



GUIDELINES FOR PROVISION OF DOCUMENTATION in relation TO CRIMES (victims assistance) act applications

From time to time, but on a regular basis, enquiries and requests are made to the Office of the Director of Public Prosecutions (ODPP) for information and access to documents relating to claims pursuant to the *Crimes (Victims Assistance) Act* and other civil claims said to arise from criminal wrong-doing. There is often some misunderstanding as to the information which should be properly made available in those circumstances.

To ensure a consistent response to requests for information and to minimise confusion with practitioners as to what material the ODPP can provide, the following guidelines shall now apply:

1. all requests are to be in writing and, when made on behalf of applicants for compensation or potential plaintiffs, accompanied with an authority to release information from the applicant for compensation
2. prior to completion of the prosecution (including any appeal period) the Office will provide the following material:
 - (a) applicant's statement(s) to police
 - (b) details of charges or counts on the indictment
 - (c) the next date listed for a court hearing
3. After completion, the Office will assist by providing the following:
 - (a) applicant's statement(s) to police
 - (b) copy of SAIK (Sexual Assault Information Kit) if available
 - (c) copy of any non-contentious statement where an authority to release is provided by the maker of the statement (to be obtained, where appropriate, by the applicant's legal representative)
 - (d) photographs (where available) showing injury to the applicant
 - (e) after a plea of guilty, a copy of the precis or Crown facts
 - (f) details of the final result
4. the Office response to requests will contain:

- (a) advice that transcript should be sought from Court Reporting Services (NT) Pty Ltd and
- (b) information about medical practitioners, other professional consultants and expert witnesses who have provided reports in evidence. To obtain copies of these, authorisation must be provided by the author.

REX WILD QC
Director of Public Prosecutions

12 April 1999



POLICY AND PROCEDURES FOR WITNESSES, INTERPRETERS AND TRANSLATORS

MISSION STATEMENT

The mission of the Office of the Director of Public Prosecutions is to provide the people of the Northern Territory of Australia with an independent, professional and effective criminal prosecution service that:

- *operates with integrity*
- *is fair and just to both victims and the accused and*
- *is sensitive to the needs of victims, witnesses and to the interests of the community on whose behalf it acts.*

Witnesses, interpreters and translators have a right to be treated courteously and to be provided with the necessary information and assistance as required. It is the responsibility of the Office, in conjunction with the police, to ensure that their rights are respected.

Witnesses, interpreters and translators may have special needs that should be given special consideration; for example, the aged, those with communication difficulties or cultural differences and those with disabilities.

For advice and assistance in relation to these needs contact should be made with the Victim Support Unit.

1. WITNESSES

The police Officer-in-charge of a case (the OIC) is responsible for seeing that the witnesses get to and from court in conjunction with the Prosecutions Liaison Officer

(see Police **General Orders** P3.7). They are also responsible for the supervision of the conduct of witnesses at court.

The Prosecutions Liaison Officer is responsible for organising transport and accommodation where needed.

Witnesses are entitled to a copy of their statement.

At court witnesses should be sought out and kept apprised before and during proceedings. Explanation of the layout of the court complex and its amenities, eg telephones, toilets and refreshments can help those unfamiliar with the court environment. The responsibility for this should be accepted by the OIC.

Prosecutors must ensure that witnesses are informed in a detailed timely manner about their attendance at court.

When, in the opinion of the Crown prosecutor, a witness is no longer required, they should be informed immediately. Witnesses are informed that they are excused and should be given a witness claim form for expenses. This should be paid without delay. Processing of witness fee payments will be 5 working days. The prosecutors' working knowledge of witness expenses procedures and entitlements will help answer important questions often asked by witnesses and police.

Pro-active, thoughtful, communicative strategies over and above legislative and procedural requirements will ensure that the OFFICE does provide a quality service to its witnesses.

2. WITNESSES' ENTITLEMENTS

(a) Generally

Witness Allowance

Witnesses' expense allowances are approved by the Director of Public Prosecutions.

A witness may be entitled to:

- (i) accommodation allowance
- (ii) meal allowance
- (iii) travelling allowance; and
- (iv) an allowance for loss of earnings in accordance with the policy.

The net amount for *Loss of Income, Salary or Wages* is to be reimbursed on production of a letter from their employer or a certified accountant, stating the **net** amount of income.

(b) Travelling Allowance

- (i) The amount of the travelling allowance that is to be paid to a witness (other than public service officers):

- (a) the amount paid for fares in travelling to and from court using the most economical form of public transport; or
 - (b) if public transport is not available and a witness travels to and from court in a private vehicle, then the witness may be paid an allowance as determined by the *Public Sector Employment and Management Act*.
- (ii) A witness is not entitled to the payment of a travelling allowance if no expenses are incurred by the witness in travelling to and from court.
 - (iii) If a witness travels to and from the court in a private vehicle with another witness only one payment is to be made for that vehicle.
 - (iv) If approval is given for the witness to travel to and from court by air, then such travel will be by economy class (or its equivalent) and will be arranged by the Office or the Prosecutions Liaison Officer.
- (c) **Accommodation and Meal Allowances (Interstate and Intrastate Witnesses)**
- (i) Accommodation will be booked and paid for by the Office for witnesses who are required to stay overnight for the purpose of attending court.
 - (ii) Where accommodation is not obtained at a hotel, motel or other establishment of the kind included in the definition of hotel in the *Hotel-Keepers Act*, the witness will, on production of receipt, be paid a daily meal allowance in accordance with section 2(c)(iii) of this Policy.
 - (iii) Meal allowance will be paid as determined by the *Public Sector Employment and Management Act* (for breakfast, lunch and dinner) and are provided for at the place of accommodation. Where a witness is only entitled to one or two of these meals a maximum allowance per meal is provided for as follows:
 - (iv) In circumstances where the witness does not eat at the place of accommodation, receipts must be produced in order for reimbursement to be claimed. Upon production of receipts, reimbursement not exceeding the prescribed maximum amount per meal provided for in section 2(c)(iii) will be provided.
 - (v) Reimbursement will only be paid at the conclusion of the matter and payment will be by way of cheque.
 - (vi) At no time will cash be paid to witnesses or interpreters from the Office.
 - (vii) Meal allowance will only be payable to witnesses who are necessarily absent overnight or for more than twelve (12) hours from that person's place of abode.
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(viii) If the person is a witness who is under the age of twelve (12) years, the amount of the meal allowance is to be halved.

(d) **Police Officers**

- (i) Witness expenses by way of loss of earnings will not be paid to any police officers (intrastate, interstate or overseas). This also applies to police officers who were *off-duty* when they witnessed an offence and who subsequently give evidence for the prosecution. The appropriate police departments are expected to remain responsible for payment of wages.
- (ii) Accommodation for Northern Territory police OFFICERS will generally be provided in Visiting Officers' Quarters. When not available, appropriate hotel accommodation will be provided by the police. Meal and travel allowances will remain the responsibility of the NT Police. The Office will be responsible, however, for such entitlements in respect of interstate or international police officers.

(e) **Public Servants - State and Commonwealth**

In accordance with By-Law 21 of the *Public Sector Employment and Management Act* no witness fee payments are to be made to a witness who is a public service officer:

- (i) within the meaning of the *Public Sector Employment and Management Act*; or
- (ii) within the meaning of the *Commonwealth Employment Service Act*, or
- (iii) a police officer within the meaning of the *Police Administration Act*, or
- (iv) a prisoner of the Crown.

(f) **People Accompanying Witnesses and Babysitters**

From time to time it is necessary for another person to accompany a witness.

This generally applies to adults accompanying child witnesses, persons accompanying disabled witnesses and interstate prison officers accompanying interstate prisoners.

These requests are to be treated as a *one off*. Such requests are to be made in advance and are to be approved by either the Director or his delegate.

(g) **Expert Witnesses**

An expert witness is a person who the prosecution has defined as being called to give evidence that involves his/her particular specialisation in private enterprise and may claim up to the maximum of \$610.20 per day. This rate is set out in the Rules of the High Court and is amended from time to time. The prosecutor will advise those

persons who qualify for this fee. If the amount claimed by the expert exceeds the scheduled fee, approval from the Director or his delegate must be sought.

3. INTERPRETERS AND TRANSLATORS

Interpreters and translators are requested through the Victim Support Unit (VSU).

The VSU will make an initial booking through either the NT Interpreter and Translating Services (NTITS) or the Aboriginal Interpreter Service (AIS).

Aboriginal interpreter bookings are made through the AIS. Fees, accommodation, transport and any other costs relating to the provision of this service are arranged by AIS and debited to the Office. Bookings are subject to confirmation by the VSU.

Interpreters that are not booked through either AIS or NTITS are paid in accordance with rates as set by the Office of Ethnic Affairs – updated rates can be obtained by contacting the Business Manager:

Interpreter – public servant

Where the interpreter is a government employee and the employee is provided *leave with pay* (as opposed to *recreation leave*) no interpreter fees are payable.

Where the interpreter is a government employee and the employee is required to take leave without pay, or recreation leave, interpreter fees pursuant to the current rates as set out by the Office of Ethnic Affairs will apply.

Cases cancelled – interpreter no longer required

Where the interpreter is notified prior to commencing travel, no interpreter fees are payable.

Where the interpreter is only notified upon arrival in Darwin (or Alice Springs, or as appropriate) a fee is payable.

(a) Transport

Transport to be provided to and from court. This should include:

- return airfares or bus fares (where necessary)
- return taxi pick up from airport to hotel (where necessary)
- return taxi pick up from hotel to court and to hotel after assignment (where necessary).

Taxi fares within the Darwin or Alice Springs city centre areas are only provided to attend court in exceptional circumstances where the witness can prove hardship

which may include adverse weather conditions or inability to walk to court due to a disability.

Where an interpreter's own vehicle has to be used a kilometre allowance may be payable at the current rate as set out in the *Public Sector Employment and Management Act* in circumstances where no scheduled passenger service (air, train, bus) is reasonably available to meet the specific needs of the situation. If a scheduled service is available, the amount payable to the interpreter is the equivalent bus fare within the NT, or airfare for interstate interpreters.

(b) **Accommodation and meals**

To be provided in accordance with section 2(c) of this policy.

(c) **General**

- (i) The Office accepts responsibility on behalf of the Crown for the provision of an interpreter to be available in court in order that the defendant may understand the nature of the proceedings.

- (ii) Defence is responsible for payment of interpreter fees, other than when the interpreter is required in court; for example, where the defence require an interpreter for conferences.

4. OVERSEAS WITNESSES

The prosecutor who has carriage of the matter should make a request in writing and forward it for the Director's approval.

The request should annex a copy of the facts and the charges, refer to the importance of the witness's evidence and whether it is feasible and desirable to seek to adduce that evidence in another way.

The estimated costs should be included in the request. The aim, of course, is to ensure cost effectiveness.

5. VARIATION

- (i) Any variation, in a particular case, to the foregoing allowances and fees will not be accepted by the Office unless agreed to in writing before the relevant expense has been incurred. In addition to the Deputy Director, who holds general delegations, the Assistant Director (Alice Springs) and General Counsel are hereby designated as officers who may authorise such variations.
- (ii) Notwithstanding anything that appears elsewhere in this statement of policy and procedures, it is recognised that from time to time emergencies may arise where witnesses are genuinely in straitened circumstances and need a small amount of cash for essential food items. In the event that a relevant member of staff of the Office (whether a prosecutor, member of the Victim Support Unit or of the administrative staff) gratuitously advances the cost of such food to a witness (by directly purchasing it rather than handing over cash), then on application reimbursement will almost invariably be approved (receipts for government accounting purposes will be requested).

REX WILD QC
Director of Public Prosecutions

May 2000





PROVISION OF INTERPRETERS

The following guidelines (by way of instructions for prosecutors and the Victim Support Unit) shall be adopted when dealing with Aboriginal witnesses in the court system:

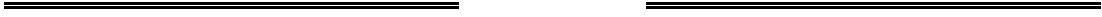
1. Prior to hearing, witnesses should be assessed, in conjunction with the Victim Support Unit, as to whether they require the assistance of an interpreter. It is to be noted that although most Aboriginal witnesses speak some English, they may not be competent in court.
2. When engaging an interpreter, the interpreter must be informed of the following:
 - name of the witness(es) to be assisted
 - name of defendant
 - type of crime.

This information will enable the interpreter to advise of any possible cultural conflicts that could arise. Where there is a conflict, another interpreter should be used.

