SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2019 0186

JAYMES TODD — Applicant

v

THE QUEEN — Respondent

JUDGES:	FERGUSON CJ, PRIEST and BEACH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	3 March 2020
DATE OF JUDGMENT:	12 March 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 46
JUDGMENT APPEALED FROM:	[2019] VSC 585 (Kaye JA)

CRIMINAL LAW – Appeal – Sentence – Murder – Sentenced to life imprisonment with non-parole period of 35 years – Whether sentence manifestly excessive – Whether sentencing judge erred by imposing a disproportionate sentence – Sexual sadism disorder primary cause of offending – Underlying paraphilic interest not able to be treated at present – Multiple mitigating factors including youth, plea of guilty, no prior convictions, dysfunctional circumstances of home life – Diminished mitigating effect of youth given seriousness of offending – Importance of general deterrence, denunciation, just punishment and community protection – Sentencing judge appropriately weighed mitigating factors and other sentencing considerations – Sentence within range of available sentencing options – Community protection not the only consideration in fixing a sentence of life imprisonment – Principle of parsimony not infringed – Sentence proportionate – Leave to appeal refused – *Sentencing Act 1991* ss 5, 11, 11A – *Veen v The Queen (No 2)* (1988) 164 CLR 465, *Azzopardi v The Queen* (2011) 35 VR 43, *Director of Public Prosecutions v Lawrence* (2004) 10 VR 125 applied – *Bugmy v The Queen* (1990) 169 CLR 525, *R v Ryrie* (1993) 64 A Crim R 332 distinguished.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr D D Gurvich QC with Mr P J Smallwood and Mr J Barreiro	James Dowsley & Associates
For the Respondent	Mr B F Kissane QC with Ms A S Ellis	Ms A Hogan, Solicitor for Public Prosecutions

FERGUSON CJ
PRIEST JA
BEACH JA:

1 Eurydice Dixon was an aspiring and talented comedian. She regularly performed on the Melbourne comedy circuit. Her last appearance was at the 2018 Melbourne International Comedy Festival. On the way home after her performance that night, she was brutally sexually assaulted, raped and murdered.[1] Her attacker, the applicant Jaymes Todd, followed her from Flinders Street Station to Princes Park. That is where the violent attack that resulted in her death took place. She was only 22 when she was killed. She has left behind a grieving and loving family. Her death has had a very significant impact on them. Indeed the impact has been sorely felt by many in the broader community.

2 The applicant has a sexual sadism disorder. He has persistent thoughts and fantasizes about coercive violent sex involving suffering to a female victim. No presently available treatment can eliminate the paraphilic interest which underlies the disorder. The applicant also suffers from a mild form of autism spectrum disorder which plays a role in his addiction to violent online pornography. At the time of the murder, the applicant was 19. He was living with his parents and siblings in a housing commission home described as an 'environment of rotting refuse, vermin and complete squalor.' He admitted to his crimes. He has no prior convictions. He was held in protective custody following his arrest.

3 After pleading guilty, the applicant was sentenced to life imprisonment with a non-parole period of 35 years' imprisonment.[2]

4 The applicant seeks leave to appeal the sentence of life imprisonment imposed for murder, and the non-parole period of 35 years. He does so on two proposed grounds. First, that both the head sentence and non-parole period are manifestly

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1 The charges were one charge of rape, one charge of attempted rape, one charge of sexual assault and one charge of murder.

2 Charge 1 - Rape, 11 years; Charge 2 - Attempted rape, seven years; Charge 3 - Sexual assault, two years; Charge 4 - Murder, life imprisonment. Total effective sentence: Life imprisonment. Non-parole period: 35 years' imprisonment.

excessive because they are too long. Second, that the judge made an error effectively by imposing a sentence of preventative detention, which the law does not allow.[3]

5 To succeed on the first proposed ground, it would be necessary for the applicant to establish that the sentence imposed was wholly outside the range of sentencing options open to the judge in the sound exercise of discretion. For the reasons which follow, he has failed to do that.

6 He has also failed to establish that the sentencing judge made any error by imposing a sentence of a length that was disproportionate to the gravity of the crimes he committed.

7 We would refuse leave to appeal.

The circumstances in which the offences were committed

8 It is unnecessary to set out in these reasons much more about how the offences were committed. Suffice to say that each of the offences was committed in truly awful circumstances and that each offence was an extremely serious example of a particularly serious offence. They were premeditated. They involved the applicant stalking Ms Dixon as she walked from the city late at night towards her home before

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[3] Ground 1: The sentence imposed on charge 4 (life imprisonment) and the non-parole period fixed were manifestly excessive.

