A Digest of Judgments Delivered in 2014 by the Court of Criminal Appeal of the Northern Territory and the Court of Appeal of the Northern Territory concerning Criminal Law in Limerick Form[*]

Malyschko v The Queen **[2014] NTCCA 1**[1]
To his mum said her son, Chris Malyschko,
"I'll do it, if that is your wish." "Go
And kill him," she bid.
And indeed, so he did:
Niceforo soon slept where the fish go.

Grieve v The Queen **[2014] NTCCA 2**[2]
Understandably, Grieve is aggrieved.
Though for sentencing, not disbelieved
("Wasn't there!"), he copped more
Than his mate. That's the law.
As for justice, that's hardly achieved.

[*] It is a truth universally acknowledged that appellate judgments are much too long and much too prosaic. My mission is to digest them, digestibly. Let's start with the law, the law, that is, of the limerick. Herewith, the rubrics: five lines; thirteen anapestic feet; AABA rhyme scheme; not necessarily filthy.

[1] The first of a trilogy of decisions handed down on the same date by the same bench, all arising from the same case, the sensational final trial conducted by Mildren J before his retirement (and the commencement of his career as an Acting Justice of the Supreme Court of the Northern Territory). Notably, all six of the appeals generated by his judgments in this case were dismissed. Malyschko's mother, it was found, paid him $15,000 (none of which he kept for himself) to murder her exceptionally abusive husband. The killing in Katherine was carried out a month after the plan was hatched. The offenders killed the victim, dumped the body, burnt their clothes and were arrested three days later. Malyschko's mother confessed a month after that. The Crown appealed the 18 years non-parole period, and Malyschko (who had nothing to lose) cross-appealed. On appeal, the judge's findings of lengthy planning, premeditation and murderous intent were not disturbed, and neither was his finding that the 'considerable provocation' amounted to exceptional circumstances for the purpose of reducing the otherwise mandatory minimum non-parole period of 20 years.

[2] Grieve's appeal against his murder conviction on the failure to seek a direction on good character was doomed, one reason being that his character was not actually all that good. Even though he was sentenced on the basis that he had withdrawn from the enterprise before the murder, this did not amount to a defence, as he had failed to take all reasonable steps to prevent the plan being executed. He also appealed his sentence (the standard life with 20, but with a recommendation for release after 14), which failed because, not having known the victim himself, he could not claim that the victim's conduct had substantially mitigated *this* offender's conduct. That the absent accomplice (and, for that matter, a fourth offender who had pleaded guilty to murder and who gave evidence for the Crown at trial) got longer than the principal offender (Malyschko) graphically illustrates the barbarity of mandatory sentencing for murder.

The Queen v Buttery **[2014] NTCCA 3**[3]
Niceforo: a terror, a nutter. 'E
Bashed 'er, accused 'er of sluttery.
Thus provoked, she agreed
That they do the dark deed.
So he died, and she paid, poor Bron Buttery.

The Attorney-General of the NT v EE **[2014] NTCA 1**[4]
The Attorney's determined to seek
His detention: "'EE makes us 'EEK'!
Lock him up. Take the key,
Throw it into the sea!"
"Not so fast, A-G. Let the law speak."

R v Nabegeyo **[2014] NTCCA 4**[5]
A shameless drunk dude, Nabegeyo,
Who recklessly had his own way (oh!),
With his pants down, got caught.
"Lad, three years is too short,
So take five", ruled NTCCA-o.

Grosvenor v The Queen **[2014] NTCCA 5**[6]
Take great care when you're trying a LIP,
When he's done with his plea a back flip,
Not to spill 'guilty' beans
To the jury. That means
They'll be prejudiced (serious slip).

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[3] In this case, the last of the trilogy, Buttery, the victim's wife, avoided a murder conviction and was found guilty of provocation manslaughter. The Crown's appeal of her sentence of 8 years with 4 years non-parole period was dismissed: she was a victim of 'severe and extreme' provocation by the victim, who had both cowed her and used her as his 'cash cow'. Interestingly, she had pleaded guilty to manslaughter before the jury, and was therefore permitted a discount of 20%, despite the fact that the trial judge had left the complete defence of defensive conduct to the jury (they evidently rejected it). Her minimum sentence of 4 years is disproportionate to the minimums of 18 and 20 years imposed on her co-offenders: bad laws make hard cases.

[4] The first appeal brought under the controversial *Serious Sex Offenders Act 2013* (NT). This was in effect a stay application by the Attorney-General against an interim supervision order made by a judge at first instance. It is evident from the judgment that if granted, this appeal would have saved the NT about $14,000, far less than the impost on the public purse of making and hearing the application. CLANT has criticised the scheme of the Act, including the reservation of the power to commence an application under the Act to a politician, the Attorney-General. This is a case in point. The appeal was rejected, the court noting the purportedly non-punitive purpose of the Act. The Attorney did not appeal the final supervision order ultimately made.