3. Where possible, the witnesses should be advised prior to the hearing of the name of the interpreter to be used.

If there is an indication of conflict another interpreter should be used.

4. Upon engagement of an interpreter their services must be used, unless there is a justifiable reason for not doing so.





ABORIGINAL EMPLOYMENT AND CAREER DEVELOPMENT STRATEGY 2000-2003

Introduction

The Office of the Director of Public Prosecutions (the ODPP) first implemented an Aboriginal Employment and Career Development Strategy (the strategy) in July 1997.

The strategy is an integral component of the ODPP Equal Employment Opportunity Management Plan and forms part of the Human Resource Policy.

The goals of the strategy are essentially two-fold. Firstly, to increase employment opportunities as well as supporting effective training and development for Aboriginal and Torres Strait Islanders so that they can reach their full career potential within the ODPP. Secondly, to increase the focus on the different cultures of both Aboriginal and non-Aboriginal people thus enabling the ODPP to better understand and address client needs.

The effectiveness of the strategy to date is demonstrated by the fact that 11% of employees are of indigenous heritage – an increase of 6%.

It is estimated that approximately 90% of criminal cases listed for hearing in Alice Springs and 70% in Darwin, concern crimes allegedly committed by Aboriginal persons. Most of these crimes are committed against other Aboriginal persons, thus giving rise to a significant number of Aboriginal witnesses.

The ODPP has established a Victim Support Unit (VSU) which provides support to victims of crime, witnesses and their families throughout the criminal justice process. This establishment of the VSU was, in part, a response to the identified needs and issues that affect Aboriginal victims and witnesses. Positions within the VSU have been identified for the employment of Aboriginal and Torres Strait Islanders.

The ODPP is committed to the continuing development and improvement of the strategy.

REX WILD QC
Director

May 2000

Legislative requirements

The *Public Sector Employment and Management Act 1993* (the Act) requires agencies to develop and implement equal opportunity programs.

Employment Instruction Number 11 issued by the Commissioner for Public Employment provides:

All agencies should implement an Aboriginal Employment and Career Development program. The program should be developed within the framework of the Act and the Northern Territory Public Sector Aboriginal Employment Career Development Strategy.

Section 28(2)(f) of the Act requires Chief Executive Officers to report annually on equal opportunity management programs and other initiatives designed to ensure that employees in Northern Territory Government Agencies have in place equal employment opportunities.

The goals of the strategy are to:

1. Develop and maintain an employment policy that will actively encourage Aboriginal and Torres Strait Islander people to apply for employment within the ODPP.
2. Increase the number of Aboriginal and Torres Strait Islander people employed by the ODPP.
3. Provide Aboriginal and Torres Strait Islander people with an opportunity to develop to their full potential.
4. Enhance career management by recognition of specific needs and by making available customised learning through individual career development programs.
5. Promote, utilise and retain the Aboriginal knowledge within the ODPP.
6. Maintain relevant, current and continuous learning opportunities for Aboriginal and Torres Strait Islander people within the ODPP.
7. Retention of an Aboriginal Support Co-ordinator within the ODPP.
8. Promote a better understanding of the indigenous culture by ensuring that all staff are trained in cross cultural awareness.

Goal 1

Develop and maintain an employment policy that will actively encourage Aboriginal and Torres Strait Islander people to apply for employment within the ODPP.

Task

- Recognise relevant Aboriginal and Torres Strait Islander culture, skills and education for inclusion in job descriptions.
- Where appropriate include cultural skills and prior knowledge in job vacancies, workplace goals, objectives and JES documentation.
- Identify positions where future programs and aims will require employment of Aboriginal and Torres Strait Islander staff.
- Expand opportunities for Aboriginal and Torres Strait Islander people to participate in part-time, casual and vocational employment.
- Include an Aboriginal or Torres Strait Islander on selection panels when interviewing Aboriginal or Torres Strait Islanders for positions within the ODPP.
- Maintain flexible work practices to accommodate short term leave to meet family demands or community commitments. This can be made available either through paid recreation leave or leave without pay.

Goal 2

Increase the number of Aboriginal and Torres Strait Islander people employed by the ODPP.

Task

- Identify vacancies that should be allocated for the employment of Aboriginal and Torres Strait Islander people.
- When such a position has been identified have the following included in job descriptions:

Persons of Aboriginal and Torres Strait Islander descent are encouraged to apply.

- Where appropriate the selection criteria should specify that the applicant have the following attribute:

Demonstrated experience in communicating effectively and sensitively with Aboriginal and Torres Strait Islander people and have an understanding of traditional and contemporary Aboriginal and Torres Strait Islander culture, society and issues.

- Actively encourage more Aboriginal and Torres Strait Islander graduates to apply for positions within the ODPP through advertising in the media.

- Provide support in career advice and advancement.
- Design jobs ensuring cultural appropriateness.
- Retention of indigenous employees by providing a career structure.

Goal 3

Provide Aboriginal and Torres Strait Islander people with an opportunity to develop to their full potential.

Task

- Create *stepping stones*, that is, positions which give Aboriginal and Torres Strait Islander people the opportunity to develop to their full potential.
- Identify vacancies for which cultural skills and education of Aboriginal and Torres Strait Islander people would be beneficial to the ODPP.
- Completion of relevant job training for Aboriginal and Torres Strait Islander people.
- Provide opportunities for secondment to other Agencies for a period of time to undertake a particular job or project.
- If required or requested, to arrange the provision of mentor support.
- Ensure that Aboriginal and Torres Strait Islander staff have access to relevant training programs at a level which benefits the role they are expected to play within the organisation.
- Promotion of the continued respect of Aboriginal and Torres Strait Islander cultural differences.

Goal 4

Enhance career management by recognition of specific needs and by making available customised learning through individual career development programs.

Task

- Provide a broad range of training opportunities that will enhance the service provided to our indigenous clients.
- Utilise in-house cultural knowledge of indigenous employees by making available the opportunity to provide input into the ODPP policies and strategies.
- Recognise the unique skills which will enable the ODPP to provide a more efficient client service.

- Extend the representation of Aboriginal and Torres Strait Islander staff to all levels within the ODPP.

Goal 5

Promote, utilise and retain Aboriginal and Torres Strait Islander knowledge within the ODPP.

Task

- Provide Aboriginal and Torres Strait Islander staff with opportunities for promotion and career advancement through the introduction of training and development programs which combine formal and on the job training.
- Ensure that Aboriginal and Torres Strait Islander staff have access to existing mainstream training opportunities.
- Promotion of the continued respect of Aboriginal and Torres Strait Islander cultural differences.
- Provide cadetships targeting Aboriginal and Torres Strait Islander people.
- Encourage law graduates of Aboriginal and Torres Strait Islander descent to apply for *articles of clerkship* with the ODPP.
- Retention of indigenous employees by providing a career structure.
- Provide a support system to assist indigenous employees in performing their duties.

Goal 6

Maintain relevant, current and continuous learning opportunities for Aboriginal and Torres Strait Islander people within the ODPP.

Task

- Ensure an appropriate induction package is made available to new staff.
- Provide Aboriginal and Torres Strait Islander staff with on the job training.
- Ensure that Aboriginal and Torres Strait Islander staff have access to existing mainstream training opportunities.
- Ensure that Aboriginal and Torres Strait Islander staff have access to relevant training programs.

- Identify a range of development options such as rotations and secondment to match the skills of individual Aboriginal and Torres Strait Islander staff.
- Develop personal development plans and provide career counselling.

- Encourage participation in the personal development plans. If required or requested, outline training needs such as assertiveness, management issues, presentation skills and career development courses.

Goal 7

Retention of an Aboriginal Support Co-ordinator within the ODPP.

Task

- Provide policy advice to the Director and other government and non-government agencies on issues affecting victims of crime and other witnesses, including Aboriginal and Torres Strait Islander victims of crime and other witnesses.
- Formulate recommendations for the ODPP and government regarding amendments to legislation, government policy and practice as it particularly affects Aboriginal victims of crime and other witnesses.
- Liaise with Aboriginal groups and organisations on issues relating to Aboriginal victims of crime in the criminal justice system.
- Represent the ODPP on relevant committees in relation to Aboriginal victims of crime, including facilitating networking with relevant agencies.
- Conduct education for the public and to Crown and Summary Prosecutors regarding issues affecting Aboriginal and Torres Strait Islander victims of crime.
- Provide victim and witness support to Aboriginal and Torres Strait Islander people.

Goal 8

Promote a better understanding of indigenous culture by ensuring that all staff are trained in cross cultural awareness.

Task

- Increase cross cultural awareness by ensuring that all staff have undertaken cross cultural training.
- Encourage staff to further their cross cultural awareness.
- Address negative attitudes of staff. Racist behaviour and attitudes are not acceptable or tolerated.
- Increase staff awareness of the broad and diverse range of Aboriginal and Torres Strait Islander cultures and issues.
- Promote an environment which accepts cultural and social differences.



EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT PLAN

The Office of the Director of Public Prosecutions (ODPP) has developed an equal employment opportunity management plan to ensure the promotion and enhancement of equal opportunity within the ODPP.

The underlying principle on which the program is based is merit. This principle requires that the policies and practices relating to recruitment, employment, career development and advancement, promotion and retirement be based solely on merit, without regard to race, gender, impairment, marital status, religious/political beliefs or other non-merit related considerations.

The overall objective of the plan is the creation and maintenance of a fair and equal workplace in which individuals have the opportunity to genuinely and effectively compete for employment and training opportunities, free from any real or perceived discriminatory practices.

The overall goal of the ODPP's *Equal Opportunity Management Plan* is to promote equality of opportunity for all employees in line with government policy and the requirements of Northern Territory legislation by:

- raising commitment and awareness of the *Equal Employment Opportunity Management Plan* throughout the ODPP
- developing best practice policies, procedures and guidelines
- recognising that cultural diversity is an asset
- providing flexible work arrangements that recognise people with special needs.

Raising commitment and awareness of the *Equal Employment Opportunity Management Plan* throughout the ODPP

- Distribute a copy of the policy statement to all employees in the Darwin and Alice Springs Offices
- inform managers of equal employment opportunity requirements under the *Public Sector Employment and Management Act*

- commence investigation of equal opportunity complaints within 7 days

- review this plan every year to ensure compliance with contemporary equal employment opportunity issues and requirements
- include equal employment opportunity statements such as *knowledge and understanding of equal employment opportunity principles* in position descriptions and selection criteria of all managers
- organise equal employment opportunity awareness training for employees directly involved in management, recruitment, selection, promotion, career development and cessation of employment as required
- appoint an Equal Employment Opportunity Co-ordinator.

Develop best practice policies, procedures and guidelines

- As vacancies arise, review advertisements, position descriptions and selection criteria to ensure compliance with equal employment opportunity principles. Position descriptions should reflect the genuine requirements of the job, including formal qualifications
- train or refresh intending interviewers prior to convening each interview panel
- offer post interview counselling to all applicants
- review and monitor policies, procedures and guidelines for recruitment and selection to encourage adherence to equal employment opportunity principles and practices
- aim to inform employees on new policies, processes and procedures, such as those relating to discipline, grievances, probation and harassment
- prepare grievance settling procedures and inform employees on appeal and grievance processes as required
- encourage employees to become familiar with legislation such as the *Anti-Discrimination Act* and the *Code of Conduct* contained in the *Public Sector Employment and Management Act*
- offer employees fair and consistent access to policies, procedures, information and conditions of service
- review current policies and procedures to identify and eliminate any direct or indirect discrimination.

Recognising that cultural diversity is an asset

- Encourage people from different backgrounds to apply for positions within the ODPP

- provide and make compulsory attendance at cross cultural awareness training for all employees in Darwin and Alice Springs Offices

- endeavour to identify positions suitable to people from culturally differing backgrounds and language groups
- project positive images of the ODPP as an equal opportunity employer in position advertisements - for example, by inserting *The ODPP is an equal opportunity employer*
- review position descriptions in areas where there is an apparent imbalance of classes of employees with a view to attracting, if possible, under-represented groups.

Provide flexible work arrangements that recognise people with special needs

- Identify employees with a physical or intellectual disability and encourage employees from groups who are disadvantaged or have a special need to apply for positions, attend training courses, seminars and conferences
- advocate work-based child care needs and availability
- support flexibility of working hours to accommodate work and family responsibilities
- support updating of skills of employees returning from parental leave
- wherever possible, offer exit interviews or questionnaires to departing employees to identify relevant workplace problems
- endeavour to provide reasonable physical access or other requirements for employees/clients with a disability
- ensure that the ODPP's *Aboriginal Employment and Career Development Strategy* is maintained and operative.





