10 IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No. M105 of 2016

BETWEEN:

THE QUEEN

Appellant

-v -

YAVAZ KILIC

Respondent

RESPONDENT'S SUBMISSIONS

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Part I: Suitability for publication on the internet.

1.1 The Respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: concise statement of the relevant issues

2.1 Did the Court of Appeal err in finding the sentence was manifestly excessive?

2.2 Are all cases within the worst case category to be viewed as having the same objective gravity?

2.3 Was the principle of parity applied?

2.4 What is the use to be made of current sentencing practices?

30 2.5 Did the Court of Appeal simply substitute its own view of the appropriate sentence?

Part III: Notice under the Judiciary Act 1903

3.1 The Respondent certifies that the question of whether notice should be given in compliance with section 78B of the Judiciary Act 1903 has been considered and that such notice is not considered to be necessary in this appeal.

Part IV: statement of contested material facts

4.1 There are no contested material facts.

Part V: Applicable constitutional provisions, statutes and regulations

5.1 The Appellant's statement of applicable constitutional provisions, statutes and regulations is accepted.

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Part VI: Statement of argument in answer to the argument of the Appellant

Grounds of appeal 1 and 2: "worst case" and "worst case category"

6.1 Ground 1 (error in upholding a ground of manifest excess for worst case offending) and Ground 2 (error in holding that the objective gravity of cases within "worst case category" may vary) both require an assessment of what "worst case" or "worst case category" means in connection with exercising or reviewing a sentencing discretion.

What is worst case offending? How is it identified? What is the legal significance of the description?

6.2 The term arose in the resolution of a crown appeal on a ground of manifest excess in *R v Tait & Bartley* where, in a joint judgement, Brennan, Deane and Gallop JJ observed:

> "The true rule as I understand it is that the maximum sentence should be reserved for the worst type of case falling within the prohibition or, as it is expressed by Dwyer C.J. in *Reynolds* v. *Wilkinson* 'for the worst cases of the sort'. That expression should be understood to be marking out a range and an offence may be within it notwithstanding the fact that it could have been worse than it was" *(footnotes omitted)*.
>
> We adopt what was said in these cases as to the appropriate principle. That principle requires that both the nature of the crime and the circumstances of the criminal be considered in determining whether the case is of the worst type."[1]

6.3 It was this statement of principle that was among those on which this Court relied in *Ibbs v R* to conclude that the maximum penalty was reserved for the worst type of case falling within the offence type[2]. It further observed:

> "When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case."[3]

6.4 The second subsidiary principle in *Veen v R (No 2)*[4] is simply a restatement of the "Ibbs principle" in positive terms: the maximum is intended, as well as reserved for, worst category cases.

6.5 Comparison between the "worst case" and the case at hand is a way in which careful attention can be paid to the maximum penalty[5]. But to say that a case falls within

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[1] *R v Tait and Bartley* (1979) 46 FLR 386, 398
[2] *Ibbs v R* (1987) 163 CLR 447, 451 -452
[3] *Supra* 452
[4] *Veen v R (No 2)* (1988) 164 CLR 465, 478
[5] *Markarian v R* (2005) 228 CLR 357, 372 [31]

the "worst case category" is not a finding of fact and does not preclude a finding of manifest excess. One could not answer a question about whether a sentence was manifestly excessive by reference to whether or not it is in the worst case category. One can only answer that question by reference to an assessment of all the objective and subjective features of the offending. The Appellant accepts that a sentencing court is not bound to impose the maximum penalty in all worst case category offences and the Appellant accepts that a sentence of 70% of the maximum penalty for this "worst case category" offence is "heavy"[6]. These concessions are logically only possible if one acknowledges that the description of offending as "worst case category" is not determinative of the range of sentences open to be imposed.

6.6 Having regard to the Appellant's submission regarding Grounds 1 and 2, it is submitted that the use of the term "worst case" has proved something of a distraction in this case.

