CITATION:	*JL v The Queen* [2019] NTCCA 7
PARTIES:	JL 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 17 of 2018 (21637051)
DELIVERED:	22 March 2019
HEARING DATE:	4 March 2019
JUDGMENT OF:	Kelly and Barr JJ and Riley AJ

CATCHWORDS:

CRIMINAL LAW – appeal against sentence – defence appeal – whether manifestly excessive – application of sentencing standards of the time of offending – general increase in sentence

CRIMINAL LAW – appeal against sentence – defence appeal – whether manifestly excessive – objective seriousness of offence – indecent assault – at least mid-range of seriousness

PRACTICE AND PROCEDURE – statutory interpretation – non-parole period – whether court obliged to impose non-parole period of not less than 50% under s 54 of the *Sentencing Act* – *Sentencing Act* s 130 – minimum 50% non-parole period applicable to a sentence imposed after commencement of the *Sentencing Act*, irrespective of when the offence was committed - court is obliged to impose non-parole period of not less than 50%

PRACTICE AND PROCEDURE – statutory interpretation – non-parole period – whether mandatory minimum non-parole periods pursuant to ss 55 and 55A of the *Sentencing Act* applicable to historical offence – not applicable – only applicable to offences under the nominated sections of the *Criminal Code*

CRIMINAL LAW – appeal against sentence – defence appeal – manifestly excessive – whether non-parole period greater than 50% manifestly excessive – whether sufficient weight given to subjective circumstances – not manifestly excessive – appeal dismissed

Criminal Code Act (NT) ss 192(3), 130(1), 132, 188, 188(1), 188(2)
Criminal Law Consolidation Act and Ordinance ss 60 and 66
Misuse of Drugs Act (NT)
Sentencing Act (NT) ss 55, 55A, 78C

Bara v The Queen [2016] NTCCA 5; *Emitja v The Queen* [2016] NTCCA 4; *Morrow v The Queen* [2013] NTCCA 7; *Whitlock v The Queen* [2018] NTCCA 7, followed

GPR v The Queen [2007] NTCCA 12; *Green v The Queen* [2006] NTCCA 22; 19 NTLR 1; *Melpi v The Queen* [2009] NTCCA 13; *Papadimitropoulos v The Queen* (1957) 98 CLR 249; *R v Inkamala* [2006] NTCCA 11; *R v Kelso* (Unreported, Supreme Court of the Northern Territory, Forster CJ, 26 May 1983); *R v Riley* [2006] NTCCA 10; 161 A Crim R 414; *R v Rindjarra* [2008] NTCCA 9; 191 A Crim R 171; *R v Tennyson* [2013] NTCCA 02; *Stuart v The Queen* [2010] NTCCA 16; *TRH v The Queen* [2018] NTCCA 14, referred to

REPRESENTATION:

Counsel:

Applicant:	M Thomas
Respondent:	M Nathan SC

Solicitors:

Applicant:	Ward Keller
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	20

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

JL v The Queen [2019] NTCCA 7
No. CA 17 of 2018 (21637051)

BETWEEN:

JL
Applicant

AND:

THE QUEEN
Respondent

CORAM: KELLY and BARR JJ and RILEY AJ

REASONS FOR JUDGMENT

(Delivered 22 March 2019)

THE COURT:

[1] Following a trial by jury, the applicant was convicted of one count of rape of a 12 year old girl, CP (committed between 18 August 1979 and 18 August 1980) and one count of indecent assault of the same child (between 18 August 1979 and 18 August 1981).

[2] He was sentenced to a term of imprisonment for six years on count 1, the maximum penalty being imprisonment for life, and to imprisonment for 18 months on count 2, the maximum penalty being imprisonment for 2 years. The sentencing judge ordered that 12 months of the sentence for count 2 be served cumulatively with the sentence for count 1, bringing the total term of imprisonment to seven years, and fixed a non-parole period of five years.

[3] The applicant seeks leave to appeal against the sentence imposed on the ground that it is manifestly excessive.