PROGRESS OF A TYPICAL MATTER FROM CHARGE TO TRIAL

To assist readers gain an appreciation of the role of the Office, an outline of the progress of a typical defended matter appears below:

1. police charge defendant with indictable offence(s)
2. police refer the matter to the Office and provide a brief, including charge sheets and statements of the witnesses
3. the matter is allocated to a Crown prosecutor to prosecute at the Magistrates Court committal hearing
4. the Crown prosecutor reviews the charges to ascertain if it is more appropriate for the prosecution to proceed to finality before the Magistrates Court
5. the Magistrates Court committal hearing is held: defendant committed for trial to the Supreme Court if *sufficient evidence* to justify trial (defendant is from now on known as the accused)
6. the Crown prosecutor prepares an indictment, case summary and list of witnesses for trial
7. a pre-trial conference is held shortly before arraignment day before the Registrar at which the issues between the Crown and the defence are canvassed
8. there is an arraignment before a judge to ascertain whether a plea of guilty is to be entered into by the accused or if the matter is to proceed to trial
9. the trial date is set at a callover; depending on the availability of judges, the date fixed may be some months away
10. a Crown prosecutor is allocated the brief
11. the witnesses are subpoenaed
12. the Crown prosecutor appears at the trial, assisted by an instructing officer

13. in the event of a conviction, a Crown prosecutor will appear at the subsequent sentencing of the accused if this does not occur immediately upon the conviction
14. if an appeal is lodged against the conviction and/or sentence, General Counsel will brief the Director or other senior appropriate prosecutor before the Court of Criminal Appeal
15. some matters may be taken to the High Court.

Of course, not all matters proceed all the way to trial:

- the defendant may be discharged in the Magistrates Court
- the defendant may, depending on the seriousness of the charge(s), be dealt with summarily in the Magistrates Court
- the defendant may plead guilty in the Magistrates Court to the indictable charge(s) and, again depending on their seriousness, be committed for sentence to the Supreme Court
- after committal for trial the accused may enter a plea of guilty (at arraignment or at any time up to and including the trial)
- the Director can, at any stage, discontinue proceedings, for example, for want of sufficient evidence or in response to the wishes of the victim.



**DECISIONS OF THE COURT OF CRIMINAL
APPEAL AND THE COURT OF APPEAL
DELIVERED BETWEEN
1 JULY 1999 AND 30 JUNE 2000**

Lofty v R

22 March and 20 July 1999 – Martin CJ, Mildren and Riley
JJ

The appellant was found guilty by a jury of murder and sentenced to imprisonment for life. The Crown case was that the appellant killed his wife by stabbing her four times with a knife around her shoulder blades intending to kill her or cause her grievous harm. There was evidence that the appellant heard that the deceased was intending to leave him and go away with another man. The traditional relationship between the deceased and the other man made such a prospective liaison especially dangerous in Aboriginal eyes. The killing occurred when the appellant and his wife were alone, but after an evening in which there had been altercations involving them and others. There was evidence that the appellant had told lies regarding the deceased's whereabouts after he had killed her.

The first trial commenced on 20 October 1997 and continued until 29 October 1997 when the jury was discharged without giving a verdict and a new trial ordered because inadmissible evidence had been received. The second trial commenced on 18 May 1998 and occupied nine days. The defence was that of provocation.

The appellant sought leave to appeal against conviction on the grounds that:

- the trial judge erred in failing to give proper directions on evidence of a fight involving the appellant and two other men
- the trial judge put to the jury a construction of the record of interview adverse to the appellant which had not been relied on by the prosecution and which the defence had not been given a chance to meet
- the trial judge erred in admitting evidence of lies told by the appellant and his concealment of the body of the deceased
- the trial judge erred in the directions on the mental element of murder
- the trial judge erred in the directions on provocation.

The court unanimously dismissed the appeal.

SGT v R

8 and 9 October 1998 - Bailey J

23, 24, 25 March and 20 July 1999 - Martin CJ, Mildren
and Riley JJ

The appellant was charged with ten sexual offences committed against his stepdaughter. The offences were alleged to have commenced when the stepdaughter was 14 years of age and reported when she was 15 years of age.

After a 14-day trial the jury found the appellant guilty of one count of committing an act of gross indecency, one count of indecently dealing with a child under the age of 16 years, one count of exposing an indecent video tape to a child under the age of 16 years, three counts of having unlawful sexual intercourse with a female under the age of 16 years and one count of having sexual intercourse without consent.

The appellant was sentenced to a total of ten years imprisonment. A non-parole period of six years was fixed.

The appellant sought leave to appeal, primarily on the basis that the verdicts were *unsafe and unsatisfactory*. In particular, the appellant argued that:

- the appellant was prejudiced by the prosecutor's refusal to call as witnesses the mother and brother of the complainant having previously indicated that it was proposed to call them
- count 7 in the indictment was duplicitous and the subsequent guilty verdict vague and uncertain. Count 7 alleged two acts of penetration without consent, *anal* and *vaginal*. The trial judge's written aide memoir that went to the jury used the expression *anal* or *vaginal*. When the verdict was taken from the jury, the count was put to the jury in the form of an allegation of sexual intercourse being *anal* or *vaginal* intercourse. The jury found the appellant guilty of this count by a majority verdict of ten or more jurors
- in respect of two counts it was not possible to reconcile the verdicts reached by the jury with the evidence placed before it
- the jury ought to have been left with a reasonable doubt regarding the veracity of the complainant given the lack of corroboration and significant discrepancies and inconsistencies in her evidence.

Leave to appeal was granted on 9 October 1998.

The court unanimously held that count 7 was duplicitous because the appellant and the court could not know whether the jury had returned a verdict of guilty of having anal sexual intercourse, vaginal sexual intercourse or both. The jury's majority verdict meant it was possible that a minority of jurors found there was anal intercourse and a minority found there

was vaginal intercourse, combining to give a majority verdict of guilty of *anal or vaginal* intercourse. The court unanimously held that the conviction on count 7 must be quashed.

The court by a majority (Martin CJ dissenting) allowed the appeal against the other convictions on the ground that the verdicts must be regarded as unsafe and unsatisfactory because of the lack of corroboration and significant discrepancies and inconsistencies in the complainant's evidence.

The order of the court was that the appeal be allowed, the convictions be quashed and verdicts of acquittal be entered in respect of all charges.

Bara v R

17 August 1998 – Angel J

15 March and 28 April 1999, 28 July 1999 – Mildren,
Thomas and Riley JJ

This appeal involved the interpretation of the provisions of the *Sentencing Act* dealing with the order of service of sentences and unexpired terms of sentences where a new sentence breached an existing parole order.

On 3 December 1993 the appellant was sentenced in the Supreme Court to five years imprisonment with a non-parole period of two years. The appellant was released to parole in July 1995. While on parole the appellant committed a further offence in respect of which he was sentenced in the Court of Summary Jurisdiction on 19 February 1997 to 12 months imprisonment with a non-parole period of eight months. Because the latter sentence imposed in February had the effect of revoking the appellant's parole order, the magistrate ordered the appellant to serve the balance of the sentence of five years which remained to be served in respect of the 1993 sentence.

On 14 August 1997 the appellant was again sentenced in the Supreme Court on another offence to seven years imprisonment, one year of which was expressed to be concurrent with the sentence the appellant was then serving. A non-parole period of five years was fixed to run from the commencement of the sentence on 14 August 1997.

In his remarks, the sentencing judge appeared to order that the new sentence be served after the balance of the 1993 sentence had been served. The effect of this order was that service of the unexpired term of the 1993 sentence would occur before the commencement of the new sentence.

The appellant sought leave to appeal on the following grounds:

- that the sentencing judge erred in failing to fix a non-parole period in accordance with the provisions of the *Sentencing Act*
- that the sentencing judge failed to take into account the totality of the sentence imposed
- that the sentence was manifestly excessive.

Leave to appeal was granted on 17 August 1998.

The Crown contested the last two grounds but conceded that the sentencing judge was in error in fixing the order in which the sentences were to be served. The Crown conceded that the sentence of 14 August 1997 should have been ordered to be served first (because of s.59 of the *Sentencing Act*), followed by the balance of the 1993 sentence, thus preserving in the Parole Board the discretion as to how much of the 1993 sentence would actually be served before the appellant was released on parole in relation to the 1993 sentence.

The court unanimously allowed the appeal holding, in effect, that the sentencing judge erred by ordering that the unserved portion of the 1993 sentence be served prior to serving the sentence which was then being imposed. The order overlooked s.13 of the *Parole of Prisoners Act* which preserved in the Parole Board the discretion as to how much of the unserved portion of the 1993 sentence the prisoner would actually serve.

The court also unanimously held that the consequence of the sentencing judge's order did not give account to the principles of totality.

The court sentenced the appellant to six years and six months imprisonment and fixed a non-parole period of four years and three months to commence from the date of sentence, viz, 14 August 1997.

Watt v R

9 October 1998 - Bailey J

1 June and 13 August 1999 – Martin CJ, Gallop and Mildren JJ

The appellant pleaded guilty to one count of stealing \$17,790.00, the property of the Lajamanu School Aboriginal Student Support and Parent Awareness (ASSPA) Committee. The appellant was a teacher at the Lajamanu School from 1991 until June 1994. Part of her duties as a teacher was to be on an ASSPA Committee. The role of this committee was to distribute ASSPA funds, which were Commonwealth government sourced, for the benefit of the education of the local Aboriginal students. The committee consisted of six members of the community who were parents of students at the school and the appellant, who acted as the school representative. The appellant also acted as secretary and treasurer at all meetings. As treasurer she had control of the cheque book, the cheques contained therein requiring two people to sign. In all cases where the appellant drew cheques for an improper purpose, she had the cheques signed by a co-signatory who had been a member of the committee but was no longer so, due to ill health.

Between 25 March and 16 June 1994 the appellant wrote ten cheques that were not legitimate cheques for ASSPA purposes. Those cheques totalled \$17,790.00

The appellant was sentenced to 18 months imprisonment, to be suspended after serving six months. Pursuant to s.40(6) of the *Sentencing Act* an operational period of two years was fixed. It was ordered that the appellant make restitution to the sum of \$17,790.00.

The appellant applied to the Court of Criminal Appeal for leave to appeal against sentence on the grounds that:

- the sentence was manifestly excessive
- the sentence imposed took insufficient regard to the appellant's family background and personal disposition and in particular her rehabilitation and the fact that she was the principal caregiver of her two infant children
- the sentencing judge erred in finding that the appellant had stolen from vulnerable people
- the sentencing judge erred in finding that this was a case which was encompassed by the sentencing principles of *R v Bird*
- leave be granted for fresh evidence to be admitted as to the effect the appellant's incarceration has had on the welfare of her two infant children.

Leave to appeal was granted on 9 October 1998.

The Crown consented to leave to appeal being granted to allow the court to clarify what powers an appeal court has to interfere with a sentence where matters that were foreseeable at the time of sentencing and taken into account by the sentencing judge materialise in a much more severe way than was anticipated.

On the hearing of the appeal the court, by a majority (Gallop J dissenting), received fresh evidence that the appellant's two infant children aged three years and 15 months respectively were suffering in an unexpected and extreme way by being separated from their mother. This evidence was received on the basis that it showed the true significance of the circumstances at the time of the original sentencing was such that had that significance been known, it would probably have led the sentencing judge to reach a different sentence.

The court allowed the appeal and quashed the sentence imposed not because of any errors being demonstrated in it but because the fresh evidence shed new light upon the facts before the sentencing judge.

The court sentenced the appellant to 12 months imprisonment and suspended the sentence upon the appellant entering into a home detention order for a period of eight months. The home detention order was made subject to certain terms and conditions.

McCarthy v Trenerry 13 August 1999 – Gallop, Mildren and Riley JJ

The appellant, a 24 year old mother of two children aged five and two years and pregnant with her third child, was convicted in the Court of Summary Jurisdiction of unlawfully assaulting another female accompanied by the circumstance of aggravation that the victim suffered bodily harm.

The appellant punched the victim *really hard* in the eye, which punch smashed her spectacles and caused injury to her face. The appellant continued to hit the victim around the

face even when she had gone to ground. The appellant had to be physically restrained from continuing the assault. The victim suffered what the magistrate described as *really horrific injury, especially the injury to the eye*. She required specialist treatment to protect the eye. Her eyesight was completely recovered by the time of the hearing in the Court of Summary Jurisdiction.