6.7 Rather than the focus being on a label, the real focus always had to be on the individual features of this case including the aggravating and mitigating features which were unique to it in order to determine where this case sat in the wide spectrum of seriousness[7].

6.8 The Court of Appeal was entitled to have regard to the finding that the offending was or was not planned. The Court of Appeal was entitled to consider whether the offending was carried out by a man with or without prior convictions for violence. The Court of Appeal was also entitled to have regard to the finding that the Respondent made efforts to put out the fire.

6.9 It follows that there is no necessary inconsistency between the way the Court of Appeal used the term "worst case" and its finding of manifest excess. The objection to the observation that the objective gravity of a "worst case" offence may vary, incontestable as a statement of fact, is semantic only.

What did the Court of Appeal mean by "worst case category"?

6.10 In any event, in describing the present offending as falling within the "worst case category", it is not at all clear that the Court of Appeal was using the term in the same sense it was used in *R v Tait & Bartley*, *Ibbs v R* and *Veen v R (No 2)*. Rather it seems to have used it to describe aspects of the objective gravity of the offending, before regard was had to the subjective circumstances of the Respondent.

6.11 The Court of Appeal twice applied the term to the present case. First,

> "The intentional setting on fire of any person with ensuing and entirely predictable life-threatening burns to a large part of the body, clearly places the case within the worst category of this offence"[8].

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[6] Appellant's submissions [6.73]
[7] *Reid (A Pseudonym) v R* [2014] VSCA 145 [107]
[8] *Kilic v R* [2015] VSCA 331 at [31] [AB195]

6.12 In this statement "worst case" categorisation seems to be used to describe the conduct, in general, of intentionally setting a person on fire rather than addressing this particular instance of that conduct.

6.13 Second,

> "Notwithstanding the unequivocal seriousness of the present offending, which justifies its categorisation as a worst case offence, it must be recognised that the objective gravity of cases falling within this category will vary as will the characteristics of the offenders."[9]

6.14 The court then turned to describe the personal circumstances of the Respondent. If, as seems likely, the court used "worst case" just to describe the objective gravity of the offending conduct or the mechanism of injury, there can be no question of any tension arising between that assessment and the conclusion the sentence was manifestly excessive.

Ground 3: parity

6.15 In Ground 3, the Appellant submits that the Court of Appeal held that the principle of parity is engaged in circumstances where a sentencing court is required to have regard to "current sentencing practices" for an offence.

6.16 It is submitted that the Court of Appeal did no such thing.

6.17 The Appellant's argument seems to rely on the premise that in referring to the cases of *Lowe*[10] and *Postiglione*[11], the Court of Appeal was applying the parity principle. However, these cases identify that the principle of parity is one aspect of a much broader principle of "equal justice". That principle requires that, as far as the law permits, like cases be dealt with alike and different cases are dealt with differently[12].

6.18 In considering whether the Respondent's sentence was manifestly excessive the Court of Appeal was required to have regard to current sentencing practices and the comparable cases that had been relied upon at the plea hearing and on the appeal.

6.19 The Court of Appeal was entitled to consider the Respondent's original sentence, current sentencing practices and the comparable cases with reference to the broad equal justice principle[13]. Such an approach did not involve any attempt to apply the more specific parity principle or any attempt to achieve numerical equivalence.

6.20 There had been no attempt by the Respondent's counsel on the plea to invoke the more specific parity principle. Indeed, in providing the cases involving the infliction

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[9] Supra [49]

[10] *Lowe v R* (1984) 154 CLR 606

[11] *Postiglione v R* (1997) 189 CLR 295

[12] *Green v R; R v Quin* (2011) 244 CLR 462 [28] – [29]; *Hili v R; Jones v R* (2010) 242 CLR 520, 535 [49]; *Wong v R* (2001) 207 CLR 584, 608 [65]

[13] *Winch v R* (2010) 27 VR 658 [24] – [25] and *Ashdown v R* (2011) 37 VR 341 [5]

of serious injury by fire, the Respondent's counsel had expressly eschewed any type of parity analysis.

