R v Hitanaya [2010] NTCCA 03

PARTIES:	THE QUEEN
	v
	HITANAYA, Fansi
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 11 of 2010 (20939664)
DELIVERED:	17 JUNE 2010
HEARING DATES:	3, 4 JUNE 2010
JUDGMENT OF:	MARTIN (BR) CJ, RILEY & SOUTHWOOD JJ
APPEAL FROM:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE

Maintaining a sexual relationship with a child under the age of 16 years in circumstances of aggravation – Crown appeal - whether sentencing Judge erred in finding applicant not a "sexual predator" – whether sentencing Judge erred in assessing weight to be given to aggravating and mitigating factors - whether sentence manifestly inadequate – appeal allowed.

Criminal Code s 127(1) & (2).

D v Western Australia [2009] WASCA 155; *Poulton v State of Western Australia* [2008] WASCA 97; *R v Bara* (2006) 17 NTLR 220; *R v Baxter*, unreported, New South Wales Court of Criminal Appeal 7 May 1991; *R v D* (1997) 69 SASR 413; *R v Fitzgerald* (2004) 59 NSWLR 493; *R v Hermann* (1988) 37 A Crim R 440; *R v Holder and Johnston* [1983] 3 NSWLR 245; *R v JO* (2009) 24 NTLR 129; *R v Johnston* (1985) 38

SASR 582; *R v Osenkowski* (1982) 30 SASR 212; *R v PDW* (2009) 25 NTLR 72; *R v Riley* (2006) 161 A Crim R 414; *R v Salameh*, unreported, New South Wales Court of Criminal Appeal 9 June 1994; *R v Williams* (1990) 53 SASR 253; *Ryan v The Queen* (2001) 206 CLR 267, cited.
JAF v State of Western Australia (2008) 190 A Crim R 124 considered.

REPRESENTATION:

Counsel:

Appellant:	W J Karczewski QC
Respondent:	J Tippett QC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Maleys Barristers and Solicitors

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Hitanaya [2010] NTCCA 03
No. CA 11 of 2010 (20939664)

BETWEEN:

THE QUEEN
Appellant

AND:

FANSI HITANAYA
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 17 June 2010)

The Court:

Introduction

[1] This is a Crown appeal against a sentence of four years imprisonment, suspended after service of two years, imposed for the crime of Maintaining a Sexual Relationship with a Child Under The Age of 16 Years. The crime was accompanied by the circumstance of aggravation that the respondent had sexual intercourse with the child. The maximum penalty for the crime is 20 years imprisonment.

[2] The grounds of appeal complain that the learned sentencing Judge erred in finding that the applicant could not be described as a "sexual predator" and

that his Honour erred in assessing the weight to be given to various aggravating and mitigating factors. In addition, ground 4 complains that the sentence was manifestly inadequate.

[3] For the reasons that follow, in our opinion the sentence was manifestly inadequate and this is one of those rare and exceptional cases in which the Crown appeal should be allowed and the respondent re-sentenced.

Facts

[4] The offending occurred between 1 July 2009 and 22 November 2009 when the respondent was aged 37 years and the female victim was aged 13. The respondent was a teacher and met the victim at school at the beginning of the 2008 school year. As well as being the victim's dance teacher, the respondent was the victim's pastoral care group leader.

[5] Over a period the victim approached the respondent in his capacity as her pastoral care group leader to discuss personal issues. The respondent gained the trust of the victim by telling her that she could talk to him without fear and that he would not disclose her concerns to any other person. The victim then disclosed to the respondent that she had been the victim of sexual abuse when she was a young child. Over the following months the respondent and the victim had a number of personal discussions about the abuse and other matters.

[6] As to the development of the relationship, and the facts of the offending, the following facts were agreed before the sentencing Judge:

"The defendant became aware of the complainant's and her family's religious beliefs and sought to find out more about their faith. The defendant befriended the complainant's family and undertook Bible studies with them. The defendant was invited to the complainant's home for lunches and dinners over the course of the following months. He eventually gained this family's trust to such a degree that he earned the title of uncle. The defendant was thereafter referred to as Uncle Fansi.

The defendant was informed by the complainant's mother and he also had become aware that the complainant had a crush on him. The parents of the complainant became concerned about the attitude changes in their daughter and had removed her from his pastoral care group. The defendant was aware that she was taken out of his class due to her infatuation with him.

The defendant continued seeing the complainant at school. And stated during his record of interview with police that he had given her some comfort cuddles on occasions when she was upset.

Shortly before the mid-year school break in or about June 2009, the defendant and complainant were alone in the dance room. The defendant kissed the complainant on the mouth before stepping back, stating, 'I'm sorry, I didn't mean that, I shouldn't have done that. I think you'd better go now'.

The relationship developed with the complainant regularly contacting the defendant on his personal mobile telephone late at night wanting to talk to him. The defendant would drive his red Honda Civic, Northern Territory registration 564 793 to a street near the complainant's residence. The complainant would then sneak out of the family home and meet the defendant at his vehicle parked in the street some distance down from the home.

During these meetings which often went for hours, the defendant and the complainant would begin by talking, but would soon engage in kissing. In August after about the third intimate meeting in his car, the defendant suggested to the complainant that they would be more comfortable at his house. To which the complainant agreed and he drove them to his flat.

From this point on their encounters would involve the defendant receiving a phone call from the complainant in the middle of the

night. The defendant would then pick the complainant up from near her home residence and drive her to his house. The defendant would then return the complainant before morning. These meetings occurred once or twice a week until the defendant's apprehension on the night of 21 November 2009.

For the first one or two occasions the defendant and complainant just talked and kissed in the defendant's bedroom. However, on the next occasion the defendant undressed himself and removed the complainant's top and bra before fondling her breasts whilst kissing.

Shortly after the above incident, the defendant on the very next occasion completely undressed the complainant, rolled her on top of him rubbing his penis against her vagina, that is the outside of the vagina.

This progressed on the following meeting to actual sexual intercourse, which then occurred once or twice a week for the remaining offending period, unless the defendant was away.

On Saturday 21 November 2009, at a time before 3 am, the defendant picked up the complainant from her address and drove to his residence. The defendant led the complainant to his bedroom where they lay on his bed cuddling and talking for a period of time. The defendant then commenced to fondle her naked breast, however, did not continue through to sexual intercourse due to the complainant menstruating.

At about 6.10 am, later that morning, the defendant drove his car to the complainant's street and parked it out the front of a neighbouring property. The complainant exited the defendant's vehicle, walked into the neighbouring property before jumping over the fence and returning into her own home.

This was witnessed by the complainant's parents who had become suspicious of their daughter's behaviour. Police were contacted, but without further information there was nothing that could be done.

On Sunday 22 November 2009 at about 2.30 am, the defendant again drove his vehicle to the complainant's street and parked out the front of the neighbouring property. The complainant entered the vehicle and the defendant drove them back to his flat.

> Again, the defendant led the complainant into his bedroom where they lay on the bed cuddling and talking. The encounter then developed into the defendant kissing and fondling the complainant with both eventually becoming naked. The defendant then inserted his erect penis into the complainant's vagina and commenced penile vaginal intercourse.
>
> The sexual intercourse continued for a short period of time before the defendant was interrupted by knocking at the door. The defendant and the complainant remained silent and motionless in the bedroom, fearing that it was the complainant's father at the door. The defendant and complainant were unaware that it was in fact the police knocking on the door.
>
> The complainant's parents had effectively staked out their own property and when they witnessed their daughter being picked up by the defendant, they contacted police and the father accompanied them to the defendant's address.
>
> The police then conducted covert surveillance of the property. And at about 5.15 am later that morning, the defendant was intercepted attempting to drive out of his driveway.
>
> The defendant consented to police searching his premises; however the complainant could not initially be located. The defendant was asked when it was that he last saw the complainant and replied, 'Not since Friday at school.'
>
> About an hour after the initial search, a secondary search was conducted by investigating members and at this time the complainant was located hiding in the boot of the defendant's vehicle. The defendant was then arrested and conveyed to the Darwin Police Station."