The appellant was sentenced to imprisonment for eight months, that term to be suspended after she had served one month, a period of two years being fixed for the purposes of s.40(6) of the *Sentencing Act*.

The appellant appealed to the Supreme Court on numerous grounds to the effect that the sentence was manifestly excessive. Further, on the hearing of the appeal on 15 March 1999, the appellant sought to place before the Supreme Court evidence from a doctor that the baby born on 1 June 1998, somewhat prematurely, was doing well at the end of November 1998, that it is not ideal for a baby to be separated from its mother and that the prison environment would not be an ideal one for the baby.

The court found that the sentence was not manifestly excessive. The court declined to receive the evidence. The court considered s.176A of the *Justices Act* and held that the qualified provisions enabling evidence to be introduced on appeal must be related to the time when sentence was passed, either to make up for a deficiency in that evidence which could have been brought forward at that time, or to better explain the evidence which was before the court. The evidence sought to be admitted did not fall within the rules. It was of a subsequent event, one that was anticipated, but not one which put the facts before the sentencing magistrate in a new light.

On 30 March 1999 the court dismissed the appeal.

The appellant then appealed further to the Court of Appeal on the grounds that:

- the appeal judge erred in failing to receive fresh evidence
- the appeal judge erred in not substituting a wholly suspended sentence.

The court unanimously dismissed the appeal on all grounds. The respondent was not called upon to make oral submissions.

Naroldol v R

20 January 1999 – Mildren J

9 and 10 August 1999, 24 September 1999 – Martin CJ,
Gallop and Thomas JJ

On 3 December 1998 the appellant was found guilty by a jury of one count of murder and sentenced to life imprisonment. The Crown case was that the appellant stabbed the deceased to death in the deceased's flat at Jabiru on 23 April 1997.

The Crown case was based upon circumstantial evidence.

The appellant told police that on the night of the death he had been drinking with the deceased at the Jabiru Sports and Social Club and subsequently went to the deceased's flat at the deceased's invitation. The appellant claimed that while he was there, two strangers, a male and a female, visited the deceased to obtain cannabis from him. The appellant claimed that these strangers said they had no money and that the female offered to have sex with the deceased in order to buy the cannabis. The appellant said that the deceased and the female had sexual intercourse but that the deceased did not supply the cannabis. An argument then

developed between the deceased and the strangers during which the male stranger stabbed the deceased. They threatened the appellant with his life if he went to the police.

The Crown case in part was that the appellant told a number of lies in his record of interview with the police which indicated a consciousness of guilt.

The appellant's fingerprints were found on a number of items in the deceased's flat which the appellant denied touching. The appellant claimed that he met up with his cousin B later that night and told him what had happened. B gave evidence that the appellant did not tell him anything of what had happened. The police located a pair of jeans at the appellant's residence upon which was located blood consistent with being that of the deceased. The appellant told police he was wearing thongs on the night he visited the deceased. At B's direction police located clothing which B said the accused was wearing on the night and which B saw the appellant throw away. Blood consistent with being that of the deceased was found on some of the discarded clothing.

The appellant did not give evidence at trial.

The appellant sought leave to appeal against conviction on the grounds that:

- the conviction was unsafe and unsatisfactory
- the evidence was insufficient to support a conviction
- the trial judge erred in not directing the acquittal of the appellant at the conclusion of the Crown case
- it was not open to the jury to use statements made by the appellant in an interview with police as demonstrating a consciousness of guilt of the crime charged
- alternatively to the ground above, it was unsafe to use the statements made by the appellant as demonstrating a consciousness of guilt of the crime charged.

On 20 January 1999 the trial judge certified that the case was a fit case for an appeal to the Court of Criminal Appeal pursuant to s.410(b) of the *Criminal Code*.

In unanimously dismissing the appeal the court held that:

- for the appellant to be properly convicted the evidence had to be such as to exclude any *reasonable* hypothesis consistent with the appellant's innocence. As the account given by the accused would stretch the jury's credulity, the jury might well have regarded it as unbelievable
- the lies told by the appellant were capable of demonstrating a consciousness of guilt
- the verdict was not unsafe and unsatisfactory.

Langtree v Trenerry 1 October 1999 – Martin CJ, Mildren and Bailey JJ

The appellant was a man who was being prosecuted after he was charged with two counts of unlawful property damage and two counts of unlawful assault, one of which involved

circumstances of aggravation. The appellant had two prior criminal convictions. As such he was a third or subsequent offender pursuant to s.78A of the *Sentencing Act*. If he was found guilty of the charge of unlawful property damage or if he pleaded guilty to the charge he would face a recorded conviction and a 12-month minimum term of imprisonment in addition to any period of imprisonment that may be imposed by the court in relation to the assault charges. The appellant's solicitor initially wrote to the Director of Public Prosecutions requesting that the charges for unlawful damage to property be withdrawn. This request was refused by the Director.

The appellant brought proceedings in the Supreme Court complaining that the Director had given no reason for the decision to prosecute him for unlawful damage to property. The appellant alleged that the Director had not had regard to or did not comply with, the guidelines issued by him under s.25 of the *Director of Public Prosecutions Act*, namely factors (c), (d), (k), (q) and (s). The appellant alleged that the potential mandatory sentence of 12 months imprisonment was *disproportionate* and *manifestly excessive* to his alleged unlawful conduct and it *infringe(d) the principle of totality*. He submitted that he was therefore *effectively deprived of a proper opportunity to plead guilty* to the charge of unlawful property damage. The solicitor for the appellant alleged that the commencement and the continuation of the proceedings was an abuse of process. The appellant sought orders from the court that the proceedings be permanently stayed or alternatively that the proceedings be quashed.

On 9 September 1999 the Supreme Court dismissed the application holding that:

- the decisions of the Director to commence and continue criminal proceedings are unsusceptible of judicial review
- the fact that the decision to prosecute and to continue with a prosecution is made by the Director and not the Attorney-General does not alter the position that these decisions are unsusceptible of judicial review
- the decisions of the Director to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and decisions as to the particular charge to be laid or prosecuted are also unsusceptible of judicial review
- it is of fundamental importance to separate the functions of the Executive from that of the courts. The Executive makes decisions whether to institute or continue criminal proceedings whilst the courts make decisions to ensure a fair trial for the accused and to prevent abuse of the court's processes. This separation ensures the integrity of the judicial process, particularly its *independence and impartiality and public perception thereof*
- Judicial Review of the decision to prosecute may be possible in exceptional circumstances, bordering perhaps on bad faith or fraud. However, on the current facts there was no suggestion of bad faith or fraud

- a court should only exercise its jurisdiction to stay proceedings to prevent *prosecutorial oppression* and this power should be used *sparingly and with the utmost caution*
- on the facts the appellant is not concerned that he will be tried unfairly or that the court's processes are being abused but rather with the consequences that the legislature has provided will flow from a finding of guilt, pursuant to s.78A of the *Sentencing Act*
- on the facts the court may be called upon to impose a penalty, pursuant to s.78A of the *Sentencing Act*. This does not amount to an abuse of process.

The decision of the Supreme Court is reported in 9 NTLR 46.

The unsuccessful appellant then appealed the decision of the Supreme Court to the Court of Appeal on the grounds, in effect, that it was wrong in law.

The court unanimously dismissed the appeal. The respondent was not called upon to make oral submissions.

Miles v R

11 and 12 August, 8 October 1999 – Gallop, Mildren and Thomas JJ

20 April 2000 – Angel, Thomas and Riley JJ

The appellant was convicted by a jury of one count of supplying heroin and one count of possessing heroin. The appellant was not legally represented and appeared for himself.

The Crown case was that the appellant supplied heroin to another supplier who then sold it to a police informer. Police had noted the serial numbers of the money used to purchase the heroin and the money was found in the appellant's possession together with an amount of heroin. The appellant made certain admissions to the police which were not electronically recorded as required by s.142 of the *Police Administration Act*. The Crown case was that the appellant had requested that no recording take place of the conversation he had with police which contained the alleged admission. Further, the Crown case was that the appellant denied any knowledge of the heroin which was found as a result of the search based on the admission.

At trial, the appellant gave an account of how he came to be in possession of the money which police had marked. He was cross-examined at length on this account. The prosecutor told the jury the appellant's account was a *pack of lies*.

The appellant was sentenced to a total period of imprisonment of eight years with a non-parole period of six years.

The appellant applied for leave to appeal against the conviction on the grounds that:

- the trial judge should not have admitted the alleged admission in the exercise of his discretion under s.143 of the *Police Administration Act*
- the trial judge had misdirected the jury concerning the use which may be made of lies which, it was alleged, the appellant had told
- the warning given by the trial judge to the jury regarding the uncorroborated disputed admissions made by the appellant to police was insufficient and was not in accordance with the decision of the High Court in *McKinney and Judge v R* (1991) 171 CLR 468. *McKinney and Judge v R* requires a trial judge to warn a jury that it may be unsafe to act on the uncorroborated disputed admissions made by a person to police.

The appellant also applied for leave to appeal against the sentence on the grounds that it is manifestly excessive. The hearing of the application for leave to appeal against sentence was adjourned until such time as the application for leave to appeal against conviction had been determined.

On 8 October 1999 the court (Gallop, Mildren and Thomas JJ) unanimously granted leave to appeal against conviction but dismissed the appeal finding that:

- there was no error in the exercise of the trial judge's discretion to admit the unrecorded admission. The trial judge correctly directed himself that the admission had not been electronically recorded because of the appellant's request that he not be taped. Also, the later refusal on the part of the appellant not to answer questions meant that police had little opportunity to obtain confirmation of the alleged admission
- the appellant did not suffer any forensic disadvantage from the fact that he did not know until committal that the admission would be used against him
- the trial judge had not been in error in directing the jury on the use they may make of lies told by the appellant (an *Edwards* direction), even though the circumstances may not have strictly warranted the direction
- a *McKinney* direction had been given to the jury by the trial judge which was satisfactory in the circumstances of the case.

The application for leave to appeal against sentence was adjourned to a date to be fixed.

The appellant subsequently applied for special leave to appeal to the High Court of Australia. A note of the proceedings before the High Court appears at page 184 of this report. On 24 March 2000, special leave to appeal was refused by the High Court.

On 20 April 2000 the Court of Criminal Appeal (Angel, Thomas & Riley JJ) unanimously granted leave to appeal against sentence for two reasons. Firstly, in the calculation of the sentence for these offences, which was cumulative on a previous sentence for a Commonwealth offence, an error had occurred which meant the appellant could be released

on parole prior to the commencement of the sentences for the current Northern Territory offences. Secondly, it appeared an error had occurred in the amount of heroin the applicant was sentenced for.

The appeal against sentence was allowed, the sentence was set aside and the case remitted back to the sentencing judge for re-sentencing. The appellant was remanded in custody for re-sentencing. The appellant had not been re-sentenced as at 30 June 2000.

The applicant pleaded guilty to one count of stealing \$52,000.00 from his de facto wife. He was sentenced to three years imprisonment with an 18 months non-parole period and was ordered to pay \$52,000.00 by way of restitution.

The applicant had been in an on-and-off sexual relationship with the victim over a period of 4 years and they had planned to marry. The victim received a cheque for approximately \$52,000.00 from her former husband as a result of a matrimonial property settlement, which she intended to use for her own purposes. The applicant deposited the cheque into a credit union account and discovered that the funds could be withdrawn immediately. He told the victim that the cheque would take seven days to clear but secretly withdrew the \$52,000.00 in cash. The applicant then deserted the victim and dissipated the entire amount of money.

The applicant sought leave to appeal against the sentence on the grounds that it was manifestly excessive and that the delay between the applicant's offending and when he was sentenced was not properly taken into account (a period of three years and nine months).

The Crown was not called upon to respond to the applicant's submissions and leave to appeal was unanimously refused. The court remarked that no issue had been raised which warranted the grant of leave to appeal.

The respondent pleaded guilty to one count of doing a dangerous act (punching victim in the face with such force that it knocked him to the ground causing him to strike his head on the bitumen road) with aggravating circumstances that he caused grievous harm to the victim and was under the influence of alcohol at the time. When passing sentence the court took into account a further offence of resisting arrest.

