CITATION:	*The Queen v Cumberland* [2019] NTCCA 13
PARTIES:	THE QUEEN v CUMBERLAND, Jesse
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the Supreme Court exercising Territory jurisdiction
FILE NO:	FSC 2 of 2018 (21719767)
DELIVERED:	19 June 2019
HEARING DATE:	12 March 2019
JUDGMENT OF:	Grant CJ, Kelly, Barr, Hiley JJ and Riley AJ

CATCHWORDS:

CRIMINAL LAW – JUDGMENT AND PUNISHMENT – MINIMUM NON-PAROLE PERIODS

By virtue of s 130(1) of the *Sentencing Act* the 70% minimum non-parole period in the amended s 55 of the *Sentencing Act* does apply when a court is sentencing an offender for an offence committed before the amendment came into effect provided the offence for which the offender is being sentenced is a "specified offence" within the definition of that term in s 55 – However, the references to sections of the *Misuse of Drugs Act* in s 55(b) of the *Sentencing Act* is a reference only to those sections in the *Misuse of Drugs Act* as amended by the *Justice Legislation Amendment (Drug Offences) Act* which amendments came into effect on 18 July 2016.

In circumstances where a court is imposing a total effective sentence for two or more offences, some of which are subject to the minimum non-parole period of 70% required by s 55 of the *Sentencing Act* and some of which are subject to the minimum non-parole period of 50% required by s 54 of the *Sentencing Act*, the requirement to fix a minimum non-parole period of not less than 70% of the sentence applies only to that part of the sentence which relates to a "specified offence" as defined in s 55 of the *Sentencing Act*.

Criminal Code 1983 (NT) s 14
Misuse of Drugs Act 1990 (NT) s 5, s 5A, s 5B, s 5C, s 6, s 6C, s 6D, s 6E, s 6G, s 7C, s 7D, s 8
Sentencing Act 1995 (NT) s 52, s 53, s 53A, s 54, s 55, s 55A, s 121, s 130

Beckwith v R (1976) 135 CLR 569, *CEV v The Queen* [2005] NTCCA 10, *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, *Emitja v The Queen* [2016] NTCCA 4, *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268, *Inkamala v The Queen* [2005] NTCCA 6, *JL v The Queen* [2019] NTCCA 7, *Owners of the Ship, Shin Kobe Maru v Empire shipping Co Inc* (1994) 181 CLR 404, *R v Lavender* (2005) 222 CLR 67, *R v Sully* [2012] SASCFC 9, *R v Watkins* [2013] SASCFC 150, *Siganto v The Queen* (1997) 141 FLR 73, *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285, *The Queen v Hopkins* [2008] NTSC 15, *TRH v The Queen* [2018] NTCCA 14, *Weinstock v Beck* (2013) ALR 1, *Whitehurst v The Queen* [2011] NTCCA 11, referred to.

REPRESENTATION:

Counsel:

Appellant:	M Nathan SC with SA Robson
Respondent:	M Thomas

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	On direct brief

Judgment category classification:	A
Number of pages:	25

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

The Queen v Cumberland [2019] NTCCA 13
No. FSC 2 of 2018 (21719767)

BETWEEN:

THE QUEEN
Appellant

AND:

JESSE CUMBERLAND
Respondent

CORAM: GRANT CJ, KELLY, BARR, HILEY JJ AND RILEY AJ

REASONS FOR JUDGMENT

(Delivered 19 June 2019)

THE COURT:

[1] The respondent pleaded guilty to six offences under the *Misuse of Drugs Act 1990* (NT) and was sentenced in the Supreme Court to imprisonment for four years and six months to be suspended after two years. The Court of Criminal Appeal has allowed a Crown appeal on the ground that the sentence imposed by the Supreme Court was manifestly inadequate. The new sentence will require the fixing of a non-parole period.

[2] Section 55 of the *Sentencing Act 1995* (NT) provides relevantly:

> **Minimum non-parole period for certain sexual offences and drug offences**

(1) If a court sentences an offender to be imprisoned for a specified offence for 12 months or longer, that is not suspended in whole or in part, the court must, under section 53(1), fix a period of not less than 70% of the period of imprisonment that the offender is to serve under the sentence.

…

(3) In this section:

Specified offence means:

...

