SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2019 0222

DIRECTOR OF PUBLIC PROSECUTIONS Appellant

v

CODEY HERRMANN Respondent

JUDGES:	MAXWELL P, KAYE, NIALL, T FORREST and EMERTON JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	18 March 2021
DATE OF JUDGMENT:	11 June 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 160
JUDGMENT APPEALED FROM:	[2019] VSC 694 (Hollingworth J)

CRIMINAL LAW – Appeal – Sentence – Crown appeal – Murder – Rape – Brutal and random public attack – Respondent sentenced to 36 years' imprisonment with 30 years non-parole – Whether sentence manifestly inadequate – Whether life imprisonment only sentence reasonably open – Respondent 20 at time of offending – Aboriginal heritage – Profound childhood deprivation and trauma – Personality disorder – Reduced moral culpability – Fair prospects of rehabilitation with appropriate treatment, support and supervision – Sentence within range reasonably open – Appeal dismissed – *Bugmy v The Queen* (2013) 249 CLR 571, *R v Verdins* (2007) 16 VR 269, *Brown v The Queen* [2020] VSCA 212 applied – *DPP v Todd* [2020] VSCA 46 distinguished – *Sentencing Act 1991* ss 1(d)(iv), 5(2).

WORDS AND PHRASES – 'nature and gravity of the offence' – 'offender's culpability and degree of responsibility' – 'moral culpability'.

APPEARANCES:	Counsel	Solicitors
For the Crown	Ms K Judd QC with Ms M Mahady	Ms A Hogan, Solicitor for Public Prosecutions
For the Respondent	Mr T Marsh	Victorian Aboriginal Legal Service
For Victoria Legal Aid (as amicus curiae)	Ms J Munster and Ms D McCann	Victoria Legal Aid

MAXWELL P
KAYE JA
NIALL JA
T FORREST JA
EMERTON JA:

Summary

1 Aiia Maasarwe was only 21 when the respondent ('CH')[1] raped and murdered her in the early hours of the morning on 16 January 2019. The sentencing judge (Hollingworth J) described Ms Maasarwe as 'a friendly, optimistic, kind, young woman, who had her whole adult life ahead of her. She was a loving and much-loved member of the Maasarwe family …'. As the judge said, her death has profoundly affected her parents and her three sisters, leaving 'an enormous hole in their lives'.[2]

2 The crimes which CH committed were deeply shocking, both for their sheer brutality and for their randomness. CH made a savage and sustained attack on Ms Maasarwe. He struck her to the head with a metal pipe, rendering her unconscious; he then dragged her from the footpath and forcefully raped her; finally, he struck her head repeatedly, with severe force, causing catastrophic injuries. He acted, the judge found, 'with the clear intention of killing her, not merely injuring her'.[3]

3 The crimes were also seemingly inexplicable. CH was a young man — 20 at the time of the offending — with no prior convictions and no history of violence. He had never met Ms Maasarwe, and there was no evidence that there had been any particular 'trigger' for the attack. In her reasons, the judge addressed this question to CH: 'Why did you do these appalling things?'.[4] To find the answer, her Honour said, it would be 'necessary to consider your background in some detail, to

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1 The abbreviation is used for ease of reference not anonymity.

2 *DPP v Herrmann* [2019] VSC 694, [26] ('Reasons').

3 Ibid [16].

4 Ibid [32].

understand how you became the seriously damaged young man who committed these offences'.[5]

4 The task of the sentencing judge is always a difficult and onerous one. This is never more so than in a case like the present, where the offending engenders both extreme private grief and enormous public distress. The judge's responsibility, on behalf of the community, is to provide a dispassionate assessment both of the objective gravity of the offending and of the subjective culpability of the offender, at the same time acknowledging the pain and distress which the offending has caused. In our respectful opinion, her Honour discharged that responsibility with great care and skill.

5 Her Honour sentenced CH to 32 years' imprisonment for the murder and 12 years' imprisonment for the rape. Cumulation of 4 years of the rape sentence produced a total effective sentence of 36 years, and a non-parole period of 30 years was fixed.

6 The Director of Public Prosecutions appeals against the sentence on the ground that the individual sentences, the total effective sentence and the non-parole period are all manifestly inadequate. According to the Director's submission, it was not reasonably open to the judge to impose a determinate head sentence. A sentence of life imprisonment was the only conclusion reasonably open, it was said, if proper weight had been given to the gravity of the offence and, in particular, to the sentencing purpose of protection of the community.

7 The Director, who herself appeared on the appeal, acknowledged the stringency of the 'manifest inadequacy' ground and, in particular, the difficulty of persuading the Court that the circumstances were such as to make a life sentence the only option reasonably available to the sentencing judge.[6] According to the

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5 Ibid [33].

6 *DPP v Karazisis* (2010) 31 VR 634, 662 [127]; [2010] VSCA 350 (Ashley, Redlich and Weinberg JJA).

submission, however, that conclusion followed necessarily from a proper appreciation of CH's limited prospects of rehabilitation and — hence — of the need for community protection to be given primacy in the sentencing synthesis.

8 For reasons which follow, we would reject that submission. In our view, the sentence of 36 years' imprisonment with a non-parole period of 30 years was within the range reasonably open to the judge sentencing this offender for these offences. On any view, the sentence represents severe punishment. Relevantly for present purposes, the sentence can be seen to reflect the giving of appropriate weight to both the horrific nature of the offending and the significant matters in mitigation which her Honour was bound to take into account. The appeal will therefore be dismissed.

9 Section 5(2) of the *Sentencing Act 1991* ('*Sentencing Act*') requires a court, in sentencing an offender, to have regard (among other matters) to 'the nature and gravity of the offence'[7] and 'the offender's culpability and degree of responsibility for the offence'.[8] The first consideration — the nature and gravity of the offence — is directed to an assessment of the objective gravity of the offence in respect of which sentence is to be imposed.

10 In making that assessment, the Court must consider and take into account matters such as the nature and effect of the actions of the offender and the objective circumstances of the offence. In this case, the judge correctly described the murder and the rape as 'very serious examples of offences which are themselves extremely serious'.[9] The objective gravity of the offending could only be assessed as very high.