Just prior to the assault, the 17 year old respondent was sitting in front of the Alice Springs 24-hour store with two co-offenders. He was intoxicated. The victim, a taxi driver, pulled up outside the store at about 4.20 am to purchase some food. As the victim went into the store he noticed the respondent trying to get into the front driver's seat of the taxi. The victim told the respondent that he already had a fare. An argument then broke out between the victim and one of the co-offenders. A co-offender punched the taxi driver to the head. The respondent punched the victim. The respondent was restrained by others and pulled away from the area. The respondent then approached the victim from behind, emerged in front of him and punched the victim to the front of his face. The victim was unable to see the punch coming and was knocked to the ground striking his head on a concrete step. The blow immediately rendered the victim unconscious. The victim was in a coma for several months. He sustained permanent brain damage and became totally reliant on others for day-to-day needs.

The respondent had a prior conviction for assault committed nine months before the present case.

The respondent was sentenced to two years and six months imprisonment. It was ordered that the sentence be suspended after the prisoner had served six months. Pursuant to s.40(6) of the *Sentencing Act* an operational period of two years and six months was fixed. No conditions were ordered to apply.

The Crown appealed against the sentence on the following grounds:

- that the sentencing judge erred in imposing a sentence which was manifestly inadequate in all of the circumstances of the case
- by suspending all but six months of the head sentence the net sentencing disposition was inadequate in all the circumstances of the case
- in imposing an inadequate head sentence and in suspending the greater proportion thereof the learned sentencing judge erred in that he placed too much weight on subjective matters generally and failed to give sufficient weight to the seriousness of the objective facts of the case.

The court unanimously allowed the appeal. Two of the judges expressed the view that an appropriate head sentence should have been in the order of imprisonment for five years and that a considerable portion of this sentence should have been served. However, because this was a Crown appeal and because of the principle of *double jeopardy*, the court held the appropriate course was to impose a lesser sentence on re-sentencing by the Court of Criminal Appeal.

The court substituted a sentence of three and a half years imprisonment. It was ordered that the sentence be suspended after the respondent has served 12 months. An operational period of three years was fixed.

Tatam v Svikart

10 December 1999 – Mildren, Thomas and Bailey JJ

The appellant was convicted of assault in the Court of Summary Jurisdiction. He was sentenced to imprisonment for nine months. It was ordered that the sentence be suspended after he had served one month. Pursuant to s.40(6) of the *Sentencing Act* an operational period of one year was fixed. He appealed both the conviction and the sentence to the Supreme Court.

A significant issue in the Court of Summary Jurisdiction was that of identification. Before the Supreme Court the appellant argued that the magistrate had inadequately warned himself of the dangers of acting on the identification evidence. The appellant argued that the circumstances of the case required a full identification warning be given in accordance with the decision of the High Court in *Domican v The Queen* (1991-92) 173 CLR 555. The respondent argued that because of the circumstances of this particular case (one of the witnesses was in some respects familiar with the appellant) a full *Domican* direction was not necessary.

The Supreme Court held that although the magistrate had erred in not giving himself a full warning about the dangers of identification evidence, no substantial miscarriage of justice had occurred. The appeal was dismissed.

The appellant then appealed to the Court of Appeal, on a number of grounds including that the Supreme Court erred in concluding that no substantial miscarriage had occurred.

After hearing the substantial part of the appellant's argument concerning the proper role of warnings in identification cases, the respondent conceded that error had occurred. Accordingly, the appeal was allowed and the conviction and sentence quashed. The case was remitted for re-hearing before the Court of Summary Jurisdiction.

Green v R

3 June 1999 and 11 February 2000 – Gallop, Angel and Mildren JJ – 133 NTR 1

The 38 year old appellant pleaded guilty in the Supreme Court to one count of having anal sexual intercourse with a boy aged eight without consent. Pursuant to s.65 (8) of the *Sentencing Act*, the appellant was sentenced to an indefinite term of imprisonment. Section 65 provides that *the Supreme Court shall not impose an indefinite sentence on an offender unless it is satisfied that the offender is a serious danger to the community because of ... the risk of serious physical harm to members of the community if an indefinite sentence were not imposed.*

The sentencing judge concluded that the appellant was a serious danger to the community because of:

- the appellant's character, age and his proclivity for aggression and loss of control of his sexual instincts when he is drunk
- the severity of the violent offence
- the special circumstances being a total of four sexual assaults between 1980 and 1997, the last three of which were upon young children, and the consequences of such offences on young children.

As required by s.65(5) of the *Sentencing Act*, the sentencing judge specified a nominal sentence of six years, being the period that the court would have fixed had it not imposed an indefinite sentence. As required by s.72 of the *Sentencing Act*, the court ordered the indefinite sentence be first reviewed on 25 September 2000.

The appellant sought leave to appeal against the sentence of the indefinite term of imprisonment on a number of grounds.

The court unanimously granted leave to appeal as this is the first occasion the Court of Criminal Appeal has been called upon to consider the provisions of the *Sentencing Act* relating to indefinite sentences for violent offenders and as the application raised a number of important questions concerning the application of the terms of those provisions.

The court dismissed the appeal holding that:

- in determining whether an offender is a serious danger to the community, the Supreme Court:

- (a) should consider the dangerousness not only at the time of sentencing but also at later points in time
- (b) may take into account the views of members of the community as to the possibility of rehabilitation of the offender
- the exercise of the discretion to impose an indefinite sentence is not confined to a case which falls into the worst category such as to attract the maximum penalty.

Neal v R

18 April 2000 – Angel, Thomas and Riley JJ

The applicant, a 21 year old male with no prior convictions, pleaded guilty to 17 counts under the *Misuse of Drugs Act* of possessing, producing and supplying a variety of dangerous drugs including cannabis, amphetamine, ecstasy and LSD and possessing tainted property, ie property obtained from the unlawful supply of dangerous drugs. The applicant began purchasing dangerous drugs in May 1998 with a view to selling the drugs at a profit to enable him to commence a legitimate business producing compact discs. In late October 1998 the applicant made several sales to a police informant and to an undercover police OFFICER. Following his arrest in October 1998 the applicant admitted to the offences charged and indicated his intention to plead guilty from the earliest time. The applicant's only other income during the six month period of unlawful activity was \$130.00 a week from unemployment benefits.

Although the applicant co-operated with the police to a large extent, he declined to identify the persons who supplied him or to whom he supplied. The sentencing judge said that had the applicant *co-operated with police in that regard substantial discount on penalty may have been available to (him)*. The sentencing judge found the applicant to be *a significant street dealer*.

The applicant was sentenced to an aggregate sentence of three years imprisonment. A non-parole period of two years was fixed. It was ordered that the tainted property (a stereo system, an answering machine, camera, computer disc drives, a laptop computer, computer speakers, a printer, coins and \$2,000.00 cash) be forfeited to the Crown.

The applicant applied for leave to appeal against the severity of the sentence on the ground that:

- the sentence and non-parole period imposed was manifestly excessive in all the circumstances of the offence and the applicant.

The Crown was not called upon to respond to the applicant's submissions and leave to appeal was unanimously refused.

Roper v Dore

11 April and 1 June 2000 – Angel, Mildren and Riley JJ

On 26 June 1998 the Court of Summary Jurisdiction ordered that the appellant serve a period of imprisonment of 29 months to commence on 2 April 1998. The court ordered that

she be released on 1 February 1999 and the balance of her imprisonment held in suspense.
The conditions of her release were that she:

- place herself under the supervision of a delegate of the Director of Correctional Services and obey all reasonable directions as to vocational training, employment, residence, associates and reporting and education counseling and treatment for alcohol abuse and anger management
- at once on release, admit herself to a Rehabilitation Centre chosen by the delegate and remain there for 13 weeks, participating fully in the program of the centre, obeying all rules and directions and doing nothing to cause her discharge from the programme.

The appellant came before the Court of Summary Jurisdiction on 11 August 1999 to be dealt with for breaching both conditions. The breaches were found proved and the court restored the balance of her sentence pursuant to s.43(5)(d) of the *Sentencing Act* save for the one month the appellant had spent in custody on remand pending hearing of the breach proceedings.

The appellant appealed to the Supreme Court on the ground that:

- the restoration of the whole of the suspended sentence was unjust in view of all the circumstances that have arisen since the suspended sentence was imposed, and in view of the absence of any re-offending.

The argument before the Supreme Court focused on whether the restoration of the sentence was *unjust* within the meaning of s.43(7) of the *Sentencing Act*. The appellant argued that the fact that she had not re-offended illustrated that her rehabilitation was in progress. The court rejected the appellant's submission and dismissed the appeal.

The appellant appealed to the Court of Appeal on the ground that the Supreme Court had not properly addressed the issues of what amounted to *unjust* within the meaning of s.43(7) of the *Sentencing Act*.

The court unanimously allowed the appellant's appeal. The court made a number of observations concerning the operation of s.43(7) of the *Sentencing Act*. In relation to the appellant's submission that it would be an error for a breaching court to consider matters which arose prior to the suspended sentence being imposed, the court held that such an interpretation would lead to *artificial* and *often unjust results*.

Secondly, it held that a court faced with breach proceedings *shall make an order restoring a sentence or part sentence where it is satisfied that there has been a breach of a condition of an order suspending a sentence or where there has been an offence committed against the law in force in the Territory or elsewhere that is punishable by imprisonment. The court will proceed in that way unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including any subsequent offence.* The court confirmed the approach taken previously by single judges in which they had made a comparison between the behavior bringing about the breach action and measured it against the circumstances that prevailed prior to the sentence being imposed.

In the case of this appellant, the court took the view that in all of the circumstances there was evidence that rehabilitation had progressed, notwithstanding that she was in breach. The court took into account that this appellant had not re-offended during five and a half months at liberty. Further, there was an explanation for her conduct which was consistent with her succumbing to family pressure. The court concluded that while it would not have been unjust to restore *part* of the sentence, the restoration of 18 months imprisonment was disproportionate to what was required. The court ordered the appellant's release from custody on conditions including attendance at a residential Rehabilitation Centre. The balance of her sentence was suspended.

Powers v R

12 February 1999 – Riley J

26 May 1999, 17 April and 6 June 2000 – Martin CJ,
Angel and Riley JJ

The appellant was found guilty by a jury at trial of one count of unlawfully causing grievous harm. The appellant was employed at a Darwin nightclub as a bouncer. On the night of the alleged assault the victim visited the nightclub where in the early hours of the morning he became involved in an altercation as a result of which he was removed from the nightclub by two bouncers including the appellant. The Crown case was that after they reached the footpath the appellant set about the assault alleged by hitting and kicking the victim, particularly about his head, whilst he lay on the ground. The victim sustained extensive facial fractures during the assault. The appellant was sentenced to a term of three years imprisonment which was to be suspended after 12 months.

At trial the central issue was the identification of the appellant as the assailant.

At trial a witness to the alleged assault (M) gave evidence that that she had seen the appellant and first recognised him as the assailant at the Court of Summary Jurisdiction prior to the committal proceedings about two and a half years after the assault. M told two other potential witnesses who were with her at the time about it but no evidence of that fact was led from them at trial because it was thought to be inadmissible. This out of court identification was not led in evidence at the committal but M identified the appellant as the assailant in the courtroom during the committal proceedings and again at the trial. The prosecutor was informed of this out-of-court identification by M on the day before the trial was listed to begin. The prosecutor advised the court and the defence of this fact before any evidence was called. Counsel for the appellant did not object to the new evidence being led nor seek a *Basha* enquiry. When directing the jury the trial judge made no comment upon the failure of the two potential witnesses to say anything to support M's out-of-court identification.

At trial the Crown called another witness to the alleged assault (J) from whom it was not intended to lead evidence of identification. As J was giving evidence she was observed by the prosecutor pointing towards the appellant *when she talked about the bouncer who did it*. She did that on two occasions neither of which was observed by the trial judge or counsel for the appellant. The prosecutor informed the trial judge of this fact in the absence of the jury. Having heard submissions as to whether a direction should be given to the jury, the trial judge ruled that he would wait until the evidence was concluded and direct the jury at that time. He did, however, warn J before she resumed her evidence and in the absence

of the jury that she should not give the jury any indication that she was making an identification. J said she had not done so. None of this was repeated in front of the jury. At the conclusion of the evidence the trial judge directed the jury that they could take into account the body language and gestures made by a witness. The trial judge indicated to the jury that J did not identify the appellant as the assailant *nor did she imply it by anything she said or by any gesture*.

