IN THE HIGH COURT OF AUSTRALIA **No. S 121 of 2011**
SYDNEY OFFICE OF THE REGISTRY

BETWEEN:

DEREK MULDROCK
Appellant
AND
THE QUEEN
Respondent

10 **RESPONDENT'S SUBMISSIONS**

Part I: Publication

This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

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(i) Whether the standard non parole period provisions apply only to offences in the middle of the range of objective seriousness or to all offences to which they relate.

(ii) Whether the CCA erred in taking the standard non parole period into account in determining the appropriate sentence in this case.

Part III: Section 78B of the Judiciary Act

This appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth)*. No such notice is required.

30 **Part IV: Statement of contested material facts**

4. 1 There was an agreed statement of facts. The facts were not referred to in any detail by the sentencing judge.

4. 2 The appellant fellated a 9 year old boy. The appellant was 30 at the time and had committed a similar offence 7 years earlier.

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4. 3 The boy in the present case lived with his mother in a granny flat attached to the house where the appellant lived. The appellant fixed the boy's bike and offered to go on a test ride with him. The boy's mother agreed.

4. 4 When the appellant and the boy were alone together, the appellant asked the boy if he wanted to go to the lake to see the animals. They decided to go swimming. The boy had no swimming costume or underwear but the appellant said he would not look.

4. 5 The boy went swimming naked, the appellant wore underpants or Speedos. The appellant tried to touch the boy's penis and bottom repeatedly but each time the boy pushed him away. Eventually the appellant touched the boy's bottom and the area around his penis (charge of aggravated indecent assault on Form 1).

4. 6 The boy got out of the water, the appellant pushed him to the ground, pinned him down by kneeling on his legs and sucked his penis twice for about 10 seconds. The boy kicked him in the shoulder or chest and the appellant fell back. The boy got dressed and rode off. The appellant yelled out "Come back, you wussy. You're just too scared to come back."

4. 7 The boy rode to a nearby house, he was in "a very distressed state" (Statement of Facts p2.9) and told the occupant that a man had touched his private parts. The man drove him home by which stage he "was sobbing hysterically and shaking". He told his mother what had happened and the police were called.

4. 8 The offence occurred on 19 March 2007. The appellant was interviewed two days later. He denied touching the boy. He said he had planned to go for a swim alone but the boy invited himself along. He thought the boy's mother had allowed the boy to come to set him up. He said the boy became agitated, possibly because of mosquito bites, kept whinging and took off on his bike.

4. 9 About 3 months later, on 5 June 2007, a DNA sample was taken from the appellant which matched the DNA found on the boy's pants. The appellant eventually pleaded guilty on 15 October 2008.

4. 10 The appellant had a prior conviction for an offence involving fellatio on a 10 year old boy for which he was sentenced to a 12 month intensive correctional order. He also had subsequent convictions for driving offences and custody of a knife in a public place for which no penalty was imposed.

4. 11 The appellant has been assessed as having a mild intellectual disability. He has particular deficits in communication skills and empathy. His cognitive reasoning and adaptive behaviour is considered lower than 99% of the population. He was in a special education class in high school and completed year 10. He has worked in a variety of jobs, including gardening, laundry work, and bicycle assembly.

4. 12 The appellant has been prescribed Androcur, an anti-libidinal medication and dexamphetamine following a diagnosis of attention deficit hyperactivity disorder. The Androcur helped quell his urges towards children although he is not able to take it for an extended period because of possible side effects.

4. 13 The sentencing judge imposed a head sentence of 9 years, with a non-parole period of 96 days, backdated to enable the appellant to be released immediately and enter a secure residential rehabilitation program in Orange for sexual offenders with intellectual disabilities.

PART V: Applicable Legislative provisions

The respondent agrees with the appellant's list of legislative provisions.

PART VI: Statement of Argument

Standard Non-Parole Period

6. 1 The appellant contends that the standard non-parole period applies "only" to offences in the middle of the range of objective seriousness and is "therefore" "irrelevant" to offences below the middle of the range (AWS at [28]).

6. 2 There is nothing in the terms of the legislation to suggest that the standard non-parole period (SNPP) provisions apply only to a particular category of offence.