[7] When interviewed by police, the respondent made full admissions to maintaining a sexual relationship with the victim. He said that over time he and the victim became closer and she told him things that he said he would not tell anyone else. He admitted knowing it was wrong and that she was underage, but said she was an attractive girl and he knew she had a crush on

him. He admitted that he "kind of liked" the idea that she was interested in him, but stated that nothing happened until a couple of weeks before the interview with police. That statement was not correct.

[8] The respondent told police that he was muddled. He said it became uncomfortable in the car and they then started going to his place to chat. On one occasion the victim's father came to the respondent's home and the victim hid in the bedroom.

[9] The respondent admitted having sexual intercourse with the victim, including more than one act of intercourse on a particular night. He believed the victim was 14 and knew what he was doing was wrong. The respondent told police that he wore a condom on the first occasion of sexual intercourse, but not on the most recent occasion.[1] He said he did not perceive the victim as a student and thought he was falling in love with her.

Effects upon victim

[10] The respondent's criminal conduct has had devastating impacts upon the victim and her family. They were described in graphic detail in a victim impact statement provided by the victim's father and include the victim being traumatised, experiencing the hurt and shame brought about by the breach of trust and offending, emotional trauma suffered by the whole family and significantly damaged relationships within the family. In the father's words, the respondent stole "something very special" from the

[1] During submissions on the appeal counsel for the respondent acknowledged that the appellant only wore a condom on the first occasion.

victim and her family and the whole family has been "emotionally devastated". Notwithstanding that Darwin has been the family home since 1945, there is now a need to relocate interstate. Their trust in teachers and the school system has been shattered. It is plain from the victim impact statement that the consequences are ongoing and will continue for a long time.

Matters personal

[11] As to matters personal to the respondent, he was born in west Timor and came to Darwin with his family at the age of three following cyclone Tracy. After completing year 12 the respondent was accepted into the School of Performing Arts in Perth and spent nine years studying dance and working.

[12] The respondent's work history included a period in 1996 and 1997 when he worked in a program designed to assist children with Down's syndrome.

[13] After returning to Darwin, the respondent attended university and, while studying, taught dancing and IT at a senior school. In 2006 he obtained his graduate diploma in secondary education and became a qualified teacher, after which he carried out relief teaching in various high schools in the Darwin area.

[14] A psychologist who examined the respondent for the purposes of the sentencing proceedings described him as a person who has experienced lifelong loneliness which has resulted in a "psychological fragility". The loneliness commenced in high school when the respondent felt that he was

an “outcast” because of his acute skin complaints, including a severe form of facial acne and psoriasis which was present on his face in an extreme fashion. The loneliness persisted notwithstanding his success in performing arts and a nine year relationship with a woman of his age while studying and working in Perth. The respondent told the psychologist that the woman was his only friend in Perth and his move back to Darwin followed the break up of that relationship. The respondent had also formed a relationship with another woman for one year and experienced a further brief relationship, but had been without a relationship with a woman for three years prior to his offending.

[15] The respondent was a person of prior good character. He had never previously been in trouble with the criminal law and a number of references were tendered which spoke very highly of him and expressed the opinion that his criminal conduct was out of character. The woman with whom the respondent had been in a relationship for nine years gave oral evidence before the sentencing Judge. Following the end of their relationship, the woman and the respondent remained in close contact and she described him as her “closest and best friend”. In evidence accepted by the sentencing Judge the woman spoke of the respondent as a genuine and sincere person whose criminal conduct was out of character. She also spoke of his deep and true remorse which was a view supported by the written references and the opinion of the psychologist.

[16] The respondent's former partner gave evidence that he had never shown any untoward interest in young girls. The psychologist expressed the opinion that the respondent's lifelong loneliness and psychological fragility better explained his behaviour than him being a "predatory paedophile". In her view the respondent had "not had the opportunity to fully develop adult social skills and confidence due to his rejection in high school and consequent loss of confidence" and "found it easy to socialise with the victim in a way he had not often experienced". The psychologist expressed the opinion that the respondent did "not appear to meet the classic paedophile criteria of long-term attraction to children and repeat offending". Accepting that the respondent had not previously been attracted sexually to a child, the psychologist was of the view that the respondent presented as "an unusual sex offender" because he had clearly been attracted sexually to the victim and had engaged in sexual offending against her.

[17] As to the danger of re-offending, the psychologist stated that the fact that the respondent had offended once was "of grave concern and should not be minimised". The psychologist observed that as the respondent had chosen to offend against the victim, there was an "obvious concern that he could make the same decision again and offend again; that he would prioritise his needs over the victim's once again, as he has done on this occasion". However, in light of her assessment that the respondent had not been sexually attracted to a minor before, the psychologist reached the following conclusion:

"Given his insight, his remorse, his lack of previous offending it is my assessment that with appropriate therapeutic intervention … there is a low chance of him re-offending. Therapeutic intervention is I believe essential."

[18] The psychologist then explained her view of the prospects of rehabilitation and the need for therapeutic intervention:

"**Prospects of Rehabilitation**

Rehabilitation of sex offenders generally has very poor success rates. However I believe Mr Hitanaya presents with differently to most sex offenders, who are repeat offenders, with a specific obsession with having sexual relations with young children. This is not the profile of Mr Hitanaya.

Given that this appears to be his first sexual offending, that Mr Hitanaya appears to have very clear insight into his offending and its wide reaching impact, to have deep and genuine remorse for his offences, I believe the prospects of rehabilitation are good. He has clear plans on how to conduct himself on release, aimed at avoiding any situation that might lead to re-offending. Further he has stated to me he is willing to engage in therapy to address his offending, to examine why he engaged in the offending, how to prevent it happening again and deal with more underlying issues such as loneliness and appropriate ways to address this. Having said this it must not be forgotten that Mr Hitanaya has chosen to act in a serious and unlawful manner. He has allowed his desires for an easing of his loneliness, for intimacy, for sexual satisfaction, to govern his behaviour and as a result committed a serious crime against a vulnerable child. Thus the recommendations below are essential in order to ensure his chance of re-offending is minimised.

Treatment Recommendations

While in prison it is highly recommended that Mr Hitanaya have regular individual psychology sessions, weekly to start with if possible. Given his different presentation to many other sex offenders, group therapy may not be appropriate however the prison therapists can decide this. A focus of therapy would need to address the offending and also work towards developing social skills to deal with the loneliness Mr Hitanaya has suffered from in an appropriate way. Upon release ongoing therapy and support will be important."

Ground 1 – "sexual predator"

[19] Ground 1 is a complaint that the sentencing Judge erred in finding that the applicant "could not be described as a sexual predator". The Crown relies upon two passages from the sentencing remarks, the first of which was as follows:

> "I have also received a report from a clinical psychologist. It appears from this report that the accused has suffered from a life of loneliness, which has resulted in psychological fragility, which better explains his conduct rather than predatory paedophilia. There is no suggestion in the material before me that he has a sexual interest in children per se."

[20] The second passage followed a reference by the sentencing Judge to the absence of a tariff for the kind of offending with which his Honour was concerned. The reasons continued:

> "However, I note that in this case the accused could not be described as a sexual predator in relation to children or a particular child or group of children, and the offending is out of character. Whilst general deterrence remains a factor of importance, less weight is given to personal deterrence in such cases."

[21] A submission that the respondent could properly be described as a "sexual predator" was not put to the sentencing Judge. In this Court, counsel for the Director of Public Prosecutions ("the Director") did not seek to support a proposition that the respondent should be categorised as a "sexual predator". Rather he contended that the sentencing Judge overlooked features of the respondent's conduct that are accurately described as predatory and that his Honour took a view of what constitutes predatory behaviour that was far too narrow.