Leave to appeal was granted on 12 February 1999.

In unanimously allowing the appeal the court identified two errors in addition to the unsatisfactory state of the evidence.

Firstly, the witness M having given evidence as to what she did when she identified the appellant out-of-court, it was an error on the part of the prosecutor to fail to lead evidence from the other two witnesses on the point. The evidence was admissible if it went only to what she said and the strength of her identification but not to the truth of what was said.

Secondly, the court held that whether or not J impliedly identified the appellant as the assailant was a matter of fact for the jury to determine. To tell the jury that J did not *imply (identification of the appellant as the assailant) by anything she said or by any gesture* was a misdirection. J should have been asked in the presence of the jury as to whether what she had done was intended to identify him. If that had been done and appropriate directions given by the trial judge, then such effect as her oral evidence or gestures may have had upon the jury could have been dispelled. There was a real possibility that the jury took into account that evidence and the gesture in coming to the finding of guilt. That evidence was not the subject of any direction or warnings to the jury as to the dangers associated with that particular identification.

The court ordered that the appeal be allowed, the conviction quashed and a re-trial ordered.

DPP Reference No 1 of 1999 14 and 15 December 1999, 22 June 2000 –
Mildren, Thomas and Bailey JJ

The respondent was a senior elder of the Gumatj Aboriginal Clan (the Gumatj clan) and responsible for enforcing Aboriginal law (Yolngu law) in land which the Gumatj clan *owned* (the land). The land in question was part of land granted pursuant to the ***Aboriginal Land Rights (Northern Territory) Act*** (the ***Land Rights Act***).

A professional photographer took photographs of the land and children of the Gumatj clan in the respondent's presence and without his permission. The respondent told the photographer to give the children \$50.00. The photographer refused. The respondent demanded the film, stating that the photographer had taken/captured the spirit images of the children. The photographer backed away and a tug-of-war with the camera strap ensued. The respondent successfully obtained the camera and removed the film, placing it in a rubbish bin. The respondent returned the camera to the photographer.

In criminal proceedings against the respondent, the magistrate found that it was an offence against both the land, including the people who identified with the land, and Yolngu law for a stranger to come onto the land and take photographs for commercial purposes without the permission of a senior elder. The magistrate also accepted that the stranger is expected to *expiate his wrongdoing* and pay a penalty or make other amends by giving compensation.

The magistrate dismissed charges against the respondent of unlawfully assaulting the photographer and unlawfully damaging the photographer's camera and film. The magistrate was satisfied that the respondent intended to apply force to the photographer and damage the film. The magistrate was not satisfied that the respondent had not acted in the exercise of a right granted or recognised by Yolngu law. The magistrate was also not satisfied that the respondent had not exercised an honest claim of right without intention to defraud in that the respondent acted honestly and reasonably as an enforcer of Yolgnu law on the land when he seized the camera and destroyed the film and assaulted the photographer in the process.

Section 26(1)(a) of the ***Criminal Code*** provides that an act is authorised if it is done in the exercise of a right granted or recognised by law.

Section 30(2) of the ***Criminal Code*** provides: *A person is excused from criminal responsibility for an act or omission done or made with respect to, or for an event caused to, property in the exercise of an honest claim of right and without intention to defraud.*

Ten *questions of law* said to have arisen during the criminal proceedings were referred to the Supreme Court at the request of the Director of Public Prosecutions pursuant to s.162A of the ***Justices Act***.

On 12 March 1999 the court determined that eight of the questions should not be answered as they went beyond what was permitted by s.162A of the ***Justices Act***.

The court determined the questions fit for consideration under s.162A of the ***Justices Act*** as follows:

- can traditional Aboriginal law found an honest claim of right within the meaning of s.30(2) of the ***Criminal Code***?
- on the facts in this case is s.26(1)(a) of the ***Criminal Code*** capable of authorising the impugned behaviour of the respondent?

The court answered both questions *No*.

In answering the first question, the court held that the respondent could only succeed under s.30(2) of the ***Criminal Code*** if he honestly believed that the rights he asserted were recognised by the general law in force in the Northern Territory sufficient to displace the operation of criminal responsibility arising from the commission of the offences, even if this was not the correct legal position.

In answering the second question, the court held that neither under common law nor the *Land Rights Act (Northern Territory)* 1976 (Cth) and *Native Title Act* 1993 (Cth) was the right asserted by the respondent granted or recognised. The right claimed by the respondent owed its existence to a moral order, religious code or other non-legal regimen.

The decision of the Supreme Court is reported in (1999) 128 NTR 1.

The original defendant in the Court of Summary Jurisdiction (who, although found not guilty of all charges before that court, was entitled to be heard in the Supreme Court upon determination of the questions reserved) appealed a number of the determinations to the Court of Appeal on the grounds, in effect, that the determinations were wrong in law.

The Court of Appeal reframed the questions for its consideration in the following terms:

- on the facts of this case is s.26(1)(a) of the *Criminal Code* capable of authorising the impugned behaviour of the respondent?
- can the right found by the learned magistrate as having been exercised by the respondent correctly be categorised as a right giving rise to an *honest claim of right* within the meaning of s.30(2) of the *Criminal Code*.

The court unanimously answered both questions in the negative and dismissed the appeal.

In answering the first question the court held that there is nothing in the *Aboriginal Land Rights (Northern Territory) Act* or the *Native Title Act* 1993 (Cth) which impliedly recognises the right of a senior elder to enforce Aboriginal traditional or customary law on Aboriginal land, whether in respect of Aboriginals who have a right to be on the land, or anybody else. The court said at paragraph 32:

So far as the criminal law is concerned ... to the extent that traditional law existed in that area prior to the establishment of the Colony of New South Wales in which it was originally located, that law was replaced by the criminal law of New South Wales; after 1863 by the criminal law of South Australia, and thereafter by the criminal law of the Northern Territory, including in 1984, the Criminal Code. ... There is no dual system of law in the Northern Territory...

In answering the second question the court found that that s.30(2) of the Northern Territory *Criminal Code* was, in all material particulars, the same in operation as s.22 of the Queensland *Criminal Code*. The court held, following the decision of the High Court of Australia in *Walden v Hensler* (1987) 163 CLR 561 (a decision on s.22 of the Queensland *Criminal Code*), that the defence of honest claim of right provided for in s.30(2) of the *Criminal Code* applies only to property offences and cannot apply to the offence of common assault.

The court held that the honest claim of right in an unlawful damage case is a belief held with respect to the property damaged. In this case there was no evidence that the respondent believed he had an interest in the film. Even though the magistrate found that the respondent held an honest belief he had a right to destroy the film, the magistrate had failed to find that the respondent's belief in the right was a belief in a right recognised by law. In order for the respondent to be acquitted, the magistrate needed to at least entertain a reasonable doubt as to whether or not the respondent held such a belief. The only beliefs which the magistrate

relied upon were the respondent's belief as an incident of his obligation as a law enforcer on Gumatj land to enforce Yolgnu law. That finding, by itself, was insufficient.

The court noted there was no form prescribed under the regulations to the *Justices Act* to initiate a case stated under s.162A and made a number of observations concerning the procedure to be followed in future cases. The judgment also contains a useful discussion of the scope, form and limits of questions of law capable of being referred under s.162A of the *Justices Act*.

Mitchell v R

10 April 2000 and 30 June 2000 – Martin CJ, Angel and Mildren JJ

The appellant pleaded guilty to one count of having sexual intercourse without consent (rape). The Crown case was that at about 4.30 am on the morning of 1 November 1998, the appellant approached the victim from behind in Mitchell Street, Darwin, and pulled her into an enclosed yard. He then raped her digitally, vaginally and anally over a period of about one and a half-hours. The appellant's conduct towards the victim varied from aggression to apology. These severe mood swings caused great distress to the victim. At one time he told the victim that he would be able to cut her throat and leave her there. The appellant let the victim go at about 6.00 am. She complained immediately to friends and then to the police. She identified the appellant in an identification parade. DNA evidence also identified the appellant. The appellant left the Northern Territory for Queensland using a false name nine days after the offence. He was arrested in Queensland and extradited to the Northern Territory.

On 17 September 1999 the appellant was sentenced to ten years imprisonment. A non-parole period of seven years was fixed.

The appellant applied for leave to appeal against the sentence on the grounds that:

- the sentence was manifestly excessive given the circumstances of the offence and the appellant
- the sentencing judge erred in failing to give adequate weight to the appellant's plea of guilty.

Leave to appeal was granted on 10 April 2000.

On the hearing of the appeal the appellant argued that this type of offence usually attracted a sentence of around eight years imprisonment. The appellant also argued that the sentence of ten years demonstrated that the sentencing judge had given insufficient weight to the appellant's plea of guilty. When sentencing the appellant the sentencing judge said that he had taken the appellant's plea of guilty into account without giving any indication to what extent the sentence had been discounted because of this factor. There was no requirement under Northern Territory law for the sentencing judge to do so. The court noted that the issue of quantification of discounts on sentence for pleas of guilty was to be argued in the matter of *Kelly v R* (see following case). The Crown argued that to reward pleas of guilty

with a discount expressed in terms of a fixed percentage of the head sentence would unduly restrict the court's sentencing discretion.

The court unanimously dismissed the appeal, save that it altered the original order so that the head sentence of ten years was deemed to have commenced from 7 February 1999 rather than 12 July 1999. Neither of the specific grounds of appeal were made out.

Kelly v R

10 April 2000 and 30 June 2000 – Martin CJ, Angel and Mildren JJ

The appellant pleaded guilty to one count of aggravated unlawful entry of a dwelling house and aggravated assault. The circumstances involved the applicant entering his neighbour's dwelling at night-time and assaulting the victim with an iron pipe. The victim sustained a broken left arm, four large lacerations to the head requiring stitches and numerous cuts and bruises to the body.

The appellant was sentenced to six years imprisonment for the unlawful entry and two years imprisonment for the assault. It was ordered that the sentences be served concurrently. A non-parole period of three years was fixed.

The appellant applied for leave to appeal against the sentence on the grounds that:

- the sentence of six years imprisonment for the unlawful entry was manifestly excessive in all the circumstances
- the sentencing judge erred in failing to give sufficient weight to the applicant's plea of guilty at the earliest opportunity.

The application was heard on 10 April 2000.

When sentencing the appellant the sentencing judge said that she had taken the plea of guilty into account as well as his co-operation at all times with the authorities. She said *(h)is plea of guilty is taken into account both because he has spared the victim the ordeal of giving evidence and he has also saved the community the expense of a trial. I take into account the plea of guilty is an expression of his remorse. He must be given a substantial discount on sentence for the plea of guilty. I note the plea of guilty was indicated from the outset in these proceedings.*

The respondent submitted that the development of a principle encouraging the specification of reduction of sentence due to a timely plea of guilty would be of benefit to the operation of the criminal justice system in the Northern Territory. Further, such an approach would not be inconsistent with the *Sentencing Act*. The respondent also submitted the law had developed in this direction in other comparable jurisdictions and the approach was supported by the *Standing Committee of Attorneys-General Work on Criminal Trial Procedure, 24 September 1999*.

While agreeing with the appellant's submission to the effect that the extent of any reduction in sentence due to an early plea of guilty should be reflected in the sentencing judge's

remarks, the respondent argued that this appellant had received the full benefit in sentence from the early indication of the plea.

The court unanimously upheld the application for leave to appeal, and the appeal itself, on both grounds. New sentences were imposed which, allowing for some cumulation, provided for a head sentence of three years and three months with a non-parole period of 50% of that time.

In relation to the submission made in respect of the court's recognition of the plea of guilty and the quantitative reflection of this in sentences generally, the court said, inter alia:

In our opinion it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor, but we do not consider that it is possible to lay down any tariff. The weight to be given to the plea will vary according to the circumstances.

Often, as here, the assistance given to the law enforcement authorities in investigating the offence may diminish the value of the plea given the strength of the prosecution case arising from that assistance. The combination of those two factors, however, allows for greater mitigation than would a plea without that co-operation. Public expense occurs not only in the courts, but also in the investigatory process.

In addition, it may be appropriate in the circumstances, rather than reduce the head sentence, to give effect to the value of the plea by other means such as a partially suspended sentence or home detention order, or by the imposition of a fine, to mention only some of the obvious examples. ...We do not believe that by encouraging sentencers to quantify the discount allowed for a guilty plea we are placing the sentencing discretion in a procedural straightjacket.



