IN THE HIGH COURT OF AUSTRALIA **No. S 99 of 2013**
SYDNEY OFFICE OF THE REGISTRY

BETWEEN: **WILLIAM DAVID BUGMY**

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S ANNOTATED SUBMISSIONS

10

Part I: Publication

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

Part II: Concise statement of issues

1. Whether a finding of manifest inadequacy is necessary to enliven the appellate jurisdiction on a Crown appeal under s 5D of the *Criminal Appeal Act*.
2. Whether the appellant's background of deprivation and disadvantage as an aboriginal
20 warranted a lesser sentence in the particular circumstances of this case.

Part III: Section 78B of the Judiciary Act

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

Part IV: Statement of contested material facts

4. 1 The respondent does not contest the appellant's statement of facts.

4. 2 The facts were agreed and the psychiatric reports and Probation reports were not
30 contested.

Date of document: 5 July 2013
Filed on behalf of the Respondent by:
S C Kavanagh
Solicitor for Public Prosecutions
175 Liverpool Street
SYDNEY NSW 2000

DX 11525 SYDNEY DOWNTOWN
Tel: (02) 9285 8761
Fax: (02) 9267 6361
Ref: N. Bruni

4. 3 The agreed facts noted that the applicant expressed "some joy that Gould was injured" and after the attack said that he "had not finished with Gould" (AB 52.50).

4. 4 The consequences for Officer Jason Gould are perhaps not adequately described by reference to the retinal detachment, decompensated cornea and eye socket fractures and the very poor likelihood of recovery of vision (AWS at [5.5]). The injuries required Jason Gould to undergo a number of operations for about a year after the attack including a bone graft from his hip to repair the bone around the eye and the insertion of metal plates in the orbital floor and cheek. These procedures left Mr Gould in considerable pain and the metal plates had to be removed 8 months later due to the ongoing pain.[1] (AB65.30). Mr Gould has been told he will have to undergo a corneal transplant in future, not to restore his sight but to help with the pain and to keep the eye alive.[2](AB106.18).

4. 5 The ongoing effects for Mr Gould have been severe pain, strain in his good eye, difficulties with depth perception and migraines. He is now unable to perform full-time duties. The loss of his job has meant reduced financial circumstances for his family which has placed pressure on his marriage. His psychological condition has also deteriorated. He suffers from anxiety, depression and sleeplessness. He is undergoing psychiatric treatment for depression and Post Traumatic Stress Disorder (AB107 – 109). In his Victim Impact Statement he also spoke of the impact of his deteriorating condition on his relationship with his two children.

PART V: Applicable Legislative provisions

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

PART VI: Statement of Argument

Fernando considerations

6. 1 The respondent does not dispute the general principles stated in ***Fernando***, ***Gladue*** and ***Ipeelee***.

6. 2 However, ***Gladue*** and ***Ipeelee*** were each concerned with the construction of particular statutory provisions which have no equivalents in NSW.

---

[1] Report of Dr W Flapper dated 31.10.2011 at p3.
[2] Vicitm Impact Statement of Jason Gould at p 5.

6. 3 The stated issue in ***Gladue*** was the proper construction of s 718.2(e) of the *Criminal Code.*[3]

6. 4 The Supreme Court held that s 718.2(e) requiring sentencing courts to pay "particular attention to the circumstances of aboriginal offenders" did not mean that judges were to give preferential or discriminatory treatment to one category of offender over another nor to pay more attention to the circumstances of aboriginal offenders than the circumstances of any other offenders, however, it meant more than that attention was to be paid to all the circumstances of the offence and the offender for that would merely re-state the existing common law approach.

6. 5 The additional element was that courts must "pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders"[4] (emphasis in original). This new requirement was said not to alter the fundamental duty applicable to every offender to determine the appropriate sentence taking into account all the circumstances of the offence, the offender, the victim and the community.[5]

6. 6 The seeming incongruity between paying particular attention to the circumstances of aboriginal offenders because they are unique yet not giving preferential treatment to aboriginal offenders was said to be reconcilable by use of a different "method of analysis" which takes into account the unique circumstances of aboriginal peoples[6]. It was noted that systemic and background factors apply to non-aboriginal offenders as well but it was necessary to recognise that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Because of such factors, aboriginal offenders are more adversely affected by incarceration and less likely to be rehabilitated thereby because the internment milieu is often culturally inappropriate and discrimination is often rampant in penal institutions[7].

