

**Court of Criminal Appeal
Supreme Court
New South Wales**

Medium Neutral

Citation:

R v Wood [2014] NSWCCA 184

Hearing dates:

16/06/2014, 16/07/2014 and 18/07/2014
(supplementary written submissions)

Decision date:

19 September 2014

Jurisdiction:

Criminal

Before:

Price J
Garling J
Bellew J

Decision:

- (a) Leave granted to the respondent to appeal;
- (b) respondent's appeal dismissed;
- (c) Crown appeal allowed;
- (d) Sentence imposed in the District Court of New South Wales on 22 November 2013 is quashed;
- (e) In lieu thereof, sentence the respondent to imprisonment for 11 years 4 months consisting of a non-parole period of 8 years commencing on 10 November 2011, and expiring on 9 November 2019 with a balance of term of 3 years 4 months commencing on 10 November 2019 and expiring on 9 March 2023.
- (f) The earliest date that the respondent will be eligible for release on parole is 9 November 2019.

Catchwords:

CRIMINAL LAW - appeal - sentence - Crown appeal - respondent appeal - manslaughter - guilty plea - head sentence 6 years 8 months - non-parole period of 5 years

CRIMINAL LAW - appeal - sentence - Crown appeal - whether the sentencing Judge erred in his treatment of the sentencing statistics for manslaughter - sentencing Judge had 'particular regard' to sentencing statistics - sentencing Judge stated he was constrained to provide a sentence as guided by overall pattern of current sentencing -

error demonstrated - sentencing discretion neither constrained nor guided by overall pattern from statistical material for manslaughter

CRIMINAL LAW - appeal - sentence - Crown appeal - whether the sentencing Judge erred by failing to take into account the need for specific and general deterrence - no express reference - general deterrence - importance of general deterrence in offences involving gratuitous unprovoked violence - importance of general deterrence in offences involving violence towards the elderly - specific deterrence - lack of remorse - no finding that the respondent was unlikely to reoffend - importance of specific deterrence - error demonstrated

CRIMINAL LAW - appeal - sentence - Crown appeal - whether the sentencing Judge erred in failing to make a finding in accordance with *Veen v The Queen [No 2]* (1987 - 1988) 164 CLR 465 that the respondent's prior criminal record meant there was a greater need for retribution, deterrence and protection of society - prior criminal history - previous offence of similarity - no specific finding made as to the impact of prior history on the sentence - error demonstrated

CRIMINAL LAW - appeal - sentence - Crown appeal - whether the sentence was manifestly inadequate - serious offence of manslaughter - elderly victim - no provocation - high moral culpability - starting point of 7 years manifestly inadequate

CRIMINAL LAW - appeal - sentence - respondent appeal - whether the sentencing Judge erred in not finding that there were special circumstances permitting a variation in the statutory ratio between the head sentence and the non-parole period - whether first time in custody constituted a special circumstance - whether being on protection in custody constituted a special circumstance - discretionary findings - no error demonstrated

CRIMINAL LAW - appeal - sentence - re-sentencing - whether the Court ought exercise its residual discretion not to intervene - need for general deterrence when elderly or vulnerable people are

attacked in public places - public confidence in the
judicial system - starting point of 12 years
imprisonment - 5% discount for guilty plea - head
sentence of 11 years 4 months - special
circumstances - need for longer period of
supervision - non-parole period of 8 years

Legislation Cited:

Crimes (Domestic and Personal Violence) Act 2007
Crimes (Sentencing Procedure) Act 1999
Crimes Act 1900
Criminal Appeal Act 1912

Cases Cited:

Attorney General's Reference No 60 of 2009
(Appleby and Ors) [2009] EWCA Crim 2693; [2010]
2 Cr App R(S) 46
Clarke v R [2009] NSWCCA 49
Collier v R [2012] NSWCCA 213
Goundar v R [2012] NSWCCA 87
Green v The Queen; Quinn v The Queen [2011] HCA
49; (2011) 244 CLR 462
Hili v The Queen [2010] HCA 45; (2010) 242 CLR
520
House v The King (1936) 55 CLR 499
Hudd v Regina [2013] NSWCCA 57
Jiang v R [2010] NSWCCA 277
Lowndes v The Queen [1999] HCA 29; (1999) 195
CLR 665
McKenna v R [2007] NSWCCA 113
Muldrock v The Queen [2011] HCA 39; (2011) 244
CLR 120
R v BW [2011] NSWCCA 176
R v Carroll [2010] NSWCCA 55; (2010) 77 NSWLR 45
R v Lee [2000] NSWCCA 392
R v Loveridge [2014] NSWCCA 120
R v McNaughton [2006] NSWSCCA 242; ; (2006) 66
NSWLR 566
R v Simpson [2001] NSWCCA 534; (2001) 53
NSWLR 704
R v Vongsouvanh ; R v Namalauulu [2004] NSWCCA
158
Veen v The Queen [No 2] [1988] HCA 14; (1987 -
1988) 164 CLR 465

Category:

Sentence

Parties:

The Crown
Daniel Wood

Representation:

Counsel:
N Adams SC (Crown)
J Stratton SC (Applicant/Respondent)

Solicitors:
S Kavanagh (Public Prosecutions)
S E O'Connor (Legal Aid NSW)

File Number(s): 2010/133560
Decision under appeal 9101
Jurisdiction:
Date of Decision: 2013-11-22 00:00:00
Before: King SC DCJ
File Number(s): 2010/133560