**OUTSTANDING APPEALS IN THE
COURT OF CRIMINAL APPEAL AND
COURT OF APPEAL AS AT 30 JUNE 2000**

Eupene v Hales

3 March and 26 May 2000 - Martin CJ, Angel and Thomas JJ

The appellant pleaded guilty in the Court of Summary Jurisdiction to one count of having possession of property, namely, seven pearls which were reasonably suspected of having been stolen or otherwise unlawfully obtained, contrary to s.61 of the *Summary Offences Act*.

The appellant was arrested when he visited premises where police happened to be conducting a search in relation to a drug related matter. A search of the appellant's bag revealed seven pearls in a tobacco tin. The pearls were wrapped in tissue paper inside the tin. The appellant told police he had found the pearls while he was walking along Vestey's beach.

The submissions on sentence focused on whether the appellant could avail himself of the *exceptional circumstances* provision contained in s.78A(6C) of the *Sentencing Act*. That provision permits a court to refrain from imposing a minimum mandatory sentence if, inter alia, the offence was *trivial* in nature. The Court of Summary Jurisdiction found that the offence was not trivial in nature and sentenced the appellant to the mandatory minimum 14 days imprisonment.

The appellant appealed to the Supreme Court. However, because of the existence of two apparently conflicting decisions of the Supreme Court as to the meaning of *trivial* in the context of the section, the Supreme Court referred the proceedings to the Full Court for determination.

In the Full Court the respondent's submissions highlighted the apparent different approaches taken by the Supreme Court in the decisions of *Curnow v Pryce* [1999] NTSC 116, 29 October 1999 and *R v Torres* (SCC 9728321), 19 August 1999. In *Curnow v Pryce*, the court applied a test which effectively meant that an offence would not be regarded *trivial* if the objective circumstances probably warranted a sentence of imprisonment (actual or suspended). That decision emphasised the remedial nature of s.78A(6C) of the *Sentencing Act*. In *R v Torres* the court emphasised the objective circumstance of each particular case without regard to what the result should be.

Argument before the Full Court considered approaches taken in other jurisdictions when the term *trivial* is used in legislation. The Full Court also sought argument from the parties on whether the elements of the unlawful possession charge had been made out in the Court of Summary Jurisdiction proceedings.

The Full Court heard argument on 3 March and 26 May 2000. The court reserved its decision. No decision had been delivered as at 30 June 2000.

Harrison v R

Application filed 2 March 1998

On 22 January 1998 the applicant, an Aboriginal male of diminished intelligence, was found guilty by a jury of the rape of a 59 year old teacher in the Barunga Community. This offence occurred in February 1996. The only evidence implicating the applicant in the offence was that the DNA profile of the offender matched the DNA profile of the applicant. The nine-day trial heard exhaustive evidence as to the testing and interpretation of DNA results.

On 18 February 1998 the applicant, who had one prior conviction for rape in 1988 when he was aged 16 years, was sentenced to 14 years imprisonment. A non-parole period of nine years ten months was fixed.

The factors making the offence serious were the assault occurred in the victim's house, the applicant was armed with a knife, the applicant threatened to kill the victim and held the knife to her throat, the assault extended over a period of several hours, the victim was penetrated numerous times and the assault left the victim with a severe and enduring back problem.

On 2 March 1998 the applicant applied for leave to appeal against conviction and sentence. The application for leave to appeal against conviction was discontinued on 15 September 1999. The sole ground of the application for leave to appeal against sentence is that it is crushing and manifestly excessive.

Subsequent to being sentenced for the present offences, the applicant was convicted and sentenced for similar and unrelated offences committed in September 1997 while on bail for the present offences. The applicant has applied for leave to appeal against severity of sentence in respect of this matter also (see next case).

On 16 March 1999 it was ordered that both applications for leave to appeal against sentence be heard together. The applications have been listed for hearing in July 2000.

Harrison v R

Application filed 15 October 1998

The applicant, an Aboriginal male of diminished intelligence, pleaded guilty to one count of unlawful entry of a dwelling house at night-time with intent to steal, three counts of having unlawful sexual intercourse without consent (rape) and one count of stealing. The applicant went to a motel in the early hours of the morning and tried to open the doors to a number of rooms. Through an open window he saw the victim sleeping in bed. He entered the room, assaulted the victim and committed three acts of vaginal and anal rape. Before leaving, he stole \$15.00 cash. These offences were committed in September 1997.

The offences were committed while the applicant was on bail for similar offences committed in February 1996 (see the preceding case). In addition, the applicant had one prior conviction for rape in 1988 when he was aged 16 years. At the time of sentencing in the present case, the applicant had been sentenced to 14 years imprisonment with a non-parole period of nine years ten months for the 1996 offences. The applicant has applied for leave to appeal against severity of sentence in respect of this matter also (see previous case).

On 16 September 1998 the applicant was sentenced to a total of 12 years imprisonment, six years of which were ordered to be served concurrently with the sentence for the 1996 offences. The sentences imposed in both cases total 20 years imprisonment. A new non-parole period of 13 years was fixed. It was ordered that the non-parole period commence on 16 September 1998, ie from the date of sentence in the present case.

The applicant applied for leave to appeal against sentence on the grounds that:

- the sentencing judge erred in ordering accumulation of sentences resulting in the term of 12 years imprisonment
- the sentencing judge erred in ordering that the non-parole period commence on 16 September 1998
- the sentencing judge gave insufficient weight to the plea of guilty
- the sentencing judge imposed a sentence that was crushing.

On 16 March 1999 it was ordered that both applications for leave to appeal against sentence be heard together. The applications have been listed for hearing in July 2000.

Margarula v Rose Appeal filed 7 April 1999

On 1 September 1998 the appellant was found guilty in the Court of Summary Jurisdiction of having trespassed unlawfully on enclosed premises, namely a large storage container owned by Energy Resources of Australia (ERA), contrary to s.5 of the *Trespass Act*. The trespass took place on a container situated on the Jabiluka Mineral Lease on 19 May 1999. The appellant was convicted and ordered to pay a \$500.00 fine and \$20.00 victim levy. The appellant was a traditional Aboriginal owner of the relevant land for the purposes of the *Aboriginal Land Rights (Northern Territory) Act*.

She appealed her conviction to the Supreme Court on the following grounds:

- the court erred in finding that at the time of the alleged offence the appellant was not acting in accordance with her entitlements under s.71(1) of the *Aboriginal Land Rights (Northern Territory) Act*.
- the court erred in having regard to the painting of a slogan on the container in determining whether the appellant's actions had interfered with ERA's enjoyment of its estate or interest in the land

- the court erred in finding that the appellant's actions interfered with ERA's enjoyment of its estate or interest in the land
- the court erred in finding that the appellant's actions were unlawful despite her belief as to her right to be on the land
- the court erred in regarding, as an aggravating factor, that the appellant's intention in entering the land was to ventilate her claim of entitlement or her beliefs.

On 12 March 1999 the court dismissed the appeal.

The unsuccessful appellant has appealed to the Court of Appeal. The appeal has been listed for hearing in July 2000.

Clancy v Gokel

Appeal filed 26 October 1999

The appellant, a juvenile, pleaded guilty in the Juvenile Court to two counts of unlawful use of a motor vehicle, five counts of stealing, three counts of aggravated unlawful entry of a dwelling house, one count of attempted unlawful entry, one count of aggravated unlawful damage and two counts of unlawful damage. The offences were committed during six different episodes of offending over a period of two months.

The circumstances were fairly typical of their kind, entry into houses and stealing cash, jewellery, alcohol and other goods. On one occasion the appellant stole a keycard from her aunt and proceeded to withdraw \$290.00 in six different transactions from her aunt's account. This money was spent on alcohol, cannabis, clothing and jewellery. The motor vehicles were taken for joy riding and none of them were damaged. On most, if not all occasions, the appellant was accompanied by another or others. The value of the property stolen was \$4,400.00 and the value of the property damaged was \$3,540.00.

The appellant was 14 years old when the offending took place. The offences were committed while the appellant was four months into an 18 months good behaviour bond for offences of dishonesty. The appellant's prior history included a previous breach of a community service order.

The appellant was sentenced to a total of 12 months detention which was wholly suspended upon the appellant entering into a bond to be of good behaviour for two years. Conditions were attached to the bond. Although the maximum penalties for the offences ranged between two years and twenty years, 12 months is the maximum period for which an order for detention of a juvenile may be made.

The appellant appealed to the Supreme Court on the ground that the sentence was manifestly excessive. On 2 September 1999 the court dismissed the appeal.

The unsuccessful appellant has appealed to the Court of Appeal, claiming that the Supreme Court was in error in dismissing the appeal.

The appeal has been listed for hearing in September 2000.

Fittock v R

Application filed 9 December 1999

On 11 November 1999 the applicant was found guilty by a jury of one count of murder and one count of attempted murder. This followed a trial in Alice Springs.

The applicant had been in a relationship with the deceased for a number of months during the early part of 1998. In about May 1998 the deceased ended the relationship and commenced another relationship with one J, the victim of the attempted murder. The applicant had difficulty coping with the termination of his relationship with the deceased. The applicant made many attempts to reconcile his relationship with her to no avail.

On 6 November 1998 the applicant went to the Borroloola Inn where between 6.00 pm and midnight he consumed approximately 12 mid-strength beers. He then drove to his home where he consumed rum.

The applicant then fully loaded a semi-automatic rifle with 21 rounds, took a bottle of rum and walked to the perimeter fence of the hotel where the deceased was working

After the deceased finished work at about 2.00 am on 7 November 1998 she went to a room in a demountable building situated not far from where the applicant was sitting. J was waiting for the deceased inside the room.

The deceased left the demountable at about 4.00 am. As she shut the door of the demountable she was confronted by the applicant who shot her once in the chest at point blank range killing her almost immediately. Another shot may have been fired.

Upon hearing the shot, J got up and went towards the door. As he did so, the applicant entered the demountable saying *Where's this cunt, I got some for him and I still got some for me*. The barrel of the gun was then pointed at J. Before the applicant could pull the trigger, J grabbed the barrel of the rifle and pushed it up into the air. As he did so the applicant discharged the rifle. A struggle then ensued with the applicant and J grappling for the firearm. During this time the rifle was discharged by the applicant on at least two occasions.

J was able to wrestle the firearm away from the applicant. Nearby hotel guests and staff then attended and assisted in restraining the applicant until police arrived.

At trial, the applicant denied that the initial shot or shots fired were intended to, or in fact did, hurt the deceased. It was not his intention to kill her or J but merely to *talk* to them. The killing was accidental.

The applicant was sentenced to mandatory life imprisonment for murder and to 8 years imprisonment for attempted murder. It was ordered that both sentences be served concurrently. A non-parole period of 4 years was fixed in respect of the sentence of eight years for attempted murder. The court is precluded from fixing a non-parole period in respect of the sentence of life imprisonment for murder.

The applicant has applied for leave to appeal against both convictions on the grounds that they are unsafe and unsatisfactory.

The applications have not yet been listed for hearing.

Waye v R Application filed 22 December 1999

The applicant pleaded guilty to the following offences all of which occurred on 4 December 1998.

- one count of unlawful entry of a building with circumstances of aggravation
- one count of stealing
- two counts of unlawful entry of a dwelling house with circumstances of aggravation. One of these unlawful entries was aggravated by the fact that the applicant intended to have sexual intercourse without consent, ie to commit the offence of rape, the unlawful entry occurred at night-time and the applicant was armed with offensive weapons, namely a knife and a hammer
- one count of having sexual intercourse with a female without her consent (rape).

The applicant called psychiatric evidence on the plea in mitigation.

In sentencing the applicant the sentencing judge found that:

- on the balance of probabilities the applicant was not a paranoid schizophrenic and was therefore subject to the general and specific deterrent aspects of sentencing
- rehabilitation did not play such a significant role in sentencing in view of the serious nature of these offences. Deterrence and retribution were factors in the sentencing process.

In arriving at the sentence imposed, the sentencing judge firstly fixed notional sentences totalling 18 years and seven months imprisonment. Taking into account the *principle of totality* the sentences were reduced to a total of 12 years imprisonment which was then ordered to be served cumulatively upon a previous sentence of two years and six months imprisonment for the offence of robbery committed on 24 October 1998. The applicant's total effective sentence is 14 years and six months imprisonment. A non-parole period of eight years and six months was fixed.