6. 3 Section 54A explains what a standard non-parole period is and 54B sets out the sentencing procedure in respect of standard non-parole periods.

6. 4 Section 54A does not state that the SNPP "applies" to, or should be imposed for, offences in the middle of the range of objective seriousness. Rather, s54A states that the SNPP "represents" the non-parole period for an offence in the middle of the range. The term "represents" has been said to be "curious" in this context.[1] However, the use of such a term, under a heading which is expressed in the

[1] ***R v Clark*** (2008) 189 A Crim R 332 at [88] per Basten JA.

interrogative tense, suggests that the provision was intended to be more explanatory than prescriptive. It does not purport to set the condition governing the application of the SNPP.

6. 5 The application of the SNPP is set out in the following section, s 54B. It is in relatively straightforward terms allowing for the imposition of a longer or shorter NPP where there are reasons for that determination. The only requirement is that the court record the reasons for setting a longer or shorter NPP and identify in the record each factor taken into account (s54B(4)).

6. 6 Section 54B(2) has been said to be "mandatory" because it is in terms that "the court is to set the standard non-parole period" *(emphasis added)* but the effect of the section is not to mandate a particular NPP for a particular category of offence rather it preserves the full scope of the judicial discretion to impose a non-parole period longer or shorter than the SNPP. This is especially evident when read in the context of s 54C where the provisions contemplate that the court may impose no custodial sentence at all: s54C(1).

6. 7 Section 54B allows the court to have regard to the full range of considerations as reasons for setting a longer or shorter NPP. The permissible reasons are those set out in s 21A (s54B(3)) which encompass any matter that is permitted to be taken into account under any Act or rule of law in addition to the 34 aggravating and mitigating factors listed in the section itself. In effect, s 21A permits the application of all the factors relevant to determination of sentence under the common law.[2]

6. 8 Therefore, the effect of the provisions of Division 1A is that the court may take into account the full range of sentencing considerations and impose a longer or shorter NPP or no custodial sentence at all. There is nothing in the provisions that limits the sentencing discretion or confines the application of the SNPP to offences in the middle of the range, or to any particular categorisation of offence.

6. 9 The lack of an obvious relationship between ss 54A and 54B perhaps arises because the two sections refer to different things. Section 54A explains what is meant by the SNPP whereas s 54B applies to the determination of sentence.

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[2] ***R v Elyard*** (2006) 45 MVR 402 at [88] per Howie J; ***R v Way*** (2004) 60 NSWLR 168 at [57].

6. 10 Section 54A explains that the penalties listed are, to borrow the Oxford English Dictionary definition of the word "standard", exemplars for the non-parole period for offences in the middle of the range. It does not use more prescriptive language because it is recognised in the provisions of Div 1A as a whole that any individual case is unlikely to match that exemplar. That is so for two basic reasons implicit in the legislation itself. Firstly, the objective circumstances of any individual case will, in many, perhaps most, cases, have particular features which set it apart from some notional standard case. Secondly, the standard is set by reference to objective circumstances only, it does not purport to take into account all the factors relevant to sentence, as s 54B recognises. Therefore, it is inevitable that when all the circumstances of the case, including the subjective features are taken into account, almost all cases will involve variation from the standard.

6. 11 Section 54B recognises this by providing for variation from the standard where there are reasons for doing so. The reasons for variation include not only objective factors, but all the circumstances relevant to the determination of the sentence which s 54B preserves. It is therefore implicit in the legislation that full consideration of all relevant factors will seldom yield a determination consistent with the standard because the standard does not purport to reflect the full range of sentencing considerations. It is a reference point reflecting objective factors only.

6. 12 The standard operates as a reference point for the middle of the range in a similar way that the maximum penalty provides a reference point for the top of the range, and in the same way that the maximum penalty does not "apply" only to offences at the top of the range the SNPP does not apply exclusively to offences in the middle of the range.

