HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

DEREK MULDROCK APPELLANT

AND

THE QUEEN RESPONDENT

Muldrock v The Queen [2011] HCA 39
5 October 2011
S121/2011

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 2 and 3 of the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 14 May 2010 and in their place order that:*

   (a) *the applicant, Derek Muldrock, have leave to appeal against the sentence imposed upon him by Black DCJ in the District Court of New South Wales on 28 July 2009; and*

   (b) *the appeal be treated as instituted and heard instanter and allowed.*

3. *Remit the matter to the Court of Criminal Appeal for the appellant to be re-sentenced consistently with the reasons for judgment of this Court.*

On appeal from the Supreme Court of New South Wales

Representation

M Thangaraj SC with D P Barrow for the appellant (instructed by Catherine Hunter Solicitor)

C K Maxwell QC with A J Robertson for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Muldrock v The Queen

Criminal law – Sentencing – Mentally retarded appellant pleaded guilty to offence of sexual intercourse with a child under 10 years – Appellant sentenced to nine years' imprisonment and non-parole period of 96 days – Standard non-parole period for offence 15 years – Relevance of statutory provision of a standard non-parole period in sentencing of offenders – Whether "two-stage approach" to sentencing of offenders for offences with standard non-parole periods required or permitted – Whether *R v Way* (2004) 60 NSWLR 168 correctly decided with respect to operation of standard non-parole periods.

Criminal law – Sentencing – Offender suffering mental retardation – Relevance of mental retardation – Relevance of availability of rehabilitative treatment.

Criminal law – Sentencing – Community protection – Relevance of availability of orders under *Crimes (Serious Sex Offenders) Act* 2006 (NSW).

Words and phrases – "objective seriousness", "standard non-parole period".

Crimes (Sentencing Procedure) Act 1999 (NSW), ss 21A, 54A(2), 54B.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. The appellant is mentally retarded. As a child he was subject to homosexual sexual abuse. As an adult he has shown a sexual interest in male children. In March 2007, he befriended a nine year old boy and took advantage of an opportunity when the two were alone to suck the boy's penis. He was charged with the offence of sexual intercourse with a child aged under 10 years. The maximum sentence for the offence is 25 years' imprisonment[1]. The standard non-parole period for the offence is 15 years[2].

2 The appellant pleaded guilty to the offence before the District Court of New South Wales (Black DCJ). He had been assessed as eligible for admission to a residential treatment facility run by the Community Justice Program of the Department of Ageing, Disability and Home Care. The facility, known as Selwood Lane, operates a program that is designed to assist intellectually handicapped individuals to moderate their sexually inappropriate behaviour.

3 Black DCJ sentenced the appellant to a term of nine years' imprisonment after allowing a 25% reduction in the otherwise appropriate sentence to reflect the appellant's plea of guilty[3]. The appellant had been in custody for three months at the date of the sentence hearing. Black DCJ backdated the sentence to give credit for the period served on remand. He specified a non-parole period of 96 days, which expired on the date of its imposition. He directed, as a condition of release on parole, that the appellant reside at Selwood Lane until the Parole Authority, acting in consultation with the Community Justice Program, determined that he be discharged.

4 Black DCJ acknowledged that the proportion between the non-parole period and the term of the sentence was unusual. His Honour correctly concluded that the provision of a standard non-parole period for the offence did not preclude the imposition of a sentence for which a very short non-parole period was specified. However, his sentencing discretion miscarried because he

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1 *Crimes Act* 1900 (NSW), s 66A.

2 *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act"), Table to Div 1A of Pt 4.

3 Sentencing Act, s 22.

did not have the power to impose conditions on a parole order respecting a sentence of nine years' imprisonment. That power is confined to sentences of three years' imprisonment or less[4]. Release on parole and the terms of the parole order are matters solely for the Parole Authority in the case of sentences exceeding three years' imprisonment[5].

5 The respondent appealed against the inadequacy of the sentence. The challenge was directed to the length of the non-parole period. It was submitted that the structure of the sentence reflected Black DCJ's erroneous view that he had power to impose conditions on the appellant's release on parole. It was also submitted that his Honour had erred by failing to "properly consider the relevance of the standard non-parole period of 15 years in determining the appropriate non-parole period"[6].

6 The appellant sought leave to appeal against the severity of the term of nine years' imprisonment. He submitted that Black DCJ had given disproportionate weight to the need to protect the community in circumstances in which that concern may be addressed by orders made under the *Crimes (Serious Sex Offenders) Act* 2006 (NSW) ("the Sex Offenders Act").

7 The New South Wales Court of Criminal Appeal (McClellan CJ at CL, Howie and Harrison JJ) refused the appellant's application for leave to appeal. The Crown's appeal was upheld and the appellant was re-sentenced to a non-parole period of six years and eight months and a balance of sentence of two years and four months.

8 The appellant appeals to this Court by special leave. He submits that the Court of Criminal Appeal erred in its consideration of the standard non-parole period. He also complains that the Court of Criminal Appeal wrongly rejected Black DCJ's finding that he is "significantly intellectually disabled". Allied to this complaint is the contention that the Court was wrong to reject Black DCJ's emphasis on rehabilitation over denunciation, punishment and deterrence in

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4 Sentencing Act, ss 50 and 51.

5 *Crimes (Administration of Sentences) Act* 1999 (NSW), ss 134 and 135.

6 *R v Muldrock* [2010] NSWCCA 106 at [4].

structuring the sentence. He submits that the Court of Criminal Appeal erred in failing to find special circumstances warranting a departure from the statutory proportion between the non-parole period and the balance of the term in re-sentencing him[7]. Specifically, he complains of the Court's finding that treatment was or may be available to him in custody. The appellant maintains his challenge that the sentence of nine years' imprisonment is excessive.

