



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

GBU

Appellant

and

THE KING

Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply

The ground of appeal

2. Noting the Respondent's Submissions (**RS**) [3]-[5], the appellant seeks to clarify its argument. The appellant alleges the Court of Appeal failed to recognise that proper application of sentencing principles required the defendant's mental illness be taken into account as a mitigating feature.
3. The sentencing judge erred in principle by not applying, and/or misapplying, the principles from *Verdins*. His Honour did consider whether the appellant's moral culpability was reduced because of his mental illness, and did not consider whether the demands of specific and general deterrence ought be moderated. Proper application of those principles would have had a mitigating effect within the instinctive synthesis process. The Court of Appeal erred by not recognising and correcting this error.¹
4. The appellant does not, in this court, seek a determination that the sentence imposed was manifestly excessive.

¹ See Appellant's Submissions (**AS**) at [70]-[78], and see *R v GBU* [2025] QCA 196 at esp [38]-[40], [50]-[53] (CAB 29-30, 32). Separately, it is appropriate to clarify footnote 69 of the AS. *R v Harb* [2001] NSWCCA 249, at [36]-[44], only provided in express terms that mental illness at the time of offending can moderate more than general deterrence; it may also mitigate, *inter alia*, moral culpability. It is an implication that each way mental illness is relevant to a particular sentence ought, generally, be articulated, as was done in recent cases such as *Walpole v R* [2026] NSWCCA 81 at [132]-[141] and *GD v R* [2026] NSWCCA 95 at [105]-[107].

Whether the sentencing judge in fact mitigated for mental illness

5. The respondent's central submission is that, at sentence, there was in fact '*significant mitigation*' afforded because of the appellant's abnormality of mind: RS [6].
6. Nothing in the record of the sentence hearing, or the sentencing remarks, supports such a reading. Martin J said that, "[i]n addition to the ordinary matters which must be considered when sentencing a person in the circumstances, there are some specific issues which require further consideration".² His Honour then enumerated four issues, the second being, "the impact of your mental illness."³ No part of his Honour's discussion of the impact of mental illness suggested the illness had a mitigatory effect. While his Honour had discussed the evidence concerning the appellant's state of mind and drug use earlier in his remarks, at CAB 13 – 14, none of that concerned the impact on sentence.
7. It cannot be inferred, from the sentence imposed and the available maximum penalty, that there was significant mitigation on account of mental abnormality (cf RS [6](c), [54]). That is especially so given the respondent submitted, at sentence, that the mental condition should not mitigate and should, in fact, aggravate the sentence.⁴ In the context of that submission, the respondent sought the imposition of a head sentence of not less than 10 years imprisonment.⁵ The fact Martin J imposed 12 years imprisonment further reinforces that there is no scope to infer Martin J mitigated the penalty for mental illness or correctly applied the principles from *Verdins*.
8. The respondent also submitted at RS [52]-[53] that Martin J's comments that the matter remained an appropriate vehicle for general deterrence does not mean he did not ameliorate the demands of general deterrence or otherwise mitigate for mental abnormality. It cannot be assumed that a judge took a relevant matter into account on sentence in a correct way when there is no reference to doing so in the sentencing remarks. That is even more so in a case like the present, where the parties at sentence disagreed about how that significant matter should be taken into account. In the circumstances of this case, Martin J ought to have addressed whether, and to what extent, the diminished responsibility reduced the appellant's moral culpability and attenuated the demands of general and specific deterrence. His Honour did not do so.

² Reasons of Martin J, 30 Jan 2025 (CAB 14 L19-21).

³ Reasons of Martin J, 30 Jan 2025 (CAB 15 L5) (underlining added).

⁴ Submissions on Behalf of the Crown at [5.4]-[5.10] (ABFM 150-151); see also ABFM 170 L9-28, 171 L1-12.

⁵ Submissions on Behalf of the Crown at [6.1] (ABFM 153).

The abnormality of the appellant's mind

9. At RS [12]–[18], the respondent attempts to diminish the effect of the appellant's mental illness at the time of the offence. Fundamentally, such an attempt is not to the point in this appeal. The error of Martin J was that his Honour did not apply, and/or did not correctly apply, the principles concerning mental illness at sentence.
10. Even if one were to suggest that an impairment which only just met the threshold for substantial impairment may not require mitigation pursuant to the *Verdins* principles, there is no suggestion the appellant's impairment was of such limited quality, noting the following:
 - (a) While Dr Schramm did not consider the appellant's impairment "*approached deprivation*",⁶ it was not open to say it fell "*well short*" of deprivation (cf RS [15]).
 - (b) The appellant, who was not suggested to be otherwise violent,⁷ experienced an illness that substantially impaired his capacity to reason rationally about the wrongness of killing his wife. It is submitted that an illness sufficient to generate the abnormal thoughts and emotions of the appellant was an illness with a significant effect on the appellant.
 - (c) To say the appellant was not "*acting out of fear or perceived threat*" (RS [16]) overstates matters. He was not in acute danger in the moments leading to the offence,⁸ but, as Martin J said when summarising the evidence, the appellant had experienced delusions of being set up, poisoned or otherwise in danger from his wife, and at the time of the offence, he suffered "*significant persecutory delusions*".⁹
11. There is nothing in the evidence that ousted the relevance of the *Verdins* considerations.

