SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Director of Public Prosecutions v Earle**
Citation:	**[2023] ACTSC 93**
Hearing Date:	14 April 2023
Decision Date:	28 April 2023
Before:	McCallum CJ
Decision:	(1) For the offence of committing an act of indecency without consent, the offender is convicted and sentenced to a term of imprisonment for one year commencing on 28 April 2023 and expiring on 27 April 2024. (2) For the offence of sexual intercourse without consent, the offender is convicted and sentenced to a term of imprisonment for two years and six months commencing on 28 October 2023 and expiring on 27 April 2026. (3) Order that those sentences be served by way of intensive correction in the community subject to the core conditions mentioned in s 42 of the *Crimes (Sentence Administration) Act 2005* and the following additional conditions: (a) to perform 300 hours of community service; (b) to undertake at least 20 hours of counselling within the next 12 months.
Catchwords:	**CRIMINAL LAW** – JURISDICTION, PRACTICE AND PROCEDURE – Judgment and Punishment – Sentence – Sexual intercourse without consent – Act of indecency without consent – Where offender expresses remorse for offending – Where offender is of good character – Whether the purposes of sentencing will be addressed by an Intensive Correction Order – Where the offender was reckless as to whether the victim was consenting – Weight to be given to sentencing purposes
Legislation Cited:	*Crimes Act 1900* (ACT) ss 54, 60(1) *Crimes Act 1900* (NSW) s 61I *Crimes (Sentence Administration) Act 2005* (ACT) s 42 *Crimes (Sentencing) Act 2005* (ACT) ss 7(2), 10(2), 11, 12, 33, 53(1)(a)
Cases Cited:	*Jurj v The Queen* [2016] VSCA 57 *Markarian v the Queen* [2005] HCA 25; 228 CLR 357 *R v Ali* (No 4) [2020] ACTSC 350 *R v Aroub* [2017] ACTSC 187 *R v Ballantyne* (unreported, Supreme Court of the Australian Capital Territory, Murrell CJ, 1 April 2014) *R v Buda-Kaa* (unreported, Supreme Court of the Australian Capital Territory, Burns J, 30 November 2012) *R v Buda-Kaa* [2013] ACTCA 46

R v Finau (No 2) [2020] ACTSC 193
R v Hartikainen (unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Meagher JA and Newman J, 8 June 1993)
R v Incandela (No 4) [2022] ACTSC 139
R v MT [2014] ACTSC 162
R v Okwicheme [2022] ACTSC 233
R v Palmer [2017] ACTSC 357
R v Taylor [2015] ACTSC 43
R v Wyper [2017] ACTCA 59
The Queen v Miller [2019] ACTCA 25

Texts Cited: Standing Committee on Justice and Community Safety, *Inquiry Into Sentencing* (Report No 4, March 2015)

Parties: Director of Public Prosecutions

Thomas Earle (Accused)

Representation: **Counsel**

B Morrisroe (DPP)

J Sabharwal (Accused)

Solicitors

ACT Director of Public Prosecutions (DPP)

Armstrong Legal (Accused)

File Number: SCC 151 of 2022

McCallum CJ:

1. Thomas Earle was tried by jury on an indictment containing one count of committing an act of indecency without consent being reckless as to whether the person was consenting, contrary to s 60(1) of the *Crimes Act 1900* (ACT) and three counts of sexual intercourse without consent being reckless as to whether the person was consenting, contrary to s 54(1) of the Act. The jury found him guilty of count 1, the act of indecency. They then found him not guilty of counts 2 and 3, two counts of sexual intercourse without consent, but guilty of count 4, the third count of sexual intercourse without consent. I will return to consider the significance of the mixed verdict.

2. The offender now stands to be sentenced for the two offences of which he was found guilty. The offence of sexual intercourse without consent carries a maximum penalty of imprisonment for 12 years. An act of indecency without consent carries a maximum penalty of imprisonment for seven years. The maximum penalty for an offence stands as a sentencing yardstick reflecting the penalty that would be imposed in the worst possible case. The offences here do not fall into that category.

Circumstances of the offending

3. I begin by addressing the circumstances of the offence. The offender and the victim met in July 2021 on a dating app. They had an intimate romantic relationship until around August 2021, when that ended but they remained friends.

4. In November 2021, the offender and the victim began communicating again by text message after the victim confided in the offender that she had been experiencing sexual harassment at her workplace. After that time, the offender spent the night at the victim's house on several occasions by prior arrangement whenever they planned to consume alcohol together. They kissed on one of these occasions but otherwise did not engage in any sexual activity.

