HIGH COURT OF AUSTRALIA

BELL, KEANE, NETTLE, GORDON AND EDELMAN JJ

DL APPELLANT

AND

THE QUEEN RESPONDENT

DL v The Queen
[2018] HCA 32
8 August 2018
S309/2017

ORDER

1. *Appeal allowed.*

2. *Set aside order 3 of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 13 April 2017 in the appeal against sentence.*

3. *Remit the proceeding to the Court of Criminal Appeal of the Supreme Court of New South Wales for determination of the appeal against sentence.*

On appeal from the Supreme Court of New South Wales

Representation

G A Bashir SC with G E L Huxley for the appellant (instructed by Matouk Joyner Solicitors)

K N Shead SC with T L Smith for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

DL v The Queen

Criminal law – Appeal against sentence – Where appellant convicted of murder – Where primary judge found it probable that appellant acting under influence of some psychosis at time of offence – Where primary judge not satisfied appellant possessed intention to kill – Where primary judge's discretion miscarried by giving primary significance to standard non-parole period – Where Court of Criminal Appeal excised power to re-sentence – Where prosecutor conceded there was no issue with primary judge's factual findings – Where Court of Criminal Appeal found primary judge's findings open – Where Court of Criminal Appeal rejected primary judge's finding that appellant had suffered temporary psychosis which precluded forming intention to kill – Where Court of Criminal Appeal took into account evidence of appellant's progress since sentence on the "usual basis" as discussed in *Betts v The Queen* (2016) 258 CLR 420 – Where Court of Criminal Appeal failed to put appellant on notice of inclination not to act on concession made by prosecution – Whether denial of procedural fairness – Whether miscarriage of justice.

Words and phrases – "circumstance of aggravation", "concession", "miscarriage of justice", "new evidence", "objective seriousness", "procedural fairness", "re-sentencing", "unchallenged factual findings", "usual basis".

Criminal Appeal Act 1912 (NSW), s 6(3).

1 BELL, KEANE, NETTLE, GORDON AND EDELMAN JJ. On 27 March 2008, following a trial in the Supreme Court of New South Wales (Hulme J and a jury), the appellant was convicted of the murder of a 15-year-old school girl, TB. The appellant was aged 16 years at the date of the offence. The offence occurred shortly before 4.00 pm on 19 July 2005. The appellant attacked TB on her way home from school. He stabbed her repeatedly to the upper back, upper chest, face and head. In all, there were 48 stab wounds. One wound penetrated the heart and the resulting blood loss led to death within a short interval. The appellant only broke off the assault when he was confronted by a passer-by.

2 In the course of the attack, the appellant cut his hand. Later that afternoon, he gave three different accounts to witnesses of how he had sustained the cut: he had fallen over a rock, he had cut his hand on a rose bush, and he had cut his hand on barbed wire. He was arrested on the evening of the assault and has been in custody since. He declined to be interviewed by the police and did not give evidence at the trial or sentence hearing. In interviews with psychiatrists and the author of a pre-sentence report, the appellant either denied involvement in TB's death or claimed to have no memory of it. The appellant had no other convictions and was described by witnesses at the trial as a shy, quiet and family-oriented youth.

3 It appears that before the trial, consideration was given by the appellant's legal advisers to the availability of psychiatric defences. Dr Nielssen, a forensic psychiatrist, interviewed the appellant in April 2007 and described him as having "an underlying schizophrenic illness" and determined that he was "probably concealing symptoms of mental illness". Dr Nielssen considered that there was doubt as to the appellant's fitness to plead. In a supplementary report prepared in October 2007, Dr Nielssen adhered to his opinion of the appellant's underlying mental condition but assessed that the appellant was fit to plead.

4 The appellant did not raise the defence of mental illness or the partial "defence" of substantial impairment by abnormality of mind[1] at the trial. At the sentence hearing, psychiatric opinion evidence as to the appellant's mental state was adduced by the prosecution and defence. It will be necessary to refer to this evidence in detail later in these reasons. For the present, it suffices to note that the primary judge found that it was probable that the appellant was acting "under the influence of some psychosis" at the time of the murder. His Honour was not satisfied beyond reasonable doubt that the offence was premeditated and, in light

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1 *Crimes Act* 1900 (NSW), s 23A.

of the appellant's mental state, his Honour was not satisfied that the appellant possessed an intention to kill.

