HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

THE QUEEN APPELLANT

AND

AKON GUODE RESPONDENT

The Queen v Guode
[2020] HCA 8
Date of Hearing: 14 November 2019
Date of Judgment: 18 March 2020
M75/2019

ORDER

1. *Appeal allowed.*

2. *Set aside the orders made by the Court of Appeal of the Supreme Court of Victoria on 16 August 2018.*

3. *Quash the sentences imposed by the Court of Appeal of the Supreme Court of Victoria on 16 August 2018.*

4. *Remit the matter to the Court of Appeal of the Supreme Court of Victoria for further determination according to law.*

On appeal from the Supreme Court of Victoria

Representation

K E Judd QC with A S Ellis for the appellant (instructed by Solicitor for Public Prosecutions (Vic))

O P Holdenson QC with C A Boston and L V Drago for the respondent (instructed by Stary Norton Halphen)

CATCHWORDS

The Queen v Guode

Criminal law – Sentence – Irrelevant consideration – Where respondent pleaded guilty to murder contrary to common law and to infanticide and attempted murder contrary to ss 6(1) and 321M of *Crimes Act 1958* (Vic) respectively – Where primary judge sentenced respondent to 26 years and six months' imprisonment with non-parole period of 20 years – Where Court of Appeal allowed appeal against sentence and re-sentenced respondent to 18 years' imprisonment with non-parole period of 14 years – Where respondent's mental condition at time of offending called for application of principles stated in *R v Verdins* (2007) 16 VR 269 – Where element of offence of infanticide included disturbance of balance of mind – Where infanticide carried significantly shorter maximum penalty than offences of murder and attempted murder – Whether Court of Appeal erred by evaluating appropriateness of sentences imposed for murder and attempted murder in light of lesser maximum penalty for offence of infanticide.

Words and phrases – "acceptance of a plea", "attempted murder", "disturbance of mind", "impaired mental functioning", "infanticide", "irrelevant consideration", "manifestly excessive", "mental condition", "mitigating factors", "moral culpability", "murder", "sentencing", "sentencing considerations", "specific error", "*Verdins* considerations".

Crimes Act 1958 (Vic), ss 3, 6(1), 321P(1)-(1A).

1 KIEFEL CJ, GAGELER AND NETTLE JJ. The sole question of principle which arises for determination in this appeal is whether, where a woman with impaired mental functioning is charged with and pleads guilty to an offence of infanticide and also offences of murder and attempted murder committed by the same act, the Crown's acceptance of the plea to the charge of infanticide is relevant to the sentences to be imposed on the charges of murder and attempted murder. For the reasons which follow, it is not.

2 The dispositive question of fact is whether the Court of Appeal of the Supreme Court of Victoria, in determining the respondent's appeal to that Court against her sentence on the basis that it was manifestly excessive, took that irrelevant consideration into account. For the reasons which follow, they did and the appeal should be allowed.

Relevant statutory provisions

3 Section 3 of the *Crimes Act 1958* (Vic) provides so far as is relevant, in substance, that the maximum penalty for an offence of murder is life imprisonment.

4 Section 321P of the *Crimes Act* provides so far as is relevant, in substance, that the maximum penalty for the offence of attempted murder is 25 years' imprisonment.

5 Section 6(1) of the *Crimes Act* provides for the offence of infanticide. The current form of s 6(1) was substituted[1] for its predecessor to give effect to recommendations made by the Victorian Law Reform Commission ("the Commission") in its Final Report into *Defences to Homicide* delivered in October 2004 ("the Commission's Report"). Relevantly, the Commission made three recommendations with respect to infanticide, as follows:

1. "Infanticide should be retained as an offence and as a statutory alternative to murder."[2]

2. "Infanticide should apply where a woman has suffered from a disturbance of mind as the result of not having recovered from the effect of giving birth or any disorder consequent on childbirth."[3]

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1 By the *Crimes (Homicide) Act 2005* (Vic).

2 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) at lv [47].

3. "The offence of infanticide should be modified by:

[(i)] extending the offence to cover the killing of an infant aged up to two years; and

[(ii)] applying the offence to the killing of older children as the result of the accused not having recovered from the effect of giving birth or any disorder consequent on childbirth."[4]

6 In support of recommendation 3(ii), the Commission stated[5]:

"The Commission [considers] that it is unjust that a woman who, due to a disturbance of mind, killed more than one child, can rely on infanticide for one child but not the other. The Commission recommends the law should be changed to rectify this anomaly."

7 Parliament accepted recommendations 1, 2 and 3(i), but did not adopt recommendation 3(ii). In the result, s 6(1) of the *Crimes Act* now appears as follows:

"If a woman carries out conduct that causes the death of her child in circumstances that would constitute murder and, at the time of carrying out the conduct, the balance of her mind was disturbed because of –

(a) her not having fully recovered from the effect of giving birth to that child within the preceding 2 years; or

(b) a disorder consequent on her giving birth to that child within the preceding 2 years –

she is guilty of infanticide, and not of murder, and liable to level 6 imprisonment (5 years maximum)."

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3 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) at lv [48].

4 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) at lv [49].

5 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) at 267 [6.41].

***Verdins* considerations**

8 Apart from s 6(1) of the *Crimes Act*, the ways in which a mental disorder or abnormality or an impairment of mental function, whether temporary or permanent ("the condition"), may be relevant to sentencing were compendiously summarised[6] by the Court of Appeal of the Supreme Court of Victoria in *R v Verdins*, as follows:

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

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6 (2007) 16 VR 269 at 276 [32] per Maxwell P, Buchanan and Vincent JJA, reformulating the principles enunciated in *R v Tsiaras* [1996] 1 VR 398. That summary has consistently been adopted by intermediate appellate courts elsewhere in Australia: *Du Randt v The Queen* [2008] NSWCCA 121 at [24] per Barr J (Basten JA and Buddin J agreeing); *Carlton v The Queen* (2008) 189 A Crim R 332 at 351 [101] per Basten JA; *Western Australia v SJH* (2009) 200 A Crim R 228 at 246 [81]-[82] per Wheeler JA (Owen JA agreeing); *R v Yost* [2010] SASCFC 4 at [21]-[22] per Kelly J (Doyle CJ and Duggan J agreeing); *Startup v Tasmania* [2010] TASCCA 5 at [6] per Evans, Tennent and Wood JJ; *R v Yarwood* (2011) 220 A Crim R 497 at 506-507 [23]-[26] per White JA (Fraser JA and North J agreeing); *Millard v The Queen* [2016] ACTCA 14 at [31] per Refshauge, Penfold and North JJ. See also *Muldrock v The Queen* (2011) 244 CLR 120 at 137-139 [50]-[55] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

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

5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.