11 The more complex question in this case concerned the assessment of CH's subjective culpability and degree of responsibility for the offence. That issue involved a detailed consideration of the evidence regarding the subjective factors that affected him and which underlay the commission of the two offences.

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7 *Sentencing Act* s 5(2)(c).

8 Ibid s 5(2)(d).

9 Reasons [22].

12 The judge concluded that CH's moral culpability for the offending was reduced by reason of two distinct, but closely related, factors. The first was what her Honour described as the 'profound childhood deprivation and trauma' from which CH suffered.[10] The second was his severe personality disorder, a psychiatric condition which impaired his mental functioning. Each of those factors, her Honour found, reduced his moral culpability to some degree.

13 Assessing culpability is a central part of the sentencing court's task in every case. It is an express objective of the *Sentencing Act* to 'ensur[e] that offenders are only punished to the extent justified by … their culpability and degree of responsibility for their offences'.[11]

14 In assessing an offender's 'moral culpability,' the sentencing court is making a moral judgment on behalf of the community about the degree of blameworthiness to be attached to the offender for the offending conduct. Determining how harshly a particular offender is to be judged — and punished — often requires a close examination of the personal circumstances and background of the offender and an exploration of factors which may explain the offending conduct. To the extent that offending conduct can be seen to reflect the operation of factors which are beyond the offender's control, the harshness of the moral judgment is likely to be moderated.

15 This focus on the offender reflects no disregard of the impact on the victim(s), nor of the seriousness of the offending. It is, rather, a function of the judge's obligations to impose punishment which is 'just in all of the circumstances'[12] and to deliver 'individualised justice'.[13]

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10 Ibid [63].

11 *Sentencing Act* s 1(d)(iv)(B). The enactment of this provision was recommended by the Victorian Sentencing Committee, whose 1988 Report said: 'In general terms the nature of the offence committed by an offender and his or her degree of culpability in committing that offence form the upper limit of sentences imposed at the present time': Victorian Sentencing Committee, *Sentencing* (1988), [3.14.5] (see also [3.15.1] and [5.3.2]).

12 *Sentencing Act* s 5(1)(a).

13 *Wong v The Queen* (2001) 207 CLR 584, 612 [77]; [2001] HCA 64 (Gaudron, Gummow and Hayne JJ); *Elias v The Queen* (2013) 248 CLR 483, 494 [27]; [2013] HCA 31 (French CJ, Hayne, Kiefel, Bell and Keane JJ).

16 There was no dispute between the parties to the present appeal as to the gravity of CH's offending. His own counsel had described it on the plea as 'the ultimate offending ... a horrific rape and murder'. The debate on the appeal instead concerned the implications of CH's deprived background and impaired mental functioning for the assessment of his culpability and of the risk that he would reoffend in the future.

17 As will appear, the expert evidence of Associate Professor Andrew Carroll, a forensic psychiatrist, established that CH's severe personality disorder was the direct result of his childhood deprivation, and that there was a clear causal connection between his impaired mental functioning and the offending. In our respectful view, her Honour was fully justified in viewing CH as less morally culpable for this atrocious conduct than a person who had not suffered such deprivation and impairment.

18 The Director's emphasis on protection of the community rested on what was said to be the risk of reoffending which CH would present in the future, such that unsupervised release could not be contemplated. As will appear, however, the expert evidence identified a number of factors indicating 'favourable prospects' for CH's rehabilitation 'if effective rehabilitative treatments are made available to him'.

19 The community is entitled to assume — and expect — that those treatments will be made available, and as soon as practicable. Minimising the risk of CH reoffending following the completion of his sentence demands nothing less. Crucially, however, this was not a case where the sentencing judge could have concluded that CH's condition was untreatable or, therefore, that he would necessarily be a risk to the public even after decades in custody.

Circumstances of the offending

20 On the evening she was killed, Ms Maasarwe had been at a social event in the city and had then been to a show in North Melbourne. She caught the tram home to

Bundoora, close to where she lived in student accommodation. Shortly after midnight, she got off the tram and began walking near a shopping centre.

21 Moments later, CH left the shopping centre, where he had been hanging around for much of the evening. He saw Ms Maasarwe walking towards him. When she was only about 100 metres from the tram stop, he attacked her. He struck her over the head with a metal pipe and she fell to the ground, unconscious. She never regained consciousness.

22 Having incapacitated Ms Maasarwe, CH dragged her body behind a low hedge, between the footpath and a car park. He removed some of her clothing and raped her forcefully. He then struck her at least nine more times to the head with the metal pipe, with severe force, causing multiple fractures to her skull and face and lacerations to her brain. She died from catastrophic head injuries.

23 CH then dragged Ms Maasarwe's body further behind the hedge. He sprayed her with an inflammable fluid from an aerosol can and, using a lighter, set fire to her clothing and body. He did this, the judge found, to try to destroy evidence that might have implicated him in the attack. The judge found that, given the severity of her skull and brain injuries, it was highly unlikely that Ms Maasarwe had survived for any significant period after those injuries were inflicted.

24 The judge was satisfied that the assault must have involved some element of premeditation, in that CH had begun it with the pipe in his hand. On the state of the evidence, however, her Honour was unable to be satisfied beyond reasonable doubt that he had obtained and secreted the pipe or the inflammable fluid at an earlier time, with the intention of using them in a later attack. Her Honour said:

> [T]he prosecution cannot establish beyond reasonable doubt that the attack involved substantial pre-planning. The disorganised manner in which you fled the scene, leaving a trail of incriminating items behind you, also suggests an unsophisticated, opportunistic attack, rather than a carefully-planned crime.[14]

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14 Reasons [20]–[21].