6. 13 It has been held that the correct approach to the maximum penalty is that it is a reference point for all offences to which it applies even those offences far removed from the top of the range. It operates to set the maximum penalty available and indicates the seriousness with which the legislature regards the offence. In that sense it is an important consideration in the determination of the sentence for any individual offence but it does not operate as the specific penalty to be "applied" to any individual offence. Similarly, the SNPP is a reference point indicating the seriousness of the offence. Together with the maximum penalty, the two provide guideposts in the determination of the sentence while recognising that

the actual sentence to be imposed in any individual case will depend on the variety of factors operating in the particular case.

6. 14 As this Court held in ***Markarian v The Queen***[3], careful attention must almost always be paid to the maximum penalty although its relevance may vary according to all the circumstances of the particular case,:

> *"It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick."*

6. 15 In the respondent's submission, this is also the correct approach to the standard non-parole period. Careful attention must be accorded the SNPP for it invites comparison between the present case and the mid range case. However, inviting comparison to a mid range case is not to require that it be applied only to mid range cases.

6. 16 This was the interpretation suggested in the Second Reading Speech where the Attorney General emphasised the importance of preserving the "complex judicial discretion" and quoted the well known passage from the decision of this Court in ***Veen No 2*** to the effect that the various purposes of punishment often overlap, sometimes pointing in different directions and that none of them can be considered in isolation.[4]

6. 17 However, as the appellant's submissions in this court demonstrate, the SNPP provisions have come to be construed in a more categorical way.

6. 18 In ***R v Way***[5] the provisions were construed in terms that the SNPP "applied" to offences in the middle of the range of objective seriousness. This meant that the "critical focus" was to be on the assessment of the objective seriousness of the offence and called for a degree of precision in that assessment not previously required. The relevant question the sentencing judge must ask and answer was:

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[3] ***Markarian v The Queen*** (2006) 228 CLR 357 per Gleeson CJ, Gummow, Hayne, Callinan JJ at [30] - [31].
[4] Parliamentary Debates, Legislative Assembly, 23 October 2002 at 5814.
[5] ***R v Way*** (2004) 60 NSWLR 168 at [62] – [69].

"are there reasons for not imposing the standard non-parole period." (***Way*** at [117]).

6. 19 This involved a single stage sentencing process similar to that applied in sentencing generally. The Court in ***Way*** listed 2 matters that should be considered in answering that question (***Way*** at [118]). One was the assessment of the objective seriousness of the offence, and the second, the presence of aggravating and mitigating factors listed in s 21A *Crimes (Sentencing Procedure) Act.*

6. 20 However, since the decision in ***Way***, those two matters have been defined as two "steps" in the determination of the sentence. The "first step"[6] was the assessment of the objective seriousness of the offence. The second step was to consider whether there were aggravating or mitigating factors warranting an increase or reduction in the NPP determined in the first step.

6. 21 On this two stage approach, the SNPP is categorised as applying "only"[7] to offences which, in the first step, were held to be in the middle of the range of objective seriousness and where there has been a plea of not guilty. This is the approach adopted by the appellant in this Court to contend that as his offence was below the middle of the range and there was a plea of guilty, the SNPP had no relevance to his case.

6. 22 This two stage approach also required a degree of precision in relation to the two steps, in particular the first step[8] for that determined the application and degree of relevance of the SNPP. It has been held that the "first step", the assessment of precisely where in the range of objective seriousness the offence falls, must be "carefully considered and appropriately described"[9] and "unambiguous"[10] findings made.

6. 23 The reason for this precision is that the degree to which the offence falls outside the mid range determines the extent to which the SNPP applies and the degree of departure warranted. This is said to provide "some check against error"[11] because an assessment, for example, that the offence is slightly above or below the mid

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[6] ***R v Reyes*** [2005] NSWCCA 218 at [44]; ***R v Reid*** (2005) 155 A Crim R 428 at [19].
[7] ***R v Sharwood*** [2006] NSWCCA 157 at [61].
[8] ***R v Knight; R v Biuvanua*** (2007) 176 A Crim R 338 per McClellan CJ at CL at [4], per Howie J at [39]; ***R v McEvoy*** [2010] NSWCCA 110 at [75] – [87] per Simpson J; ***R v Sellars*** [2010] NSWCCA 133 at [11].
[9] ***R v Knight; R v Biuvanua*** (2007) 176 A Crim R 338 McClellan CJ at CL at [4].
[10] ***R v* Smith** [2009] NSWCCA 17 at [24].
[11] ***R v McEvoy*** [2010] NSWCCA 110 at [90] – [91] per Simpson J.

