original image, and added sexually explicit text.			
6	Aggravated indecent dealing (child under 10)	14 years imprisonment	Offender took, and kept, four photographs of the daughter in various sexualised positions, on her back, on her left side, bent forward at the waist, and exposing her buttocks and genitals to the camera, after her pyjama shorts and underwear had been removed. Offending occurred in the family home while the daughter was in her mother's bed.	1-4 years old	1 year 6 months	Concurrent with index offence
7	Aggravated incest (child under 10)	25 years imprisonment	Penetration (digital) of offender's daughter's vagina by him, with the daughter lying on her stomach, her skirt pulled up and her underwear pulled down, propped up, in order to expose her buttocks and genitals. The	4-5 years old	4 years	3 months cumulative

			offending involved the touching of the daughter's clitoris, before the offender placed a clear bubbly type substance across the daughter's vagina and anus, after using his hands to expose the daughter's anus and vagina further. The offending then continued with the offender placing his erect penis and exposed scrotum between his daughter's exposed buttocks. Offending occurred in the family home, while the daughter was in her mother's bed. Offence depicted in series of 14 photographs taken, and kept, by the offender.			
8	Aggravated incest (child under 10)	25 years imprisonment	Offender physically manipulated his daughter to have her digitally penetrate her own vagina, after positioning her to expose her buttocks,	4-5 years old	1 year 6 months	Concurrent with index offence

			anus and vagina, before turning her over onto her stomach, again exposing her anus and vagina, before placing his erect penis and exposed scrotum over the top of her vagina and anus after having used his hands to spread her buttock cheeks. Offending occurred in the family home, and the child appears to be asleep during the offending. Offence depicted in a series of 24 photographs taken, and kept, by the offender.			
9	Aggravated gross indecency (child under 10)	25 years imprisonment	Offender used his hand to grasp the crotch of the daughter's playsuit and underwear and pull them down, exposing her buttocks and vagina, while she is lying in her own bed, on her side with knees towards her chest. Offending occurred in the family home. Offence depicted in a	4-5 years old	1 year 6 months	Concurrent with index offence

			photograph taken, and kept, by the offender.			
10	Aggravated gross indecency (child under 10)	25 years imprisonment	Offender placed a clear bubbly wet substance along his daughter's vagina, after exposing it. The daughter was dressed in black leggings which have the crotch cut away to expose her buttocks and genitalia, which was done by the offender. The offender placed a soft toy and pillow under the daughter's stomach to better expose her genitalia, and manipulated her body, firstly, by grasping her left buttock, secondly, by tucking her knees under her hips to push her buttocks into the air, and thirdly, by placing her on her back and putting her legs at a 90 degree angle. Offending occurred in the family home, in the daughter's bed in her bedroom. The daughter	4-5 years old	2 years 3 months	Concurrent with index offence

			appears to be asleep during the offending. Offence depicted in series of 27 photographs taken, and kept, by the offender.			
11	Aggravated gross indecency (child under 10)	25 years imprisonment	Offender placed a clear bubbly wet substance along his daughter's vagina and anus, after exposing her vagina and anus to the camera multiple times, and manoeuvring her physically in order to be able to do so, including by touching her vagina and anus. Offending occurred in the family home, in the daughter's bed in her bedroom. The daughter appears to be asleep during the offending. Offence depicted in series of 22 photographs taken, and kept, by the offender.	4-5 years old	3 years 6 months	3 months cumulative
12	Aggravated gross indecency (child under 10)	25 years imprisonment	Offender pulled his daughter's underwear down to her upper thighs before he positioned her on her mother's bed	4-5 years old	1 year 6 months	Concurrent with index offence

			in a way such that her hands grasped the inside of her underwear exposing her buttocks and genitalia. Offence depicted in a photograph taken, and kept, by the offender			
13	Aggravated indecent dealing (child under 10)	14 years imprisonment	Offender took, and kept, six photographs of his niece's exposed buttocks, and groin region, from behind, with her legs spread apart while she was lying on her stomach. The offending occurred in the offender's family home, while the niece was in the care of the offender.	4-7 years old	1 year	2 months cumulative
14	Aggravated indecent dealing (child under 10)	14 years imprisonment	Offender took, and kept, two photographs of his niece's groin and buttock region, with her underwear partially covering her buttocks whilst she is on all fours. One image is at a distance, and the other is a close up shot. The offending occurred at the offender's family home, while the	6-8 years old	1 year	Concurrent with index offence

			niece was in the care of the offender.			
15	Aggravated indecent dealing (child under 10)	14 years imprisonment	Offender took, and kept, five photographs of his niece focusing in on her buttock and groin region, at various locations throughout the house. The offending occurred at the offender's family home, while the niece was in the care of the offender.	6-8 years old	1 year	Concurrent with index offence
16	Aggravated indecent dealing (child under 10)	14 years imprisonment	Offender took, and kept, 25 photographs of his niece in various positions on a fold out bed, and also on a tricycle, focusing in on her buttock and groin region, exposing her underwear. The offending occurred at the offender's family home, while the niece was in the care of the offender.	6-8 years old	1 year	Concurrent with index offence
17	Aggravated indecent dealing (child under 10)	14 years imprisonment	Offender took, and kept, two photographs of his niece sitting in a chair with her knees raised and legs spread apart, focusing in on her groin	6-8 years old	1 year	Concurrent with index offence