The genesis of the mental illness

12. At RS [19], the respondent observes that a person who causes their mental illness through drug use is in '*a factually different position*' to one whose illness is caused organically. It can be accepted those are different factual situations. But whether, and when, such

⁶ ABFM 22 L45.

⁷ See ABFM 17 L43 – 18 L3, and Criminal history (ABFM 5); see also ABFM 174 L39-43.

⁸ ABFM 20 L9–11.

⁹ Reasons of Martin J, 30 Jan 2025 (CAB 13 L34 – 14 L19).

cases should be treated differently at law is more nuanced.¹⁰ The respondent does not expressly identify circumstances where an offender with a mental illness independent of the presence of an intoxicant causing it, should be denied a finding of reduced moral culpability and/or denied moderation of the sentencing purposes of general and specific deterrence.

13. At RS [57] and [50], it is said that the fact the illness was caused by drug use goes to the nature and severity of the illness. In fact, such a cause does not speak to the severity of the illness at the time of the offence. Nor does it speak, of itself, to the nature of the illness at the time of the offence. It speaks to the illness's causes and, potentially, the illness's persistence and possible future reoccurrence.

Substantial mitigation from mere reduction of the charge to manslaughter

14. At RS [21]-[22], the respondent refers to dissenting observations of Chesterman J in *R v Potter* to the effect that the reduction in a charge from murder to manslaughter, with the availability of a discretionary sentencing regime, is itself substantial mitigation.¹¹ It is not correct that the mere availability of different penalties up to life imprisonment itself constitutes significant mitigation at sentence. Mitigation involves a reduction in penalty, not the mere possibility of reduction.
15. The respondent's suggestion that moral blameworthiness is not "*necessarily reduced below that which would attend a serious case of manslaughter*" is of no assistance, as the conclusion in a given case will depend on its own facts. Here, the sentencing judge was required to assess what reduction in moral culpability should be afforded to the appellant on account of his mental illness, compared to the moral culpability which substantially corresponds with the objective seriousness of the offence of which he was convicted,¹² and not some other, more serious, offence.

The appellant's intention

16. The respondent, at RS [31] and [58] especially, emphasises the respondent's intention to kill, perhaps to suggest no amelioration of moral culpability was required, and/or to assist

¹⁰ See AS at [45]-[64], including, at note 58, *R v Davis* (1881) 14 Cox CC 563, in which, it is submitted, the court focused on the immediate, and not the remote, cause of the offence. See also 'Criminal Responsibility of Insane Drunkards' (1902) 15(9) *Harvard Law Review* 755 at 755-756, suggesting *delirium tremens* should be a defence only where it is a remote consequence of drinking alcohol.

¹¹ *R v Potter; ex parte Attorney-General (Qld)* (2008) 183 A Crim R 497 at [74]-[75].

¹² See *DS v The Queen* (2022) 109 NSWLR 62 at 159 [91], *GD v R* [2026] NSWCCA 95 at [103].

in inferring that 12 years imprisonment was arrived at after correctly applying the *Verdins* principles. However, such emphasis misunderstands the appellant's state of mind.

17. The intention of a person with a pathologically abnormal mind does not necessarily equate with the intention of a person without one.¹³ The culpability of a person's intent ought be assessed within the context of the person's whole mind.¹⁴ The intent of an offender, whose diminished responsibility derives from a substantial impairment of the capacity to know that his act was wrong, may be less culpable given the substantial impairment of their ability to understand the moral wrongness of their actions.
18. The penalties under Queensland law suggest a person with such an intent may be less culpable than a person without an intent to kill but who is engaging in other unlawful activity. A person who intends to kill but whose capacity to know they ought not do so is substantially impaired faces a maximum penalty of life imprisonment, but a person who commits felony murder without an intent to kill or harm is liable to mandatory life imprisonment.¹⁵
19. The intent of a person with diminished responsibility must be judged within the context of the person's impairment. How was the person's capacity to reason impaired? How substantially was that capacity impaired? What effect did the nature and degree of impairment have on the person's capacity to reason about their intent to commit the particular crime contemplated? That is the individualised approach required by *Markarian* and *Verdins*.

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¹³ See, more generally, *Hawkins v The Queen* (1994) 179 CLR 500 at 513-514, including *Schultz v The Queen* [1982] WAR 171 at 173-174.

¹⁴ See, as an example of how other factors must also be viewed in the context of the person's whole mind at the time of the offence, *GD v R* [2026] NSWCCA 95 at [105] ("That the offending also involved a breach of trust is acknowledged but this factor is of course tempered by [GD's] acute psychosis.")

¹⁵ *Criminal Code* (Qld), ss 302(1)(b),(3), 303(1), 304A, 305(1).