[22] The sentencing Judge accepted the opinion of the psychologist that psychological fragility better explained the criminal conduct than a view that the respondent was a "predatory paedophile". The opinion of the psychologist was not challenged by the Crown before the sentencing Judge and it was open to his Honour to accept that opinion. Having accepted that opinion and made the finding, and having observed that there was nothing in the material before him suggesting that the respondent possessed a "sexual interest in children per se", it was open to his Honour to find that the respondent was not in the category of a sexual predator who has an unhealthy sexual interest in children at large and that the criminal conduct did not result from a general sexual interest in children. It was in this sense that the psychologist used the expression "predatory paedophile".

[23] In the course of the Crown submissions, our attention was drawn to a number of authorities which have discussed the meaning of "predator" and "predatory". There appears to be a developing jurisprudence around these classifications. We regard this development as unfortunate. In our view, placing an emotive label on conduct tends to detract from the essential task of a sentencing court, namely, a determination of the relevant facts and an analysis of those facts in order to identify aggravating and mitigating features of the offending. Labels such as "predator" and "predatory" have a strong tendency to arouse emotions, particularly in the area of sexual crimes against children. Such labels can easily be misleading because they deflect from a consideration of the facts of the individual offending and tend to put

offenders who commit sexual crimes against children in the same category regardless of wide variations in facts and moral culpability.

[24] In making these observations, we do not mean to suggest that it will never be appropriate to describe an offender as a "predatory paedophile". Such a description might inevitably be necessary when dealing with an offender who possesses a proven sexual interest in children at large and who pursues that interest by committing crimes against children. Nor do we mean to suggest that it will not be appropriate to draw attention to features of criminal conduct that might accurately be described as predatory. As will appear later in these reasons, in our view such features existed in the respondent's conduct with respect to the victim. We seek to highlight that in cases falling short of true predatory paedophilia, it is undesirable to use emotive labels or to create a special category of offending to which are attached the potentially misleading and emotive labels of "predator" or "predatory conduct".

Grounds 2 and 3 – Weight to various factors

[25] Grounds 2 and 3 concern the weight given by the sentencing Judge to various factors. The Director submitted that too much weight was given to the respondent's previous good character, prospects of rehabilitation and other matters personal to him, and to the consensual nature of the sexual relationship. On the other hand it was said that his Honour gave too little weight to the serious breach of trust, the duration and frequency of the

offending and the need for both general and specific deterrence. Under these grounds, the Director was effectively contending that when properly analysed, the circumstances relied upon in mitigation were worth little weight and, as a manifestly inadequate sentence was imposed, the likely explanation is that his Honour gave too much weight to these factors and too little weight to aggravating factors. The Director submitted that when the remarks of the sentencing Judge are properly analysed, it is apparent that his Honour used as a template for his assessment of the various features of the offending the judgment of Wheeler JA in *JAF v Western Australia*.[2] In so doing his Honour was led into error in his analysis of the aggravating and mitigating features of the respondent's offending. Before dealing with that submission and the relevance or otherwise of *JAF*, it is appropriate to deal with two particular aspects as discrete topics.

Prior good character

[26] As to matters of mitigation, reliance was placed upon the prior good character of the respondent. The sentencing Judge found that the offending was out of character and referred to references which demonstrated that the respondent was, and still is, "held in high regard by those who know him as a good-hearted, kind, considerate and compassionate person who has a genuine desire to help others."

[2] (2008) 190 A Crim R 124.

[27] The prior good character of an offender is always relevant to the exercise of the sentencing discretion. However, the weight to be given to this factor varies according to the circumstances of the offending.

[28] In *Ryan v The Queen*,[3] the High Court was concerned with the sentencing of a priest who had pleaded guilty to a number of sexual offences against 12 young boys committed over a period of 20 years. The sentencing Judge accepted that the offender was contrite and had previously held an unblemished character and reputation. However, in view of the offending, the sentencing Judge determined that the previous good character and reputation did not entitle the offender to "any leniency whatsoever". An appeal to the Court of Criminal Appeal failed, but on appeal to the High Court it was held by the majority that the offender was entitled to some but not significant leniency. This was the view taken in the Court of Criminal Appeal, but as the sentencing Judge had made no allowance whatsoever for the previous good character, the majority in the High Court were of the view that the appeal should be allowed.

[29] Although the offender in *Ryan* had committed offences against a number of victims over a long period, the following remarks of McHugh J demonstrate the underlying principle that the nature of the offending may be such a "countervailing factor" to the otherwise good character of an offender that it

[3] (2001) 206 CLR 267.

results in the good character carrying less weight than it would otherwise be given:[4]

> "Sentencing is not a mathematical process. Various factors have to be weighed. The otherwise good character of the prisoner is one of them. It is a mitigating factor that the sentencing judge is bound to consider. But the nature and circumstances of the offences for which he or she is being sentenced is a countervailing factor of the utmost importance. The nature of the offences for which the appellant was being sentenced meant that his otherwise good character could only be a small factor to be weighed in the sentencing process.
>
> First, there were multiple offences involving repeated acts committed over a number of years. They were not isolated incidents which might be said to be out of character. Secondly, the appellant was, as his counsel conceded before Judge Nield, leading a double life. Over many years, the appellant was doing "good works" while he was committing grave offences. This contradiction indicates that the appellant's otherwise good character was a minor factor to be weighed. Thirdly, the appellant committed the offences in the course of his priestly duties and it was as a priest that he did the 'good works' which are at the heart of his claim of good character. This reduces the weight that ought to be given to his otherwise good character. Fourthly, and related to the third point, the offences involved breaches of trust." (citations omitted)

[30] To the same effect were the following observations of Callinan J:[5]

> "It is well settled that whilst bad character will not operate to increase the sentence, good character may operate to reduce the sentence which the facts of the crime would otherwise attract. In some cases good character has even been held to be so significant a factor as to require the imposition of a non-custodial penalty in lieu of a term of imprisonment. In exercising a sentencing discretion, less weight has been given to previous good character in circumstances in which the offence is not an isolated act. When the crime or crimes are part of a prolonged course of criminal activity, less weight will usually be given to the apparent good character and record of an accused. …

[4] *Ryan v The Queen* (2001) 206 CLR 267 at 278 [33] and [34].
[5] *Ryan v The Queen* (2001) 206 CLR 267 at 317 [174].

> Similarly, it has also been said that good character is of less weight when a series of crimes are deliberately and carefully planned and executed.
>
> The rule that good character is a mitigating factor in sentencing may also be qualified in the case of persons who abuse high public office to commit offences, or use their good character to increase the prospects of successfully completing the crime." (citations omitted)

[31] In the course of his remarks, Callinan J referred to the following passage from the judgment of Lee J, with whom McInerney J agreed, in *R v Hermann*:[6]

> "So far as the question of good character is concerned, it has been pointed out in other cases that, where the event is not an isolated one, it is difficult for the court to give a great deal of consideration to an accused's 'previous good character', for the truth of the matter, as the evidence has disclosed, is that whilst appearing to have a good character and others believing so, he has over a lengthy period been committing a heinous crime on a helpless child. To give an applicant's so-called 'previous good character' much weight in such circumstances is to give an appearance that the court is conceding to a parent or a person in loco parentis or within the family unit some right to use a child for sexual pleasure at will. Of course, when the offence is an isolated one, the matter of the good character of the applicant as a factor in mitigation may be given a much greater degree of significance."

[32] Again, although the period of the offending in *Hermann* was much longer than the offending under consideration and involved a man having sexual intercourse with his step-daughter, the remarks demonstrate the underlying principle to be applied in the case of this respondent.

[33] The respondent's criminal conduct was not an isolated lapse of judgment. It was a sustained course of conduct over a period of months involving a gross

[6] (1988) 37 A Crim R 440.

breach of special trust and a deliberate pursuit of the victim for the respondent's own sexual gratification. In these circumstances, the weight to be given to the respondent's prior good character by way of mitigation was significantly reduced.