Assessing offence gravity

25 Her Honour identified a number of matters as relevant to assessing the objective gravity of the offending. Her Honour said:

> The murder and rape were completely random offences, committed against a total stranger, late at night. Ms Maasarwe was doing nothing more than walking along a public street, on her way home from a night out, as she had every right to do.
>
> Whenever a woman is brutally attacked by a stranger in public, understandably it causes other women to feel less safe going about their ordinary daily lives.
>
> Ms Maasarwe was physically small, unsuspecting and alone. Seeing you only moments before you first struck her, she had no opportunity to flee or defend herself.
>
> You quickly subjected her to a savage attack, with a crude but effective weapon, which immediately rendered her unconscious. Once she was completely incapacitated, you dragged her off the footpath, to a position of relative cover, where you forcefully raped her. You struck her head repeatedly, using severe force, causing catastrophic injuries. You struck her with the clear intention of killing her, not merely injuring her.[15]

26 Noting that the attack was 'entirely unprovoked',[16] the judge concluded that the murder and rape were

> both very serious examples of offences which are themselves extremely serious.[17]

Her Honour said:

> It is a significant aggravating feature of your offending that you tried to destroy evidence of your offending by setting Ms Maasarwe's clothing and body alight. Treating her body in this way showed utter contempt for her dignity.[18]

27 The Director relied on these findings in submitting that the objective gravity of the murder was 'extremely high' and that of the rape 'very high'. The submission also relied on Dr Carroll's characterisation of the murder as an instance of 'sexual homicide'.

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15 Ibid [13]–[16].

16 Ibid [22].

17 Ibid [23].

18 Ibid [18].

28 In his evidence, Dr Carroll explained that sexual homicides were typically classified into three categories: angry, sadistic, and inadvertent. The latter category comprised cases where the offender intended to commit rape but then decided to kill the victim in order to reduce the likelihood of being caught. That characterisation could be readily ruled out in this case, Dr Carroll said.

29 Dr Carroll said he had given careful consideration to whether the present case fell into the sadistic category. He concluded that there was no evidence of sadistic motivation, no desire to 'keep the victim conscious, in order to torture and humiliate as part of the act'. Rather, in his opinion, the present case was very clearly an example of 'angry' sexual homicide. As he said in evidence:

> [T]he presence of so-called overkill, where the level of brutality inflicted on the victim was far, far in excess of that required to bring about her death … is classically seen in this angry type of sexual homicide.

30 As will appear, Dr Carroll's opinion was that the offence was driven 'by a furious rage on the background of a damaged personality'. According to his report:

> Clearly, … Mr Hermann's angry state was such that he gave no heed whatsoever to the inevitable suffering and death of his victim and the suffering of numerous others that inevitably followed.

31 Both on the plea and in this Court, the submissions for the Director relied on the sentencing reasons of Kaye JA in *Director of Public Prosecutions v Todd* ('*Todd*').[19] In that case, a life sentence was imposed for a violent rape and murder. In his reasons, Kaye JA said:

> In the end, and after giving this matter truly anxious consideration, and giving full weight to the mitigating circumstances to which I have referred, I have come to the conclusion that the only appropriate sentence, for the offence of murder in this case, is one of life imprisonment, with a fixed minimum period of years before you are eligible to be considered for release on parole. I have reached that conclusion because of the enormity of your offending, and the extremely high level of the objective gravity of, and your subjective culpability for, that offending. In my view, only a sentence of life imprisonment, with a fixed non-parole period, could properly vindicate the central sentencing purposes of general deterrence, denunciation and community protection.

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19 [2019] VSC 585, upheld in *Todd v The Queen* [2020] VSCA 46.

> In particular, any sentence less than a term of life imprisonment would detract from the effect of the sentence as a deterrent to others who might be tempted to succumb to their own impoverished impulses to offend in the manner in which you did. Only by a sentence of life imprisonment can this Court make it absolutely plain, with no qualification, that any person, who is minded to offend in the manner in which you did, will be met with the full force of the law, and lose their right to be at liberty in society for the remainder of their lives.
>
> Allied to that, only a sentence of life imprisonment can adequately express the true and full measure of the condemnation by the Court, and thus by the community, of the appalling depravity that lay at the centre of your offending, and thus uphold the most basic values of a decent civilised society.
>
> In addition, 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.[20]

32 In the present case, the judge concluded that the *Todd* decision was 'only of limited assistance'. Her Honour said:

> There are some similarities between the two cases, including the following: you both brutally raped and murdered a complete stranger, late at night, in a public place; you were both young offenders with no prior convictions; you both pleaded guilty at an early stage, but had limited remorse; and both cases fell within the standard sentence provisions.
>
> However, there are also some very important points of difference between this case and the *Todd* case. On the one hand, Mr Todd killed his victim with his bare hands, rather than a weapon. He also did not commit any aggravating act, such as setting fire to the body.
>
> On the other hand, unlike in this case, Mr Todd's offending involved substantial premeditation. He had had a long-standing sexual fantasy to rape and strangle to death a woman, for more than a year. On the night in question, he spotted his intended victim and followed her on foot for almost an hour, through the city and Carlton streets, until he was able to attack her in a remote location.
>
> As his victim's suffering was at the core of his coercive sexual sadism disorder, Mr Todd restrained Ms Dixon throughout the attack and eventually choked her to death, as she bravely tried to fight back. The experts agreed that the paraphilic interest that underlay Mr Todd's disorder was untreatable, resulting in his prospects of rehabilitation being very limited. Mr Todd's background did not give rise to specific *Bugmy* considerations, nor was it

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20 Ibid [116]–[119].

suggested that *Verdins* principles applied to his sexual sadism disorder.[21]

33 In our view, the judge was right to view the decision in *Todd* as of only limited assistance. As her Honour noted, there were several significant features of that case which made it materially worse than the present case. First, there was 'substantial premeditation'[22] during the period when Todd was following his victim and 'entertaining powerful thoughts of enacting the violent sexual fantasy to which [he] had become addicted, namely, the rape and strangulation to death of a female victim'.[23] As the Director properly conceded, premeditation is a recognised aggravating factor.[24]

34 The second significant feature was that Todd's victim was conscious throughout. As Kaye JA found, Todd knew that he was causing her severe distress, and her suffering was 'the essence of the sexual arousal that drove [his] actions'.[25] The third feature was that Todd's disorder was effectively untreatable, resulting in what his Honour found was an 'unacceptable risk that [he] would reoffend'.[26] As noted earlier, no such finding was — or could have been — made in relation to CH. Finally, Todd's background, and his sexual sadism disorder, provided very little mitigation of his moral culpability.[27]

Assessing moral culpability: childhood deprivation

35 As noted earlier, the judge accepted that CH's moral culpability was reduced by virtue of both his childhood deprivation and his severe personality disorder. Before examining the expert evidence on which those conclusions were based, it is necessary to identify the separate frames of reference which are engaged. We deal

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21 Reasons [109]–[112].