range would warrant a commensurately slight departure from the SNPP. Once that assessment of objective seriousness is made, if the NPP intended is substantially below or above the SNPP "the sentencing judge would be wise to examine whether other factors (for example, personal circumstances) warranted the differential. If they do not, the sentence should be re-considered."[12] Where the offence falls above the mid range then the maximum penalty becomes of more significance as a benchmark.[13]

6. 24 There has been some recognition[14] that this two stage approach was contrary to the principles enunciated by this Court in ***Markaraian*** and for that reason it has been held that it should be avoided for offences other than SNPP offences. However, the two staged approach has been held to be "necessary"[15] for SNPP offences.

6. 25 This is the antithesis of the approach identified by this Court in ***Wong***[16] and ***Markarian*** where it was held that a sentencing judge must take into account all of the circumstances of the offence and the offender together. Instead of that synthesis there is now a "dichotomy"[17] and "a strict line"[18] is to be drawn between the objective and subjective considerations. Matters not relevant to the assessment of objective seriousness are to "placed to one side"[19] for the purposes of the first step. Rather than regard the relevant considerations as forming, in the terms used by Gleeson CJ in ***R v Gallagher***[20], a complex of interrelated considerations very often competing and contradictory to arrive at a single sentence which takes due account of them all, the approach adopted after ***Way*** was to separate "objective seriousness" and use it to determine a particular range of non-parole period which is then varied up or down depending on other factors personal to the offender with care not to stray too far from the NPP determined in the first step.

6. 26 In reality, there is some artificiality in the distinction between the two stages because the factors relevant to the assessment of the objective seriousness overlap

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[12] ***R v McEvoy*** [2010] NSWCCA 110 at [91] per Simpson J.
[13] ***R v Knight; R v Biuvanua*** (2007) 176 A Crim R 338 per Howie J at [47].
[14] ***R v Georgopolous*** [2010] NSWCCA 246 per Howie J at [32].
[15] ***R v Mayall*** [2010] NSWCCA 37 per Howie J at [31].
[16] ***Wong v The Queen*** (2001) 207 CLR 584 at [74] – [77] per Gaudron, Gummow and Hayne JJ.
[17] ***R v Way*** (2004) 60 NSWLR 168 at [93].
[18] ***R v Way*** (2004) 60 NSWLR 168 at [98] – [99].
[19] ***R v Way*** (2004) 60 NSWLR 168 at [99].
[20] ***R v Gallagher*** (1991) 23 NSWLR 220 at 228, quoted with approval in ***Wong*** at [76].

with the reasons for departing from the SNPP, as was acknowledged in ***Way***.[21] For example, in a case such as the present, the offender's intellectual disability is regarded as an objective factor, although it is also a subjective factor. In this way, intellectual disability has been held to be relevant to determining the objective seriousness of the offence in the "first step", but it is also one of the mitigating factors listed in s21A (s 21(3)(j)) as a reason for setting a shorter NPP under s 54B in the "second step".

6. 27 Similarly, factors such as prior criminal history of similar offences, as in the present case, or the fact that the offence was committed while on conditional liberty, are not factors that are to be taken into account in assessing the objective seriousness of the offence, however, they are listed as aggravating factors in s 21A.

6. 28 More fundamentally, it is well established that such a categorical approach distorts the balancing process for it is not always possible to categorise a factor as objective or subjective, or as mitigating or aggravating. The various individual circumstances often operate in contradictory ways depending on the context. The present case serves as an example. The appellant submits that the fact that he was himself sexually assaulted at a young age together with his intellectual disability has resulted in his inability to deal with that experience which he then acts out. Viewed in this way, his intellectual disability and his history of such offences calls for understanding in relation to his moral culpability and indicates the need for treatment and counselling. On the other hand, the appellant's difficulty in controlling his sexual urges towards young boys together with his intellectual disability indicate that he presents a continuing danger and also suggests that the prospects for rehabilitation may be limited. This is confirmed by his previous conviction for a similar offence and the failure of the treatment administered at that time.

