

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ

COLIN JOSEPH SIGANTO

APPELLANT

AND

THE QUEEN

RESPONDENT

Siganto v The Queen (D9-1998) [1998] HCA 74
3 December 1998

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Criminal Appeal of the Northern Territory and remit the matter to that Court for consideration of the issues raised by s 411(4) of the Criminal Code (NT).*

On appeal from the Supreme Court of the Northern Territory

Representation:

D Grace QC with S J Cox for the appellant (instructed by Northern Territory Legal Aid Commission)

R S L Wild QC with A M Fraser for the respondent (instructed by Director of Public Prosecutions (Northern Territory))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Siganto v The Queen

Criminal law – Sentencing – Factors to be taken into account – Whether distress occasioned by victim giving evidence an aggravating factor.

Criminal law – Sentencing – Whether sentence manifestly excessive – Parity principle.

Words and Phrases – "relevant circumstance".

Sentencing Act (NT), ss 5(1)(a), 5(2)(b), 5(2)(s), 54, 55(1), 58.

Criminal Code (NT), ss 192(3), 411(4).

Prisons (Correctional Services) Act (NT), s 92 (repealed).

1 GLEESON CJ, GUMMOW, HAYNE AND CALLINAN JJ. Following a trial in the Supreme Court of the Northern Territory the appellant was convicted of an offence against s 192(3) of the *Criminal Code* (NT) ("the Code"), the offence being that on 27 September 1994 at Darwin he had sexual intercourse with a woman without her consent.

2 The sentencing hearing took place before the trial judge, Angel J, on 27 August 1996. On 3 September 1996 the appellant was sentenced to imprisonment for nine years. Angel J fixed a non-parole period of six years and four months. An appeal against sentence to the Court of Criminal Appeal of the Supreme Court of the Northern Territory (Martin CJ, Kearney and Priestley JJ) was unsuccessful.

3 The appellant was granted special leave to appeal to this Court, but the grant was limited to the following grounds:

- (1) The Court of Criminal Appeal of the Supreme Court of the Northern Territory erred in law in failing to find that the learned sentencing judge had erred in characterising the appellant's plea of not guilty effectively as an aggravating factor.
- (2) The Court of Criminal Appeal of the Supreme Court of the Northern Territory erred in determining that the sentence was within range by reference to sentences imposed in recent years rather than by reference to the new statutory regime under the *Sentencing Act* (NT).

4 The objective circumstances of the offence were serious. The appellant, a twenty seven year old single man, was driving home on the evening of 27 September 1994 when he saw the victim, a young woman, waiting for a bus. He offered her a lift, and she got into his car. Against her wishes, he then drove to a secluded bush area, parked the car, dragged the victim from the car, punched her in the mouth, and subjected her to forcible sexual intercourse in circumstances of violence and degradation. He then drove off and left the victim, who walked to a nearby post office and telephoned the police. The major issue at the trial was identification.

5 It is convenient to deal first with the second ground of appeal. That ground emerged in the course of argument upon the application for special leave to appeal. In the Court of Criminal Appeal a number of other grounds had been argued, and an unsuccessful attempt was made to press them on the application for special leave. Those grounds raised legal issues arising out of the circumstance that there had been significant amendments to the sentencing regime applicable in the Northern Territory. Those amendments were brought about by the enactment of

the *Sentencing Act* (NT) ("the Act") which came into effect on 1 July 1996. They included the abolition of the system of remissions, and also provisions relating to the fixing of non-parole periods by sentencing judges.

- 6 In dealing with a ground of appeal which complained that the sentence imposed by Angel J was manifestly excessive, the Court of Criminal Appeal said that the basis of the submission was that Angel J had failed to make findings as to the appellant's prospects of rehabilitation, and to give proper weight to them. The Court of Criminal Appeal dealt with that argument and, in the course of doing so, made the following concluding remarks¹:

"General and personal deterrence undoubtedly play the most significant part in fixing an appropriate sentence for crimes of this type. After all, the maximum penalty is imprisonment for life. The parliament intends that the offence be seen at the top end of the scale of gravity of criminal conduct. The head sentence of nine years imprisonment is not excessive. It is within the range of sentences imposed in this Court in recent years for offences of rape where the accused is convicted after trial, and the assault is accompanied by violence and degradation beyond the minimum which might be expected. It is a sentence warranted by the objective facts measured against the maximum."