[4] The applicant was the step-father of the victim and her siblings. The victim was 12 or 13 years of age during the offending period; the applicant was 37 or 38. The offences with which the applicant was charged occurred in the context of an ongoing abusive relationship beginning when the victim was nine years old. The offences occurred when CP's mother was away. The victim gave evidence of a range of serious sexual offending including inappropriate touching, attempted fellatio, digital penetration and penile/vaginal penetration, all without the victim's consent.

[5] The facts in relation to count 1, as found by the sentencing judge are as follows:

> On one specific occasion, when her mother was in Orange in New South Wales, the offender came into her bedroom. He was wearing a towel and carried her from her bed into his bedroom and took off her clothes. He got onto the bed, got on top of her and penetrated her vagina with his penis. He had sex with her on that bed. She remembers it hurting, and crying and asking for it to stop. The offender put his hand over her mouth and told her to be quiet. It seemed to go on for a while. She does not remember specifically how long. She was 12 years old.

[6] The facts in relation to count 2, as found by the sentencing judge, are as follows:

> The offender came into the shower or into the bathroom area while she was showering. She did not hear him coming in. He pulled back the curtain. He had removed his shorts and his penis was semi-erect. He put his hand behind her neck and pushed her face down towards his penis.

> He wanted her to have oral sex with him. She remembers his penis touching her lips, but she was not going to open her mouth. She did not really know what was happening. There was a noise outside and he left the bathroom. She does not think his penis touched her lips for very long. She was 12 or 13 years old.

[7] The applicant contends that the sentence for count 1 is manifestly excessive; the sentence for count 2 is manifestly excessive; the overall sentence is manifestly excessive and the non-parole period is manifestly excessive.

[8] The principles applicable to appeals of this nature are well known.[1] 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.

The sentence for count 1

[9] The basis for each of the applicant's contentions is the submission by the applicant that when a court is sentencing an offender for historical offences, the court **must** apply the sentencing standards that were applied at the time of the offending,[2] and that, in recent times, courts have imposed harsher penalties for child sex offences than was the case when these offences were

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1 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].

2 The applicant cites *Green v R* (2006) 19 NTLR 1 at [44]; *GPR v R* [2007] NTCCA 12 at [25] – [30]; *Stuart v R* [2010] NTCCA 16 at [63]

committed. That submission overstates the position. In *Green v R*, Martin CJ (with whom Southwood J agreed) stated the relevant principles in the following terms:

> [45] As is not unusual in the criminal law, the considerations founded in public policy do not all point in the same direction. There is a tension between those considerations which requires resolution through the application of fundamental principles of "justice and equity" while retaining sufficient discretion in a sentencing court to resolve practical issues which necessarily arise when sentencing many years after the commission of an offence. Balancing the competing interests, and applying those fundamental principles, in my opinion, speaking generally, when changing sentencing standards have resulted in penalties increasing between the commission of the crime and the imposition of sentence, and in circumstances where the delay is not reasonably attributable to the conduct of the offender, a sentencing court should, as far as is reasonably practicable, apply the sentencing standards applicable at the time of the commission of the offence. As Mason CJ and McHugh J said, the offender has "an entitlement" to be sentenced "in conformity with the requirements of the law as it then stood".
>
> [46] The view I have expressed is subject to important qualifications. First, the general principle is not an "inflexible rule". If good grounds exist, it may be appropriate to apply current sentencing standards. Secondly, the general principle can be applied only if it is reasonably practicable to do so. If the available evidence fails to establish a change in sentencing standards between the commission of the offence and the time of sentencing, the court will be left with no alternative but to apply current standards.
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> [47] There is a third qualification. Statutory changes in sentencing regimes can complicate the application of the general principle as a matter of practicality and they might dictate that the general principle has been qualified or is inapplicable.

[10] It may be queried in this case, as in many historical child sex cases, whether it can fairly be said that the delay was "not reasonably attributable to the conduct of the offender". However, the discussion which follows is based on the assumption that in the applicant's case, it would be appropriate to apply

the sentencing standards which applied at the time the offences were committed.