6. 7 These background factors were regarded as causative: "background factors which figure prominently in the causation of crime by aboriginal offenders"[8] and "where

---

[3] ***R v Gladue*** (1999) 1 S.C.R. 688 at 703[24].
[4] ***R v Gladue*** (1999) 1 S.C.R. 688 at 708 [37].
[5] ***R v Gladue*** (1999) 1 S.C.R. 688 at 728 [75].
[6] ***R v Gladue*** (1999) 1 S.C.R. 688 at 728 [75].
[7] ***R v Gladue*** (1999) 1 S.C.R. 688 at 724 [68] – [69].
[8] ***R v Gladue*** (1999) 1 S.C.R. 688 at 724 [67], [69].

such factors have played a significant role" in bringing the particular offender before the courts it was incumbent on sentencing judges to consider such factors in determining whether imprisonment would serve the appropriate purposes of punishment.[9]

6. 8 None of this was said to suggest that there was to be an automatic reduction of sentence or of the period of sentence simply because the offender is aboriginal[10] nor that aboriginal offenders were to be sentenced in a way that always gave greater weight to principles of restorative justice and less weight to goals such as deterrence, denunciation and protection of the community.[11] This was because consideration of the unique circumstances pertaining to aboriginal offenders was but one of the considerations to be taken into account whereas the determination of the appropriate sentence depended on all the factors which must be taken into account in the individual case. The weight to be given to the various factors will vary in each case.[12] It was acknowledged that "generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing."[13]

6. 9 The decision in ***Ipeelee*** was concerned with the interaction between these ***Gladue*** principles and the Long Term Supervision Order provisions (LTSO).[14] Under those provisions habitual repeat offenders may be designated Long Terms Offenders and made subject to a mandatory minimum sentence of two years for the predicate offence and to Long Term Supervision Orders (LTSO) for a period up to 10 years[15]. LTSOs are subject to conditions the breach of which may result in the LTSO being suspended and the offender serving the period of suspension in custody. Breach of the conditions also constitutes an indictable offence punishable by up to 10 years imprisonment.[16] In Mr Ipeelee's case, where abstinence from alcohol was a condition of his LTSO, drinking alcohol became an indictable offence punishable by up to 10 years imprisonment. Mr Ipeelee was sentenced to 3 years imprisonment for drinking alcohol.

---

[9] ***R v Gladue*** (1999) 1 S.C.R. 688 at 725 [69].
[10] ***R v Gladue*** (1999) 1 S.C.R. 688 at 733 [88].
[11] ***R v Gladue*** (1999) 1 S.C.R. 688 at 729 [78].
[12] ***R v Gladue*** (1999) 1 S.C.R. 688 at 734 [88].
[13] ***R v Gladue*** (1999) 1 S.C.R. 688 at 730 [79].
[14] ***R v Ipeelee*** [2012] S.C.R. 433 at [34].
[15] ***R v Ipeelee*** [2012] S.C.R. 433 at [44].
[16] ***R v Ipeelee*** [2012] S.C.R. 433 at [44] – [45].

6. 10 The decision in ***Ipeelee*** sought to correct certain errors in the implementation of the ***Gladue*** principles. One error was to require that offenders establish a "direct causal link" between the systemic and background factors and the commission of the offence. The Court held there was no such requirement, what was required to be established was that the factors "may have played a part in bringing the particular offender before the courts."[17]

6. 11 The distinction between the factors being causally linked and being "tied in some way to the particular offender and offence" such as to bear upon the moral culpability for the offence or "indicate which sentencing objectives can and should be actualized"[18] is not entirely clear, particularly as in ***Ipeelee*** these factors were characterised as the "underlying causes of the criminal conduct."[19]

6. 12 The appellant adopts this approach in the present case and submits that no causative link is required yet also contends that the appellant's deprivation was "integrally related" to his history of offending and to considerations of deterrence, rehabilitation and protection of the community (AWS at [6.23]). As in ***Ipeelee*** where the background factors were characterised as the underlying causes of the criminal conduct, the appellant submits that the cultural history of dispossession and colonisation, with ongoing grave socio economic difficulties are linked to subsequent offending (AWS at [6.28]). The background factors are said to be relevant to the moral blameworthiness of the individual (AWS at [6.26]).

6. 13 While it is clear from the general principles stated in ***Fernando***, ***Gladue*** and ***Ipeelee*** that the relevance of the background factors extends beyond them being causally linked to the offence that does not mean that their impact will be the same when they are causally linked and when they are not. The appellant is correct that for such background factors to diminish the moral blameworthiness of a particular offence they must be "integrally related" to the commission of that particular offence. It is not clear that there is any meaningful distinction between being "integrally related" and causally linked to the commission of a particular offence.

6. 14 The second major error ***Ipeelee*** sought to correct was the interpretation of the passage in ***Gladue*** that sentencing for serious or violent offences is likely to be the same for aboriginal and non-aboriginal offenders as meaning that the ***Gladue*** principles do not

---

[17] ***R v Ipeelee*** [2012] S.C.R. 433 at [82] – [83].
[18] ***R v Ipeelee*** [2012] S.C.R. 433 at [83].
[19] ***R v Ipeelee*** [2012] S.C.R. 433 at [73].

apply to serious offences. It was pointed out that as s 718.2(e) is a statutory duty imposed in respect of all offences the ***Gladue*** principles must be applied to any case involving an aboriginal offender, including those for breach of a LTSO.[20] It was an error to exclude the ***Gladue*** principles in cases of serious offences, but the statement from ***Gladue*** that generally, as a matter of *practical reality*, the sentences for serious offences will be the same, or close to the same, for aboriginal and non-aboriginal offenders was not resiled from. The reason was the fundamental reason given in ***Gladue*** itself, namely, the unique circumstances pertaining to aboriginal offenders are but one of the considerations to be taken into account whereas the appropriate sentence depends on all the factors. In any individual case, such as the present case, other factors may warrant a more severe penalty even affording full weight to the ***Fernando*** considerations.