6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment." (footnote omitted)

Proceedings at first instance

9 In this matter, the respondent was arraigned before the Supreme Court of Victoria on 16 January 2017 on an indictment alleging one charge of infanticide (Charge 1), two charges of murder (Charges 2 and 3) and one charge of attempted murder (Charge 4). The respondent pleaded guilty to each charge. As the Summary of Prosecution Opening[7] disclosed, the respondent committed the offences on 8 April 2015 by driving a car, carrying four of her children, into Lake Gladman in Wyndham Vale, Victoria with the intention of killing each child.

10 In support of her plea in mitigation of penalty, the respondent adduced uncontested expert psychiatric evidence from Dr Danny Sullivan, a Consultant Forensic Psychiatrist and Assistant Clinical Director at the Victorian Institute of Forensic Mental Health, to the effect that, at the time of the offending, the respondent was suffering from a "major depressive disorder, mild-moderate in severity, with somatic syndrome", the consequence of having given birth to the youngest of the deceased children. Dr Sullivan added, in the language of s 6(1)(b) of the *Crimes Act*, that the balance of the respondent's mind was thus disturbed by a depressive illness which arose as a consequence of the respondent having given birth to her youngest child within the preceding two years. In a Second Supplementary Psychiatric Report, Dr Sullivan further opined that, "[o]n balance, there is evidence of post-traumatic stress disorder, which is mild in severity", but stated that he did "not consider that this diagnosis materially

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7 Which was read onto the transcript by the Crown, and accepted by the respondent as accurate.

alter[ed] [his] previous consideration of impairment of mental functioning at the time of the alleged events".

11 The sentencing judge (Lasry J) found that the respondent's mental state affected all four charges and "it also follows that several of the principles decided in *R v Verdins* apply ... so as to reduce but not eliminate the moral culpability of [the respondent's offending]" and "to significantly moderate the role of specific deterrence in the sentence to be imposed on [the respondent] as well as general deterrence".

12 On that basis, on 30 May 2017, his Honour sentenced the respondent on Charge 1 to 12 months' imprisonment, on each of Charges 2 and 3 to 22 years' imprisonment and on Charge 4 to six years' imprisonment, and ordered that six months of the sentence imposed on Charge 1, three years of the sentence imposed on Charge 3 and one year of the sentence imposed on Charge 4 be served cumulatively on the sentence imposed on Charge 2, making a total effective sentence of 26 years and six months' imprisonment. Lasry J fixed a non-parole period of 20 years.

Proceedings before the Court of Appeal

13 The respondent applied for leave to appeal against sentence to the Court of Appeal. That Court, constituted by a single judge of appeal (Weinberg JA), dismissed[8] the application on the papers under s 315 of the *Criminal Procedure Act 2009* (Vic). His Honour held[9] that it could not "reasonably be contended that the individual sentences, the total effective sentence, or the non-parole period, were wholly outside the range reasonably available for offences of this gravity".

14 Pursuant to s 315(2) of the *Criminal Procedure Act*, the respondent elected to have her application for leave to appeal redetermined by the Court of Appeal constituted by two or more judges of appeal (Ferguson CJ, Priest and Beach JJA). Their Honours held[10] that Lasry J had erred by giving insufficient weight to the respondent's mental condition and other mitigating factors, with the result that the sentences that Lasry J imposed on Charges 2, 3 and 4 were manifestly excessive, and that, "in light of the sentences imposed by the judge on charges 2 and 3, the orders for cumulation on the other charges were also

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8 *Guode v The Queen* [2017] VSCA 311 at [39].

9 *Guode v The Queen* [2017] VSCA 311 at [39].

10 *Guode v The Queen* [2018] VSCA 205 at [72]-[73].

manifestly excessive". The Court of Appeal quashed the sentences imposed on Charges 2, 3 and 4; resentenced the respondent on each of Charges 2 and 3 to 16 years' imprisonment and on Charge 4 to four years' imprisonment; ordered that 12 months of the sentence imposed on Charge 3 and six months of each of the sentences imposed on Charges 1 and 4 be served cumulatively on the sentence imposed on Charge 2, making a total effective sentence of 18 years' imprisonment; and fixed a non-parole period of 14 years.

15 In reasoning to those results, the Court of Appeal noted[11] that:

> "Much of the discussion in this case concerned the ramifications of joining charges of infanticide and murder (and attempted murder) on the indictment; and more particularly, whether the charges of murder needed to be viewed through the 'prism' of infanticide. In our view, the real relevance of the charge of infanticide lies not so much in its presence on the indictment vis-à-vis the charges of murder (and attempted murder), but in the prosecution's acceptance – in laying that charge and accepting a plea to it – that the balance of the applicant's mind was disturbed due to a depressive disorder consequent on her giving birth to the child Bol [the youngest child]. That acceptance must, we consider, influence any assessment of the applicant's moral blameworthiness on all of the charges that she faced."

16 The Court of Appeal further noted[12] that Parliament had not accepted the Commission's recommendation that, where a woman who, due to a disturbance of mind the result of not having recovered from the effect of giving birth or any disorder consequent on childbirth, kills a child of less than two years of age and also another child or other children of a greater age, the offence of infanticide should apply to each child and not just to the child under two years of age. But their Honours then went on as follows[13]:

> "As we have indicated, however, the prosecution's acceptance of a plea to infanticide is *not* irrelevant to a consideration of the applicant's other offending. Indeed, the opposite is true. At the risk of repetition, the prosecution conceded that the second limb of s 6(1) was engaged. It was thereby conceded that at the time that the applicant drove into the lake

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11 *Guode v The Queen* [2018] VSCA 205 at [61].

12 *Guode v The Queen* [2018] VSCA 205 at [64].

13 *Guode v The Queen* [2018] VSCA 205 at [65]-[67], [72] (emphasis added).

intending to kill the child Bol [the youngest child], 'the balance of her mind was disturbed because of ... a disorder consequent on her giving birth to that child'.