5 At the time, a standard non-parole period of 25 years' imprisonment applied to the offence[2]. The primary judge applied the law as it was then understood[3], giving primary significance to the standard non-parole period in the determination of the appropriate sentence. The standard non-parole period, as it stood, represented the non-parole period for an offence in the middle range of objective seriousness for such an offence[4]. The primary judge assessed that the offence was "a little below the mid-range" of objective seriousness. On 14 November 2008, the primary judge sentenced the appellant to a term of imprisonment for 22 years with a non-parole period of 17 years. The sentence was expressed to commence on 19 July 2005. The appellant will not be eligible for consideration of release on parole until 19 July 2022. The sentence will expire on 18 July 2027.

6 By notice filed on 14 April 2016, the appellant sought leave to appeal against the sentence on the grounds that the primary judge erred in his application of the standard non-parole period legislation in light of this Court's decision in *Muldrock v The Queen*[5], and that the sentence was manifestly excessive. The prosecution conceded what was described as a "*Muldrock* error". This was a concession that it was an error to give primary significance to the standard non-parole period in determining the appropriate sentence. The Court of Criminal Appeal (Leeming JA, Rothman and Wilson JJ) was unanimous in

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2 *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act"), Item 1B of the Table to Pt 4, Div 1A as at 27 March 2008.

3 *R v Way* (2004) 60 NSWLR 168.

4 Sentencing Act, s 54A(2). Section 54A(2), as amended by the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act* 2013 (NSW), currently provides that: "[f]or the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the Table to this Division that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness."

5 (2011) 244 CLR 120; [2011] HCA 39.

upholding this ground, a conclusion which enlivened the Court of Criminal Appeal's power to re-sentence the appellant[6].

7 On the hearing of the appeal before the Court of Criminal Appeal, neither party challenged the primary judge's factual findings. The prosecution acknowledged that the sentence needed to be adjusted in light of *Muldrock*, but submitted that the adjustment should be minimal. The Court of Criminal Appeal majority, Leeming JA and Wilson J, rejected the primary judge's finding of the appellant's mental state at the time of the offence. That rejection took into account evidence that had been tendered to show the appellant's progress in custody in the period since the sentence hearing. Their Honours found that the appellant intended to kill TB. Wilson J also found that the offence involved "some degree of premeditation". Given these findings, Leeming JA and Wilson J concluded that no lesser sentence was warranted in law and the appellant's appeal was dismissed. Rothman J, in dissent, would not have departed from the primary judge's unchallenged findings. His Honour would have allowed the appeal and re-sentenced the appellant to a non-parole period of 12 years' imprisonment with a remainder of term of six years' imprisonment.

8 On 15 December 2017, Kiefel CJ, Bell and Keane JJ granted the appellant special leave to appeal. The appeal is brought on two grounds. The first ground complains that the appellant was denied procedural fairness. The second ground complains that the Court of Criminal Appeal erred in substituting aggravated factual findings, in the absence of challenge to the findings of the primary judge and in circumstances in which their Honours accepted that the findings of the primary judge were open. For the reasons to be given, the appeal must be allowed on the first ground and the matter remitted to the Court of Criminal Appeal.

The re-sentencing discretion

9 In a case in which the Court of Criminal Appeal finds that the sentencing judge's discretion has miscarried, its power to re-sentence is enlivened unless, in the exercise of its discretion, the Court of Criminal Appeal is satisfied that no other (generally lesser) sentence is warranted in law. As explained in *Kentwell v The Queen*, the Court of Criminal Appeal exercises an independent sentencing discretion in that it is required to form its own view of the appropriate sentence, rather than confining itself to the determination of whether the identified error

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6 *Criminal Appeal Act* 1912 (NSW), s 6(3).

infected the sentence imposed below[7]. Exceptional cases apart, the Court of Criminal Appeal's determination of the appropriate sentence is determined on the material that was before the sentencing judge, the sentencing judge's unchallenged factual findings, and any relevant evidence of the offender's post-sentence conduct[8].