6. 15 In ***Ipeelee*** it was held that the fundamental error made by the provincial and appellate courts in interpreting the LTSO provisions was to regard the provisions as emphasising protection of the community over rehabilitation.[21] The Court held that the LTSO provisions had 2 specific objectives, protection of the public and rehabilitation of the offender. Contrary to the approach taken by the provincial and appellate courts, the Supreme Court held that the "key feature"[22] and "ultimate purpose"[23] of the LTSO provisions was rehabilitation.

6. 16 NSW has no equivalent to s718.2(e) focussing on Aboriginal offenders. There is a provision similar to the first part of s718.2(e) in s 5(1) of the *Crimes (Sentencing Procedure) Act* 1999 requiring that available sanctions other than imprisonment be considered and that a sentence of imprisonment must not be imposed unless "no penalty other than imprisonment is appropriate." However, unlike s 718.2(e), it does not call for particular attention to aboriginal offenders. Section 3 of the *Crimes (Sentencing Procedure) Act* stipulates a number of purposes of punishment but, unlike the position in Canada, no single purpose is given prominence[24]. The *Habitual Criminals Act* 1957 and *Crimes (High Risk Offenders) Act* 2006 bear some similarity to the LTSO regime but have no bearing on the present case.

---

[20] ***R v Ipeelee*** [2012] S.C.R. 433 at [87].
[21] ***R v Ipeelee*** [2012] S.C.R. 433 at [48], [50], [89].
[22] ***R v Ipeelee*** [2012] S.C.R. 433 at [50].
[23] ***R v Ipeelee*** [2012] S.C.R. 433 at [48].
[24] ***Muldrock v R*** (2011) 244 CLR 120 at [20]

6. 17 Legislative provisions focussing on aboriginal offenders have been enacted in other states, for example, the establishment of 'Koori Courts' in Victoria[25] but no such provisions have been enacted in NSW[26].

6. 18 The NSW Law Reform Commission Report 96 *Sentencing: Aboriginal Offenders* "overwhelmingly"[27] did not support the prescription of special legislative principles in relation to the sentencing of Aboriginals. The Commission was of the view that the present common law principles were "sufficiently flexible to take account of the circumstances of Aboriginal offenders"[28] and the reduction of those principles to statutory form "would add nothing to the existing common law and is completely unnecessary."[29]

6. 19 The common law principles referred to were those enunciated particularly in ***R v Fernando***.[30] ***Fernando*** has been quoted with approval in most states across Australia. It was discussed by Eames JA in ***Fuller-Cust***[31] and the principles distilled into 8 propositions in ***DPP v Terrick*** (2009) 24 VR 245 at [46].

6. 20 In broad terms, those propositions were similar to the ***Gladue*** principles. The same fundamental distinctions were drawn whereby, on the one hand, it was noted that there is no separate system of sentencing for aboriginal offenders and that sentencing principles apply irrespective of the identity of the particular offender or his or her membership of an ethnic or other group, but on the other hand acknowledging that the circumstances of deprivation and disadvantage that may apply by reason of the offender's aboriginality needs to be taken into account.

6. 21 The propositions hold that the systemic and background circumstances do not afford an automatic mitigation of penalty but they may affect the assessment of moral culpability. They may require some moderation of denunciation, and of general or personal deterrence and they may bear upon the prospects of rehabilitation. They may also indicate that custody may be more onerous for the particular offender. Whether,

---

[25] J Manuell SC: *The Fernando Principles: the sentencing of Indigenous offenders in NSW*, Discussion Paper for the NSW Sentencing Council December 2009 at [67] – [74].
[26] There is a Circle Sentencing Intervention Program operating in NSW but its application is confined to a defined range of offences in the Local Court : s 347 *Criminal Procedure Act* 1986, Part 6 Criminal Procedure Regulation 2010.
[27] NSW Law Reform Commission Report 96 *Sentencing: Aboriginal Offenders,* October 2000 at 54 [2.46].
[28] NSW Law Reform Commission Report 96 *Sentencing: Aboriginal Offenders,* October 2000 at xv.
[29] NSW Law Reform Commission Report 96 *Sentencing: Aboriginal Offenders,* October 2000 at 54 [2.47].
[30] NSW Law Reform Commission Report 96 *Sentencing: Aboriginal Offenders,* October 2000 at 54 [2.46].
[31] ***R v Fuller-Cust*** (2002) 6 VR 496 at [78] – [92].

and to what degree, such considerations apply depends on the particular circumstances of the case.

