CITATION:	*Turley v The Queen* [2019] NTCCA 4
PARTIES:	TURLEY, Glen Cecil v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 2 of 2018 (21708184)
DELIVERED:	10 January 2019
HEARING DATE:	28 August 2018
JUDGMENT OF:	Grant CJ, Kelly and Blokland JJ

CATCHWORDS:

CRIMINAL LAW – SEXUAL OFFENCES AGAINST CHILDREN – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – MANIFEST EXCESS

Whether sentence manifestly excessive – no manifest excess having regard to seriousness of the offending, aggravating factors and maximum penalties – leave to appeal granted and appeal dismissed.

Bara v The Queen [2016] NTCCA 5, *Director of Public Prosecutions v Dalgliesh (a pseudonym)* (2017) 349 ALR 37, *Emitja v The Queen* [2016] NTCCA 4, *Markarian v The Queen* (2005) 228 CLR 357, *Morrow v The Queen* [2013] NTCCA 7, *Whitlock v The Queen* [2018] NTCCA 7, referred to.

CRIMINAL LAW – SEXUAL OFFENCES AGAINST CHILDREN – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – REDUCTION FOR GUILTY PLEA

Whether greater reduction than 25 per cent ought to have been allowed for pleas of guilty – whether in cases of sexual offending against children there are public policy considerations for larger reductions to encourage guilty pleas – difficulties of proof in child sex cases – additional value of sparing victims trauma of having to give evidence – sentencing court not limited in the circumstances to a discount of 25 per cent – no standard or maximum reduction in recognition of a plea of guilty – sentencing court may exercise a wide discretion in according leniency in recognition of the value of a guilty plea – strong Crown case which included admissions made by the applicant in pretext telephone calls and a recorded interview – three victims whose evidence was mutually admissible – significant corroboration – applicant showed no remorse – no greater reduction or less severe sentence warranted – leave to appeal granted and appeal dismissed.

DF v The Queen [2006] NTCCA 13, *JKL v The Queen* [2011] NTCCA 7, *Kelly v The Queen* (2000) 10 NTLR 39, *R v Ellis* (1986) 6 NSWLR 603, *R v Sutton* [2004] NSWCCA 225, *Ryan v R* (2001) 206 CLR 267, *Siganto v The Queen* (1998) 194 CLR 656, *Staats v The Queen* (1998) 123 NTR 16, *Whitlock v The Queen* [2018] NTCCA 7, *Wright v The Queen* [2007] NTCCA 5, referred to.

REPRESENTATION:

Counsel:

Applicant:	JCA Tippett QC
Respondent:	M Nathan SC

Solicitors:

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

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

Turley v The Queen [2019] NTCCA 4
No. CA 2 of 2018 (21708184)

BETWEEN:

GLEN CECIL TURLEY
Applicant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, KELLY and BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 10 January 2019)

THE COURT:

[1] On 19 January 2018 the applicant pleaded guilty to three counts of maintaining a sexual relationship with a child under the age of 16. The applicant seeks leave to appeal against the sentence imposed following that plea.[1]

[2] The facts of the offending (summarised from the sentencing remarks) are as follows:

(a) Count 1 was a charge of maintaining a sexual relationship with KM, a child under the age of 16 years, aggravated by the fact that KM was in

1 As the appeal is brought against the sentence passed on the finding of guilt, leave is required pursuant to s 410(c) of the *Criminal Code* (NT)).

his care and that in the course of the relationship the applicant had unlawful sexual intercourse with KM and indecently dealt with her.

The facts in relation to count 1 are that in 1996 the applicant formed a relationship with KM's mother and they moved in together. They married in 1999 and both KM and her mother lived with the applicant until July 2002 when the relationship ended. After that, KM visited the applicant's house, spending most Friday nights there until December 2002.

Between 2000 and December 2002 the applicant maintained a sexual relationship with KM, while she was living with her mother at his home and during visits following their separation. KM was aged between seven and nine during the period of offending.

Sometime in 2002, the applicant took KM for a drive in his car out onto a dirt road. He offered to let the child drive his car, but only if she performed fellatio on him. He placed his penis into the victim's mouth and had her perform fellatio on him after which he allowed her to drive the car.