22 Ibid [112].

23 *Todd* [2019] VSC 585, [52] (Kaye JA).

24 *Hudson v The Queen* (2010) 30 VR 610, 619 [39]; [2010] VSCA 332 (Ashley, Redlich and Harper JJA).

25 *Todd* [2019] VSC 585 [79] (Kaye JA).

26 Ibid [88]–[89].

27 Ibid [80], [83].

first with deprivation.

36 As to deprivation, the submissions on behalf of CH rested on what was said by the High Court in *Bugmy v The Queen* ('*Bugmy*').[28] The Court there expressed in two different ways the potential relevance of childhood deprivation to the assessment of moral culpability. The first — more general — expression was as follows:

> The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.[29]

37 The second — more specific — expression was in these terms:

> An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.[30]

38 Importantly, the High Court also said:

> The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving 'full weight' to an offender's deprived background in every sentencing decision.[31]

39 The insights which *Bugmy* provided are of great importance, given the frequency with which sentencing courts are called on to deal with offenders who come from backgrounds of severe disadvantage. As Redlich and Tate JJA said in

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28 (2013) 249 CLR 571; [2013] HCA 37.

29 Ibid 594 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

30 Ibid 595 [44].

31 Ibid 594-5 [43]–[44].

Marrah v The Queen:

> Circumstances of deprivation, abuse and other social disadvantage occurring during an offender's formative years are more than matters of historical significance to the administration of justice. The effects of such social disadvantage do not generally diminish with the passage of time, and are likely to have profound and lasting consequences. The common experience of the law is that very frequently such disadvantage precedes the commission of crime, and often explains and contributes to an offender's criminal behaviour. The frequency with which criminal conduct can be explained by such disadvantage does not relieve each sentencing judge of the obligation to take such matters into account. Though they do not provide an excuse for offending behaviour, they must be given due weight in the sentencing calculus.[32]

40 Subsequent decisions of this Court attest to the frequency with which sentencing courts are required to deal with issues of deprivation and disadvantage. In 2019 and 2020 alone, this Court on 26 separate occasions affirmed the applicability of the *Bugmy* principles to an offender's circumstances.[33]

41 Relevantly for present purposes, these decisions can be seen to reflect the application of both the general and the specific approaches described in *Bugmy*. As an example of the general approach, the Court in *Director of Public Prosecutions v Drake* said:

> [T]he profound dysfunction, disadvantage and abuse experienced by the respondent during his formative years were relevant to an appropriate evaluation of his moral culpability. As recognised by the High Court in *Bugmy*, those experiences, none of which were of his making, all played a significant role in shaping the respondent's personality and his responses. As a consequence, his subjective culpability, for the offending in which he engaged, could not be equated with that of a person who committed the same offence but had had the advantage of a normal, stable and regular home

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32 [2014] VSCA 119, [16] (citations omitted).

33 *Edwards v The Queen* [2020] VSCA 339; *Lockyer (a pseudonym) v The Queen* [2020] VSCA 321; *Shok v The Queen* [2020] VSCA 294; *Byrne v The Queen* [2020] VSCA 289; *Cooper v The Queen* [2020] VSCA 288; *Haberman v DPP* [2020] VSCA 286 ('*Haberman*'); *Salmi v The Queen* [2020] VSCA 250; *Victorsen v The Queen* [2020] VSCA 248; *Freeburn v The Queen [No 2]* [2020] VSCA 176 ('*Freeburn*'); *Rezai v The Queen* [2020] VSCA 106; *DPP v Snow (a pseudonym)* [2020] VSCA 67 ('*Snow*'); *Maddocks v The Queen* [2020] VSCA 47; *DPP v Green* [2020] VSCA 23 ('*Green*'); *DPP v Drake* [2019] VSCA 293; *Berry v The Queen* [2019] VSCA 291; *Leishman v The Queen* [2019] VSCA 270; *Durham v The Queen* [2019] VSCA 176; *Holland v The Queen* [2019] VSCA 173; *Luchian v The Queen* [2019] VSCA 145; *Williamson v The Queen* [2019] VSCA 138 ('*Williamson*'); *Walker v The Queen* [2019] VSCA 137 ('*Walker*'); *DPP v Heyfron* [2019] VSCA 130 ('*Heyfron*'); *DPP v Macarthur* [2019] VSCA 71; *Davies v The Queen* [2019] VSCA 66; *DPP v Hodgson* [2019] VSCA 49; *DPP v Shearer (a pseudonym)* [2019] VSCA 47.

environment during his or her childhood years.[34]

42 The more specific approach was reflected in *Director of Public Prosecutions v Snow (a pseudonym)*.[35] In that case, the sentencing judge was satisfied, on the basis of expert evidence, that there was a 'nexus' between the offending and the 'high level of deprivation, abuse and other social [disadvantage]' which the offender had experienced or observed during her formative years.[36] The finding of 'nexus' led the judge to conclude that the offender's moral culpability, and the need for general deterrence, should be 'substantially moderated'.[37]

43 On the Director's appeal against sentence, this Court said:

> The reasons do not elaborate on the nature of the nexus to which his Honour was referring. Read in context, however, we infer that his Honour had in mind either an explanatory nexus or a causal nexus.
>
> If the former, his Honour was satisfied that the devastating impact of such an upbringing could help explain what both defence counsel and the prosecutor on the plea described as 'inexplicable' conduct. If the latter, the 'nexus' might be thought to be analogous to what, in the context of impaired mental functioning, has been described as a 'realistic connection' between the impairment and the offending. Most often, what is looked for in that context is a causal connection, in the sense that the offending would not have occurred, or would not have taken the form it did, had it not been for the operative effect of the impairment of mental functioning.[38]