[11] The applicant referred in written submissions to five sentences for the crime of rape imposed by the Supreme Court of the Northern Territory between 1979 and 1981[3] in which the sentences ranged from imprisonment for three years to imprisonment for 11 years and six months. (The intermediate sentences were four and a half years, five years, and seven and a half years.) All of the victims were adults. In oral submissions counsel for the applicant referred to a sixth case from 1982 in which an 18 year old man was sentenced to imprisonment for four years with a non-parole period of two years and five months for the rape of a 14 year old school girl.

[12] The applicant submitted that there was a pattern to the sentences.

(a) Where the sexual offending was aggravated by other offending (usually a break in or use of violence or a weapon) the head sentence was from four to eight years with the exception of one offender with several relevant priors who received 11 years and six months.

(b) A non-parole period was usually imposed.

(c) The non-parole period was usually less than 50% of the head sentence.

[13] The data does not establish the pattern contended by the applicant. First, it should be noted that five of the sentences relied on by the applicant

3 These were taken from the Judges' Sentencing Book Volume 1 1974-1982 pp 186-188.

(including the 1982 case introduced in oral submissions) followed guilty pleas. Assuming a 25% reduction for the plea, the starting point for five year sentence would have been six years and eight months; the starting point for the sentence of seven years and six months would have been eight years and 10 months; the starting point for sentence of four and a half years would have been six years; and the starting point for the 1982 sentence of four years would have been five years and four months.[4] The Judges' Sentencing Book does not record whether the offender who received a sentence of 11 ½ years pleaded guilty or not guilty. (If the sentence followed a guilty plea with an allowance of 25% reduction for the plea, the starting point would have been a sentence of 13 ½ years.) In summary, the starting point for sentences for rape in the cases relied on by the applicant ranged from three years[5] to 13 ½ (or 11 ½) years.

[14] By contrast with the majority of the cases relied on, the applicant was found guilty following a trial by jury. He was not remorseful and was not entitled to any reduction in his sentence for willingness to facilitate the course of justice.

[15] Several other comments may be made in relation to the applicant's submission. The first is that it is erroneous to suppose that five cases could establish a pattern of sentences relevant to the time. That is simply an

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4 Assuming a 20% reduction, these figures would have been six years three months, eight years four months, five years eight months and five years.

5 The sentence of three years was imposed following a trial so it can be assumed there was no reduction.

insufficient number to give rise to a pattern, particularly when the circumstances of each of the cases cited are so different from each other and from the present case. Further, as this Court has observed on many occasions, there is no tariff applicable to such cases and they vary enormously in terms of the facts of the offence, the impact upon the victim and the circumstances of the offender. This is even more so for non-parole periods fixed at a time when there was no statutory minimum in place.

[16] Secondly, the date range chosen by the applicant is unduly narrow. The applicant refers to a case in which an offender was sentenced in 1983 to seven years imprisonment (with a non-parole period of three and a half years) for the rape of his 15 year old step-daughter as being "outside the 1979-81 time period".[6] The first thing to say about that is that, whilst this offending took place between 1979 and 1981, if the offending had come to light in a timely fashion, there is a reasonable chance that the applicant would have been sentenced in 1982 or 1983.

[17] The second is that there is no suggestion that sentencing standards were different between 1979 and 1983. It is in more recent times that courts have come to a better understanding of the devastating effects of sexual abuse on children and penalties have increased accordingly.

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6 This is the case of *R v Kelso* (Unreported, Supreme Court of the Northern Territory, Forster CJ, 26 May 1983) to which the sentencing judge was referred in sentencing submissions.

[18] The next three entries in the Judges' Sentencing Book after those relied upon by the applicant in written submissions are as follows.[7]

(a) On 26.03.82, a 21 year old man pleaded guilty to raping "a drunken Aboriginal girl" with two others. The Sentencing Book recited [rightly or wrongly] that the victim was not permanently damaged physically or mentally and that she "had considerable sexual experience". The offender was sentenced to five years and nine months (which would give a starting point of seven years and eight months assuming 25% reduction).[8] The judge fixed a non-parole period of one year and nine months (ie just over 30%).