The primary judge's reasons

10 At the sentence hearing, it was the prosecution's case that the offence was "'at the very high end of objective seriousness', 'frenzied … full of hate and rage', involving a specific intention to kill and 'a very clear element of premeditation'". The primary judge accepted that the attack was frenzied but he considered the further findings sought by the prosecution were "much more doubtful". The submission that the offence was premeditated depended upon the inferences to be drawn from the timing and location of the attack, the appellant's possession of a knife, and the appellant's conduct in truanting from school that day. The attack took place shortly after TB got off the school bus, as she was taking a shortcut to her home through the car park of the Forresters Beach Resort. It was the first day at school following the school holidays. The appellant did not attend school that day. He returned home in the middle of the day, telling his mother, untruthfully, that he had left school early because he had a stomach ache. He left the house at about 3.30 pm, saying that he was going to Forresters Beach to "look at the trail bikes".

11 The primary judge found that the appellant was aware of the timing of the buses and the stop at which TB alighted. A few months earlier, the appellant had got off the bus at the same spot on two occasions. His Honour was not prepared to infer that the offence was premeditated from the fact the appellant had taken the day off school or from his presence at the scene; the appellant had missed school on other occasions and there was nothing remarkable about his presence in the general area. His Honour noted that the appellant and TB were accustomed to travel on the same school bus. There was no evidence of any relationship between the two and no suggestion that the appellant had attempted to make contact with TB during the school holidays. The knife had not been

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7 (2014) 252 CLR 601 at 615 [35] per French CJ, Hayne, Bell and Keane JJ; [2014] HCA 37.

8 *Carroll v The Queen* (2009) 83 ALJR 579 at 584 [24]; 254 ALR 379 at 385; [2009] HCA 13; *Betts v The Queen* (2016) 258 CLR 420 at 427 [14]; [2016] HCA 25.

located; all that was known about it was that it was short. The evidence was neutral on whether the appellant regularly carried a knife.

12 The primary judge considered that there was "much irrationality about what occurred". This observation took into account the absence of evidence that TB had slighted or rejected the appellant and the absence of any other conceivably rational explanation for the attack. His Honour considered that the irrationality of the attack was itself against a finding of premeditation.

The psychiatric evidence adduced at the sentence hearing

13 The prosecution adduced evidence from Dr Kasinathan and Dr Allnutt. Dr Kasinathan had been the consulting psychiatrist at the juvenile justice facility in which the appellant was housed. He had seen the appellant on some 20 to 30 occasions. Dr Allnutt is a consultant forensic psychiatrist and he interviewed the appellant shortly before the sentence hearing, some three years after the offence. The appellant called Dr Nielssen, who had interviewed the appellant again shortly before the sentence hearing. Each of the psychiatrists was cross-examined and none departed from the opinions expressed in their reports.

14 Dr Allnutt diagnosed the appellant as suffering from "depressive and anxiety symptoms. Probably with obsessive compulsive symptoms, of obsessive compulsive disorder." Dr Allnutt acknowledged that there might be a connection or causative link between the appellant's anxiety disorder and his offence, but was unable to conclude that there was. Dr Allnutt considered that possible explanations for the frenzied nature of the attack (committed by a person who until then seemed to have led a normal life) were psychosis; an interaction with TB that went wrong; and a loss of control and temper. While Dr Allnutt could not rule out the possibility of psychosis, he considered the appellant had been highly disturbed at the time of the offence and that there might be another, non-psychotic but irrational, reason for it.