44 The decisions of this Court also reaffirm the need for an appropriate evidentiary foundation before an offender's disadvantaged background can be taken into account.[39] Depending on the extent and quality of the evidence, it may or may not be possible to establish a 'nexus' or 'realistic connection' between the offending

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34 [2019] VSCA 293, [32] (Maxwell P, Priest, Kaye, T Forrest and Emerton JJA) (citations omitted). See also *Green* [2020] VSCA 23, [83] (Maxwell P, Priest and Kaye JJA); *Walker* [2019] VSCA 137, [74] (Whelan, Kyrou and Kaye JJA); *Williamson* [2019] VSCA 138, [106] (Kaye JA); *Freeburn* [2020] VSCA 176, [52] (Kyrou, Kaye and Emerton JJA); *Haberman* [2020] VSCA 286, [72]–[73] (Kaye and T Forrest JJA).

35 [2020] VSCA 67.

36 *DPP v [Snow]* (Unreported, County Court of Victoria, Judge Allen, 11 November 2019) [117].

37 Ibid.

38 *Snow* [2020] VSCA 67, [75]–[76] (Maxwell P, Beach JA and Croucher AJA) (citations omitted).

39 *DPP v Terrick* (2009) 24 VR 457, 469 [46.7]; [2009] VSCA 220 (Maxwell P, Redlich JA and Robson AJA) (*'Terrick'*).

and the relevant background circumstances.[40]

45 The significance of the 'general' approach enunciated in *Bugmy* is that the relevance of deprivation to sentencing does not depend on proof of such a nexus. As Victoria Legal Aid pointed out in its helpful submission as amicus curiae, 'the impact of disadvantage is complex, multilayered, non-linear and not easily "diagnosed" or measured'. The High Court's recognition that serious childhood deprivation is likely to make an offender less morally culpable than 'an offender whose formative years were not marred in that way'[41] reflects the principle of equal justice. As Dawson and Gaudron JJ said in *Postiglione v The Queen*:

> Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them.[42]

46 It is the mark of a humane society that the moral judgment expressed through sentencing should take account of the lifelong damage that may result from exposure to violence or abuse or parental neglect in an offender's formative years. As the present case graphically illustrates, childhood trauma can permanently damage — and seriously distort — a person's view of the world around them and their understanding of social norms. Thus, in *Freeburn v The Queen [No 2],* it was accepted that the offender's 'background, of deprivation and abuse, played a material role in shaping his responses, and thus in his offending'.[43] In *Snow,* the Court drew attention to 'the impact on the decision-making of individuals of growing up, and living, in circumstances of prolonged and widespread social disadvantage'.[44]

47 In the present case, as will appear, there was an unusually extensive documentary record of CH's childhood years, enabling the circumstances of deprivation to be clearly identified and analysed. Moreover, the uncontested

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40 Ibid 468 [46.2]–[46.3].

41 *Bugmy* (2013) 249 CLR 571, 594 [40]; [2013] HCA 37 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

42 (1997) 189 CLR 295, 301; [1997] HCA 26.

43 *Freeburn* [2020] VSCA 176, [51] (Kyrou, Kaye and Emerton JJA).

44 *Snow* [2020] VSCA 67, [79] (Maxwell P, Beach JA and Croucher AJA).

opinion of Dr Carroll was that there was a relevant causal nexus between the deprivation and the offending. As in *Snow*, the expert evidence of the harm suffered by CH provided some explanation of seemingly inexplicable offending.

48 The judge made the following findings:

> You undoubtedly suffered from profound childhood deprivation and trauma. Dr Carroll described the first couple of years of life as being crucial in terms of human development. He said that due to the lack of secure, early attachment in the first three years of your life, the foundational building blocks of normal personal functioning were not established. Even though your foster mother subsequently provided some stability in your life, it is very difficult to try to overcome such profound early deficits, and you continued to experience abandonment issues and feelings of alienation. I accept Dr Carroll's evidence as to the effect that your childhood deprivation had on your capacity to process emotional distress and control your impulses; that reduces your moral culpability to some degree.[45]

Assessing moral culpability: impairment of mental functioning

49 The second frame of reference concerns impairment of mental functioning. In *R v Verdins*,[46] this Court identified six different ways in which an offender's impaired mental functioning may be relevant to sentencing. The first of the so-called '*Verdins* principles' is that an impairment of mental functioning, if shown to have had a 'realistic connection' with the offending, may reduce the offender's moral culpability for the offence.[47] The court may also conclude that the impairment warrants some moderation of specific and/or general deterrence.[48] Whether any such conclusion is available in a particular case depends on what the expert evidence shows about 'the nature, extent and effect of the mental impairment experienced by the offender at the relevant time'.[49]

50 As noted earlier, CH was diagnosed as having a severe personality disorder.

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45 Reasons [63].

46 (2007) 16 VR 269; [2007] VSCA 102 ('*Verdins*').

47 Ibid 276 [32] (Maxwell P, Buchanan and Vincent JJA); *DPP v O'Neill* (2015) 47 VR 395, 414 [74]; [2015] VSCA 325 (Warren CJ, Redlich and Kaye JJA).

48 *Verdins* (2007) 16 VR 269, 276 [32]; [2007] VSCA 10 (Maxwell P, Buchanan and Vincent JJA).

49 Ibid 271 [8] (Maxwell P, Buchanan and Vincent JJA).

At the time of the sentencing in this case, there was a divergence of views as to whether such a condition was capable of engaging the *Verdins* principles. The judge gave careful reasons for concluding that it was, and sentenced CH accordingly. Her Honour's conclusion in that regard was subsequently confirmed by the 2020 decision of this Court in *Brown v The Queen*,[50] where a five-member Bench held that the *Verdins* principles were capable of application to the sentencing of an offender who suffered from a personality disorder.