In *QPX*[14], Bongiorno JA was required to sentence a woman who had pleaded guilty to the infanticide with respect to one twin, 'M', and to recklessly causing serious injury to the other twin, 'N'. In the course of his reasons for sentence, his Honour said:

> 'This case of infanticide and, in this particular instance, the charge of recklessly causing serious injury must both be viewed in light of the statutory definition of infanticide set out in the *Crimes Act 1958*. By the Crown's acceptance of QPX's plea of guilty to infanticide in respect of M it has acknowledged that both offences were committed in circumstances arising from or causally connected to her recently having given birth to her twin daughters. The prosecutor in this Court correctly acknowledged this analysis. ...'

In alike vein, we consider that the charges of murder and attempted murder must be viewed in light of the statutory definition of infanticide in s 6(1) of the *Crimes Act 1958*, and by the prosecution's acceptance of a plea to infanticide with respect to [the youngest child], by which it acknowledged that all four offences were committed in circumstances arising from, or causally connected to, a disorder consequent upon the applicant recently having given birth to [that child].

...

In our view, there is substance in the submissions of the applicant's counsel that sentences of 22 years' imprisonment on each of the two charges of murder are of the order of sentences generally reserved for cases unattended by the powerful mitigating features of this case. Had adequate weight been given to the applicant's mental condition and other factors in mitigation, we consider that significantly more lenient sentences would have been imposed on each of those charges. Indeed, in our view, the individual sentences on those charges are beyond the range of those open in the sound exercise of the sentencing discretion, and are manifestly excessive (as is the sentence on the charge of attempted murder)."

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14 *Director of Public Prosecutions v QPX* [2014] VSC 189.

The appeal to this Court

17 By grant of special leave, the Crown appeals to this Court on the sole ground that the Court of Appeal erred by taking into account as a relevant consideration, in the determination of whether the sentences imposed on the charges of murder and attempted murder were manifestly excessive, that the Crown had accepted the respondent's plea of guilty to the charge of infanticide.

18 The Director of Public Prosecutions submitted that it is clear from the Parliament's rejection of recommendation 3(ii) of the Commission's Report that the Crown's acceptance of the respondent's plea to the charge of infanticide was irrelevant to the sentences to be imposed on the other charges. In the Director's submission, it is also clear from the passages of the Court of Appeal's reasons for judgment set out above that, despite the irrelevance of the Crown's acceptance of the respondent's plea to the charge of infanticide, the Court of Appeal treated it as relevant. Moreover, in the Director's submission, if the Court of Appeal had not treated the Crown's acceptance of the respondent's plea to the charge of infanticide as informing the sentences properly to be imposed on the charges of murder and attempted murder, it would not have been open to the Court of Appeal to conclude, as their Honours did, that the sentences imposed in respect of those charges and the total effective sentence, in view of the orders for cumulation, were manifestly excessive, the result of giving inadequate weight to mitigatory considerations.

19 Counsel for the respondent submitted, to the contrary, that, although the Court of Appeal referred to the fact of the Crown's acceptance of the respondent's plea to the charge of infanticide; and that the offences of murder and attempted murder "must be viewed in light of the statutory definition of infanticide in s 6(1) of the *Crimes Act*"; and that by accepting the respondent's plea to the charge of infanticide, the Crown had "acknowledged that [all of the] offences were committed in circumstances arising from or causally connected to [the respondent] recently having given birth", the Court of Appeal were properly to be understood as using those expressions as no more than a compendious means of reiterating Dr Sullivan's uncontested expert psychiatric evidence (to which their Honours had earlier referred) that, at the time of the offences, the respondent was suffering from a major depressive illness, mild-moderate in severity, which impaired her capacity to exercise appropriate judgment, think clearly, make calm and rational choices, and appreciate the wrongfulness of her conduct, which was very likely causally associated with her behaviour in driving her children into the lake. On that basis, in counsel's submission, it was well open to the Court of Appeal to conclude that the sentences imposed in respect of the charges of murder and attempted murder and the total effective sentence, in view of the orders for cumulation, were manifestly excessive.

The irrelevance of the plea to the charge of infanticide

20 The Crown's acceptance of the respondent's plea to the charge of infanticide was irrelevant to the sentences to be imposed on the other charges. By its rejection of recommendation 3(ii) of the Commission's Report, Parliament signified that it is impermissible in a matter of this kind to view offences other than infanticide "in light of the statutory definition of infanticide in s 6(1) of the *Crimes Act*". Consequently, where a woman, like the respondent, who, due to a disturbance of mind the result of childbirth, kills one of her children of less than two years of age and, at the same time, kills or attempts to kill another or others of a greater age, she stands to be sentenced on the charge of infanticide in accordance with s 6(1) but to be sentenced for the other offences without reference or regard to s 6(1), or to the mental condition that it describes.

21 The mental condition relevant to the offence of infanticide is that the balance of the woman's mind was disturbed because of a disorder consequent on her giving birth to the deceased child within the preceding two years. Once that is established, the woman comes within the unique sentencing regime of s 6(1) of the *Crimes Act* and the sentence to be imposed on her for the offence of infanticide is to be imposed by reference to the maximum penalty for infanticide of five years' imprisonment having regard, inter alia, to the nature and gravity of the woman's disturbance of mind.

22 By contrast, in the case of other offences committed at the same time as the offence of infanticide, the sentences to be imposed on the woman are to be imposed by reference to the maximum penalties for those offences, in accordance, inter alia, with relevant *Verdins* considerations having regard to the evidence of the woman's mental condition at the time of the offending, or sentence, or both: in this case, Dr Sullivan's evidence that the respondent suffered from a "major depressive disorder, mild-moderate in severity, with somatic syndrome", which impaired her capacity to exercise appropriate judgment, think clearly, make calm and rational choices, and appreciate the wrongfulness of her conduct, which was very likely causally associated with her behaviour in driving her children into the lake.

23 No doubt, the assessment of the nature and gravity of the woman's state of mind for the purposes of sentencing her for the offence of infanticide is likely to entail consideration of the same evidence as is relevant to the assessment of the woman's mental condition for the purpose of applying the *Verdins* considerations to the sentences to be imposed for the other offences. It is not to the point, however, and it says nothing sufficiently specific about the nature and gravity of a woman's mental condition for the purpose of applying the *Verdins* considerations to the other offences, to observe that the woman's mental condition is capable of description as a disturbance of mind because of a disorder

consequent on the woman giving birth to another child within the meaning of s 6(1) of the *Crimes Act*. So to describe the woman's mental condition creates the risk that the other offences will be "viewed in light of the statutory definition of infanticide in s 6(1) of the *Crimes Act*", and thus as attracting sentences at least to some degree informed by the unique sentencing regime of s 6(1) that Parliament has determined should apply only to the offence of infanticide. It is a practice that should be avoided.