6.21 It is submitted that the reference by the Court of Appeal to the Respondent's sentence being "unjustifiably disparate"[14] from the sentences imposed in comparable cases should be understood in the same way as the reference to "disparity" by the plurality in *Munda v State of Western Australia* is to be understood[15].

6.22 In *Munda v State of Western Australia*, it was accepted that a disparity between a sentence under consideration and the sentences imposed in comparable cases might be one pointer towards (in that case) manifest inadequacy[16].

6.23 This Court should be slow to conclude that the Court of Appeal applied principles of parity to its consideration of current sentencing practices.

Ground 4 current sentencing practices

6.24 In referring to the issue of current sentencing practices it is submitted that the Court of Appeal adopted an approach that was consistent with that adopted by this Court in *Hili v R* and other cases[17].

6.25 The Court of Appeal recognised that[18]:

(a) Sentences imposed in other case are not precedents;

(b) Sentences in other cases should not be considered to restrict the sentencing judge's instinctive synthesis; and

(c) The range of sentences imposed in the past does not fix the boundaries within which future sentences must be passed.

6.26 Consistent with *Hili v R*, the Court of Appeal recognised that:

(a) sentences in other cases do play a role in informing the instinctive synthesis;

(b) that an overview of other cases may provide a general guide to current sentencing practices;

(c) current sentencing practices including an examination of comparable cases can provide a relevant yardstick by which a sentencing court can consider consistency in sentencing and consistency in the application of relevant legal principles.

6.27 Indeed in *Hili v R*, the plurality recognised that in seeking consistency, sentencing judges must have regard to what has been done in other cases. Moreover, it was

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[14] *Kilic v R* [2015] VSCA 331 [67] [AB207 -208]
[15] *Munda v State of Western Australia* (2013) 249 CLR 600 [39]
[16] *supra*
[17] *Hili v R; Jones v R* (2010) 242 CLR 520, 535 [49]; *Wong v R* (2001) 207 CLR 584, 608 [65]; *R v Pham* (2015) 325 ALR 400, 405 -406 [27] – [28]
[18] *Kilic v R* [2015] VSCA 331 [48] and [66] [AB 200 and 207]

said that past sentences can and should provide guidance to sentencing judges and Appellant courts and that past sentences stand as a yardstick against which to examine a sentence[19].

6.28 The Court of Appeal was also conscious of the limitations associated with the use of comparable cases.

6.29 Whereas the Appellant cites the case of *DPP v OJA, WBA and EBD* as demonstrating the correct approach to current sentencing practices, it should also be noted that in that case Nettle JA (as he then was) also stated:

> "At the same time, however, the nature of criminal conduct is such that there is not infrequently sufficient similarity between two cases to imply that sentences should be comparable and, if they are not, that something has gone awry"[20].

6.30 In the Respondent's case, it was the stark reality that in terms of the sentences imposed in cases of intentionally causing serious injury by the use of fire, the Respondent's sentence was respectively 7, 8, 9 and 9 ½ years longer than the sentences imposed in other cases.

6.31 More recently, the plurality in *R v Pham* recognised that one of the relevant factors in determining whether a sentence was manifestly excessive was the degree to which the impugned sentence differed from sentences that have been imposed in comparable cases[21].

6.32 It is recognised that the Victorian Court of Appeal did proceed on the basis that one of the relevant factors in the consideration of an appropriate sentence is an expectation by an offender that he will be sentenced in accordance with current sentencing practices.

6.33 Of course such an expectation cannot mean that a sentence outside the existing sentencing practices cannot be imposed where the circumstances of the offending and the offender require such a sentence.

