

R v Rostron [2013] NTSC 03

PARTIES: THE QUEEN

v

ROSTRON, Dennis

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 30 of 1989 (8905227)

DELIVERED: 30 JANUARY 2013

HEARING DATES: 15 JANUARY 2013

JUDGMENT OF: KELLY J

CATCHWORDS:

Sentencing – murder – life imprisonment – *Sentencing (Crime of Murder) and Parole Reform Act* (“the Act”) – defendant shot and killed five members of his family including his two infant children – sentenced in 1988 to life imprisonment – under s 18 of the Act life sentence taken to include 25 year non-parole period – application by the Director of Public Prosecutions pursuant to s 19(4) of the Act to fix a non-parole period longer than 25 years – matters that would have been relevant to fixing a non-parole period at the date of sentencing considered – a longer non-parole period is warranted as a result of objective and subjective factors affecting the relative seriousness of the offence – discretion in s 19(4) to fix a longer non-parole period enlivened – discretion unfettered and normal sentencing principles apply – consideration of all relevant sentencing principles including factors arising during period of imprisonment – offences mitigated by provocation in relation to the adult victims – whether on balance of probabilities defendant suffering from depressive illness at the time of the offending – some remorse shown – largely accepts

responsibility for crimes – steps taken towards rehabilitation – defendant suffers from ill health - non-parole period of 28 years fixed

*Sentencing (Crime of Murder) and Parole Reform Act 2003 s 18, s 19
Criminal Code s 159*

R v Crabbe (2004) 150 A Crim R 523; *Leach v R* (2005) 159 A Crim R 183; (2005) 16 NTLR 117; *R v Olbrich* (1999) 199 CLR 270; *Woods v R* [2012] NTCCA 8; followed

R v Coulston [1997] 2 VR 446; *R v Glen Denzel Collett* (Sentence (SCC 21014612) 15 November 2011); *R v Leach* (2004) 14 NTLR 44; *R v Pfitzner* [2009] NSWSC 1267; considered

REPRESENTATION:

Counsel:

Applicant:	J Karczewski QC
Respondent:	S Cox QC

Solicitors:

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

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

R v Rostron [2013] NTSC 03
No. 30 of 1989 (8905227)

BETWEEN:

THE QUEEN
Applicant

AND:

DENNIS ROSTRON
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 30 January 2013)

- [1] On Sunday 25 September 1988 Dennis Rostron shot and killed five people, his wife Cecily, his father-in-law Dick Murrumurru, Dick's wife Dolly, and his own two infant children, Preston and Zarack aged two and one. He was tried and convicted of five counts of murder and has spent the last 24 years in prison.
- [2] When Mr Rostron was sentenced to life imprisonment in 1988, the law as it then stood did not allow the possibility for a person sentenced to life imprisonment for murder to be released on parole, but in 2003 the law was changed. By virtue of s 18 of the *Sentencing (Crime of Murder) and Parole Reform Act 2003* ("the Act") Mr Rostron's sentence is taken to include a

non-parole period of 25 years: this is because he is serving a sentence for two or more convictions for murder; the non-parole period would otherwise have been taken to be 20 years. Section 19(4) of the Act provides that this Court may fix a non-parole period that is longer than a non-parole period referred to in s 18 if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted. The Director of Public Prosecutions (“the DPP”) has made application for such an order to be made in Mr Rostron’s case.

- [3] What happened just over 24 years ago has never been in dispute. Dennis Rostron is a traditional Aboriginal man, raised in the bush. In September 1988 Mr Rostron, his wife Cecily and their two small sons, Preston and Zarack were living with Cecily’s father, Dick Murrumurru and Dick’s wife Dolly at Dick Murrumurru’s Outstation at Molgawo some distance from Maningrida. Cecily and the children went to Jabiru for about 8 days: they returned on Friday 23 September. While Cecily and the children were away, there was trouble between Dennis and Mr Murrumurru. Mr Murrumurru accused his wife, Dolly, (who was about Dennis’s age – much younger than Mr Murrumurru) of speaking to Dennis, which was not permissible due to the avoidance relationship between mother-in-law and son-in-law. Mr Murrumurru also threatened Dennis.
- [4] When Cecily and the children returned from Jabiru late on Friday 23 September, Dennis and Cecily had an argument. Dennis was upset because

Cecily had not brought back some batteries he had asked her to bring from Jabiru: as a result of that argument Cecily was crying.