6. 22 The NSW Law Reform Commission noted that aboriginal people should not be viewed as one undifferentiated category. It is important to understand the cultural issues and the special needs of aboriginal offenders in relation to the individual case.[32] As the Commission stated, "Aboriginal offenders are not an homogenous group, and the circumstances of each offender must be considered individually. In the absence of specific evidence that Aboriginality had any impact on the commission of the offence, it should be taken into account only in a general way. As Justice Toohey has noted:

> Aboriginality may in some cases mean little more than the conditions in which the offender lives. In other cases it may be the very reason the offence was committed."[33]

6. 23 These principles are not challenged by the appellant in the present case. The appellant acknowledges that there is no "race discount" nor that the appellant's personal circumstances should be elevated over the circumstances of the offence (AWS at [6.32]). Nor is it suggested that this was a case in which the appellant's background was the cause of, or the "very reason" for, the commission of the offence.

6. 24 The point of contention is the comment by Hoeben JA that "with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account, must diminish. This is particularly so when the passage of time has included substantial offending." (CCA at [50] AB 194.43). This is said to be a new and erroneous statement of principle.

6. 25 The appellant interprets the comment as setting forth a new limitation on the application of the ***Fernando*** considerations. The limitation is said to apply over time and with continued offending. The passage of time and continued offending constitute a single qualification because, as a matter of practical reality, courts will only have occasion to consider the ***Fernando*** considerations over time where subsequent offences have been committed.

---

[32] NSW Law Reform Commission Report 96 *Sentencing: Aboriginal Offenders,* October 2000 at [5.2].
[33] NSW Law Reform Commission Report 96 *Sentencing: Aboriginal Offenders,* October 2000 at [2.20] citing an unpublished address to the 2nd International Criminal Law Congress (24 June 1988) by Toohey J: *The Sentencing of Aboriginal Offender* at p 21.

6. 26 The correct approach for which the appellant contends is that all relevant factors must be taken into account and given their full weight. The appellant submits that the effects of profound deprivation do not diminish over time and their relevance should not be constrained (AWS at [6.19] – [6.20]).

6. 27 The respondent does not dispute that proposition.

6. 28 It is obviously correct that the systemic and background factors, particularly the extreme circumstances of deprivation to which ***Fernando*** refers[34], remain significant and should not be discounted or given less than full weight in any sentencing exercise affecting the offender.

6. 29 That is true of all relevant circumstances relating to the offence or the offender and it would plainly be an error not to give any relevant circumstance due consideration.

6. 30 Hoeben JA's comment should not be taken out of context and construed as meaning that the ***Fernando*** considerations must be given less weight with the passage of time as if that was an automatic consequence of continued offending. The comment was made in the context of holding that it was correct to take the ***Fernando*** considerations into account. It did not represent the formulation of some new principle but was merely a reference to the well known passage from ***Veen (No 2)***[35] stating that factors such as prior record may "illuminate the moral culpability" of the offender and that considerations of retribution, deterrence and protection of the community may indicate that a more severe penalty is warranted. Hoeben JA had quoted this passage earlier in the judgement (CCA at [42] AB 191.25).

6. 31 The misinterpretation of the comment as limiting the role of ***Fernando*** considerations may have arisen from the form of expression used. The metaphor of weighing and balancing competing considerations, if taken too literally, carries the unavoidable implication that some factors may be outweighed or given relatively little weight as compared to other matters thus suggesting they have a diminished or reduced significance in the balancing process. Such a view would be plainly incorrect. The same difficulty arises in the formulation used in ***Terrick*** even though the process was not described in terms of weight: "Where the offender has prior convictions, such that considerations of specific and general deterrence and community protection become increasingly important sentencing factors, the significance of personal circumstances

---

[34] ***R v Fernando*** (1992) 76 A Crim R 58 at 60 – 61.
[35] ***Veen (No 2) v R*** (1988) 164 CLR 465 at 477.

will correspondingly decrease."[36] The imputation being that "the significance" of personal circumstances "decreases" in corresponding proportion to the significance of the other factors.

6. 32 Even the formulation from ***Veen (No2)*** that "considerations of retribution, deterrence and protection of the community may indicate that a more severe penalty is warranted", if read too literally, may imply by use of the expression "a more severe penalty is warranted" that some notional penalty accrued to the offence which was increased to something "more severe" because of the other considerations.

6. 33 The factors relevant to the assessment of the objective and subjective circumstances are intangible. They have no measurable weight or significance and the presence of one or more factors does not displace or discount the significance of the others. And, as McHugh J observed in a different context, they are also "incommensurables. They have no standard of comparison."[37] That is why all relevant matters must be taken fully into account. To do otherwise would mean that some circumstance was not given proper consideration. The result, if it is to be fair and just, must take all factors into account together.

6. 34 The error of affording a limited role to the ***Fernando*** considerations is the same error as failing to afford full significance to any relevant matter, such as prior criminal record. As Justice Toohey noted in relation to Aboriginality, prior criminal record may in some cases be relevant only as part of the general background, in others it may be of primary concern. For example, both Ipeelee and Veen had prior records for serious offences of violence. Ipeelee was sentenced for drinking alcohol. His record for offences of violence, including sexual offences, may have had little significance in relation to the offence of drinking alcohol. On the other hand, Veen was sentenced for homicide and the fact that he had committed his second homicide just 9 months after being released on licence from his first homicide was a prominent concern on sentence.