(b) an offence against section 5(1), 5B(1), 5C(1), 6(1), 6C(1), 6D(1), 6E(1), 6G(1), 7(1), 7C(1) or 7D(1) of the *Misuse of Drugs Act*;

[3] Count 1 in this case is a charge of supplying a dangerous drug to a child contrary to s 5(1) of the *Misuse of Drugs Act* between 16 April 2015 and 1 January 2016. Count 2 is a charge of supplying a commercial quantity of cannabis contrary to s 5(1) of that Act between 17 July 2016 and 25 April 2017. Count 4 is a charge of supplying a commercial quantity of MDMA, contrary to s 5(1) of the Act between 21 August 2016 and 25 April 2017. Counts 3, 5 and 6 are all charges of intentionally receiving property (money) obtained directly or indirectly from the commission of an offence against the relevant provisions of the Act, contrary to s 8 of the Act.

[4] The offending in count 1 occurred before the amendments to s 55 of the *Sentencing Act* applied the 70% minimum non-parole period to specified drug offences. The amendments were introduced by the *Justice Legislation Amendment (Drug Offences) Act 2016* (NT), which also made substantial amendments to the *Misuse of Drugs Act* and came into effect on 18 July 2016. Before the amendments, the minimum non-parole period applying to

offences under the *Misuse of Drugs Act* was 50% as specified in s 54 of the *Sentencing Act*. The offending on counts 2 to 6 occurred after the amendments came into effect.[1]

[5] In resentencing the respondent, the Court will need to decide whether the 70% minimum non-parole period in the amended s 55 applies when a court is sentencing an offender for offences committed before the amendment came into effect ("the first question for determination").

[6] The Court will also need to decide whether the minimum non-parole period of 70% must be applied:

(a) across all 6 counts; or

(b) only to that part of the sentence that relates to offences specified in s 55(3) ("the second question for determination").

The first question for determination

[7] The section of the *Misuse of Drugs Act* relevant to counts 2 and 4 [s 5(1)] is listed within the definition of "specified offence" in s 55(3) of the *Sentencing Act*. The section relevant to counts 3, 5 and 6 [s 8] is not listed within that definition.

[8] The situation with count 1 is more complicated. Count 1 was an offence against s 5(1) of the *Misuse of Drugs Act* as it was configured before the

1 The date of commencement of the offending specified in counts 2, 3, 4 and 5 is in fact one day before the amendments came into effect, but the wording of the charges on the indictment make it clear that the charges were laid under the *Misuse of Drugs Act* as amended.

18 July 2016 amendments. Section 5(1) of the *Misuse of Drugs Act* is listed in s 55 of the *Sentencing Act*. However, the question is whether the s 5(1) so listed is a reference only to s 5(1) of the amended *Misuse of Drugs Act*, or whether it includes s 5(1) of the Act prior to the amendments.

[9] Similar issues arose in *TRH v The Queen*[2] and *JL v The Queen*[3].

[10] The Court of Criminal Appeal in *TRH* held that both the 50% minimum non-parole period in s 54 and the 70% minimum non-parole period in s 55A for certain offences against children do apply to offences committed before the introduction of those minimum non-parole periods. The basis for that decision was s 130(1) of the *Sentencing Act*,[4] which commenced on the same date as the *Sentencing Act* as a whole (1 July 1996) and provides:

> This Act applies to a sentence imposed after the commencement of this section, irrespective of when the offence was committed.

[11] In *JL v The Queen*[5] the Court of Criminal Appeal considered the question of whether s 55A of the *Sentencing Act*, which provides for a minimum 70% non-parole period for certain offences against children, applies to offences committed under repealed legislation before the introduction of the *Criminal Code Act 1983* (NT) and found that it did not. The reasoning was as follows [references and citations omitted, emphasis added]:

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2 *TRH v The Queen* [2018] NTCCA 14.

3 *JL v The Queen* [2019] NTCCA 7.

4 In reaching that conclusion, the Court determined that neither s 121 of the *Sentencing Act* nor s 14 of the *Criminal Code 1983* (NT) operated such that the 70% minimum non-parole period had no application.

5 *JL v The Queen* [2019] NTCCA 7 at [32] to [39].

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.

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. …

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. 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*.

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 Ordinanc*e (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.

…

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.