- 7 The present case involved one of the first sentences for an offence against s 192(3) of the Code passed after the amending legislation came into effect in July 1996. Having regard to the manner in which the sentencing proceedings were conducted before Angel J, and the way the appeal was presented to the Court of Criminal Appeal, there is no basis for criticising either the sentencing judge, or the Court of Criminal Appeal, for making reference to "the range of sentences imposed in this court in recent years, for offences of rape". The transcript of the sentencing proceedings before Angel J records that both the Crown Prosecutor and counsel for the appellant referred Angel J to the details of sentences which had been imposed in recent years. At an early stage of his submissions, counsel for the appellant said to Angel J:

"It would be helpful perhaps if I could hand up a schedule of cases which were prepared by the Legal Aid Commission. This purported to cover virtually all s 192's in the Darwin court between '91 and '94 and it would give your Honour a very clear idea, I think, of the total range of sentences."

1 *Siganto* (1997) 97 A Crim R 60 at 68.

3.

Counsel then took Angel J through the schedule. A similar exercise, in somewhat less detail, had previously been performed by the Crown Prosecutor. Thus, the sentencing proceedings were conducted on the common understanding that it was relevant for Angel J to look at sentences that had been imposed under the earlier sentencing legislation. Similarly, in the Court of Criminal Appeal, reference was made to what were said to be comparable sentences imposed before July 1996. That was the background against which the Court of Criminal Appeal made the remark quoted above.

8 There is no justification for a conclusion that either Angel J, or the Court of Criminal Appeal, was unaware of, or ignored, the differences between the sentencing regime which applied when the earlier sentences were imposed and the new regime under which Angel J was operating. Indeed, both at first instance and on appeal, there were references to the new legislation, and the Court of Criminal Appeal made the remark which forms the basis of the second ground of appeal after a lengthy review of the legislative changes, which were relevant to a number of arguments that had been advanced in that court on behalf of the appellant. Not only was it proper for Angel J and the Court of Criminal Appeal to take into consideration sentences prior to 1996; that is what they were invited to do by the parties.

9 An argument was advanced in the course of the appeal to this Court which, strictly speaking, does not fall within the terms of the second ground of appeal, but which we have considered. We were informed that the same argument had been advanced in the Court of Criminal Appeal, although it was not specifically addressed in that court's reasons for judgment. The argument concerned an aspect of the changes in the sentencing laws insofar as those changes affected the appellant. (It bears some similarity to an argument considered by the Court of Criminal Appeal of New South Wales in *R v Maclay*² with respect to the changes introduced by the *Sentencing Act* 1989 (NSW), and some of the reasoning in that case is relevant.)

10 The offence was committed in September 1994. The appellant was charged in October 1994. Committal proceedings were listed to commence on 3 April 1995 and again on 1 July 1995. On each occasion, the complainant failed to appear at court and the proceedings were adjourned. The committal proceedings ultimately commenced on 2 November 1995. In December 1995 an indictment was filed. On 1 July 1996 the Act came into effect. In August 1996 the appellant was tried, and convicted, and he was sentenced in September 1996.

2 (1990) 19 NSWLR 112.

- 11 That the new sentencing regime was intended to bear more harshly upon serious sexual offenders than the previous regime was made clear by the Attorney-General when the legislation was introduced into the Legislative Assembly. He said³:

"Members will be aware of the community concern that has been expressed in relation to the incidence of sexual assaults in the Territory. The government has already indicated that it would introduce legislation to ensure that those offenders convicted of serious crimes of violence against a person would be subject to longer prison sentences. In line with community concern, the government has decided, as one of the initiatives that it is taking in relation to sex offences, that serious sex offenders should spend longer in prison. In this spirit, the bill provides that those offenders found guilty of the offence of rape under section 192(3) of the *Criminal Code* will have to serve the statutorily fixed term of 70% of the sentence."

- 12 That legislative intention was put into effect in s 55(1) of the Act. In s 58(1), which was inapplicable to the present case, the Act provided that the abolition of remissions was to be taken into account when sentencing an offender to a term of imprisonment of less than 12 months.

- 13 The Court of Criminal Appeal held, on the true construction of the legislation, and upon the basis of common law principles as to the operation of statutes⁴, that those new provisions applied to the sentencing of the appellant. Special leave to appeal against that part of the decision of the Court of Criminal Appeal was refused. Parliament intended the new sentencing regime to apply to persons in the position of the appellant.

- 14 The appellant sought to circumvent this conclusion by relying on one of the sentencing guidelines set out in s 5 of the Act. At the end of sub-s (2), which sets out matters to which a court is obliged to have regard in sentencing an offender, it is provided that the court shall have regard to:

"(s) any other relevant circumstance."