On another occasion, in June 2002, the applicant took KM on a fishing trip. He again drove his car onto a dirt track and pulled over. He said to KM, "If you want to drive, you have to suck my dick." The applicant opened the driver's side door and KM got out of the car and went to the driver's side. The applicant inserted his penis into KM's mouth and had

her perform fellatio on him for approximately five minutes. Then he allowed KM to drive the car on the dirt track.

On a Friday afternoon between July 2002 and December 2002, the applicant picked up KM from school. He took her into his house and told her to go and have a shower. Then he removed his clothes and got into the shower with her. He touched KM on the outside of her vagina and then rubbed his fingers on her vagina. KM left the shower and the applicant told her not to get dressed, and to lie on her bed naked. KM was afraid the applicant would touch her again, so she lay on the bed and pretended to be asleep. The applicant went into the room, touched KM and grabbed her on the bottom. Then, thinking she was asleep, he left the room.

Sexual offending of the same nature occurred regularly from 2000 until the victim and her mother moved to Adelaide in December 2002.

(b) The victims of Counts 2 and 3, JW and KSM, are sisters, the applicant's step-daughters in a later relationship. Count 2 was a charge of maintaining a sexual relationship with JW, a child under the age of 16 years, aggravated by the fact that she was in his care, and that in the course of the relationship the applicant had sexual intercourse with JW and indecently dealt with the child. Count 3 was a charge of maintaining a sexual relationship with KSM, a child under the age of 16 years, aggravated by the fact that she was in his care, and that in the

course of the relationship the applicant had sexual intercourse with KSM and indecently dealt with the child and by the fact that KSM was under 10 years of age.

The facts of counts 2 and 3 are that in February 2006 the applicant formed a relationship with the mother of JW and KSM and she and the children moved into his house. JW was 11 or 12 years old during the period of the offending and KSM was five or six years old.

During the period from February 2006 through to the end of 2006, the applicant groomed both victims and maintained sexual relationships with them.

On one occasion during this period the applicant approached JW as she sat on the living room couch. He was naked and had an erect penis. He asked JW to touch his penis and she did so.

On a separate occasion the applicant again approached JW and removed his erect penis from his pants. He told JW how to masturbate him. JW then masturbated the applicant. Then he asked her to perform fellatio on him. The applicant inserted his erect penis into JW's mouth and told her how to perform fellatio. He ejaculated after removing his penis from her mouth and told her to wipe up the ejaculate with a tissue, which she did.

On another occasion during the late evening the applicant was sitting at a computer in the lounge room of his home, watching pornography. KSM woke up and went into the lounge room. The applicant showed KSM pornography and allowed her to watch the pornography with him.

On another occasion the applicant and JW were sitting outside on the verandah of his home. The applicant rolled up his shorts and exposed his erect penis. He put chocolate on the outside of his penis and put his penis into JW's mouth. He told JW to lick the chocolate off his penis. The applicant then put honey on his erect penis and put it in JW's mouth. JW licked and sucked the honey off the applicant's penis. The applicant then called his pet dog and allowed the dog to lick the remainder of the honey from his penis as JW watched.

On a separate occasion, the applicant and JW were in the lounge room of his home. The applicant exposed his erect penis and inserted part of a pen into the eye of his penis. Then he had JW masturbate him with her hands.

On another occasion, the applicant was in the master bedroom with JW. The applicant undressed himself and JW and he lay down on the bed behind JW, who was lying on her side. The applicant took hold of his erect penis and rubbed the tip of his penis against JW's vagina. The applicant told JW he could not insert his penis into her vagina because it would break her hymen and people would know.

On a separate occasion, during the day, the applicant was lying on his bed in the master bedroom with both JW and KSM. He was naked with an erect penis. He picked up KSM, who was also naked, held her above his face, lowered her vagina onto his mouth performed cunnilingus on her while JW watched. After a time, the applicant put KSM down and had her touch him on his erect penis. Then he picked up JW, lowered her vagina onto his face and performed cunnilingus on her while KSM watched.

On a separate occasion the applicant entered KSM's room at night, naked. He put KSM's hand on his penis and assisted her to masturbate him. Then he put his hand in KSM's underwear and touched the outside of her vagina.