6. 29 This highlights the difficulty of attempting to isolate factors such as intellectual disability, or prior criminal history, and to apply them to a first step or second step in a tightly defined staged process.

6. 30 The correct approach is that the SNPP applies to all offences listed in the table in a similar way as the maximum penalty applies to all offences to which it relates.

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[21] ***R v Way*** (2004) 60 NSWLR 168 at [87].

However, its relevance in any individual case depends on all the circumstances of the particular case. A two staged approach is not required under the legislation. All factors relevant to the assessment of the appropriate sentence should be considered together. If the result of that assessment is that the appropriate non-parole period is longer or shorter than the SNPP then the reasons for that difference must be given. Those reasons will consist of all the factors that were taken into account to arrive at that result as s 54B permits.

6. 31 Accordingly, although the appellant's offence fell below the middle of the range of objective seriousness, the SNPP continued to apply to his offence. Whether or not the 15 year SNPP, or some other term, should be imposed was to be determined by taking into account all the relevant circumstances together.

Ground 2: The sentencing judge had found that the appellant was 'significantly intellectually disabled'. The Court erred in deciding that the finding 'was not justified by the contemporary evidence'.

6. 32 The appellant contends that the CCA was wrong to find that the appellant was not significantly intellectually disabled and that in doing so the Court substituted its own inexpert opinion based merely on the fact that he had a driver's licence and had undertaken employment for that of the unchallenged psychological evidence.

6. 33 The appellant is correct that there was no dispute that the appellant suffered from an intellectual disability. The evidence was that the appellant's disability was in the "mild" range and as the appellant points out, the categories of intellectual disability are terms of art and range from 'borderline', 'mild', 'moderate', 'severe', and 'profound' (AWS at [20]). The sentencing judge referred to the appellant as having a "significant" intellectual disability. The CCA pointed out that that was not consistent with the evidence and that the appellant's disability was "mild". That was not an error, it was simply a restatement of the evidence.

6. 34 The sentencing judge may have meant that the appellant's intellectual disability was significant in the determination of the sentence, although it is hard to tell as his Honour's reasons were very brief and there was no discussion of how the appellant's disability impacted on the determination of the sentence. Contrary to the appellant's contention, the CCA's treatment of this issue was not based on the fact that the appellant held a drivers licence and had held a variety of jobs.

6. 35 There was evidence throughout the psychological reports suggesting that, although the appellant had significant deficits in some areas, such as mathematics and literacy, it was not the case that he was entirely unaware of the nature of his actions or that they were wrong. The reports noted that the appellant understood that his conduct was wrong and that his predilection for young boys was a problem which he had to address, although, not unusually, he also tended to minimise his culpability by blaming others for putting him in situations which gave rise to his offences.

6. 36 When the appellant spoke to Ms Daniels about the 2000 offence he claimed that someone must have put ecstasy in his drink that day (Report of Ms Daniels dated 30/6/2000 at [190]). When asked about his court case he said "Yeah, I think a kid asked me to do something, and I thought I better do what he asked, because if I didn't, I thought he would make a worser story of it, so I agreed to suck him off orally. Stupid mistake." He gave a similar version to Dr Muir (Report of Dr Muir dated 8/5/2000 at p 2.2)(CCA at [28]).

6. 37 The appellant made similar comments about the present offence. He claimed to Dr Westmore that he had been set up (Report of Dr B Westmore dated 13/5/08 at p 2.9). He gave a similar account to his wing officer in gaol (Pre Release Report dated 21/8.09 at p 2.9).