- 15 Senior counsel for the appellant did not seek to argue that the mere fact that the offence was committed before the commencement of the Act was a relevant

3 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 May 1995 at 3388.

4 See *Rodway v The Queen* (1990) 169 CLR 515 at 521-523.

5.

circumstance. To do so would be to seek to construe par (s) as including, without expressing it, a transitional provision radically altering the operation of the Act. Indeed, it would be to repeat one of the arguments in respect of which special leave to appeal was refused. Nor did he seek to advance a general proposition to the effect that a court, sentencing a serious sex offender after the commencement of the Act, should take the abolition of remissions into account. Such an argument would be inconsistent with s 58(1), which addresses that subject, but applies only to sentences of less than 12 months.

16 The argument was that, in the particular circumstances of the present case, which included the fact that some of the delay in bringing the appellant to trial occurred as a result of the conduct of the complainant, and was not the fault of the appellant, fairness and "equal justice" required that the appellant should not be punished more severely than he would have been had he been sentenced before the commencement of the Act. Thus, on the individual facts of this particular case, the consideration that the appellant was being punished for an offence committed before the operation of the Act was a "relevant circumstance".

17 This argument should be rejected. The Act was intended to apply to offenders being sentenced for offences committed before the commencement of the Act. Giving effect to that intention produces the result that people who had previously offended but had not yet been sentenced would be treated differently from people who had previously offended and had been sentenced. This is not relevantly inequality before the law. It is a consequence of a change in the law. The circumstances which, in a given case, meant that an offender came under the new regime could vary greatly. The Legislative Assembly could have enacted transitional provisions to cover such cases, but it did not do so, and this failure to do so must (in the light of the transitional provisions that were made) be taken to be deliberate⁵.

18 It is hardly surprising that the Court of Criminal Appeal regarded this point as covered by its general reasoning on the temporal application of the Act.

19 The second ground of appeal must fail.

20 The first ground of appeal arises out of the following observations made by Angel J in the course of his remarks on sentence. His Honour said:

"You pleaded not guilty, having always denied the charge, and have shown no remorse whatsoever. The jury took but a short time to find you

5 See also *R v Maclay* (1990) 19 NSWLR 112.

6.

guilty, an inevitable finding on the evidence. The jury were satisfied that you lied on oath in denying the crime, and that you lied to police during the record of interview when you said you were home on the night in question, and that you pretended to confuse your movements during that week when confronted with a Woolworths docket showing that you were out on the road on the night in question rather than at home as you had told the police.

Your victim, a full-blood Aboriginal woman, was greatly distressed by your crime. Her distress was evident to police officers who attended the Winnellie Post Office, and other police officers who interviewed her sometime after the event. Your victim's distress was aggravated by having to give evidence against you, both at the committal and at trial."

- 21 It is argued on behalf of the appellant that the manner in which Angel J referred to the appellant's plea of not guilty indicates that his Honour treated this as an aggravating circumstance, and increased the punishment which would otherwise have been imposed by reason of the fact that the appellant defended himself against the charge. Without question, that would have constituted a serious error. In *R v Gray* the Victorian Court of Criminal Appeal said⁶:

"It is impermissible to increase what is a proper sentence for the offence committed, in order to mark the court's disapproval of the accused's having put the issues to proof or having presented a time-wasting or even scurrilous defence."

- 22 A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed. On the other hand, a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case. It is also sometimes relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence.

- 23 The Court of Criminal Appeal took the view that all Angel J was doing, in his reference to the plea of not guilty, was pointing out that the appellant was not entitled to the leniency which ordinarily flows from a plea of guilty. It is proper for a sentencing judge to observe, in a particular case, that circumstances which

6 [1977] VR 225 at 231; cf *R v Harper* [1968] 2 QB 108 at 110.

7.

might otherwise attract leniency are absent. A trial judge's reference to the absence from the case of a matter of mitigation does not mean that the judge is indicating the presence of a circumstance of aggravation. There is no reason to infer that Angel J made the error attributed to him in relation to the plea of not guilty.