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

[12] This reasoning is directly applicable. The "specified offences" to which s 55 of the *Sentencing Act* applies are defined by reference to specific sections of the *Misuse of Drugs Act*. That definition was introduced into the *Sentencing Act* on 18 July 2016 by the *Justice Legislation Amendment (Drug Offences) Act*, the relevant part of which amended the *Misuse of Drugs Act* by introducing those sections that are defined and listed in s 55 as "specified offences": ss 5(1), 5B(1), 5C(1), 6(1), 6C(1), 6D(1), 6E(1), 6G(1), 7C(1) and 7D(1). Those offences proscribe the following conduct:

(a) Section 5(1) creates the offence of intentionally supplying a commercial quantity of a dangerous drug.

(b) Sections 5B(1) and 5C(1) create the offences of intentionally supplying a dangerous drug to a child (a commercial quantity in s 5B and less than a commercial quantity in s 5C).

(c) Section 6(1) creates the offence of intentionally cultivating a commercial quantity of a dangerous drug.

(d) Sections 6C(1) and 6D(1) create the offences of intentionally cultivating a dangerous drug in the presence of a child (a commercial quantity in s 6C and less than a commercial quantity in s 6D).

(e) Section 6E(1) creates the offence of intentionally manufacturing a commercial quantity of a dangerous drug.

(f) Section 6G(1) creates the offences of intentionally manufacturing a dangerous drug in the presence of a child.

(g) Section 7(1) creates the offence of intentionally possessing a commercial quantity of a dangerous drug.

(h) Sections 7C(1) and 7D(1) create the offences of intentionally possessing a dangerous drug in a public place (a trafficable quantity in s 7C and less than a trafficable quantity in s 7D).

[13] Before the 18 July 2016 amendments, all of the conduct proscribed in these sections was likewise proscribed, but in different sections of the *Misuse of Drugs Act*. For example, under the earlier provisions of the *Misuse of Drugs Act*, s 5(1) created the offence of unlawfully supplying any dangerous drug. Differential maximum penalties were set out in s 5(2) for various categories of supply.

[14] The respondent in this case was charged on count 1 with unlawful supply of a dangerous drug under the old s 5(1). As the supply was to a child, the drug was a drug specified in Schedule 2 and the amount supplied was less than a commercial quantity, the maximum penalty was that set out in s 5(2)(a)(iii) and this was specified on the indictment. If that conduct occurred after 18 July 2016, it would be the subject of a charge under s 5C(1).

[15] The appellant contended that the minimum non-parole period in s 55 of the *Sentencing Act* applies to count 1 either on the basis that the reference to s 5(1) in s 55 includes a reference to that section whether before or after the 18 July 2016 amendments or, alternatively, that the definition of "specified

offence" in s 55 includes an offence against s 5C(1) of the *Misuse of Drugs Act* which proscribes the same conduct as that which the respondent was convicted of on count 1. We reject both of those contentions.

[16] In our view, by introducing the amendments to s 55 of the *Sentencing Act* at the same time and in the same legislation as the amendments to the *Misuse of Drugs Act*, and by defining the "specified offences" to which s 55 applies by reference to the numbered sections of the amended *Misuse of Drugs Act* (most of which numbered sections did not previously exist), the legislature intended the provisions of s 55 to apply only to offences under the Act as amended.

[17] In *TRH*, the Court of Criminal Appeal considered the situation where a person had been convicted of a historical offence committed before the introduction of s 55A of the *Sentencing Act* under a section of the *Criminal Code* listed in s 55A, (namely s 132) which had since been substantially amended. The Court held that, provided it could accurately be said that the appellant was sentenced to be imprisoned for an offence against s 132 of the *Criminal Code*, then the 70% minimum non-parole period specified in s 55A did apply to at least that portion of the sentence imposed for the offences against s 132.[6] The Court held further that the appellant in that case had been sentenced to a term of imprisonment for an offence against s 132 within the meaning of s 55A.

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6 *TRH v The Queen* [2018] NTCCA 14 at [22] to [31].

[18] That is not the case here. The amended s 5(1) (supply of a commercial quantity of a dangerous drug) creates a different offence from the old s 5(1) (supply of a dangerous drug *simpliciter*).[7] The offence for which the respondent was convicted and sentenced on count 1 was supplying a dangerous drug in circumstances where the amount was less than a commercial quantity, the dangerous drug was one specified in Schedule 2, the offender was an adult and the person to whom it was supplied was a child. He was not on that count convicted and sentenced for an offence against s 5(1) of the *Misuse of Drugs Act* of supplying a commercial quantity of a dangerous drug within the meaning of s 55A of the *Sentencing Act*.

