



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

GBU

Appellant

and

THE KING

Respondent

10

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues on Appeal

2. By voluntary ingestion of intoxicants, a defendant generates an enduring pathology that has an existence independent of any continued presence of the intoxicant. The pathology causes the defendant to be of diminished responsibility. At sentence, in what circumstances should such a defendant be denied a finding of reduced moral culpability, and denied moderation of the sentencing purposes of general and specific deterrence?
- 20 3. Did the Court of Appeal err, by failing to find the sentencing judge, in this matter, was required to mitigate the penalty of the defendant because of a reduction in moral culpability and/or moderation of the requirements of general and specific deterrence?

Part III: Section 78B Notices

4. Notices under s 78B of the *Judiciary Act 1903* (Cth) are not required.

Part IV: Decisions Below

5. The reasons for judgment of the Court of Appeal of the Supreme Court of Queensland are not reported but are published as *R v GBU* [2025] QCA 196 (CAB 22–36). The reasons of the primary judge (Martin J) are unreported (CAB 11–17).

Part V: Statement of Relevant Facts

6. The appellant was sentenced to 12 years imprisonment for the manslaughter (domestic violence offence) of his wife of 27 years.¹
7. The offence happened on 14 February 2022, when the appellant was aged 50.
8. The appellant and his wife separated about six months before the offence, but continued to see each other regularly, spending some nights and weekends together.²
9. The appellant had been a regular user of illicit drugs throughout much of his adult life, which included regular drug use with his wife. The appellant had two prior court entries, each for minor drug offences in 1992 and 1996.³
- 10 10. In 2021 the appellant developed a drug-induced psychotic illness, given his sustained methylamphetamine abuse and dependence. His illness resulted in paranoid, delusional beliefs about the deceased.⁴ The evidence indicated:
 - (a) on 9 September 2021, he voluntarily attended a hospital, was admitted, and ultimately discharged on 11 September 2021;⁵
 - (b) he told Dr Scott and Dr Schramm that he ceased use of illicit substances in about October 2021;⁶ and
 - (c) on 27 January 2022, he saw a General Practitioner, who prescribed him an anti-psychotic, which he reportedly took.⁷
11. From 11 to 14 February 2022, he and his wife stayed at a hotel and socialised with others.
- 20 During that time he formed the belief that his wife had stolen from him. On the morning of 14 February 2022, he and his wife awoke, and he asked questions of her, including whether his life had been a lie. He then strangled her, and after a period, took a knife and

¹ Reasons of Martin J, 30 Jan 2025 (CAB 12, 16).

² Statement of Facts at [1] (Appellant's Book of Further Materials (ABFM) 6).

³ Queensland Court Outcomes (ABFM 5).

⁴ Statement of Facts at [30]–[31] (ABFM 10).

⁵ Report of Dr Kumaravelu at p 2 (ABFM 31), Report of Dr Scott at p 2-3 (ABFM 113-114).

⁶ Report of Dr Schramm at p 7-8 (ABFM 64 – 65), 28 (ABFM 85) (on 27 Jan 2022 he indicated 'he had been clean for three months'), 42 (ABFM 99); Report of Dr Scott at p 9 (ABFM 120). Although evidence of when he stopped taking drugs may not have been entirely consistent, it is submitted there was no clear evidence he used after October 2021, and it appears the sentencing judge did not proceed on the basis the appellant used drugs after October 2021: see CAB 14 lines 11 – 15.

⁷ Report of Dr Kumaravelu at p 5 (ABFM 34), 15 (ABFM 44), Report of Dr Schramm at 28-29 (ABFM 85-86).

made large cuts to each of her forearms. Her death was caused by a combination of the strangulation and cuts to her forearms.⁸

12. The appellant was charged with murder. That charge was referred to the Mental Health Court (MHC) for a determination of his mental condition at the time of the offence.⁹
13. The MHC received evidence from three psychiatrists. The Court found the appellant was, at the time of the offence, experiencing a drug-induced psychotic illness, which had persisted in the absence of illicit substances in the appellant's body.¹⁰
14. The Court found that the drug induced psychotic illness substantially impaired his capacity to know he ought not to do the acts which caused death, and he was therefore of diminished responsibility pursuant to s 304A(1) of the *Criminal Code* (Qld).¹¹
15. The appellant was then committed for sentence on a charge of manslaughter and entered his plea in the Supreme Court of Queensland.¹² The only penalty for murder is life imprisonment, whereas, for manslaughter, the maximum penalty is life imprisonment.¹³

Reasons of the sentencing judge

16. The sentencing judge, Martin J, noted the finding of the MHC that the appellant committed the offence in a state of diminished responsibility.¹⁴ His Honour found that:
 - (a) At the time of the offence, the appellant suffered from a drug-induced psychosis which resulted in delusional beliefs involving the deceased, believing the deceased confirmed some of his paranoid concerns.
 - (b) The appellant intentionally killed his wife, but that he suffered an abnormality of mind which substantially impaired his capacity to know that he ought not to do so.

⁸ Statement of Facts at [3] – [13], [20] – [27] (ABFM 6–7, 9–10).

⁹ Statement of Facts at [33] (ABFM 10), Reasons of MHC at 1-2 (ABFM 13).

¹⁰ Reasons of MHC at 1-15 L17-19 (ABFM 26), 1-17 L39-43 (ABFM 28).