- 24 However, the reference to the aggravation of the victim's distress by having to give evidence at the committal and at the trial raises a related, although narrower, issue which needs to be understood against the background of case law in the Northern Territory to which Angel J was referred in the course of sentencing proceedings. In *R v Melville*⁷, a case in some respects similar to the present, Gray AJ, with whom Martin CJ and Thomas J agreed, said, after referring to a passage in the remarks on sentence in that case:

"I read that passage as doing no more than identifying one of the aspects of the distress caused to the prosecutrix by the commission of the offence and the subsequent legal proceedings. His Honour merely pointed out that this particular aspect of distress was occasioned by the appellant's decision to plead not guilty. His Honour cannot be understood as treating the mere fact of the not guilty plea as an aggravating circumstance. *The aggravating circumstance was the distress occasioned by the prosecutrix giving evidence.* This was one of the consequences of the crime and the ensuing trial.

In R v Webb [1971] VR 147 at 151 the Court of Criminal Appeal said that a sentencing judge 'is equally entitled, in our view, to have regard to any detrimental, prejudicial, or deleterious effect that may have been produced on the victim by the commission of the crime'. See also *R v P* (1992) 64 A Crim R 381 at pp 384-5.

In my opinion, the learned trial judge was entitled to regard the distress suffered by the prosecutrix in giving evidence, part of which he had personally observed, as an important aggravating factor." (emphasis added)

- 25 That judgment was referred to by the Crown Prosecutor in the proceedings before Angel J. It was submitted on behalf of the appellant in the Court of Criminal Appeal that it was wrong in principle.

- 26 The Court of Criminal Appeal dealt with the argument as follows⁸:

7 Unreported, Court of Criminal Appeal of the Northern Territory, 27 March 1995.

8 *Siganto* (1997) 97 A Crim R 60 at 64.

"The Director appearing on behalf of the respondent submitted that his Honour, having seen the witness, was in the best position to give proper weight to the effect which the ordeal had on her. By this we take him to refer to the ordeal of relating the details of the attack, in evidence. He submitted the ordeal aggravated the distress occasioned by the physical conduct of the accused when committing the offence; since harm occasioned to a victim is a relevant sentencing factor, any aggravation of that harm must also be relevant and may lead to an increased penalty. Here, the applicant maintained that he was not the offender, he was elsewhere at the time. The victim was accordingly obliged to tell her story in open court. The circumstances of the offence are set out at the beginning of these reasons.

We do not think that it is necessary to consider the correctness of the decision of this Court in *Melville*. It might be reasonably inferred that his Honour looked at it, but it is not apparent that he increased the penalty because of the aggravation of the victim's distress caused by her having to give evidence at committal and trial. It is not possible to say that his Honour, by his bare statement of this and other facts, increased the sentence on account of any of them. They demonstrate at least as much the basis for his finding that the applicant had 'shown no remorse whatsoever', going to the issue of mitigation."

27 Bearing in mind the current state of the law in the Northern Territory, as expressed in *Melville*, and that the decision in *Melville* was relied upon in argument before Angel J by the Crown Prosecutor, and having regard also to the manner in which his Honour expressed himself, it is difficult to avoid the conclusion that he treated the distress of the victim at having to give evidence in the criminal proceedings as a matter of aggravation. His Honour was bound by the decision in *Melville*, it was relied upon by the Crown, he found as a fact that the victim's distress was aggravated by having to give evidence, and *Melville* held that this was an aggravating circumstance relevant for sentencing purposes.

28 Although both sides to the present appeal agreed that, subject to any decision which this Court may make, *Melville* currently represents the law in the Northern Territory, there was some uncertainty, both as to the principle for which it stands, and as to the legal foundation of that principle.

29 The passage from the judgment in *Melville* set out above indicates that the starting point of the reasoning involved is the undoubted proposition that a sentencing judge is entitled to have regard to the harm done to the victim by the commission of the crime. That is the rule at common law, and s 5(2)(b) of the Act provides that, in sentencing an offender, a court shall have regard to "the nature of

the offence and how serious the offence was, including any physical, psychological or emotional harm done to a victim."

- 30 Equally well established is the proposition enunciated in *Gray*, above. The same proposition is expressed in Thomas, *Principles of Sentencing*, as follows⁹:

"A plea of guilty may properly be treated as a mitigating factor, indicating remorse, and will justify a reduction in the sentence below the level appropriate to the facts of the offence; but the defendant who contests the case against him, while not entitled to that mitigation, may not be penalized for the manner in which his defence has been conducted by the imposition of a sentence above the ceiling fixed by the gravity of the offence."

- 31 In *R v Richmond*¹⁰, Cussen J explained why a sentencing judge is not entitled to treat, as a circumstance of aggravation, the fact that an offender's testimony has been disbelieved. One reason is that even an innocent person may be deterred from seeking to defend himself or herself if it were the case that rejection of the defence case by a jury may result in an increased sentence. Similar considerations apply to the argument presently under consideration. A sentencing judge is punishing an offender for the crime, not for the conduct of the defence case.