6. 35 In the present case, the appellant committed an unprovoked act of violence in gaol while on remand for offences of violence. Even giving full weight to the ***Fernando*** considerations it was not an error to place some emphasis on considerations of denunciation, deterrence and protection of the community in the particular circumstances of the case.

---

[36] ***DPP v Terrick*** (2009) 24 VR 245 at [46].
[37] ***Pfennig v R*** (1995) 182 CLR 461 at 528.

Mental illness

6. 36 At the sentence hearing the appellant's legal representative submitted that the appellant suffered from "a serious schizophrenia type illness, that ... arises independently of drug and alcohol use"[38] (AB31.16) and "according to the psychiatrists he suffers from an anti-social personality disorder as well as his other conditions which are more properly – some of which are considered mental illnesses."[39](AB31.48). The prosecutor "conceded" this and stated that "that means necessarily that he is in some ways not a great vehicle for general deterrence." (AB36.25).

6. 37 It was not correct that the psychiatrists had diagnosed the appellant with a serious schizophrenia type illness, anti-social personality disorder as well as other mental illnesses. There was only one psychiatrist, Dr Westmore. He examined the appellant at the Goulburn Prison Complex on one occasion and acknowledged that the assessment was "particularly difficult" because he and the appellant were separated by a Perspex screen which made it difficult to hear the appellant clearly (Report of Dr Westmore 1/8/11 at p1 (AB120.45). His diagnosis was necessarily tentative and he requested a further examination or other clinical material with which to form a definitive diagnosis.

6. 38 Dr Westmore noted that the appellant reported that he had used various substances; heroin, cannabis, amphetamines and valium, but he said these were not an issue for him, his real problem was alcohol. He said he heard voices which went away when he drank but come back when he stopped (AB121.30). The antipsychotic medication at night was "sort of helping". He said he got a few hours sleep and his weight and appetite were stable. He said he had a lot of anger at the law but he did not have thoughts of self harm (AB123.33).

6. 39 Dr Westmore listed a number of possible disorders which may have applied to the appellant but considered that he would need to see further documentation or to examine him in a more appropriate setting. His opinion was expressed in terms of "probable" and "likely" diagnoses. Dr Westmore considered that the appellant required extended counselling for his drug and alcohol abuse problems and regular psychiatric review in relation to the reported voices (AB125.43).

---

[38] Transcript 15/12/11 at 13.5.
[39] Transcript 15/12/11 at 13.47.

6. 40 As requested, Dr Westmore was provided with general medical records and "some entries relevant to his mental state" and 3 months later wrote a further report (Report of Dr Westmore 11/11/11 at p 1 AB128.42). Dr Westmore noted that the material indicated that the appellant had suffered episodes of depression in the past associated with thoughts of self harm and self harming behaviours. He was identified as having auditory hallucinations in 2009.

6. 41 The material provided no definitive diagnosis. Of the last review by a mental health worker Dr Westmore noted that "a detailed mental state was not conducted and no diagnostic conclusions reached" (AB129.15). A schizophreniform illness was considered at one stage. This may or may not have been of psychotic origin depending on whether the appellant had taken drugs or alcohol while in gaol. If he had not taken drugs or alcohol in gaol then it may have been of "primary psychotic origin". It was also possible that the symptoms may have occurred in the context of a Depressive Disorder. Dr Westmore considered it important that the appellant be reviewed regularly by mental health staff and psychiatrists with the Justice Health System and receive ongoing psychiatric care on his return to the community (AB129.32).

6. 42 These were understandably guarded and conditional observations. This was acknowledged by the sentencing judge who noted that "no particular diagnosis was given" in Dr Westmore's first report (ROS at [43] AB154.20) and that "the supplementary report does not appear to advance the matter further" (ROS at [44] AB 154.32). Despite there being no particular diagnosis his Honour afforded "some moderation" to general deterrence "because of those issues" (ROS at [47] AB155.25). His Honour also noted that neither report established "a link between the mental disorders or illness and the offending behaviour" (ROS at [45] AB154.45).

6. 43 One of the factors said to be relevant was that the appellant had made 5 previous suicide attempts while in custody (AWS at [6.22 (e)]). It is not clear where that fact is established. The Probation Report by Ms McNamara dated 23/10/08, Exhibit 2, is cited but in that report it was noted that the appellant reported that he had made 5 suicide attempts between 1992 – 1995 (AB114.25). The appellant would have been between 11 – 14 years of age and the criminal record shows that he was not in custody at that time (AB71 – 73).

6. 44 This is not to deny the extremely difficult background of violence, alcoholism and drug abuse suffered by the appellant nor to minimise the effects of separation from his family at age 12 and his time in foster care, juvenile institutions and adult prisons. The psychological and emotional damage wrought by such experiences was part of the relevant background pertaining to the appellant. Powerful as that subjective case was, the crucial issue was whether mental illness had been established, the nature of that illness and how that illness related to the appellant's moral culpability, and whether, and to what extent, general and personal deterrence, and the other purposes of punishment had a role to play. It was also important to assess the impact the mental illness may have had on the question of whether imprisonment would be more onerous for the appellant.