¹¹ Reasons of MHC 1-17 L21 to 1-18 L13 (ABFM 28–29). The “capacities” in the *Criminal Code*, s 304A, are those which operate in a determination of whether a person is insane: *R v Smith (aka Stella)* (2021) 8 QR 338 at 352 [30]–[31], and the substantial impairment of capacity must be a “real cause” of a defendant’s offending conduct, if the defendant is to be found of diminished responsibility: at 353 [36]–[37].

¹² Submissions on behalf of the Crown at [4.1] (ABFM 149); Transcript, 23 Jan 2025 at 1-3 to 1-4 (CAB 9–10).

¹³ *Criminal Code* (Qld), ss 305, 310. A prisoner serving life imprisonment for murder is generally eligible for parole after 20 years imprisonment: *Corrective Services Act 2006* (Qld), s 181(1), (2). An offender sentenced to life imprisonment for manslaughter is automatically eligible for parole after serving 15 years imprisonment, but a sentencing judge may impose a parole eligibility date greater than 15 years, with no upper numerical limit: *Penalties and Sentences Act 1992* (Qld), s 160D(3) and *Corrective Services Act 2006*, s 182(3).

¹⁴ Reasons of Martin J, 30 Jan 2025 (CAB 13 L13-15).

- (c) The appellant's illness arose from sustained methylamphetamine abuse and dependence, but he was not using illicit substances at the relevant time.
- (d) The appellant's long-time abuse of methylamphetamine elicited paranoia and irritability, and exaggerated his anger, defensiveness, and impulsivity.¹⁵

17. The sentencing judge did not appear to mitigate the appellant's penalty on account of his mental illness or his resulting diminished responsibility. His Honour did not discuss whether the appellant's moral culpability should be diminished. His Honour did not discuss whether the demands of specific deterrence ought be attenuated.

10 18. The sentencing judge's discussion of mental illness was largely confined to the issue of general deterrence. His Honour found the case was an appropriate means for demonstrating general deterrence given the illness was drug-induced. He reasoned:

Secondly, I have to consider the impact of your mental illness. This is not an organic illness. It is an illness brought on by your own behaviour in engaging in the long-term and heavy consumption of methamphetamine. There is no suggestion that your condition came about for any other reason than your own actions in your mammoth addiction to this awful drug.

20 It has been said in some cases – for example, *R v Neumann; Ex Parte Attorney-General* [2007] 1 Qd R 53 – that general deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality, because such an offender is not an appropriate medium for making an example to others. That is clearly the case where a person is suffering from an abnormality of mind which is not brought on by the person's own illicit and unlawful behaviour, but the reasoning in that case also supports the conclusion that not all cases involving an offender who is suffering from a mental disorder should be regarded as an inappropriate vehicle for general deterrence.

A question which must be considered is whether the particular case is an appropriate means for demonstrating that to others. I am satisfied that this is such a case. It was your conduct which led to your mental condition. You developed a significant mental illness because you engaged in the consumption of an illicit drug

¹⁵ Reasons of Martin J, 30 Jan 2025 (CAB 13 L13-32).

to such a great extent. The absolute folly of consuming illicit drugs is a message which should be made clear again and again.”¹⁶

19. The sentencing judge remarked that sentences for manslaughter can vary greatly, and that “[t]he Court of Appeal has indicated that sentences for this kind of offence can fall in the general area of nine to 12 years.”¹⁷ His Honour imposed 12 years imprisonment.

The Court of Appeal

- 10 20. The Court of Appeal (Brown JA; Bowskill CJ and Mullins P agreeing) refused the application for leave to appeal against sentence. The Court found that the sentence was not manifestly excessive (ground 1), and that sentencing judge made no error with respect to his treatment of the appellant’s mental illness (ground 2).
21. The Court accepted that the the six ways impaired mental functioning is relevant to sentencing, as articulated in *R v Verdins* (2007) 16 VR 269, apply in Queensland.¹⁸
22. The Court said Martin J correctly applied *Verdins* to find the case was an appropriate vehicle for general deterrence given the drug use. The Court said the extent to which general deterrence was moderated was a matter for the sentencing judge’s discretion,¹⁹ but did not suggest Martin J actually moderated the purpose of general deterrence. The Court rejected the “*underlying premise*” of ground 2, namely, that Martin J accepted, as a matter of principle, that a non-organic mental condition could not mitigate sentence.²⁰
- 20 23. The Court of Appeal then considered the appellant’s argument, as part of ground 2, that his Honour had nonetheless wrongly focused on the non-organic origins of the illness.
24. In doing so, the Court of Appeal considered whether *R v Martin* (2007) 20 VR 14 established the correct way to apply the *Verdins* principles in cases of an offender in a drug induced psychosis. Without deciding whether *Martin* applied in Queensland, the Court said, even if it did, the appellant had failed to lead evidence that he “*was unaware of the potential for his drug use to cause psychological conditions*”, and therefore, it seems, mitigation due to his mental illness was not required pursuant to *Martin*.²¹

¹⁶ Reasons of Martin J, 30 Jan 2025 (CAB 15 L5–26).

¹⁷ Reasons of Martin J, 30 Jan 2025 (CAB 16 L18–22).

¹⁸ *R v GBU* [2025] QCA 196 at [32] – [36] (CAB 28–29).

¹⁹ *R v GBU* [2025] QCA 196 at [39] – [41] (CAB 30).