5. On 29 December 2021, the victim contacted the offender seeking to obtain prohibited drugs. She invited him to her house to have dinner and "stay over". Over the course of the evening, they ate together, drank red wine and beer, smoked marijuana, consumed "jungle juice" and watched a movie. At some point, the victim went to bed and fell asleep while the offender remained downstairs.

6. At around 2am the following morning, the victim awoke to find the offender's hand inside her underwear. She was lying on her side and the offender was "spooning" her from behind. The offender was rubbing her clitoris with his fingers. Those are the acts that constitute the act of indecency. As the victim was asleep when those acts began, the

offender must be taken to have known that she did not consent to being touched in that way. A person cannot, in law or in fact, consent to sexual activity in their sleep.

7. After she awoke, the victim turned on her back. The offender then scooped her down the bed and removed her underwear. The victim's evidence was that she pushed her bottom into the bed in an attempt to stop her underwear being removed. She said that this was "the only thing [her] body would do…[to try and] stop it". Apart from that movement, the victim described herself as frozen and stiff.

8. The offender then digitally penetrated the victim's vagina and performed cunnilingus on her. Those were the acts relied upon to support counts 2 and 3 on the indictment, for which the jury returned verdicts of not guilty. I have no doubt that the victim did not in fact consent to those acts. The verdicts indicate acceptance of the reasonable possibility that the offender honestly believed she was consenting at that time. Having regard to the nature of those acts and based on the offender's evidence given at the trial, I am satisfied on the balance of probabilities that he did honestly believe she was consenting to those acts. The victim accepted in her evidence that she did not say or do anything during those acts to indicate otherwise.

9. The offender then inserted his penis into the victim's vagina and thrust it in and out with some force. That was the conduct relied upon for count 4. The victim said the offender was "slamming into [her]" and that she was no longer stiff, but "like a ragdoll" at that stage. After a couple of minutes, the victim said "wait, wait, wait", at which point the offender immediately stopped and asked if she was okay. The victim responded that the offender had taken her by surprise, to which he laughed and apologised. The victim then left her bedroom (leaving the offender there), went into the bedroom of her housemate and said, "Tom raped me". The victim's housemate asked the offender to leave the house and he complied with that request.

The offender's state of mind

10. It is necessary to make a finding as to the offender's state of mind at the time of the act of sexual intercourse in count 4. Section 54(3) of the *Crimes Act* provides that, for the purposes of that section, proof of knowledge or recklessness is sufficient to establish the element of recklessness. Recklessness can accordingly be proved in any one of three ways: if the offender knew the victim was not consenting; if he realised there was a possibility that she was not consenting and proceeded anyway or if he did not consider whether she was consenting or not. The consideration of that issue must be informed by the acquittals on counts 2 and 3.

11. The offender gave evidence in the trial that the act of indecency constituting count 1 occurred after the victim had woken up, rolled over to face him and started kissing him. In accordance with the *Liberato* direction given at the trial, the jury must have rejected that version, set it aside and been satisfied beyond reasonable doubt of the victim's version, which was that she was asleep when the touching began. I am satisfied on that basis that the offender knew the victim did not consent to the indecent act of having her clitoris touched.

12. The position as to count 4 is more complex. Once it is accepted, as I do accept, that the offender honestly believed he had the victim's consent to put his fingers in her vagina and to perform the intimate act of cunnilingus on her, I cannot be satisfied beyond reasonable doubt that the offender nonetheless knew that the victim did not consent to the next sexual act of inserting his penis into her vagina. The victim and the offender had not previously been able to have sex in that way because the offender had been unable to sustain an erection. Consistent with the jury's verdict, I am satisfied that, finding himself capable on this occasion, the offender did not turn his mind to the need to ascertain consent to the different kind of intercourse in which he was about to engage.

Impact on the victim

13. I am required to take into account the effect of the offending on the victim as addressed in her victim impact statement: ss 33(1)(f) and 53(1)(a) of the *Crimes (Sentencing) Act 2005* (ACT). The victim read her statement aloud to the Court at the proceedings on sentence. It is clear that she has been absolutely devastated by the offences.

14. The offending has affected her physically, emotionally and financially. After that night, she washed herself with bleach, which she believed was the cause of eczema and bacterial vaginosis. She has gone from being a financially independent young woman to quitting her full-time job, moving in with her parents in Sydney and becoming financially and emotionally dependant on them.