Error in taking an irrelevant consideration into account

24 As is apparent from the Court of Appeal's reasons, their Honours followed[15] Bongiorno JA's process of reasoning in *Director of Public Prosecutions v QPX*[16]: that, where a woman was charged with infanticide of one child and, simultaneously, with recklessly causing serious injury to another, both offences had to be viewed in light of the definition of infanticide in s 6(1) of the *Crimes Act*, and the Crown's acceptance of the woman's plea of guilty to infanticide in respect of the first child was to be treated as acknowledging that both offences were committed in circumstances arising from or causally connected to the woman having recently given birth to both children. On that basis, the Court of Appeal concluded[17] that the respondent's offences of murder and attempted murder needed to be "viewed in light of the statutory definition of infanticide in s 6(1) of the *Crimes Act*", and the Crown's acceptance of the respondent's plea to infanticide in respect of her youngest child was to be taken as an acknowledgment that all four of the respondent's offences were committed in circumstances arising from, or causally connected to, a disorder consequent upon the respondent having recently given birth to the respondent's youngest child.

25 Of course, if, as counsel for the respondent submitted, that meant no more than that the Court of Appeal considered the charges of murder and attempted murder were to be viewed in light of the uncontested expert evidence that the respondent was suffering from a clinically significant mood disorder which impaired her capacity to exercise appropriate judgment, think clearly, make calm and rational choices, and appreciate the wrongfulness of her conduct, there would be no error in it. But if, as the Director contended, the Court of Appeal intended thereby to convey that the sentences imposed on the charges of murder and

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15 *Guode v The Queen* [2018] VSCA 205 at [66].

16 [2014] VSC 189.

17 *Guode v The Queen* [2018] VSCA 205 at [67].

attempted murder needed to be reduced to reflect the fact that the balance of the respondent's mind was disturbed because of a disorder consequent on her giving birth to a child within the preceding two years within the meaning of s 6(1) of the *Crimes Act*, the Court of Appeal were in error. So to approach the sentencing task was tantamount to doing the very thing that Parliament, by rejecting recommendation 3(ii) of the Commission's Report, determined should not be done.

26 Given that the Court of Appeal expressly referred to Parliament's rejection of recommendation 3(ii) of the Commission's Report, it presents in one sense as unlikely that the Court of Appeal would have made that error. As the Director submitted, however, three features of the Court of Appeal's reasons provide "an evidentiary basis for the conclusion"[18] that their Honours did mean to convey that the sentences imposed on the charges of murder and attempted murder needed to be reduced, from levels that would otherwise have been appropriate, to reflect the fact that the balance of the respondent's mind fell within the description of a disorder consequent on her giving birth to a child within the preceding two years within the meaning of s 6(1) of the *Crimes Act*.

27 First, the Court of Appeal's reasons accord closely to what senior counsel who appeared for the respondent before that Court there described as his "primary argument", that the charges of murder and attempted murder were to be seen in light of the Crown's acceptance of the respondent's plea to the charge of infanticide, and, in particular, meant that the sentences to be imposed on the charges of murder and attempted murder should be "very much significantly lower"; that the charges of murder and attempted murder were to be "look[ed] at ... through the lens of infanticide"; that "the cases show that moral culpability is reduced enormously in infanticide cases and that's what we have here"; and, ultimately, that "[o]nce you accept what the public conscience is about the tragedy and horror of the killing or murder of a child which is captured by infanticide, that has to very much more seriously inform how you assess what the public conscience is with regard to sentence on the murders".

28 Secondly, the Court of Appeal's repeated observations that the Crown was to be taken as having conceded that the respondent's state of mind was as prescribed by s 6(1)(b) of the *Crimes Act* and that the offences of murder and attempted murder were to be seen in the light of the statutory definition of infanticide in s 6(1) of the *Crimes Act* cannot sensibly be regarded as a

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18 *Matthews v The Queen* (2014) 44 VR 280 at 288 [17] per Warren CJ, Nettle and Redlich JJA.

compendious reference back to Dr Sullivan's more detailed and nuanced explanation of the respondent's psychological condition at the time of offending. The question for the Court of Appeal was whether and to what extent Dr Sullivan's uncontested psychiatric evidence (which their Honours had earlier set out in extenso) demonstrated that the respondent's psychological condition was so grave that the sentencing judge must have given insufficient weight to *Verdins* considerations. As has been observed, the statutory prescription "a disorder consequent on her giving birth to that child within the preceding 2 years", as such, says next to nothing as to the nature and gravity of the respondent's psychological condition.

29 Thirdly, of the 14 paragraphs of the Court of Appeal's reasons comprising their Honours' analysis of the relevant principles and the application of them to the determination of whether the sentences imposed in respect of the charges of murder and attempted murder were manifestly excessive, seven are concerned with the offence of infanticide and the significance of the Crown's acceptance of the respondent's plea of guilty to the charge of infanticide as a concession that at the time the respondent drove her children into the lake intending to kill them, the balance of her mind was affected in the manner prescribed in s 6(1)(b) of the *Crimes Act*. In view of the Court of Appeal's concentration on the point, it is unrealistic to suppose that their Honours did not regard it as one of importance in the determination of the sentences properly to be imposed for the offences of murder and attempted murder.

30 Whether it would have been open to the Court of Appeal to conclude, without taking into account the Crown's acceptance of the plea to the charge of infanticide, that the sentences imposed by the sentencing judge on the charges of murder and attempted murder were manifestly excessive is not a question which needs to be determined in the appeal. It is a question of a nature which, as a general rule, this Court does not entertain[19].

Conclusion and orders

31 The Court of Appeal erred by taking into account as a relevant consideration in the determination of whether the sentences imposed on the charges of murder and attempted murder were manifestly excessive that the Crown had accepted the respondent's plea of guilty to the charge of infanticide,

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19 *Neal v The Queen* (1982) 149 CLR 305 at 322-323 per Brennan J; *Munda v Western Australia* (2013) 249 CLR 600 at 621-622 [60] per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ.

and thus that the charges of murder and attempted murder were to be viewed "in light of the statutory definition of infanticide in s 6(1) of the *Crimes Act 1958*".