6. 38 In relation to the 2000 offence Dr Muir noted that "Mr Muldrock does understand the nature of his offence and is aware that his actions were wrong. He is also aware that his fantasies about young children are inappropriate as well……He has retarded development of the mind and as a consequence does have difficulty in managing his impulses and controlling his actions. Whilst he is aware that what he was doing was wrong, it is only a superficial awareness." (Report of Dr K Muir dated 8/5/2000 at p3.2). The appellant acknowledged that he had problems with his sexuality and that the medication was helping. He spoke of his urges as "horrible thoughts" and he knew it was wrong to do such things to children. He said he "suck[ed] them off" but he would never do anything else, which suggested that he was able to distinguish some scale of seriousness in respect of such conduct (Report of Ms Daniels dated 30/6/2000 at [315]). Ms Daniels thought he showed some insight into his problem and he acknowledged he needed help to address it (at [325] – [330]).

6. 39 The CCA was also entitled to have regard to the evidence of the commission of the offence itself for it showed a degree of planning and deliberation. So too his conduct after the offence indicated that he appreciated the seriousness of what he had done. He denied the conduct when spoken to by police, and later even though he admitted he had done it, he attempted to minimise the criminality by blaming the boy and his mother.

6. 40 As the appellant points out, there was evidence that he had held a variety of jobs (Report of Dr Hayes dated 25/9/08 at p3.3) and had a drivers licence. There was also evidence that he lived away from home while in a relationship with a girlfriend (Report of Dr B Westmore dated 13/5/08 at p 3.7). At the time of the 2000 offence he reported having "a fairly active social life" and a wide range of interests including bonsai, computer spelling and film (Report of Ms Daniels dated 30/6/2000 at [200]). He told Dr Westmore he would like to learn computer skills and landscaping in future (Report of Dr B Westmore dated 13/5/08 at p 3.7).

Ground 4: The Court erred in its failure to find special circumstances. The Court erred in finding the treatment was or may be available in prison.

6. 41 As the appellant points out, Professor Hayes was concerned about the lack of treatment facilities in the correctional system (AWS at [25]). In her report dated 25 September 2008, Dr Hayes had expressed concern that the appellant would not get a place in an Additional Support Unit because the number of beds was limited and there were only 3 Additional Support Units in the state. Dr Hayes felt that if the appellant did not get a place in an Additional Support Unit he would be put in segregation or in protection because of his vulnerability and the nature of his offence (Report of Dr Hayes dated 25/9/08 at p 6.5).

6. 42 However, those concerns were not realised. The evidence was that the appellant had indeed been placed in an Additional Support Unit (Affidavit of Justin Warne dated 28 September 2009).

6. 43 Mr Warne stated that the Additional Support Unit was for offenders who needed to be placed outside the mainstream correctional centre environment because of their disability and the Unit provided assessment, general management and participation in specific programs to address offending behaviour (Affidavit of Justin Warne dated 28 September 2009 at [2]).

6. 44 Mr Warne described that inmates of the Unit are required to complete compulsory programs which include, Core Skills assessment, Identity Essential skills, Numeracy and Literacy and other programs. There were also other psycho-educational programs offered. In addition, inmates were seen on an individual basis to review coping and to address triggers that led to their offending behaviour (Affidavit of Justin Warne dated 28 September 2009 at [6] – [7]). The evidence from the Pre Release Report was that the appellant had had regular contact with the in house psychologist within the Additional Support Unit (Pre Release Report by Michele Jordan dated 21 August 2009 at p 3.7). The appellant completed a Core Skills assessment which determined that he could recognise numbers but could not perform simple addition or subtraction functions however, he could read unfamiliar texts and could write legibly although he required assistance with his spelling and punctuation and his reading is very slow (Pre Release Report by Michele Jordan dated 21 August 2009 at p 3.4).

6. 45 A program aimed at sexual offenders with intellectual disability and other cognitive impairments had been written and was being finalised. It was expected that it would be trialled in late 2009.

6. 46 Accordingly, the CCA was correct to find that treatment was available to the appellant within the prison system for the evidence was that the appellant had been placed in a special Unit where he had access to appropriate programs and would receive individual attention outside the mainstream prison environment.

Ground 3: The Court of Criminal Appeal erred in concluding that the sentencing judge had focussed entirely on rehabilitation and had not had regard to the other recognised aspects of sentencing.

6. 47 His Honour imposed a head sentence of 9 years with a non-parole period of 96 days. His Honour acknowledged that this form of sentence was "very unusual" and that "it may well be appropriate for the Court of Criminal Appeal to consider the situation here in light of the sentence I propose to pass" (ROS 3.9). The 96 day NPP plainly indicated that his Honour had focussed very heavily on rehabilitation.