15. The offending has also brought the victim severe mental distress. She has experienced sleep paralysis and anxiety in her relationships. She emphasised the retraumatising effect of the trial process, describing the proceedings as "emotionally draining" and "triggering feelings of shame, guilt and self-doubt".

Objective seriousness

16. It is necessary to make an assessment of the objective seriousness of the offences. The prosecutor noted the "unifying principles" accepted by the Court of Appeal in *R v Wyper* [2017] ACTCA 59 at [114]:

(a) Sexual offences are regarded as objectively serious offences by the courts;

(b) The serious nature of sexual intercourse without consent demands that the sentencing purposes of deterrence, denunciation and recognition of harm to the complainant be given prominence;

(c) A period of full-time imprisonment is usually necessary to give effect to the above sentencing principles.

17. The application of those principles must always be assessed according to the individual circumstances of the case.

18. The prosecutor also relied on the list of factors that may inform the assessment of the seriousness of a sexual offence (which is "descriptive, rather than prescriptive") provided in *Jurj v The Queen* [2016] VSCA 57 at [80] and applied in this jurisdiction by Mossop J in *R v Palmer* [2017] ACTSC 357 at [22]:

(a) whether the offence was premeditated;

(b) whether the offender acted alone or in company;

(c) how long the attack lasted and whether the victim was raped more than once;

(d) whether the offending involved violence or threats of violence;

(e) whether a weapon was used;

(f) whether the victim was injured in the course of the rape;

(g) whether the victim was humiliated or degraded;

(h) whether the offender used a condom;

(i) whether the victim was particularly vulnerable; and

(j) whether the offender ignored warnings or protests by the victim.

19. The prosecutor relied in this context on the decision of the Court of Criminal Appeal of New South Wales, *R v Hartikainen* (unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Meagher JA and Newman J, 8 June 1993). I did not understand it to be suggested that the outcome in that case provided any assistance for comparative purposes. While decisions of the New South Wales Court of Criminal Appeal deserve respectful consideration for the guidance they may provide, a sentence imposed in another jurisdiction does not stand as an appropriate comparator. There is a single common law of Australia which includes common law principles of sentencing concerning, for example, general deterrence, proportionality and totality. However, each State and Territory (and indeed the Commonwealth) has its own statutory sentencing regime and consequently its own individualised sentencing jurisprudence.

20. Further and in any event, the offender in *Hartikainen* pleaded guilty to a more serious offence, being the offence of having sexual intercourse with a woman without her consent *knowing* that she was not consenting, contrary to s 61I of the *Crimes Act 1900*

(NSW) (the offender having commenced having sexual intercourse with the victim while she was asleep). At the time he was sentenced, the maximum penalty for that offence had recently been increased from 8 to 14 years imprisonment, manifesting an intention on the part of the New South Wales Parliament substantially to increase the penalties attached to certain sexual offences so as to reflect community standards.

21. Noting all of those qualifications, the decision includes a statement about the nature of sexual violence which provides important guidance in assessing the seriousness of such offences. Gleeson CJ (with whom Meagher JA and Newman J agreed) said at:

> It was pointed out by his Honour in his remarks on sentence that the sexual intercourse was not accompanied by any additional violence of the kind that is sometimes encountered in cases of rape. However, non-consensual sexual intercourse is itself an extreme form of violence, and one which the community expects will be taken very seriously by the courts.

22. Those remarks confirm, as is trite, that all offences of sexual intercourse without consent should be treated as offences of considerable seriousness. While the offence itself may involve conduct of short duration (as is the case here), the resulting trauma suffered by victims is often intense and enduring. That is clearly the case here, and that is a relevant factor.

23. At the same time, in determining the appropriate sentence for these offences, I must have regard to the fact that the range of possible sexual offending is broad; from violent, predatory and humiliating attacks involving penetration achieved by deliberate force or threat, to fleeting, impulsive acts undertaken without regard to whether there is consent from the victim.

24. A number of the factors in *Jurj* are absent from the present offending. There is no suggestion that it was premeditated; the victim was not subjected to additional violence or threats of violence beyond the violence inherent in any sexual offending; there is no evidence of the victim being physically injured in the course of the offending; the offender did not use a weapon and he acted alone. The offending was of short duration and the offender did not do anything to humiliate the victim beyond the degree of humiliation inherent in sexual offences.