JUDGMENT

- 1 **THE COURT:** The Crown appeals pursuant to s 5D *Criminal Appeal Act* 1912 against a sentence imposed upon Daniel Wood (the respondent) by King SC DCJ in the District Court at Sydney on 22 November 2013.
- 2 The respondent seeks leave to appeal in one respect against the sentence.
- 3 The respondent pleaded guilty on the first day of his trial to the charge that on 22 May 2010 he did feloniously slay Mary Touma. This is an offence of manslaughter by an unlawful and dangerous act contrary to s 18(1)(b) *Crimes Act* 1900 . The maximum penalty for manslaughter is 25 years imprisonment. There is no standard non-parole period.
- 4 Proceedings on sentence commenced on 19 April 2013 when the Crown bundle which included a statement of agreed facts, was tendered and marked as the first exhibit. They resumed before the Judge on 17 May 2013 when Sue Wood, the respondent's mother gave evidence and other material was tendered. Mr R Jankowski of counsel appeared on both occasions for the respondent. The proceedings were further adjourned to enable the Crown to obtain the sentencing remarks for some of the respondent's prior offences and for the respondent to file further material. On 16 August 2013, Mr Jankowski was granted leave to withdraw as he had no further instructions. On 4 October 2013, the Judge was told that the respondent wished to withdraw his plea.
- 5 On 15 November 2013, Ms C Davenport SC appeared for the respondent. Ms Davenport told the Judge that there would be no application to withdraw the plea. Further material was tendered and after addresses, the matter was adjourned for sentence on 22 November 2013.

- 6 After making an allowance of 5 per cent for the utilitarian value of the plea of guilty, the Judge sentenced the respondent to imprisonment with a non-parole period of 5 years to date from 10 November 2011 and to expire on 9 November 2016, with an additional term of 1 year 8 months to date from 10 November 2016 and to expire on 9 July 2018.
- 7 The Crown's amended notice of appeal identifies the following grounds:
- "Ground 1: His Honour erred in his treatment of the sentencing statistics for manslaughter.
- Ground 2: His Honour erred by failing to take into account the need for general deterrence.
- Ground 3: His Honour erred by failing to take into account the need for specific deterrence of the respondent.
- Ground 4: His Honour erred in failing to make a finding in accordance with *Veen (No 2)* (1987-1988) 164 CLR 465 that the respondent's prior criminal record meant there was a greater need for retribution, deterrence and protection of society.
- Ground 5: The sentence is manifestly inadequate."
- 8 The respondent seeks leave to appeal against the severity of the sentence upon the single ground that:
- "The learned sentencing Judge erred in not finding that there were 'special circumstances' permitting a variation in the statutory ratio between the head sentence and the non-parole period."

FURTHER SUBMISSIONS IN THE APPEAL

- 9 At the conclusion of oral submissions in this Court, the parties were granted leave to file and serve supplementary written submissions addressing the then pending judgment in the Crown appeal of *R v Loveridge* within 14 days of the delivery of that judgment. Judgment was delivered on 4 July 2014: *R v Loveridge* [2014] NSWCCA 120.
- 10 Written submissions were subsequently received from both parties. As emphasised by the Crown and the respondent, the decision in *Loveridge* was not a guideline judgment. However, the judgment raises matters of legal principle that are of relevance to this appeal.

FACTS

- 11 During the sentencing proceedings, an agreed statement of facts was tendered which the Judge recited in his remarks on sentence. A convenient summary of the facts is included in the Crown's written submissions :

"In short, the deceased, Mrs Touma (aged 71 years) left her son's delicatessen business ... at Rosebery shortly after 3:30pm on Friday, 21 May 2010 to walk to her local shopping centre to pick up a few things before walking home. The respondent (then aged 30) was riding his push-bike along the same footpath on Gardeners Road, Rosebery when he came upon the deceased who was walking in the same (easterly) direction on the footpath.

Whilst approaching the deceased from behind the respondent was heard by witnesses to be yelling at the deceased. He then rode past the deceased (without incident). After overtaking her, the respondent was seen to drop his bike to the ground about 10 metres further down the road, and walk back to the deceased whilst loudly swearing at her and using aggressive words. At that point the deceased had stopped walking and was just standing on the footpath.

The respondent then pushed the deceased with two open hands to her upper chest area, causing her to immediately fall backwards, striking the back of her head on the concrete footpath.

The respondent walked back to his bike, leaving the deceased on the ground. Whilst walking back he was asked by a witness what had happened and the respondent replied, '*The bitch got in my way*'.

The respondent then got on his bike and rode off continuing on his easterly path.

Witnesses went to the aid of the deceased, but she was unable to speak, unable to get up without assistance and vomited on several occasions. She was also bleeding from the nose. She lapsed into unconsciousness and was taken to hospital by ambulance but died the following day.

Neurosurgeons opined that she had suffered "unsurvivable brain injury". Post mortem examination determined the cause of death as blunt force head injury. She had sustained a large area of bruising on the middle of the back of her head, consistent with having fallen backwards and striking the back of her head. There were extensive fractures of both orbital grooves in her head; a fractured skull at the back of her head; two bruises on her buttocks; and small abrasions on her hands."

- 12 It was an agreed fact that the respondent was under the influence of alcohol that he had consumed earlier on that day.