Particulars:
Those sentences were manifestly too long in light of:
(a) The applicant's youth, otherwise good character, early guilty pleas, admissions, remorse, background, Asperger's Syndrome and his having been held in protective custody;
(b) The severity of a sentence of life imprisonment, given the applicant's age, vulnerability in custody and the prospect that he would need to be held in protection for the foreseeable future; and
(c) The principle of parsimony.

Ground 2: The sentencing judge erred by applying principles of preventative detention which are not encompassed within the provisions of the *Sentencing Act 1991* or by the common law.

The current practice of the Court does not encourage the giving of particulars for a ground of manifest excess. The application for leave to appeal in this proceeding was filed before recent amendments to Practice Note SC CA 1 (Criminal Appeals).

The applicant did not initially rely on the second proposed ground in his application for leave. Having given notice that he intended to do so, on the hearing he sought leave to include it as a proposed ground.

she was viciously attacked and murdered. The applicant's acts fulfilled his sadistic sexual fantasies. He spent time after he murdered Ms Dixon searching on the internet for reports about what he had done and on pornographic websites. When he was first interviewed by police, the applicant sought to weave a web of lies before ultimately confessing to his crimes.

9 The details and circumstances of the offences are set out in the judge's sentencing remarks.[4]

The offender

10 As noted previously, the applicant has a sexual sadism disorder. He was examined by Dr David Thomas, a consultant psychiatrist and Professor James Ogloff, a clinical and forensic psychologist. In the opinion of Dr Thomas, the applicant's sexual sadism disorder contributed to his offending behaviour. He also diagnosed that the applicant has autism spectrum disorder which materially contributed to the applicant's behaviour. Professor Ogloff agreed that the applicant suffers from both disorders and that his sexual sadism disorder was the primary cause of the applicant's sexual assault and murder of Ms Dixon. His opinion was that the autism spectrum disorder did not directly contribute to the offending, although the applicant's searching for and watching of pornography may have been affected by that disorder and the repetitive behaviours that accompany it. Professor Ogloff's opinion was that that was not particularly likely, as the applicant's online activity did not follow a rigid repetitive pattern.

11 The applicant had behavioural difficulties from a young age and changed schools more than once. He was seen by a number of medical experts. He was diagnosed with autism spectrum disorder (then referred to as Asperger's disorder) and attention deficit hyperactivity disorder (which was treated with medication). He completed year 10 and then embarked on a Hospitality, Education and Training course which he was still undertaking when he committed the offences against

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[4] *DPP v Todd* [2019] VSC 585 ('Reasons').

Ms Dixon.

12 As noted above, the applicant lived in squalid conditions with his parents and two brothers.

13 More information about the applicant is available in the Reasons.

The judge's sentencing remarks

14 The judge set out with precision the circumstances of the offending and the applicant's background. He considered the evidence of Dr Thomas and Professor Ogloff in some detail. The judge determined that the applicant had an actual intention to kill Ms Dixon[5] and that each of the offences was motivated by the overwhelming urge that the applicant had to enact the fantasy with which he had become obsessed.[6] He accepted that the applicant's autism played a role – albeit not a major one – in his addiction to violent online pornography that fed the fantasy.[7] The judge noted the maximum sentence for each offence and described the offences as most serious instances of such offences.[8] His Honour referred to the impact on the victims left behind after Ms Dixon's death. He made particular mention of the statement made by Ms Dixon's sister and of the statements of Ms Dixon's boyfriend and a close family friend.[9]

15 His Honour stated that 'in the absence of appropriate and effective treatment, there is an unacceptable risk that, on … release into the community, [the applicant] would re-offend in the same manner.'[10] The judge observed that treatment in the form of medication would only reduce the applicant's sex drive while he was taking it but it would not eliminate his paraphilic interest, or the behaviours driven by it

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5 Reasons [41].