[19] As to the second proposition – that s 55 of the *Sentencing Act* applies to count 1 because the conduct constituting the offence is the same as that proscribed by s 5C(1) – we adopt what was said in *JL v The Queen* (set out above).

> 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.

[20] Accordingly, the answer to the first question for determination must be given in two parts:

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7 Some of the conduct that was covered by the old s 5(1) has been deliberately excluded from s 55 – for example s 5A(1), supply of less than a commercial quantity of a dangerous drug.

(a) By virtue of s 130(1) of the *Sentencing Act*, in principle, the 70% minimum non-parole period in the amended s 55 does apply when a court is sentencing an offender for an offence committed before the amendment came into effect provided the offence for which the offender is being sentenced is a "specified offence" within the definition of that term in s 55.

(b) However, the references to sections of the *Misuse of Drugs Act* in paragraph (b) of the definition of "specified offences" in s 55 of the *Sentencing Act* is a reference only to those sections in the *Misuse of Drugs Act* as amended by the *Justice Legislation Amendment (Drug Offences) Act* which amendments came into effect on 18 July 2016.

The second question for determination

[21] The second question for determination is whether the minimum non-parole period of 70% must be applied across all six counts, or only to that part of the sentence relating to offences specified in s 55(3) of the *Sentencing Act*.

[22] Counsel for the respondent contends that the correct approach to calculating the required minimum non-parole period in such cases is to take 70% of the sentence imposed for any offences listed in s 55(3) and add 50% of the balance, in accordance with s 54 of the *Sentencing Act*.

[23] Counsel for the appellant, on the other hand, contends that the Court was bound to fix a non-parole period of at least 70% of the whole sentence

imposed where any part of that sentence relates to an offence listed in s 55(3). The Crown's reasoning is as follows.

(a) Sub-section 53(1) of the *Sentencing Act* requires a court sentencing an offender to a term of imprisonment for 12 months or more that is not suspended (or partly suspended) to fix a period during which the offender is not eligible to be released on parole, unless the court considers that it would be inappropriate to fix a non-parole period at all. Sub-section 53(1) is expressed to be subject to "this section" (ie s 53) and ss 53A, 54, 55 and 55A.

(b) Subsection 53(2) provides:

> Where a court sentences an offender to be imprisoned in respect of more than one offence, a period fixed under subsection (1) is in respect of the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed.

(c) That is to say, when looking at the following sections, (ss 53A, 54, 55 and 55A) the thing that they operate on is the non-parole period fixed under s 53(1) in respect of the single "aggregate period of imprisonment" – which is to say, the total effective term of imprisonment "under all the sentences then imposed".

(d) For "standard" offences (those not subject to the special provisions in ss 53A, 55 and 55A), s 54(1) provides:

> Subject to this section, where a court sentences an offender to be imprisoned for 12 months or longer that is not suspended in whole or in part, the court must fix a period under section 53(1) of not

less than 50% of the period of imprisonment that the offender is to serve under the sentence.

(e) That is to say, read in conjunction with s 53(2), s 54 requires the court to fix a non-parole period of not less than 50% of the total effective sentence imposed for all offences "under all the sentences then imposed".

(e) Section 55(1) provides if a court sentences an offender to a term of imprisonment for [an offence specified in s 55(3)], for 12 months or longer (and the sentence has not been suspended or partly suspended), "the court must, under section 53(1), fix a period of not less than 70% of the period of imprisonment that the offender is to serve under the sentence."

(f) That is to say, read in conjunction with s 53(2), where it applies, s 55(1) requires the court to fix a non-parole period under s 53(1) of not less than 70% "of the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed".

(g) Sections 54 and 55 are not inconsistent. A non-parole period of "not less than 70%" of a sentence is also "not less than 50%" of that sentence.

(h) In this case, the precondition for the application of s 55(1) will be met: the Court must sentence the respondent to a term of imprisonment for

two offences[8] specified in s 55(3) – the sentence will be for more than 12 months, and it will not be wholly or partly suspended.

[24] On that construction, the combined effect of s 53(2), 54 and 55 is that, where (as in the case of the respondent) the Court is sentencing an offender for more than one offence, at least one of which is an offence listed in s 55(3), then to comply with all three provisions, the sentencing court must fix a single non-parole period[9] of not less than 70% of the total effective sentence then being imposed.[10]

[25] The respondent contends that s 53(2) does not have this effect. Its purpose is to provide that there should be only one non-parole period fixed for the total sentence imposed – not one for each separate offence. It says nothing about how to calculate the minimum non-parole period which must be imposed. Sections 55(1) and 54 can both be given effect by fixing a single non-parole period that is 70% of the sentence for any offences listed in s 55(3) and 50% of the balance of the sentence.