²⁰ *R v GBU* [2025] QCA 196 at [39] – [41] (CAB 30).

²¹ *R v GBU* [2025] QCA 196 at [42] – [52] (CAB 30–32). In *Martin*, the Court was dealing with an offender who acted while in a drug induced florid psychotic state that was a result of voluntary consumption. The Court said

Part VI: Argument

Summary of argument

25. A sentencing judge must account for *all* the relevant factors, which may pull in different directions, and then, after reflecting on their significance, make a judgement, expressed as the sentence: see *Markarian v The Queen* (2005) 228 CLR 357 at 373-375 [37].
26. *R v Verdins* provides that a mental illness is relevant to sentence because it may, *inter alia*, reduce an offender's moral culpability, moderate or eliminate general deterrence, and/or moderate or eliminate specific deterrence.
- 10 27. The sentencing judge made an error of principle. Before making the *Markarian* judgement, Martin J failed to account for all the relevant circumstances. Rather, Martin J applied such weight to the cause of the appellant's mental illness that he gave no weight to the effects of the illness at the time of the offence. This was erroneous, given: the appellant's drug taking caused an illness giving risk to a partial defence; there was no evidence the appellant was aware of the potential for his drug-taking to cause that pathology; and given the separation in time between the drug-taking and offending. Thus, Martin J failed to correctly determine whether the appellant's moral culpability was reduced, and whether to moderate the demands of specific and general deterrence.
28. The effect of this error is that the sentence did not achieve the balance required by *Markarian*, resulting in a punishment which was not just in all the circumstances.
- 20 29. The Court of Appeal failed to identify or correct the sentencing judge's error of principle. It failed to recognise that the appellant's mental illness required mitigation of his sentence, by way of reduction in moral culpability and mitigation of the demands of deterrence. It failed to correct Martin J's failure to address moral culpability and specific deterrence, and his binary approach to general deterrence.

General principles

30. The majority in *Markarian* provided that a sentencing judge must account for *all* of the relevant factors, which may pull in different directions, and then, after reflecting on their significance, make a judgement, expressed as the sentence.²²

the key issue was what the probable consequences of ingestion were and whether the offender foresaw those consequences. It held the evidence showed he was aware that when he takes drugs he experiences delusions.

²² *Markarian* (2005) 228 CLR 357 at 373-375 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ), quoting *Wong v The Queen* (2001) 207 CLR 584 at 611-612 [74]-[76] (Gaudron, Gummow and Hayne JJ).

31. A corollary of the above is that any punishment must be just in *all* the circumstances, which is reflected in s 9(1)(a) of the *Penalties and Sentences Act 1992*. This statutory provision broadly reflects the principle of “proportionality” affirmed by the majority in *Veen v The Queen (No 2)* (1988) 164 CLR 465 (*Veen (No 2)*).²³ In *Australian Building and Construction Commissioner v Pattinson*, the majority said *Veen (No 2)* stands as authority for the proposition that, in the criminal law:

...a sentence that is imposed with a view to protecting the community from a criminal offender must not be disproportionate to the seriousness of the offending for which the offender is being sentenced. That is because, in the criminal law, the purpose of retribution – that is, imposing a punishment that fits the crime and is proper because it is what the offender deserves – constrains the sentencing discretion.²⁴

32. The proportionality principle, which could be expressed as the principle of “appropriateness”,²⁵ has particular application when considering the sentencing purpose of deterrence. In *Muldrock v The Queen* (2011) 244 CLR 120 the Court quoted the following statement with approval:

[The] significance [of general deterrence] in a particular case will, however, at least usually be related to the kindred concept of retribution or punishment in which is involved an element of instinctive appreciation of the appropriateness of the sentence to the case. A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community.²⁶

33. The Court in *Muldrock* affirmed that the above principle applies when “*sentencing offenders suffering from mental illness, and those with an intellectual handicap.*”²⁷ The Court then observed (underlining added):

A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to

²³ (1988) 164 CLR 465 at 472-474 (Mason CJ, Brennan, Dawson and Toohey JJ).

²⁴ (2022) 274 CLR 450 at 467 [39], citing *Veen (No 2)* (1988) 164 CLR 465 at 472-474.

²⁵ See *Hoare v The Queen* (1989) 167 CLR 348 at 354.

²⁶ (2011) 244 CLR 120 at 138-139 [53], quoting *R v Mooney* (unreported, Court of Criminal Appeal (Vic), 21 June 1978) at 8.

²⁷ (2011) 244 CLR 120 at 139 [54].

reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community.²⁸

34. In *Veen (No 2)*, a diminished responsibility case, the majority observed that:

Prima facie, a mental abnormality which exonerates an offender from liability to conviction for a more serious offence is regarded as a mitigating circumstance affecting the appropriate level of punishment. Historically, that was the effect of the provision on which s. 23A was modelled, that is, s. 2 of the *Homicide Act 1957* (UK).²⁹

35. The majority in *Veen (No 2)* observed that a mental abnormality which diminishes an offender's moral culpability for a crime *may* indicate a shorter penalty.³⁰ Other factors about an offender, such as his criminal history, may also inform his moral culpability.³¹

36. In *DS v The Queen* the New South Wales Court of Criminal Appeal referred with approval to the observation of Beech-Jones CJ at CL (as this Honour then was) in *Paterson v R* that an offender's moral culpability is concerned with the offender's moral blameworthiness for an offence, which may be informed by several factors.³² It is to be observed that s 9(2)(d) of the *Penalties and Sentences Act 1992* states that a sentencing court must have regard to the extent to which the offender is to blame for the offence.