15 Dr Kasinathan assessed the appellant the day after the offence and noted that his presentation was "strange" and thought form was not normal. This was the only occasion when Dr Kasinathan noticed these abnormalities. Dr Kasinathan agreed with Dr Allnutt's diagnosis of an anxiety disorder with depression. Dr Kasinathan was unable to see any connection between the appellant's anxiety symptoms and the offence. He agreed that the appellant's affect generally was somewhat restricted and, while this could be a sign of schizophrenia, he thought it was probably an autistic trait. Dr Kasinathan pointed out that the appellant had been under regular observation and that no psychosis had been detected. He was unable to find a psychiatric explanation for

the attack; he postulated that it might have been an overly explosive reaction to a slight, amplified by anxiety.

16 Dr Nielssen considered that, at the time of the offence, the appellant had been, and at the date of the sentence hearing still was, in the prodromal phase of schizophrenia. This is the phase of the illness between the decline in social function and the emergence of frank psychiatric symptoms. It is usually only apparent in retrospect when acute symptoms have manifested. Dr Nielssen acknowledged that the illness had not developed as he would have expected in the period of three years since the offence. Dr Nielssen also acknowledged that a trial of medication for schizophrenia seemed to have no effect. Neither consideration led Dr Nielssen to depart from his opinion. That opinion took into account the appellant's mother's observations of the appellant's decline in scholastic performance and social function prior to the offence; a family history of mental illness; the appellant's striking abnormality of emotional expression in the course of each of Dr Nielssen's interviews with him; and a subtle impairment in the appellant's capacity for logical thinking. In summary, Dr Nielssen thought it likely that, at the time of the attack, the appellant was "in the early phase of psychotic illness".

The primary judge's finding

17 The primary judge did not find Dr Kasinathan's suggestion of an overly explosive reaction to a slight to be an adequate explanation for the offence, given that there was nothing in the appellant's past behaviour to suggest that he was prone to rage. His Honour favoured Dr Nielssen's opinion as more probably the correct explanation for the offending. As earlier stated, his Honour found that it was probable that the appellant was acting under the influence of some psychosis at the time of the offence.

The statutory scheme

18 The offence of murder is one for which a standard non-parole period applies under Pt 4, Div 1A of the Sentencing Act[9]. At the date of the offence, the standard non-parole period for the offence of murder was 20 years' imprisonment. The Sentencing Act was amended with effect from 1 January 2008, providing a standard non-parole period of 25 years' imprisonment for the murder of a person aged under 18 years. The increased standard non-parole

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9 Sentencing Act, Items 1, 1A and 1B of the Table to Pt 4, Div 1A.

period applied to a conviction for such an offence on or after 1 January 2008[10]. The appellant was convicted of the murder of TB on 27 March 2008 and, thus, at the date he was sentenced by the primary judge, the standard non-parole period for his offence was 25 years.

19 The Court of Criminal Appeal's consideration of the re-sentencing of the appellant took place in a significantly altered statutory context. Section 54D(3), inserted into the Sentencing Act with effect from 1 January 2009[11], provides that standard non-parole periods do not apply to the sentencing of an offender if the offender was under the age of 18 years at the time the offence was committed. At the sentencing of the appellant in November 2008, it had been necessary to take into account that a standard non-parole period of 25 years' imprisonment applied to the offence. At the date the Court of Criminal Appeal considered re-sentencing, no standard non-parole period applied to the offence.

The conduct of the appeal in the Court of Criminal Appeal

20 The appellant tendered the affidavit of his instructing solicitor, Carla Velasquez, on the "usual basis". Ms Velasquez summarised entries contained in the appellant's case management file, records maintained by Juvenile Justice relating to the appellant's incarceration between 2005 and 2010, and records maintained by Justice Health relating to the appellant's medical treatment following his transfer to the adult correctional system in February 2010. Annexed to Ms Velasquez's affidavit were copies of reports prepared by a psychologist, Karen Clarke, dated 30 October 2009, and a psychiatric registrar, Dr Kheng Chan, dated 17 September 2014.