32 The orders of the Court of Appeal should be set aside, the sentences imposed by the Court of Appeal should be quashed and the matter should be remitted to the Court of Appeal for further determination according to law.

GORDON AND EDELMAN JJ.

Introduction

33 On 8 April 2015, Ms Guode deliberately drove her car into Lake Gladman in Wyndham Vale, Victoria. Four of her children were in the car. The oldest of those children (Aluel) was five years old. Her twins (Madit and Hangar) were four years old. And her youngest child (Bol) was aged 16 months. Shortly prior to this shocking event, one of her children had been observed to be hysterical in the car while another child was observed hanging off or grabbing the front seat, and Ms Guode had been seen huddled over the steering wheel with her face in her hands.

34 Ms Guode survived, together with Aluel. The other three children drowned. Ms Guode was charged on indictment with (i) infanticide of Bol (charge 1), (ii) murder of Madit and Hangar (charges 2 and 3), and (iii) attempted murder of Aluel (charge 4). Ms Guode pleaded guilty to all counts in the Supreme Court of Victoria on 16 January 2017.

35 Ms Guode had arrived in Australia in 2005 as a refugee on a Global Special Humanitarian visa after having been raised in South Sudan during the civil war. She had witnessed her husband's murder. She had been raped to the point of unconsciousness and had been wounded with a knife. She had escaped by walking for 18 days to Uganda with her three young children. After arriving in Australia, she had four further children as a result of a relationship which saw her ostracised from her community.

36 At the time of her offending, Ms Guode was a single parent with a traumatic past. She had seven children, spoke little English, had severe financial problems, and was socially isolated. The uncontested evidence at the sentencing hearing was that Ms Guode had been suffering from a major depressive disorder linked with the birth of Bol in 2013 and a mild post-traumatic stress disorder. The primary judge (Lasry J) sentenced her to imprisonment for 22 years for each charge of murder and six years for the charge of attempted murder. After concurrency of some of those sentences, her total effective sentence was 26 years and six months' imprisonment with a non-parole period of 20 years.

37 After an application for leave to appeal against sentence was refused by a single judge, Ms Guode renewed her application for leave to appeal against her sentence. Her sole proposed ground of appeal was that the sentence was manifestly excessive. The Court of Appeal of the Supreme Court of Victoria allowed the appeal and resentenced Ms Guode. But for her pleas of guilty, the

Court of Appeal said that it would have imposed a total effective sentence of 33 years' imprisonment with a non-parole period of 27 years[20]. After taking into account the pleas of guilty, the sentence for each charge of murder was reduced from 22 years to 16 years' imprisonment and the sentence for the charge of attempted murder was reduced from six years to four years' imprisonment. The Court of Appeal imposed a total effective sentence of 18 years' imprisonment with a non-parole period of 14 years.

38 Perhaps due to an awareness that this Court rarely grants special leave to provide a second appellate consideration of whether or not a primary sentence was manifestly excessive, the sole ground of appeal upon which special leave to appeal was sought from, and granted by, this Court was that the Court of Appeal erred by taking into account as a relevant consideration in its determination of manifest excess the fact that the prosecution had accepted a plea of guilty to infanticide in respect of charge 1 on the indictment. The Crown's submissions before this Court had two strands.

39 One strand of the Crown's submissions was that the large difference in sentence between the Court of Appeal and the primary judge bespeaks error, especially since a single judge of the Court of Appeal had refused leave to appeal. That submission should not be accepted. A conclusion that the decision of the primary judge was manifestly excessive will often necessitate a substantial reduction when resentencing. A further obstacle, particularly in the absence of any ground of appeal by the Crown alleging error in relation to the mitigating factor of Ms Guode's plea of guilty, is the term of 33 years' imprisonment that the Court of Appeal would have imposed but for her pleas of guilty. This is, to say the least, a large obstacle to concluding that the Court of Appeal had resentenced Ms Guode for murder and attempted murder by reference to infanticide with its maximum sentence of five years[21]. Finally, and most fundamentally, the Crown's submission amounts to little more than an attempt impermissibly to introduce, by the back door, a ground of appeal that the Court of Appeal erred in concluding that the primary judge's sentence was manifestly excessive.

40 The only remaining issue on this appeal is the second strand to the Crown's submissions. That strand involves the submission that nine paragraphs of the Court of Appeal's reasons[22] should be interpreted as revealing a basic error. That basic error was said to be that the Court of Appeal allowed the lesser

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20 *Sentencing Act 1991* (Vic), s 6AAA.

21 *Crimes Act 1958* (Vic), s 6(1).

22 *Guode v The Queen* [2018] VSCA 205 at [61]-[69].

maximum penalty of five years' imprisonment for infanticide to "permeate or percolate" into the assessment of the sentences for the murder charges (which carried a maximum penalty of life imprisonment[23]) or attempted murder charge (which carried a maximum penalty of 25 years' imprisonment[24]). The Crown submitted that this error was exemplified by a process of reasoning that the sentences for murder and attempted murder should be viewed through the "prism" of the lower maximum of five years' imprisonment as the Victorian Law Reform Commission had recommended in a 2004 report[25]. Perhaps unsurprisingly, the Court of Appeal did not make any such elementary error expressly. The Crown's submission is effectively that this error should be inferred from those nine paragraphs.

41 Nothing in the nine paragraphs upon which the Crown relies provides any basis for concluding that the Court of Appeal made that basic error. No such submission had been made to the Court of Appeal. Preceding the nine paragraphs was an accurate summary of the submissions of the parties, containing no legal error. Following the nine paragraphs was a description of the essential reasoning of the Court of Appeal, containing no legal error. And within the nine paragraphs was the following: (i) a recitation of the history of infanticide that had been a matter of submission; (ii) the unimpeachably correct statement by the Court of Appeal that Ms Guode was to be sentenced according to what the law is, not what the Victorian Law Reform Commission thought desirable; (iii) a statement that the relevance of infanticide was that "all four offences were committed in circumstances arising from, or causally connected to, a disorder consequent upon [Ms Guode] recently having given birth to Bol"[26]; and (iv) a correct statement and application of the principles concerning mental impairment as a mitigating factor in instances of murder and attempted murder.