- [5] Mr Murrumurru told Dennis off and told him not to touch the food which had been prepared for the evening meal. This meant that Dennis did not eat anything on Friday evening. The following morning Dennis asked Cecily to cook food for him but Mr Murrumurru told her not to touch it. Dennis told Cecily to forget about the arguments but she said, “You can say that, but I won’t forget”.
- [6] That morning, Dennis told Cecily that he wanted to take the two children to visit his family at Kolorbidahdah outstation, but Cecily refused to allow the children to visit and, for the first time, told Dennis that the children were not in fact his children.
- [7] Following this argument, on Saturday morning Dennis went by himself to hunt and shot two emus for the group. He came back to the camp and got a tractor to collect the emus. The emus were cooked but it appeared that no one ate them that evening; they were eaten the following morning. Dennis did not eat at all on Saturday evening: he had a headache. He had been having headaches, sometimes quite severe and debilitating headaches, since he had fallen out of a tree when he was about 12 or 13 years of age and a stick protruded into his skull.
- [8] On Sunday morning Cecily was still not talking to Dennis. He asked her to bring the children to him and she refused. He asked her to cook pancakes

for him for breakfast but she went and sat with her father who told her not to touch the food and not to cook for Dennis. Dennis went and sat in the shade apart from the others. He heard Cecily, Dolly and Mr Murrumurru talking: Dolly was telling Cecily to leave Dennis and that Cecily and the two children should come with Dolly and Mr Murrumurru; Cecily agreed. Dennis told his sons to come to him but Mr Murrumurru told the children not to go to him and said that they were not his sons. He asked Cecily to bring the children to him and she told him, "They are not your kids". Dolly also said this and the three of them told Dennis to go away, that they didn't want Rembarngan¹ people to stay with them and for him to go to Kolorbidahdah.

- [9] Then Dennis went and got two guns, a 12 gauge shotgun and a .308 rifle, came back to where his family was sitting or lying together on a mattress, and shot and killed them all. He fired multiple shots with the shotgun which required particular and deliberate care in firing to operate successfully because of a fault in the firing pin. He shot young Zarak twice from two different directions, and the same with Mr Murrumurru. Dolly, he shot once with the shotgun, and once with the .308. There were a number of other people at the outstation. They ran away when they heard the shots and saw Dennis shooting his family. Dennis pointed the gun at the fleeing people and fired at them but did not hit anyone else; then he shot the outstation radio, and walked away into the bush.

¹ This is the name of Mr Roston's mother's clan.

- [10] Dennis walked many kilometres through the bush to Kolorbidahdah outstation where his mother gave him “a little bit” of food; then he went off again into the bush. In a sad sequel to these terrible events, defence counsel related from the bar table (without objection) that after Dennis left, his mother walked away from the outstation into the bush and has not been seen since. Eventually Dennis walked into Maningrida, about 60 km from Kolorbidahdah, and gave himself up to police. He told police in detail what he had done and went with them back to Molgawo outstation where took part in a re-enactment of the shootings which was video-taped by police.
- [11] When he told police what he had done, Dennis described feeling very angry as he shot his family. At his trial, Dennis said that before the shootings, he was worried about the marriage; he was crying sometimes, feeling sad and thinking about killing himself; that when he shot them he was feeling both sad and very angry; that he was crying, his teeth were “falling down” and he was shaking.
- [12] Dennis Rostron has never denied shooting all five members of his family. He pleaded not guilty to murder on the basis of diminished responsibility, which would have reduced his crimes from murder to manslaughter. In relation to the killing of the three adults, but not the children, he also relied on the defence of provocation which would likewise have reduced those crimes from murder to manslaughter.