Victim's consent

[34] In a passage cited at par [38] of these reasons, the sentencing Judge spoke of the victim being a "willing participant" in the sexual conduct. His Honour was expressing the view that this was not a case in which the offender prevailed over the reluctance of a young victim to engage in sexual conduct with the offender. To that extent the observations are correct, but the significance of the absence of this aggravating circumstance should not be misunderstood.

[35] The fact that the victim consented to the sexual conduct is not a mitigating circumstance. Laws prohibiting sexual activity with children are designed to protect children from those who would exploit them and from themselves. Through parliament, the community has set the age at which the community has determined that a young person can legally consent to sexual activity with another person. Below that age, even if the child consents, the sexual conduct remains an offence. The consent of the child is not a mitigating circumstance. On the other hand, it would be an aggravating circumstance if the offender used force or threats or other means to overcome a child's

resistance. That aggravating feature did not exist in the criminal offending of the respondent.

[36] In the context of this discussion about the relevance of the fact that the child consented, we agree with the following observations of King CJ, with whom Olsson J agreed, in *R v Williams*:[7]

> "The law which prohibits sexual intercourse with young girls exists in order to protect young girls from their own inclinations, until they have reached a sufficient degree of maturity in life to make sensible and responsible decisions as to their own lives. It is necessary for the courts to impose penalties which vindicate that law and deter older men from taking advantage of the sexual inclinations of young girls."

Use of *JAF*

[37] In his sentencing remarks, after setting out the agreed facts and having referred to the absence of prior convictions, the respondent's remorse and the impact of the offending upon the victim and her family, the sentencing Judge identified a number of aggravating features accompanying the offending. His Honour then referred to mitigating circumstances and the opinion of the psychologist that psychological fragility better explained the criminal conduct than predatory paedophilia. His Honour spoke of the prospects of rehabilitation and the absence of a tariff with respect to the type of offending under consideration.

[38] The sentencing Judge then made the following remarks which immediately preceded the imposition of the sentence:

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[7] (1990) 53 SASR 253 at 254.

> "However, I note that in this case the accused could not be described as a sexual predator in relation to children or a particular child or group of children, and the offending is out of character. Whilst general deterrence remains a factor of importance, less weight is given to personal deterrence in such cases.
>
> Also, this is not a case where the general reputation of the offender has been exploited to obtain or maintain a position of dominance over the child in order to avoid detection or in order to make it difficult for the child to complain. In this case the accused told the child that, if he were to be found out, he would plead guilty as it was not her fault. In this case the child was clearly a willing participant albeit unlikely to have had the maturity to enable her to reflect upon the wisdom of having sexual activity at her age at all, or to understand the likely social and emotional consequences of an affair with a much older man who was, in fact, one of her teachers. Nor is this a case where the child was very young. There is no evidence of force or threats or a pattern of abuse starting from the time when the child was quite young."

[39] It appears that the source of some of these remarks is from the judgment of Wheeler JA in *JAF v Western Australia*.[8] The offender was a school teacher who had developed a relationship with the complainant who was between 14 and 15 years of age. The victim was a student at a school where the appellant taught, but he was not her class teacher. He was the coach of a water polo team in which the victim played and was a friend of the family. The appellant did not have any direct responsibility for the victim at the school, rather, as Wheeler JA observed:[9]

> "The appellant's position of authority, then, was the general authority of a teacher at a school at which the complainant was a student, although he had no direct responsibility for her."

[8] (2008) 190 A Crim R 124.
[9] *JAF v Western Australia* (2008) 190 A Crim R 124 at p 126 [2].

[40] Wheeler JA also noted that the complainant "apparently regarded the relationship as one of boyfriend and girlfriend, and it appears that on occasions the appellant referred to it in the same way". The appellant was aged 34 and married with two small children.

[41] As to mitigating circumstances, Wheeler JA spoke of the willingness of the complainant and of the offender's response when an investigation was undertaken:[10]

> "There was a number of mitigating features, both personal to the appellant and arising from the circumstances of the case. While it is plainly irresponsible of any adult in the appellant's position to embark on such a relationship, it can at least be said that there appear to have been a number of occasions on which the appellant was careful to ascertain, so far as he could, that the complainant was a willing participant in what took place. He took precautions against pregnancy and sexually transmitted disease. When it became clear that the relationship was being investigated, he advised the complainant to tell the truth. He made prompt admissions, and entered early pleas of guilty."

[42] *JAF* assumed a position of prominence in the proceedings before the sentencing Judge because counsel for the respondent interlaced his submissions concerning the respondent's criminal conduct with constant references to *JAF* by way of comparison. Counsel sought to persuade the sentencing Judge that the facts of the offending were so similar as to warrant the application of the remarks of Wheeler JA. His Honour appears to have accepted the submissions of counsel for the respondent because, in the remarks we have cited, it appears that his Honour had in mind sections of

[10] *JAF v Western Australia* (2008) 190 A Crim R 124 at 126[4].

the remarks of Wheeler JA which are highlighted in the following passages from her Honour's judgment:[11]

> "The State submits that '… the dominant sentencing considerations in child sexual abuse cases are punishment, general and personal deterrence and the protection of vulnerable children'. It is therefore submitted that mitigatory factors personal to an offender are given less weight than they might otherwise be given. A related submission was that in cases involving sexual offending, the fact that the offender is otherwise of good character ordinarily carries little weight.
>
> It is true that observations of the kind found in the State's submissions are frequently to be found in cases dealing with sexual offences involving children. However, it is important to appreciate the context in which such observations generally come to be made. The cases in which dominant considerations are the protection of children, to such an extent that personal factors are given very little weight are, when properly analysed, generally cases in which the offender can be *characterised as a 'sexual predator'*, in the sense used by McLure JA in *Poulton v Western Australia* [2008] WASCA 97 at [4], *either in relation to children generally or in relation to a particular child or group of children*. In relation to offenders who are not 'predators', and whose behaviour is plainly out of character, *while general deterrence remains a factor of importance, personal deterrence, while remaining a factor to be considered, is of less weight.*
>
> Further, cases in which previous good character are given little weight are often cases in which the good reputation enjoyed by an offender is *exploited by him or her in order to obtain or maintain a position of dominance over the child or children in question, or in order to avoid detection*. An example is *Longley v The Queen* (2001) 121 A Crim R 78, in which the offender was a well represented housemaster at the boarding school attended by some of his victims. In that case, Scott J noted (at [6]) that the character references demonstrated the unlikelihood that a child in the position of the victims could expect to be believed, if he had thought to complain of the offender's conduct. In the present case, the appellant's position and good reputation did assist him in finding the opportunities to be alone with the complainant, *but this is not a case in which he abused*

[11] *JAF v Western Australia* (2008) 190 A Crim R 124 at 127{11] – [13].

that position in order to establish dominance over her or in order to make it difficult for her to complain of his conduct." (our emphasis)

[43] The passage from the judgment of McLure JA in *Poulton* to which Wheeler JA referred was as follows:[12]

> "[4] The purpose of s 321 of the Code is to protect children: … The seriousness of the offending is increased if a person abuses a position or situation that enables that person to influence, persuade, pressure, force, manipulate or otherwise take advantage of the child for the purpose of facilitating the commission of the offence. Such people are sexual predators who prey on and exploit the vulnerability of their child victims."

[44] In our view, it is apparent that the sentencing Judge accepted that the facts in *JAF* were sufficiently similar to the respondent's offending as to make the observations of Wheeler JA applicable to the respondent's offending. In our view his Honour erred in this regard.

[45] First, Wheeler JA observed that the cases in which considerations such as punishment and general deterrence prevail over personal circumstances such as prior good character are those in which the offender can be characterised as a sexual predator, in the sense used by McLure JA in *Poulton*, "either in relation to children generally or in relation to a particular child or group of children". The sentencing Judge found that the respondent "could not be described as a sexual predator in relation to children or a particular child or group of children and the offending is out of character".

[12] *Poulton v Western Australia* [2008] WASCA 97 at [4].