SUBJECTIVE CIRCUMSTANCES

- 13 The respondent who is of Aboriginal and Irish descent was born on 17 November 1979 and was 30 years old at the time of the offence. The respondent's mother gave evidence before the Judge and reports from Dr Olav Nielssen, a psychiatrist, and Tim Watson-Munro, a psychologist, were tendered together with a pre-sentence report and two character references.
- 14 The Judge extensively considered the respondent's subjective case in his sentencing remarks. The respondent's parents separated when he was young. The high schools he attended included Chevalier College where he was a boarder. The respondent's mother in her evidence said her son had been subject to intense bullying that included racist remarks while at the college but he was a good student who obtained the Higher School Certificate. The respondent's employment after he left school included working as a prison officer with the Department of Corrective Services for about four years. The

respondent told Dr Nielssen that he had been employed for 90 per cent of the time since leaving school and his employment at the time of the offence was delivering junk mail.

- 15 Dr Nielssen reported that the respondent began drinking alcohol at around the age of 18 and said that his pattern had become one of "*binge drinking*" over several days, followed by a week or two of abstinence. He confirmed that "*complications of alcohol use were the role of alcohol in two of the three confrontations with the police, and the high range drinking charge*".
- 16 Dr Nielssen made a diagnosis of recurrent depressive illness in remission, possible bipolar mood disorder, and alcohol abuse disorder in remission. Dr Nielssen reported that the respondent had an episode of depression in the months before the offence but by the time of the offence, he had recovered and was not affected by persisting symptoms of depression.
- 17 Mr Watson-Munro noted the respondent's complex clinical history in the context of a complicated family dynamic, an absence of contact with his natural father until the age of 18 years with him consequently being deprived of his father's support during his difficult adolescence at Chevalier where he was a boarder and the description of a protracted Depressive Illness and an Anxiety Disorder according to DSM-IV TR criteria. Mr Watson-Munro observed that the respondent had also self-medicated over the years and since about the age of 21 to 22 his primary drug of addiction had been alcohol. He was of the opinion that all of these issues had contributed to the respondent's offending over the years including the current matter before the court.
- 18 Mr Watson-Munro reported the respondent's description of having a "*nervous breakdown*" which led to him leaving his job as a prison officer. He noted that the respondent's depression and anxiety had escalated whilst in total isolation on remand due to his former employment. He reported that the respondent had been prescribed Zoloft (200 milligrams) but required more intensive treatment than merely taking anti-depressant drugs. Mr Watson-Munro stated that the respondent expressed considerable remorse for his actions which he believed to be genuine. The psychologist considered that the respondent would benefit from supportive psychotherapy, in addition to Cognitive Behaviour Therapy focussed upon impulse control training and systematic desensitisation for his anxiety.
- 19 Graeme Banks, the author of the Probation and Parole Pre-Sentence Report, noted that the respondent appeared reluctant to discuss any details pertaining to the offence and it had been difficult to ascertain his attitude to it. Mr Banks stated that the respondent was a 33 year old man who appeared to have benefited from a supportive upbringing despite the absence of a fraternal influence in his formative years. Mr Banks observed that the respondent

appeared to have been well educated completing his schooling to Year 12 level and undertaking further studies at tertiary level. Mr Banks recounted that the respondent indicated he had been diagnosed with depression and anxiety and was currently prescribed Zoloft 200mg daily.

- 20 The references that were tendered include a reference from the respondent's most recent employer, Richard Lord, who was the General Manager of Macarthur Pamphlet Distributors. Mr Lord wrote that the respondent had been working for the company since December 2012 "*doing letterbox deliveries*". Mr Lord described the respondent as being friendly, reliable and punctual and said that he worked unsupervised. Also included in the material before the Judge was a Certificate of Service from the Department of Corrective Services which stated that the respondent had been employed by that Department from 3 July 2000 to 1 March 2004, when he had been terminated.
- 21 The respondent's prior criminal history includes three counts of assaulting an officer in the execution of his duty and one count of common assault in 2003 for which he was fined; assault occasioning actual bodily harm in 2005 for which he was sentenced to 9 months imprisonment which was suspended upon his entering into a good behaviour bond under s 12 *Crimes (Sentencing Procedure) Act* 1999; resisting an officer which attracted a fine; wilfully obstructing an officer in the execution of his duty in 2006 for which he was sentenced to 9 months imprisonment which was suspended upon his entering into a good behaviour bond under s 12 *Crimes (Sentencing Procedure) Act*; three counts of assaulting an officer in the execution of his duty and resisting an officer in 2007, with 12 month good behaviour bonds being imposed under s 9 *Crimes (Sentencing Procedure) Act*.
- 22 His record also disclosed an offence of driving with high range PCA in January 2009. He was ordered to perform 350 hours community service by the Local Court at Walgett for this offence on 28 July 2009.
- 23 The Crown tendered the facts of some of the respondent's prior offences. The assault occasioning actual bodily harm in 2005 involved the respondent who was riding a bicycle overtaking very closely the victim who was standing on a railway platform. The respondent was questioned by the victim about his conduct. After maintaining he had not done anything wrong, the respondent punched the victim in the face a number of times. He then rode off. The victim suffered cuts to the face, severe swelling to the left side of the face and a broken nose.