6 Reasons [55].

7 Reasons [80].

8 Reasons [42]-[43].

9 Reasons [56]-[58].

10 Reasons [89].

which constitute his sexual sadism disorder.[11] His Honour concluded that the prospects of the applicant successfully addressing his disorder are poor such that the judge was satisfied that the applicant's prospects of rehabilitation are very limited.[12] He said:

> The evidence adduced on your plea is such that it must be concluded that, at least for the foreseeable future, you would pose an unacceptable risk to the community, and in particular to women, if you were to be released.[13]

16 His Honour found this in the context of also being satisfied that the applicant was to some extent sincere in his desire to address the issues that drove him to commit the crimes he had.[14]

17 The judge considered the factors relied on in mitigation – plea of guilty;[15] ultimate admission of guilt when interviewed by police;[16] some remorse;[17] young age;[18] no prior convictions;[19] the dysfunctional circumstances of his home life;[20] the indirect contribution that the applicant's autism made to the development of his sexual sadism disorder that precipitated the offending[21] and the difficulty of his time in prison due to his autism spectrum disorder.[22]

18 His Honour referred to the applicable sentencing principles[23] including condemnation by the Court of the crimes committed by the applicant; general

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11 Reasons [91].

12 Reasons [94].

13 Reasons [94].

14 Reasons [95].

15 Reasons [96], [113].

16 Reasons [97], [113].

17 Reasons [98]-[100], [113].

18 Reasons [101]-[103], [113].

19 Reasons [104], [113].

20 Reasons [113].

21 Reasons [113].

22 Reasons [105], [113].

23 Reasons]108].

deterrence; and specific deterrence. His Honour stated:

> it is important that the sentences, that I impose on you, be of sufficient severity to serve as a general deterrent to others in the community, by delivering a clear and unequivocal message that the kind of outrageous and depraved conduct in which you engaged will be met with the most severe of sentences, in which mercy plays no role. It is only in that way that this Court can do its best to protect the lives and safety of women, and other vulnerable members of our society, from the type of predatory conduct in which you engaged.
>
> It is also important that the sentences be of sufficient duration to provide protection to those members of our society from you, at least until you are properly assessed to be safe to return to the community. The conclusion, that I have reached about your prospects of rehabilitation, and the risk that you will re-offend by succumbing to your sexual sadism disorder, means that substantial weight must be given to the protection of the community, but bearing in mind the principle that that consideration does not justify the imposition of sentences that are disproportionate to the seriousness of your offending.[24]

19 Later his Honour said:

> in light of the conclusions that I have reached about your poor prospects of rehabilitation, and of your risk of re-offending, it is simply impossible to set, in 2019, a date by which the Court could consider that it would be safe for you to live in the community without the important safeguards of the supervision, oversight and management that can be provided by the parole system. The requirement of community protection, thus, weighs heavily in favour of the sentence that I have considered is necessary to impose in your case.[25]

20 When dealing with the non-parole period, his Honour specifically noted that he had taken into account and given weight to the mitigating circumstances but had also taken into account his assessment, based on the evidence, that the applicant had limited prospects of rehabilitation.[26]

21 His Honour concluded that the only appropriate sentence on the charge of murder was one of life imprisonment with a fixed minimum period of 35 years

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24 Reasons [109]-[110].

25 Reasons [119].

26 Reasons [121].

before being eligible to be considered for parole.[27] In respect of the other charges, his Honour imposed lengthy individual sentences reflecting the objective gravity of the sexual offences committed (even though those sentences are to be served concurrently with each other and with the life sentence).[28]

Relevant law

22 The only purposes for which a sentence may be imposed are set out in s 5 of the *Sentencing Act 1991*. They are:

(a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or

(b) to deter the offender or other persons from committing offences of the same or a similar character; or

(c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or

(d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or

(e) to protect the community from the offender; or

(f) a combination of two or more of those purposes.

23 The principle of parsimony (now encapsulated in s 5(3) of the *Sentencing Act*) is that a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

24 Proportionality is important. As was said in *Veen v The Queen (No 2)* ('*Veen*'):[29]

> The principle of proportionality is now firmly established in this country … a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the

[27] Reasons [116].

[28] Reasons [123]-[124]. Charge 1 - Rape, 11 years; Charge 2 - Attempted rape, seven years; Charge 3 - Sexual assault, two years.

[29] (1988) 164 CLR 465 ('*Veen*').

offender.[30]

25 As the High Court went on to make clear, protection of society remains a material factor in fixing a proportionate sentence.[31] What is impermissible is the imposition of a disproportionately long term of imprisonment — without paying proper regard to the objective seriousness of the offence — purely for the purposes of protecting the community. A sentencing court may not impose a sentence merely to 'warehouse' an offender.