9 For the reasons that follow, the Court of Criminal Appeal erred by refusing leave to challenge the severity of the sentence. It was conceded below that Black DCJ's sentencing discretion had miscarried. This enlivened the Court of Criminal Appeal's power in its discretion to vary the sentence and to impose such sentence as seemed proper[8]. In re-sentencing the appellant the Court of Criminal Appeal should have taken, but did not take, sufficient account of the appellant's mental retardation[9]. The appeal should be allowed and the proceedings should be remitted to the Court of Criminal Appeal for that Court to re-sentence the appellant.

The proceedings below

10 Black DCJ found that the appellant is "significantly intellectually disabled". He took into account that the appellant had been convicted of a similar offence committed in similar circumstances seven years earlier. The appellant was sentenced by the Queensland District Court for that offence to 12 months' imprisonment to be served by way of an intensive correctional order. His Honour observed that, whatever treatment had been administered in consequence of that order, it had not cured the appellant. In the circumstances, he considered that the protection of the community was to be given weight in the sentence. His Honour found that the appellant's disability was a "highly relevant" factor in sentencing. It was a factor that made it inappropriate to reflect consideration of general deterrence in the sentence. He considered that the

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7 Under s 44(2) of the Sentencing Act, the balance of the term of the sentence must not exceed one-third of the non-parole period unless the court decides that there are special circumstances for it being more.

8 *Criminal Appeal Act* 1912 (NSW), s 5D(1).

9 *R v Muldrock* [2010] NSWCCA 106 at [26]-[28].

protection of the community would be promoted in the long term by the appellant undergoing treatment at Selwood Lane.

11 The Court of Criminal Appeal was critical of Black DCJ's failure to consider the "objective seriousness" of the offence and the part that the standard non-parole period should play in the determination of the appropriate sentence[10]. It said[11]:

> "It is apparent that having regard to the sentencing regime for many offences a non-parole period of 15 years is considerable. Some persons sentenced for murder receive less. However, the responsibility of the courts is to be faithful to the sentences defined by Parliament which includes proper recognition of the standard non-parole period provided for particular offences."

The Court referred to three cases involving the sentencing of an offender for sexual intercourse with a child aged under 10 years[12]. It said that these cases confirmed that the non-parole period imposed upon the appellant was "entirely inappropriate"[13]. None involved a mentally retarded offender. The Court said that it was constrained by the head sentence of nine years, which had not been the subject of the respondent's challenge[14]. The Court was not persuaded that there were special circumstances to justify a departure from the statutory proportion between the non-parole period and the term of the sentence[15].

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10 *R v Muldrock* [2010] NSWCCA 106 at [29].

11 *R v Muldrock* [2010] NSWCCA 106 at [35].

12 *R v Muldrock* [2010] NSWCCA 106 at [36]-[40] citing *Eedens v The Queen* [2009] NSWCCA 254; *R v AJP* (2004) 150 A Crim R 575; *MLP v The Queen* (2006) 164 A Crim R 93.

13 *R v Muldrock* [2010] NSWCCA 106 at [41].

14 *R v Muldrock* [2010] NSWCCA 106 at [41].

15 *R v Muldrock* [2010] NSWCCA 106 at [45].

Standard non-parole periods – the legislative regime

12 The provision of standard non-parole periods for the sentencing of offenders in New South Wales was introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW) ("the Amending Act"), which inserted Div 1A of Pt 4 into the Sentencing Act. Division 1A governs the sentencing of offenders for offences to which standard non-parole periods apply. These are the offences specified in the Table to the Division. The standard non-parole period is the non-parole period set out for each offence in the Table[16]. Section 54A(2) provides:

> "For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division."

13 Section 54C(1) should also be noted. It provides:

> "If the court imposes a non-custodial sentence for an offence set out in the Table to this Division, the court must make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account."

Section 54B applies when a court sentences an offender to imprisonment for an offence listed in the Table[17]. At the material time, s 54B relevantly provided[18]:

> "…
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> (2) When determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for

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16 Sentencing Act, s 54A(1).

17 Sentencing Act, s 54B(1).

18 Section 54B has since been amended to take into account the provision for imposing an aggregate sentence of imprisonment: see *Crimes (Sentencing Procedure) Amendment Act* 2010 (NSW).

setting a non-parole period that is longer or shorter than the standard non-parole period.

(3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.

(4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.

…"

14 Sub-section (3) directs attention to s 21A. A new s 21A was inserted into the Sentencing Act at the same time as Div 1A[19]. It is sufficient to set out s 21A(1):

"**General**

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

(a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,

(b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,

(c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law."

15 Further, regard is not to be had to the aggravating and mitigating factors if to do so "would be contrary to any Act or rule of law"[20].

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19 Amending Act, Sched 1[2].

20 Sentencing Act, s 21A(4).

16 Since the reasons for imposing a non-parole period that is longer or shorter than the standard non-parole period are to be found in s 21A, it is necessary to consider the scope of the matters that, in addition to those within sub-ss (1)(c), (2) and (3), are embraced by the concluding sentence of sub-s (1).

17 The provisions introduced by the Amending Act focused upon the fixing of non-parole periods. It remained, and remains, essential to recognise, however, that the fixing of a non-parole period is but one part of the larger task of passing an appropriate sentence upon the particular offender. Fixing the appropriate non-parole period is not to be treated as if it were the necessary starting point or the only important end-point in framing a sentence to which Div 1A applies.