25. There are some factors that aggravate the objective seriousness of the offending. Both offences occurred in the victim’s home, a place where she was entitled to feel safe. Count 1 began when the victim was asleep and so particularly vulnerable. As already indicated, the offender must be sentenced for that offence on the basis that he knew she was not consenting.

26. The same cannot be said for the offender’s conduct in count 4. As already explained, I am satisfied that the act of penile penetration followed upon what the offender believed

was a consensual act of cunnilingus and the victim's evidence was that she did not communicate her lack of consent to that act. When she did tell the offender to wait, he stopped and asked if she was okay. On the other hand, the seriousness of that offence is aggravated by the fact that the offender did not use a condom or any other form of protection.

27. I do not consider it necessary to pinpoint the seriousness of the offences on a notional line. The act of indecency is of higher seriousness within its range because the offender must be taken to have known there was no consent, even if he was hopeful that it might be forthcoming. By the time of the act of sexual intercourse in count 4, he believed there had been consent to some acts but proceeded in a selfish way to a different act of intercourse without turning his mind to the question of consent.

28. In the result, the Court is left to deal with an offence that was of extreme seriousness to the victim and by which her life as she knew it has been torn apart. That is a significant factor in the sentencing exercise. However, it is necessary also to assess the offender's culpability for his offending conduct. The law has a tendency to assume bright line clarity in the mind of an offender between having consent to sexual activity or not. In truth, the issue of consent in sexual relations can be complex, changing, awkward and messy. The freeze response is now better understood than it once was as a normal response to unwanted sexual activity. That is why parliaments across the country are clarifying the law to make plain that consent must be positively communicated and not assumed.

29. Unfortunately, in the circumstances here, the freeze response created confusion, as the jury must have found. The acquittal on counts 2 and 3 must be reconciled with the conviction on count 4. In my assessment and based on my analysis of the evidence at trial, the logic of the verdicts is as I have explained; that the offender honestly but mistakenly believed that the victim was consenting to his first two acts of sexual intercourse but that he did not turn his mind to that important question before moving to a different sexual act. The result is tragic indeed. The victim has been left severely traumatised while the offender must be dealt with for the acts that caused that trauma, even though the more serious offence was due to recklessness in failing to turn his mind to the issue of consent at a particular point of the sexual activity rather than knowledge of a lack of consent, which would undoubtedly be more serious.

Circumstances of the offender

30. I turn to consider the circumstances of the offender. The evidence leaves me in no doubt that, outside the present offending, the offender is a person of good character with strong pro-social influences. He is a relatively young man without any criminal history. He was

raised in what is clearly a loving and supportive family and holds strong relationships with friends, family and colleagues.

31. The evidence included a pre-sentence report as well as several character references from the offender's family, friends and previous employers. These letters speak with one voice as to the offender's good nature. Many provide anecdotes of acts of good will or altruism by the offender and express their unwavering support for him.

32. The author of the pre-sentence report states that the offender regularly spends time with one group of friends but that he has felt socially isolated since the commission of the current offences.

33. While the offender has some history of alcohol and drug use, he has been abstinent from any illicit substances since the commission of the offences and has returned numerous negative urinalysis tests during this time. He was assessed by Correctives Services as presenting a medium to low risk of general reoffending and an average risk of sexual reoffending. That assessment is important but is necessarily based on limited information. The circumstances of the offences and the character references cause me to conclude that the offender is very unlikely to re-offend in any way. That conclusion finds support in the report of a forensic psychologist, Mr Matt Visser. I will return to address that report.

34. The offender holds a Bachelor of Science degree from the Australian National University. Prior to his arrest, he had gained employment through a graduate program at a consulting firm. Since his arrest, he has been working as a gardener and regained employment at the Canberra Southern Cross Club. References provided by his employer at the Southern Cross Club and his employer at the time of the offending attest to the offender's strong work ethic, dependability and courteousness.

35. Many of the references provided by the offender's friends and family express concern for his psychological wellbeing. Those concerns are echoed in Mr Visser's report. He made a formal diagnosis of mild to severe Major Depressive Disorder. Mr Visser noted that he was particularly concerned with the offender's level of suicidal ideation which he described as being in the "extremely high range". He also agreed with the assessment of the offender's mother that a period of incarceration would increase his likelihood of both suicide and drug use.