SOME FINDINGS BY THE JUDGE

- 24 Having viewed the CCTV footage, the Judge found that as the respondent approached the deceased from the rear, it is likely he would have been aware that she was an elderly female. His Honour said that if the respondent did not realise that fact at that point "*it must have been patently evident to him when he alighted from his bicycle and walked the ten metres back to confront her*".
- 25 The Judge's remarks included that the deceased was an elderly, vulnerable female going about her ordinary daily life, who was entitled to expect that she would not be confronted or assaulted in the manner that she was. The Judge found that the respondent's conduct was unprovoked, callous and gratuitous and of such sufficient force that it caused the deceased to fall backwards and strike her head on the concrete.
- 26 The Judge noted that
- "[t]here have been a significant number of matters before the courts in recent years involving injuries, whether it be from a punch or some other particular application of force, which has caused victims to fall to the ground and hit their heads, occasioning such significant injuries that they have died either then or later".
- 27 His Honour observed that
- "coverage of those matters by all forms of the media for such a protracted period means that any reasonable person must have realised that the act of applying sufficient force to a 71 year old female that would cause her to fall backwards was exposing her to an appreciable risk of serious injury and more serious consequences, as indeed followed".
- 28 His Honour remarked that the agreed facts referred to the respondent as being "*under the influence of alcohol that he had consumed earlier on that day*." His Honour referred to a passage in Dr Nielssen's report, in which he relates being told by the respondent that he "*was going back home to get drunk but [he] hadn't started yet*." The Judge said that according to that statement, the respondent was not likely to be affected by alcohol, however, he was bound by the agreed fact. His Honour referred to the CCTV footage of the respondent riding his bicycle before the offence and noted that the respondent was "*entirely capable of riding a bicycle that day*".
- 29 The Judge determined that the respondent had a high level of moral culpability in relation to his conduct which was not diminished in any way by the agreed fact that the respondent had consumed some unknown quantity of alcohol prior to the offence.
- 30 His Honour found as an aggravating factor that the offence was committed against a vulnerable 71 year-old female. He determined that there were no underlying mental health, alcohol or other issues that were in any way relevant to cause or reduce the respondent's moral culpability for a very serious incident of violence resulting in the deceased's death.

31 His Honour referred to the Victim Impact Statement that was read to the court by Mrs Soraya Thomas, a daughter of the deceased. He said that

"at 71, [Mrs Touma] was entitled to expect that she might live out the balance of her life with the comfort and support of her extended family for whatever period remained to her" .

32 The Judge said that Mr Watson-Munro's report indicated

"that despite [the respondent's] unhappy experience of bullying at Chevalier College, the [respondent] had obtained an entry score of 64 which enabled him to matriculate to the University of Western Sydney..." (AB 27).

33 In referring to Mr Watson-Munro's report of the respondent's expression of remorse, the Judge observed that the psychologist did not provide information as to how the respondent expressed "*considerable remorse*." The Judge said that the court was

"not in a position in the absence of appropriate information to make any assessment for itself as to whether the [respondent] was at the time genuinely remorseful".

34 The Judge said that a further difficulty with the issue of remorse was that the respondent did not enter a guilty plea until the first day of the trial, which was some two and a half years from the commission of the offence and had subsequently indicated that he wished to withdraw the plea. His Honour said that although the respondent did not eventually make such an application, this indication was inconsistent with genuine remorse.

THE RESPONDENT'S APPEAL

35 It is convenient to first consider the respondent's appeal which consists of a sole ground, namely:

"The learned sentencing Judge erred in not finding that there were 'special circumstances' permitting a variation in the statutory ratio between the head sentence and the non-parole period."

Argument

36 The respondent submitted that there were a number of matters which could constitute special circumstances permitting a variation between the non-parole period and the head sentence. It was the respondent's first time in custody and there was also evidence that he had been on protection from 20 May 2013 which could be considered a special circumstance.

- 37 The Crown argued that the Judge considered the issue of special circumstances which was a discretionary matter. The Crown contended that the Judge was not obliged to find special circumstances neither for the reasons advanced nor for any other reason, and the Judge's discretion had not miscarried.

Consideration

- 38 During his remarks on sentence, the Judge gave careful consideration to the respondent's custodial conditions.

- 39 His Honour observed:

"The only information before the Court as to the condition or conditions in which the offender has served his time in protective custody is only those matters referred to by way of documentation provided. They do not evidence any harsher form of custody to being in the general population of a prison other than, clearly, the lack of association with other prisoners and the opportunity to mix with other prisoners, certainly when at the PRNA level.

Harsher conditions to serving a sentence is a matter in respect of which the onus is on the offender to prove that the conditions are harsher. Except to the extent that I have referred to his more solitary existence, there is no evidence that protection is a harsher form of custody in respect of this offender. Indeed, being in protection may in fact alleviate general stresses and anxieties that would occur for all prisoners within the general prison population."

- 40 His Honour then went on to take into account the limited circumstances of isolation that he had referred to in determining the length of the sentence.
- 41 Later on in his sentencing remarks, the Judge said that he had considered the question of special circumstances but did not find any.
- 42 It is well established that care should be avoided in counting any hardship of protective custody as a reason for discounting the total sentence and again as a factor establishing special circumstances: *R v Lee* [2000] NSWCCA 392 at [80].
- 43 The respondent bore the onus of establishing that his custodial conditions were more onerous than usual. The Judge took into account the respondent's more solitary existence which he found proved in fixing the length of the sentence. It would have been an error for the Judge to take this factor into account once again in finding special circumstances.
- 44 As to the respondent's first time in custody, it has often been said that this factor alone would not ordinarily constitute special circumstances: *Collier v R* [2012] NSWCCA 213 at [36]; *Clarke v R* [2009] NSWCCA 49 at [12]. In any event, a finding of special circumstances is a discretionary finding of fact and this Court will be slow to intervene: *Jiang v R* [2010] NSWCCA 277 at [83]; *Hudd v Regina* [2013] NSWCCA 57 at [171].