37. In *Bugmy v The Queen* the majority cited,³³ with apparent approval, Gleeson CJ's observation in *R v Engert*, that:

...the question of the relationship, if any, between the mental disorder and the commission of the offence, goes to circumstances of the individual case to be taken

²⁸ (2011) 244 CLR 120 at 139 [54], citing, in that passage, *R v Engert* (1995) 84 A Crim R 67 at 71.

²⁹ (1988) 164 CLR 465 at 476. Speaking to the *Homicide Bill 1957* (UK), Lord Chancellor Viscount Kilmuir said: "My Lords, may I say a word about diminished responsibility?... It might be asked why this doctrine should be peculiar to murder. The answer is that in murder alone the sentence is fixed, and will remain fixed under the Bill: in other cases, once guilt is proved, the court, in assessing sentence, will always make allowances for human weakness. In murder it can make no such allowance": Parliamentary Debates, House of Lords, 21 Feb 1957, vol 201, col 1166 – 1167. Section 304A of the *Criminal Code* (Qld) has been described as having been "clearly based" on s 2 of the *Homicide Act 1957* (UK): *R v Rolph* [1962] Qd R 262 at 276 (Hanger J).

³⁰ (1988) 164 CLR 465 at 476-477.

³¹ (1988) 164 CLR 465 at 477.

³² (2022) 109 NSWLR 62 at 95 [64], quoting *Paterson v R* [2021] NSWCCA 273 at [29]-[31].

³³ (2013) 249 CLR 571 at 596 [47].

into account in the application of the relevant principles. The existence of such a causal relationship in a particular case does not automatically produce the result that the offender will receive a lesser sentence, any more than the absence of such a causal connection produces the automatic result that an offender will not receive a lesser sentence in a particular case.³⁴

The *Verdins* principles

38. In *Verdins* the Victorian Court of Appeal considered a number of authorities, both Victorian and interstate, before producing a summary of six considerations applicable to sentencing an offender with a mental impairment. Before listing those six considerations, the Court noted the following matters, which, it is submitted, provide the setting in which the summary should be considered and applied:

- (a) A sentencing court should not concern itself with a condition's classification or diagnostic label, and that "*what matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time.*"³⁵ The Court later observed:

[T]he sentencing court needs to direct its attention to how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances – that is, at the time of the offending or in the lead-up to it – or is likely to affect him/her in the future.³⁶

- (b) General deterrence will not always be excluded as a sentencing consideration on account of mental illness.³⁷ When general deterrence still operates in a particular case, it ought be "sensibly moderated".³⁸

- (c) The Court referred with approval to *R v Matthews*, where the NSW Court of Criminal Appeal explained that the reason for giving less weight to general deterrence in the case of an offender suffering from a mental impairment is that:

... the community will readily understand that the offender who suffers from a mental disorder or abnormality is less in control of his or her cognitive

³⁴ (1995) 84 A Crim R 67 at 71.

³⁵ (2007) 16 VR 269 at 272 [8].

³⁶ (2007) 16 VR 269 at 273 [13].

³⁷ (2007) 16 VR 269 at 273 [15]-[17].

³⁸ (2007) 16 VR 269 at 273 [17], quoting *R v Yaldiz* [1998] 2 VR 376 at 381 (Batt JA) and citing *R v Lewis* (unreported, Court of Appeal (Vic), 20 Apr 1998), *R v Swingler* [2001] VSCA 26 at [13], *R v Chambers* (2005) 152 A Crim R 164 at [26]-[28], *R v Ahmed* [2006] VSCA 200 at [28].

facilities or emotional restraints, and in some instances lacks the ability to make reasoned or ordered judgments. Almost invariably there is a limited appreciation of the wrongfulness of the act, or of its moral culpability, which although falling short of avoiding criminal responsibility does justify special consideration upon sentencing. Moreover, such a condition is inherent and its presence does not depend upon any element of choice.”³⁹

- (d) The Court explained that an offender with impaired mental functioning at the time of offending may have reduced moral culpability, and hence blameworthiness, if the impairment affected the offender’s ability, *inter alia*, to exercise appropriate judgement, or to make calm and rational choices, or to appreciate the wrongfulness of the conduct in question.

39. The Court then summarised six ways a mental disorder, abnormality, or impairment of mental function – whether temporary or permanent – may be relevant to sentencing:

Impaired mental functioning, whether temporary or permanent (“the condition”), is relevant to sentencing in at least the following six ways:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender’s legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of

³⁹ (2007) 16 VR 269 at 274 [22], quoting *R v Matthews* (2004) 145 A Crim R 445 at 450 [22].

the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.

5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.

40. In *R v Guode*, the majority observed that this compendious summary has “consistently been adopted by intermediate appellate courts elsewhere in Australia.”⁴⁰

Markarian and Verdins endorse individualised justice

41. In *R v Howell*, Nettle JA observed, with Ashley and Redlich JJA agreeing, that:

The point of *Verdins* is that each case depends upon its own facts and in particular on the nature of the mental condition in question. ... The theory and reality upon which the intuitive synthesis approach to sentencing is built is that each case is unique...⁴¹

The relevance of intoxication, addiction and mental state to the *Verdins* factors

Intoxication

42. Generally, voluntary intoxication by alcohol or drugs does not reduce moral culpability.⁴² In Queensland, that also follows from s 9(9A) of the *Penalties and Sentences Act 1992*. However, there are exceptional instances where voluntary intoxication may permit mitigation of penalty, such as where the results of intoxication were entirely unexpected,⁴³ or where the decision to become intoxicated was the result of a painful medical condition,⁴⁴ or where the intoxication arises from an addiction, not itself the result of an original free choice.