- 32 There are a number of aspects of the process of criminal investigation, and of the administration of criminal justice, that are likely to cause distress to many victims of crime. Being subjected to cross-examination by defence counsel is one of them; but there are others as well. The very denial of guilt by a person charged may be distressing to a victim, especially if, as not infrequently occurs, it is accompanied by a version of events which is offensive. Distinguishing between a plea of not guilty and the manner of conduct of the defence case is difficult, both in terms of principle and in a practical sense.

- 33 It was suggested in the course of argument that *Melville* might stand for a principle which applies only in a special and relatively unusual type of case: one where the actual form of harm done to a victim by the commission of the offence is made worse by some aspect of the conduct of the offender in defending the case. It was pointed out that *Melville* was a rather extreme case. For reasons that are presently irrelevant, the complainant was cross-examined on five separate occasions. She had suffered psychological harm as a result of the crime, and this was aggravated by the course later taken by the legal proceedings against the

9 2nd ed (1979) at 50.

10 [1920] VLR 9 at 12.

offender. Such a principle, however, would be difficult to confine. It would also be difficult to apply in practice. How would a sentencing judge set about distinguishing between an aggravation of pre-trial harm and fresh or different harm resulting from the conduct of the defence case?

34 The suggested principle in *Melville* should be rejected. The applicable principle is that stated in *Gray*. To some, it may appear a matter of semantics to distinguish between denying the existence of circumstances of mitigation and asserting the existence of circumstances of aggravation; and judicial statements intended as the former may sometimes be misunderstood as intending the latter. However, the distinction can be important.

35 In deciding that the distress occasioned to a complainant by having to give evidence is an aggravating circumstance for sentencing purposes, *Melville* was incorrect and should be overruled.

36 The Court of Criminal Appeal should have concluded that Angel J followed and applied *Melville*, and that, in the result, his Honour's discretion miscarried. It would then have become the obligation of the Court of Criminal Appeal to consider, pursuant to s 411(4) of the Code, whether some other sentence was warranted in law. If that question were answered in the affirmative, the Court of Criminal Appeal would quash the sentence of Angel J and re-sentence the appellant. If it were answered in the negative, it would dismiss the appeal.

37 In the light of some of the comments made by the Court of Criminal Appeal, it is far from clear that, if the Court had found that Angel J had followed *Melville* and thereby been compelled by authority to sentence on an erroneous basis, it would have concluded that some sentence other than that imposed by Angel J was warranted. That question did not arise for decision. The matter should be remitted to the Court of Criminal Appeal to enable that question to be addressed.

38 The appeal should be allowed. The orders of the Court of Criminal Appeal should be set aside. The matter should be remitted to the Court of Criminal Appeal for consideration of the issues raised by s 411(4) of the Code.

39 GAUDRON J. The facts and the history of these proceedings are set out in the joint judgment of Gleeson CJ, Gummow, Hayne and Callinan JJ. I agree with their Honours, for the reasons that they give, that the appeal should be allowed on ground 1 of the Notice of Appeal. However, I differ from their Honours with respect to ground 2 and would also allow the appeal on that ground.

40 To understand ground 2 of the Notice of Appeal, it is necessary to note that the appellant was sentenced in 1996 for a serious sexual offence committed in 1994 against s 192(3) of the *Criminal Code* (NT) ("the Code"). He was sentenced under the *Sentencing Act* (NT) ("the Act") which came into force on 1 July 1996. He was, apparently, the first person to be sentenced under that Act for an offence under s 192(3).

41 The Act effected a number of changes to Northern Territory sentencing law and practice, including with respect to the non-parole period to be set for an offence under s 192(3) of the Code. Section 55(1) of the Act specifies that, subject to an exception¹¹ which is not presently relevant:

"... where a court sentences an offender to be imprisoned for an offence against section 192(3) of the Criminal Code that is not suspended in whole or in part, the court shall fix a [non-parole] period under section 53(1) of not less than 70% of the period of imprisonment that the offender is to serve under the sentence."