- 45 In the present case, no error in his Honour's approach or in the exercise of his discretion has been demonstrated. This ground of appeal fails. There is no other basis for the Court to uphold the respondent's appeal. It must be dismissed.

THE CROWN APPEAL

- 46 We turn now to the Crown appeal.

Ground 1: His Honour erred in his treatment of the sentencing statistics for manslaughter.

Argument

- 47 The Crown submitted that the Judge erred by treating the sentencing statistics for manslaughter as constraining him in the exercise of his sentencing discretion. The Crown contended that his Honour failed to recognise the extremely limited assistance that could be given by the statistics he had obtained. Instead, his Honour expressly stated that he "*particularly had regard*" to what was shown in them. The Crown further referred to the Judge's remarks "*but the Court is also constrained to provide a sentence as guided by the overall pattern of current sentencing*". The Crown noted that the undiscounted starting point of the sentence was 7 years, which happened to correlate with the Judge's observation that for all offenders the statistics showed a mean sentence of 7 years.
- 48 It was submitted by the Crown that his Honour's erroneous treatment of the manslaughter statistics provides some explanation as to how a manifestly inadequate sentence was ultimately imposed.
- 49 The respondent contended that the Judge was clearly aware of the limitations of Judicial Commission statistics when he referred to them as a "*blunt instrument*". The respondent submitted that in a Crown appeal, the relevant issue was whether or not the sentence is consistent with an existing pattern of sentencing. The respondent argued that there is a very well recognised group of cases where a single punch or push has resulted in a death. Those cases were generally characterised by the fact that there is no evidence of an intention to kill or to inflict grievous bodily harm. The respondent submitted that the Judge was not in error in taking into account sentencing statistics for manslaughter in considering the appropriate range of sentence for this offence.

Consideration

50 The Crown's complaint focuses on the Judge's treatment of the Judicial Commission sentencing statistics and not upon his consideration of decisions in previous cases which he correctly found to be of limited assistance "*as each case turns on its own individual facts*".

51 When referring to the Judicial Commission sentencing statistics his Honour's remarks included:

"I have referred myself to the statistics available through the Judicial Information Research System in respect of sentences imposed for manslaughter. It has often been said, particularly in the Court of Criminal Appeal, *that the statistics are a blunt instrument, but they do at least provide an overview of sentencing ranges*. One of the reasons why statistics are a blunt instrument is that they cannot be researched to determine what effect varying degrees of utility discounts may have had, or varying degrees of discounts given for assistance may have had. However, in respect of the 189 instances recorded in the statistics from April 2006 to March 2013, in respect of all offenders, 80% of offenders dealt with for the term of the sentence received a full term of four and a half years to ten years. *The mean was seven years.*" (italics added)

52 And further:

"In determining sentence, a Court must have regard to the maximum term that is provided by the legislation, *but the Court is also constrained to provide a sentence as guided by the overall pattern of current sentencing*. It is for that reason that I have particularly had regard to the overall pattern as shown from the available statistics". (Italics added).

53 In the passage of the sentencing remarks quoted at [51] above his Honour appears to recognise some of the limitations in use that can be made of Judicial Commission sentencing statistics. In *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520 the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) stated at [48] that sentencing consistency:

"... is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were."

54 However, it is our view that his Honour was incorrect when he said in the passage quoted at [52] above that "*the Court [was] also constrained to provide a sentence as guided by the overall pattern of current sentencing*." Sentencing statistics do not act as a restraint in sentencing an offender but in appropriate cases may act as a yardstick against which a proposed sentence may be examined: *Barbaro v The Queen*; *Zirilli v The Queen* [2014] HCA 2 at [41].

55 Contrary to the respondent's submission, we do not consider that there is a well recognised group of cases where a single punch or push has resulted in death. As was said by the Court (Bathurst CJ, Johnson and RA Hulme JJ) in *R v*

Loveridge [2014] NSWCCA 120 at [226] - [227]:

"There is, in truth, no range of sentences for offences of manslaughter which may be said to have a single common component relating to the mechanism of death (such as the victim's head striking the ground after a blow to the head). To the same effect, there is no range of sentences for manslaughter offences said to have been committed by use of a knife or a rock or some other implement.

The myriad circumstances of manslaughter offences render it unhelpful to speak in terms of a range of sentences, or tariff, for a particular form of manslaughter. Gleeson CJ made this clear in *R v Blackledge* (see [193] above), in a passage cited regularly in cases such as *R v Hoerler* [2004] NSWCCA 184; 147 A Crim R 520 at 530 [40]."

- 56 The limited assistance that may be derived from Judicial Commission sentencing statistics is diminished in the case of manslaughter because the offence covers such a wide variety of circumstances. The use of statistical information in manslaughter cases has been described as not illuminating in any decisive manner the decision to be reached: *R v BW* [2011] NSWCCA 176 at [61]; *Goundar v R* [2012] NSWCCA 87 at [44] - [45]. Reliance on such data has also been said in manslaughter cases to be "*unhelpful and even dangerous*": *R v Vongsouvanh*; *R v Namalauulu* [2004] NSWCCA 158 at [REF _Ref398109954 \r \h 38].
- 57 In the present case, the Judge analysed the sentencing statistics for manslaughter and arrived at a mean of 7 years for a full term of imprisonment. The starting point of the sentence that his Honour ultimately imposed was 7 years after allowing a discount of 5 per cent for the plea of guilty.
- 58 In our view, the particular regard that his Honour had to the Judicial Commission sentencing statistics was an error. His sentencing discretion was neither constrained nor guided by an overall pattern shown from the statistical material for manslaughter.
- 59 We consider that sentencing statistics for manslaughter offences are of such limited assistance to sentencing Judges that they should be avoided.
- 60 We would uphold Ground 1 of the appeal.