18 At common law the exercise of the sentencing discretion is the subject of established principles. These include proportionality[21], parity[22], totality[23], and the avoidance of double punishment[24]. In *R v Way*, the Court of Criminal Appeal held that s 21A(1) preserves the entire body of judicially developed sentencing principles, which constitute "law" for the purposes of both s 21A(1) and s 21A(4)[25]. No question of the correctness of that interpretation was raised in this appeal and it may be accepted. In this statutory context the principles of the common law respecting the sentencing of offenders answer the description of "matters that are required … to be taken into account by the court under any … rule of law"[26].

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21 *Veen v The Queen [No 2]* (1988) 164 CLR 465; [1988] HCA 14. The Sentencing Act contains explicit recognition of proportionality as the fundamental precept of sentencing in ss 22A(2) and 23(3).

22 *Lowe v The Queen* (1984) 154 CLR 606; [1984] HCA 46.

23 *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70.

24 *Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57.

25 *R v Way* (2004) 60 NSWLR 168 at 183 [56]-[57].

26 Cf *R v Hoar* (1981) 148 CLR 32 at 38 per Gibbs CJ, Mason, Aickin and Brennan JJ; [1981] HCA 67; *Pearce v The Queen* (1998) 194 CLR 610 at 623 [41] per McHugh, Hayne and Callinan JJ.

19 Under common law sentencing practice, factors that do not affect the assessment of the relative seriousness of the offence may nonetheless be relevant to the determination of an appropriate sentence. Such factors include that the sentence may be served under conditions of segregation[27] or that imprisonment will be particularly burdensome because of the offender's physical condition[28]. Considerations of this character, which have been recognised by courts as bearing relevantly on the exercise of the sentencing discretion in this context, answer the description of "matters that are … permitted to be taken into account by the court under any … rule of law"[29]. The appellant submits and the respondent correctly accepts that s 21A permits the court to take into account all of the factors that, under the common law, are relevant to the determination of sentence[30]. This recognition is important to understanding the operation of Div 1A.

20 It should also be noted that the introduction of standard non-parole periods was accompanied by the incorporation of a statutory statement of the purposes of sentencing[31]. The purposes there stated are the familiar, overlapping and, at

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27 *R v Totten* [2003] NSWCCA 207.

28 *R v Smith* (1987) 44 SASR 587.

29 *R v Way* (2004) 60 NSWLR 168 at 183 [56]-[59]; *Elyard v The Queen* (2006) 45 MVR 402 at 407 [18].

30 *R v Way* (2004) 60 NSWLR 168 at 183 [57]; *Elyard v The Queen* (2006) 45 MVR 402 at 407 [18].

31 Section 3A of the Sentencing Act, inserted by Sched 1[1] of the Amending Act, provides that:

> "The purposes for which a court may impose a sentence on an offender are as follows:
>
> (a) to ensure that the offender is adequately punished for the offence,
>
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,

(Footnote continues on next page)

times, conflicting, purposes of criminal punishment under the common law[32]. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen [No 2]*[33] in applying them[34].

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community."

32 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476-477 per Mason CJ, Brennan, Dawson and Toohey JJ.

33 (1988) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ.

34 In his second reading speech for the Bill for the Amending Act, the Attorney-General said:

> "A fair, just and equitable criminal justice system requires that sentences imposed on offenders be appropriate to the offence and the offender, that they protect the community and help rehabilitate offenders to prevent them from offending in the future. The imposition of a just sentence in the individual case requires the exercise of a complex judicial discretion. The sentencing of offenders is an extremely complex and sophisticated judicial exercise. The High Court has described the various purposes and the necessary complexity of the sentencing exercise in the following terms …"

He went on to quote the passage from the joint reasons in *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476 referred to above: New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2002 at 5815.

21 The Court of Criminal Appeal's criticism of Black DCJ's failure to consider the objective seriousness of the offence[35] reflected that Court's earlier analysis of the operation of Div 1A in *Way*. The appellant submits that *Way* was wrongly decided to the extent that it held that the standard non-parole period operates as a benchmark or guidepost in sentencing for a Div 1A offence that does not fall within the middle of the range of objective seriousness. The respondent, while not critical of the analysis in *Way*, submits that later decisions purporting to apply that decision have evidenced a "more categorical" two-stage approach to the sentencing of offenders for Div 1A offences[36]. The respondent acknowledges that this approach is apt to distort the exercise of the sentencing discretion and that it is not required by the terms of Div 1A.

R v Way

22 The Court of Criminal Appeal in *Way* took as its starting point that s 54B(2) is expressed in "mandatory terms"[37]. In order to give "sensible meaning" to sentencing for Div 1A offences the Court said that s 54B(2) is to be construed so as to include, as a reason for departing from the standard non-parole period, that the offence is outside the middle range of objective seriousness for such offences[38]. This required the Court to determine what would constitute an abstract offence in the middle of the range of objective seriousness[39]. In performing this task, the Court considered that the expression "objective

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35 *R v Muldrock* [2010] NSWCCA 106 at [29].

36 *R v Reyes* [2005] NSWCCA 218 at [44]; *R v Reid* (2005) 155 A Crim R 428 at 435 [19]; *R v Knight* (2007) 176 A Crim R 338 at 341 [4] and 346 [39]; *R v McEvoy* [2010] NSWCCA 110 at [75]-[87]; *R v Sellars* [2010] NSWCCA 133 at [11].

37 *R v Way* (2004) 60 NSWLR 168 at 183 [62]. This Court (Gummow and Callinan JJ) refused special leave on the ground that, on any view of the construction of the legislation, there were insufficient prospects of a different result on any re-sentencing of the applicant: [2005] HCATrans 147.