[13] A number of psychiatrists gave evidence at the trial on the issue of diminished responsibility. Dr Ridley had been treating Mr Rostron for depression while he was on remand awaiting trial. She gave evidence that he was suffering from a depressive illness and expressed the opinion that at the time of the shootings it was more probable than not that he had been suffering from an abnormality of mind (depression) which substantially impaired his capacity to understand what he was doing at the time when he shot the five victims. This evidence, if accepted, would have afforded Mr Rostron the partial defence of diminished responsibility pursuant to s 159 of the *Criminal Code*. Dr Ridley had not viewed the electronic record of interview or read the transcript of that interview before expressing this opinion.

[14] Dr Barclay, on the other hand, while agreeing that Mr Rostron was suffering from depression at the time he interviewed him (after the killings), said that in his view, Mr Rostron was suffering from reactive depression.² He was unable to say whether Mr Rostron had been suffering from depression at the time of the killings but he didn't believe that, if he was, it had substantially impaired his responsibility for his actions. In Dr Barclay's opinion, if Mr Rostron had been significantly depressed at the time he committed the killings, his condition would most likely have deteriorated further after committing the killings and spending ten days in the bush with very little food, yet there is no indication of Mr Rostron being depressed at the time of

² presumably a reaction to having killed his family, being placed in prison on remand, and facing trial for five counts of murder

the interview with police: during that interview, Mr Rostron spoke of his anger and gave significant reasons for his actions.

[15] The jury found Mr Rostron guilty of murder on all five counts.

[16] The DPP submits that I should be satisfied that a longer non-parole period than 25 years is warranted because of the relative seriousness of the offences, and that I should exercise the discretion conferred on the Court by s 19 of the Act to increase the non-parole period. The DPP does not submit that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met if Mr Rostron is imprisoned for the term of his natural life without the possibility of release on parole;³ simply that a non-parole period of more than 25 years is warranted.

[17] There was no dispute about the principles to be applied. Section 18 of the Act provides that a sentence for murder in the present circumstances is taken to include a non-parole period of 25 years. Section 19(4) provides:

- (4) The Supreme Court may fix a non-parole period that is longer than a non-parole period referred to in section 18 or subsection (3)⁴ if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

³ in accordance with s 19(5) of the Act

⁴ Subsection (3) provides that, subject to subsections (4) and (5), the Court must fix a 25 year non-parole period if certain aggravating features exist, including that the victim was under 18 years of age. This would have applied to Mr Rostron if it were not for the fact that his sentence is already taken to include a non-parole period of 25 years because of the number of victims.

[18] The Court must be satisfied that, because of objective and/or subjective factors affecting the seriousness of the offending, a longer non-parole period is warranted, before the discretion in s 19(4) is enlivened.⁵ There is no requirement of satisfaction to a particular degree such as beyond reasonable doubt: either the Court is satisfied or it is not.⁶

[19] In assessing the relative seriousness of the offence, the Court is to take into account objective and subjective factors existing at the time of the offence, including those which would have affected a decision to fix a non-parole at the date the original sentence had been passed, had such a sentencing option been available at the time. These include factors such as immediate remorse, co-operation with authorities, and previous good character, as well as factors which affect the moral culpability of the offender such as provocation, and psychological factors not amounting to a defence which may have contributed to the offending behaviour.⁷ In making the initial assessment which enlivens the discretion to increase the non-parole period under s 19, the Court is not permitted to take into account matters which have arisen since the original sentence was passed, such as the offender's behaviour in prison.⁸

⁵ *R v Crabbe* (2004) 150 A Crim R 523 at p 544 para [104]

⁶ *Leach v R* (2005) 159 A Crim R 183; (2005) 16 NTLR 117 at p 121 paras [10] and [11]

⁷ *R v Crabbe* (2004) 150 A Crim R 523 at pp 543 - 544 para [101]