On another occasion the applicant took JW on a trip to Katherine in his 4-wheel drive vehicle. During the drive, the applicant removed his penis from his pants in order for JW to masturbate him. The applicant had JW perform fellatio on him. Then he pulled off the road got out of the car and ejaculated on the ground. The applicant then took JW to the Katherine movie theatre.

On a separate occasion, the applicant was sitting on the couch in his home. He lay JW across his lap and he removed her clothes. He held JW's hands above her head with one hand and inserted the fingers of his other hand into her vagina. He also played with her nipples. JW told

the applicant to stop and then slapped him across the face. The applicant became angry and threw her off the couch, causing her to land on the ground. JW got up and stayed in her bedroom.

On another occasion during this period the applicant and KSM were in the master bedroom. The applicant placed his hand on her vagina. KSM told the applicant to stop and that she would tell her mother if he continued. The applicant later left the room.

[3] After the victims had made disclosures and participated in interviews with police, JW took part in a pretext phone call with the applicant. During the phone call, which was recorded, the applicant made admissions to the offending. However, he sought to minimise his offending by claiming that it was "a bit of a two-way street" and that he did not think there was any harm in it. He also said, "Well, it wasn't actually sex or anything. We were just mucking around. That's all."

[4] The applicant was later arrested and he participated in a recorded interview in which he made some admissions. However, he again sought to minimise his offending by claiming that JW and KSM would grab his 'old fella' out of curiosity and he let it go too far.

[5] On 2 February 2018 the applicant was sentenced to a total effective sentence of 15 years' imprisonment with a non-parole period of 10 years and six months. This sentence was imposed after a 25 per cent discount for the pleas of guilty had been allowed.

[6] The applicant seeks leave to appeal against this sentence on three grounds. Ground 1 was subsequently abandoned. Ground 2 was that the sentence was manifestly excessive. Ground 3 was that a greater reduction than 25 per cent ought to have been allowed. While conceding that a 25 per cent reduction was within the range established by current sentencing practices, the applicant argued that, in cases of sexual offending against children, there are public policy considerations that should lead this Court to establish, as a principle, that substantially larger reductions should be made in order to encourage guilty pleas, because of the difficulties of proof in child sex cases, and the considerable additional value of a plea in such cases in sparing victims the trauma of having to give evidence.

Ground 2: that the sentence was manifestly excessive

[7] The principles applicable to appeals of this nature are well known.[2] The presumption is that there is no error. An appellate court interferes only if it is shown that the sentencing judge committed error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error. It is incumbent upon the appellant to show that the sentence was clearly and obviously, and not just arguably, excessive.

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2 See, for example, *Whitlock v The Queen* [2018] NTCCA 7; *Bara v The Queen* [2016] NTCCA 5 at [75]-[76]; *Emitja v The Queen* [2016] NTCCA 4 at [39]-[40]; and *Morrow v The Queen* [2013] NTCCA 7 at [36].

[8] The applicant contended that a sentence of 15 years after a discount of 25 per cent reflects a starting point of 20 years' imprisonment and that this was manifestly excessive, particularly in light of the mitigatory factors mentioned by the trial judge such as:

(a) the length of time since the last offending occurred in 2006 and the applicant's good behaviour since that time;

(b) the difficulties and the difficult environment to which the applicant will be subject whilst in prison;

(c) the reduced risk of re-offending because of the applicant's age (58);

(d) the opportunity to engage in appropriate sex offender programs and the psychiatric opinion that such programs are likely to assist the applicant to develop empathy;

(e) his physical health;

(f) the great degree of supervision he will be subject to upon release; and

(g) the potential for a serious sexual offender application being made in the future.

[9] In his submissions on Ground 2, the applicant placed a great deal of emphasis on the sentence imposed in *The Queen v MLW*.[3] *MLW* involved sexual abuse by the offender of his two young granddaughters over an

3 Supreme Court of the Northern Territory, SCC 21521727, 17 March 2017.

extended period of time. *MLW* was found guilty after a trial by jury and sentenced to a term of imprisonment for 12 years. The applicant contended that, by comparison, a starting point of 20 years for the applicant was manifestly excessive. He contended that, although there were three victims in the applicant's case, and only two in the case of *MLW*, the applicant had abused the children over a lesser period of time.