38 *R v Way* (2004) 60 NSWLR 168 at 184 [67].

39 *R v Way* (2004) 60 NSWLR 168 at 185 [74]-[76].

seriousness" was not to be narrowly confined[40]. Rather, it was to be understood as taking into account the physical acts of the offender and their consequences, together with circumstances personal to the offender that are causally connected to the commission of the offence[41]. The Court instanced duress, provocation, robbery to feed a drug addiction, mental state (intention being more serious than recklessness), and mental illness or intellectual disability (where the latter are related to the commission of the offence) as such circumstances[42]. These were to be distinguished from those more accurately described as circumstances of the offender and not of the offence[43].

23 The Court held that the standard non-parole period only applies to sentencing for an offence after conviction at trial[44]. This is because the Sentencing Act provides that a sentencing judge may impose a lesser sentence on an offender to take into account the fact of a plea of guilty[45]. In sentencing for a Div 1A offence after trial, the Court said that the sentencing judge must ask and answer the question: "are there reasons for not imposing the standard non-parole period?"[46]. In answering that question, the Court said that the sentencing judge should consider the objective seriousness of the offence (taking into account any facts explaining why the offence was committed) in order to determine whether the offence is within the midrange of seriousness[47].

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40 *R v Way* (2004) 60 NSWLR 168 at 186 [85].

41 *R v Way* (2004) 60 NSWLR 168 at 186-187 [86].

42 *R v Way* (2004) 60 NSWLR 168 at 186-187 [86].

43 *R v Way* (2004) 60 NSWLR 168 at 187 [86].

44 *R v Way* (2004) 60 NSWLR 168 at 185 [71].

45 *R v Way* (2004) 60 NSWLR 168 at 184 [69], referring to s 22 of the Sentencing Act.

46 *R v Way* (2004) 60 NSWLR 168 at 191 [117].

47 *R v Way* (2004) 60 NSWLR 168 at 191 [118].

The parties' submissions

24 The appellant's submission, that the standard non-parole period has no role in sentencing for an offence in the low (or high) range for offences, assumes that s 54B(2) "prima facie *mandates*" the specification of the standard non-parole period for a midrange offence. The respondent correctly submits that there is nothing in the scheme of Div 1A to suggest that the provisions respecting standard non-parole periods apply only to a particular category of offending, whether low, middle or high range. The respondent submits that:

> "Section 54B(2) has been said to be 'mandatory' because it is in terms that 'the court **is** to set the standard non-parole period' [respondent's emphasis] but the effect of the section is not to mandate a particular [non-parole period] for a particular category of offence rather it preserves the full scope of the judicial discretion to impose a non-parole period longer or shorter than the [standard non-parole period]. This is especially evident when read in the context of s 54C where the provisions contemplate that the court may impose no custodial sentence at all: s 54C(1)."

25 The respondent's submission should be accepted. It follows from that acceptance that *Way* was wrongly decided. As will appear, it was an error to characterise s 54B(2) as framed in mandatory terms. The court is not required when sentencing for a Div 1A offence to commence by asking whether there are reasons for not imposing the standard non-parole period nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness.

Sentencing of offenders pursuant to s 54B(2)

26 Section 54B applies whenever a court imposes a sentence of imprisonment for a Div 1A offence[48]. The provision must be read as a whole. It is a mistake to give primary, let alone determinative, significance to so much of s 54B(2) as appears before the word "unless". Section 54B(2), read with ss 54B(3) and 21A, requires an approach to sentencing for Div 1A offences that is consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen*[49]:

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48 Sentencing Act, s 54B(1).

49 (2005) 228 CLR 357 at 378 [51]; [2005] HCA 25.

> "[T]he judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case." (emphasis added)

27 Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness"[50]. Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.

28 Nothing in the amendments introduced by the Amending Act requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with an hypothesised offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period.

29 A central purpose of Div 1A is to require sentencing judges to state fully the reasons for arriving at the sentence imposed. The reference in s 54B(4) to "mak[ing] a record of its reasons for increasing or reducing the standard non-parole period" is not to be understood as suggesting either the need to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or the need to classify the objective seriousness of the offending. It does require the judge to identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed. The obligation applies in sentencing for all Div 1A offences regardless of whether the offender has been convicted after trial or whether the offence

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50 Sentencing Act, s 54A(2).

might be characterised as falling in the low, middle or high range of objective seriousness for such offences.

30 The full statement of reasons for the specification of non-parole periods either higher or lower than the standard assists appellate review and in this way promotes consistency in sentencing for Div 1A offences. It may also increase public awareness of the sentencing process[51].

31 The maximum penalty for a statutory offence serves as an indication of the relative seriousness of the offence[52]. An increase in the maximum penalty for an offence is an indication that sentences for that offence should be increased. It appears that for most, if not all, Div 1A offences, the standard non-parole period exceeds the mean non-parole period for the offence recorded in the statistics kept by the Judicial Commission of New South Wales in the period before the enactment of Div 1A[53]. As the Court of Criminal Appeal correctly pointed out in *Way*, it is necessary to treat this circumstance with care[54]. The standard non-parole period represents the non-parole period for an hypothetical offence in the middle of the range of objective seriousness without regard to the range of factors, both aggravating and mitigating, that bear relevantly on sentencing in an individual case. It may be, as the Court of Criminal Appeal observed in *Way*, that for some Div 1A offences there will be a move upwards in the length of the non-parole period as a result of the introduction of the standard non-parole period[55]. This is the likely outcome of adding the court's awareness of the

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51 In his second reading speech for the Bill for the Amending Act, the Attorney-General said that "[t]hese reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process": New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2002 at 5813.