⁸ *ibid* at p 544 paras [102] & [103]

[20] Once the discretion has been enlivened, that discretion is unfettered: normal sentencing principles apply, and the court may take into account factors which have arisen since the commencement of imprisonment.⁹

[21] Ordinarily, the existence of a greater number of victims warrants a longer non-parole period. In *R v Crabbe Martin* (BR) CJ said:

“[The] scheme provides for an absolute minimum non-parole period of 25 years for two crimes of murder. In my view the community expectation and intention reflected in the scheme is that ordinarily an offender being sentenced in respect of five crimes of murder could not expect to receive the minimum non-parole period of 25 years. I do not exclude the possibility that compelling objective and/or subjective factors might justify the imposition of the minimum period of 25 years.”¹⁰

[22] This principle was explained by the Victorian Court of Appeal in the following terms which were endorsed by Martin (BR) CJ in *R v Leach*¹¹:

“As regards what may for brevity be called multiple murders, generally speaking at all events, the fact that the offender has committed not one but two or more murders is an important matter in considering whether to decline to fix a non-parole period. Judges who sentence murderers must not fail to have a proper regard to what used to be called the sanctity of human life The criminal who kills not one but two, three or four human beings can be given no longer sentence than the killer of a single victim. Two, three or four life sentences, served, as they must be, concurrently, are of the same duration as a single one. Differentiation is possible only as regards the non-parole period – by increasing that period or by refusing to fix one at all. Of course, everything depends on the circumstances. The perpetration of multiple killings may in a given case not even

⁹ *ibid* at pp 544 – 546 paras [106] to [112]

¹⁰ *ibid* p 551 para [146]

¹¹ (2004) 14 NTLR 44 at pp 77-78 para [224]

warrant the imposition of a life sentence, let alone the further momentous step of denial of the possibility of parole. We wish only to make it plain that, while everything depends on the circumstances of the particular case, those who kill a number of victims in horrendous circumstances, where no substantial factor pointing towards clemency is present, must in general expect to be seriously considered for the possible imposition of life sentences unmitigated by the hope of parole.”¹²

[23] The murder of children is generally considered to be objectively more serious than the murder of adults. The legislative scheme reflects this in requiring a minimum 25 year non-parole period for the murder of a person under the age of 18.¹³ If the victim is an infant or very young child, that is generally regarded as more serious still.¹⁴

[24] It is an aggravating factor if the murder has been committed in breach of trust – as in the murder of a child by a parent.¹⁵

[25] Mr Karczewski QC for the DPP relies upon a number of aggravating factors on the basis of which he contends that the Court should be satisfied that a non-parole period greater than 25 years is warranted.

(a) There were five murder victims. In addition Mr Rostron fired at a number of other people who were fleeing the scene.

¹² *R v Coulston* [1997] 2 VR 446 at 463 per Winneke P, Brooking JA and Southwell AJA

¹³ Section 19(3)(c)

¹⁴ See, for example, *R v Pfitzner* [2009] NSWSC 1267 at para [88] in which Hulme J remarked: “It is axiomatic that a child of 2 is considerably more vulnerable than a child of 17.”

¹⁵ See, for example, *R v Pfitzner* (supra) at para [87].

- (b) Two of the victims were very small children. What is more, these victims were Mr Rostron's own children, who looked to him for care and protection: he abused their trust in the worst possible way by taking their lives.
- (c) The victims were all vulnerable, the two small children because of their youth and helplessness, and all of the victims because they were sitting or lying together on a mattress and unable to escape or to defend themselves.
- (d) The crime was to some extent pre-meditated and determined. The DPP contends that the offences involved some planning and single-mindedness by Mr Rostron in effecting his purpose, and that this is evidenced by the fact that he went away and returned with two firearms; that he struck while the victims were vulnerable and unable to escape or defend themselves; that he fired multiple shots with two weapons; and that the shotgun, which he used first, had a faulty firing pin and needed to be handled with particular care to make it fire. To these matters might be added the statements made by Mr Rostron in his record of interview with police in which he says that when he shot at each of the victims he wanted them to die; that he was thinking on Saturday that he wanted them to die – and that he shot them on Sunday.