42 One of the basic principles to be applied in an appeal from the exercise of a sentencing discretion is that "[i]t must appear that some error has been made in exercising the discretion"[27]. Either *specific* error must be identified in the reasons given or error *inferred* from the result being, on the facts, "unreasonable or

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23 *Crimes Act 1958* (Vic), s 3.

24 *Crimes Act 1958* (Vic), ss 321P(1), 321P(1A).

25 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) at 266-267 [6.41].

26 *Guode v The Queen* [2018] VSCA 205 at [65], [67].

27 *House v The King* (1936) 55 CLR 499 at 505.

plainly unjust"[28]. The reasons a sentencing court gives must speak for themselves. Those reasons for sentence must be read, and read fairly, for what they say. Either the reasons, when read fairly, reveal that a wrong principle has been applied, or they do not.

43 On this appeal, a specific error was alleged, and that error does not appear in the reasons of the Court of Appeal. This Court should not intervene, on the application of the Crown, to increase a sentence passed or not disturbed by the intermediate court except to correct some identified error of principle. Here, there is no such error. The appeal should be dismissed.

The sentencing hearing and the role of infanticide

The offence of infanticide

44 The offence of infanticide is contained in s 6(1) of the *Crimes Act 1958* (Vic), which provides that the offence is committed in circumstances as follows:

> "If a woman carries out conduct that causes the death of her child in circumstances that would constitute murder and, at the time of carrying out the conduct, the balance of her mind was disturbed because of –
>
> (a) her not having fully recovered from the effect of giving birth to that child within the preceding 2 years; or
>
> (b) a disorder consequent on her giving birth to that child within the preceding 2 years –
>
> she is guilty of infanticide, and not of murder, and liable to level 6 imprisonment (5 years maximum)."

45 Although infanticide is a separate and wholly distinct offence from murder and attempted murder, there can be overlap in the underlying factual substratum relevant to those offences. The relevant overlap in this case concerned expert evidence from Dr Sullivan, a consultant forensic psychiatrist, that satisfied the requirement in s 6(1)(b) that the balance of Ms Guode's mind was disturbed because of a disorder consequent on her giving birth to a child in the previous two years.

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28 *House v The King* (1936) 55 CLR 499 at 505.

46 The evidence from Dr Sullivan was also relevant to the charges of murder and attempted murder. In *R v Verdins*[29], the Court of Appeal of the Supreme Court of Victoria reformulated the principles concerning the relevance of impaired mental functioning to sentencing. The Court of Appeal stated that there are at least six ways in which impaired mental functioning could be relevant. Relevantly to this appeal, these ways included:

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

47 For these reasons, when the Crown accepted Ms Guode's plea of guilty to infanticide, it must have been taken to accept Dr Sullivan's conclusion that the elements of s 6(1)(b) of the *Crimes Act* were satisfied by evidence that was also relevant to the *Verdins* factors.

Dr Sullivan's evidence

48 At Ms Guode's sentencing hearing, Dr Sullivan's evidence was that Ms Guode had a major depressive disorder linked with the birth of Bol in 2013.

49 In his first report, of 13 January 2017, Dr Sullivan described how the birth of Ms Guode's youngest child, Bol, had been complicated by post-partum haemorrhage which required a blood transfusion. Following Bol's birth,

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29 (2007) 16 VR 269 at 276 [32] (footnote omitted).

Ms Guode had "declined in functioning", including withdrawal from social events and a range of symptoms of depression including "disturbed sleep and appetite, weight loss, reduced energy and concentration, subjective confusion and reduced interest in usual activities, tearfulness, hopelessness and helplessness about her situation". Dr Sullivan described the clear sustaining factors for Ms Guode's depression: "the burden of looking after a large family with limited assistance; financial stressors; relational problems with the father of the younger children; stigma and persecution within her community; and ill-defined health problems". He said that the "onset and persistence of her depressive symptoms are consistent with a diagnosis of major depressive disorder, mild-moderate in severity, with somatic syndrome". Dr Sullivan concluded that at the time of the incident with which Ms Guode was charged she "was suffering from a depressive illness which was a consequence of having given birth to Bol within the preceding two years". He said that "the balance of her mind was disturbed by depression".

50 Dr Sullivan prepared a second report, dated 11 February 2017. In this second report, he repeated the conclusions from his first report and concluded that Ms Guode's

> "mental functioning at the time of the offences was impaired by clinically significant mood disorder, and that this was likely causally associated with her behaviour in driving into the lake. ... [D]epression impaired her capacity to exercise appropriate judgment, and her capacity to think clearly and make calm and rational choices. ... Ms Guode's capacity to appreciate the wrongfulness of her conduct at the time was impaired. The intent of the behaviour was obscured."

51 Dr Sullivan prepared a third report, dated 28 March 2017. In this third report, he described evidence from Ms Guode including that she had seen her husband shot dead in South Sudan and his body burned, that she had been raped until she was unconscious, and that upon escaping to northern Uganda (by walking for 18 days with her three young children) she had been treated in hospital including for knife wounds in her back and on her hand. Dr Sullivan referred to her evidence of flashbacks of these events and he concluded that there was evidence that, in addition to his other diagnoses, Ms Guode was also suffering from post-traumatic stress disorder, which was mild in severity, and that this diagnosis did not materially alter his previous consideration of the impairment of Ms Guode's mental functioning at the time of the events.

52 Dr Sullivan was cross-examined by the Crown. The cross-examination included questions about the history of infanticide and the recommendations made by the Victorian Law Reform Commission. Dr Sullivan testified:

> "[W]e have lots of hypotheses about why depression occurs and they involved biological, psychological, social explanations; none of those are satisfactory explanations for all of these conditions. I think that the Law Reform Commission in my opinion rightly pointed out that this is not just a single condition which is based upon immeasurable, biological or physiological variables and it's far more complex than that and most of us from our personal experience have known people who are depressed or perceive them all as different human beings. They've experienced depression as individually and differently as they are themselves individually different."

53 Dr Sullivan gave evidence that Ms Guode's conduct fell within the offence of infanticide in s 6(1)(b) of the *Crimes Act 1958* (Vic) because "the balance of her mind was disturbed because of ... a disorder consequent on her giving birth to that child within the preceding 2 years".

The sentencing by the primary judge

54 In sentencing Ms Guode, the primary judge described a submission by Ms Guode's counsel that it was through the "prism" of the charge of infanticide that the charges of murder and attempted murder should be viewed. The use of the word "prism" by counsel was unfortunate. However, in written submissions, Ms Guode's counsel explained the meaning of this reference:

> "This offending, though, must be seen contextually, through the prism of [Ms Guode's] poor mental health that is an essential part of the (accepted) plea to infanticide."