26 Protection of the community is relevant to both the head sentence and to whether a minimum sentence ought to be fixed (and, if so, the length of the minimum term).[32] If a non-parole period has been fixed, once that period has been served, release is neither automatic nor a matter of mere formality. It is the Adult Parole Board (not the courts) that determines whether a prisoner may be released back into the community.[33] The granting of parole is subject to conditions. In addition, while under parole the person is still under sentence.[34] The Court's task in setting the non-parole period is to determine the minimum period that justice requires the offender must serve before being eligible for release on parole.[35] That determination must be made in the context of all of the circumstances.[36]

27 In *Bugmy v The Queen* ('*Bugmy*'), the High Court cautioned against looking too far into the future as to the likelihood of the offender re-offending when setting the non-parole period. In that case a life sentence was imposed by statute.[37] A

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30 Ibid 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

31 Ibid 473, 475 (Mason CJ, Brennan, Dawson and Toohey JJ).

32 Section 11(1) of the *Sentencing Act* provides that, in sentencing an offender to life imprisonment, the court must, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence or the past history of the offender make the fixing of such a period inappropriate.

33 *Corrections Act 1986* s 74 ('*Corrections Act*').

34 *Corrections Act* s 76.

35 *Power v The Queen* (1974) 131 CLR 623 (Barwick CJ, McTiernan, Menzies, Stephen and Mason JJ), 628-9 (Barwick CJ, Menzies, Stephen and Mason JJ).

36 *Bugmy v The Queen* (1990) 169 CLR 525, 538 (Dawson, Toohey and Gaudron JJ) ('*Bugmy*').

37 Ibid, 537 (Dawson, Toohey and Gaudron JJ).

minimum term of 18 years and six months was set by the judge. The offender was 27 when he was sentenced. He had a lengthy criminal record. He also had what was described by the judge as 'a very unfortunate and deprived background' and was dislocated from the Aboriginal community to which he belonged. His behaviour in prison was described as 'unsettled and anti-social' and he had a major problem with alcohol and drug abuse. A clinical psychologist described him as having only a shell of personal development with virtually non-existent conscience formation and very poor impulse control. A psychiatrist said that his prognosis was not good. The majority held:

> The risk that the applicant might re-offend was of course a relevant factor in fixing a minimum term. But a minimum term of eighteen years and six months is of such length as to take the prospects of re-offending in this case beyond even speculation. The applicant was twenty-seven years of age when the minimum term was fixed. He will be over forty-five before the likelihood that he will re-offend will become a matter for assessment. It is not possible to say now what the likelihood will be then. Equally, the applicant's behaviour in prison is a relevant consideration, but the longer the minimum term the less importance it must assume, simply because of the impossibility of making a forecast of future behaviour so far ahead. Again, while the desire on the part of his Honour to protect the community is material to the fixing of a minimum term as well as a head sentence, its significance must be the less the longer the minimum term, simply because relevant forecasts cannot be made at such a distance.[38]

28 In *R v Ryrie* ('*Ryrie*'),[39] the applicant was convicted of murder and sentenced to death. That was commuted to imprisonment for 50 years and a non-parole period of 40 years. After serving 26 years of his sentence, legislative changes enabled the applicant to apply for a different non-parole period. The judge refused to fix a non-parole period. One of the grounds of appeal was that the judge had applied principles of preventative detention which was not permissible. The then Director of Public Prosecutions conceded that having served 26 years of his sentence, all but one of the purposes of imprisonment set out in s 5(1) of the *Sentencing Act* had been met. Unsurprisingly, the Court observed that it should be 'anxious to ensure that

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38 Ibid.

39 (1993) 64 A Crim R 332 ('*Ryrie*').

continued incarceration does not represent indeterminate preventative detention.'[40] Southwell J, with whom Fullagar J agreed, asked rhetorically, '[i]f 26 years of behaving as a model prisoner, and in recent time coping, apparently satisfactorily, with unsupervised leave, is not sufficient, how can it be said that another few years is likely to alter things?'[41] His Honour concluded that the refusal by the judge to set a non-parole period offended what had been said by the High Court as to the principle of proportionality.[42]

29 In *R v Denyer*[43] the applicant was sentenced on three counts of murder to life imprisonment with no non-parole period set. The applicant was diagnosed with a sadistic personality disorder. A psychiatrist and a psychologist gave evidence that in their opinions there was no known way of dealing with such a disorder and that it might well last for life. Crockett J held that the evidence of the two experts could be no more than an opinion held by each.[44] His Honour observed that it 'was not possible positively to assert that there might not be a cure, spontaneous or otherwise, that would at some time in the future permit the applicant to be granted his freedom without risk to the community.'[45] Crockett J went on to note that if a non-parole period was set, at the relevant time, the Parole Board may not allow release if the applicant was not cured.[46] A non-parole period of 30 years was fixed.