[46] To the extent that the respondent could not be described as a sexual predator in the relation to children generally or a group of children, the conclusion by the trial Judge is correct. However, in the sense in which McLure JA in *Poulton* used the expression "sexual predator" as someone who "abuses a position or situation that enables the person to influence, … manipulate or otherwise take advantage of a child for the purpose of facilitating the commission of the offence", it is not correct to say that the respondent could not be described as a "sexual predator" in relation to a particular child, namely, the victim.

[47] As we have said, we prefer to avoid using the term "sexual predator", but to the extent that his Honour found that the respondent did not abuse his position or a situation which enabled him to influence, manipulate or otherwise take advantage of the victim for the purpose of facilitating the commission of the sexual offences, that finding is contradicted by the admitted Crown facts. The respondent gained the special trust of the victim and her family and became aware that the victim had a crush on him. He was aware that she had been removed from his pastoral care because of the parents' concern about the situation. Against that background the respondent abused his position and a situation that enabled him to influence and take advantage of the child for the purposes of committing the crimes. He initiated the sexual conduct at school by kissing the victim on the mouth. The respondent facilitated the secret departures of the victim from her family home late at night in order to meet in his vehicle and to engage in

kissing. In an intentional escalation of the nature of the sexual conduct, the respondent took advantage of his influence and the vulnerability of the victim by shifting the late night meetings to his home where, in stages, he escalated the nature of the sexual conduct which he intended would lead to sexual intercourse. More details are set out in par [60] where the features of the criminal conduct are identified.

[48] Secondly, using words which are also found in the highlighted passages from the judgment of Wheeler JA, the sentencing Judge found that the respondent had not exploited his general reputation in order to obtain or maintain a position of dominance over the child for the purpose of avoiding detection or making it difficult for the child to complain. In this context his Honour referred to the respondent having told the victim that "if he were to be found out, he would plead guilty as it was not her fault". His Honour went on to speak about the victim being a willing participant.

[49] In *JAF*, when the offender became aware that the relationship was being investigated, the offender advised the victim to tell the truth. In the case of the respondent, the reference to the respondent telling the victim he would plead guilty if the relationship was discovered came from submissions of counsel for the respondent which were presented in the following terms:

> "They spoke about what would happen if their relationship was discovered. He told her he would confess it and plead guilty. That was the right thing to do. That it was entirely his fault and it was not her fault at all and she was not to blame."

[50] The respondent was dealing with an immature 13 year old girl who was infatuated with him. It is an inescapable conclusion that he well knew that if the relationship was discovered, the child would be devastated by the fact that the respondent would be in serious trouble. In addition, the respondent was well aware of the religious beliefs of the child's parents and of the trauma and distress that would follow for the child if the relationship was discovered.

[51] In these circumstances, while the offence was not aggravated by threats or inducements calculated to prevent the victim disclosing the respondent's criminal conduct, we do not regard the fact that the respondent told the child that he would confess and plead guilty as a mitigating circumstance.

[52] In the passages cited, the sentencing Judge was speaking of the use of general reputation in order to achieve a position of dominance over the victim and to avoid detection by making it difficult for the victim to complain. However, the wider use of a general reputation or position of power should not be overlooked. As McLure JA observed in *D v Western Australia*,[13] "the mere fact that a person is in a position of power, influence or authority can potentially increase that person's attractiveness in a broad sense to persons in their charge". In the case of the respondent, his particular position of trust as the victim's pastoral group leader resulted in him gaining the victim's confidence and in making her vulnerable to his influence. He did not need to positively exploit his general reputation in

[13] [2009] WASCA 155 at [5].

order to make it difficult for the child to complain. His very position and her infatuation ensured that it would be extraordinarily difficult for her to complain.

[53] There is a significant distinction between the circumstances in *JAF* and the respondent's criminal conduct. In *JAF*, McLure JA made the point that proof of a causal connection between the position of care, supervision or authority and the commission of the crimes would "increase the seriousness of the offending", but such a causal connection did not exist in the case of *JAF*.[14] Although *JAF* was a teacher at the school, he was not the victim's class teacher. His position stands in contrast to the position of the respondent who taught the victim dance and was her pastoral group leader. There was a strong causal connection between the position of care and responsibility occupied by the respondent with respect to the victim and the ultimate criminal offending. It was the respondent's position of care and responsibility which directly enabled the respondent to gain the special trust of the victim. In turn this placed the victim in a position of vulnerability to the influence of the respondent and it was a vulnerability of which the respondent was well aware. Ultimately, the establishment of the special relationship of trust and the existence of the vulnerability enabled the respondent to commence the sexual nature of the conduct and to escalate it into regular sexual intercourse over a prolonged period.

[14] *JAF v Western Australia* (2008) 190 A Crim R 124 at 132 [25].

[54] As is explained later in these reasons, in our view the sentence was manifestly inadequate. Having regard to the sentencing remarks in their entirety and to the inadequate sentence, we have reached the conclusion that his Honour allowed the comparison with *JAF* undue influence and ultimately overlooked the critical distinction between *JAF* and the respondent's criminal conduct to which we have referred. It appears likely that the concentration upon *JAF* in the submissions by counsel for the respondent and the use of *JAF* by the sentencing Judge led his Honour into error in either overlooking or failing to give due weight to critical aggravating circumstances involved in the respondent's criminal conduct. In that process, inappropriate weight appears to have been given to matters that were more in the nature of an absence of aggravating circumstances. It appears likely that his Honour gave inappropriate weight to the willingness of the child to engage in the conduct and to the relevance of the general reputation of the offender. More significantly, it appears that his Honour has ultimately overlooked the importance of the critical features of the respondent's criminal conduct which demonstrate an exploitation of the special position of trust and of the victim's vulnerability for the respondent's own sexual gratification.

General deterrence

[55] The Director submitted that the sentencing Judge erred in giving too little weight to the need for general deterrence. There is nothing specific in his Honour's remarks which support that contention. However, his Honour

devoted considerable time to observations about the personal circumstances of the respondent while giving the aspect of general deterrence only cursory recognition. His Honour's only reference to general deterrence was the observation that "general deterrence remains a factor of importance". We recognise the force of the submissions of counsel for the respondent that it is not necessary for a sentencing Judge to repeat on every occasion the importance of general deterrence and the reasons why it is important, but for the reasons earlier discussed and in the light of the inadequacy of sentence, we are led to the view that his Honour probably allowed other matters to be given undue weight at the expense of general deterrence which was a particularly important factor in the exercise of the sentencing discretion.

[56] In *R v JO*,[15] this Court emphasised the importance of general deterrence when sentencing for sexual offences against children. The Court was concerned with a Crown appeal against a sentence for two offences of indecently dealing with a child under the age of 16, aggravated by the child being under the age of 10. In 2004 the maximum penalty for the offences had been increased from 10 to 14 years. In respect of the offence under consideration committed in the aggravating circumstance accompanying the offending, the same legislation increased the maximum penalty from 14 to 20 years imprisonment. Maximum penalties for other sexual offences

[15] (2009) 24 NTLR 129.

against children were also increased. The following observations made in *JO* are of general application:[16]

> "Every offence against a child is a serious offence. In 2004 the maximum penalty for the offences of which JO was convicted was increased from 10 to 14 years and sentencing courts must respond accordingly. Sexual assaults against children are abhorrent crimes which cause grave disquiet throughout the community. In recent years the community has come to recognise that these offences are far more prevalent than previously was thought to be the situation. The community has reached a more enlightened understanding of the nature of sexual crimes and the personal violation involved in all such crimes, including those previously regarded as relatively minor offences. The impacts of these types of crimes are now better recognised and understood, particularly the long-term effects upon victims who were children at the time of the offending.
>
> Children are among the most vulnerable members of our community and are entitled to the full protection of the law. Children in domestic circumstances are particularly vulnerable to abuses of trust by a trusted family member. Penalties imposed by the criminal court in recent years have increased in recognition of both the increased maximum penalties for crimes of the type committed by JO and of their prevalence and harmful effects. General deterrence is a matter of particular importance, together with denunciation by the community through the imposition of condign punishment."