52 *R v Tait* (1979) 24 ALR 473 at 483-484; *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452; [1987] HCA 46; *Gilson v The Queen* (1991) 172 CLR 353 at 364; [1991] HCA 24.

53 *R v Way* (2004) 60 NSWLR 168 at 194 [139].

54 *R v Way* (2004) 60 NSWLR 168 at 194 [140].

55 *R v Way* (2004) 60 NSWLR 168 at 195 [142].

standard non-parole period to the various considerations bearing on the determination of the appropriate sentence. It is not because the standard non-parole period is the starting point in sentencing for a midrange offence after conviction[56].

32 An offence of sexual intercourse with a child aged under 10 years falling within the middle of the range of objective seriousness has a standard non-parole period of 15 years. That circumstance says little about the appropriate sentence for this mentally retarded offender and this offence. The Court of Criminal Appeal erred by treating the provision of the standard non-parole period as having determinative significance in sentencing the appellant. That error necessarily affected the Court's determination of the appellant's application for leave to appeal against the severity of the sentence. The determination that the challenge to the sentence was without merit[57] was wrong. To explain why that is so, it is necessary to say something more about the offence and the appellant's disability.

The facts

33 The appellant was aged 30 years at the date of the offence. The victim was living with his mother in a granny flat attached to the house in which the appellant was living. The appellant fixed the boy's bike and offered to go for a test ride with him. The boy's mother agreed. When the appellant and the boy were alone together, the appellant asked the boy if he wanted to go to the lake to see the animals. They cycled a distance of one or two kilometres to the lake. They decided to go swimming. The boy had no swimming costume or underwear and he went into the lake naked. The appellant joined him, wearing his underpants or Speedos. He repeatedly tried to touch the boy's penis and bottom, but each time the boy pushed him away. Eventually he succeeded in touching the boy's bottom and the area around his penis. This activity was

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56 Cf *R v Way* (2004) 60 NSWLR 168 at 194 [140].

57 *R v Muldrock* [2010] NSWCCA 106 at [15]-[18].

charged as an offence of aggravated indecent assault[58]. Black DCJ took this offence into account in sentencing the appellant for the principal offence[59].

34 The boy got out of the water and the appellant pushed him to the ground, pinning him down by kneeling on his legs. He sucked the boy's penis twice for about 10 seconds. The boy kicked him in the shoulder or chest and the appellant fell back. The boy got dressed and rode off. The appellant yelled out, "Come back, you wussy. You're just too scared to come back". The boy rode to a nearby house. He was in a very distressed state and he told the occupant, Mr Fuzzard, that a man had touched his private parts. Mr Fuzzard drove him home, by which stage the boy was "sobbing hysterically and shaking". A short time later, the mother answered a knock at the door and saw the appellant standing there, holding a bike pump. She closed the door on him and contacted the police.

35 The appellant was interviewed by the police in the presence of a Salvation Army officer, who acted as a support person. He gave an account that he had planned to go swimming by himself and that the boy had invited himself on the excursion. The appellant said that he thought the boy's mother had "set him up" by allowing the boy to go with him and that the mother would have viewed him as an "easy target". He maintained that the boy had falsely accused him of touching him. He denied any wrongdoing.

36 The offence occurred on 19 March 2007. The previous offence took place in 2000, when the appellant was living with his parents in Cairns ("the 2000 offence"). The victim of the 2000 offence was also a neighbouring male child. As earlier noted, the facts of the 2000 offence were similar to those presently under consideration.

37 The appellant was referred to Dr Muir, a psychiatrist, for treatment following the commission of the 2000 offence. Dr Muir initially prescribed Androcur, a testosterone suppressant that reduces the sex drive. Androcur is known to have severe complications. Dr Muir ceased prescribing it for the

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58 *Crimes Act* 1900 (NSW), s 61M(1). The maximum penalty for the offence is imprisonment for seven years. The standard non-parole period for the offence is five years: Sentencing Act, Table to Div 1A of Pt 4.

59 Sentencing Act, s 33.

appellant some time before the sentence hearing in the Queensland District Court because he did not consider that its continued use was warranted. He assessed the appellant as having been significantly traumatised by his arrest and court appearances. Dr Muir thought that it was likely that the experience would "contain" the appellant's behaviour. It is not known what, if any, treatment the appellant received during the 12 months that he was subject to the treatment order.

38 The appellant had not previously been sentenced to a term of full-time custody at the time he appeared for sentence before Black DCJ.

The expert evidence

39 The respondent tendered the reports of Dr Muir and Ms Daniels, a clinical psychologist, in the proceedings before Black DCJ. These reports had been prepared in connection with the proceedings before the Queensland District Court in 2000. Dr Muir concluded that the appellant was "undoubtedly mentally retarded". The likely cause of the condition was cerebral anoxia at birth. The appellant had been placed in special classes throughout his school career. He could barely read or write and was only able to tell the time by the use of a digital watch.

40 The appellant was sexually abused at the age of 10 by a young adult male who performed oral sex on him. Dr Muir said that the appellant's retarded development was the cause of his difficulty in managing his impulses and controlling his actions.

41 Ms Daniels assessed the appellant's Performance IQ as within the category of mentally retarded and his Full Scale IQ as within the borderline range. She considered that his "maladaptive sexual behaviour" appeared to be the manifestation of his own childhood sexual abuse and his mental retardation. In her view, the appellant had little control over his "acting out behaviour".