(b) On 19.02.82, an 18 year old man pleaded guilty to raping a 14 year old schoolgirl. He was sentenced to four years in prison (a starting point of five years and four months assuming a 25% reduction)[9] with a non-parole period of two and a half years (ie just over 60%).[10]

(c) On 23.02.83, a 27 year old man pleaded guilty to entering the victim's home, threatening her with a knife and raping her. He was sentenced to eight years for the rape (a starting point of 10 years and eight months

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7 There are no more sentences listed in Volume 1 of the Judges' Sentencing Book after these three.

8 seven years two months assuming a 20% reduction

9 five years with a 20% reduction

10 This is the case referred to by counsel for the applicant in oral submissions.

assuming a 25% reduction)[11] with a four year non-parole period (ie 50%).

[19] Looking at the entries in the Judges' Sentencing Book before those chosen by the applicant, one sees a similar range of sentences.

(a) In 1974 there were five sentences of six years for the crime of rape, all of which were guilty pleas, meaning there was likely to have been a starting point of around eight years, and one sentence of three years, also following a guilty plea, meaning a likely starting point of around four years. Two of the six year sentences had non-parole periods of two years (ie just over 33%) and one had a non-parole period of two and a half years (ie just under 42%). The three year sentence had a non-parole period of 18 months (ie 50%).

(b) In 1975, there was one sentence of seven years and two months (a likely starting point of nine years and seven months) with a non-parole period of four years (ie just under 56%); one sentence of six years (a likely starting point of eight years) with a non-parole period of four years (ie just under 67%) and two sentences of one year.[12]

(c) In 1978[13] there was a sentence of five years (a likely starting point six years and eight months) with a non-parole period of three years

11 10 years with a 20% reduction

12 Both of the one year sentences were partly suspended.

13 There were no recorded rape cases in the Judges' Sentencing Book for 1976 or 1977.

(ie 60%), one of six years, one of four years and two of three years – all following trial and all with 50% non-parole periods.

(d) In 1979, there was a further sentence not included in the applicant's submissions, in which the offender was sentenced to eight years (a likely starting point of 10 years and eight months) with a non-parole period of four years (50%).

[20] The applicant submitted that the instant offence was significantly less serious than any of the cases he cited, chiefly because most of those involved the commission of other offences (such as unlawful entry into the victim's home or caravan) or the use of violence or a weapon. That contention must be rejected. The forced penetration of a 12 year old child by a person in a position of trust, accompanied by the additional violence of covering her mouth to prevent her from crying out is a very serious crime indeed. The breach of trust was gross: the applicant was the victim's step-father and had sole care of her at the time. Further, the offence was not an isolated incident: it did not involve a momentary lapse of judgement, but took place in the context of a protracted period of escalating sexual abuse. The victim was very young and the age discrepancy considerable. The offending has had a profound and long-lasting impact upon the victim and her family as appears from her victim impact statement which was partially reproduced by the learned sentencing judge.

[21] It must also be said that although sentences for lesser forms of sexual abuse of children have increased markedly, the same is not true to the same extent of sentences for the rape of children. That has always been viewed as a most serious and abhorrent crime and penalised accordingly.[14] Nevertheless, it may be accepted that sentences for the rape of a child have, in general, increased since the time these offences were committed, although the maximum penalty (life imprisonment) has, for obvious reasons, remained the same. In *The Queen v Tennyson*[15] the Court of Criminal Appeal said:

> A number of decisions of this Court have established that crimes of sexual intercourse with a child without consent, such as that committed by this respondent, are to be treated as extremely serious crimes.
>
> In *Rindjarra*,[16] the Court accepted that decisions of this Court in *Green v The Queen*,[17] *R v Inkamala*[18] and *R v Riley*[19] provide empirical standards of comparison for very serious examples of digital/vaginal sexual intercourse with a child without consent and provided a valid indication of the prevailing range of sentences for comparative conduct. To those decisions might be added *Melpi v The Queen*.[20] These cases demonstrate that, although there is no fixed range or tariff, this Court has set a standard for this kind of offending where the starting point at first instance is usually somewhere between 12 years and 16 years.