[26] Defence counsel, Ms Cox QC, contended that the offences were more spontaneous and less planned, but apart from that accepted that the above

matters were aggravating factors to be taken into account in determining whether the Court should be satisfied that a longer non-parole period was warranted. Moreover, she conceded that these factors in combination satisfied the test in s 19(4) for enlivening the discretion to fix a longer non-parole period. However, she submitted that when a range of subjective factors are taken into account, the Court should be of the opinion that a longer non-parole period ought not be fixed in the circumstances.

[27] In relation to the degree of planning involved, I do not agree that these killings were essentially spontaneous: I accept the submission of Mr Karczewski that these crimes were to some extent pre-meditated for the reasons set out above.

[28] It was submitted by defence counsel that although the jury must have rejected provocation as a defence, there was factual provocation which goes some way towards mitigating the offences at least against the three adults. Presumably the jury found either that Mr Rostron did not act as a result of losing control, or that the provocation offered by the three adults was not such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased. That does not mean the court cannot take into account the behaviour of the adult victims as a contributing factor in the offending – at least insofar as the crimes against those adults is concerned. Indeed this was conceded by the Crown at the trial, and during the present hearing. At the time Mr Rostron committed these killings, he was being isolated and

cruelly treated by the three adult victims: they were sending him away, and denying that he had any parental rights in relation to his two children. I accept that this behaviour on the part of the adult victims must be taken into account in relation to the sentences for the murder of the three adults. I do not consider that it in any way mitigates Mr Rostron's culpability for the murder of the two children.

[29] It was further submitted that, at the time of the killings, Mr Rostron had not eaten for two days during which time he had hunted two emus in the heat and humidity of the build-up and had been suffering from a headache for over a week. I accept that his physical condition may well have been a contributing factor to his offending.

[30] Counsel for the defence submitted that I ought to find that, at the time he committed these murders, Mr Rostron was suffering from a depressive illness that affected his judgment. As set out above, in finding Mr Rostron guilty of murder, the jury must be taken to have rejected the evidence of Dr Ridley to the effect that at the time of the shootings Mr Rostron had been suffering from an abnormality of mind which substantially impaired his capacity to understand what he was doing. However, that does not necessarily mean that the jury rejected the whole of Dr Ridley's evidence. The jury may have found that, although Mr Rostron was suffering from a depressive illness, it was not such as to substantially impair his capacity to understand what he was doing. It is therefore up to me to make a finding of fact on the available evidence as to whether Mr Rostron was suffering from

depression at the time and whether that contributed to his offending. This being put forward as a mitigating factor, the onus is on the defence to establish it on the balance of probabilities.¹⁶

[31] I am not satisfied on the balance of probabilities that Mr Rostron was suffering from a depressive illness at the time of committing these murders. Dr Ridley, who expressed the opinion that he was, had not seen the record of interview or read the transcript of that interview. The interview with police took place 10 days after the killings, after Mr Rostron had come in from the bush where he had had very little food for 10 days; as he said in the record of interview, he was starving. Dr Barclay opined that, if Mr Rostron had had a depressive illness at the time of the killings, one would expect it to have been worse at the time of the interview, yet there is no sign of depression in the record of interview, and no sign of lack of understanding of what he had done; rather he said he was angry at the time and gave coherent reasons for that feeling and for his actions.