42 The appellant was also assessed by Professor Hayes, a psychologist, in connection with the present offence. Professor Hayes reported that the appellant's IQ Composite Standard Score of 62 was indicative of a mild intellectual disability. The appellant functions at a level lower than 99% of the population. His receptive and expressive language is equivalent to that of a child aged five and a half years. Test results measuring the appellant's ability to communicate, daily living skills and level of socialisation (adaptive behaviour)

confirmed the diagnosis of mild intellectual disability. The appellant functions in the lowest 0.1% of the population in terms of his adaptive behaviour.

43 Professor Hayes observed that:

> "Mr Muldrock has deficits in empathy, that is, understanding how another individual is thinking and feeling. Although he has been sexually assaulted himself, he says that he cannot recall how he felt at the time, and he cannot understand how his victim would feel. He also holds a number of cognitive distortions regarding the offences, including the view that 'I'm not purposely like that'."

44 Professor Hayes considered that the appellant would benefit from a program designed for a sex offender with an intellectual disability. She commented on the lack of availability of programs for intellectually disabled sex offenders in custody. She suggested that the appellant needed to learn practical skills for dealing with situations in which he is in the proximity of children. She commented on his lack of appropriate social and recreational outlets for a man of his age and ability, suggesting that he required a comprehensive program to address the areas of deficit in his adaptive behaviour.

45 Selwood Lane is a six bedroom facility located in a semi-rural setting. There is limited access to the neighbouring premises. Locks are installed on all windows and doors and there is perimeter sensor lighting. Staff are directed to maintain "line of sight supervision [of residents] at all times". The staff have experience in working with intellectually handicapped individuals who display "challenging and highly sexualised behaviours".

46 At the date of the appeal to the Court of Criminal Appeal, the appellant was being held in an Additional Support Unit, a facility accommodating offenders who require placement outside the mainstream prison environment. He had been moved to this unit because of his "challenging behaviour" towards staff and inmates. His poor behaviour had culminated in him being held in segregation for two weeks. It was not known how long he would remain in the Additional Support Unit.

47 The Manager of the Long Bay Parole Unit reported that no sex offender treatment options for inmates with intellectual disabilities were available to the appellant. An affidavit sworn by a principal prison officer stated that a treatment

program aimed specifically at sexual offenders with intellectual disability and other cognitive impairments had been written and was "being finalised".

A departure from Black DCJ's factual finding?

48 The appellant contends that the Court of Criminal Appeal erred in holding that Black DCJ's finding that he is "significantly intellectually disabled" was not "justified by the contemporary evidence". It is not clear that the Court rejected the factual finding of intellectual disability. The relevant passage is in the reasons of McClellan CJ at CL (Howie and Harrison JJ concurring)[60]:

> "[27] In the present case the sentencing judge concluded that the [appellant] 'was significantly intellectually disabled' and that accordingly general deterrence 'was inappropriate', although his Honour accepted that personal deterrence was still relevant. In my judgment this finding was not justified by the contemporary evidence. Although Professor Hayes in her report dated 25 September 2008 expressed the opinion that the [appellant] suffered from 'a mild intellectual disability' he has sufficient capacity to have obtained a driver's licence and has undertaken some paid employment. Professor Hayes concluded that the [appellant] does have 'deficits in empathy' which are likely to be a result of his intellectual functioning.
>
> [28] The evidence clearly establishes that the [appellant] knew that what he had done was wrong. This is apparent from the fact that when confronted by the police he originally denied any suggestion of wrong-doing and claimed that he had in effect 'been set up.' Dr Muir concluded that the [appellant] understood the nature and wrongfulness of his conduct with respect to the earlier offence and that the circumstances confirmed that he was aware that his actions were a breach of the law."

49 McClellan CJ at CL had noted earlier in his reasons that the respondent did not put in issue that the appellant had a mental disability nor that the disability was a relevant factor in sentencing him[61]. Paragraph [27] is ambiguous. On one view, his Honour was rejecting Black DCJ's conclusion that

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60 *R v Muldrock* [2010] NSWCCA 106 at [27]-[28].

61 *R v Muldrock* [2010] NSWCCA 106 at [23].

general deterrence was not a relevant factor (as distinct from rejecting the factual finding of intellectual disability). Another view is that his Honour considered that the contemporary evidence (Professor Hayes' report) did not support Black DCJ's finding that the appellant's intellectual disability was "significant". On either analysis, the Court of Criminal Appeal erred in its approach to the evidence of the appellant's disability in re-sentencing him.

Sentencing mentally retarded offenders

50 The assessment that the appellant suffers from a "mild intellectual disability" should not obscure the fact that he is mentally retarded. The condition of mental retardation is classified according to its severity as mild, moderate, severe or profound[62]. Mental retardation is defined by reference to both significantly subaverage general intellectual functioning and significant limitations in adaptive functioning[63]. "Significantly subaverage intellectual functioning" is defined as an intelligence quotient (IQ or IQ-equivalent) of about 70 or below[64]. The position is well explained in a discussion paper published by the New South Wales Law Reform Commission[65]:

> "A person's intellectual disability can be classified as 'mild', 'moderate', 'severe' or 'profound', based upon certain IQ (intelligence quotient) ranges. A further category, 'borderline', is also used to indicate people just above the mild range in terms of intellectual functioning. A person with a 'severe' or 'profound' disability may be unable to learn basic social skills such as speech, walking and personal care, and is likely to require supported accommodation. The majority of people with an intellectual

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62 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed (text rev) (2000) ("DSM-IV-TR") at 42.