The applicant has applied for leave to appeal on the grounds that:

- the effective sentence of 14 years and six months and the non-parole period of eight years and six months were manifestly excessive given the circumstances of the offence and of the applicant
- the learned sentencing judge erred in fixing the length of the non-parole period, in that an eight years and six months period was not a due proportion of the effective head sentence of fourteen years and six months

- the learned sentencing judge erred in that she did not give any or sufficient weight to the psychiatric evidence called on behalf of the applicant.

The application has been listed for hearing in August 2000.

McKay v R Application filed 7 March 2000

The applicant was convicted by a jury of two counts of having sexual intercourse with a female without her consent. Each offence was contrary s.192(3) of the *Criminal Code*. The applicant was, at his own request, unrepresented by counsel at trial.

The victim's employment involved assisting people with psychiatric disabilities, including securing accommodation. After the applicant had secured accommodation through the victim's employer, the victim visited him at his residence as part of her duties. The Crown case was that the applicant asked the victim to look at something in his bedroom that was not working. When the victim went to the bedroom he followed her, pushed her onto the bed, turned the light off, locked the door and had vaginal and anal intercourse without her consent. The applicant hit the victim who became unconscious for a period and at one stage put a pillow over her head. The applicant stopped what he was doing and the victim ran out the door and drove away in her vehicle. The victim made an immediate complaint of rape. There was medical evidence capable of corroborating the complaint. There was evidence of distress.

The applicant's case, which was rejected by the jury, was that the victim consented to the acts of sexual intercourse. He denied pushing or hitting the victim and he denied the use of a pillow. After having consensual sexual intercourse the victim was acting a bit strange and really sad. The applicant unlocked the door and the victim then left the house.

On 8 February 2000 the applicant was sentenced to an aggregate sentence of 14 years imprisonment. A non-parole period of ten years was fixed.

On 18 February 2000 the sentencing judge declined the applicant's application to re-open the sentencing proceedings pursuant to s.112 of the *Sentencing Act*. Section 52 of the *Sentencing Act* prohibits an aggregate sentence for offences contrary to s.192 of the *Criminal Code*.

The applicant has applied for leave to appeal against sentence on the grounds that:

- the sentencing judge erred in imposing an aggregate sentence
- the sentencing judge erred in imposing a sentence that was manifestly excessive in all the circumstances
- the sentencing judge erred in the application of the principles of general deterrence to the sentences imposed on the applicant
- the sentencing judge erred in treating as a circumstance of aggravation the manner of the conduct of the trial by the applicant.

The application has not yet been listed for hearing.

The applicant pleaded guilty to 18 counts of aggravated unlawful entry of a building, 18 counts of stealing, seven counts of aggravated criminal damage and two counts of aggravated unlawful use of a motor vehicle. The value of the property stolen or damaged was in excess of \$120,000.00. Very little of the property stolen was recovered. Little explanation was offered for the commission of the offences. The offences of unlawful entry were characterised by the destruction of personal possessions of the victims within the residences.

The applicant, who was aged 18 years at the time of the commission of the offences, had an extensive prior criminal history for similar offences. A co-offender involved in several of the offences was dealt with in the Court of Summary Jurisdiction. The co-offender had no prior criminal history.

The applicant was sentenced to five years and eight months imprisonment. A non-parole period of two years and ten months was fixed.

The applicant has applied for leave to appeal on the grounds that:

- the sentencing judge gave undue weight to the applicant's substantial prior record of offending
- the sentencing judge attached undue weight to the appellant's age of 18 years as compared to the co-offender's age of 17½ years
- the sentencing judge attached insufficient weight to the principles of parity
- the sentencing judge attached insufficient weight to the appellant's prospects of rehabilitation
- the sentencing judge failed to have regard to the principle of totality.

The application has been listed for hearing in September 2000.

After a hearing following a plea of not guilty the appellant was found guilty by the Court of Summary Jurisdiction of possessing a trailer reasonably suspected of having been stolen or otherwise unlawfully obtained. The trailer was worth about \$2,000.00. The finding of guilt attracted a mandatory minimum sentence of 14 days imprisonment unless the appellant proved, on the balance of probabilities, that he had *co-operated with law enforcement agencies in the investigation of the offence* as provided for by s.78A(6C)(d) of the *Sentencing Act*.

The court found that although the appellant co-operated with the police in that he kept his appointments with police during the investigation, was polite, courteous and answered questions for as long as questions were asked, co-operation also entailed a substantial

degree of truth in what was said on those occasions. As the court had disbelieved the account given by the appellant to the police during the investigation, the court found that the appellant had not *co-operated with law enforcement agencies*.

The appellant was sentenced to 14 days imprisonment.

The appellant appealed to the Supreme Court on the ground that the magistrate erred in his interpretation of s.78A(6C)(d) of the *Sentencing Act* in terms of co-operation with law enforcement agencies. On 8 March 2000 the Supreme Court dismissed the appeal.

The unsuccessful appellant has appealed to the Court of Appeal on the grounds that:

- the Supreme Court erred in its interpretation of s.78A(6C)(d) of the *Sentencing Act*
- the Supreme Court should have interpreted the section beneficially and in favour of the citizen
- the Supreme Court should have interpreted the concept of *co-operation* to include *any co-operation* and should have held *any co-operation* invoked s.78A(6C)(d) of the *Sentencing Act*
- section 78A(6C)(d) of the *Sentencing Act* does not abridge the right *nemo tenebatur prodere seipsum*.

The appeal has not yet been listed for hearing.

Nelson v R

Application filed 26 May 2000

The applicant pleaded guilty on an ex officio indictment to one count of unlawfully causing grievous harm and one count of assault with circumstances of aggravation. The victim in each case was different. The assaults were committed a month apart.

On 30 November 1999 the applicant came home to his wife of 13 years after a day of drinking and an argument arose about the applicant's drinking habits. The applicant became increasingly angry, pushed his wife over, dragged her from the lounge room to the kitchen and poured a half-full kettle of recently boiled water over the victim. He then stabbed her three times with a steak knife. The burns were particularly serious and the victim is still receiving regular medical attention.

On 31 December 1999 the applicant was drinking in the grounds of Alice Springs High School with a small group of people including his mother. The applicant requested that his mother give him money for alcohol and she refused. He then ripped off a branch from a nearby tree of about a metre long and one and a half inches thick and struck his mother over the head with the stick, then twice to her face, once to her mouth and once to her left eye. He then punched her in the eye. The mother then gave him money for him to stop hurting her. The victim suffered bruising and lacerations to the eye and mouth.

The applicant was sentenced to three years and six months imprisonment on the charge of causing grievous harm and to 20 months imprisonment on the charge of assault. The sentencing judge stated that although the two sentences should be served cumulatively because they were quite separate offences on different dates involving different victims, the

sentences would be made concurrent as to eight months to take account of the *totality principle*. The total effective head sentence imposed was four years and six months.

Section 53(1) of the *Sentencing Act* requires a court sentencing an offender for 12 months or longer (provided the sentence is not suspended in whole or in part) to fix a period during which the offender is not eligible to be released on parole *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*. The sentencing judge declined to fix a non-parole period because the applicant had an extensive history of offending, the attacks were cowardly and serious attacks upon Aboriginal women, the appellant appeared to have little or no prospect of rehabilitation and the applicant had previously breached a suspended sentence imposed for aggravated assault.

The applicant has applied for leave to appeal on the grounds that:

- the sentence is manifestly excessive taken as a whole in all the circumstances and of the applicant
- the learned sentencing judge erred in failing to set a non-parole period
- the learned sentencing judge erred in failing to give due weight to the totality principle by not making the sentence for assault wholly or substantially concurrent with the sentence for causing grievous harm.

The application has not yet been listed for hearing.



APPLICATIONS IN THE HIGH COURT

Melbourne v R

19 June 1998 - McHugh and Callinan JJ;
10 December 1998 and 5 August 1999 – McHugh,
Gummow, Kirby, Hayne and Callinan JJ – 164 ALR 465

This case was noted in the 1996-97 Annual Report at page 39, the 1997-98 Annual Report at pages 65 and 66 and the 1998-99 Annual Report at page 71.

The appellant was found guilty by a jury of murder. He ran a defence of diminished responsibility which was not accepted by the jury. At trial, the appellant did not deny that he had stabbed the deceased. However, he sought a conviction for manslaughter on the ground of diminished responsibility. To establish diminished responsibility, it was necessary for the jury to accept the truth of a number of statements the appellant made to investigating police OFFICERS and to experts who were called at his trial to give evidence of his psychiatric state. At trial, the appellant adduced evidence of good character. The trial judge instructed the jury as to the relevance of the good character evidence to the improbability of the appellant having committed the offence, but made no direction as to the relevance of the good character evidence to the jury's decision whether to believe what the appellant had told the police and expert witnesses. Trial counsel for the appellant did not ask for a further direction at the time.

The appellant appealed to the Court of Criminal Appeal. He contended that the trial miscarried because the trial judge failed to instruct the jury that it could take account of evidence of his good character in deciding whether he had told the truth to the police and expert witnesses. The appellant contended that a more extensive direction should have been given that canvassed the use a jury might make of his good character in deciding whether to believe what he had told the police and expert witnesses.

In dismissing the appeal, the Court of Criminal Appeal held that evidence of good character may not be used to support the credibility of the accused in interrogation by police or the truthfulness of the history given to experts as a foundation of their respective opinions.

The appellant applied to the High Court and was granted special leave to appeal on 19 June 1998 on the following ground:

- may evidence of good character be used to support the credibility of out of court assertions by an accused person which are relied on by an expert witness as the foundation of his or her opinion?

The appeal was heard by the High Court sitting in Canberra on 10 December 1998. The court reserved its decision.

On 5 August 1999 the High Court, by a majority (Kirby and Callinan JJ dissenting), dismissed the appeal.

The court held that where an accused has led evidence of good character, the trial judge is not obliged to direct the jury as to the manner in which it can be used. The court also held that the evidence of the appellant's good character did not, in this case, require the trial judge to give a direction further to that which she gave.

Miles v R

24 March 2000 – Gleeson CJ, Kirby and Callinan JJ

The decision of the Court of Criminal Appeal dismissing the appeal against conviction is noted at page 159 of this Report.

The unsuccessful appellant in the Court of Criminal Appeal applied for special leave to appeal to the High Court of Australia. The application raised issues concerning:

- the operation and interpretation of s.143 of the *Police Administration Act* which allows the admission into evidence of disputed, unrecorded confessions or admissions in some circumstances
- the correct content of the *McKinney* warning when such evidence is admitted into evidence
- the requirement for, and content of, an *Edwards* direction on lies to be given to a jury when the suggested lie is essentially a denial of the prosecution case by an accused who gives an alternative explanation.

The application for special leave was heard in Canberra on 24 March 2000.

Special leave to appeal was unanimously refused.



OTHER SIGNIFICANT CASES

R v Hudson

The accused, an Aboriginal male, appeared before the Supreme Court at Alice Springs on 16 August 1999 and pleaded not guilty to one count of murder. A jury was then empanelled to try the case. The case is significant because of the manner in which the Crown presented its evidence to the jury. As there was no dispute between the Crown and the accused as to the facts essential to establish the case for the prosecution, the entire Crown case was presented by way of formal admissions made by the accused. The admissions were made pursuant to s.379(1) of the *Criminal Code* which provides that *an accused person may by himself or his counsel admit on the trial any fact alleged against him and such admission is sufficient proof of the fact without other evidence.*

No oral evidence was called in the Crown case. Prior to trial it was agreed between the Crown and the defence that the sole issue for determination by the jury was whether the accused was of diminished responsibility at the time of the killing so as to reduce the verdict from murder to manslaughter. The onus of proving that the accused was of diminished responsibility was on the accused. Because the issue had to be proved by the defence, the standard of proof required was on the balance of probabilities.

The admitted facts were read out to the jury and tendered in evidence as an exhibit. The Crown then closed its case. The effect of the facts was that on 28 November 1998 the accused, aged 18, had anally raped, and then drowned, the six year old female victim at a waterhole on the Finke River near Middle East Camp at Hermannsburg. The accused was a petrol sniffer.

The defence called one witness, a neuropsychologist who had some clinical experience in the Northern Territory with petrol sniffers. The effect of his evidence was that petrol sniffers do have reduced executive function. Ultimately, he conceded, in cross-examination, that the accused demonstrated reasonable executive function. The jury clearly did not accept the plea of diminished responsibility.

On 17 August 1999 the jury returned a verdict of murder and the accused was sentenced to mandatory life imprisonment.