51 The Court in *Brown* concluded as follows:

> An offender diagnosed with a personality disorder should be treated as in no different position from any other offender who seeks to rely on an impairment of mental functioning as mitigating sentence in one or other of the ways identified in *Verdins*. Statements to the contrary in *O'Neill* should no longer be followed. Whether and to what extent the offender's mental functioning is (or was) relevantly impaired should be determined on the basis of expert evidence rigorously scrutinised by the sentencing court.[51]

52 On the plea, and in this Court, counsel for CH submitted that the impairment of mental functioning resulting from his personality disorder should be viewed as reducing his moral culpability, and as moderating the need for specific and general deterrence. Her Honour accepted that submission, saying:

> Dr Carroll believes that your severe personality disorder led to you perceiving the world in 'a profoundly abnormal way', and severely impaired your ability to exercise appropriate judgment, to think clearly, to make calm and rational choices. As far as causation is concerned, Dr Carroll also said that the offending 'only made sense' by reference to your severe personality disorder. In those circumstances, *Verdins* principles operate to reduce, to some extent, your moral culpability, and the need for general and specific deterrence.[52]

53 There were, however, three further matters which her Honour said needed to be noted:

> First, as with the *Bugmy* principles, the matters that make *Verdins* principles applicable to you decrease your moral culpability, but increase the importance of community protection. That said, according to Dr Carroll,

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50 [2020] VSCA 212 ('*Brown*').

51 Ibid [6] (Maxwell P, Niall, T Forrest, Emerton and Osborn JJA).

52 Reasons [82].

> although some degree of personality dysfunction is likely to be enduring, the current degree of personality dysfunction is not necessarily permanent; the prognosis will depend on your access and response to treatment, and the effects of natural maturation on your central nervous system.
>
> Secondly, your personality disorder has arisen out of your deprived background. In those circumstances, I have been mindful of the need to avoid inappropriate doubling up of the mitigatory effect of the *Bugmy* and *Verdins* principles in this particular case.
>
> Thirdly, your personality disorder reduces, but does not remove, the need for general deterrence. Women should be free to walk the streets alone, without fear of being violently attacked by strangers. Your sentence must also reflect the court's denunciation of, and the need for just punishment for, these terrible crimes.[53]

54 In this Court, the Director submitted that, in relying on Dr Carroll's statement that the offending 'only makes sense' by reference to CH's personality disorder, the judge had 'overstated [its] role'. The effect of the disorder, it was said, permitted 'only a limited moderation of moral culpability, general deterrence and specific deterrence'. According to the submission, his moral culpability remained 'very high' and both general and specific deterrence remained 'important sentencing considerations'.

55 The Director further submitted that, as CH's personality deficits were fully taken into account in accordance with the *Verdins* principles, it was 'double count[ing]' for his moral culpability to have been moderated on the basis of 'the *Bugmy* principles'. Because the evidence 'maps [CH's] deprived background directly onto his personality disorder', there is 'a complete overlap' between the *Verdins* and *Bugmy* principles'. It followed, according to the submission, that the application of the *Verdins* principles precluded any further mitigation on the basis of CH's disadvantaged background.

56 In her reasons for sentence, the judge made the following relevant findings:

(a) from a very early age, CH has suffered from a severe personality disorder involving particular deficits, namely: chronic emotional disconnection; distorted assumptions regarding other people's

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[53] Ibid [82]–[86].

attitudes and intentions towards him; chronic hyper-arousal and hypervigilance; and a sense of dissociation from the world;[54]

(b) that disorder was caused by and arose from the profound childhood deprivation and trauma he suffered during the first three years of his life;[55] and

(c) CH's personality dysfunction underlay an accumulated, unprocessed anger which, in the context of a number of 'proximal factors', led to him committing the offences.[56]

57 Those findings were based substantially on the evidence of Professor Carroll. Delivered orally and addressed to CH in the sentencing reasons, the findings necessarily constituted an abbreviated summary of the quite complex and nuanced evidence given by Professor Carroll. A detailed examination of his evidence is important to elucidate the content, nature and significance of the findings on which her Honour based her conclusion that CH's moral culpability was materially reduced.

What the expert evidence showed

58 Having examined CH, and having reviewed a very large file as to his history and circumstances, Professor Carroll outlined four 'entrenched [and] interrelated' deficits that he identified in CH's psychological function. In Professor Carroll's opinion, the four deficits added up to 'a severe personality disorder with very significant impairment in his functioning'.

59 First, there were deficits in CH's capacity to process emotional distress stemming from the inevitable stressors of life. Dr Carroll explained that, rather than working through his distress, CH had tended to avoid, suppress and minimise his emotional distress in various ways. In his evidence on the plea, Dr Carroll explained

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54 Ibid [56]–[57].

55 Ibid [63], [85].

56 Ibid [60], [82].

that, as a result, CH had a 'steadily growing collection of unresolved traumas', and … a deep wellspring of sadness and anger'. CH had chronically suppressed his emotions as a heavily entrenched coping strategy that he had developed from his early childhood. In doing so CH had accumulated, and suppressed, a growing world of emotions, including anger, from his early childhood.

60 Secondly, CH operated on distorted assumptions concerning other people's attitudes and intentions towards him, 'founded on profound mistrust and anxiety'. Dr Carroll explained that CH did not have a 'pervasive kind of psychopathic callous indifference to … other people's states of mind'. Rather, his understanding and experience of other people's mental states was 'markedly skewed by his own feelings of profound inadequacy'. CH projected his feelings onto others and automatically assumed that other people were appraising his achievements in a negative way. As a result, his assumptions about how other people felt and acted towards him fuelled his anger and despair, so that he experienced his social world as 'inherently hostile'.

61 The third deficit was a degree of 'chronic hyper-arousal'. From early childhood, CH appeared to have been hyper-vigilant, experiencing the normal, mainstream, social world around him as a threatening place. In his evidence, Dr Carroll stated that from early childhood CH had 'experienced the world as a threatening place, …. likely to evoke in him unpredictable and poorly processed emotions'.

62 The fourth deficit was CH's 'impaired self-direction and agency'. That is, he demonstrated a lack of coherent and stable goals, aspirations and values, which constituted a 'deep sense of having no real point of effective contact with the world around him'.