63 DSM-IV-TR at 41.

64 DSM-IV-TR at 41. A measurement error of approximately five points is allowed in assessing IQ: DSM-IV-TR at 41. The appellant obtained a Full Scale IQ of 64 in a test conducted in October 2007 at the Tweed Valley Clinic.

65 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues*, Discussion Paper 35, (1994) at 16-17 [2.6].

> disability have a 'mild' level of intellectual disability and 'can learn skills of reading, writing, numeracy, and daily living sufficient to enable them to live independently in the community.' These classifications have limited utility and can sometimes be misleading. For example, such terms may suggest to criminal justice personnel, who do not have a full understanding of the disability involved, that a 'mild' intellectual disability is inconsequential." (footnotes omitted)

51 The fact that the appellant had engaged in some paid employment and that he held a driver's licence does not detract from the assessment of his retardation. The evidence was that he had "enormous difficulty with employment". He was unemployed at the time Ms Daniels assessed him. She recommended that he would benefit from "a properly supervised sheltered workshop environment". He was in receipt of a disability support pension in mid-2008 and had been so for some time when he was assessed by Dr Westmore to determine whether he had sufficient capacity to be fit to be tried.

52 Dr Muir's assessment that the appellant understood the wrongfulness of his conduct respecting the earlier offence was qualified by the observation that this was "only a superficial awareness". Dr Muir also said:

> "In the interview situation, it is readily apparent that Mr Muldrock is significantly mentally retarded. His speech is very slow and measured and in a monotone."

53 Black DCJ's finding, expressed in lay terms, that the appellant's intellectual disability is "significant", was apt. It was an error for the Court of Criminal Appeal to reject the finding, if that is what it did. Alternatively, it was an error for the Court to find that Black DCJ's determination, that general deterrence had no place in sentencing the appellant, was not justified by the evidence. One purpose of sentencing is to deter others who might be minded to offend as the offender has done. Young CJ, in a passage that has been frequently cited, said this[66]:

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66 *R v Mooney* unreported, Victorian Court of Criminal Appeal, 21 June 1978 at 5, cited in *R v Anderson* [1981] VR 155 at 160.

> "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."

In the same case, Lush J explained the reason for the principle in this way[67]:

> "[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."

54 The principle is well recognised[68]. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence[69]. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to 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.

55 In this case, there was unchallenged evidence of the causal relation between the appellant's retardation and his offending in the reports of Dr Muir and Ms Daniels. The fact that the appellant possessed the superficial

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67 *R v Mooney* unreported, Victorian Court of Criminal Appeal, 21 June 1978 at 8, cited in *R v Anderson* [1981] VR 155 at 160-161.

68 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476-477. See also *R v Anderson* [1981] VR 155; *Scognamiglio* (1991) 56 A Crim R 81; *R v Letteri* unreported, New South Wales Court of Criminal Appeal, 18 March 1992; *Engert* (1995) 84 A Crim R 67; *Wright* (1997) 93 A Crim R 48.

69 See *Engert* (1995) 84 A Crim R 67 at 71.

understanding of a mentally retarded adult that it was wrong to engage in sexual contact with a child and that he told childish lies in the hope of shifting the blame from himself were not reasons to assess his criminality as significant[70], much less to use him as a medium by which to deter others from offending.

Treatment in prison and special circumstances

56 The Court of Criminal Appeal acknowledged that the rehabilitation of the appellant was a significant consideration[71]. It said that the non-parole period would "allow for his treatment *if it is available* within the prison system"[72]. The Court was not persuaded it should find that special circumstances justified a departure from the statutory proportion between the non-parole period and the term of the sentence. In coming to this conclusion, it said, "[i]t is plain that the [appellant] requires effective treatment if he is ever to be a responsible member of the community. *That treatment is available within the prison system*."[73]

57 The latter finding approaches inconsistency with the earlier finding, for it asserts as a fact that about which the earlier finding may have raised a doubt. And it was not supported by the evidence. In any event, it was an error to determine the structure of the sentence upon a view that the appellant would benefit from treatment while in full-time custody. Full-time custody is punitive. The non-parole period is imposed because justice requires that the offender serve that period in custody[74]. Furthermore, the availability of rehabilitative programs within prisons is a matter for executive determination. There can be no confident prediction that an offender will be accepted into a program or that the program will continue to be offered during the term of the sentence.

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70 *R v Muldrock* [2010] NSWCCA 106 at [34]

71 *R v Muldrock* [2010] NSWCCA 106 at [44].

72 *R v Muldrock* [2010] NSWCCA 106 at [44] (emphasis added).

73 *R v Muldrock* [2010] NSWCCA 106 at [45] (emphasis added).

74 *Power v The Queen* (1974) 131 CLR 623 at 628-629 per Barwick CJ, Menzies, Stephen and Mason JJ; [1974] HCA 26; *Bugmy v The Queen* (1990) 169 CLR 525 at 536 per Dawson, Toohey and Gaudron JJ; [1990] HCA 18.

58 The desirability of the appellant undergoing suitable rehabilitative treatment was plainly capable of being a special circumstance justifying a departure from the statutory proportion between the non-parole period and the term of the sentence. The Court of Criminal Appeal was wrong to hold that Black DCJ had been diverted by the evidence concerning Selwood Lane, and that he failed to carry out the task required of a sentencing judge[75] in focusing on rehabilitation and not on denunciation, punishment and deterrence[76]. As explained, punishment, in the sense of retribution, and denunciation did not require significant emphasis in light of the appellant's limited moral culpability for his offence. And there was no requirement for general deterrence. It was open to Black DCJ to view personal deterrence as likely to be advanced by a sentence that required the appellant to undergo appropriately tailored treatment in a secure facility such as Selwood Lane. The Court of Criminal Appeal erred in finding that there were no special circumstances within s 44(2) of the Sentencing Act[77].