[26] The appellant counters that the mathematical approach contended for by the respondent would be to take the focus of the court away from fixing a non-parole period for the aggregate total effective sentence, as required by s 53(2), and to apply instead an erroneous approach of looking at non-parole

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8 Accepting that the offence in Count 1 does not attract the 70% minimum non-parole period, as we have found in answering the first question for determination, Counts 2 and 4 are both offences contrary to s 5(1) of the *Misuse of Drugs Act* within the meaning of s 55(3) of the *Sentencing Act*.

9 In order to comply with s 53(2).

10 In order to comply simultaneously with both s 54 and s 55A.

periods for individual sentences and then adding them up, contrary to the requirements of that sub-section.

[27] The construction propounded by the appellant has the merit of simplicity and certainty. However, there are two decisions of this Court which have applied the approach contended for by the respondent.

[28] In *Inkamala v The Queen*[11] the appellant had been sentenced to a term of 11 years imprisonment for a number of counts of rape and one count of deprivation of liberty. The sentencing judge stated that under the *Sentencing Act* the minimum non-parole period that could be set was 70% of the period of 11 years, and fixed the non-parole period accordingly. On appeal Martin (BR) CJ, with whom Thomas and Riley JJ agreed, said:

> Section 55(1) of the *Sentencing Act* provides that where a court sentences an offender to be imprisoned for an offence against s 192(3) of the Criminal Code that is not suspended in whole or in part, the court shall fix a non-parole period of not less than 70% of the period of imprisonment that the offender is to serve under the sentence. The sentences to which s 55(1) apply were those imposed in respect of the crimes of rape in counts 2-5. Section 55(1) did not apply to the sentence imposed for deprivation of liberty contrary to s 196(1) of the Code.
>
> In respect of the sentence for deprivation of liberty, pursuant to s 54 of the Code, the minimum non-parole period was 50% of the sentence imposed.
>
> In these circumstances, the fixing of the non-parole period has been attended by an error of principle. This requires this Court to consider the question of the non-parole period afresh in the exercise of this Court's discretion. In my view, the appropriate non-parole period would be a period of seven years.

11 *Inkamala v The Queen* [2005] NTCCA 6.

[29] No reasons were given for this approach to minimum non-parole periods and we understand that the contention now made by the appellant was not made to the Court in *Inkamala* and there was no real discussion of how the minimum non-parole period provisions should be construed.

[30] In *CEV v The Queen*[12] the Court of Criminal Appeal (consisting of Mildren, Riley and Southwood JJ), in resentencing the appellant following a successful appeal against his sentence, said:

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

[31] Again no reasons were given, the argument now raised by the appellant was not before the court, and the approach adopted was assumed to be the correct approach. That approach is consistent with the following reasoning:

(a) s 53(1) of the *Sentencing Act* is the provision which empowers the sentencing court to fix a non-parole period;

(b) s 54, and ss 53A, 55 and 55A where applicable, impose limitations on the exercise of that power by mandating minimum non-parole periods for any sentences referred to in those sections; and

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12 *CEV v The Queen* [2005] NTCCA 10.

(c) s 53(2) imposes a further limitation, namely that the court can only impose a single non-parole period that covers "all the sentences then imposed".[13]

[32] The alternative argument in relation to the correct construction of the minimum non-parole provisions of the *Sentencing Act* was first raised before the Court of Criminal Appeal in *TRH*. It was not necessary to determine the question in *TRH* and, given the decisions in *Inkamala* and *CEV*, the Court in *TRH* considered it would be preferable to defer consideration of this issue until it could be referred for decision by a bench of five Judges. It has become necessary to determine the question in this case and the Court of Criminal Appeal as originally constituted has referred the issue as a question of law for determination by the present bench of five Judges.

[33] This particular issue has not been determined by any other Australian superior court. Sentencing legislation is not uniform throughout Australia, and different approaches have been adopted by the various legislatures in relation to the fixing of minimum non-parole periods and the application of those periods in a single sentencing exercise involving offences attracting different minima. While the relevant provisions of the *Sentencing Act* must be construed by reference to their particular terms, two general propositions may be stated.