36. Mr Visser recommended:

> [T]hat he engage with his GP to obtain a mental health care plan, consider the possibility of antidepressant medication, and see a clinical psychologist for a minimum of twelve sessions occurring no less than fortnightly.

(Footnotes omitted.)

37. He also said:

> As there is significant pressure on the mental health system at the current time, returning to see his previous counsellor, Mr Wigley, in the period before he can access a clinical psychologist is appropriate. Given his drug use remains a risk factor, ongoing random drug testing through corrections would also be appropriate.

38. The offender expressed an intention and willingness to continue engagement with mental health services. That is confirmed in a letter from the offender's General Practitioner expressing an intention to refer the offender for regular counselling.

39. It is necessary to address a submission made by the offender concerning alleged extra-curial punishment. The submission was based on the fact that the offender has been subject to media reporting during the trial. He submitted that these reports have triggered feelings of shame as a result of his family's previous experience of media attention. I am not persuaded that it is appropriate to mitigate the sentence on the basis of that experience. I have no difficulty accepting that media attention must have been upsetting for the offender and his family, particularly in light of the prior experience addressed in the material. Unfortunately, as submitted by the prosecutor, that is an ordinary incident of the principle of open justice. Indeed, the expectation of publicity is a premise of the principle of general deterrence. It would be incoherent at the same time to allow a reduction in sentence on that account.

The weight to be given to other sentencing purposes

40. The prosecutor submitted that the offender has not demonstrated insight into his offending or any genuine remorse for the harm caused and that his lack of insight limits the offender's prospects for rehabilitation. I respectfully disagree. This is a rare case in which the offender's persistence in an aspect of an unsuccessful defence and his ability to experience and demonstrate remorse are not mutually exclusive. In a letter to the Court, the offender wrote:

> I can see now that I should have communicated better, raising the question of consent beforehand and at time during, or simply done nothing at all. In the future, I will be much more cautious and wary of making sure consent is given by any future sexual partner. I don't want to cause any future sexual partner pain or suffering due to a lack of communication on my part.
>
> I acknowledge that due to my inaction, a person has been hurt, both physically and mentally. I do not find any joy or satisfaction in the hurting of anyone, let alone someone I cared for very much.

41. In those remarks, the offender maintains that he believed the victim to be consenting at the time of the offending, which necessarily rejects the jury's guilty verdicts. However, his letter at the same time demonstrates insight into the fact that his conduct was wrong,

a level of resolve to not engage in similar conduct in the future and, in my assessment, genuine regret for the harm his conduct has caused to the victim, for whom he cared greatly. In those circumstances, I do not think it is necessary to give any significant weight to specific deterrence in this case.

42. Conversely, I accept the prosecutor's powerful submissions as to the need for the offender's sentence to denounce the offending conduct and reflect significant weight to the purpose of general deterrence. The offender comes from a background of some privilege, particularly compared with the disadvantage suffered by many offenders that come before this Court. Unlike cases in which the *Bugmy* principles are enlivened, he has been raised to have the resources, skills and supports required to make appropriate decisions about his conduct. As submitted by the prosecutor, the Court should impose a sentence that conveys to the victim of these offences and other victims that their experiences of sexual offences will be taken seriously.

43. The prosecutor also submitted that the weight given to general deterrence should be given primacy as a sentencing purpose at the expense of the purpose of rehabilitation. She relied in that context on the decision of the Court of Appeal in *The Queen v Miller* [2019] ACTCA 25 where the Court said at [44]:

> The primary sentencing considerations for sexual offending are punishment, deterrence, denunciation and recognition of the harm done to the victim. In the proceeding before the primary judge there was little by way of remorse demonstrated by the respondent beyond his plea of guilty to the offence. Personal deterrence should have been a relevant consideration at that time. General deterrence, or deterrence of others from committing like crimes, is always an important consideration in imposing a sentence for sexual offending. The above does not deny the relevance of rehabilitation in sentencing offenders such as the respondent, but in sentencing for sexual offences rehabilitation will ordinarily be given lesser weight than the other considerations to which we have referred due to the gravity of the offending.

44. Such comments are important for general guidance and in supporting consistency in sentencing, but they must not be hardened into immutable rules. To apply statements of broad application in that way would put a gloss on the terms of s 7(2) of the *Crimes (Sentencing) Act* and would subvert individualised justice and the process of instinctive synthesis that this Court is required to undertake in accordance with decision of the High Court in *Markarian v the Queen* [2005] HCA 25; 228 CLR 357.