⁴⁰ (2020) 267 CLR 141 at 148-149 [8] and note 11. In Queensland, for example, the Court of Appeal in *R v HYQ* [2024] QCA 151 at [43] cited and affirmed *Verdins* and its summary of relevant principles.

⁴¹ (2007) 16 VR 349 at 357 [24].

⁴² *R v Redenbach* (1991) 52 A Crim R 95; *R v Rosenberger*; *Ex parte Attorney-General* [1995] 1 Qd R 677.

⁴³ *Hasan v R* (2010) 31 VR 28 at 34 – 37 [25]-[34].

⁴⁴ In Queensland, see *R v Adam* [2022] QCA 41 at [31]-[41], *R v Carey* [2024] QCA 69.

Addiction

43. In *R v Henry* Spigelman CJ said that self-induced addiction at an age of rational *choice* establishes moral culpability for the *predictable consequences of that choice*.⁴⁵ Wood CJ at CL expressed a similar view, and Hulme J agreed with both judges.⁴⁶

44. Wood CJ at CL rejected, for the purposes of mitigation of sentence, an analogy between mental illness and drug addiction. The presence of a mental disorder is inherent and does not depend upon any element of choice. By contrast, addiction involves a choice about whether to experiment with drugs and thereafter to continue with their use, given “[t]he addictive quality of drugs and the potential of a slide into a degraded or criminal lifestyle are so well-known as to invite a free choice.”⁴⁷ His Honour did not cite evidence or authority to support a claim that most ordinary people would believe, for each illicit drug, that use of such a drug involved a real potential to slide into a criminal lifestyle.

Intoxication at or about the time of the offence which generates a psychosis, but no enduring pathology

45. Intermediate courts of appeal have held that voluntary drug consumption, leading to intoxication at about the time of the offence and a psychosis that is causative of the offending, does not, generally, reduce moral culpability.⁴⁸

46. However, it may in limited circumstances do so, depending on whether the offender foresaw the consequences of the intoxication.⁴⁹ This approach parallels the approach, mentioned at [42] above, that in cases absent of mental illness, unexpected behaviour resulting from voluntary intoxication might be mitigating.

47. In *R v Martin*, the Victorian Court of Appeal held that:

...the critical factor in determining the significance of drug-induced psychosis for sentencing purposes is the degree of foreknowledge on the part of the offender. There is an obvious parallel in this respect with sentencing for offences committed

⁴⁵ (1999) 46 NSWLR 346 at 383.

⁴⁶ (1999) 46 NSWLR 346 at 395 [257] and 409-410 [331].

⁴⁷ (1999) 46 NSWLR 346 at 394-395 [252]-[259].

⁴⁸ See, eg, *Butler v Western Australia* [2010] WASCA 104 at [59]-[62] (Owen JA; Pullin JA agreeing); *R v Wright* (1997) 93 A Crim R 48 at 52 (Hunt CJ at CL; Gleeson CJ and Hidden J generally agreeing);.

⁴⁹ *R v Redenbach* (1991) 52 A Crim R 96 at 99; *R v Martin* (2007) 20 VR 14 at 19-20 [20]; *R v Gagalowicz* [2005] NSWCCA 452 at [36]; *DPP v Arvanitidis* [2008] VSCA 189 at [34]; *Butler v Western Australia* [2010] WASCA 104 at [59]-[62]; *MT v R* (2021) 17 ACTLR 22 at 38 [104].

while under the influence of alcohol, where the concept of “reckless intoxication” has been developed.⁵⁰

48. The Court subsequently said: “*Voluntary ingestion of drugs should be approached no differently from intoxication, in our view. The critical question will be what the probable consequences of the ingestion of the particular drug by the particular offender were, and whether the offender foresaw those consequences.*”⁵¹ An offender may lack awareness of such consequences due to lack of knowledge that the ingestion of a drug might trigger a psychotic reaction.⁵²

10 49. The method of determining such a question will depend on the facts and evidence in each matter. In *R v Shafik-Eid* [2009] VSCA 217, Mr Shafik-Eid was an established drug user, who, after ingesting methylamphetamine and cannabis before and during the course of his offending, became intoxicated. In that state he violently offended. The Court’s judgment does not make entirely clear if Mr Shafik-Eid became psychotic. While he also suffered from an “*underlying psychological condition*” at the time of the offences, this psychological condition would not alone have contributed to the commission of the offences. His reduction in moral culpability was found to be “*very minor*”.

20 50. Lasry AJA, with whom the other judges of the Court of Appeal agreed, held that for Mr Shafik-Eid’s drug-induced intoxication to mitigate his penalty, Mr Shafik-Eid was required to establish that he did not foresee the consequences of that intoxication.⁵³ That view – that the onus is on the defendant – is best understood as confined to the facts of that case. It is not appropriate for sentencing courts to presume that all offenders know, subject to contrary proof, that consumption of any drug that is illicit will lead to a psychosis or other mental illness.⁵⁴

Intoxication generating a pathology which has an existence independent of the continued presence of the intoxicant

51. It is submitted that an offender who through ingestion of an intoxicant generates an underlying pathology, which is itself independent of the continued presence of the intoxicant, will be generally be less morally culpable if, at the time of ingestion, it cannot

⁵⁰ (2007) 20 VR 14 at 20 [21].