The term of the sentence

59 Black DCJ fixed the term of nine years (reduced from 12 years) because he considered that the protection of the community required it. The appellant submits that he exceeded the bounds of discretion in so doing. It is not the function of this Court to determine challenges to sentences that are said to be excessive. However, since special leave was granted to consider an important question concerning the standard non-parole period and since the resolution of that question has revealed error in the Court of Criminal Appeal's refusal of leave it is appropriate to deal with the challenge to the severity of the sentence.

60 A fundamental precept of the criminal law is that a sentence should not be increased beyond that which is proportionate to the crime in order to extend the

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75 *R v Muldrock* [2010] NSWCCA 106 at [31].

76 *R v Muldrock* [2010] NSWCCA 106 at [34].

77 *R v Muldrock* [2010] NSWCCA 106 at [45].

period of protection of the community[78]. The distinction between extending a sentence to protect society and taking into account society's protection in determining the appropriate sentence may not always be easy to draw[79]. The expert evidence did not provide a foundation for the conclusion that the appellant's sexually aberrant behaviour could not be controlled by treatment and a program addressing the matters identified in Professor Hayes' report. The appellant's mental retardation and the fact that he has not previously served a sentence of full-time custody, together with the circumstances of the offence, the nature of the intercourse, its short duration and the absence of accompanying threats or other intimidating behaviour, did not warrant the imposition of a term of nine years' imprisonment (after reduction for the plea of guilty). The sentence was manifestly excessive. This conclusion does not depend upon acceptance of the submission that the availability of orders under the Sex Offenders Act is to be taken into account.

The Sex Offenders Act

61 The Sex Offenders Act empowers the Supreme Court on the application of the State of New South Wales to order the continuing detention in custody or the extended supervision of a sex offender following the expiration of the offender's sentence[80]. Section 24A(1)(b) of the Sentencing Act provides that a court must not take into account as a mitigating factor the fact that the offender has or may become the subject of an order under the Sex Offenders Act[81]. The appellant

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78 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472 per Mason CJ, Brennan, Dawson and Toohey JJ; *Baumer v The Queen* (1988) 166 CLR 51 at 57-58 per Mason CJ, Wilson, Deane, Dawson and Gaudron JJ; [1988] HCA 67.

79 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 474 per Mason CJ, Brennan, Dawson and Toohey JJ.

80 Sex Offenders Act, ss 9 and 17.

81 In sentencing, the court must also not take into account as a mitigating factor the fact that the offender has or may become a registrable person under the *Child Protection (Offenders Registration) Act* 2000 (NSW) as a consequence of the offence or that the offender has or may become the subject of an order under the *Child Protection (Offenders Prohibition Orders) Act* 2004 (NSW): Sentencing Act, s 24A(1).

submits that it remains open to the sentencing court to have regard to the availability of orders under the Sex Offenders Act, not as a mitigating factor, but because the statutory scheme provides the means for protecting the community from those sex offenders who pose a continuing risk of harm. From this it is said to follow that there is less justification for incorporating consideration of the protection of the community in the sentence imposed on a sex offender. The notion that a sentence might be reduced to take into account the existence of a regime outside the criminal law providing for the detention of sex offenders may be thought to have little to commend it as a matter of principle. The Court of Criminal Appeal was right to reject the submission. The expression "mitigating factor" in s 24A refers to a factor that is taken into account to reduce the sentence that would otherwise be appropriate. It is the function of the court sentencing an offender for a criminal offence to take into account the purposes of criminal punishment in determining the appropriate sentence. A purpose of punishment is the protection of the community from the offender[82]. A court may not refrain from imposing a sentence that, within the limits of proportionality, serves to protect the community in a case that calls for it because at some future time the offender may be made the subject of an order under the Sex Offenders Act.

Conclusion

62 In the written submissions filed on the appellant's behalf, senior counsel proposed that this Court should set aside the orders made by the Court of Criminal Appeal, allow his appeal to that Court and sentence him to a term of less than three years, specifying a non-parole period of one day, on the condition that the appellant reside at Selwood Lane for the duration of the sentence (or as the Parole Authority determines). On the hearing of the appeal, senior counsel informed the Court that a place for the appellant at Selwood Lane was no longer available. He acknowledged the force of the respondent's submission that the proceedings should be remitted to the Court of Criminal Appeal for re-sentencing. Fresh evidence concerning the appellant's circumstances and treatment options may be led on that occasion. This is the appropriate course.

63 The Court of Criminal Appeal's orders determined both the appellant's leave application and the respondent's appeal. The respondent's complaint is confined to the length of the non-parole period and the appellant's complaint is

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82 Sentencing Act, s 3A(c).

confined to the term of the sentence. The appellant has now been in custody for over two years and five months. Nonetheless, to preserve the Court of Criminal Appeal's discretion to frame an appropriate sentence consistently with the reasons for judgment of this Court, both the respondent's and the appellant's appeals should be the subject of the remitter.

64 For these reasons there should be orders:

1. Appeal allowed.

2. Set aside pars 2 and 3 of the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 14 May 2010 and in their place order that:

   (a) the applicant, Derek Muldrock, have leave to appeal against the sentence imposed upon him by Black DCJ in the District Court of New South Wales on 28 July 2009; and

   (b) the appeal be treated as instituted and heard instanter and allowed.

3. Remit the matter to the Court of Criminal Appeal for the appellant to be re-sentenced consistently with the reasons for judgment of this Court.