6.34 The Appellant submits that an offender can only have a legitimate expectation that he will be sentenced according to law. However, as this Court has recognised one of the hallmarks of a fair system of law is the notion of reasonable consistency. This Court in *R v Pham* considered the position adopted by the Victorian Court of Appeal that an offender had a legitimate expectation to be dealt with consistently with current sentencing practices in Victoria. While the plurality corrected that it was consistency with current sentencing practices nationally that was relevant it did not suggest that an offender's expectation that he would be dealt with in a manner

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[19] *Hili v R* (2010) 242 CLR 520 [53] – [54]
[20] *DPP v OJA, WBA and EBD* (2007) 172 A Crim R 181, 196 [30]
[21] *R v Pham* (2015) 325 ALR 400, 406 [28]

consistently with current sentencing practices was not one of the relevant factors in determining an appropriate sentence.

6.35 The Appellant argues that the "three cases relied upon by the Court of Appeal to upset the sentence" had significant limitations in establishing the sentencing range but, nonetheless concedes they could be used as a yardstick[22].

6.36 It was not just those three case on which the Court of Appeal relied. Like the Learned Sentencing Judge, the Court of Appeal had to and did assess the objective gravity of the offence and the matters in mitigation, as well as considering the comparable cases.

6.37 That cases involving intentionally causing serious injury by fire are uncommon did not deprive such cases as there are of relevance. Indeed, three of the cases were tendered by the Appellant on the plea[23].

6.38 On the one hand the Appellant concedes that the cases of infliction of serious injury by fire could serve as a general yardstick of which the sentencing judge of which the sentencing judge was bound to take account. On the other hand, the Appellant places reliance on the fact that the "worst case" label was not applied in those cases and there were differences in the circumstances involved in those cases.

6.39 It is submitted that the comparison with the case of *R v Alipek* is stark. It was a case of attempted murder, with a maximum of 25 years' imprisonment, where the use of fire was accompanied by an intention to kill. The sentence was to be imposed after trial upon a 35 year old man with prior convictions for violence. Notwithstanding the psychological problems of Mr Alipek, the 12 year sentence imposed on him for attempted murder was significantly less than the sentence imposed on the Respondent for a less serious offence.

6.40 In the Respondent's case, the Court of Appeal correctly stated the applicable law[24] and simply concluded what was obvious: that the sentence imposed stood in stark contrast with sentences previously imposed for the intentional infliction of serious injury by fire[25] and, except for *Ali v R*[26], with sentences imposed for offending inflicting permanent and serious brain injury. The sentence the Court of Appeal substituted exceeded by a considerable margin the sentences imposed in the cited cases of intentionally causing serious injury by fire.

6.41 The "distinguishing features" relied upon by the Appellant are not such as to render the cases of intentional injury by fire incomparable[27] and were apparent to the Court

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[22] Appellant's submissions [6.21]

[23] Those were *R v Alipek* [2006] VSCA 66, *Emery v R* [2010] VSC 478 and *Rossi v R* [2010] VSC 602

[24] *Kilic v R* [2015] VSCA 331 [48] [AB 200]

[25] Ibid [32] [AB 195 – 196]

[26] [2010] VSCA 182

[27] In fact it was *Huitt's* co-offender, not Huitt, who was punched by the victim and Huitt's so called "compromised mental state" "was produced by a combination of marijuana use and various psychosocial stresses": *R v Huitt* [1998] VSCA 118 [14].

of Appeal[28]. The fact the term "worst case" is not used in the reasons for sentencing in those cases did not prevent the Court of Appeal from considering their gravity relative to the present offending nor does it establish the offending in those cases was less grave than the present. In any event, it is false to assume that only closely comparable cases can provide a yardstick[29].

6.42 The stark difference between the sentencing outcomes in other cases involving deliberate setting of another on fire and the original sentence in this case were proper matters to take into account in concluding, together with other concerns the Court of Appeal had about the way the sentence was reached[30], that the sentence imposed on the charge of intentionally causing serious injury was manifestly excessive.