6. 45 The assessment called for in cases such as ***Engert***[40], which his Honour purported to apply, was not undertaken and based on the admittedly conditional findings of Dr Westmore his Honour concluded that there should be "some" moderation to general deterrence (ROS at [47] AB155.28).

6. 46 The point made so emphatically in ***Engert*** was that mental disorder does not produce the automatic consequence that less importance is given to general deterrence. In any particular case, mental disorder may mean that general deterrence is of less importance but that deterrence of the offender or protection of the community may be of greater importance.[41] The existence of a causal connection between the mental disorder and the commission of the offence may be significant in assessing moral culpability or the application of the other purposes of punishment. That does not mean that the existence of such causal relationship produces the automatic result that the offender will receive a lesser sentence anymore than the absence of such a causal connection means that the offender will not receive a lesser sentence.[42]

6. 47 It is well established, as is evident from Gleeson CJ's analysis of the significance of mental illness in ***Engert***, that it is not necessary to establish that the mental illness was causative of the offence for it to be relevant on sentence for it may be relevant in a variety of ways. However, where mental disorder is shown to be causative that may afford a particular relevance, for example, in relation to moral culpability, that may

[40] ***R v Engert*** (1995) 84 A Crim R 67.
[41] ***R v Engert*** (1995) 84 A Crim R 67 at 68.
[42] ***R v Engert*** (1995) 84 A Crim R 67 at 71.

not accrue where the disorder played no role in the commission of the offence. This will depend on all the circumstances of the case.

6. 48 In the present case, a number of possible mental disorders were suggested and it was important to assess the degree to which any of the possible conditions may have impacted on the relevant considerations. Some may have had little relevance. For example, the appellant's alcohol and drug abuse issues may have been important in relation to rehabilitation and to his proper management in custody but they appeared to have nothing to do with the commission of the offence and were of little or no significance in relation to considerations of denunciation and deterrence.

6. 49 It was no answer to the criticism that the proper assessment of mental illness had not been undertaken to say that both legal representatives had made the same error and had simply assumed that automatic consequences followed. The need to undertake such assessment was fundamental to the sentencing exercise where an issue of mental illness arose and the CCA was correct to hold that such an assessment had not been undertaken.

6. 50 In the present case, the CCA considered that the tentative opinion expressed did not warrant a finding of mental illness. The Court also noted that such symptoms as were described did not appear to indicate that the appellant had a limited understanding of what he was doing or that his moral culpability was reduced or that he was a person for whom deterrence or retribution would have no purpose (CCA at [45] – [47] AB193.30). Those findings were open to the Court.

Crown Appeals under s 5D

6. 51 The appellant submits that the first three grounds of appeal were essentially particulars of the fourth ground, manifest inadequacy (AWS [6.1]), and as the CCA expressly eschewed finding that the sentence was manifestly inadequate the court erred in allowing the Crown appeal.

6. 52 If the first 3 grounds of appeal were merely particulars of the fourth, then the finding that all 3 grounds were established was tantamount to finding that the fourth was established. This was especially so where the 3 grounds encompassed errors in respect of both the objective and subjective circumstances.

6. 53 That the sentence was considered manifestly inadequate can readily be implied from the findings made, from the fact that the sentence was increased and the extent of the increase.[43]

6. 54 As the appellant submits (AWS at [6.2]) the power under s 5D has been read as subject to ***House***[44] principles. ***House*** established that the appellate jurisdiction in relation to a discretionary decision is enlivened by error. A number of types of error were identified which may enliven that jurisdiction: "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration." Where any of those errors are found the appellate court may exercise its own discretion "in substitution"[45] of the original determination. Sentencing is a single exercise and an error in any aspect of that exercise enlivens the jurisdiction to consider the sentence afresh even in relation to aspects not affected by the error.[46]

6. 55 The Court may intervene even where none of the above specified errors are found if the result is "unreasonable or plainly unjust".

6. 56 This residuary category, manifest inadequacy, is one of a number of bases which may warrant intervention. It is not the only or the necessary ground to warrant intervention.

6. 57 It may be that as a matter of discretion the appellate court may not intervene and increase a sentence where, despite specific error, the sentence is not manifestly inadequate, but that does not mean that there is no power to allow an appeal without a finding of manifest inadequacy. That would reduce the 5 identified categories of error to only one, the residuary category. There is nothing in the decisions of this Court in ***Green and Quinn*** (2011) 244 CLR 462 or ***Lacey v AG*** (2011) 242 CLR 573 which overturns ***House*** and confines Crown appeals to that single category.

6. 58 In the present case, there were 4 specific errors which enlivened the appellate power. The CCA identified two errors under ground 3, in relation to his Honour's approach to mental illness.