Applicant's case

30 As noted above, the applicant relies on two proposed grounds of appeal: the first, that the sentence is manifestly excessive because it is too long and the second, that the judge impermissibly imposed a sentence of preventative detention.

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40 Ibid 356 (Southwell J, Fullagar J agreeing).

41 Ibid 356-7 (Southwell J, Fullagar J agreeing).

42 Ibid 357 (Southwell J, Fullagar J agreeing).

43 [1995] 1 VR 186.

44 Ibid 193.

45 Ibid.

46 Ibid.

31 In relation to the manifest excess ground, the applicant submits that if all the relevant factors had been taken into account, then the judge could not have arrived at the sentence which he did. The eight factors he relied on are:

(a) his youth;

(b) his otherwise good character with no criminal history or pending charges;

(c) his early guilty pleas;

(d) his admissions of guilt;

(e) his remorse;

(f) his autism spectrum disorder (both from the perspective of his moral culpability and the hardship he will experience in prison);

(g) the fact that he has been held in protective custody; and

(h) his dysfunctional home setting and background of behavioural difficulties (including self-harm by cutting, sleeping rough and suicidal behaviour).

32 In respect of this last point, his counsel submitted that these matters are of more than historical significance and are likely to have had profound and lasting consequences. As such, counsel contended, these matters had to be given due weight and go to the applicant's moral culpability which should be reduced accordingly.

33 Counsel submitted that if the combination of the eight factors were taken into account and assessed in the light of the objective seriousness of the offending, then the principle of parsimony ought to have led to the position where there was clear scope not to impose a life term because a lesser sentence was available. Counsel described the life sentence imposed as the most severe sentence. The sentence had to be approached on the basis that the whole of the sentence would be served because there is no presumption that parole would be granted.

34 While accepting that the judge was not bound by it, the applicant's written

case noted that on the plea the prosecution did not seek life imprisonment.

35 Counsel referred to the sentencing purposes set out in s 5(1) of the *Sentencing Act* set out in [22] above. Counsel submitted that a lengthy term of imprisonment (less than a life sentence) would serve all of those purposes. So far as deterrence was concerned, he submitted that proportionality had a part to play and the purpose of deterrence should have been influenced by the applicant's youth. The censuring of the offender by a lengthy prison term would be symbolic and act to satisfy the purpose of denunciation. Counsel contended that protection of the community can be addressed over a finite period, but not so far into the future as a life sentence. While counsel accepted that the applicant's prospects of rehabilitation were not positive, it was important that as a 19 year old offender he was not deprived of a goal of a fixed date for unconditional release noting that the sentence imposed should not be crushing. In this regard, counsel submitted that the judge gave insufficient weight to the applicant's youth.

36 Indeed, counsel contended that little or no weight had been given to any of the matters raised.

37 Counsel submitted that standard sentences which had been imposed in recent times had been for substantially lesser terms of imprisonment and were in the order of 20 years or so.[47]

38 In moving to the non-parole period of 35 years that was set, counsel contended that the same factors that were relevant for setting the head sentence were also relevant in that context. Counsel observed, however, that different weight was to be accorded to them.

39 Counsel did not cavil with the finding that there is a degree of risk to the

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[47] *R v Brown* [2018] VSC 742 (sentence of 30 years' imprisonment with non-parole period of 24 years); *R v Robertson* [2019] VSC 145 (sentence of 24 years' imprisonment with non-parole period of 19 years); *R v Leigh* [2019] VSC 378 (sentence of 28 years' imprisonment with non-parole period of 22 years); *R v Willis* [2019] VSC 398 (sentence of 20 years' imprisonment with non-parole period of 14 years).

community if the applicant is released in the foreseeable future. However, his argument was that the foreseeable future does not extend to a time 35 years from now, which is an inordinately long period. Picking up some of the language in *Bugmy*, he submitted there was no evidence that the applicant was irredeemable or incorrigible to a great distance in the future, being 20, 25 or 30 years. Counsel contended that it could not be said that in less than 35 years' time, there was no realistic possibility of treatment of the applicant's sexual sadism disorder either entirely or in a manner in which the risk of reoffending was much reduced.