[10] The applicant's contention that the sentence reflects a starting point of 20 years is misleading, as it fails to take into account the structure of the sentence. In relation to count 2 (considered by the sentencing judge to be the most serious) the applicant was sentenced to nine years' imprisonment. On count 1 he was sentenced to imprisonment for seven years and six months with three years to be cumulative on count 2, and on count 3 he was likewise sentenced to imprisonment for seven years and six months with three years to be cumulative on count 1, bringing the total effective sentence to 15 years.

[11] The maximum penalty for each of the offences is imprisonment for 20 years. As the High Court[4] has emphasised:

> [C]areful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

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4 *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at 372 [31]; quoted and relied on in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41; 349 ALR 37 at [10].

[12] Each of these offences was objectively serious with the following aggravating features.

(a) Each offence involved a gross breach of trust. The applicant was the stepfather of all three victims (across two separate relationships) and the offending occurred while he had sole or primary care for them.

(b) The offending was protracted. It did not involve a momentary lapse of judgement. In respect of Count 1 the offence spanned three years and involved regular abuse of the child throughout that period and even after the breakdown of his relationship with the mother. Counts 2 and 3 occurred over an 11 month period and also involved multiple incidents.

(c) The victims were very young. KM, the victim in Count 1, was aged between seven and nine years during the time of the offending. JW, the victim in Count 2, was 11 or 12 during the offending period and KSM the victim in Count 3 was five or six during the offending.

(d) There was a large disparity in age between the applicant, who was aged between 42 and 47 at the relevant times, and the victims.

(e) The offending conduct, whilst not including penile/vaginal penetration, was still extremely serious involving fellatio, cunnilingus, digital penetration, mutual masturbation, simulated intercourse and indecent touching.

(f) The offending involved a significant level of depravity. On one occasion the applicant offended against two victims in the presence of each other; he exposed one victim to pornography; and on one occasion he involved a family pet.

(g) There was a degree of emotional manipulation. The applicant told one victim on two occasions that she would only be allowed to drive a motor vehicle if she performed fellatio upon him.

(h) On one occasion, the applicant responded violently when the victim told him to stop digitally penetrating her and then slapped his face. The applicant became angry and threw her to the ground.

(i) In relation to counts 2 and 3, the applicant was aware that he had previously given in to a criminal temptation and engaged in conduct that was both criminally and morally wrong against his step daughter in a previous relationship. Against this background, he began another relationship with the victims' mother and placed himself in another position of trust, which he abused by sexually interfering with his step daughters in the second relationship.

(j) He continued to abuse his victims until firstly KM and her mother moved interstate and secondly, KSM threatened to tell her mother if he continued.

(k) The offending has had a devastating and long lasting impact upon each of the victims and their families which was set out in the victim impact statements, parts of which were referred to by the learned sentencing judge.

[13] In light of the seriousness of the offending, these aggravating factors and the maximum penalties, it can hardly be said that the individual sentences are excessive (let alone manifestly so). Counsel for the applicant submitted that these offences were in "the middle order of offending as compared with other such offending which comes before these Courts". The sentence for the most serious offence is just under half the maximum and for the other two counts, considerably less than half the maximum penalty. (The starting point for count 2, before the discount of 25 per cent, is just over half the maximum and for the other two, half the maximum.) Moreover, the sentencing judge ordered substantial concurrence. Using count 2 (the most serious) as a base, his Honour ordered more than half of the sentences for each of the other two counts to be served concurrently.

[14] So far as the comparison with *MLW* is concerned, first, it must be borne in mind (as the applicant has rightly conceded) that there is no "tariff" for cases of this nature: each case is highly dependent on its own individual circumstances. Second, there are significant factual differences between the two cases, in particular the fact that in the applicant's case there were three victims, hence three charges, each bearing a maximum penalty of 20 years imprisonment. When one takes into account that significant difference, it

can be seen that the sentences handed down in the two cases are within a broadly similar range. In *MLW* the offender was sentenced to imprisonment for 10 years for the more serious offence and imprisonment for six years for the other offence.

[15] The sentencing judge took into account a range of mitigating factors, including those set out at [4] above, and, in particular that, "Serving a term of imprisonment will be a harsh experience for the offender." However, his Honour correctly observed in his sentencing remarks to the applicant:

> [Y]our crimes are marked by numerous factors of aggravation. The seriousness of your conduct means that matters personal to you that might otherwise have been given significant weight in mitigation must take second place to the importance of general deterrence, punishment and the marking of the Court's disapproval.