			region, exposing her underwear. The offending occurred at the offender's family home, while the niece was in the care of the offender.			
18	Produce CAM	10 years imprisonment	Offender created CAM by taking a picture of another niece with her mouth open and her tongue partially protruding, and inserting a photograph of his erect penis near her head, with a white looking substance covering her face. An explicit caption, "Are you gonna cum on my face this time uncle [EG] I want it all on me aaahhhh" was added to the image.	1-3 years old	9 months	Sentences to be served concurrently with each other Sentence on count 18 to be served 2 months cumulatively
19	Produce CAM	10 years imprisonment	Offender created CAM by taking a picture of an unknown female child with a male hand touching her vagina, and superimposing the face of a 16 year old child known to the offender. An explicit caption, "Don't stop	11-14 years old	9 months	

			uncle [EG] that feels good" was added to the image.			
20	Produce CAM	10 years imprisonment	Offender created CAM by taking a picture of an unknown female child in swimmers with her hands ready to untie her bikini bottoms, and superimposing the face of the same 16 year old child known to the offender. An explicit caption, "So I'm just going to take these off now uncle [EG]" was added to the image.	11-14 years	9 months	
21	Produce CAM	10 years imprisonment	Offender created 13 CAM images by taking pictures of unknown female children in sexualised positions, and superimposing the face of the same 16 year old child known to the offender. Explicit captions such as "Do it uncle before mum gets home," "very wet pussy …", "like this uncle [EG]" and "I'm going to fuck your pussy now …" were	11-14 years old	9 months	

			added. In other edited images of semi naked children, the offender has inserted text which reads [the second niece's name] aged 9, [the second niece's name] aged 10.			
22	Indecent dealing	10 years imprisonment	Offender took, and kept, multiple covert photographs of an unknown young female child at a shopping centre, focussing on her groin and buttock region, exposing her underwear. Images were kept in a folder titled 'local girls' on one of the offender's devices.	Young female child	9 months	Sentences to be served concurrently with each other Sentence on count 22 to be served 2 months cumulatively
23	Indecent dealing	10 years imprisonment	Offender took, and kept, multiple covert photographs of an unknown young female child at Woolworths, focussing on her groin and buttock region, exposing her underwear. Images were kept in a folder titled 'local girls' on one of the offender's	Young female child	9 months	

			devices.			
24	Indecent dealing	10 years imprisonment	Offender took, and kept, multiple covert photographs of an unknown young female child at a shopping centre, focussing on her groin and buttock region. Images were kept in a folder titled 'local girls' on one of the offender's devices.	Young female child	9 months	
25	Indecent dealing	10 years imprisonment	Offender took, and kept, two covert photographs of an unknown female child at Woolworths, focussing on her upper thigh and buttock region. Images were kept in a folder titled 'local girls' on one of the offender's devices.	Female child	9 months	
26	Indecent dealing	10 years imprisonment	Offender took, and kept, multiple covert photographs of an unknown young female child at a shopping centre, focussing on her upper thigh and groin region,	Young female child	9 months	

			exposing her underwear. Images were kept in a folder titled 'local girls' on one of the offender's devices.			
27	Indecent dealing	10 years imprisonment	Offender took, and kept, multiple covert photographs of an unknown female child at a shopping centre, focussing on her legs and buttock region. Images were kept in a folder titled 'local girls' on one of the offender's devices.	Female child	9 months	
28	Indecent dealing	10 years imprisonment	Offender took, and kept, multiple covert photographs of an unknown young female child at a kid's playground, focussing on her legs and buttock region, exposing her underwear. Images were kept in a folder titled 'local girls' on one of the offender's devices.	Young female child	9 months	

SCHEDULE 2

Resentence for Counts 2 to 12 (the offending against the daughter)

- **Count 3 -** convicted and sentenced to imprisonment for **5 years**; (The same applies to each of counts 2, 4, 5, 7, 8, 10 and 11.)

- **Count 2** – convicted and sentenced to imprisonment for 5 years. Five months is to be served cumulatively on the sentence imposed for count 3; **(5 years and 5 months)**

- **Count 4** – convicted and sentenced to imprisonment for 5 years. Five months is to be served cumulatively on the sentence imposed for count 2; **(5 years and 10 months)**

- **Count 5** – convicted and sentenced to imprisonment for 5 years. Five months is to be served cumulatively on the sentence imposed for count 4; **(6 years and 3 months)**

- **Count 6** – convicted and sentenced to imprisonment for 2 years. Two months is to be served cumulatively on the sentence imposed for count 5; **(6 years and 5 months)**; (The same applies to counts 9 and 12.)

- **Count 7** – convicted and sentenced to imprisonment for 5 years. Five months is to be served cumulatively on the sentence imposed for count 6; **(6 years and 10 months)**;

- **Count 8** – convicted and sentenced to imprisonment for 5 years. Five months is to be served cumulatively on the sentence imposed for count 7; **(7 years and 3 months)**;

- **Count 9** – convicted and sentenced to imprisonment for 2 years. Two months is to be served cumulatively on the sentence imposed for count 8; **(7 years and 5 months)**;

- **Count 10** – convicted and sentenced to imprisonment for 5 years. Five months is to be served cumulatively on the sentence imposed for count 9; **(7 years 10 and months)**;

- **Count 11** – convicted and sentenced to imprisonment for 5 years. Five months is to be served cumulatively on the sentence imposed for count 10; **(8 years and 3 months)**;

- **Count 12** – convicted and sentenced to imprisonment for 3 years. Three months is to be served cumulatively on the sentence imposed for count 11; **(8 years and 6 months)**.

TOTAL SENTENCE FOR COUNTS 2 TO 12 **8 YEARS AND 6 MONTHS**