45. While I agree that general deterrence should be given significant weight, the offender's strong prospects of rehabilitation and low risk of reoffending must also be given due weight in the present sentencing exercise.

Comparative cases

46. I am required to have regard to current sentencing practices: s 33(1)(za) of the *Crimes (Sentencing) Act*. The prosecutor identified nine comparative sentencing decisions. Before turning to the detail of those decisions, I make two general observations. First, the decisions support the prosecutor's primary contention that the punishment for an offence of sexual intercourse without consent contrary to s 54(1) will ordinarily include a term of full-time imprisonment. Secondly, however, all nine were cases in which, leaving aside any other differences, the offender knew or must be taken to have known that the victim was not consenting to the sexual intercourse. That alone distinguishes them from the present case. As I have indicated, while I am satisfied beyond reasonable doubt that the offender must have known the victim did not consent to the act of indecency charged in count 1 (because she was asleep when it started), I am not satisfied beyond reasonable doubt that he knew she was not consenting to the act of sexual intercourse charged in count 4. For that reason, none of the cases provided by the prosecutor are directly comparable so far as this offender's culpability is concerned.

47. Dealing with the comparative decisions in chronological order, the earliest was the decision in *R v Buda-Kaa* (unreported, Supreme Court of the Australian Capital Territory, Burns J, 30 November 2012). That was a case of digital penetration committed in the face of clear resistance by the victim. The offender was found guilty after a trial. He had a significant criminal history. At the time of the offences he was 22 years of age and was on parole for offences of aggravated burglary. He had a diagnosis of schizophrenia which did not reduce his moral culpability but the judge did allow some moderation to the sentence on that account, apparently because his mental condition would make a sentence of imprisonment more onerous for him. The offender was sentenced to a term of imprisonment for three years with a non-parole period of one year and six months. A Crown appeal on the ground of manifest inadequacy was dismissed: *R v Buda-Kaa* [2013] ACTCA 46. The Court of Appeal held that the sentence was "lenient" and "at the low end of the appropriate range of sentences for offences of this kind" but not manifestly inadequate: [29]. The case is clearly distinguishable because the offender was on parole at the time of the offence.

48. In *R v Ballantyne* (unreported, Supreme Court of the Australian Capital Territory, Murrell CJ, 1 April 2014), the offender and the victim had both attended an 18th birthday party. The victim went to sleep at the end of the party on a mattress on the floor. The offender lay down next to her and digitally penetrated her while she was asleep. He had no prior relevant history. He was found guilty after a trial but still did not acknowledge having committed the offence at the time of sentence. The Chief Justice noted, "[t]hat is

unfortunate. An acknowledgment would have assisted the victim to reconcile what occurred to her": at [10]. However, her Honour attributed the offender's attitude to "his immaturity" (he was 19) and considered that he could not be held responsible for that. He was sentenced to a term of imprisonment for 18 months of which he was ordered to serve six months by way of periodic detention. The balance of the sentence was suspended and the offender was subject to a good behaviour order for that period. I note that periodic detention is no longer available as a form of sentence.

49. *R v MT* [2014] ACTSC 162 also involved a conviction after a trial for an act of sexual intercourse that began while the victim was asleep after both the victim and the offender had attended a party. The intercourse was penile-vaginal intercourse and the offender did not use of a condom. The offender in *MT* relied on *Ballantyne* as a comparative decision. However, the sentencing judge noted that the offender in *MT* had persisted after the victim awoke and made it clear that she was not consenting. Indeed, he did not stop "until his phone rang and he answered it". Unsurprisingly, the sentencing judge found that his persistence in those circumstances made the offence significantly more serious than the offence considered in *Ballantyne*. Refshauge J accepted that the offence was opportunistic and found that it was at the "lower end of objective seriousness" but "by no means at the lowest end": [44]-[46]. The offender was 19 and was treated by the sentencing judge (with respect, appropriately) as being "still relatively young". The offender had no relevant criminal record and "excellent prospects of rehabilitation". He was sentenced to two years imprisonment with a non-parole period of nine months and a recommendation that if released on parole he participate in the Adult Sex Offender Program.