[16] His Honour also quoted (appropriately) these remarks of Mildren JA in *MLW*:

> It is not always an easy balancing exercise between the principle of proportionality and the humanitarian considerations in sentencing someone like [the offender] … However, that is what often happens in cases like this. I do not disregard these factors entirely but, as the law stands, they cannot be given much weight.

[17] The sentence was not manifestly excessive. This ground of appeal fails.

Ground 3: this Court should establish, as a principle, that substantially larger reductions should be made in child sex cases in order to encourage guilty pleas, because of the difficulties of proof in such cases, and the considerable additional value of a plea in such cases in sparing victims the trauma of having to give evidence.

[18] During the sentencing hearing, the sentencing judge asked counsel whether there was any principle which recognised that there may be additional benefit where a plea of guilty is entered in a prosecution of sexual offending against children and whether there was any principle in sentencing law that pleas of guilty in these matters require additional encouragement by way of an increased reduction given that presently guilty pleas are the exception rather than the rule. Defence counsel, Mr Read SC, made brief written submissions to the effect that there was no such principle; that there have been no pronouncements from higher courts which isolate cases of this nature as deserving additional mitigatory benefit or benefit because of public policy considerations; and that the authorities confirm the usual exercise of the sentencing discretion, namely that each case needs to be dealt with on its own merits and own particular considerations. No reference was made to any particular authorities.

[19] That led the sentencing judge to make the following comments in the sentencing remarks:

> Further, as Mr Read has very eloquently argued, a sentencing court cannot stray too far, if at all, beyond the usual 25 per cent maximum discount that is available for pleas of guilty. This is despite the very significant utilitarian benefits that are gained when an offender pleads guilty in a case such as this. It is very rare that offenders plead guilty in cases such as this. The benefits for the victims include not only the

> fact that they will not be required to give evidence but that they have the benefit of a full and frank admission and acknowledgement by the offender that what he did to them was very wrong and they were not to blame in any way. This would be completely lost if they were required to be cross-examined. The trauma and lack of certainty of a trial is avoided for victims who have suffered very considerable trauma. This is a significant saving. There has also been a significant saving of Court time and the prospects of an appeal have been avoided.
>
> It may be that it is time for the legislature to consider that sexual offenders should be given greater incentive to plead guilty in cases such as this, because of the enormous benefit that victims can obtain when an offender pleads guilty and, through the frankness of this plea, releases the victims of the traumatic burden they carry in these cases while they remain unresolved.
>
> The law has not reached such a stage. No higher court pronouncements have been identified which isolate cases of this nature as deserving of additional mitigatory benefits because of the public policy considerations to which I have referred. However, I do note that, as a result of the offender's pleas of guilty, the victims have been vindicated, they have gained certainty, avoided a traumatic and difficult trial and will not be exposed to technical and potentially complex appeals.

[20] This is a very unusual application. This proposed ground of appeal does not allege error on the part of the sentencing judge. Rather, the applicant is urging this Court to establish, for the first time, a principle that substantially larger reductions should be made in child sex cases in order to encourage guilty pleas, and that this Court should re-sentence the applicant in accordance with that principle. We are of the opinion that there is no need to establish any such special principle for child sex cases; that the sentencing discretion is not constrained in the manner contended by the applicant; and that, to the extent that the sentencing judge acted on the assumption that he was unable to give a greater than 25 per cent reduction, (encouraged by written submissions from counsel for the applicant) his Honour was in error.

[21] The applicant's contention on this ground is based on an unduly restrictive view of the extent of a sentencing judge's discretion in relation to the mitigatory allowance to be made in the case of guilty pleas. It is common, among criminal lawyers on and off the bench to speak, in a shorthand way, as the sentencing judge did in the remarks quoted above, of "the usual 25 per cent discount". However, there is no standard or maximum reduction in recognition of a plea of guilty. Judges in this jurisdiction can and do exercise a wide discretion in according leniency in recognition of the value of a guilty plea. The existence of this discretion (which must be exercised judicially) has been recognised and emphasised many times by this Court.