6. 48 His Honour gave brief reasons which offered no explanation of the relevant factors which had led to this unusual result. The only description of the objective facts was that the "nature of the intercourse was oral carried out by the offender upon the child" (ROS at 1.3). The aggravated indecent assault offence on the

Form 1 was noted as being "in relation to the same child on the same occasion shortly before it when they were swimming, and it is in relation to him touching him in a sexual way." There was no further mention of the objective circumstances.

6. 49 The only reference to the subjective circumstances was that "he is, in my view, significantly intellectually disabled"... ... "The other significant matter is that in the year 2000 the offender was convicted of an offence of almost the same nature up in far north Queensland." (ROS at 2.3).

6. 50 There was also no discussion of the significance of the appellant's paedophilia and the difficulties he had in controlling his sexual urges towards young boys, nor of the nature of the appellant's intellectual disability, or of the particular deficits he suffered in that regard and how they related to his paedophilia and his offending behaviour, and how that relationship affected his moral culpability or the prospects of rehabilitation. There was not even any mention of his age.

6. 51 It was evident that his Honour wanted the appellant released immediately so that he could enter the Selwood Lane facility, and as the CCA noted (CCA at [31]), this appeared to divert his Honour from the other factors that were also relevant to the determination of the appropriate sentence.

6. 52 Rehabilitation was plainly an important consideration in the appellant's case and this was accepted (CCA at [23] – [26], [44]), but there were other relevant purposes to be taken into account in accordance with s 3A *Crimes (Sentencing Procedure) Act*; punishment, personal and general deterrence, protection of the community, accountability, denunciation and recognition of the harm done.

6. 53 The Crown conceded in the CCA that in light of the appellant's mental disability general deterrence was of less significance than it would be in the case of a person not suffering from such a disability (CCA at [23]). However, that did not mean that all considerations other than rehabilitation were to be excluded.

6. 54 Dr Hayes was of the view that the appellant has "deficits in empathy" and "cognitive distortions regarding the offences". Dr Hayes considered that the appellant needed to participate in a programme which focused on the development of empathy skills and addressed the cognitive distortions: (Report of Dr Hayes dated 25/9/08 at p 5.8).

6. 55 Similar concerns had been expressed by Ms Daniel's in her report 8 years earlier where Ms Daniels noted that the appellant's remorse was "primarily related to his own feelings as a victim" (Report of Sharon Daniels & Associates dated 30/6/00at [60]) and that he has "little control over his acting out behaviour" (at [70]).

6. 56 It was these concerns that led to the conclusion that the appellant should enter a program that could teach such skills. However, those comments also gave rise to other concerns. The need for training in empathy skills may well suggest that, from the viewpoint of rehabilitation, participation in such a program would be beneficial. On the other hand, the appellant's lack of empathy and cognitive distortions regarding the offences also raised concerns about his moral culpability and his likelihood to re-offend. This lack of empathy and the fact that the appellant has twice committed offences against young boys meant that protection of the community was also an important factor to be taken into account.

6. 57 The appellant contends that the sentence gave effect to the need for the "protection of the community" (AWS at [75], [79]), presumably in the sense that the community was protected because the appellant was in a residential facility and receiving treatment to address his sexual urges. If the treatment resulted in there no longer being a risk of re-offending that would "benefit the community" in the long term (ROS at 3.6) although it is not clear that that is what is meant by the protection of the community in s 3A. The appellant's rehabilitation was a future prospect that may confer a benefit to the community if that possibility eventuated but protection of the community refers to protection from a current risk. That purpose is usually served by custodial segregation rather than participation in a residential treatment program.

6. 58 The appellant further contends that placement in the treatment centre was an alternative form of custody and the appellant may have been required to spend a significant period there, perhaps years, subject to the decision of the Parole authority (AWS at [78]). However, that was not the point for that is true of all prisoners serving terms in excess of 3 years. They remain under the supervision of the parole authority and may not be released at the expiry of the NPP.