63 In assessing the nature of CH's disorder and the causes of it, Dr Carroll had the advantage of studying a very large volume of material obtained from the Victorian Aboriginal Child Care Agency ('VACCA'). CH was born in 1998 to 19-year-old parents. His mother was an Aboriginal woman and his maternal

grandparents came from the Cape York Peninsula in Far North Queensland. The VACCA materials indicated that CH's mother was a person who had significant issues relating to alcohol and substance abuse throughout her life. Dr Carroll noted that CH had spent his infancy in an environment that was 'unsafe, unpredictable and unresponsive to his basic needs', so that his fundamental socio-emotional needs were not met in his very early years. As a result, the 'foundational building blocks of normal personality functioning were simply never established'.

64 In evidence, Dr Carroll expressed the view that the 'damage had already been done before the age of two'. CH's upbringing in those early years with his biological parents was 'bereft of normal levels of nurture, of ensuring his safety, of making him feel secure, and of emotional reciprocity'. This deficiency in CH's early infancy was very important, because 'the lack of that early secure attachment means that the very first developmental task of any human being has not been navigated'.

65 Dr Carroll explained that, from a very early age, CH did not find the world to be a trustworthy place. On both a psychological and neurobiological level, he said, if such trust is not established in the first 18 months to 2 years, it is very difficult to rectify. In cross-examination, Dr Carroll reaffirmed that the origins of CH's pent up anger lay in the early neglect by his parents. That process was exacerbated by the subsequent 'intermittent abandonment' of CH by his mother throughout his childhood, when she often failed to attend for access visits or, when she did, she turned up intoxicated. Dr Carroll was of the view that that process was exacerbated further by CH's mother's death when he was 13 years of age, and his father's complete abandonment of him.

66 According to Dr Carroll, the most severely personality disordered people are not those who suffer abuse in middle childhood or adolescence but, rather, those who have been subjected to neglect and deprivation from early infancy. Such processes have neurobiological correlates, he said, meaning that parts of CH's brain did not develop in a normal way because of the level of neglect to which he was

subjected in his first two years. Dr Carroll stated that, as a consequence of CH having been reared in a chaotic, insecure, dangerous environment that was not responsive to his basic needs, enduring deficits developed in his personality from his very early childhood.

67 Of particular significance was the evidence given by Dr Carroll as to the connection between CH's severe personality disorder and this offending. Dr Carroll explained that during the six months before the offence CH's life had been marked by 'profound chaos and despair'. He was then homeless and unemployed; he spent most of his time with peers who used illicit substances; and he only had infrequent contact with his foster mother and his sister. He was in a cycle of addiction with methamphetamine, and was not engaged with mental health services.

68 As a result, CH was at this time 'bereft … of any pro-social external "scaffolding"' and subject to the 'regular damaging effects of cannabis and methamphetamine'. In that setting:

> his already fragile 'higher order' mental functions — the 'executive functioning' capacity of the brain, responsible for self-control, coherent planning and organisation, began to break down entirely'.

69 In this context, Dr Carroll said, CH's 'unprocessed, longstanding underlying emotions of anger towards the world (to a large extent directed towards females) began to erupt in conscious awareness'. On the night of the offence, his 'unprocessed anger' became manifest, with catastrophic consequences. The offences were driven by a 'disinhibited eruption of underlying anger', which CH had long held at a deep and profound level, being anger towards the world in general and, more particularly, towards females.

70 There were, Dr Carroll said, a number of recent 'proximal factors' — surrounding circumstances — which were likely to have reinforced each other and further compromised CH's executive functioning. They were: humiliating experiences with his peers; ongoing effects of regular intoxication; worsening mood state; and poor physiological health. It was in that context, in an explosion of

'furious rage', that he committed the murder.

71 As noted earlier, Dr Carroll described the killing as an 'angry type of sexual homicide'. Explaining that categorisation in evidence, Dr Carroll said that the 'primary driver' for the offences was the 'eruption of suppressed rage … this deep wellspring of anger'. At the time of the offences, CH was in a 'very disinhibited … state of a rage'. Dr Carroll further explained that CH had harboured anger for many years, towards the world in general and towards females in particular. He had never processed those emotions, and his anger had developed and evolved. At the time of the offence, his anger 'burst forth'.

72 Dr Carroll explained that, while there were a number of factors underlying the offending, 'underpinning all of this is his severe personality disorder'. In Dr Carroll's opinion, it was only possible to 'make sense' of the offending by reference to the severe personality disorder. Accordingly, he said, there was a clear causal nexus between the disorder and the offence.

73 Asked whether CH would have committed the assault with a specific intent to rape the victim, or whether it was 'simply wrapped up in the overall sense of misdirected rage', Dr Carroll responded:

> I think the two cannot really be disaggregated. It's … almost sort of stereotypical, primitive male rage that we have this dreadful combination of severe violence allied with rape … this is the manifestation of male rage towards a female and I don't think we can neatly split it.

74 It is clear from the evidence of Dr Carroll that, as a result of the deficits and deprivation of CH's early childhood, he was severely psychologically and emotionally damaged. Further, that damage endured. The four deficits described by Dr Carroll were integral to the development, suppression and ultimate eruption of the deep sense of rage that grew within CH during his teenage years. His psychological props were severely compromised, as reflected in — and exacerbated by — the impoverishment of his daily life.

75 While, ordinarily, the effects of intoxication by illicit substances are not

regarded as a mitigating circumstance, it is clear from the report of Dr Carroll that CH's use of cannabis and other illicit substances was part of his 'coping style', which was to suppress and minimise emotional distress. The drugs provided a respite from his unmanageable feelings of distress and despair. Over time, the drug addiction further entrenched CH's pattern of avoidance of the challenges of adulthood. In that way, his consumption of drugs, and the effects that they had on him, arose from and were an aspect of his damaged psyche.[57]

76 In the light of Dr Carroll's evidence, it was well open to the judge to be satisfied that CH's severe personality disorder was a significant contributing cause of the offending. Plainly, the offending was not the product of some form of psychopathy, deviancy, or uncontrolled lust. Rather, it was the tragic result of the explosion of rage which, as Dr Carroll explained, had built up within CH to breaking point.