[22] In *Whitlock v The Queen*[5] the appellant contended that the sentencing judge was in error in applying a 20 per cent reduction although he had accepted that the offender had shown some remorse; and that he ought to have applied a 25 per cent reduction. In rejecting that contention, the Court of Criminal Appeal said:

> A number of well-settled principles have application to that determination. First, any reduction in sentence to take into account a plea of guilty and remorse is a discretionary determination which has no set value and which does not require a reduction of 25 percent. Secondly, that will ordinarily be the extent of the reduction where a guilty plea is indicated at the earliest opportunity such that it may be considered both facilitative to the administration of justice and indicative of true remorse; but again that is a matter for the exercise of the discretion.

5 [2018] NTCCA 7 at [28].

[23] In *Kelly v The Queen*,[6] the Court of Criminal Appeal said:

> In our opinion it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor, but we do not consider that it is possible to lay down any tariff. The weight to be given to the plea will vary according to the circumstances.
>
> Often, as here, the assistance given to the law enforcement authorities in investigating the offence may diminish the value of the plea given the strength of the prosecution case arising from that assistance. The combination of those two factors, however, allows for greater mitigation than would a plea without that cooperation. Public expense occurs not only in the courts, but also in the investigatory process.
>
> In addition, it may be appropriate in the circumstances, rather than reduce the head sentence, to give effect to the value of the plea by other means such as a partially suspended sentence or home detention order, or by the imposition of a fine, to mention only some of the obvious examples.

[24] In *Wright v The Queen*,[7] the Court of Criminal Appeal said:

> There is no set range of percentage reduction appropriate for pleas of guilty. Each case must be determined according to its particular circumstances. There is no doubt, however, that pleas of guilty or indication of pleas of guilty at the earliest possible opportunity accompanied by true remorse are entitled to attract a greater reduction than late pleas which are not accompanied by true remorse. There is a range of reduction available to each sentencing Judge and it is not to the point that the Appellate Court would have given a greater reduction than the sentencing Judge. This Court is only entitled to interfere if it is satisfied that the reduction of 15% was outside the proper range of reduction available to the sentencing Judge so as to be manifestly inadequate.

[25] In *JKL v The Queen*,[8] the Court of Criminal Appeal said:

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6 [2000] 10 NTLR 39 at [27]-[28].

7 [2007] NTCCA 5 at [32].

8 [2011] NTCCA 7 at [28].

> There is no sentencing principle in the Northern Territory which requires a sentencing Judge to grant a reduction of 25 per cent for a guilty plea that is made at the earliest opportunity. The value of the reduction to be given for any plea of guilty is a matter of discretion. The value is dependent on the circumstances of the particular case and the extent to which it demonstrates remorse, the acceptance of responsibility and resipiscence, the willingness to facilitate the course of justice, the extent to which a witness who may find the procedure painful has been spared the necessity to give evidence, and the utilitarian benefits that flow from the plea. In the Northern Territory a reduction of 25 per cent will normally be given in circumstances where there has been an early guilty plea which is indicative of true remorse and resipiscence. While a plea of guilty entered at the first reasonable opportunity may be a significant factor in assessing the extent to which it is indicative of remorse and resipiscence, it will not necessarily do so in all cases.

[26] The circumstances affecting the weight to be given to the plea as a mitigating factor are almost infinitely various. They include the time at which the offender indicates that he will plead guilty (and thus the saving in time and money effected by the plea); the extent and nature of co-operation given to authorities and whether that co-operation includes the voluntary disclosure to the authorities of offending which may not otherwise have come to light; the strength of the Crown case[9] and any difficulties in proof there may have been had the matter gone to trial; the extent to which the plea is indicative of genuine remorse as distinct from a mere acknowledgment of the inevitable; the extent to which the plea serves the self-interest of the accused[10] and other factors affecting the utilitarian and what might be called the humanitarian value of the plea including the value

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9 The strength of the Crown case is not relevant in determining the utilitarian value of the plea of guilty, but in the evaluation of remorse and what weight should be given to that factor in determining the appropriate sentence. *R v Sutton* [2004] NSWCCA 225 at [12] and the cases cited therein.