50. *R v Taylor* [2015] ACTSC 43 was yet another offence of sexual intercourse that began while the victim was asleep after a party. Throughout the night, the offender had repeatedly sat next to the victim and put his hand on her leg despite her repeatedly rejecting his advances and moving away. She had consumed alcohol, LSD and speed and was barely able to walk. After other guests left, the victim fell asleep on the couch. While she was asleep, the offender digitally penetrated her vagina. She had no recollection of events. The charge was based on an admission by the offender. The offender was 49 at the time of the offence. He had a shocking childhood marred by multiple incidents of physical and sexual abuse. He pleaded guilty on the first morning of the trial. The sentencing judge accepted that there were powerful mitigating factors but held that the offence was "a very serious one which involved predatory behaviour throughout the time [he] was at the party": at [54]. He was sentenced to two years imprisonment suspended after serving six months with a two-year good behaviour order.

51. The only decision drawn to my attention by the parties in which an offender has not been sentenced to a period of full-time or periodic detention for an offence against s 54(1) is *R v Wyper*. The offender and the victim in that case were in an intimate relationship. The victim was living in the offender's house until one morning when he asked her to leave. She asked why and said she did not want to leave. The offender said, "[d]o you want me to fuck you, to make you happy and then you will leave". He held her down on the bed and penetrated her vagina with his fingers. He was found guilty after a trial. The sentencing judge did not record any finding as to whether the offender knew the victim was not consenting.

52. *R v Aroub* [2017] ACTSC 187 was a case in which the victim fell asleep in a spare room at the offender's house. She awoke to find the offender digitally penetrating her and pushed his hand away. Chief Justice Murrell stated that the offence did not fall into the worst category as it involved "impulsive, brief, digital penetration": [17]. Her Honour noted the offender came from a disadvantaged background and his intoxication likely contributed to the offence. The offender was on conditional liberty but had no history of sexual offences. Murrell CJ sentenced the offender to two years imprisonment suspended after six months, taking into account the "strong subjective features" and the low to moderate objective seriousness of the offence. As with *Buda-Kaa*, the fact that the offender was on conditional liberty was plainly significant.

53. In *R v Finau (No 2)* [2020] ACTSC 193, the offender and complainant were work colleagues who shared a taxi home after a night out in Civic. The offender undressed and attempted to kiss the complainant, who resisted. He then forced her onto the couch and covered her mouth to stop her repeated protests. He struck her in the face and then engaged in penile-vaginal intercourse for less than a minute. He was sentenced to two years and six months imprisonment, suspended after serving nine months. The sentencing judge noted that "having regard to the offender's otherwise exceptionally good character, the low risk of re-offending, and the excellent prospects of rehabilitation, it is appropriate to impose a partially suspended sentence that nevertheless sees the offender serving a substantial period of full-time imprisonment adequate to recognise relevant sentencing purposes": at [49].

54. In *R v Ali (No 4)* [2020] ACTSC 350, the victim and offender were work colleagues. The offender asked to stay at the victim's house after a night out, saying he did not have his keys. The victim went to sleep in the spare bedroom and closed the door behind her. Sometime later, the victim woke to the offender kissing her, and she told him she wanted to sleep. He then squeezed her breast, to which she said "no". He later placed his hand down her pants, inserted his fingers into her vagina and moved his fingers up and down.

He must be taken to have known the victim did not consent. The offender was found guilty after a trial. He was assessed as a low risk of reoffending generally and average risk of sexual offending. He had otherwise good prospects of leading "a lawful life". For the charge of sexual intercourse without consent he was sentenced to two years imprisonment. On each count of act of indecency, he was sentenced to two months imprisonment, cumulative as to one month. A non-parole period of 15 months was imposed.

55. The prosecutor included my decision in *R v Incandela (No 4)* [2022] ACTSC 139 in her bundle of comparative decisions. The circumstances of that case were very different from the present case and I do not think it provides any useful guidance.

56. The same may be said of the last decision relied upon by the prosecutor, being the sentencing decision in *R v Okwicheme* [2022] ACTSC 233. Leaving aside the fact that the sentence imposed in that case is currently under appeal, the circumstances are too different to provide any useful guidance.

57. Section 10(2) of the *Crimes (Sentencing) Act* provides that the Court may impose a sentence of imprisonment only if satisfied, having considered possible alternatives, that no other penalty is appropriate. In the present case, the prosecutor submits, and the offender accepts, that a sentence of imprisonment is the only appropriate sentence. I agree.

58. However, it remains necessary to consider how the sentence should be served. Section 11 of the Act confers power in certain circumstances to order that a sentence be served by intensive correction in the community, while s 12 confers power to suspend all or part of a sentence of imprisonment.