6.43 In relation to the use made of *DPP v Terrick*[31], *Arthars v R*[32] *and Ali,* the Appellant makes the point that 3 cases do not establish a range. That may well be true but misses the point that the sentences imposed in these cases are among the highest of all sentences imposed for the offence of intentionally causing serious injury. Thus, they represent the closest all offences have come to "worst case category" offending. *Arthars v R* and *DPP v Terrick* were both acknowledged to fall in the worst case category. *Ali v R*, arguably worse than both, was described as "a very serious example" of the offence[33].

6.44 The Appellant's submission that it was not open to the Court of Appeal to draw a distinction between the injuries suffered by the victim in this case and those suffered by the victims in *DPP v Terrick, Arthars v R and Ali v R*[34] is not sustainable. The evidence of permanent physical injury to the complainant in this case was very limited. Dr Schreiber's statement of 9.2.2015 was based entirely on hospital notes and photographs. The victim was discharged from hospital on 14.8.2014. The Appellant did not obtain an updated medical statement or fresh photographs prior to plea. The Appellant resisted a fresh evidence ground in the Court of Appeal by successfully arguing that the medical evidence accepted on the plea extended only to the possibility of permanent scarring to large areas of the complainant's body including sensitive areas and did not state in any detail how or to what degree the

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[28] The Court of Appeal specifically noted Alipek's psychiatric history [34] and that the injuries to the victim of Emery and Rossi were not life-threatening [38]. [AB 197]

[29] *Munda v State of Western Australia* (2013) 249 CLR 600 [39]

[30] The Court of Appeal was not satisfied the sentencing judge had taken account of the extra curial punishment occasioned by the burns sustained by the Respondent [58] [AB 204]. It was not satisfied that the sentencing judge appreciated the limited seriousness of the prior offending and thus may have afforded it more weight than was warranted [59] [AB 205]. It thought imprudent the failure to take further time to give measured consideration to consider the sentencing submissions made by the Respondent on the plea, to consider the sentencing authorities tendered by the Respondent and to afford the opportunity of calm reflection after seeing, for the first time, objectively horrific photographs taken only shortly after the offence [62] – [63]. [AB 205- 206]

[31] *DPP v Terrick, Marks and Stewart* (2009) 24 VR 457

[32] *Arthars & Plater v R* (2013) 39 VR 613

[33] *Ali v R* [2010] VSCA 182 [58]

[34] Appellant's submission [6.38]

full functionality of the complainant's hands and limbs would be diminished[35]. There was no victim impact statement.

6.45 The Court of Appeal said this of the victim in *Ali v R*

> "Michael Tully was taken to hospital but he did not regain consciousness for 13 days. A neurosurgeon gave evidence that he suffered a fractured skull with a blood clot in the surface of his brain. Tully was subsequently taken to a nursing home. He was unable to care for himself in any way. He was not able to walk and was completely dependent on others for his needs. Tully died on 2 August 2002 [offence date 29.4.1999]."[36]

6.46 In relation to the victim in *Arthars v R*, who suffered permanent brain injury, the Court of Appeal said this:

> "The injuries caused to the victim were catastrophic and could easily have been fatal. He has been left permanently disabled."[37]

6.47 The sentencing court in *DPP v Terrick*, did have the benefit of an updated medical report. That evidence enabled the Court of Appeal to identify the evidence of sustained injuries to the victim:

> "The injuries left Mr Schueth physically and mentally disabled. When he was repatriated to his home in Germany, the prognosis was that he would remain severely disabled for the rest of his life. The judge had before him more recent reports from German doctors who had treated Mr Schueth following his repatriation. They said:
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> > Expressive speech is completely missing. He is able to understand simple orders. He can neither write, read or count. Free sitting is only possible for two minutes. Transfer from wheelchair to bed and vice versa can be done with minor support of a physiotherapist. Walking for a distance of 15 metres is done with the aid of two therapists.
>
> Further:
>
> > Prepared meals are taken by himself. He can brush his teeth and wash his face, otherwise assistance is needed in activities of daily living. There is urinary and bowel incontinence.
>
> The doctors concluded:
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> > Mr Schueth is thought to remain severely disabled and to need permanent support. Whether he will regain his speech is questionable, the same holds for permanent walking."[38]