[57] In the context of general deterrence, the remarks of Doyle CJ in *R v D*[17] are pertinent. His Honour was concerned with a sentence imposed upon an offender who had sexually abused his step-daughter over a period of two months when she was aged 13. In addition to speaking of general deterrence, his Honour spoke of the "insidious effect" of this type of crime

[16] *R v JO* (2009) 24 NTLR 129 at 146 [81] – [83].
[17] (1997) 69 SASR 413.

which causes a loss of trust in those in whom a duty of care is placed and who stand in a position of trust and authority with respect to the victim:[18]

> "They are offences that cause a feeling of outrage and revulsion in the community. The penalty must reflect that feeling. They involve a serious breach of trust. As this case makes clear, such offences cause serious harm to the victim in many cases. There is every likelihood that the effects of that harm will be prolonged, and perhaps lifelong. The courts must do what they can to protect children from such conduct. Deterrence is an important part of sentencing for an offence such as this. Although reasons for the offending vary, and sometimes the offenders are persons who were themselves sexually abused as children, it seems clear that such offenders are not usually persons who are unable to control their sexual instincts. While acknowledging that the punishment of offenders is only one factor that may limit the incidence of this offence, the courts must proceed on the basis that punishment has a part to play in deterring offenders.
>
> Offences such as the present one have an insidious effect upon the community, and that is also something to consider. They lead, and I suspect are already leading, to a loss of trust in the very persons upon whom we often rely for the nurture of children, for their education, and for guidance, leadership and instruction for children. As our society becomes more aware of the extent to which children are subjected to sexual abuse, this insidious effect is increasing.
>
> It appears that the sexual abuse of children by persons in a position of trust is quite widespread. It may not be occurring more often than it did in the past. It may well be that it is now being detected more often than it was. Be that as it may, the offences that are involved come before the courts with disturbing frequency. It is for those reasons that I consider that the court should increase, to a moderate degree, the level of penalty imposed for such offences."

[58] The observations of Doyle CJ concerning the "insidious effect" are of particular relevance to the criminal conduct of the respondent. As the victim's father said in his victim impact statement:

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[18] At 423.

> "He shattered our trust in a profession which needs the trust of parents – the school system."

Manifestly inadequate

[59] The complaint that the sentence is manifestly inadequate requires an analysis of the circumstances of the offending and of the matters advanced by the respondent by way of mitigation. It also requires consideration of sentencing standards for crimes of the type under consideration.

Features of the offending

[60] The respondent's offending was marked by the following features:

- The respondent was 24 years older than the victim.
- The respondent was in a position of trust as a teacher and, more particularly, was in a special position of trust by reason of his position as the victim's pastoral care group leader.
- In his capacity as the teacher responsible for the pastoral care of the victim, the respondent was approached by the victim concerning personal issues and gained her trust by telling her that she could talk to him without fear of disclosure.
- The victim placed great trust in the respondent by telling him that she had been the victim of sexual abuse when she was a young child.

- After disclosure of the sexual abuse, the victim continued to confide in the respondent and the respondent was aware of her particular vulnerability by reason of the prior sexual abuse.

- The respondent befriended the victim's family to the extent of undertaking Bible studies with them. He was invited into the family home for lunches and dinners. The respondent gained such a degree of trust that the victim and her family referred to him as uncle.

- Thereafter, the respondent occupied a position of special trust with respect to both the victim and her family.

- The respondent became aware that the victim had a crush on him and was infatuated with him. He became aware that the victim's parents were so concerned that they removed the victim from the respondent's pastoral care group. In substance the respondent had been warned off. He knew the parents would expect him to respond accordingly. Notwithstanding being warned off and this knowledge, the respondent continued seeing the victim at school and, on occasions, instigated physical contact with the victim by giving her cuddles when she was upset.

- Occupying the special position of trust, and aware of family concerns and of the victim's infatuation with him, in about June 2009 the respondent initiated sexual contact with the victim in the school environment of the dance room by kissing the victim on the mouth.

- Aware of the victim's vulnerability and infatuation, and aware of the concerns and disapproval of the victim's parents, the respondent participated in a development of the relationship out of school hours in a manner designed to conceal the existence of the ongoing relationship. In response to requests by the victim, the respondent regularly facilitated the secret departure of the victim from her family home late at night by driving to the nearby vicinity and enabling the victim to sneak out of the family home and meet him in the vehicle.

- The respondent took advantage of the child's particular vulnerability and of the special relationship of trust, which had not come to an end. It was in these circumstances that the respondent influenced and manipulated the development of the relationship into a sexual relationship.

- After about three intimate meetings in the respondent's car involving kissing, the respondent sought to escalate the nature of the sexual contact by suggesting that they would be more comfortable at his residence.

- The respondent continued to facilitate the secret departure of the victim from her home late at night for sexual purposes at his residence. He escalated the nature of the sexual conduct for his own sexual gratification. After two occasions at the residence that involved talking and kissing in the respondent's bedroom, the respondent initiated the escalation and engaged in sexual conduct which he intended would lead to sexual intercourse. The respondent undressed himself and removed the

victim's top and bra before fondling her breasts whilst kissing. On the next occasion, the respondent completely undressed the victim, rolled her on top of him and rubbed his penis against the outside of the victim's vagina. On the following occasion the first act of sexual intercourse occurred. Thereafter intercourse occurred once or twice a week unless the respondent was away.

- The respondent's offending did not involve a momentary lapse in judgment. It was a sustained course of criminal conduct over a significant period of approximately 19 weeks. The respondent engaged in sexual intercourse with the victim on between 15 and 30 occasions. A high level of moral culpability was involved.

- With the exception of the first act of intercourse, the respondent repeatedly placed the physical welfare of the victim at risk by having sexual intercourse with her without the use of a condom or any other form of protection against pregnancy and sexually transmitted disease.

- The respondent did not voluntarily cease his criminal conduct. It was brought to an end through the efforts of the victim's parents and the intervention of police.

- The victim hid in the respondent's home when her father knocked on the door.

- Initially the respondent lied to police and endeavoured to prevent the discovery of his criminal conduct by hiding the victim in the boot of his vehicle.

- The respondent's criminal conduct has had very serious and longstanding effects upon the victim and her family.

Mitigating features

[61] As to matters of mitigation, this was not a case in which, from the outset, the offender sought out the victim for the purpose of eventual sexual gratification. Initially, the victim approached the respondent in his capacity as her pastoral care group leader and he responded appropriately. It was in this context that the relationship began to develop. It is relevant to recognise that the respondent did not possess an unhealthy interest in children generally and his psychological fragility borne out of chronic loneliness contributed to the respondent abusing the special position of trust that developed and giving priority to his own desires.

[62] In relation to his criminal conduct, the respondent did not use force or threats in any way.

[63] The respondent's prior good character carried some weight by way of mitigation and it is clear that the respondent is truly remorseful and deeply regrets his conduct and the impact it has had upon the victim, her family and the respondent's own family. The respondent has full insight into the

reasons for his criminal conduct and the devastating impacts that have flowed from it. He has lost his job and vocation.

[64] As to the respondent's prospects of rehabilitation, the sentencing Judge referred to the view of the psychologist that psychological fragility better explains the criminal conduct than predatory paedophilia and that there was no suggestion in the material before his Honour that the respondent has a sexual interest in children per se. His Honour then reached the conclusion that the respondent has "good prospects" of rehabilitation:

> "The psychologist considers that there is a low chance of his re-offending in a similar way in the future and that he has good prospects of rehabilitation. I accept that opinion.
>
> There is also positive evidence from the accused's former partner which provides solid evidence that his chances of rehabilitation are good. There are clear plans upon his release which will help him to avoid any similar situation arising in the future. I accept his former partner's evidence as well."