10 *DF v The Queen* [2006] NTCCA 13 at [16].

of sparing complainants and other witnesses the trauma of having to give evidence and the other benefits to victims mentioned by the sentencing judge in the remarks quoted above. It is clear that these are not independent factors. They are inter-related in complex ways.

[27] As Street CJ said, in *R v Ellis*:[11]

> This Court has said on a number of occasions that a plea of guilty will entitle a convicted person to an element of leniency in the sentence. The degree of leniency may vary according to the degree of inevitability of conviction as it may appear to the sentencing judge, but it is always a factor to which a greater or lesser degree of weight must be given.

[28] Street CJ went on in the immediately following paragraphs to discuss the "significant added element of leniency" which should be accorded an offender who voluntarily discloses offending which was unlikely to have been discovered and established without the disclosure, on the basis that, "It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence."[12]

[29] Although sometimes referred to as "the *Ellis* principle" this is not a stand-alone principle. It is an application of the more general principles relating to

11 (1986) 6 NSWLR 603.

12 (1986) 6 NSWLR 603 at 604.

reduction of sentences as a consequence of a plea of guilty referred to in the passage from *Ellis* quoted at [27] above. As McHugh J said in *Ryan v R*:[13]

> The statement in *Ellis* that "the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency" is a statement of a general principle or perhaps more accurately of a factor to be taken into account. It is not the statement of a rule to be quantitatively, rigidly or mechanically applied. It is an indication that, in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case.

[30] In discussing the applicable principles in *Ryan v R,*[14] a case, like the present, involving serial sexual offending against children[15], Kirby J said:

> Clearly, it is in the public interest that the law should encourage offenders to acknowledge, and bring to official notice, offences not previously known to the authorities. In part, this interest derives from the saving of costs in the investigation and prosecution of criminal offences. In part, it is because it helps to improve the clear-up rate for crimes and vindicates the public process of punishing and deterring crime. …
>
> The applicable public interest also includes a growing concern of modern criminal law and practice with a consideration that is of particular relevance to a case such as the present. I refer to enlarged attention to the position of the victims of crime. A confession by an offender allows a victim a public vindication. In the particular matter of serial criminal offences against children and young persons, a confession by the offender may also facilitate the provision, where appropriate, of community assistance to the victim or the payment of

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13 [2001] HCA 21; 206 CLR 267

14 At [92] to [94]; *Ryan* was a paedophile priest. He pleaded guilty to a large number of sexual offences against children, many of them as a result of voluntary disclosures he made after being charged with the others. He appealed against the severity of his sentence on several grounds including that the sentencing judge did not properly apply the *Ellis* principle and as a result did not allow a sufficient reduction on account of his voluntary disclosures. Kirby J disagreed with the majority on this ground of appeal but the point of difference between Kirby J and the majority was not one of principle. The majority found that the sentencing judge had in fact taken into account in favour of the appellant his disclosure of offences and "gave him credit for that". (There was disagreement in principle on a different issue – ie the proper characterisation of paedophilia for sentencing purposes.)

15 This case was not brought to the sentencing judge's attention.

> compensation and an extension of greater family understanding and support. Medical reports tendered in the appellant's sentencing proceedings indicated that some of the persons abused by him as boys were considered, years later, still to be in need of psychiatric treatment.
>
> Unless persons such as the appellant are encouraged to bring unreported cases to notice, the likelihood is that, in the great majority of instances, such crimes will not be reported. They will therefore go unpunished. Accordingly, both from the point of view of society and of the victims of crime, there are strong reasons of policy why the law should encourage offenders to make full confessions. It should certainly not discourage them. Encouraging a full confession may also be an important first step in securing help for, and counselling of, the offender. This is, likewise, one of the objectives of criminal punishment and thus of judicial sentencing.

[31] The applicant contends that there is a need for a special principle to encourage pleas of guilty in child sex cases because of the difficulties of proof in such cases, and the considerable additional value of a plea in such cases in sparing victims the trauma of having to give evidence. As is made clear in the cases cited above, these are factors which sentencing judges can and do take into account in assessing the value of a guilty plea and there is no reason why they cannot place additional weight upon such factors in appropriate cases. Further, these factors are not unique to child sex cases.