6.48 The Respondent, of course, recognises that the victim in this case suffered very serious injuries. However, s5(2)(daa) of the *Sentencing Act 1991 (Vic)* requires the court to consider the impact of the offence on the victim. Thus, the measure of

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[35] *Kilic v R* [2015] VSCA 331 [24] – [29] [AB 194 – 195]

[36] *Ali v R* [2007] VSCA 182 [13]. Michael Tully was 46 years old when he died *R v Ali* [2007] VSC 350 [14]

[37] *Arthars & Plater v R* (2013) 39 VR 613, 622 [32]

[38] *DPP v Terrick, Marks and Stewart* (2009) 24 VR 457, 462 [18]

harm to the victim was a relevant consideration. There is a meaningful difference between suffering brain injury of a kind that precludes independent living and the injuries suffered by the victim in this case. The differences between the victim's injuries and cases involving catastrophic brain injury are not subtle differences. The distinction drawn by the Court of Appeal was pertinent and correct[39].

6.49 The differences between those decisions and the present case relied upon by the Appellant do not prevent those cases from providing guidance as to current sentencing practices[40].

6.50 The Appellant acknowledges that the Court of Appeal correctly stated the use that could be made of worst case offending authorities in determining whether the sentence was manifestly excessive[41].

6.51 The Appellant complains that despite the absence of any error in stating the law, the Court of Appeal's conclusion that the worst case offending authorities reveal the original sentence to be manifestly excessive was not reasonably open.

6.52 In circumstances where the Court of Appeal had reservations about the way in which the sentencing discretion was exercised, it is submitted that the Court of Appeal undertook an analysis of all relevant matters, including matters of aggravation and mitigation and, as required, had regard to current sentencing practices. The Court of Appeal's conclusion, following that analysis, was not attended by error.

6.53 The Appellant seeks to establish its contention as to error in this case by reference to other decisions of the Court of Appeal, *Hasan v R*[42], *Ashdown v R*[43] and *DPP v Dalgliesh (A pseudonym)*[44]. *DPP v Dalgliesh* is a decision made subsequent to the present case. The Appellant did not seek special leave to appeal from *Hasan v R* or *Ashdown v R*. The Respondent submits that these cases reveal nothing at all about whether the present decision is attended by error. The nub of the Appellant's complaint seems to be the observation by the Court of Appeal that it was constrained by current sentencing practices in its determination of those appeals. Nowhere is such a concern expressed in the present case.

6.54 Had the Court of Appeal in fact felt constrained by current sentencing practices insofar as they were revealed by the cases brought to its attention and by its pre-

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[39] *Kilic v R* [2015] VSCA 331 [68] [AB 208]

[40] In *Arthars v R*, the attack was premeditated [43]. The plea was very late, taking place after a *Basha* enquiry and the offenders were found to have lacked remorse [34]. Though Arthars did have a long history of psychiatric problems, it was not such as to afford him any moderation of moral culpability, general deterrence or specific deterrence [12] – [20]. Though there was mitigation on account of delay owing to rehabilitation achieved in the intervening period, there was no mitigation on account of anxiety over the period because of the offenders' contribution to the delay [32]. Though there were good prospects for rehabilitation, Plater committed violent offences while on bail for this offence [56].

[41] Appellant's submissions [6.36]

[42] (2010) 31 VR 28

[43] (2011) 37 VR 341

[44] [2016] VSCA 148

existing knowledge of sentencing practices, it would not, in resentencing the Respondent, have imposed a sentence so much greater than those imposed in the comparable cases and of the same order as the "worst case" examples, other than *Ali v R*.