Ground 2: His Honour erred by failing to take into account the need for general deterrence.

Ground 3: Honour erred by failing to take into account the need for specific deterrence of the respondent.

Argument

- 61 It is convenient to deal with these grounds of appeal together. The Crown contended that at no point in his sentencing remarks did the Judge refer to the need for general deterrence and that the bare reference to s 3A *Crimes (Sentencing Procedure) Act* was insufficient in the circumstances of the case. The Crown submitted that the Judge did not give any weight to general deterrence, nor did his Honour recognise the need for general deterrence.
- 62 The Crown pointed out that the Judge did not refer to the need for specific deterrence which the Crown said was a very significant consideration. The Crown referred to the respondent's lack of remorse, to his history of reacting to situations with aggression and violence, and to his well established alcohol consumption issues.
- 63 The respondent argued that the lack of reference by the Judge to general and specific deterrence did not mean that it had not been taken into account. The respondent referred to his Honour's regard to s 3A which includes both specific and general deterrence. The respondent contended that the undiscounted starting point of the sentence was towards the top of the range for an offence of this kind. The respondent submitted that if that argument was accepted, it provided further support that his Honour took into account general and specific deterrence.
- 64 When referring to the decision in *Loveridge* on the issues of specific and general deterrence, the respondent submitted that the remarks of the Court were directed to 'alcohol-fuelled violence' and in the present appeal the Judge had placed considerable weight on the respondent's history of violence.

Consideration

- 65 This Court has observed on many occasions that 'single-blow' manslaughter cases (by unlawful and dangerous act) are not rare in this State and need to be addressed by sentences that reflect the element of general deterrence: *R v Carroll* [2010] NSWCCA 55; (2010) 77 NSWLR 45; *Loveridge* at [103].
- 66 The need for general deterrence is not confined to alcohol fuelled violence but includes gratuitous, unprovoked violence on the streets, whether in city centres, or residential areas. People have the right to expect that their streets will be safe: *Attorney General's Reference No 60 of 2009 (Appleby and Ors)* [2009] EWCA Crim 2693; [2010] 2 Cr App R(S) 46 cited with favour in *Loveridge* at [209]-[210]; *R v McKenna* [2007] NSWCCA 113 at [2].

- 67 This expectation gathers importance as the number of aged and vulnerable persons in our community increases. It must be clearly understood that violence towards the elderly will not be tolerated. In the circumstances of the present offence, a strong element of general deterrence was called for.
- 68 His Honour did not expressly refer to general and specific deterrence but stated that "... *he must have regard to s 3A of the Crimes (Sentencing Procedure) Act 1999*".
- 69 Section 3A relevantly includes as a purpose of sentencing:
- "(b) to prevent crime by deterring the offender and other persons from committing similar offences.
- ...
- (f) to denounce the conduct of the offender."
- 70 Although it appears that his Honour acknowledged the principle of general deterrence in a general way by referring to s 3A, the sentence, in our view, did not make any allowance for this significant sentencing principle.
- 71 As to the issue of specific deterrence, the Judge was unable to conclude that the respondent was remorseful or contrite. No finding was made that the respondent was unlikely to re-offend or had good prospects of rehabilitation. The respondent had callously walked away from Mrs Touma after she struck her head on the ground and he told a witness that "*the bitch got in my way*". In these circumstances, specific deterrence could not be ignored. The impact that the respondent's prior criminal history might have on specific deterrence is considered in Ground 4.
- 72 The facts of this offence required the Judge to emphasise the importance of general and specific deterrence, rather than make an oblique reference to s 3A.
- 73 In our view, the sentence imposed does not reflect the significance that general and specific deterrence ought to have played in the proper exercise of his Honour's sentencing discretion. The Crown has established error in accordance with the principles in *House v The King* (1936) 55 CLR 499 at 504-505 as his Honour failed to properly take into account these material considerations.
- 74 We would uphold Grounds 2 and 3 of the appeal.

Ground 4: His Honour erred in failing to make a finding in accordance with *Veen (No 2)* (1987-1988) 164 CLR 465 that the respondent's prior

criminal record meant there was a greater need for retribution, deterrence and protection of society.

Argument

- 75 The Crown submitted that the Judge had before him the facts of the respondent's prior violent offending and although he noted the Crown's submission in accordance with *Veen v The Queen [No 2]* [1988] HCA 14; (1987 - 1988) 164 CLR 465 in his sentencing remarks, the Crown complained that his Honour erred by not making a finding that as a consequence there was a greater need for retribution, deterrence and protection of the community. It is the Crown case that the Judge did not give any weight to this consideration.
- 76 The respondent contended that his prior history of offences involving personal violence needed to be kept in perspective. None of the offences carried a maximum penalty of over 5 years, all had been dealt with in the Local Court and full-time custodial sentences had not been imposed. The respondent submitted that the Judge's sentencing remarks indicated that the Judge had taken into account the respondent's prior criminal history and the weight his Honour gave to factors such as his criminal record was a matter of discretion.