⁵¹ (2007) 20 VR 14 at 22 [30].

⁵² *Butler v Western Australia* [2010] WASCA 104 at [61].

⁵³ [2009] VSCA 217 at [30]. See also *DPP v Arvanitidis* [2008] VSCA 189 at [31]-[34].

⁵⁴ Such a presumption does not meet the test of a fact for which judicial notice can be taken: see *Holland v Jones* (1917) 23 CLR 149 at 153.

be thought they had grounds to believe that an underlying pathology endangering others would result from the ingestion. The demands of general deterrence, and potentially specific deterrence, will also usually be moderated by such pathology.

52. This is for at least two principal reasons.

53. The **first reason** is that such an approach coheres with the law of criminal responsibility, namely, the defences of insanity and diminished responsibility.

54. Insanity requires proof of “*a state of mental disease or natural mental infirmity*”, and diminished responsibility requires proof of “*a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury)*”.⁵⁵

55. In respect of insanity, in *R v Falconer*, this Court held that “*an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary*” is a state of mental disease, but the “*reaction of a healthy mind to an extraordinary external stimuli*” is not.⁵⁶ For example, in *Fang v The Queen*,⁵⁷ Mr Fang had become voluntarily intoxicated at about the time of the offence, and in a state of psychosis resulting from that intoxication, killed someone. The NSW Court of Criminal Appeal considered the delineation made in *R v Falconer* and held that a drug induced psychosis, which is unaccompanied by a separate psychiatric illness, did not constitute a disease of the mind.⁵⁸

56. In respect of diminished responsibility, the Queensland Court of Criminal Appeal has confirmed that the temporary effects of alcohol must be put to one side in determining whether the accused had an abnormality of mind that substantially impaired one of the three capacities. However, the enduring damage occasioned by alcohol use need not be put to one side.⁵⁹

⁵⁵ *Criminal Code* (Qld), s 27(1) and s 304A(1), respectively.

⁵⁶ (1990) 171 CLR 30 at 53-54 (Mason CJ, Brennan and McHugh JJ) citing with approval the reasoning of King CJ in *R v Radford* (1985) 42 SASR at 274-275, and at 76 (Toohey J; with Deane and Dawson JJ generally agreeing with Toohey J at 59-60). Further, in any event, s 28(2) of the *Criminal Code* excludes from the defence of insanity any defendant who has “to any extent intentionally caused himself or herself to become intoxicated or stupefied”.

⁵⁷ (2018) 97 NSWLR 876.

⁵⁸ (2018) 97 NSWLR 876 at 890 [76], 895 [95]. See further *R v Davis* (1881) 14 Cox CC 563 at 564 (Stephens J), distinguishing drunkenness from the diseases to which drunkenness leads.

⁵⁹ *R v Whitworth* [1989] 1 Qd R 437 at 445-446 (Thomas J; Matthews J generally agreeing); *R v Nielsen* [1990] 2 Qd R 578 at 585-586 (de Jersey J; McPherson JA agreeing).

57. Relevantly, each defence remains available to an accused who, at the time of offending, is suffering from an enduring pathology caused by the voluntary consumption of an intoxicant, where the existence of that pathology is not dependent on the presence of the intoxicant in the accused's body.⁶⁰

58. While there is an onus on an accused to prove they were insane or of diminished responsibility, they are not required to prove they were blameless when causing their pathology. The elimination or reduction in legal responsibility must be, at least in part, because the law regards persons with those defences as less morally culpable than those without.⁶¹ It would therefore be incongruous if an abnormality of mind resulting in a defence of diminished responsibility did not also result in a moderation of moral culpability when fixing penalty. This is reflected in the observation in *Veen (No 2)*, extracted at [34], above.

59. The **second reason** is that a reduction in moral culpability in such cases coheres with the approach in cases which involve both intoxication and mental illness. Those cases, as outlined above, relate moral culpability to the degree to which a defendant could foresee the consequences of their drug or alcohol taking. In cases of enduring mental illness caused by drug consumption, it would rarely be the case that a defendant would know of, or expect, the enduring mental illness. Enduring mental illness, caused by drug consumption, has not been suggested to be a common occurrence in society or something that is widely known of. Enduring mental illness is not something a court could assume, without evidence, that many ordinary people, let alone all ordinary people, would be aware is a real risk of illicit drug consumption. There are few intermediate appellate cases on drug induced enduring mental illness, but two cases where the mental illness has its origins in drug-taking are instructive.

60. The first case is *R v Bowley* (2016) 262 A Crim R 93. There, the applicant suggested he became addicted to drugs at the age of 14.⁶² In early 2014, when an adult, his use of steroids and amphetamines escalated. That led to psychosis and a completely consuming drug addiction, which was the state he was in when he committed the index offences in

⁶⁰ See *Stefanski v Western Australia* (2022) 58 WAR 1 at 28 [126]–[127] and 31–33 [151]–[158] especially [153] (Buss P); *R v Whitworth* [1989] 1 Qd R 437 at 445–446; *Dearnley v The King* [1947] St R Qd 51 at 61 (Philp J), and cf at 68 (Matthews J) citing Griffith CJ in *R v Corbett* [1903] St R Qd 246 at 249.