55 The primary judge referred to this submission about the "prism" of infanticide, and then said[30]:

> "As far as I know there has not been an occasion where a woman has been sentenced for infanticide and for other offences concerning the killing of children who do not fall within the legal definition. Clearly, your mental state as I conclude it to be, affects all four charges.
>
> Therefore, your plea to infanticide having been accepted and there being evidence to support a conclusion from Dr Sullivan, it also follows that several of the principles decided in *R v Verdins* apply in your case. There was a realistic connection between your mental state as Dr Sullivan

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30 *R v Guode* [2017] VSC 285 at [55]-[57] (footnote omitted).

> described it and your offending. There was no contention about that between your counsel and the prosecutor on the hearing of your plea."

56 It was common ground on the appeal to this Court that there was no error in these remarks by the primary judge.

57 On appeal to this Court, the Crown submitted that the primary judge erred by saying the symptoms of Ms Guode's mental impairment were "severe and had been for some time" in a description that was quoted by the Court of Appeal. It may not have been inapt to describe the consequences of a depression disorder that is "mild-moderate in severity" combined with post-traumatic stress disorder that is "mild in severity" as, in total, being "severe". In any event, in circumstances in which the quote had been relied upon by Ms Guode before the Court of Appeal without demur, and in which the Court of Appeal placed little reliance upon this description, this point was, at best, as the Crown accepted on this appeal, "not [a] big point[]".

The Court of Appeal hearing and decision

58 The essence of the submissions before the Court of Appeal on Ms Guode's behalf was as follows:

> "The law rightly allows ... for an understanding that the state of mind and motives of the killer are highly relevant. In circumstances where the child is under the age of two this can be reflected in the charge of infanticide. In circumstances where the children are over the age of two the law should not, and does not ignore the state of mind and motives of the offender. The disturbed mind necessarily is relevant to an assessment of the seriousness of the offending and other sentencing principles.
>
> The commission of the offences of murder with a disturbed mind, where [Ms Guode] could not cope with the extreme difficulties she encountered in trying to care for her children, provides a stark contrast to the motivations behind most crimes of murder."

59 There was, and could be, no suggestion on the appeal to this Court that this submission involved any error. Counsel for Ms Guode's argument was plain. The acceptance of a plea of guilty to infanticide necessarily involved an acceptance that, as s 6(1)(b) of the *Crimes Act* requires, "the balance of [Ms Guode's] mind was disturbed".

60 After summarising the submission from Ms Guode's counsel[31], and the submissions from the Crown[32], the Court of Appeal's reasoning, which spans 14 paragraphs, was entitled "Analysis"[33]. As mentioned above, the analysis of the Court of Appeal was preceded by an accurate summary of the submissions made on behalf of Ms Guode, which contained no error. There was also no suggestion of any error in the concluding paragraphs of the analysis of the Court of Appeal, which contained the Court's essential reasoning about why the primary judge's sentence had involved manifest error. Within those paragraphs the Court of Appeal said[34]:

> "[T]here is substance in the submissions of [Ms Guode's] counsel that sentences of 22 years' imprisonment on each of the two charges of murder are of the order of sentences generally reserved for cases unattended by the powerful mitigating features of this case. Had adequate weight been given to [Ms Guode's] mental condition and other factors in mitigation, we consider that significantly more lenient sentences would have been imposed on each of those charges. Indeed, in our view, the individual sentences on those charges are beyond the range of those open in the sound exercise of the sentencing discretion, and are manifestly excessive (as is the sentence on the charge of attempted murder)."

61 The Crown's submission on this appeal accepts that (i) the Court of Appeal preceded its analysis with an accurate summary of Ms Guode's submission, which summary contained no legal error, and (ii) the Court of Appeal concluded its analysis, containing its essential reasoning concerning manifest excess, without legal error. This is not a promising start for the Crown's submission that in between the legally correct commencement, conclusion and summary, the Court of Appeal made the fundamental error of viewing the offences of murder and attempted murder through the prism of infanticide.

62 Some of the analysis in the nine paragraphs that the Crown sought to impugn on this appeal was not strictly necessary for the resolution of the appeal to the Court of Appeal. But appellate legal reasoning is not always confined to those matters that are essential to the disposition of an appeal. Indeed, in some instances it is necessary for appellate judges to address submissions that are not

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31 *Guode v The Queen* [2018] VSCA 205 at [53]-[55].

32 *Guode v The Queen* [2018] VSCA 205 at [56]-[60].

33 *Guode v The Queen* [2018] VSCA 205 at [61]-[74].

34 *Guode v The Queen* [2018] VSCA 205 at [72].

dispositive of an appeal[35]. In many others it will be appropriate for appellate judges, in the exercise of judgment, to do so. In this case, involving the unique circumstance of overlapping charges of infanticide and murder, it was not inappropriate for the Court of Appeal to engage in nine paragraphs of discussion concerning this overlap. This is particularly so given that, as the Court of Appeal said at the commencement of those paragraphs, "[m]uch of the discussion in this case concerned the ramifications of joining charges of infanticide and murder (and attempted murder) on the indictment; and more particularly, whether the charges of murder needed to be viewed through the 'prism' of infanticide"[36].

63 Nothing in the nine paragraphs which the Crown sought to impugn on this appeal supports the Crown's submission that the Court of Appeal's analysis of the "discussion in this case" involved the acceptance of a proposition involving the basic error that the process of sentencing for murder or attempted murder in the case should be viewed through the "prism" of infanticide so that the maximum sentence for murder or attempted murder needed somehow to be understood or modified by reference to the lower maximum sentence for infanticide. This is for four reasons.

64 First, in the first of the nine paragraphs, after explaining that it was responding to the "discussion in this case", the Court of Appeal said[37]:

> "[T]he real relevance of the charge of infanticide lies not so much in its presence on the indictment vis-à-vis the charges of murder (and attempted murder), but in the prosecution's acceptance – in laying that charge and accepting a plea to it – that the balance of [Ms Guode's] mind was disturbed due to a depressive disorder consequent on her giving birth to the child Bol. That acceptance must, we consider, influence any assessment of [Ms Guode's] moral blameworthiness on all of the charges that she faced."