6. 59 The more fundamental difficulty with this approach is that it is contrary to the long established principle that the NPP is not to be fixed solely or primarily to serve the interests of the offender's rehabilitation. The approach of treating the

NPP as the shortest period possible to facilitate the offender's rehabilitation was rejected by this Court in ***Power v. The Queen***[22] and has been consistently rejected since[23].

6. 60 Part of the reason for that is, as Gibbs J stated in ***R v Pedder***[24], a court "cannot abdicate its duty to impose a proper sentence on the assumption that, if the offender were sentenced to a short term of imprisonment, he might be transferred to and kept in a security patients' hospital." That view was quoted with approval in both ***Veen*** [No 1][25] and ***Veen*** [No 2][26].

6. 61 The CCA was correct to hold that, while some considerations, such as general deterrence, were to be given less weight because of the appellant's intellectual disability, all relevant factors were to be taken into account (CCA at [23] – [26], [42]).

6. 62 As the CCA found, there was evidence that the offence was premeditated (CCA at [34]). The appellant approached the boy's mother 1 -2 weeks before the offence and told her the boy was "gifted" and suggested the boy play keyboard with him at the children's Sabbath at their local church (Statement of Facts p 1.5). At a later stage, the appellant offered to fix the boy's bike. He then suggested they go on a test ride together. The appellant told the boy's mother that they would ride around the circle of the street where they lived (Statement of Facts p 1.8). The mother agreed to that suggestion. However, after they rode off and were alone the appellant suggested to the boy that they ride to the lake which was about 1 – 2 kilometres away. At the lake he told the boy he would not look if the boy took off his clothes. The appellant got into the water with the boy and made a number of attempts to touch him which the boy rebuffed (Offence of aggravated indecent assault on the Form 1). The appellant then used force to hold the boy down and fellate him. The managed to escape by kicking the appellant in the chest and riding off on his bike.

6. 63 When he was questioned the appellant did not merely deny the incident he constructed a version where he claimed that the boy had invited himself to come

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[22] ***Power v The Queen*** (1974) 131 CLR 623.
[23] The authorities affirming the approach taken in ***Power*** are reviewed in ***Bugmy v The Queen*** (1990) 169 CLR 525 per Mason CJ & McHugh J at 530 -1, per Dawson, Toohey, Gaudron JJ at 536.
[24] ***R v Pedder*** (Unreported; 29 May 1964; Queensland Court of Criminal Appeal)
[25] ***Veen v The Queen [No 1]*** (1979) 143 CLR 458 at 469.
[26] ***Veen v The Queen [No 2]*** (1988) 164 CLR 465 at 475.

swimming, that the boy went into the water by himself, became agitated possibly because of mosquito bites, kept whinging and finally rode off on his bike (Statement of Facts at p 4). The version he gave to his psychiatrist Dr Westmore, over a year later, also suggested that the boy had followed him to the lake (Report of Dr B Westmore13.5.08 at p 2.8 – 3.2). Three months later police took a buccal swab and the DNA matched that found on the pants the boy was wearing on the day of the offence. A plea of guilty was not entered until 15 October 2008, 17 months after the offence.[27]

6. 64 The statement of facts recorded that immediately after the assault the boy was in "a very distressed state" (Statement of Facts p2.9) and by the time he got home he "was sobbing hysterically and shaking". The longer term effects were that he has difficulty sleeping without the light on, he feels scared of being alone, scared of playing with older children, scared of men. He said "I don't want to feel sad and scared but I can't stop these feelings that come into my mind when I lest expect it." He said he did not feel this way before: "I don't trust anyone anymore and I am always worried that I will be hurt again. I hate feeling like this."(Victim Impact Statement dated 20.8.08 part of Exhibit A).

6. 65 These matters were not mentioned by the sentencing judge. The appellant's intellectual disability was of course a very important feature which had to be given due significance in what was a serious offence committed by an offender with an acknowledged problem controlling his sexual urges towards children. However, it needed to be taken into account together with all the relevant considerations and assessed within the statutory framework that applied to this offence.

Dated: 3 May 2011

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[27] Transcript of sentence hearing 10/12/08 at p 4.15.