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13 Section 57 of the *Sentencing Act* operates the same way in circumstances where an offender is later sentenced for other offending as a result of which the non-parole period needs to be adjusted.

[34] First, if the legislature wishes to require the application of the higher minimum non-parole period to the whole of a total effective sentence for two or more offences which attract different minimum non-parole periods, it is a simple matter to provide for that result in unambiguously clear and express terms.[14] Secondly, the application of the higher minimum non-parole period to a total effective sentence for two or more offences which attract different minimum non-parole periods has the potential in some cases to deliver an unjust result, or at least to work against the interests of justice.[15]

[35] In this case, the first question to be answered is that posed by s 55(1): is the court sentencing the offender to be imprisoned for a specified offence for 12 months or longer, that is not suspended in whole or in part? Counts 2 and 4 are "specified offences" within the definition in s 55(3) of the *Sentencing Act*. If the objective seriousness of those offences warrants a term of imprisonment greater than 12 months that is not suspended in whole or in part, "the court must, under s 53(1), fix a non-parole period of not less

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14 The Victorian legislation, which most closely resembles the Northern Territory *Sentencing Act* in its general operation, imposes minimum non-parole periods in respect of "standard sentence offences". Where a sentencing court is fixing a non-parole period for a total effective sentence imposed for two or more offences, at least one of which is a "standard sentence offence", the legislation provides expressly that the court must fix a non-parole period of at least the specified minimum proportion across the total effective sentence: see *Sentencing Act 1991* (Vic), s 11A(4), (5). The appellant's contention that the Victorian authorities express the basic requirement that a single non-parole period should be fixed referable to the total effective sentence must be considered in this statutory context. In any event, the issue here is not whether a single non-parole period must be fixed. That is an express requirement of the *Sentencing Act* and not a matter in dispute. The issue for determination is how that period is properly calculated.

15 This has been recognised in the Victorian legislation. As described in the preceding footnote, where a court is sentencing an offender for more than one offence each of which, on its own, would attract a different minimum non-parole period, the higher specified non-parole period applies across the total effective sentence. However, the legislation provides a broad and overriding discretion not to apply the higher specified non-parole period across the total effective sentence if the sentencing court "considers that it is in the interests of justice not to do so".

than 70% of the period of imprisonment that the offender is to serve under the sentence".

[36] The next question concerns the operation of s 53(2) of the *Sentencing Act* in circumstances where a court is sentencing an offender in respect of a total effective sentence imposed for two or more offences which attract different minimum non-parole periods.

[37] The first step in the interpretative process is to consider whether on a plain and natural reading of the language of the statute there is only one available construction having regard to the express terms used or the necessary intendment. If there are two competing interpretations reasonably available, or if there is an ambiguity, the next step is to resolve that contest by the application of the common law principles and subsidiary guidelines of statutory interpretation, and by reference to extrinsic materials where permissible.

[38] On one argument, the natural construction of ss 55(1) and 53(2), when read together, is that "[i]f a court sentences an offender to be imprisoned for a specified offence ... the court must, under section 53(1), fix a period of not less than 70% of the period of imprisonment that the offender is to serve under the sentence", which must be "in respect of the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed".

[39] On the other hand, it is arguable that on a plain and literal reading of the formulation in s 55(1) requiring the court to "fix a period of not less than 70% of the period of imprisonment that the offender is to serve under the sentence", that is necessarily a reference to the sentence imposed for the "specified offence" rather than to any other offence.[16] The argument follows that where different sentences are being fixed for different offences as part of the one sentencing exercise, s 55(1) is speaking to the sentence for the "specified offence", whereas s 53(2) is speaking to the total effective sentence in respect of more than one offence. All that is compelled is the fixing of a single non-parole period across the sentence.

[40] As the competing submissions disclose, there are the two interpretations reasonably available; or, to put it another way, the statutory language gives rise to some ambiguity. The Second Reading Speech referred to by the appellant does not assist in resolving the interpretation issue. The original Bill relevantly introduced a 70% minimum non-parole period for those found guilty of rape under s 192(3) of the *Criminal Code*. That minimum was subsequently extended to the drug offences specified in the section. There is nothing in the Speech which states that the legislature intended that minimum to apply not only to specified offences but also to any other offence for which the offender is sentenced at the same time. Nor is that something required by what the appellant refers to as "the truth in

16 In particular, the words "under the sentence" at the end of s 55(1) must refer back to the sentence referred to earlier in the same subsection (ie the sentence for a specified offence in s 55(1)), and not to "the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed" referred to in s 53(2).

sentencing imperatives". Nor does a single non-parole period calculated by reference to the different minimum non-parole periods prescribed for each offence necessarily lack transparency.