42 Other changes with respect to sentencing law and practice took effect simultaneously with the Act's commencement in July 1996. In particular, s 92 of the *Prisons (Correctional Services) Act* (NT) was repealed with respect to persons sentenced on or after 1 July. In general terms, administrative directions made pursuant to s 92 of the *Prisons (Correctional Services) Act* (NT) had the effect that sentences imposed prior to 1 July 1996 were remitted by a third. Because of those remissions, the pre-1996 sentencing practice was for non-parole periods for all offences to be fixed at something less, perhaps substantially less, than two-thirds of the head sentence. Thus, it seems that prior to July 1996, it might be expected that, with remissions, a person sentenced to nine years, as the appellant was in this case, would serve a maximum period in the order of six years with a non-parole period somewhere in the order of four years.

43 Under the sentencing regime which came into effect in July 1996, however, the maximum period of imprisonment, in the case of a sentence of nine years, has become just that. And in the case of an offence under s 192(3) of the Code, a person sentenced to nine years is now required to serve a minimum period just

11 Section 55(1) does not apply if a court "considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of ... a [non-parole] period inappropriate." See ss 53(1) and 55(2).

short of six years and four months before becoming eligible for parole. Or to put the matter another way, a nine year sentence under the new regime approximates, in terms of the maximum period of incarceration, a sentence of 13½ years under the old regime.

- 44 It is in the context of the changes to sentencing law and practice effected in July 1996 that ground 2 of the Notice of Appeal asserts:

"The Court of Criminal Appeal of the Supreme Court of the Northern Territory erred in determining that the sentence was within range by reference to sentences imposed in recent years rather than by reference to the new statutory regime under the Sentencing Act (NT) 1995."

- 45 As I understand it, ground 2 does not assert that the Court of Criminal Appeal should not have had regard to sentences imposed prior to July 1996 but that, for the purpose of determining whether the appellant's sentence was excessive, the court should have done more than compare head sentences. Thus, it was argued that it was necessary to compare or, at least, engage in an exercise that took account of "actual incarceration" under the new regime as compared to the old. And that exercise, according to the argument, would result in a shorter head sentence than that imposed on the appellant.

- 46 It was also put in oral argument in this Court that, if it was not generally permissible to compare periods of actual incarceration under the different sentencing regimes, nonetheless, that approach should be adopted in the present case. It was put that it was a relevant circumstance for the purposes of s 5(2) of the Act (which specifies the matters to be taken into account on sentence) that, through no fault of his own, the appellant was sentenced under the new sentencing regime, rather than the one in force at the time he committed the offence.

- 47 Prosecuting counsel submitted to the sentencing judge, Angel J, that, in sentencing the appellant, it was not permissible to take account of the abolition of remissions or to balance for the greater non-parole period required by s 55 of the Act by reducing the head sentence. His Honour did not indicate in his remarks on sentence whether or not he adopted that course. However, the Court of Criminal Appeal seems to have proceeded on the basis that he did and, also, on the basis that that was the correct approach¹².

- 48 In ground 1(c) of his amended grounds of appeal in the Court of Criminal Appeal, the appellant asserted that his "sentence and non-parole period ... were manifestly excessive" because they would "result in the [appellant] serving a period of incarceration which is manifestly greater than that served by persons previously convicted of the same crime committed with comparable features and

12 *Siganto v The Queen* (1997) 97 A Crim R 60 at 64-66, 66-67, 68, 69.

circumstances."¹³ The Court of Criminal Appeal did not deal specifically with that ground of appeal. However, it dismissed the argument that the head sentence was excessive, holding that it was "within the range of sentences imposed ... in recent years for offences of rape where the accused is convicted after trial, and the assault is accompanied by violence and degradation beyond the minimum which might be expected" and that it was "warranted by the objective facts measured against the maximum [of life imprisonment]."¹⁴ It is to be inferred from these observations that the Court of Criminal Appeal took the view that the only relevant comparison was with head sentences imposed before the Act came into force, as prosecuting counsel had contended before Angel J.

49 The principle invoked by the appellant in ground 1(c) of his amended grounds of appeal to the Court of Criminal Appeal and in ground 2 of his Notice of Appeal to this Court is the principle of parity or consistency in sentencing. That principle most commonly falls for consideration in the case of co-offenders¹⁵. However, it is not restricted to cases of that kind. A contention that a sentence is manifestly excessive or manifestly inadequate is a contention of disparity or inconsistency measured over the range of sentences imposed on those convicted of a particular offence. And to say that a particular sentence is "within range" is simply to say that there is no disparity or inconsistency of that kind.