[22] In all of the circumstances, it cannot be said that the head sentence of six years for count 1 is manifestly excessive by the sentencing standards of the

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14 For example, in *R v Kelso* (referred to at [16] above) the court imposed a sentence of seven years imprisonment in 1983 for the rape of the offender's 15 year old step-daughter after a plea of guilty, a starting point of approximately nine years four months assuming a 25% discount.

15 [2013] NTCCA 02 at [27] – [28]

16 (2008) 191 A Crim R 171 at 182 [54]; 183 [59]; 189 [93]

17 (2006) 19 NTLR 1

18 [2006] NTCCA 11

19 (2006) 161 A Crim R 414

20 [2009] NTCCA 13 at [30]

time when the crime was committed and in fact may be considered comparatively lenient.[21] The issue of the non-parole period is dealt with below.

The sentence for count 2

[23] The applicant relied on *Stuart v R*[22] in which the Court of Criminal Appeal analysed sentences for indecent assault against a child in the period from 1979 to 1984. In *Stuart* the Court said:

> Allowing for a discount in the order of 25 per cent for a plea of guilty, we consider a median range for offending of this kind where there was no penetration and where the matter proceeded to trial, would have been in the order of 16 months.[23]

[24] That figure simply demonstrates that a head sentence of 18 months for count 2 is not manifestly excessive according to the sentencing standards of the time.

[25] The applicant characterised the conduct as "minimal and brief touching" and submitted that it was at the lower end of the scale for indecent assaults. That is inaccurate. The applicant came into the shower where the child was showering. She was naked. His penis was exposed and he tried to force her to have oral sex with him: he was only unsuccessful because she kept her mouth shut. His penis touched her mouth. He only desisted because of a

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21 It is at least strongly arguable that the offender in the instant case was deserving of a more severe sentence than that handed down in *Kelso*, given the younger age of the victim, the continuing nature of the abuse and the fact that Kelso was immediately remorseful, took full responsibility for the offence and pleaded guilty. The applicant displayed none of these features.

22 supra

23 *Stuart* at [64]

noise outside. It is a serious example of indecent assault upon a child – at least mid-range in seriousness.

The order that 12 months of the sentence for count 2 be served cumulatively with the sentence for count 1

[26] The only submission made by the applicant in relation to this aspect of how the sentence is said to be manifestly excessive is that "the cumulative period of 12 months imprisonment applied in the instant case was well more than the eight months actual imprisonment imposed in *Stuart*". That is irrelevant. *Stuart* is not authority for the proposition that every indecent assault upon a child committed in the early 1980s and sentenced today merits a sentence of 16 months imprisonment suspended after eight months. Each case depends upon its own facts. There was no error of principle in the sentencing judge's determination that 12 months of the 18 month sentence should be served cumulatively with the sentence for count 1.

The non-parole period

[27] The applicant argues that, historically, offenders sentenced for rape were given relatively short non-parole periods and that the sentencing judge should have imposed a lesser non-parole period in the applicant's case. The applicant went so far as to submit that a non-parole period of "significantly less than 50%" should have been imposed.

[28] The applicant contended in written submissions that during the period in question, in most cases of offenders sentenced for rape, the non-parole

period imposed was less than 50%. This is not borne out by the examples given by the applicant in written submissions.

[29] In the cases cited in the applicant's written submissions in which a non-parole period was imposed,[24] one received a head sentence of three years with a non-parole period of two years (c. 67%); one received a head sentence of five years with a non-parole period of two and a half years (50%); one received a head sentence of 11 ½ years with a non-parole period of four and a half years (c. 40%) and one received a head sentence of seven and a half years with a non-parole period of three years (40%). (That is to say, two received non-parole periods of 50% or more and two received non-parole periods of 40%.)

[30] In the next three cases appearing in the Judges' Sentencing Book (referred to at [18] above) one offender received a non-parole period of just over 30%, one received a non-parole period of just over 60% and one received a non-parole period of 50%. There was a further 1979 case not mentioned by the applicant in which the head sentence was eight years and the non-parole period was four years (50%). In summary, out of the eight cases listed in Volume 1 of the Judges' Sentencing book beginning in 1979, where non-parole periods were imposed, five received non-parole periods of 50% or more, and three received non-parole periods less than 50%.