[41] Moreover, if it is true, as the appellant asserts, that the legislature would "doubtlessly … have contemplated the commonly occurring situation of a mix of offences and sentences comprising the total effective sentence", it could have provided expressly for the application of the 70% minimum across all sentences, but failed to do so. Noting that does not amount to "reading down" the provisions requiring the application of a 70% minimum for specified offences or the provision requiring the fixing of a single non-parole period.

[42] Although the extrinsic materials do not assist, the principles of statutory interpretation do offer some guidance in the resolution of the issue. The first relevant principle relates to the penal character of the *Sentencing Act*. It is a general principle in the interpretation of penal provisions, although now perhaps one of last resort, that "if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject".[17] To put it another way, where there is any real ambiguity persisting after the application of the ordinary rules of construction, it is to be resolved in favour of the most lenient construction. While that principle has its most usual and obvious application in relation to the interpretation of

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17 *Beckwith v R* (1976) 135 CLR 569 at 576; *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 105; *R v Lavender* (2005) 222 CLR 67 at [87]-[95] per Kirby J.

provisions creating criminal offences, it applies more generally to penal and fiscal provisions.

[43] In *Siganto v The Queen* and *TRH v The Queen*,[18] this Court observed, with particular reference to minimum non-parole periods, that the abolition or reduction of a possible benefit having the effect of reducing the term of imprisonment imposed by way of a penalty does not amount to an increase in penalty for the offence concerned. While that characterisation was applied to resolve questions concerning the application of s 14 of the *Criminal Code* and s 121 of the *Sentencing Act*, it does not follow that a requirement for the imposition of a non-parole period of not less than 70% of the sentence is not more punitive than a requirement for the imposition of a non-parole period of not less than 50% of that sentence. The imposition of a non-parole period clearly has a penal element. As Southwood J described the matter in *The Queen v Hopkins*:[19]

> A purpose but not the only purpose in fixing a non-parole period is to assist the prisoner's rehabilitation through conditional freedom. The non-parole period also has a punitive aspect: *R v Chan* (1994) 76 A Crim R 252 at 255. Subject to s 53A, s 54, s 55 and s 55A of the Act, the non-parole period is a minimum period of imprisonment to be served by a prisoner because the sentencing judge considers that, in all of the circumstances of the case, the crime committed calls for such punishment: *Power* (1974) 131 CLR 623 at 627 629; *Deakin* (supra) at 89. The punitive aspect of fixing a non-parole period is sometimes referred to as the penal element: *R v EO* (2004) 8 VR 154 at 169. This element must appropriately reflect the importance of such principles as

18 *Siganto v The Queen* (1997) 141 FLR 73 at 80 and *TRH v The Queen* [2018] NTCCA 14 at [28]. Cf *R v Mason & Saunders* (1998) 2 Qd R 186 at 189 (per Davies & Pincus JJA, de Jersey J concurring); affirmed in *R v Truong* (2000) 1 Qd R 663 at 669 and in *R v Pham* (2009) 197 A Crim R 246.

19 *The Queen v Hopkins* [2008] NTSC 15 at [11].

retribution, protection of the community and specific and general deterrence: *R v EO* (supra) at 169.

[44] There is no doubt that the construction contended for by the appellant has the potential to lead to more punitive dispositions. That would be the case for any sentence where there is a degree of cumulation between sentences imposed for offences attracting different minimum non-parole periods. That effect will be amplified where the sentence involves a more serious offence attracting the 50% minimum and a less serious offence attracting the 70% minimum, even where the sentences are ordered to be served concurrently.

[45] The appellant concedes there will be cases within that category in which the result may arguably be regarded as "unfair". In seeking to meet that argument, the appellant submits that it assumes "quite impossibly" that the more serious offence would always deserve a non-parole period of less than 70%. As this Court observed in *Emitja v The Queen*, in determining the length of a non-parole period a sentencing judge takes into account the same considerations which inform fixing the head sentence, including antecedents, criminality, punishment and deterrence, although different weightings are applied to those considerations for the purpose of determining whether a non-parole period should be fixed and, if so, of what duration.[20] The purpose of rehabilitation also informs that determination.[21] Although the minimum non-parole period of 50% of the sentence is not a

20 *Emitja v The Queen* [2016] NTCCA 4 at [57].