50 As Mason J pointed out in *Lowe v The Queen*, the notion of parity in sentencing is "a matter of abiding importance to the administration of justice and to the community."¹⁶ His Honour explained its importance in these terms:

"Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice."¹⁷

51 Once it is appreciated that the principle of parity in sentencing is concerned with consistency in punishment, it is apparent that all components of a sentence must be taken into account to determine whether the principle has been violated,

13 *Siganto v The Queen* (1997) 97 A Crim R 60 at 61.

14 *Siganto v The Queen* (1997) 97 A Crim R 60 at 68.

15 See, for example, *Lowe v The Queen* (1984) 154 CLR 606 and *Postiglione v The Queen* (1997) 189 CLR 295.

16 (1984) 154 CLR 606 at 611.

17 (1984) 154 CLR 606 at 610-611.

including the maximum and minimum periods of actual incarceration¹⁸. That is so whether the question is that of parity between co-offenders or parity across the range of those convicted of the offence in question.

52 A change in sentencing law necessarily has the consequence that there will be some disparity or inconsistency in punishment between those sentenced before the change comes into effect and those who are sentenced afterwards. But the principle of equal justice is of such fundamental importance that it is incumbent upon a sentencing judge to ensure that the sentence to be imposed will produce no greater disparity than is necessary to give effect to the legislated change. In the context of this appeal, that means that, unless an intention to the contrary is to be discerned from the Act, the sentencing judge should have crafted the appellant's sentence to take account of the longer maximum and minimum periods of incarceration resulting from the abolition of remissions and the altered regime for the setting of non-parole periods. To ascertain whether a contrary intention is to be discerned from the Act, it is necessary to turn, in some detail, to the provisions which bear on that question.

53 Section 5 of the Act, which is headed "Sentencing Guidelines" provides, in sub-s (1), that:

" The only purposes for which sentences may be imposed on an offender are –

- (a) to punish the offender to an extent or in a way that is just in all the circumstances;
- (b) to provide conditions in the court's order that will help the offender to be rehabilitated;
- (c) to discourage the offender or other persons from committing the same or a similar offence;
- (d) to make it clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved;
- (e) to protect the Territory community from the offender; or

18 See *Postiglione v The Queen* (1997) 189 CLR 295 at 302 per Dawson and Gaudron JJ, 338 per Kirby J. See also *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Gibbs CJ, 620 per Brennan J, 625 per Dawson J.

15.

- (f) a combination of 2 or more of the purposes referred to in this subsection."

Sub-section (2) of s 5 specifies various matters to which regard is to be had on sentence, including "any other relevant circumstance."¹⁹

54 Prima facie, at least, the requirement in s 5(1)(a) that punishment be "just in all the circumstances" directs the conclusion that disparity which might otherwise result from the abolition of remissions or the new regime for fixing non-parole periods is a matter properly to be taken into account under s 5(2)(s) as a "relevant circumstance". To ascertain whether s 5(1)(a) does have that effect, however, it is necessary to consider the specific provisions of the Act concerned with remissions and non-parole periods.

55 So far as concerns remissions, s 58(1) of the Act provides that, subject to s 78A²⁰, which is not presently relevant, "when sentencing an offender to a term of imprisonment²¹ of less than 12 months a court shall consider whether the sentence ... would result in the offender spending more time in custody, only because of the abolition of remission entitlements²² ... than he or she would have spent had he or she been sentenced before [their abolition] for a similar offence in similar circumstances." If the sentence would have that result, s 58(2) requires it to be reduced in accordance with sub-s (3) which directs the court to assume that the offender would have been entitled to maximum remissions and specifies that

19 Section 5(2)(s).

20 Section 78A prescribes minimum terms of imprisonment to be imposed compulsorily on conviction of a "property offence", an expression defined by s 3(1) and Sched 1 of the Act to mean an offence against ss 210 (except as specified), 211-215, 218, 229, 231 or 251 of the Code, or s 61 of the *Summary Offences Act* (NT).

21 Section 58(4) defines a "term of imprisonment" to include

"(a) a term that is suspended wholly or partly; and

(b) any non-parole period fixed in respect of the term."

22 Section 58(4) defines "remission entitlements" as meaning

"... a remission under section 92 of the *Prisons (Correctional Services) Amendment Act*, as in force before the commencement of section 6 of the *Prisons (Correctional Services) Amendment Act (No 2) 1994*, that may have been granted to a prisoner under the determination made under that section that was in force immediately before that commencement".

the sentence is not to be reduced by more than is necessary to ensure that the actual time spent in custody is not greater than would otherwise have been the case.