40 In relation to his second proposed ground, the applicant submits that the life term and 35 year non-parole period fixed were disproportionate sentences. Many of the arguments in relation to this ground overlapped with those in relation to the first ground. Counsel accepted that protection of the community was material in respect of both the head sentence and minimum term but contended that the significance of that factor reduced the longer the term of imprisonment that was imposed, because relevant forecasts cannot be made at such a distance.[48] Counsel stressed that there were limitations as to how far into the future the Court could look when assessing the applicant's prospects of rehabilitation. He contended that a 10 year prognosis was as far as could be gauged. Both the applicant's future behaviour in prison and his psychiatric condition could not be assessed beyond that. It could not be known now whether future medical developments would enable the applicant's sexual sadism disorder to be treated more effectively than is currently the case.

41 The applicant's counsel submitted that his client was not to be detained for crimes he may commit in the future. He also observed that the applicant was not to be sentenced as a serious sexual offender where protection of the community is the principal purpose for which the sentence is imposed.[49]

42 Counsel submitted that his Honour had not imposed the life sentence for

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48 Relying on *Bugmy* (1990) 169 CLR 525, 537 (Dawson, Toohey and Gaudron JJ).

49 *Sentencing Act* s 6D.

sentencing purposes other than the protection of the community. In this regard, he drew on the passage set out in [19] above from his Honour's reasons. Counsel submitted that this reasoning disclosed that the judge had imposed a form of preventative detention which was not permissible.[50] Counsel contended that a life sentence was not open in respect of the objective gravity of the offence and the moral culpability of the applicant.

43 In his submission, if there had been no mitigating factors one could understand the sentence that had been imposed but once the mitigating factors were taken into account, no logical conclusion would justify the imposition of a life sentence. Counsel contended it was simply too long a period with the only explanation being that it was directed to preventative detention.

44 In relation to the non-parole period, Counsel's argument proceeded on the basis that all other sentencing considerations (apart from protection of the community) were dealt with well before the end of 35 years.

Respondent's submissions

45 In short, the respondent submitted that the sentence (both head sentence and non-parole period) were within the range of sentences properly open to the judge. The judge had carefully considered all the relevant factors and taken them into account appropriately in setting the sentence. This was reflected in his Honour's sentencing remarks when regard was had to the whole of his reasons. The sentence was not manifestly excessive.

46 In relation to the second proposed ground of appeal, the respondent submitted that it was well-open to the sentencing judge to determine that only a sentence of life imprisonment, with a fixed non-parole period, could properly vindicate the central sentencing purposes of just punishment, general deterrence, denunciation and community protection. Given his Honour's conclusions with

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[50] Counsel referred to *Ryrie* (1993) 64 A Crim R 332, 356 (Southwell J, Fullagar J agreeing).

respect to the applicant's rehabilitation prospects and the likelihood of him reoffending, his Honour was obliged to give community protection considerable weight. His Honour did not engage in impermissible preventative detention but rather had regard to community protection as one factor of several in the exercise of the sentencing discretion. Finally, the respondent submitted that the fixing of a non-parole period illustrated that his Honour had due regard to the principles of proportionality.

Was the sentence manifestly excessive? (Ground 1)

47 As the judge said, and counsel accepted, each of the offences was an extremely serious example of particularly serious offences.[51]

48 The judge was at pains to ensure that he bore in mind all of the relevant sentencing purposes and principles. He carefully considered each of them. He gave each of the eight factors relied on before us by the applicant the weight that he deemed appropriate in the circumstances. He did so in accordance with principle. In any event, manifest excess is a conclusion that does not depend on the attribution of specific error.[52]

49 The more serious the offending, the more the mitigating effect of youth diminishes.[53] As the seriousness of the offending increases, so too does the emphasis on denunciation, general and specific deterrence.[54] In a case such as the present, particularly in respect of the charge of murder, those three things were of great importance. In the context of this case, there was much less room for the applicant's youth to play a significant role in the sentencing task that faced the judge. Naturally youth is still a factor; but the weight accorded to it cannot be permitted to overshadow how serious the offending has been and the consequences of the

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[51] Reasons [112].