Consideration

- 77 Section 21A(2) *Crimes (Sentencing Procedure) Act* provides that an aggravating factor to be taken into account in determining the appropriate sentence for an offence includes:
- "(d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences)"
- 78 Under s 21A(6), a "serious personal violence offence" is a personal violence offence within the meaning of s 4 *Crimes (Domestic and Personal Violence) Act* 2007 that is punishable by imprisonment for life or a term of 5 years or more. None of the respondent's prior offences fell within the definition of a serious personal violence offence.
- 79 Nevertheless, his Honour was entitled to have regard to the respondent's history of criminal offending so as to give more weight to retribution, personal deterrence and the protection of the community than would be the case if such a record did not exist: *Veen (No 2)*; *R v McNaughton* [2006] NSWCCA 242; (2006) 66 NSWLR 566.

80 During his sentencing remarks the Judge said that the respondent's past criminal record "*certainly indicates past belligerence, aggression and violence*". When referring to the offence of assault occasioning actual bodily harm in 2005, his Honour said:

"The facts on one previous occasion bear some similarity to the current offence in that the [respondent], at a railway station while taking his bicycle over an overpass, proceeded for no apparent reason to assault a traveller who had alighted from the train, the assault causing a broken nose."

81 As the Judge said, the respondent's assault on the railway traveller bore similarity to the assault upon Mrs Touma. Both were strangers to him and were assaulted for no apparent reason. Each of the victims were in public places and were entitled to expect that they would be safe from unprovoked violence.

82 Another matter that was relevant to the issue of specific deterrence was that the respondent had only completed the 350 hour community service order for the high range drink driving offence committed at Walgett in 2009 shortly before he committed the present offence.

83 His Honour, however, did not make a specific finding as to the impact that the respondent's prior criminal record had on the sentence. This fortifies our view that his Honour did not have proper regard to specific deterrence. The offender's prior offending provided a further reason for the Judge to emphasise the importance of specific deterrence in the sentence.

84 We would uphold Ground 4 of the appeal.

Ground 5: The sentence is manifestly inadequate

Argument

85 The Crown submitted that the starting point of 7 years for manslaughter in the aggravating circumstance of it being committed upon an obviously elderly victim was manifestly inadequate compared with the maximum penalty of 25 years. The Crown argued that there was little operating in the respondent's favour and that general and specific deterrence were key considerations that needed to be reflected in the sentence. It was contended that the errors identified in the grounds of appeal, both individually and in combination contributed to the manifest inadequacy of the sentence.

86 The respondent referred to the starting point of the head sentence in the order of 7 years and to what were said to be reports of similar cases that had been provided to the Judge. Reference was also made to the Judicial Commission sentencing statistics with the median sentence being 7 years. The respondent

submitted that the head sentence was at the high end of the pattern of sentences and the Crown had not established that the respondent's sentence was 'unreasonable or plainly unjust.' The respondent contended that the decision in *Loveridge* does not provide support for the Crown's complaint of manifest inadequacy as there were present in that case a large number of aggravating factors which did not apply to the present appeal, apart from the respondent's prior history of violence.

Consideration

- 87 As previously stated, the other sentencing decisions and Judicial Commission sentencing statistics are of little assistance in this case.
- 88 The circumstances surrounding Mrs Touma's death make this a serious offence of manslaughter. More than a push was involved. The respondent rode past Mrs Touma on his bicycle without incident and after overtaking her, dropped his bicycle to the ground. He walked a distance of about ten metres back to Mrs Touma whilst loudly swearing at her and using aggressive words. He knew that she was an elderly woman who had done nothing to provoke his aggression.
- 89 The respondent's conduct must have terrified Mrs Touma, who had stopped walking. The respondent then pushed her with two open hands to the upper chest area, causing her immediately to fall to the ground. He callously walked away and falsely blamed Mrs Touma for his actions.
- 90 Although the Judge correctly found that the respondent's moral culpability was high, we do not consider that either the objective gravity of the offence or the respondent's high moral culpability is adequately reflected in the sentence. Furthermore, the principles of general and specific deterrence were not properly taken into account.
- 91 In the circumstances of this offence we are satisfied that the starting point of 7 years imposed was manifestly inadequate. This conclusion is not founded upon the view that if any of us had been the sentencing Judge, a greater sentence would have been imposed in the exercise of the sentencing discretion, *Lowndes v The Queen* [1999] HCA 29; (1999) 195 CLR 665 at 671-672. The Crown has established each of the grounds of appeal including ground 5.

Re-sentence?

- 92 The question remains as to whether the Court should intervene and re-sentence the respondent. There is a residual discretion to decline to interfere even though the sentence is manifestly inadequate.

93 In *Green v The Queen; Quinn v The Queen* [2011] HCA 49; (2011) 244 CLR 462, the majority (French CJ, Crennan and Kiefel JJ) observed at [1] that the primary purpose of Crown appeals was to "*lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons*". Their Honours at [36] described the primary purpose of laying down principles as a "limiting purpose" and said:

"It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion."

94 Their Honours observed at [43] that other circumstances may combine to produce injustice if a Crown Appeal is allowed. Their Honour's said at [43]:

"They include delay in the hearing and determination of the appeal, the imminent or past occurrence of the respondent's release on parole or unconditionally, and the effect of the re-sentencing on progress towards the respondent's rehabilitation. They are relevant to the exercise of the residual discretion. The guidance afforded to sentencing judges by allowing the appeal should not come at too high a cost in terms of justice to the individual."