21 At the date of Dr Chan's report, the appellant was being held in the Long Bay Hospital Mental Health Unit ("the Mental Health Unit") following his transfer from a correctional centre under Pt 5, Div 3 of the *Mental Health (Forensic Provisions) Act* 1990 (NSW). Dr Chan noted, by reference to Justice Health records, a concern that the concreteness of the appellant's thought processes and his restricted affect was "likely secondary to an underlying psychotic illness". The treating team considered that the appellant qualified as a "mentally ill" person. Dr Chan recorded that the appellant had a "strong family history of mental illness", including that his father was the product of an incestuous relationship between his grandmother and her own son, and that the

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10 *Crimes (Sentencing Procedure) Amendment Act* 2007 (NSW).

11 *Crimes Amendment (Sexual Offences) Act* 2008 (NSW).

father suffered from schizophrenia and had committed suicide. The treating team's recommendation was that the appellant be managed as a correctional patient at the Mental Health Unit.

22 On 13 October 2014, Dr Chan reported that the appellant had been observed over the preceding four weeks and there was no evidence to suggest that he had any psychotic feature. Dr Chan concluded that the appellant was not suffering from a serious mental illness and that his presentation was more consistent with autistic spectrum traits. The appellant was discharged from the Mental Health Unit.

23 The prosecution tendered two affidavits on the "usual basis". One annexed records relating to the appellant's various disciplinary infractions, and the other extracted observations taken from the Justice Health file on several days in 2014 and 2015. It was not submitted by either party on the hearing in the Court of Criminal Appeal that any of the new evidence was relevant to the assessment of the appellant's culpability for his offence. The new evidence was relevant to the assessment of the prospects of the appellant's rehabilitation and to the conditions of his custody.

The Court of Criminal Appeal

24 Leeming JA approached the consideration of re-sentencing on the footing that the Court of Criminal Appeal must take into account factual circumstances as they existed at the date of the appeal and not as they were in 2008[12]. This was correct insofar as the statutory sentencing regime and the appellant's conduct in, and experience of, custody were concerned. His Honour went on, however, to state that the Court of Criminal Appeal had the benefit of evidence that was not available to the primary judge, including expert psychiatric evidence of the appellant's current and former mental states, which bore directly on the objective seriousness of the offence. His Honour acknowledged that the primary judge's findings had been open, but said that the new evidence had led him to form "a very different view of the objective seriousness of the offence".

25 Before turning to the new evidence, Leeming JA said that two matters were to be noted about the stances taken by the parties on the issue of

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12 *DL v The Queen (No 2)* [2017] NSWCCA 58 at [5] citing *MB v The Queen* [2013] NSWCCA 254 at [18].

re-sentencing. The first concerned the stance taken by the appellant. His Honour noted that senior counsel:

> "initially took the view that 'we don't ask the Court to re-find the facts', although at the same time it was said that the Court would put the finding of objective seriousness 'entirely to one side', because of the absence of a [standard] non-parole period".

26 It is evident that his Honour considered that there was some inconsistency between senior counsel's initial view – not to ask the Court to re-find the facts – and her invitation to the Court to put the primary judge's finding of the objective seriousness of the offence entirely to one side.

27 The second matter concerned the stance taken by the prosecution. Leeming JA noted that on the hearing of the appeal:

> "the Crown said that it did not take issue with [the primary judge's] assessment of criminality, 'except to say that in the circumstances, the [appellant] was well catered for in terms of those features that were taken into account to his considerable advantage'".

28 Leeming JA observed that the prosecutor had characterised a number of the primary judge's findings as "unduly favourable" to the appellant and characterised the primary judge's failure to find that the appellant intended to kill as "a generous finding". His Honour said that the Court of Criminal Appeal was not bound by the primary judge's findings (especially given the "materially different evidence now before it"), nor was the Court bound by the prosecutor's statement that the Crown did not take issue with the primary judge's "assessment of criminality". Indeed, Leeming JA considered that, in light of "its inconsistency with the written and oral submissions", the concession may have been a slip.

29 Leeming JA said that although senior counsel for the appellant had sought to acknowledge the prosecutor's "concession" – that there was no issue with the primary judge's assessment of criminality – the correct position was stated by senior counsel immediately thereafter:

> "[findings of objective seriousness] should be put to one side because the sentencing discretion is being exercised afresh by this Court, and it's for this Court to make their own findings completely unfettered by any findings of the original sentencing judge. That sentence [has] miscarried and this Court must simply come to its own conclusion."