24 In one case, the offender was sentenced to imprisonment for four and a half years and given a bond after serving six months.

[31] The sentencing judge sentenced the applicant to a total of seven years imprisonment with a non-parole period of five years. This is very close to the 70% minimum non-parole period mandated by s 55 of the *Sentencing Act* for certain drug offences and sexual offences (including rape);[25] and by s 55A for certain offences against children under 16 (including indecent dealing with a child under the age of 16,[26] and any assault on a child under the age of 16).[27]

[32] The first question is whether the sentencing judge was obliged to impose a non-parole period of not less than 70%. If not, the second question is whether the imposition of a non-parole period of 70% was manifestly excessive in all of the circumstances.

[33] The legislature expressed a clear intention in s 130(1) of the *Sentencing Act* that "this Act applies to a sentence imposed after the commencement of this section, irrespective of when the offence was committed." It follows that the minimum non-parole period in s 54 applies to the sentence handed down to the applicant.[28] The sentencing judge was thus obliged to impose a non-parole period of not less than 50% of the total sentence imposed and the applicant's contention that a non-parole period of "significantly less than 50%" should have been imposed is not sustainable.

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25 now s 192(3)

26 now s 132

27 now s 188

28 *TRH v The Queen* [2018] NTCCA 14

[34] Likewise, the minimum non-parole periods in ss 55 and 55A apply when a court is sentencing an offender for an offence to which those sections apply regardless of when the offence was committed.[29] However, in ss 55 and 55A, the offences to which the 70% minimum non-parole period applies are defined by reference to sections of the *Criminal Code*.

[35] The *Criminal Code* did not come into force until 1 January 1984. The applicant was charged with offences under the *Criminal Law Consolidation Act and Ordinance* (which was repealed by the *Criminal Code Act*). Count 1 was a charge of rape under s 60 of the *Criminal Law Consolidation Act and Ordinance*. Count 2 was a charge of indecent assault under s 66 of that Act.

[36] The conduct of the applicant which gave rise to a finding of guilty of count 1 would, if committed after the introduction of the *Criminal Code*, be an offence against s 192(3) of the *Code*.[30] The conduct which gave rise to the finding of guilty of count 2 would, if committed after that time, be an offence against s 188[31] (and also s 132)[32] of the *Code*. Section 55 of the *Sentencing Act* prescribes a minimum non-parole period of 70% of the sentence imposed for offences against s 192(3) and s 55A prescribes a minimum non-parole period of 70% for offences against ss 188 and 132 where the victim is a child under the age of 16.

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29 *Sentencing Act* s 130; *TRH v The Queen* at [20] to [30]

30 At common law "rape" is the carnal knowledge of a woman without her consent by force, fear or fraud. See Ross on Crime (8th Edition) 18.100 at p 1249 and the cases cited therein; also *Papadimitropoulos v The Queen* (1957) 98 CLR 249 at 261. Section 192(3) creates the offence of having sexual intercourse without consent.

31 Count 2 was a charge of indecent assault. Section 188(1) creates the offence of assault and s 188(2)(k) specifies as an aggravating factor that the assault was indecent.

32 Section 132 creates the offence (inter alia) of indecent dealing with a child under the age of 16.

[37] The first question for determination is whether the use of the section numbers of the *Code* in ss 55 and 55A indicate a legislative intention to apply the 70% minimum non-parole periods only to offences committed after the introduction of the *Criminal Code* (ie after 1 January 1984) or whether the words "irrespective of when the offence was committed" in s 130 indicate a legislative intent to apply the provisions of the *Sentencing Act,* including the minimum non-parole provisions in ss 55 and 55A, to offences described in the sections of the *Code* listed in ss 55 and 55A, irrespective of when the offences were committed, and whether those offences were contained in earlier legislation.