65 In the context discussed above, this statement must mean that by accepting Ms Guode's plea of guilty to infanticide the Crown must have been taken to have accepted the presence of Ms Guode's depressive disorder at the time of the events, a disorder which was relevant by the application of the *Verdins* factors to sentencing for the charges of murder and attempted murder.

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35 *Kuru v New South Wales* (2008) 236 CLR 1 at 6 [12].

36 *Guode v The Queen* [2018] VSCA 205 at [61].

37 *Guode v The Queen* [2018] VSCA 205 at [61].

66 Secondly, after three paragraphs of discussion about the history of infanticide and the Victorian Law Reform Commission report into defences to homicide, which reflected submissions made by the Crown on the appeal to it, the Court of Appeal rejected the very point, and the very error, that the Crown alleged in this Court that the Court of Appeal had made. The Court of Appeal said: "Of course, [Ms Guode] fell to be dealt with according to what the law is, not according to what the VLRC thought desirable"[38]. The reference to the Victorian Law Reform Commission report, which had been the subject of expert evidence and submissions, was understandable. Importantly, the Court of Appeal then reiterated the relevance of the Crown's acceptance of a plea of guilty to infanticide, namely a concession that the *Verdins* factors, to which the Court had referred earlier, would apply[39]:

> "It was thereby conceded that at the time that [Ms Guode] drove into the lake intending to kill the child Bol, 'the balance of her mind was disturbed because of … a disorder consequent on her giving birth to that child'."

67 Thirdly, in case there were any doubt, the Court of Appeal reiterated this point yet again[40] by reference to a decision of Bongiorno JA[41], who said of the relationship between the charge of infanticide and the charge of recklessly causing serious injury that, by the Crown's acceptance of the plea of guilty to infanticide, "it has acknowledged that both offences were committed in circumstances arising from or causally connected to her recently having given birth". The Court of Appeal said that the relevance of the charges of murder and attempted murder, "in light of the statutory definition of infanticide", applied in "alike vein" since the Crown's acceptance of the plea "acknowledged that all four offences were committed in circumstances arising from, or causally connected to, a disorder consequent upon [Ms Guode] recently having given birth to Bol"[42].

68 Fourthly, the last two of the nine paragraphs that the Crown sought to impugn involved a direct application of the relevant *Verdins* factors. The Court of Appeal explained that there was a causal link between the impairment of Ms Guode's mental functioning and her behaviour in driving her car with her

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38 *Guode v The Queen* [2018] VSCA 205 at [65].

39 *Guode v The Queen* [2018] VSCA 205 at [65].

40 *Guode v The Queen* [2018] VSCA 205 at [66].

41 *Director of Public Prosecutions v QPX* [2014] VSC 189 at [26].

42 *Guode v The Queen* [2018] VSCA 205 at [67].

children into the lake. The Court of Appeal considered the manner in which that impairment affected Ms Guode's capacity to make decisions. The Court of Appeal concluded, applying the *Verdins* factors, that Ms Guode's "moral culpability [was] significantly reduced", and "that both general deterrence and specific deterrence should be significantly moderated as sentencing considerations"[43]. Indeed, this explanation by the Court of Appeal is a complete answer to the submission that the Court had made the basic error which was attributed to it[44]:

> "Given the *state of the evidence*, it cannot be denied that [Ms Guode's] mental functioning at the relevant time was impaired by a *clinically significant mood disorder*, which very likely was causally associated with [Ms Guode's] behaviour in driving her children into the lake. *Major depression impaired [Ms Guode's] capacity* to exercise appropriate judgment, and her capacity to think clearly and make calm and rational choices. Indeed, the *uncontradicted psychiatric opinion* is that [Ms Guode's] capacity to appreciate the wrongfulness of her conduct at the time was impaired, and the intent of her behaviour was obscured." (emphasis added)

69 These four reasons are confined to an analysis of the Court of Appeal's reasons, including the Court of Appeal's description of the oral arguments to which it responded. There are difficulties in interpreting reasons for decision in light of oral statements to which the court does not refer.

70 However, even if significance were to be given to such oral statements of counsel, it is notable that after senior counsel for Ms Guode submitted that murder should be viewed through the lens of infanticide, Priest JA responded that "a better way" of looking at the issue was that "the diminution of [Ms Guode's] moral culpability is something that should apply across the board" and that "there's been an acceptance of a diminution of her moral culpability by the Crown in accepting and laying a charge of infanticide". Senior counsel for Ms Guode accepted this reformulation. Then, in an exchange with the Director of Public Prosecutions, Priest JA observed, and the Director accepted, that Parliament had not acted upon the recommendation of the Victorian Law Reform Commission. His Honour then said, in terms that summarise the point that we consider was made by the Court of Appeal in the nine relevant paragraphs:

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43 *Guode v The Queen* [2018] VSCA 205 at [68]-[69].

44 *Guode v The Queen* [2018] VSCA 205 at [68].

> "By accepting the plea to infanticide the Crown accepted, did it not, that the balance of [Ms Guode's] mind was disturbed and that, as you've pointed out, paragraph 89 of the prosecution opening, that she was suffering from a disorder, you can't then compartmentalise that, can you, and say I will only plead infanticide."

Conclusion

71 Before the primary judge it was common ground that there were no cases that involved fact patterns that were comparable to this case. The tragic and shocking events involved Ms Guode's gross breach of the trust reposed in her by her children, leading to the loss of life of three of her young and vulnerable children and nearly leading to the loss of life of another. On any view, the primary judge was required to sentence her to a lengthy term of imprisonment, particularly for the two charges of murder and the charge of attempted murder. However, there were also numerous factors raised on behalf of Ms Guode in mitigation including her background, the burden of her imprisonment, including protective custody and possible deportation at the conclusion of her term of imprisonment, the effect of prison on her mental health, and her rehabilitation prospects. Most significantly, however, the nature and effect of Ms Guode's mental impairment as contributing factors to her actions were the central reasons for the conclusion by the Court of Appeal that the primary judge's sentence had been manifestly excessive. The essence of the reasoning of the Court of Appeal was no more than to say that Ms Guode's mental impairment, necessarily accepted by the Crown in its acceptance of a plea of guilty to infanticide, was relevant to the sentencing exercise for all four of the offences of which Ms Guode was convicted, and not merely to infanticide. That reasoning was not in error.

72 The appeal must be dismissed.