30 His Honour concluded that "[i]t will be seen that [the appellant] has had ample opportunity to be heard on all aspects of his appeal against sentence".

31 Turning to the question of re-sentence, Leeming JA observed that more than 11 years had passed since the killing and that the appellant had been under the consistent care of psychologists while in custody. Significantly in his Honour's analysis, there was no suggestion rising above speculation of incipient schizophrenia. His Honour considered that the number and location of the stab wounds pointed inexorably to the appellant having had the intention of killing TB. Leeming JA rejected the primary judge's finding that the appellant had suffered from "a temporary psychosis which precluded his forming an intention to kill" for two reasons. First, there was no evidence to sustain that finding. Secondly, given the necessity for any finding to be consistent with the jury's verdict, Leeming JA was unable to "conceive of a temporary psychosis which left [the appellant] with an intention to inflict grievous bodily harm while falling short of an intention to kill". The first reason took into account the new evidence and raises consideration of its availability to challenge the primary judge's factual findings. The second reason challenges the primary judge's finding without recourse to the new evidence.

32 Wilson J also approached consideration of re-sentencing upon a view that no limitation applied to the use to be made of the new evidence. Her Honour found that the psychiatric opinion accepted by the primary judge "has not been borne out by time". Her Honour considered that the number, location and severity of the wounds led irresistibly to the conclusion that the appellant intended to kill TB. Wilson J also concluded, contrary to the primary judge's finding, that the offence was accompanied by some degree of premeditation. The conclusion, at least in part, rested on the absence of evidence that the appellant was carrying a knife for a purpose other than using it for a lethal attack, and to this extent wrongly imposed an onus on the appellant respecting a circumstance of aggravation[13]. Her Honour also rejected the primary judge's finding that the appellant was unlikely to re-offend, and would have departed from the primary judge's finding that special circumstances justified a departure from the statutory proportion between the head sentence and the non-parole period[14].

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13 *R v Olbrich* (1999) 199 CLR 270; [1999] HCA 54.

14 Sentencing Act, s 44(2).

The first ground – procedural fairness

33 Leeming JA's view that the appellant had been given an ample opportunity to be heard on all aspects of his appeal appears to have been based on two misconceptions. The first misconception was that there was an inconsistency between the parties' stance that the primary judge's "assessment of criminality" was not in issue and the parties' invitation to put the primary judge's assessment of the objective seriousness of the offence entirely to one side.

34 As earlier explained, the primary judge assessed the objective seriousness of the offence in circumstances in which it was an offence to which a standard non-parole period of 25 years' imprisonment applied. Consistently with the way the law was understood, the primary judge considered that he was required to first assess where in the continuum of seriousness this offence lay. And as also earlier explained, by the time the Court of Criminal Appeal came to consider re-sentencing, no standard non-parole period applied to the offence. The parties each made submissions about how the Court of Criminal Appeal might assess the objective seriousness of the offence in light of the current statutory regime and recognising that it was open to the Court of Criminal Appeal to form its own view of where the appellant's conduct stood on an objective scale of offending[15]. In making these submissions, neither party was inviting the Court of Criminal Appeal to depart from the factual findings below.

35 The primary judge did not essay a discrete "assessment of criminality"; the prosecutor's concession that the Crown did not take issue with the "assessment of criminality" was a shorthand way of acknowledging that the Crown was not seeking to challenge the primary judge's findings that informed the appellant's criminality for his offence. Relevantly, these findings were that it was probable that the appellant was acting under the influence of some psychosis at the time of the murder, and that it had not been proved to the criminal standard that the appellant intended to kill TB or that the killing was premeditated. So much was made clear in an exchange between senior counsel for the prosecution and Rothman J on the hearing of the appeal. His Honour asked if the prosecution took issue with the "substantive findings of [the primary judge]" as to either the assessment of the criminality or the factual findings. Senior counsel for the prosecution responded "[n]o, your Honour, except to say that in the circumstances, the [appellant] was well catered for in terms of those features that were taken into account to his considerable advantage".