[32] There is no need for this Court to attempt to establish a special principle applicable only to child sex cases, nor is it desirable. The sentencing discretion in relation to the reduction which can be made in recognition of a guilty plea is not constrained in the manner suggested by the applicant’s submissions. Judges in this jurisdiction have in the past allowed, and will continue in the future to allow, substantial reductions, including reductions

from 30 to 50 per cent,[16] in appropriate cases where one or more relevant factors warrant it – for example where there has been an early plea indicative of genuine remorse coupled with valuable assistance to the authorities[17] or in sex cases where there is often a greater than usual value in sparing the victim the ordeal of a trial, and providing the victim with vindication.

[33] The particular value of sparing a victim the additional trauma of having to give evidence, and the mitigatory effect of providing validation and, perhaps, closure, and/or access to counselling or other assistance, are relevant factors which can be, and are, given effect to by sentencing judges. There is no constraint on a sentencing judge placing additional weight on such benefits in the case of a particularly vulnerable victim. This may (in appropriate cases) include, but is not limited to, child victims of sexual offences. The reduction to be allowed is a matter for the sentencing judge taking into account all relevant circumstances.

[34] In the applicant's case it seems clear that the sentencing judge did give additional weight to these factors. There was a strong Crown case which included admissions made by the applicant in pretext telephone calls and a recorded interview with police; there were three victims whose evidence was mutually admissible; and significant corroboration. The applicant showed no

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16 We are not aware of reductions greater than 50 per cent having been given in the past but this is not an indication that 50 per cent is necessarily the upper limit. It all depends on the particular circumstances of the case.

17 In some cases, where an offender has co-operated with authorities in a manner which might put their safety at risk, substantial reductions have been allowed which are not explicitly stated in the sentencing remarks.

remorse: he sought to minimise his offending and to pass blame to the victims. Given these circumstances, one might ordinarily expect a reduction of less than 25 per cent. The inescapable inference is that, in reducing the applicant's sentence by 25 per cent, the sentencing judge allowed a significant additional reduction in recognition of the added utilitarian value of the plea in vindicating the victims and saving the victims the trauma of having to give evidence. Indeed his Honour said:

> I do note that, as a result of the offender's pleas of guilty, the victims have been vindicated, they have gained certainty, avoided a traumatic and difficult trial and will not be exposed to technical and potentially complex appeals.

[35] The acknowledged public policy behind reducing sentences in recognition of a plea of guilty is to act as an inducement to an offender to enter a plea of guilty in return for a lesser penalty than might otherwise have been expected.[18] There is nothing to prevent a sentencing judge from giving recognition in appropriate cases to the sorts of considerations mentioned by Kirby J in *Ryan* – ie that the instant case is of a kind in which there may be a greater public interest in encouraging offenders to plead guilty. There is no need to confine this to child sex cases.

[36] It is unclear whether the sentencing judge acted on the assumption that he had no discretion to apply a reduction of greater than 25 per cent. As stated above, if his Honour did so, that was an error, largely contributed to by

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18 *JKL v The Queen* [2011] NTCCA 7 at [25]; *Kelly v The Queen* (2000) 10 NTLR 39 at par [24]; *Staats v The Queen* (1998) 123 NTR 16 at 28 per Angel J; *Siganto v The Queen* (1998) 194 CLR 656 at par [22]; *R v Ellis* at 604.

counsel for the applicant. Also as explained above, it is clear that in allowing a 25 per cent reduction, his Honour did make a substantial additional reduction in the applicant's sentence because the applicant's pleas of guilty vindicated the victims, gave them certainty, avoided a traumatic and difficult trial and possible technical and potentially complex appeals.[19]

[37] On an appeal against sentence, if the Court is of the opinion that another sentence, whether more or less severe, is warranted and should have been passed, the Court must quash the sentence and either impose another sentence or remit the matter to the sentencing judge:[20] otherwise, the Court must dismiss the appeal.[21] Whether or not the sentencing judge acted on the assumption that he had no discretion to apply a reduction of greater than 25 per cent to the sentence, we are not of the opinion that another sentence is warranted and should have been passed.

[38] ORDERS:

(a) Leave to appeal is granted.

(b) The appeal is dismissed.

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19 See sentencing remarks quoted at [34] above.

20 *Criminal Code* s 411(4)(a).

21 *Criminal Code* s 411(4)(b).