---

[43] ***Dinsdale v R*** (2000) 202 CLR 321 at [8] -[9].
[44] ***House v R*** (1936) 55 CLR 499.
[45] ***House v R*** (1936) 55 CLR 499 at 505.
[46] ***McGarry v The Queen*** (2001) 207 CLR 121 at 126 [9] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; ***Strong v The Queen*** (2005) 224 CLR 1 at 9 [11] per Gleeson CJ, at 13 -14 [25] – [27] per McHugh J, at 19 [44] & 29 [75] per Kirby J

6. 59 The first error was a factual error in treating Dr Westmore's conditional diagnosis as a definitive diagnosis such as to attract the special approach to mental illness described in ***Engert*** and ***Muldrock***[47]. The CCA held that to take such provisional comments into account in that way was more speculative than inferential (CCA at [47] AB194.15). The second error was the sentencing judge's apparent assumption that the conditional diagnosis produced the automatic result that the appellant was to some extent an inappropriate medium for general deterrence. This was held to be wrong in law because such automatic consequences do not follow from such a diagnosis. The correct approach was that the relevance of mental illness had to be weighed in the context of the particular circumstances of the case (CCA at [45] – [46] AB193.30).

6. 60 The third error was also an error of principle in describing the offence as a "result offence" the seriousness of which depended on the seriousness of the injuries inflicted (discussed more fully at [6.79] below). The fourth error was an error of fact in his Honour's finding that the offence occurred "on the spur of the moment" (discussed more fully at [6.73] below).

6. 61 These specific errors and the implied finding that the sentence was manifestly inadequate meant that in increasing the sentence, the CCA was not merely substituting its own view but, having found error, in the words of ***House***, exercising its own discretion "in substitution" of the original determination.

Residual discretion

6. 62 The appellant submits that the factors which would have warranted not intervening in the exercise of the discretion were the conduct of the prosecutor in not making a submission as to any particular level of objective seriousness, his acceptance of the appellant's mental illness, the fact that the appellant had spent 135 days in segregation, that the sentence was being served many miles from the appellant's family and that the sentence included a recommendation of a full time rehabilitation program.

6. 63 It is evident that the CCA did not refer to the discretion. The failure to mention those matters did not vitiate the sentence nor mean that the factors were not considered in deciding that intervention was warranted.

6. 64 The matters listed did not warrant exercising the discretion against intervention. A submission as to where the objective seriousness fell relative to the mid range was not

---

[47] ***Muldrock v R*** (2011) 244 CLR 120 at [53] – [55].

required or even helpful. The fact that such a submission was not made was not a matter relevant to the exercise of the discretion particularly where the prosecutor had detailed a number of reasons why this was a serious offence (AB33.40 – 36.10).

6. 65 The fact that both the prosecutor and the appellant's legal representatives made inaccurate submissions about the appellant's mental illness was an error to be corrected not a factor against intervention.

6. 66 The fact that the appellant had spent part of his time in segregation also did not warrant the exercise of the discretion. The fact that the sentence may have been more onerous for the appellant was a relevant consideration however there was no evidence that the sentence was to be served in segregation. As the sentencing judge noted, part of the time spent in segregation was because a syringe had been found in the appellant's yard bag (ROS at [49] – [50] AB155.40). The fact that that infraction led to segregation, or that any future infractions may also lead to disciplinary measures, was not a reason not to increase the sentence.

6. 67 It is not strictly correct that the sentencing judge recommended that the appellant undergo full time drug rehabilitation. That was not a recommendation but a condition of parole (AB160.55) which meant that at the expiry of his 4 year NPP the appellant could not be released to parole until a suitable placement in a full time rehabilitation facility was available. It also meant that if he failed to complete the program he would be returned to custody. The effect of this condition was potentially to extend his period in custody. The existence of that limitation on his release was not a basis to exercise the discretion.

The seriousness of the offence

6. 68 The appellant further submits that the CCA erred in its assessment of the seriousness of the offence, in particular that the Court was wrong to find error in the way the sentencing judge had assessed the objective circumstances.

6. 69 There were arguably 3 errors in the portion of the remarks on sentence under the heading, **Assessment of the Criminality.**

6. 70 The sentencing judge stated that the appellant's representative submitted that "the matter is 'well below' the mid range of seriousness" and the Crown submitted that it was "at or about the mid range." His Honour determined that it was "slightly less serious" than the mid range (ROS at [30] (AB151.25).

6. 71 On that view of the respective positions, his Honour's determination of "slightly less" than mid range appeared to be a middle position between the "well below" and mid range positions of the parties. However, that characterisation did not accurately reflect the submissions of either party. The defence representative had not submitted that the seriousness of the offence was "well below" the mid range and the prosecutor had not submitted that it was at the mid range. The appellant's representative had distinguished between the seriousness of the intent and the seriousness of the injuries. The mens rea was said to be "well below" the mid range but the result was "mid-range to above mid - range" (AB 29.30). The same distinction as to the seriousness of the mens rea and of the injuries was put in the written submissions (Submissions on Sentence MFI 1 at [24] and [51]) where it was submitted that, balancing those factors, the offence was "properly characterised as mid-range" (Submissions on Sentence MFI 1 at [24] and [52]).