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15 *Carroll v The Queen* (2009) 83 ALJR 579 at 584 [24]; 254 ALR 379 at 385.

36 The prosecutor's submissions, that the primary judge's finding that it was not proved that the appellant intended to kill TB was "generous" and that the primary judge had taken into account "a number of matters" that were "unduly favourable", were in aid of the submission that any reduction in the appellant's sentence should be minimal. The submissions were not inconsistent with the prosecutor's decision not to challenge any of the primary judge's factual findings.

37 The second misconception concerned the use to which the new evidence was to be put. In this Court the appellant submits, and the prosecution does not dispute, that all of the new evidence was tendered on the "usual basis". The "usual basis" refers to the practice discussed in *Betts v The Queen*[16] of receiving evidence on the hearing of a sentence appeal of the offender's progress towards rehabilitation in the period since the sentencing. The evidence is routinely admitted on the limited basis that it may be taken into account in the event that the court comes to re-sentence[17]. On the hearing of the appeal in the Court of Criminal Appeal, immediately after thanking the prosecutor for the concession (that the Crown did not take issue with the primary judge's assessment of criminality), senior counsel for the appellant drew the Court's attention to *Betts* as the most "recent decision of the High Court indicating what the usual basis usually means", and submitted that "there is no issue between the parties as to the findings of [the primary judge]".

38 *Betts* allows that in an exceptional case new evidence may be received for the purpose of revisiting the findings of primary fact. For the reasons there explained, the interests of justice will generally not be served by permitting either party to make a new or different case on the hearing of the appeal[18]. Here neither party invited the Court of Criminal Appeal to re-sentence the appellant upon a factual basis that differed from the primary judge's findings, much less to use the new evidence to impugn those findings.

39 Leeming JA was right to say that the Court of Criminal Appeal was not bound by the prosecutor's concession. Notwithstanding the adversarial nature of criminal proceedings, the public interest in the sentencing of offenders is such

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16 (2016) 258 CLR 420.

17 *Betts v The Queen* (2016) 258 CLR 420 at 426 [11]; *Douar v The Queen* (2005) 159 A Crim R 154 at 178 [124] per Johnson J; *R v Deng* (2007) 176 A Crim R 1 at 8 [28] per James J.

18 *Betts v The Queen* (2016) 258 CLR 420 at 428 [16].

that the sentencing judge (or the appellate court in the case of re-sentencing) is not constrained by any agreement between the parties as to the appropriate range of sentence or by concessions made by the prosecutor[19]. Where, however, the judge (or the appellate court in the case of re-sentencing) is minded not to act on a concession made by the prosecution, the failure to put the offender on notice of that inclination and give him or her an opportunity to deal with the matter by evidence or submissions will ordinarily be a miscarriage of justice. In the absence of such an indication, it will be reasonable for the offender to conduct his or her case upon the understanding that the concession will be accepted and acted upon by the court[20]. It was an error to hold that the appellant had had ample opportunity to be heard on all aspects of his appeal.

40 It cannot be said that the error could not have made any difference to the outcome of the appeal. It is, with respect, by no means evident that the new evidence provided a basis for departing from the primary judge's acceptance of Dr Nielssen's opinion. The new evidence did not contain any expression of expert opinion as to the appellant's mental state at the time of the offence. The majority drew the inference from the circumstance that the appellant has not developed schizophrenia that Dr Nielssen's opinion has been shown to be wrong. Whether that is an available inference should not be thought to be uncontroversial.

41 At the sentence hearing, Dr Nielssen maintained his opinion notwithstanding that the appellant had not gone on to develop schizophrenia in the three years following the offence. Dr Nielssen explained that there are varied courses of schizophrenia "ranging from sudden severe onset in early adolescence

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19 *GAS v The Queen* (2004) 217 CLR 198 at 211 [31]; [2004] HCA 22; *Elias v The Queen* (2013) 248 CLR 483 at 494-495 [27]; [2013] HCA 31; *Barbaro v The Queen* (2014) 253 CLR 58 at 76 [47]-[49] per French CJ, Hayne, Kiefel and Bell JJ; [2014] HCA 2; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 606 per Kirby P.