[5] Crown appeal allowed against a sentence of 3 years suspended after 18 months. The court ruefully observed that it was precluded by operation of section 16AA of the *Crimes Act* (Cth) from having regard to an aggravating circumstance: the culturally taboo kinship relationship between the offender and the victim.

[6] A litigant in person is a dangerous man: this then unrepresented appellant had, before trial, indicated a plea to one of two counts on the indictment. At trial, he contested both charges. On appeal, it was held that leave should have been sought by the Crown before cross-examining the accused on his backflip, and that the use made of this highly prejudicial matter amounted to a serious miscarriage of justice. Coda: on the day of his retrial, almost two years after the original trial, the appellant pleaded guilty to both charges.

***Osadebay v The Queen* [2014] NTCCA 6**[7]
Osadebay's bad day: DNA
Meant his EROI can't fly. Instead, say
(Now on oath), "In the car
We had sex." Too bizarre.
Guilty lies? Yes, they are, so he'll pay.

***Whitfield v The Queen* [2014] NTCCA 7**[8]
Young Whitfield's suspender's restored.
His complaint (that's not fair!)'s not ignored,
But he fluffed his last chance
With his stuff-you-all stance.
As he's lived, by law's sword he's now floored.

***Leo v The Queen* [2014] NTCCA 8**[9]
Mandatory retrospectivity
Engenders excessive captivity.
Consequently this court
Manifests, as it ought,
To confine its extent, a proclivity.

***Leo v The Queen* (No 2) [2014] NTCCA 9**[10]
"We acknowledge the force of your bid that
We remit (which would save a few quid, that),
But we can't. Wish we could
And that parliament would
Change the Code." (Now all good, as they did that.)

[7] An excellent illustration of why the best advice to give a client before the police interview is "if you do talk, DON'T LIE". The accused here dug himself such a deep hole that even though the appeal court found significant errors in the trial judge's corroboration directions, the proviso was readily applied.

[8] The only applicant/appellant to appear unrepresented before the NTCCA in 2014, which upheld the sentencing judge's decision to restore a partially suspended sentence following "flagrant disregard for his obligations" by way of both breaches of conditions and re-offending. The court, however, was at pains to give the applicant a fair go, as is evident from its careful and detailed reasons for judgment.

[9] In a sense, this is not an important case, as its application is confined to offenders sentenced to a narrow range of offences committed during a two month period between two sets of statutory amendments. Two features, however, emerge from these technical and convoluted proceedings. Firstly, mandatory sentencing legislation, by its nature, produces anomaly, harshness, inconsistency, complexity, confusion and injustice. Secondly, generally speaking, judges try to find ways of reading such laws down.

[10] This is a coda to the previous case, and gratifyingly, the judgment is only slightly longer than the limerick. It is also gratifying that the court's recommendation was implemented by the enactment of the *Criminal Code Amendment (Remission for Resentencing) Act 2015* (NT) which commenced on 6 May 2015.

***The Queen v Indrikson* [2014] NTCCA 10**[11]

He was caught with one hundred green pounds.
His sentence: just four. Out of bounds.
Public conscience is shocked
By that wrist-slap. We've locked
Him away now for four more years (zounds!).

***Gregurke v The Queen* [2014] NTCCA 11**[12]

Though the circs of your motive were murky,
The sentence imposed was too quirky.
'Twas elder abuse,
Which we need to reduce.
No excuse, but more mercy, Gregurke.

***Seriban v R* [2014] NTCCA 12**[13]

Mister Seriban's pseudo-scam tale:
Though the jury heard you'd been in gaol,
Your "judge misdirected"
Submission's rejected.
Years late, your complaint is now stale.

***BB v The Queen* [2014] NTCCA 13**[14]

"Two years plus (he was merely a tween)
Is excessive and patently mean
(Though fully suspended)",
His counsel contended.
"Quite right, so we must intervene."

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[11] The largest transhipment of cannabis – 67kg, which sold for close to half a million dollars – to come before the Northern Territory courts, led to a successful Crown appeal and a new head sentence of eight years.

[12] Serious breach of trust involving the theft of $124,000 (the victim's life savings) over six months in 134 separate transactions from an elderly lady in the care of the offender. Did the venerable sentencing judge (who has served a remarkable 50 years as a judicial officer) over-identify with the victim, as is impertinently suggested in the limerick? In any event, the original sentence (6/4) was found to be manifestly excessive for this remorseful and co-operative first offender, and both the head sentence and non-parole period were reduced by eighteen months.

[13] This was a "pseudo-scam" in two senses: it involved an alleged conspiracy to import pseudoephedrine (a methamphetamine precursor); and the accused claimed at trial that it wasn't an actual conspiracy, but a pseudo-conspiracy, in which he was trying to scam others by pretending to be a drug importer. The only partially explained five year delay in applying for leave to appeal prejudiced the Crown, as in the interim, evidence (eg phone intercepts) had been destroyed and contact with Indonesian witnesses had been lost. In any event, the inadvertent disclosure to the jury that the accused had once been in prison was held, in the circumstances, not to be greatly prejudicial.