⁶¹ See remarks of Lord Chancellor Viscount Kilmuir, at note 29, above.

⁶² (2016) 262 A Crim R 93 at 97 [17].

late 2014.⁶³ He remained “*grossly disturbed*” well after his initial remand in custody. That psychotic state was a result of “*pathological changes in brain biochemistry*” caused by his continued drug use, which the Court considered was distinct from voluntary intoxication. Peter Lyons J, with whom the other judges agreed, held that the applicant, by being both intoxicated by drugs at the time of the commission of the offences and suffering from psychosis, did not exclude his mental state from mitigating sentence. His psychotic state moderated his moral culpability and moderated the significance of general and specific deterrence.⁶⁴

- 10 61. It is submitted that the engagement of the *Verdins* factors in that case was appropriate, given there was no suggestion that, at the time the appellant started using drugs generally, or at the time he began to use drugs more heavily, he was aware he was likely to develop a pathological change in brain chemistry.
- 20 62. The second case is *R v Sebalj* [2006] VSCA 106. This case was described by the Court in *Martin* as an example of a “*drug-induced psychosis*” which substantially reduced the offender’s level of culpability for offending generated by the paranoid delusions of that psychosis.⁶⁵ That applicant stabbed his partner of four years, with whom he had a loving relationship, to death. He had long been addicted to amphetamines. Some weeks prior to then, the applicant ceased taking the drug and when a psychotic illness then developed, he did all he could to address it. While in a psychotic state, he killed his partner under a delusional belief he needed to defend himself against her activities, lest he lose his own life.⁶⁶ Vincent JA (Maxwell P agreeing) noted that where the psychotic state of an applicant is the consequence of deliberate conduct, such as the ingestion of drugs, the extent to which it can be asserted that his level of moral culpability is reduced may become problematic. It was held that, although it is seldom that a self-induced psychosis would result in significant mitigation, his level of moral culpability should be regarded as low. This was so regardless of whether his paranoid delusions resulted from a transient psychosis generated by the applicant’s efforts to withdraw from the use of drugs, or whether those paranoid delusions were indicative of the onset of the applicant’s subsequently diagnosed paranoid schizophrenia.⁶⁷

⁶³ (2016) 262 A Crim R 93 at 94-97 [5]–[17].

⁶⁴ (2016) 262 A Crim R 93 at 103 [44]–[47].

⁶⁵ *R v Martin* (2007) 20 VR 14 at 19–20 [20].

⁶⁶ [2006] VSCA 106 at [6]–[11].

⁶⁷ [2006] VSCA 106 at [14]–[15].

63. Like *Bowley*, this case does not suggest that in cases of illness originally caused by drug taking, an offender is presumed be aware of such a risk and thus denied any moderation according to the *Verdins* principles, absent evidence to the contrary.
64. For the above reasons, an offender, who by ingestion of an intoxicant generates an underlying pathology which is independent of the continued presence of the intoxicant, will usually be less morally culpable for offending that results from the pathology.

How the sentencing judge and the Court of Appeal erred

- 10 65. The appellant's ingestion of methylamphetamine caused him, in 2021 – well before the offence – to develop an underlying pathology, in his case described as an illness. There was no suggestion that the illness was dependent, for its existence, on the continued presence of methylamphetamine.
66. There was no evidence that the appellant foresaw that his ingestion of methylamphetamine would cause an underlying pathology, that is, a pathology not dependent of the presence of methylamphetamine for its continued existence, and generate paranoid delusions creating a danger to other people, including his wife.
67. The fact he had been a long-term user of drugs but had not had contact with mental health services prior to 2021,⁶⁸ and the fact his criminal history contained no entries for property offences or offences of violence while drug-affected, supports an inference that such a mental illness was not foreseen by him.
- 20 68. The appellant's reduced capacity to choose his thoughts after he became mentally ill, including his delusional thoughts about his wife, was a consequence of his illness. At the time of the offence, his capacity to appreciate the wrongness of his action against his wife was substantially impaired by reason of that illness.
69. That state of substantial impairment, the result of an illness independent of the existence of any active intoxicant, determined a reduction of legal responsibility, but also reflected a reduced moral culpability. This is for the reasons given at [53] to [64] above, including that there was no evidence he foresaw that his drug use would result in a mental illness. Further, there was a separation in time and mental state between the appellant's ingestion of the substances causing the illness and the offending. The thoughts and actions which
- 30 caused the illness were so distant in time, and so distinct in nature, from the thoughts and

⁶⁸ Report of Dr Kumaravelu at p 2 (ABFM 31).

actions at the time of the offence, that the appellant's moral culpability at the time he caused the illness cannot be equated with his moral culpability at the time of the offence. However, the sentencing judge applied such weight to the appellant having caused his illness that no weight was applied to the effects of the illness on the appellant at the time of the offence.

70. Martin J erred in two ways in respect of the *Verdins* considerations.

(a) **First**, his Honour did not consider whether the appellant's moral culpability was moderated, or that the demands of specific deterrence ought be moderated, because of his mental illness (the first and fourth *Verdins* considerations). There is no part of his Honour's remarks that can reasonably be regarded as dealing with these considerations. For the reasons above, the appellant's moral culpability was reduced by at least some degree because of his mental illness.⁶⁹ Moreover, in circumstances where the appellant had no criminal history of offending while mentally ill or intoxicated, and where it could have been inferred he was not originally aware his drug-taking would cause him to engage in this violent conduct, his mental illness meant the demands of specific deterrence required moderation.