Summary offences

6.55 The Respondent contends that the Court of Appeal's decision that the sentences imposed on the summary offences and the orders for accumulation were manifestly excessive is not attended by error. The Respondent notes that the sentences described in the Appellant's submissions for the Respondent's antecedents were all part of aggregate sentences – the same aggregate sentences for the weapons and dishonesty offending and do not reflect the gravity of the relevant offences individually.

6.56 It is not enough for the Appellant simply to submit the sentences imposed by the sentencing judge were not manifestly excessive. For this Court to intervene, it must show that the Court of Appeal erred in so finding. The Appellant does not even argue that it was not open to the Court of Appeal to find manifest excess.

6.57 The Appellant does not contend that the Court of Appeal erred in the exercise of its re-sentencing discretion. Specifically, it does not contend that the Court of Appeal imposed a manifestly inadequate sentence. In view of this, there is no basis for this Court to intervene in respect of the Court of Appeal's finding of manifest excess in respect of the summary offences.

Ground 5: error in applying principles governing appellate review of discretionary judgement

6.58 In this case, consistent with this Court's approach to the issue of manifest excess, the Court of Appeal came to a conclusion that the individual sentences, the total effective sentence and non-parole period were manifestly excessive[45]. To reach that conclusion, the Court of Appeal did not need to identify any specific sentencing error in order to justify that conclusion.

6.59 It is submitted that the Court of Appeal did see the comparison between the Respondent's sentence and current sentencing practices involving the comparable cases as one pointer to the sentence being manifestly excessive[46].

6.60 However, it should be accepted that the ultimate conclusion was based on a range of factors of which the issue of current sentencing practices was but one factor[47].

6.61 This was not simply a case of the Court of Appeal simply substituting its own view as to the appropriate sentence.

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[45] *R v Pham* (2015) 325 ALR 400, 412 - 413 [56]
[46] *Munda v State of Western Australia* (2013) 249 CLR 600 [39]
[47] *R v Pham* (2015) 325 ALR 400, 412 -413 [56]

Different weightings – personal circumstances

6.62 The Appellant submits that the Court of Appeal committed a specific error in "weighing" some matters differently from the learned sentencing judge[48]. No such error was made. The Court of Appeal made one decision: that the sentence was manifestly excessive by reference to all relevant sentencing considerations. That it recorded the submissions of counsel for the Respondent as to how the sentence might have come to be manifest excessive[49], which it did not necessarily accept, does not detract from the fact that it reached a conclusion as to manifest excessive and not specific error on the part of the sentencing judge.

6.63 In reaching its conclusion as to manifest excess, the Court of Appeal was not obliged to give all sentencing considerations the same weight as the sentencing judge. Indeed, divining exactly the weight attributed to each consideration is difficult, particularly in the context of briefly-stated and quickly-formulated sentencing remarks. The Court of Appeal was bound, unless it found them to be erroneous, by the sentencing judge's findings of fact but, save as in respect of "premeditation", the Respondent does not assert the Court of Appeal acted contrary to any finding by the sentencing judge[50].

6.64 The Court of Appeal did not form a different conclusion from the sentencing judge in respect of premeditation. At the paragraph impugned by the Appellant, the Court of Appeal sought to restate the conclusion reached by the sentencing judge. For this purpose, it did use the phrase "not premeditated"[51] but this was clearly tied to the reference to not bringing the petrol to the scene. This was precisely the context in which the sentencing judge had accepted a submission that the petrol was used opportunistically "insofar as it refers to spontaneity and opportunism"[52]. The Court of Appeal was not unaware of the facts leading up to the complainant being set on fire which it had correctly extracted earlier in its judgement[53]. The Court of Appeal otherwise referred to "lack of premeditation" compendiously in its summary of matters leading to its conclusion that the sentence was manifestly excessive[54]. However, this is to be understood in the context in which the term had previously been used.