[65] There was a sound basis for his Honour to reach the conclusion that the prospects of rehabilitation were good. This included the evidence of the respondent's previous partner of nine years concerning plans for the future employment of the respondent.

[66] The Director challenged the view of the psychologist that the respondent's "lifelong loneliness has resulted in a psychological fragility" and pointed out that such loneliness or fragility had not prevented the respondent from forming and maintaining relationships with female partners. The respondent's previous partner gave evidence that the respondent is the sort

of person who "everybody likes from the start" and that she does not know of a person he has met that would not like him. None of the written references referred to loneliness. The only reference of loneliness was the following:

> "Q. Now, I think that you became aware that he was particularly lonely in Darwin. Is that right?
>
> A. Yes, he did indicate to me throughout the last few years that, yes, he was lonely."

[67] The Crown did not challenge the view of the psychologist during the proceedings before the sentencing Judge. In these circumstances, in the absence of material compelling a different view, it would be inappropriate to permit the Crown on appeal to change its position or for this Court to find that the sentencing Judge was in error on this aspect.

[68] In relation to the likelihood of re-offending, in pars [17] and [18] we summarised the view of the psychologist and quoted some of her remarks. The psychologist recognised the risk of re-offending and her opinion that there is a "low chance" of re-offending was hedged with the requirement that there be therapeutic intervention both while the respondent is incarcerated and after his release. These views were not challenged by the Crown before the sentencing Judge. It appears that his Honour might have overlooked the view of the psychologist that therapeutic intervention is "essential" as his Honour did not attach a condition to suspension that the respondent undertake counselling, treatment or therapy.

The sentence

[69] It is in light of all the circumstances of the offending and of the respondent that the adequacy or otherwise of the sentence is to be considered. There is no tariff for the various forms of sexual assaults upon children. These types of crimes are committed in a wide variety of circumstances and by a wide variety of offenders. However, as discussed in *JO*,[19] notwithstanding the absence of a tariff, "there is a range of appropriate sentences that can be said to comprise the sentencing 'standard'". The judgment continued:

> "A sentencing standard is not a fixed range or tariff. The role of a sentencing standard was explained in the joint judgment of Martin (BR) CJ and Riley J in *Daniels v The Queen* (2007) 20 NTLR 174 at [29]:
>
> > The role of sentencing standards must be properly understood. They do not amount to a fixed tariff, departure from which will inevitably found a good ground of appeal. We respectfully agree with the observations of Cox J in *R v King* (1988) 48 SASR 555 as to the proper role of sentencing standards (at 557):
> >
> > > … In a word, this case is about sentencing standards, but it is important, I think, to bear in mind that when a standard is created, either by the cumulative force of individual sentences or by a deliberate act of policy on the part of the Full Court, there is nothing rigid about it. Such standards are general guides to those who have to sentence in the future, with certain tolerances built into or implied by the range to cater for particular cases. The terms of approximation in which such standards are usually expressed – "about" and "of the order of" and "suggest" and so on – are not merely conventional. … It follows that a particular sentence will not necessarily represent a departure from the standard because it is outside the usual or nominal range; before one could make that judgment it would be necessary to look at all of the circumstances of the case. Those circumstances will include, but of course not be confined to, the questions whether or not the offences charged are

[19] (2009) 24 NTLR 129 at 147 [87].

> multiple or single and whether the defendant is a first offender with respect to the particular crime charged. That is not to undermine the established standard but simply to acknowledge that no two cases, not even two "standard" cases, are the same. …"

[70] As was pointed out in *JO*, in the absence of a tariff, while some guidance can be obtained from previous individual sentences, a comparison with prior sentences is of "limited assistance". In particular, as sentencing standards may vary between jurisdictions, the assistance to be offered by sentences imposed in other jurisdictions may be limited.

[71] A review of sentences imposed for the crime of maintaining a sexual relationship with a child under the age of 16 imposed in the period 2005 – 2009 discloses sentences ranging from two years and four months to 11 years. The offenders included parents of victims and other persons in positions of trust, but none were teachers whose responsibilities included the pastoral care of the victim.

[72] In addition to having regard to previous sentences for the crime under consideration, it is appropriate to have regard to sentences imposed for other sexual assaults against children such as indecent dealing with a child under the age of 16 years and unlawful sexual intercourse with a child under the age of 16 years. Sentences imposed for the latter crime are of particular relevance because, in the present case, the crime of maintaining a sexual relationship with a child under 16 years is comprised of the individual acts

of unlawful sexual intercourse with the child.[20] The essence of the crime is not the maintenance of the sexual relationship. It is "the doing, as an adult, of an act defined to constitute an offence of a sexual nature in relation to a child on three or more occasions".[21] In the case of the respondent, the actus reus of his offence was the commission of acts of unlawful sexual intercourse with the child on three or more occasions.

[73] The offence of having unlawful sexual intercourse with a child under the age of 16 years carries a maximum penalty of imprisonment for 16 years.[22] If the offence is accompanied by defined aggravating circumstances the maximum penalty increases to 20 years. Not surprisingly, an examination of penalties imposed for offences of sexual intercourse with children under the age of 16 years discloses a wide range of penalties. None of the cases involve circumstances close to those of the respondent's criminal conduct.

[74] In our opinion, if the respondent had pleaded guilty to an individual act of sexual intercourse with the victim, he could have expected a sentence of the order of the sentence that was imposed by the sentencing Judge. If the individual offence had been an isolated act, in view of the respondent's prior good character the sentence might well have been lower, but if the respondent pleaded guilty to multiple crimes of sexual intercourse with the child, it is likely that the total sentence would have been significantly longer than the sentence imposed by the sentencing Judge.

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[20] *R v D* (1997) 69 SASR 413; *R v Fitzgerald* (2004) 59 NSWLR 493.
[21] *R v PDW* (2009) 25 NTLR 72 at 80 [13].
[22] *Criminal Code* s 127(1).

[75] Although it is appropriate to have regard to penalties imposed for the offence of sexual intercourse with a child under 16, precise comparisons cannot usefully be made. The legislature has created a single offence of maintaining a sexual relationship and the prosecution chose to charge that offence rather than individual offences of sexual intercourse with the child. We note that the maximum penalty for the offence of maintaining a relationship in circumstances of aggravation is the same as the maximum penalty for an individual offence of sexual intercourse with a child under 16 years in circumstances of aggravation. It could be said that in this way the legislature has created an anomaly. The maximum penalty for a single discrete offence will be the same as the maximum for an offence that involves at least three discrete offences.

[76] The respondent's offending was marked by numerous features of aggravation. His criminal conduct was not toward the lower end of the scale of seriousness for offences of the type under consideration. It was a serious example of such criminal conduct involving a high degree of moral culpability. The seriousness of the respondent's total criminal conduct meant that matters personal that might otherwise be given significant weight in mitigation took second place to the importance of general deterrence, punishment and marking the disapproval of the community.

[77] The sentencing Judge started with a sentence of six years which he reduced to four years by reason of the respondent's plea of guilty and genuine remorse. In our view that starting point was so far outside the proper range

of the sentencing discretion as to be manifestly inadequate and to demonstrate error in point of principle.

Crown appeals – principles

[78] The principles governing Crown appeals are not in doubt and are well known. They were discussed in *R v Riley*[23] and it is unnecessary to repeat that discussion. Even if the manifest inadequacy is such as to demonstrate error in point of principle, the court must carefully consider the next step which involves determination as to whether this is one of those rare and exceptional cases in which the Crown appeal should be allowed and the respondent re-sentenced.

[79] In this context, the respondent advanced the following written submission:

> "The court must guard against permitting the course of justice to be disturbed by the influence of attitudes based on emotion rather than reason."