6. 72 Accordingly, the appellant's representative had submitted that taking both elements into account the offence was at the mid-range. As the CCA noted, his Honour was not bound to accept the parties' submissions, but he had arrived at an assessment that was lower than that submitted by even the appellant's representative on the basis of a misunderstanding of the submissions.

6. 73 This assessment also appears to have been based on his Honour's finding that the offence was committed "on the spur of the moment" when the appellant did not get what he wanted in relation to the visiting hours (ROS at [28] AB150.49). That finding also went further than the appellant's representative had submitted. The appellant's representative had submitted that while the offence was not entirely spontaneous it was certainly not planned or organised (AB29.17).

6. 74 The agreed facts did not support the characterisation of the offence as spur of the moment. The appellant was upset that his visitor may not have been able to arrive before visiting hours expired and the victim, Jason Gould, offered to find out if visiting hours could be extended for the appellant's visitor. For some reason, this prompted the appellant to follow Mr Gould into the wing office and threaten him, saying "I'll split you open, you cunt".

6. 75 The offence did not occur on the spur of the moment at that stage.

6. 76 Rather, the appellant walked away. Some minutes passed. The appellant made a phone call. When the call ended, the appellant spoke to another officer, Assistant

Superintendent Pitt. It was during that conversation that the appellant became enraged, went to a nearby pool table, took some pool balls and threw them at Assistant Superintendent Pitt and another officer.

6. 77 Jason Gould was not in the yard during this incident. The attack on Mr Gould began when he came to the yard. The appellant saw him, threw pool balls at him and repeated the earlier threat saying; "Gould you cunt, I told you I'm going to split you open." Mr Gould was truck twice in the back and retreated to the wing office. It was at that stage, as Mr Gould tried to lock the wing office door, that the appellant threw the ball that struck him in the eye.

6. 78 It may have been correct that the offence was not "part of a planned or organised criminal activity" as that aggravating factor is understood under s21A(2)(n) but that did not mean that it was spur of the moment. The agreed facts described some persistence in the appellant's conduct from the making of the initial threat to "split Gould open", walking away, making the phone call during which the threat was repeated, to speaking to another officer, further threats and finally attacking Gould and the other officers.

6. 79 There was a further error in describing the s 33 offence as a "result offence". That was taken from the quoted passages from ***R v McCullough*** (2009) 194 A Crim R 439 at [37] where it was said that the seriousness of a malicious wounding offence "significantly depend[ed] upon the seriousness of the wounding." (ROS at [23] AB 149.40) and from ***R v Mitchell and Gallagher*** (2007) 177 A Crim R 94 at [27] where it was said that the nature of the injury "will to a very significant degree determine the seriousness of the offence and the appropriate sentence."(AB 149.40). ***McCullough*** and ***Mitchell and Gallagher*** both dealt with offences under s 35 of malicious wounding or causing grievous bodily harm. That approach had no application to the assessment of the seriousness of an offence under s 33 which involves the specific intent of intending to cause grievous bodily harm.

6. 80 The offence under s 33 cannot properly be described as a "result offence". Its seriousness does not depend on the seriousness of the injuries inflicted. The degree of injury is an important component but the seriousness of the offence derives in large part from the seriousness of the mental element required. The intent to cause grievous bodily harm is the intent for murder and amongst the most serious known to the criminal law. The seriousness of that intent is reflected in the legislation. The basic

offence of inflicting grievous bodily harm (s 35 *Crimes Act*) carries a maximum penalty of 10 years imprisonment. The s 33 offence carries a maximum penalty of 25 years. The significant increase in the penalty for the respective offences reflects the seriousness of that mental element.

6. 81 In addition to these 3 errors the CCA found that the sentencing judge failed to mention that the appellant had expressed no remorse or contrition for the offence or acknowledged the serious injuries inflicted (CCA at [40] AB190.43).

6. 82 It is true that the CCA noted that the sentencing judge had made no reference to personal deterrence and appeared to have inadequately appreciated the importance of general deterrence under ground 2 dealing with errors in the assessment of objective seriousness (CCA at [38] AB190.27). This was part of the finding that his Honour had given insufficient importance to the aggravating feature that the offence was committed against a Correctional Services officer (CCA at [35] AB189.38). The CCA quoted 2 cases, ***Schneidas*** and ***Davis*** (CCA at [36] and [37]) dealing with the significance of that aggravating feature where the point was made that it was a matter going to the proper administration of the prison system and that sentences for such offences must involve a "significant component" of personal and general deterrence (cf ***Davis*** at CCA at [37] AB190.20). The fact that these considerations had not been mentioned, or inadequately appreciated, suggested, as the Crown submitted, that insufficient weight had been given to that aggravating feature. It was not an indication that those purposes of punishment were part of the assessment of objective seriousness.

6. 83 The various errors warranted intervention, and on the re-determination consequent upon the finding of such errors, it was open to the CCA to increase the sentence as it did in the particular circumstances of this case.

PART VIII: Time Estimate

It is estimated that oral argument will take 1 hour.

Dated: 5 July 2013

L Babb

Telephone: (02) 9285 8606

Facsimile: (02) 9285 8600
Email:enquiries@odpp.nsw.gov.au