[32] Defence counsel relied on a report of Dr Walton to support the submission that Mr Rostron's offences had been contributed to by a depressive illness; however I found that report to be of little assistance. After reviewing the rather scanty evidence – namely that at a time after he had been remanded in prison on charges of murder, Mr Rostron was diagnosed as having depression; that he has had “a depressed mood” from time to time over the years in prison (although never again of such major proportions); and the

¹⁶ *R v Olbrich* (1999) 199 CLR 270; *Woods v R* [2012] NTCCA 8

fact that his history of head injury and brain infection would place him at elevated risk of depression – Dr Walton says: “All this falls well short of a basis for an unequivocal opinion.” All he can say is that “it is indicative” that Dr Ridley’s opinion is to be preferred, but this view appears from his report to be largely based, not on any scientific criteria, but on his personal knowledge of the two (now deceased) psychiatrists.

[33] Dr Walton goes on to ask:

“If it is accepted that Mr Rostron may have been in a significant state of clinical depression at the time of the killing, how may that be seen as relevant?” (*emphasis added*)

In answering that purely hypothetical question, he says,

“[T]he killing of one’s spouse in a context of some animosity, even extending to one’s in-laws who may have been caught up in the same ill-feeling is not only not especially unusual as a crime, neither does it clearly suggest that mental illness may be relevant”.

Finally, in relation to the children he says,

“[T]he killing of one’s young children is another matter. In my opinion, serious depression is such a common factor in such killings that effectively it needs to be excluded as relevant.”

[34] That statement in relation to the children suffers from two difficulties.

First, it is hypothetical. It is based on the assumption that Mr Rostron was in fact suffering from significant clinical depression at the time, when Dr Walton conceded earlier in his report that there is insufficient basis to form

such an opinion. Secondly, for sentencing purposes, it misstates the onus of proof in relation to a matter put forward by the defence in mitigation.

[35] No doubt Mr Rostron was sad when he committed these murders. He had reason to be sad: his marriage was breaking down; he was being treated badly by his wife and in-laws and excluded from the family; and his parental right to his two children was being challenged. He was also, as he told the police, very angry. However, I am not satisfied on the balance of probabilities that he was suffering from a depressive illness at that time.

[36] Another subjective factor relied on is that Mr Rostron has expressed remorse and taken full responsibility for his crimes. To a large extent I accept that that is the case. Importantly, he has never denied killing the five people. He told police what he had done in the first interview and co-operated in doing a videoed re-enactment. He also gave evidence at the trial in which he described what he did and how he killed the victims. He did not plead guilty to murder, but that is because he relied on a number of partial defences which, if accepted, would have reduced the crimes to manslaughter.

[37] On the other hand, Mr Rostron did not display remorse during the initial interview with police. His description of the killings was quite matter of fact. However, he swore an affidavit for the purpose of the present proceeding in which he says that there is not a day goes past when he does not regret “what has happened” and no day that he does not feel sad at

losing his wife and children and parents in law. He says: “Over the years I have been in prison I have always thought how old my sons would be when I see families visiting other prisoners and I think I don’t have a wife and children because of me.” This demonstrates some remorse – although he focuses on his own feelings and not on the pain and terror he caused the victims or the grief that he caused other members of the family.

[38] Also, although Mr Rostron has never denied being physically responsible for killing his family, I am not sure he has really fully accepted moral responsibility. In his affidavit he says:

“I think it was because of all these things, the constant headaches, not eating, not sleeping well and constant arguments and then being told that they didn’t want me and to go away without my wife and children that made me commit these crimes.”

Also, in speaking of his regret in the same affidavit he says that he regrets “what has happened”, not “what I did”. In speaking to Dr Walton, Mr Rostron told him he believed he may have killed his family because he was “sung”. He also ascribed responsibility for the depression he suffered after he was imprisoned (which he says nearly killed him) to black magic, but says that has resolved now the person he considers responsible has died.

[39] In summary, I accept that Mr Rostron has largely, but not wholly, accepted responsibility for his crimes and feels considerable remorse – albeit largely springing from the effect of his crimes on himself.