[52] *Dinsdale v The Queen* (2000) 202 CLR 321, 325–6 [6] (Gleeson CJ and Hayne J).

[53] *Azzopardi v The Queen* (2011) 35 VR 43, 55-6 [37]-[40] *('Azzopardi')*; *DPP v Lawrence* (2004) 10 VR 125, 132 [22] ('*Lawrence*').

[54] *Azzopardi* (2011) 35 VR 43, 55-6 [37]-[40]; *Lawrence* (2004) 10 VR 125, 132 [22].

offending. The judge was clearly mindful of these principles.

50 As the judge observed, it was to the applicant's credit that he had no criminal history, particularly given his circumstances and background. The dysfunctional setting in which the applicant lived and his history of behavioural and other issues throughout his life all factored into the judge's consideration. The applicant's ultimate confession to police and plea of guilty at the earliest opportunity had value – importantly, and among other things, the plea saved family and friends from suffering further through the ordeal of a trial.

51 The applicant's remorse was not unequivocal. Nevertheless, in the applicant's favour, the judge accepted that he did feel a degree of remorse.

52 The judge had due regard to the effect of the applicant's mild autism spectrum disorder – both on his moral culpability and on his time in prison which is likely to be more difficult for him. He will likely be held in protective custody which was also taken into account by the judge.

53 There were mitigatory factors which the judge weighed in the balance. But, as he must, the judge also gave weight to other sentencing considerations and set a sentence that was within the range of sentencing options available to him.

54 His Honour had regard to the sentences in other cases to which the standard sentencing scheme applied. No two cases are alike. Each must turn on its own facts, including the circumstances of the offence and the circumstances of the offender. Those previous sentences do not and cannot create a precedent which must be followed unless capable of being distinguished. Nor do they set limits within which a judge must sentence. We consider, in any event, that the sentences imposed in the cases relied on (in each of their own circumstances) do not immediately suggest that the sentence in this case was manifestly excessive.

55 If a sentence is within the available range, the principle of parsimony is not infringed. The principle takes into account the wide discretion reposed in judges

when sentencing. There is no single number of years or specific term of imprisonment that must be imposed to prevent the sentencing discretion from miscarrying. It is only when the sentence imposed is outside the range of sentencing options available that the term of imprisonment will become 'more severe than that which is necessary.'[55]

56 Neither the sentence imposed nor the reasons for it suggest that the sentencing discretion miscarried. Rather, it appears to us that the sentence was arrived at after very careful consideration by his Honour. While what sentence we might have imposed is irrelevant, it is difficult to contemplate that less than a life sentence would have been set by any judge. The non-parole period of 35 years was unexceptionable given the gravity of the offending and the applicant's prospects of rehabilitation.

57 The judge variously described the applicant's offending as horrifying, violent, appalling, confronting, outrageous, predatory, disturbing, callous, cruel, brutal, cowardly, sadistic, premeditated, categorically evil, gratifying the applicant's perverted and depraved sexual desires, striking at the very heart of the most basic values of a decent civilised society, a reflection of the darkest form of human thinking. We agree.

58 He described Ms Dixon as totally vulnerable, defenceless and helpless. Again, we agree.

59 The applicant's conduct was unspeakably loathsome and cruel and must be condemned in the strongest terms. A young woman should be able to walk home alone after a night out without any fear of being harmed, let alone subjected to a vile sexual attack and killed. She should not have to be looking over her shoulder to see if anyone is following her. Her heart should not have to skip a beat when she hears approaching steps from behind. Tragically, this case shows that women still cannot have confidence that they can walk in public places at night without potentially

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[55] *Sentencing Act* s 5(3).

attracting the attention of predators.

60 The gravity of the offending by the applicant had to be recognised in the sentence. It is very important that the applicant be punished to an extent and in a manner which is just in all of the circumstances and that it is made very clear that offences such as those committed by the applicant will attract serious punishment. Community protection is promoted through just punishment. Plainly, protection of the community had an important role to play in the sentencing of the applicant. This is particularly so in circumstances where his sexual sadism disorder presently cannot be cured and it was that disorder that fuelled the depraved fantasies that culminated in his deadly attack on Ms Dixon. The non-parole period of 35 years takes into account that there may come a time when medical advances may be made such that the serious danger that the applicant presents to women may be curbed, and the Adult Parole Board may deem it safe to grant him conditional release into the community.