20 *Collins v The Queen* (2018) 92 ALJR 517 at 525 [32]; 355 ALR 203 at 211; [2018] HCA 18; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 613 per Sheller JA; *R v Tadrosse* (2005) 65 NSWLR 740 at 745 [19] per Howie J; *Stokes v The Queen* (2008) 185 A Crim R 74 at 77 [13]-[15] per Barr J; *Ng v The Queen* (2011) 214 A Crim R 191 at 205-206 [43]-[50]; *Govindaraju v The Queen* [2011] NSWCCA 255 at [52]-[57], [62] per Hall J; *R v Cunningham* [2005] QCA 321 at 5 per Keane JA.

to subtle onset in mid or even late adult life". The appellant's restricted emotional expression, the strong family history of schizophrenia, and the appellant's psychosocial decline were matters on which Dr Nielssen placed weight. He rejected autism as an explanation for the appellant's restricted affect because autism is present from infancy, whereas the appellant's history was of apparently normal development until the 6 to 12 months before the offence, which were marked by psychosocial decline. If the primary judge's acceptance of Dr Nielssen's opinion were to be the subject of challenge, it might be expected that those acting for the appellant would seek to obtain a further report from Dr Nielssen.

42 Leeming JA's second reason for rejecting the primary judge's finding respecting intent did not depend on the new evidence. Leeming JA said that he could not "conceive of a temporary psychosis which left [the appellant] with an intention to inflict grievous bodily harm while falling short of an intention to kill". The observation fails to take account of the onus in the case of circumstances of aggravation. Murder was left to the jury on the basis that the appellant possessed the intention either to kill or to do grievous bodily harm. The primary judge was required to sentence upon the basis that, at the time the appellant stabbed TB, he possessed at least the intention to do grievous bodily harm. His Honour was not required to sentence the appellant on the basis that he intended to kill TB unless he was satisfied that that intention had been proved beyond reasonable doubt. In light of his acceptance of Dr Nielssen's opinion and the irrationality of the attack, the primary judge was not so satisfied.

43 On one view, Leeming JA was raising a more fundamental issue, which is the capacity to reconcile the finding that the appellant was under the influence of "some psychosis" with the verdict. The primary judge did not elaborate on the effect of that influence on the appellant's conduct or understanding. In circumstances in which the prosecution did not object to the tender of Dr Nielssen's opinion at the sentence hearing, the primary judge is to be taken to have found that the appellant's mental condition did not *substantially* impair his capacity to understand events, judge whether his actions were right or wrong or control himself[21].

44 The appellant's first ground is made good. The majority's decision to depart from the primary judge's unchallenged factual findings, and to take the new evidence into account in substituting a finding of aggravation – the intention

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21 *Crimes Act* 1900 (NSW), s 23A.

to kill (and in Wilson J's case the finding of premeditation and the rejection of the finding of unlikelihood of re-offending) – without notice to the appellant, was procedurally unfair and has occasioned a miscarriage of justice.

45 This conclusion makes it unnecessary, and for that reason undesirable, to address the appellant's second ground, which invites the Court to state a principle respecting the power of an appellate court, determining an appeal against sentence under the common form appeal provision, to substitute aggravated factual findings for the unchallenged findings of the sentencing judge.

46 The appeal must be remitted to the Court of Criminal Appeal for consideration of the re-sentencing of the appellant. In making this order, this Court is not to be taken to be expressing any view as to whether some other (lesser) sentence is warranted in law.

Orders

47 For these reasons there should be the following orders:

1. Appeal allowed.

2. Set aside order 3 of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 13 April 2017 in the appeal against sentence.

3. Remit the proceeding to the Court of Criminal Appeal of the Supreme Court of New South Wales for determination of the appeal against sentence.