[80] Reference was made to the decision of the South Australian Court of Criminal Appeal in *R v Johnston*.[24] The Court was concerned with a Crown appeal against a sentence imposed for the crime of causing death by dangerous driving. Counsel for the Crown had referred to the "grave community concern in relation to the number of people killed and injured on the roads". In the course of a judgment with which White and Millhouse JJ agreed, King CJ made the following observations which reflect the need for

[23] (2006) 161 A Crim R 414 at 419 [18] – [20].
[24] (1985) 38 SASR 582.

the court to determine sentences generally, and Crown appeals in particular, "calming and dispassionately":[25]

> "Judges of this Court, like all sensible citizens, must share the concern expressed by the Crown prosecutor on behalf of the government that the number of deaths occurring on the roads and at the continued prevalence of dangerous driving is a cause of death. The penalties imposed by the courts must be such, within the limits imposed by reason and considerations of justice, as to operate as a deterrent to those who might be inclined to engage in dangerous driving. *We must take care, however, not to allow the continuing road toll to produce knee jerk reactions. A proposal to increase the level of prevailing punishments must be judged calmly and dispassionately.* … The need to satisfy public feeling and to calm public outrage is not to be ignored, *but courts must guard against permitting the course of justice to be distorted by the influence of attitudes which are based upon emotion rather than reason*." (our emphasis)

[81] These remarks are applicable to the case under consideration. It has attracted considerable publicity and debate of an emotive kind. At the time of sentencing, the sentencing Judge strongly criticised a newspaper headline that referred to the respondent as a "rapist". There is no crime of "rape" in the *Criminal Code* of the Northern Territory; the crime is the crime of sexual intercourse without consent and it carries a maximum penalty of life imprisonment. There is no crime of "statutory rape". The crime is sexual intercourse with a child under 16 and is committed even if the child consents to intercourse. It carries a maximum penalty of 16 years and, when accompanied by aggravating circumstances, a maximum of 20 years.

[25] *R v Johnston* (1985) 38 SASR 582 at 584.

[82] Historically, and in the current ordinary use of language, the crime of rape has been understood to refer to the crime of sexual intercourse without consent. As the word "rape" has ordinarily been understood, therefore, it was incorrect to refer to the respondent as a "rapist". Eventually common usage of any word in the English language may change its ordinary meaning, but thus far the ordinary meaning of the word "rape" denotes a lack of consent to sexual intercourse.

[83] The criticism by the sentencing Judge resulted in significant public debate about the use of the word "rapist", which in turn brought about extensive publicity concerning the length of the sentence. This is why the remarks of King CJ in *Johnston* are apposite. Further, it is also appropriate to repeat the remarks of this Court in *JO*:[26]

> "Where it is unnecessary to discuss in detail the principles governing Crown appeals, in view of the extensive publicity that followed the imposition of the sentence at first instance, it is appropriate to emphasise that the Court of Criminal Appeal cannot be influenced by public criticism that a sentence is inadequate. As Doyle CJ said in *R v Nemer*:
>
> > If the sentence is within an appropriate range, the court cannot interfere. If the court does interfere, it does so because an error has been made, not because the sentence has been widely criticised.
>
> In making that observation, Doyle CJ was not suggesting that a sentencing judge or the Appeal Court ignores community concerns about crime. His Honour said:
>
> > The judge can take account of public attitudes to the type of crime in question, and public concern about the prevalence of a type of

[26] *R v JO* (2009) 24 NTLR 129 at 149 [96] – [98].

> crime or about its effects. In this general way public opinion is relevant. A sentencing judge can also have regard in a general way to a public expectation that serious crime will attract severe punishment. But it is not lawful for a judge to try to identify and then impose the sentence that the public expect. The judge must sentence according to law, not according to the public expectation. In any event, there is no way of knowing reliably what the public as a whole want or expect in a particular case.

In the context of strong public criticism of the sentence in that case as being inadequate, Doyle CJ emphasised that it would be wrong to increase a sentence because it had been strongly criticised. As his Honour said, the court is not 'trying to satisfy the critics.' The court can only interfere if error has occurred. His Honour added that this approach does not mean that public criticism of a sentence is wrong or resented by the court. His Honour continued:

> The public have a right to criticise and to hear the criticisms of others through the media. This is a legitimate function of the media. But the public needs to understand the points I have just made." (citations omitted)

[84] As we have said, the respondent's criminal conduct was a serious example of the crime of maintaining a sexual relationship with a child under the age of 16 years in the circumstance of aggravation that the child was under the care of the offender. The maximum penalty is 20 years. A starting point of six years, before allowing for the plea of guilty accompanied by remorse, is far too low for a serious example of this type of criminal conduct. The sentence is "so disproportionate to the seriousness of the crime as to shock the public conscience".[27] Error in point of principle has been established.

[85] Notwithstanding that the sentence was so manifestly inadequate as to demonstrate error in point of principle, it remains to be considered whether this is one of those exceptional cases in which the Court should set aside the

[27] *R v Osenkowski* (1982) 30 SASR 212 per King CJ at 213.

sentence and re-sentence the respondent. In this context, counsel for the respondent criticised the conduct of the prosecution before the sentencing Judge and contended that it deprived the respondent of the opportunity of arguing issues before the sentencing Judge and contributed to errors about which the Director now complains in this Court. While it would have been preferable if the Crown had engaged in a greater dissection of the facts in *JAF* in order to highlight for the sentencing Judge the significant differences between the circumstances of that case and the offending of the respondent, counsel did emphasise the abuse of trust, the importance of denunciation and both personal and general deterrence. In response to submissions by counsel for the respondent the Crown identified the crucial distinction between *JAF* and this case, namely, the causal connection between the position of trust and authority and the criminal conduct. It was the causal connection that did not exist in *JAF* and was advanced by the Crown as a distinguishing element. It cannot be said that the failure of the prosecutor to go into detail contributed to any error by the sentencing Judge.

[86] If we had been sentencing at first instance, we would have regarded a period of eight years as an appropriate starting point. After allowing for the plea of guilty accompanied by remorse, we would have imposed a sentence of six years imprisonment. However, this is a Crown appeal and special considerations apply when re-sentencing following a successful Crown appeal. These special considerations arise out of the "element of double jeopardy involved in requiring an offender to face the prospect of being

sentenced twice for the same criminal behaviour".[28] This principle is of particular importance when an offender has been released by the sentencing Judge and, having resumed life in the community and progressed towards rehabilitation, the offender faces the prospect of being sent to gaol by the appellate court.[29] It may be of less importance in the case of an offender who has been sentenced to a long period of imprisonment, particularly if the Crown appeal is heard soon after the imposition of the sentence. There is authority in New South Wales supporting the view that in some cases it may not be appropriate to allow any reduction when re-sentencing following a successful Crown appeal,[30] but it is unnecessary to discuss those authorities.

[87] In the circumstances under consideration, in our view some allowance should be made in recognition of the principle of double jeopardy. If we were to re-sentence the respondent, we would impose a sentence of five years imprisonment and suspend it after service of three years.

[88] The offending involves crimes against a child committed in circumstances involving a grave breach of a special trust between the offender and the victim. Crimes against children generally, and particularly those committed in such circumstances, cause grave disquiet throughout the community and carry with them devastating and longstanding effects. General deterrence and the maintenance of appropriate sentencing standards are particularly

[28] *R v Riley* (2006) 161 A Crim R 414 at 420[22].
[29] *R v Bara* (2006) 17 NTLR 220.
[30] Those authorities include *R v Holder and Johnston* (1983) 3 NSWLR 245; *R v* Baxter, unreported, New South Wales Court of criminal Appeal 7 May 1991; R *v Salameh*, unreported, New South Wales Court of Criminal Appeal 9 June 1994.

important. In this context, having regard to the errors by the sentencing Judge and the manifest inadequacy of the sentence, in our view this is one of those rare and exceptional cases in which the appeal by the Crown should be allowed and the appellant re-sentenced.

[89] The appeal is allowed and the sentence set aside. Allowing for the principle of double jeopardy, we impose a sentence of imprisonment for five years commencing 22 November 2009. The sentence will be suspended after the respondent has served three years. The operative period of the suspension is three years from the date of the respondent's release. We will hear counsel as to conditions to be attached to suspension.