6.65 Under this heading, the Respondent refers to youth, antecedents and prospects of rehabilitation without specifically asserting the Court of Appeal made a different

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[48] Appellant's submissions [6.68]

[49] *R v Kilic* [2015] VSCA 331 regarding rehabilitation [53] [AB 203]; regarding youth [51] – [56] [AB 201 – 204]; regarding extra curial punishment [58] [AB 204]; regarding antecedents [59] [AB 205]; regarding sentencing without time for measured consideration [60] – [64] [AB 205 – 206]

[50] The Court of Appeal specifically endorsed the sentencing judge's approach to youth [55] [AB 203 – 204] and antecedents [59] [AB 205]

[51] *R v Kilic* [2015] VSCA [58] [AB 204]

[52] *DPP v Kilic* [2015] VCC [16] [AB 136]

[53] *R v Kilic* [2015] VSCA [5] [AB 187]

[54] *R v Kilic* [2015] VSCA 331 [68] [AB 208]

assessment of weight from the sentencing judge. The Court of Appeal expressly endorsed the approach of the sentencing judge in respect of youth and antecedents.

Part VII: Notice of Contention

7.1 The Respondent's counsel at the plea had specifically submitted that this was not a "worst case" example[55].

7.2 Counsel for the Appellant at the plea had not submitted that this case fell in the worst case category. She had described this as an "extremely bad example of the charge of intentionally causing serious injury and at the high end for the purposes of sentencing[56].

7.3 It is submitted that as bad as this offending was, there were several factors that meant this case could not rightfully be regarded as a worst category case.

7.4 Considering only the objective features of the offending, first, there was a finding by the Learned Sentencing Judge that the offending was spontaneous and opportunistic and not planned[57]. Secondly, the Respondent was a man with no prior convictions for violence. Thirdly, and significantly, it was accepted by the Learned Sentencing Judge that the Respondent had tried to stop the fire[58]. He had suffered extensive burns to his arms and wrists which meant that he was hospitalised for three days. Fourthly, as bad as the injuries to the victim were, there was a distinction to be drawn between the injuries in this case and those cases including lifelong physical and mental incapacities.

7.5 Considering the subjective features, there was an early plea which reflected actual remorse, by a youthful offender. It is simply not open to conclude that this case fell in the worst case category. This is revealed by asking the question, would it have been open to the sentencing judge to impose the maximum penalty? The answer is clearly no.

7.6 If the Court of Appeal in fact concluded that this was a worst case category example as that term is used in *R v Tait & Bartley*, *Ibbs v R* and *Veen v R (No 2)*, the Respondent contends it was in error. However, such error is not one which could impugn the Court of Appeal's determination of the Respondent's appeal to that Court.

7.7 Identification of whether a particular case falls in or outside the "worst case category" is not a finding of fact and is not a step along the path of exercising or reviewing the sentencing discretion. The boundaries of the "worst case" or "worst category case" are not determined by reference to evidentiary criteria. They have not been defined except to say the ability to conceive of a worse case will not

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[55] Plea hearing 15 [AB 35]
[56] Ibid 34 [AB 54]
[57] *DPP v Kilic* [2015] VCC 392, 39 [15] – [16] [AB136]
[58] Ibid 42, [30] [AB139]

preclude a particular case being included in the "worst case" category. However, more is required than a case being very serious[59].

7.8 The Court of Appeal's assessment of the overall gravity of the offending is reflected in its conclusion that the sentence imposed at first instance was manifestly excessive and in the sentence it substituted. What it said about "worst case" status is not capable of reflecting an error in reasoning towards that conclusion.

Part VIII: Presentation of oral argument

8.1 The Respondent estimates 1 -2 hours are required for the presentation of oral argument.

Dated 22 September 2016

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[59] *R v Bilal Skaf* [2005] NSWCCA 297