21 *Whitehurst v The Queen* [2011] NTCCA 11.

default setting, there will frequently be circumstances in which the minimum period will be fixed, even for serious offending.

[46] Having regard to that principle of statutory interpretation, and given the lack of any express stipulation by the legislature and the doubt attending the operation of s 53(2) of the *Sentencing Act*, an interpretation which would potentially lead to a more punitive disposition should not be preferred. Section 53(1) is expressed to be "subject to ss 53A, 54, 55 and 55A". This can be given effect by calculating a non-parole period in accordance with s 55 for sentences referable to the "specified offence(s)", and then adding any further non-parole periods for the balance of the total effective period of imprisonment in accordance with the direction in s 53(2). The language of the statute accommodates such a construction. That construction should be adopted where the alternative has the potential to give rise to injustice.

[47] That result also receives some faint support by analogy from the presumption of statutory interpretation that the grant of power to a court is subject to express limitations only, and that provisions granting powers to a court should not be read subject to implications or limitations which are not found in the express words.[22] While it is no doubt express in the language of the statute that any non-parole period fixed for a sentence imposed in respect of a "specified offence" must be not less than 70% of the sentence,

22 See, for example, *Owners of the Ship, Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *Weinstock v Beck* [2013] HCA 14; ALR 1 at [55]; *The Commonwealth v SCI Operations Pty Ltd* [1998] HCA 20; 192 CLR 285 at [26]; *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284.

the words do not expressly require that minimum proportion to be imposed across any additional part of the total effective period of imprisonment attributable to other categories of offence. Similarly, while it is no doubt express in s 53(2) of the *Sentencing Act* that a single non-parole period must be fixed where a court sentences an offender to be imprisoned in respect of more than one offence, the words do not expressly require that the period be not less than 70% of the sentence in circumstances such as those under consideration in the present case. Those requirements may only be derived by implication.

[48] The construction we have preferred is subject to one qualification. Where a court has fixed an aggregate sentence of imprisonment under s 52 of the *Sentencing Act*, the operation of s 53(2) would require the court to give application to the minimum non-parole period prescribed for the specified offence or offences. That is because to do otherwise would require the construction of a fiction that the head sentence has been fixed other than as a single penalty across multiple offences including a specified offence or offences. That is so even in the absence of words providing expressly for that result.[23] However, in circumstances where the imposition of an aggregate term of imprisonment across multiple offences attracting different

23 The *Sentencing Act 2017* (SA) provides that a court may sentence a person to a single penalty for a number of offences. Where the sentencing court adopts that approach, if a mandatory minimum non-parole period is prescribed in respect of any of those offences, any non-parole period to be fixed must be not less than the mandatory period prescribed "in respect of the relevant offence"; and if there is more than one such offence the period must be not less than the greater of those mandatory periods: see *Sentencing Act 2017* (SA), s 47(6). That is only the case in relation to the imposition of a single aggregate penalty across multiple offences: see, in relation to the predecessor legislation, *R v Sully* [2012] SASCFC 9 at [115] per Vanstone J (Anderson J concurring); *R v Watkins* [2013] SASCFC 150 at [29]-[31] per Stanley J (Kourakis CJ and Vanstone J agreeing).

minimum non-parole periods would lead to an unjust result, or would otherwise be inappropriate, a sentencing court would not be compelled to proceed in that fashion. It would be open to impose separate sentences in respect of each offence with appropriate provision for concurrency and cumulation as part of a total effective period of imprisonment.

[49] We would answer the second question for determination as follows. In circumstances where a court is imposing a total effective sentence for two or more offences, some of which are subject to the minimum non-parole period of 70% required by s 55 of the *Sentencing Act* and some of which are subject to the minimum non-parole period of 50% required by s 54 of the *Sentencing Act*, the requirement to fix a minimum non-parole period of not less than 70% of the sentence applies only to that part of the sentence which relates to a "specified offence" as defined in s 55 of the *Sentencing Act*. While the sentencing court may fix something greater than the minimum period required in respect of each offence, that is a matter for the exercise of the court's discretion.

[50] While that answer is consistent in principle with the decisions in *Inkamala* and *CEV*, it should not be seen as endorsing the manner in which the minimum non-parole periods were calculated in those cases. The minimum non-parole period of 70% must govern all of that part of the sentence which is referable to the specified offence or offences.

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