61 The applicant's proposed first ground must fail.

Did the judge impose a sentence of preventative detention? (Ground 2)

62 In effect, the argument in relation to the second proposed ground of appeal is that the life sentence with a minimum term of 35 years was only imposed in an attempt to prevent the applicant from committing further crimes well beyond the foreseeable future.

63 His Honour did have community protection firmly in mind in setting the applicant's sentence. After careful deliberation, he formed the view that community protection weighed heavily in favour of a life sentence. But that was not his only consideration in respect of fixing a life sentence. General deterrence and condemnation of the applicant's behaviour also featured heavily in his decision to impose that sentence. He came to this view in the context of the 'extremely high level of the objective gravity of, and [the applicant's] subjective culpability for' the offending.

64 The judge was alive to issues of proportionality. He said:

> It is also important that the sentences be of sufficient duration to provide protection to those members of our society from you, at least until you are properly assessed to be safe to return to the community. The conclusion, that I have reached about your prospects of rehabilitation, and the risk that you will re-offend by succumbing to your sexual sadism disorder, means that substantial weight must be given to the protection of the community, but bearing in mind the principle that that consideration does not justify the imposition of sentences that are disproportionate to the seriousness of your offending.[56]

65 Having imposed a life sentence, the judge was required to fix a non-parole period of at least 30 years (unless he considered that it was 'in the interests of justice not to do so').[57] In setting the non-parole period, the judge, as he was bound to do, took into account the mitigating factors in favour of the applicant. He was required to, and did, give discrete consideration to those factors which existed in the material before him which bore upon the question of when the applicant should be eligible for mitigation of confinement and, in turn, rehabilitated under conditional supervision.[58] But with prospects of rehabilitation no better than limited and given the gravity of the offending, the judge was well able to form the view that a minimum term of 35 years was appropriate.

66 So far as the proportionality cases relied on by the applicant are concerned, we would make some observations. The principle set out in *Veen* is not in doubt. How the principle is applied in any given case depends on the particular circumstances of the case. So in *Ryrie,* it was conceded that all of the sentencing purposes (other than community protection) had been met by the 26 years already served by Ryrie. The only purpose of further detention would have been to 'extend the period of protection of society from the risk of recidivism on the part of the

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[56] Reasons [110].

[57] *Sentencing Act* s 11A(4).

[58] See *R v Bernath* [1997] 1 VR 271, 278 (Callaway JA, Winneke P and Brooking JA agreeing), quoting *R v Mulvale* (unreported, Court of Appeal, Winneke P, 20 February 1996).

offender.'[59] That is not the case here. Any parallels with *Bugmy* (such as the Bugmy's age and eligibility to apply for parole at the age of 45) can also be seen to lack force when closer regard is had to other facts. In *Bugmy* his ability to counter his drug addiction was at the heart of his prospects of rehabilitation. Bugmy recognized the consequences of his drug-taking and was taking some steps (such as participation in group therapy) to counter his addiction. Here, the facts are very different. Treatment cannot eliminate the underlying paraphilic interest the applicant has. His sexual sadism disorder was the primary cause of his offending. Professor Ogloff noted that there is a lack of evidence that the disorder can be effectively treated. Consequently, the applicant's stated willingness to participate in sex offender treatment does not take matters very far. Professor Ogloff observed that sexual deviance is the most potent and strongest predictor of sexual reoffending. The judge was very conscious of these matters.

67 It is one thing to say that 35 years is too far into the future to predict an offender's behaviour and likelihood of complying with treatment programmes to address addictions and rehabilitate. It is quite another to say that it is beyond what is foreseeable when there is seemingly no effective treatment for the underlying disorder that precipitated such horrific offending. That is even more the case when regard is had to the statutory minimum non-parole period of 30 years set by s 11A(4) of the *Sentencing Act.* As noted above, the non-parole period takes into account the possibility of developments in treatment for the disorder that afflicts the applicant.

68 Proposed ground 2 would fail. We would refuse leave to add that as a proposed ground in the application for leave to appeal.

Conclusion

69 The application for leave to appeal will be refused.

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[59] *Ryrie* (1993) 64 A Crim R 332, 356 (Southwell J, Fullagar J agreeing), quoting *Veen* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

Postscript

70 Counsel for the applicant acted for him on a pro bono basis. The submissions that were presented to the Court were of the highest standard. There was clearly a substantial amount of work and careful analysis undertaken by those acting for the applicant. The Court was much assisted by, and is grateful for, their helpful contribution.