95 The Crown submitted that in the present case, the circumstances do not require the Court in the exercise of its residual discretion to allow a manifestly inadequate sentence to stand. The Crown said that public interest in the proper administration of criminal justice requires that the Court intervene. Another submission was that the case potentially fulfills the criteria of laying down important principles for the governance and guidance of courts with respect to violence committed against members of the public in public places, particularly where members of the public are vulnerable by reason of age or for other reasons.

96 No specific submission was made on the respondent's behalf as to the exercise of the Court's residual discretion but three affidavits were tendered in the event of re-sentence.

97 In an affidavit affirmed on 30 May 2014, the respondent refers to the uncertainty that he has experienced since hearing of the Crown's appeal. He states that when he was in the Cooma Correctional Centre he was doing really well and had been taken off the anti-depressant Zoloft. However, in February this year, he was starting not to feel good and had requested to go back on Zoloft, but was waiting to see the psychiatrist. He said that he was feeling manic and could not concentrate.

98 The respondent recounts that he signed himself into protection because of a threatening letter found in his cell at the Cooma Correctional Centre and was placed in segregation at the Goulburn Correctional Centre until he was transferred to Bathurst. He refers to the support of his mother, his family and

friends at Walgett and his feelings of loneliness as his family in Walgett find it too far to travel. The respondent has recently applied to the University of Southern Queensland through the Australian Indigenous Knowledge program to study Geology or Geography in the Semester 2 intake but says that he will need to be on medication before the course starts.

- 99 Sue Wood, the respondent's mother, in an affidavit affirmed on 11 June 2014 states that she continues to regularly have contact with her son either by prison visits, telephone conversations or letters. She refers to the deterioration in her son's mental health after the Crown appeal. She observed that he is depressed, the sparkle in his eyes has gone, and he has lost weight.
- 100 Annexed to Vanessa Carmody-Smith's affidavit affirmed 6 June 2014 is a letter from the University of Western Sydney as to the respondent's University attendance in 1998 when he was enrolled in the Bachelor of Arts - Communication Studies Course and a copy of an email confirming the assessment of the respondent's application at the University of Southern Queensland for Semester 2. Ms Carmody-Smith is the applicant's solicitor.
- 101 In our view, the proper administration of justice does not support the exercise of the residual discretion. Guidance to sentencing judges that may be provided by this decision includes the need for general deterrence when elderly or vulnerable persons are attacked in public places. Public confidence in the justice system would not be served by allowing a sentence that was manifestly inadequate to stand nor would the requirement for general and specific deterrence.
- 102 We have regard to the effect that the Crown appeal has had particularly on the mental health of the respondent but there has been no delay on the part of the Crown in prosecuting the appeal. We are satisfied that the residual discretion should not be exercised and the respondent should be re-sentenced.
- 103 The maximum penalty for manslaughter is 25 years imprisonment. The maximum penalty is a legislative guidepost, and serves as an indication of the relative seriousness of the offence: *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120.
- 104 For the purpose of re-sentencing, the objective and subjective considerations to be taken into account are clear from what has been written to this point. No complaint was made by the respondent as to the Judge's finding that his high level of moral culpability for the offence was not diminished in anyway by the agreed fact that the respondent had consumed some unknown quantity of alcohol prior to the offence. Furthermore, the respondent did not challenge his Honour's conclusion that there were no underlying mental health, alcohol or other issues that were in anyway relevant to reduce his moral culpability. His

Honour's determination that he was unable to assess whether the respondent was genuinely remorseful was not criticised by the respondent nor was the absence of a finding as to the respondent's prospects of rehabilitation. We adopt all of these matters in re-sentencing the respondent, save to say that the respondent has taken some steps towards rehabilitation since he has been in custody.

- 105 It is evident from the respondent's affidavit that he has spent only some of his time in protective custody. It is appropriate to take into account the time spent in protective custody, as his Honour did, in determining the length of the sentence.
- 106 The undiscounted starting point of the sentence which this court is to impose should be 12 years imprisonment. The Judge discounted the sentence by 5 per cent for the utilitarian value of the plea of guilty. We propose to apply the same discount. This would provide a total sentence, rounded slightly, of 11 years and 4 months.
- 107 In the exercise of our sentencing discretion, and in light of the evidence now before the court, we are persuaded to find special circumstances being the need for a longer period of supervision to address the respondent's alcohol abuse and psychiatric problems. We have determined that a non-parole period of 8 years is the minimum period that the respondent must spend in custody in order to appropriately reflect the criminality involved in the offence: *R v Simpson* [2001] NSWCCA 534; (2001) 53 NSWLR 704 per Spigelman CJ at [63]. The balance of term should be 3 years and 4 months.
- 108 Accordingly, the Court makes the following orders:
- (a) Leave granted to the respondent to appeal;
 - (b) respondent's appeal dismissed;
 - (c) Crown appeal allowed;
 - (d) Sentence imposed in the District Court of New South Wales on 22 November 2013 is quashed;
 - (e) In lieu thereof, sentence the respondent to imprisonment for 11 years 4 months consisting of a non-parole period of 8 years commencing on 10 November 2011, and expiring on 9 November 2019 with a balance of term of 3 years 4 months commencing on 10 November 2019 and expiring on 9 March 2023.
 - (f) The earliest date that the respondent will be eligible for release on parole is 9 November 2019.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 19 September 2014