56 It was by reference to s 58 of the Act that prosecuting counsel contended before Angel J that it was not permissible to have regard to the abolition of remissions when sentencing the appellant. The contention that that is the consequence of s 58 is based on the rule of construction embodied in the Latin maxim *expressio unius est exclusio alterius*. As this Court has frequently pointed out, however, great care must be exercised in the application of that rule for it is "not of universal application and applies only when the intention it expresses is discoverable upon the face of the instrument"²³.

57 Given the fundamental nature of the principle of parity or consistency in sentencing, it is, in my view, impossible to conclude from the bare terms of s 58 of the Act that the legislature intended the abolition of remissions to be taken into account in the case of sentences of less than 12 months but not in any other case. Rather, viewed in the context of the Act as a whole, s 58 is to be seen simply as directing the precise method by which sentences of less than 12 months are to be reduced by reason of the abolition of remissions. The consequence is that, in other cases, allowance for the abolition of remissions is to be accommodated in a general way within the guidelines set out in s 5(1) of the Act, particularly that in par (a) which directs that the punishment be "just in all the circumstances".

58 It is necessary now to consider the provisions of the Act concerned with non-parole periods. In general terms, the Act requires that where a court imposes a sentence of imprisonment for life or for 12 months or longer, it must fix a non-parole period "unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate."²⁴ Save in the case of a sentence for an offence against

23 *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94. See also *O'Sullivan v Farrer* (1989) 168 CLR 210 at 215 per Mason CJ, Brennan, Dawson and Gaudron JJ; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 250 per Deane, Dawson, Toohey and Gaudron JJ; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 213 per Gaudron J; *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 311 per Brennan CJ, Gaudron and McHugh JJ, 320 per Toohey and Gummow JJ; *Federal Commissioner of Taxation v Rowe* (1997) 71 ALJR 624 at 627 per Brennan CJ, Dawson, Toohey and McHugh JJ; 143 ALR 406 at 410; *Ousley v The Queen* (1997) 71 ALJR 1548 at 1559 per Gaudron J; 148 ALR 510 at 525.

24 Section 53. Note the section does not apply to a sentence for 12 months or longer that is suspended in whole or in part or to a sentence for the crime of murder. (See (Footnote continues on next page)

s 192(3) of the Code (that being the offence for which the appellant was sentenced), s 54 requires that the non-parole period be "not less than 50% of the period of imprisonment that the offender is to serve under the sentence."²⁵ As already pointed out, in the case of an offence under s 192(3) of the Code, s 55 requires that the non-parole period be fixed at 70% of the sentence.

59 If the abolition of remissions is taken into account when specifying a head sentence – and in my view it must be – it is likely that non-parole periods of not less than 50% imposed in accordance with s 54 of the Act will not differ greatly from those set under the pre-1996 sentencing regime. If that is not the case, however, there is nothing in the Act to suggest that a head sentence should not be adjusted to effect some balance between the non-parole periods generally resulting from the operation of s 54 and those fixed under the pre-1996 sentencing regime. However, the position is different in the case of non-parole periods fixed in accordance with s 55 of the Act.

60 When regard is had to the consideration that the Act specifies that an offence under s 192(3) of the Code is to attract a non-parole period of not less than 70%, as distinct from a period of not less than 50% in all other cases, it is clear that the legislature intended that persons convicted of that offence are now to be treated differently from all other persons sentenced under the Act. And as they were not previously treated differently from other offenders, it follows that the legislature intended that they should also be treated differently from those sentenced for that offence under the old regime. Accordingly, the principle of parity in sentencing has been displaced to the extent of the different treatment directed by s 55 of the Act.

61 The Court of Criminal Appeal should have had regard to the abolition of remissions and the overall difference in non-parole periods, if any, resulting from s 54 of the Act when determining whether the appellant's head sentence was excessive. However, there was no room for further adjustment of the head sentence to balance for the longer non-parole period required by s 55 of the Act.

62 As I would allow the appeal on ground 2 of the Notice of Appeal, it is unnecessary to consider the more limited argument advanced in this Court that the

ss 53(1)(b) and (3)). Note also that in the case of a sentence for a property offence, the non-parole period is not to commence before the mandatory period of the sentence expires (see s 53(1A)).

25 Note that, in addition, the period set must not be less than eight months (s 54(2)) and that, in the case of a sentence for a property offence, the non-parole period must be fixed on the basis that the sentence does not include the mandatory period fixed under s 78A of the Act (s 54(1A)).

timing of the appellant's conviction required that the abolition of remissions and the altered non-parole regime be taken into account in his particular case.