59. The prosecutor submitted that nothing other than full-time detention is warranted in this case and that an intensive correction order (ICO) would be inadequate to give effect to the purposes of sentencing. I have given anxious consideration to that submission. In so doing, I have had regard to the circumstances in which the sentencing option of ICOs was introduced in this Territory.

60. The provenance of the notion that a term of imprisonment can, consistently with the purposes of sentencing, be served by intensive correction in the community was considered by the Standing Committee on Justice and Community Safety, *Inquiry Into Sentencing* (Report No 4, March 2015). In its report, the Standing Committee recorded submissions from several stakeholders, who argued that ICOs would expand the range of orders available to courts, filling the gap between community and custodial orders. The flexibility of ICOs was contended to increase judicial discretion and more aptly

consider an individual's circumstances. Their introduction of tailored supervision would, in turn, reduce recidivism and public resource costs in the long term, though it was noted that such orders require adequate resources to be effective. The Standing Committee recommended the introduction of ICOs in the Australian Capital Territory, particularly due to their benefits in reducing recidivism.

61. The decision in *Wyper* supports that analysis. In that case the Court of Appeal held at [128] – [129]:

> 128. …an ICO is "a sentence of 'last resort' for offenders before full-time imprisonment." Further, an ICO was "designed to be punitive while still allowing the courts to incorporate elements of rehabilitation… It is flexible … but still sufficiently structured to ensure every order places appropriate demands on an offender."
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> 129. There can be no general rule that, where general deterrence is an important sentencing purpose, such as in sexual offending in a family violence context, it is never appropriate for a court to make an ICO. In relation to any category of offence, a sentencing court has a broad discretion which must take into account many considerations, not just general deterrence. In any event, the legislature envisaged that an ICO could reflect sentencing purposes such as general deterrence.

62. In my assessment, this is a case in which the purposes of sentencing will adequately be met by sentencing the offender to a term of imprisonment to reflect the seriousness of the offences and their very serious impact on the victim but ordering that the sentence be served by intensive correction in the community. In reaching that conclusion, I have had regard to s 11(3) of the *Crimes (Sentencing) Act*, which provides that if the sentence of imprisonment imposed is for more than two years but not more than four years, an ICO may be made only if the Court considers it is appropriate to do so, having regard to:

(a) the level of harm to the victim and the community caused by the offence;

(b) whether the offender poses a risk to particular people or the community; and

(c) the offender's culpability for the offence having regard to all the circumstances.

63. As already explained, the level of harm to the victim is high in the present case and that is a factor weighing against making an intensive correction order. However, in assessing that factor, I must also assess the significance of the jury's verdicts, particularly the acquittals on counts 2 and 3. I have also given careful consideration to the complexity of issues of consent to which I have already referred. I have no doubt that the victim's experience of these events was extremely traumatic for her and that the shadow of that trauma will be long. That factor must be weighed in the context that the offender's state of mind did not match the degree of trauma he caused by his conduct. His liability to be punished is due to a criminal failure to advert to a critical issue, but he is not in the category of an offender who has persisted with sexual violence in the face of protest or

a known lack of consent. The third factor in s 11(3) accordingly weighs in favour of making an ICO.

64. As to the second factor, for reasons already explained, I am not persuaded that the offender poses a risk to the victim, to future partners or to the community.

Sentence

65. For those reasons, having regard to the seriousness of the offences and their impact on the victim, I propose to impose sentences totalling three years of imprisonment but to order that those sentences be served by way of intensive correction in the community with additional conditions requiring him to undertake counselling and to perform community service.

66. Thomas Earle, please stand:

(1) For the offence of committing an act of indecency without consent, you are convicted. For that offence, I sentence you to a term of imprisonment for one year commencing on 28 April 2023 and expiring on 27 April 2024.

(2) For the offence of sexual intercourse without consent, you are convicted. For that offence, I sentence you to a term of imprisonment for two years and six months commencing on 28 October 2023 and expiring on 27 April 2026.

(3) I order that those sentences be served by way of intensive correction in the community subject to the core conditions mentioned in s 42 of the *Crimes (Sentence Administration) Act 2005* and the following additional conditions:

(a) That you perform 300 hours of community service;

(b) That you undertake at least 20 hours of counselling within the next 12 months.

I certify that the preceding sixty-six [66] numbered paragraphs are a true copy of the Reasons for Sentence of her Honour Chief Justice McCallum

Associate: Grace Hartley

Date: 28 April 2023