(b) **Second**, his Honour erred in considering how the appellant's mental illness affected general deterrence (the third *Verdins* consideration). His Honour, at CAB 15 lines 5 to 26, seemed only to consider whether or not the case was "*an appropriate means for demonstrating that to others*", and was satisfied it was such a case. However, the authorities are to the effect that, once a judge determines general deterrence is not eliminated, the Court must then determine whether the demands of general deterrence should be sensibly moderated. While it may be appropriate to conclude that a desire to discourage drug taking meant general deterrence ought not be eliminated, the reasons for reduction in moral culpability meant the appellant was a less suitable vehicle for general deterrence compared to others. The demands of general deterrence ought to have been moderated.

71. The sentencing judge erred in principle – before making the value judgement required by *Markarian*, he failed to take into account *all* the relevant circumstances. Rather, his Honour applied such weight to one circumstance that it eliminated necessary weight to

⁶⁹ It has been remarked that the effect of mental illness on moral culpability and general deterrence are different questions and ought be separately addressed: see *R v Harb* [2001] NSWCCA 249.

other circumstances. Thus, a sentence resulted which did not achieve the balance required by *Markarian*, and the sentence, informed by this error of principle, resulted in a punishment which was not “*just in all the circumstances*”.

72. The Court of Appeal failed to identify or correct the sentencing judge’s error of principle.

73. The focus of Brown JA was perhaps distracted by the view that the appellant’s second ground of appeal alleged that Martin J found, as a matter of general principle, that because the appellant’s mental illness was caused by drug use, it could not mitigate punishment. The judgment of Brown JA was directed to illustrating that there is no such principle of law, and that Martin J did not accept such a principle existed.⁷⁰ The appellant in this Court does not contend Martin J accepted such a principle existed.

74. However, because of the errors described at [69] to [70], above, his Honour failed to apply moderation on account of the relevant *Verdins* considerations.

75. The real error in Brown JA’s judgment is not recognising that mitigation, in accordance with the first, third and fourth *Verdins* considerations, was required, and that the sentencing judge either failed to consider, and/or misapplied, those considerations. Her Honour failed to appreciate that the issue of general deterrence is not binary, but usually a question of what moderation should apply in the circumstances of the case.

76. In regard to why no moderation of general deterrence was required, at [42] and [51] (CAB 30–33), her Honour highlighted that the appellant at first instance did not lead evidence of the appellant’s unawareness of “*the potential for his drug use to cause psychological conditions*”, and said the fact he had not suffered a psychotic episode before September 2021 did not demonstrate an absence of relevant knowledge.

77. Respectfully, that reasoning is flawed. First, the question ought not be whether drug use had the potential to cause psychological conditions generally, but whether it had the real potential to cause an ongoing pathology independent of the presence of the drug which caused it; that is, an enduring mental illness. Second, there is no principle requiring an offender to positively prove an absence of knowledge of such a potential, as opposed to the sentencing judge making a decision about such knowledge on the evidence presented. Justification of such a principle would require acceptance that most ordinary people are aware drug use can lead to an enduring pathology independent of the presence of the drug

⁷⁰ See esp CAB 30 [41].

which caused it; that is, an enduring mental illness. This cannot be correct. Third, the more reasonable inference from the evidence in this matter was that the appellant did not have knowledge of the potential consequence of drug use seen in this case.

78. In all the circumstances, some reduction in moral culpability, and some moderation of general and specific deterrence, was required. That moderation must involve some mitigation of penalty. The Court therefore erred in not finding mitigation of the penalty was required.

79. The matter ought be remitted to the Court of Appeal for re-sentencing.⁷¹

Part VII: Orders Sought

10 80. Appeal allowed.

81. Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 21 October 2025.

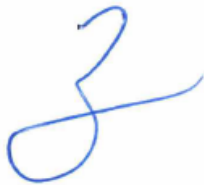
82. Remit the appeal dated 14 February 2025 to the Court of Appeal of the Supreme Court of Queensland for determination according to law.

Part VIII: Time Estimate

83. The appellant estimates presentation of his oral argument will require up to two hours.

Dated: 10 June 2026

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⁷¹ As to that approach, see *Inge v The Queen* (1999) 199 CLR 295 at 319-320 [66]-[67]; *R v Guode* (2020) 267 CLR 141 at 158 [32].

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	<i>Criminal Code</i> (Qld)	5 Jul 2021 – 7 Mar 2022	ss 27, 28, 304A, 305, 310	Act in force on date of offence	14 Feb 2022
2	<i>Penalties and Sentences Act 1992</i> (Qld)	13 Dec 2024 – 25 May 2025	s 9	Act in force on dates of sentence hearing	23 Jan 2025 and 30 Jan 2025
4	<i>Corrective Services Act 2006</i> (Qld)	13 Dec 2024 – 1 Jun 2025	ss 181, 182	Act in force on dates of sentence hearing	23 Jan 2025 and 30 Jan 2025
5	<i>Homicide Act 1957</i> (UK)	Original (s 2 remained unamended until 2009)	s 2	Version in force prior to, and when, s 304A was inserted into the <i>Criminal Code</i> (Qld)	