[38] We are of the view that the 70% minimum non-parole period mandated by ss 55 and 55A applies only to offences against those sections of the *Criminal Code* listed in ss 55 and 55A and not to offences of a similar or even identical kind under previous legislation.[33] The respondent did not contend otherwise. Section 55 provides that the court shall fix a non-parole period of not less than 70% "for a specified offence" and defines "specified offence" to mean offences against identified sections of the *Criminal Code* and the *Misuse of Drugs Act*. Section 55A does not use the term "specified

33 This may be contrasted with s 78C of the *Sentencing Act* in which, for the purpose of the mandatory sentencing provisions, "violent offence" is defined as:

(a) an offence against a provision of the Criminal Code listed in Schedule 2; or

(b) an offence substantially corresponding to an offence mentioned in paragraph (a) against:

(i) a law that has been repealed; or

(ii) a law of another jurisdiction (including a jurisdiction outside Australia).

offence" but nevertheless lists the offences to which it applies by reference to specified sections of the *Criminal Code*.

[39] The offences with which we are concerned are not offences against any of the nominated sections of the *Code*. They are offences against the provisions of earlier legislation. Therefore the sentencing judge was not obliged to fix a non-parole period of not less than 70% of the sentence imposed.

[40] The second question is whether the non-parole period of five years fixed by the sentencing judge is manifestly excessive, given that his Honour had a discretion to fix any non-parole period which was not less than 50% of the head sentence.

[41] The applicant argued that the following circumstances, particular to the applicant, point to the non-parole period of five years being excessive.

(a) The applicant is 78 years of age and has a range of health problems: diabetes, poor circulation, painful feet and legs and altered sensory perception; all of which will make prison significantly more difficult for the applicant than for a "normal prisoner".

(b) He has no prior convictions and a long history of gainful employment which persisted until he was 77 years old.

(c) A report by psychiatrist Dr Walton concluded that Dr Walton did not think there was any significant risk of re-offending.

[42] The learned sentencing judge took all of these matters into account. In sentencing the applicant, having earlier referred to the conclusions in Dr Walton's report, his Honour said:

> The age and relative frailty of the offender are factors that may result in the weight that is given to deterrence being moderated. Further, the fact that the offender will find imprisonment harder than other prisoners (and indeed he has found it difficult to date), because of his age and frailty is a factor which may be taken into account by way of mitigation. Each year of a custodial sentence for an aged person represents a substantial proportion of their remaining life expectancy. It is a relevant consideration that by virtue of their age, they may not emerge from prison alive. In this regard, it seems to me that having regard to all of the circumstances in this case, the sentences to be imposed on the offender must not be crushing.

[43] His Honour continued, immediately before passing sentence:

> On the other side of the scales, it is important to note that the offending is objectively very serious and the offender has high moral culpability. The offending occurred in the context of the offender maintaining an ongoing sexual relationship with the victim while he was in a position of great trust and care. The offending has taken away the victim's childhood and has caused her significant emotional trauma for the greater part of her life, while the offender, on the other hand, has been able to lead a full and productive life.

[44] His Honour then imposed the sentences in question, including the non-parole period. There is no mention in the sentencing remarks of any mandatory minimum non-parole periods, or any obligation to impose the non-parole period in fact imposed. The non-parole period imposed is the minimum time which the sentencing judge determined that justice required the applicant to spend in prison in all of the circumstances.

[45] The applicant has not demonstrated any error in the approach of the sentencing judge and in our view the non-parole period of five years was not manifestly excessive given the objective seriousness of the offending. The sentencing judge took into account all of the matters now relied upon by the applicant, when fixing the head sentence and the non-parole period.

Conclusion

[46] Leave to appeal should be granted and the appeal dismissed.

(a) the individual head sentences are not manifestly excessive and nor is the total head sentence;

(b) the mandatory 70% minimum non-parole periods only apply to offences under the nominated sections of the *Criminal Code* so that the minimum non-parole period which the sentencing judge was obliged to impose was 50%; and

(c) the non-parole period of five years is not manifestly excessive.

ORDERS:

1. Leave to appeal is granted.

2. The appeal is dismissed.