[14] Having regard to the youth and immaturity of this twelve year old first-time offender, and the unplanned and unsophisticated nature of the aggravated robbery in which he took part, his fully suspended sentence of two years detention was halved on appeal.

***O'Reilly v R* [2014] NTCCA 14**[15]
Notwithstanding a slight factual flaw,
You nonetheless shattered his jaw.
Not to put it too highly,
A mindless, O'Reilly,
Drunk, cowardly act, to be sure.

***Chin v Teague* [2014] NTCA 05**[16]
There is more than just one way to skin
A cat of a case, for a win.
Prosecution's caught short:
Can't explain what it ought.
Take it ("Teague, case dismissed!") on the chin.

***Demur v The Queen* [2014] NTCCA 15**[17]
"Ten disqualified years." Sam demurred:
"With no form, I need not be deterred.
Here's the sin in this thing:
Excess 'manifest sting'".
"We agree", say the three. "Your judge erred."

***Singh v The Queen* [2014] NTCCA 16**[18]
In deep trouble, right up to the hilt. He
Still cries over milk that's been spilt. He
Distrusts those attorneys.
His hard lonely journey's
Now fixed, by one curséd word--"Guilty".

[15] In this Mitchell Street drunken assault by an Irishman, the "slight factual flaw[s]" were that the victim, a bouncer, was not looking away when he was punched by the offender, and the blow did not knock him down. So, found the appeal court, what: appeal dismissed.

[16] The Court of Appeal upheld a magistrate's decision to force on the prosecution and dismiss drug driving charges, thereby providing the defendant with a full discharge, despite not having had the facts of the case determined on their merits. This decision is a significant endorsement of the power of magistrates to back up their case management directions with teeth: appeal courts will only interfere with a decision to grant or refuse an adjournment when required to cure 'serious injustice'.

[17] Mr Demur, who had an otherwise clean driving record, had pleaded guilty to dangerous driving causing serious harm, after rolling his ute while drunk with an unrestrained passenger in the tray. He did not demur at the sentence of 3 years 3 months suspended after 18 months, but his appeal against the ten year disqualification he received was successful: the disqualification period was reduced to five years.

[18] This is the sort of client defence lawyers dread: the 'he forced me to say guilty' client. I was the lawyer, and I ended up being cross-examined in the Court of Criminal Appeal. Mr Singh's application failed, and he is now stained with a conviction for crimes he has always stoutly maintained he never committed. In my view, the real evil in this case is the *Bail Act* presumption which put him on remand for a year and reduced him to such a desperate state that, on my advice, he pleaded up to reduced charges to get time served, and to get out.

***Wesley v The Queen* [2014] NTCCA 17**[19]
A bad rush of young blood to the Ed
Left nine victims (including a Fed)
In shock and alarm,
Two with serious harm.
Bottom thirty's high. Eighteen instead.

***Anderson v The Queen* [2014] NTCCA 18**[20]
It's a well-known fact, often seen,
That the law, when an ass, can be mean,
But re-sentenced young Luke
Had some luck. By a fluke
He scrapes under the bar: just eighteen.

***Fisher v The Queen* [2014] NTCCA 19**[21]
When you're gaoled in another locality,
"Pre-offending" can tax rationality,
But one has to be practical,
Fixing a tactical
Term with regard to totality.

***Murdoch v The Queen* [2014] NTCCA 20**[22]
At the Vics, we are thumbing our schnozzle,
(As does Sydneyside), pointing a nozzle,
And hosing our pal,
Good old 'probative val.'
(That *Shamouil*'s sure caused a schemozzle.)

***The Queen v Cavanagh-Novelli* [2014] NTCCA 21**[23]
Now Jace Cavanagh (hyphen) Novelli
Served only two months. Bloody 'ell, 'e
Should've really got four.
Send him back to do more?
No, he's sorted now: not on your nellie.

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[19] On appeal, the court reduced the non-parole period for this 15 year old violent offender, noting that under the *Youth Justice Act* the *Sentencing Act* "50% rule" for non-parole periods does not apply.

[20] Coincidentally, the same issue arises as in the previous case. Here, the appellant "scrapes under the bar" because he was a few months under the age of 18 when he committed his offence, and coincidentally, the CCA scrapes 18 months off his non-parole period.

[21] The same sentencing dilemma as that which the court confronted in *Mill v The Queen* (1988) 166 CLR 59: how to deal with similar offending across jurisdictions. Solution: the totality principle prevails, even though this results in a more lenient sentence than is indicated by the instant offence's objective circumstances.

[22] This decision deals with various issues, including the admissibility of evidence of uncharged acts and complaint, but the limerick focusses on the unresolved controversy regarding the scope of 'probative value' in the *Uniform Evidence Act*. The NT now follows *R v Shamouil* (2006) 66 NSWLR 228, but watch this space.

[23] Another drunken Mitchell Street assault. Despite finding that the sentence imposed was manifestly inadequate, the CCA fashioned a fresh sentence so as not to interrupt the respondent's promising efforts at rehabilitation. In other words, they did not send him back to do more time.