[40] Defence counsel also submitted that I should consider Mr Rostron's prospects of rehabilitation as very good and his chances of re-offending as slight. In doing so, Ms Cox relied on the fact that Mr Rostron had been of previously good character before committing these murders, indicating that this violent offending was out of character, and also on the fact that Mr Rostron has been to all intents and purposes a model prisoner. He has taken steps to rehabilitate himself through education – learning to read and write and doing art courses. He has been described by a prison art lecturer as “a significant artist”: she says his work is outstanding and could sell nationally and internationally for amounts which mean he could easily support himself and make a mark in the art world. Ms Cox submitted that this gave Mr Rostron an incentive not to re-offend.

[41] Mr Rostron was found unsuitable for the offender family violence programme conducted by prison authorities, but has been placed on a waiting list for individual treatment.

[42] I am not prepared to make a finding that Mr Rostron is unlikely to re-offend. While I accept that he is a talented artist who is likely to be able to support himself with his art, and that he was previously of good character, his actions in killing his own small children were utterly inexplicable. No doubt anyone who knew Mr Rostron before these killings would have considered it unlikely that he would offend in this way once. Who can say whether circumstances may arise in which he would kill again. I also accept that he would have an incentive not to re-offend; but again, one would have

thought, before he committed these crimes, that he would have had an even stronger incentive not to offend in this way once – namely natural love and affection for his children.

[43] Having said that, the DPP is not applying for an order under s 19(5) that no non-parole order be fixed, simply that a period greater than 25 years be fixed, so assessment of Mr Rostron's prospects of rehabilitation will be a matter for the parole board at the appropriate time and no doubt if he is granted parole it will be on strict conditions as to access to weapons among other things.

[44] Finally, Ms Cox relied on evidence concerning Mr Rostron's state of health. Mr Rostron has a long history of heart and lung problems. He suffers from ischaemic heart disease (angina) and chronic obstructive airways disease (emphysema). He also has a history of rheumatic heart disease. He is susceptible to chest infections and was admitted to Royal Darwin Hospital with severe pneumonia in January 2011. Whilst there, he suffered a heart attack as a result of blockage of one of the major blood vessels leading into the heart.

[45] Despite being only 49 years old, Mr Rostron has the appearance (and state of health) of a much older man. Ms Cox tendered in evidence what can only be described as shocking statistics published by the Northern Territory Government on the life expectancy of Aboriginal and non-Aboriginal Territorians compared with that for Australians overall. For those born

between 1967 and 1979 (Mr Rostron was born in 1963 but the statistics in the tendered publication do not go back that far) the life expectancy of Aboriginal men is 52.5, for non-Aboriginal Territory men 64.7, and for Australian men overall, 67.6.

[46] In 2011, in sentencing an 80 year old man for engaging in conduct that gave rise to a danger of death (by shooting his son-in-law), I made the following remarks:

“I also need to take into account the fact that you are an elderly man with the usual health problems associated with old age and that a lengthy prison sentence may well be effectively a life sentence for you.”¹⁷

It is deeply shocking that similar considerations apply to Mr Rostron, an Aboriginal man who is only 49 years old.

[47] I am satisfied of the threshold conditions set by s 19(4), namely that because of the objective and subjective factors affecting the relative seriousness of the offence, a non-parole period longer than 25 years is warranted. I turn now to the question of whether, in light of all of the relevant circumstances, including circumstances that have arisen since the original sentence was passed, such a longer non-parole period should be imposed and, if so, what that longer period should be.

[48] In fixing a non-parole period I am bound to determine the minimum period that justice requires that Mr Rostron must serve, having regard to all of the

¹⁷ *R v Glen Denzel Collett* (Sentence (SCC 21014612) 15 November 2011)

circumstances of the offence, and taking into account all of the matters relevant to sentencing; those in existence at the time the original sentence was passed, and those that have arisen since. These factors, both positive and negative, are discussed in detail above. Taking all of those matters into account, if it had not been for Mr Rostron's ill-health and the concomitant risk that a very long non-parole period may well be an actual life sentence for him, I would have considered a non-parole period of at least 30 years to be warranted. However, in the circumstances, considering his ill health and taking into account that risk, I fix a non-parole period of 28 years.