77 Her Honour's conclusion that CH's moral culpability was therefore reduced is unimpeachable. Certainly, as Dr Carroll stated, CH was responsible for his actions; and he knew that what he was doing was wrong. At the same time, however, his personality disorder severely affected his ability to control his emotions and faculties, to think clearly, to make calm, reasoned decisions and to exercise appropriate judgment. Again, as Associate Professor Warrick Brewer said, CH's 'markedly negative developmental trajectory' was reflected in a 'reduced moral sense [which] places an insufficient barrier to socially unacceptable behaviours'.

'Overlap' of **Bugmy** *and* **Verdins**

78 As the evidence made clear, CH's disorder, and the deficits which were an integral part of that disorder, were not of his making. They were the consequences of the deprived and traumatic years of his early infancy. That being so, the judge

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[57] See *R v Rogers* (1989) 44 A Crim R 301, 305–6 (Malcolm CJ); *Terrick* (2009) 24 VR 457, 468 [46.2], [53]; [2009] VSCA 220 (Maxwell P, Redlich JA and Robson AJA); *Green* [2020] VSCA 23, [45], [96] (Maxwell P, Priest and Kaye JJA).

concluded that the principles in both *Bugmy* and *Verdins* were engaged.[58]

79 A common feature of those two sets of principles is that they permit the court to view an offender's moral culpability as reduced where, through no fault of the offender, his or her psychological functioning or personality structure has been impaired. The impairment may be the result of some endogenous condition (such as schizophrenia) or of damage occasioned by neglect or violence or abuse during the offender's developmental years.

80 In our respectful view, the judge was right to draw on both sets of principles. This was an unusual case in that there was powerful evidence which engaged both. There was evidence of CH's childhood deprivation and its catastrophic effects on his developing brain and personality and, hence, on his ability to deal with the vicissitudes of life. And there was evidence of the serious psychiatric condition which he developed as a consequence of the damage caused in the early years.

81 What was so illuminating about Dr Carroll's evidence was that it explained how the two were connected. Understanding the severe deprivation suffered by CH during his infancy enabled a better understanding of the deficits in his psychological functioning at the time of these offences.

82 Her Honour recognised the convergence of the two sets of considerations, and the need to avoid 'inappropriate double counting'.[59] We reject, however, the Director's submission that there was 'a complete overlap' between the two. As we have said, it was highly relevant for the judge to know that CH, through no fault of his own, was a badly damaged individual from the outset, just as it was relevant to know how his severe personality disorder affected his mental functioning in the lead-up to the offending.

83 Each frame of reference had its own explanatory work to do, enhancing the

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58 Reasons [63], [82].

59 This notion of 'double counting' or 'doubling up' has been previously considered by sentencing judges in this Court. See, eg: *R v Nolan* [2020] VSC 416; *R v Cook* [2015] VSC 406.

judge's understanding of both the offender and the offences. As CH's counsel submitted in this Court, the impact of his childhood deprivation was not limited to the development of the personality disorder. His teenage years followed a 'pattern of pervasive under-attainment, unemployment, early exit from the educational system and homelessness'. Such unremittingly negative experiences both reflected and reinforced CH's perception of what his counsel described as his 'generally futile and hopeless position in the world'.

84 It follows, in our view, that notions of 'double counting' and 'overlap' are unhelpful. Sentencing is in no meaningful sense a 'counting' exercise, in which matters of aggravation or (in this context) mitigation are somehow 'added up'. Once each such matter has been identified, the judge must draw them all together in order to arrive at a single assessment of the offending and the offender. That is an exercise of judgment, informed by experience.

85 So far as the offender is concerned, the judge makes a determination of the moral culpability of the offender, and of the weight which should, as a matter of justice, be given to the sentencing purposes of general deterrence and specific deterrence. That determination reflects the judge's assessment of the offender based on a distillation of all of the relevant information.

86 In the present case, both CH's past deprivation and his current psychological impairment were relevant to the assessment. As the judge correctly found, his moral culpability for this offending could not be realistically equated with that of a person who had had the advantage of a stable, secure and loving upbringing, and who did not suffer from the same impairment of mental functioning.[60]

87 As we have said, Dr Carroll was able to undertake such a thorough and detailed examination of CH's psychological state because he had available to him the very substantial file maintained by VACCA, which recorded CH's very difficult past history. Unfortunately, in the vast majority of cases, and particularly those which

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60 See above n 34.

come before the lower courts in this State, there are insufficient resources to enable the provision to those courts of reports relating to offenders who have suffered the kind of significant deprivation or dysfunction experienced by CH in his early years.

88 Experience overseas has demonstrated that reports such as the Canadian Gladue Reports are important aspects of the criminal justice system, particularly in the case of Aboriginal offenders.[61] In that respect, we note that a project has recently commenced to trial Aboriginal Community Justice Reports. As this case has demonstrated, the provision of such reports in appropriate cases will constitute an important step in ensuring the just sentencing of offenders in this State.

Prospects of rehabilitation and protection of the community

89 There was extensive debate, on the plea and in this Court, about the assessment of CH's prospects of rehabilitation. The question of rehabilitation had significance for two distinct aspects of the sentencing process. The first concerned the mitigating significance of CH's youth; the second concerned the risk of reoffending which he would present in the future, which bore directly on the question of protection of the community.

90 As to the relevance of CH's youth, the judge said:

> The law says that the youth of an offender should be a primary consideration for a sentencing court, where the matter properly arises. In the case of such an offender, rehabilitation is usually more important than general deterrence; rehabilitation benefits the community as well as the offender. One of the important reasons underlying these principles is that young people may be more prone to acting in a spontaneous and ill-considered fashion, when their brains have not finished maturing.
>
> However, those principles are not absolute; due regard must be had in each case to other relevant matters, including the seriousness of the offending, and whether there has been any prior offending. Generally speaking, the more serious the offending, the less the weight to be attached to youth. But the mitigatory effect of youth will be extinguished only in circumstances of the gravest criminal offending, and where there is no realistic prospect of

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61 See Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39 *Melbourne University Law Review* 47, 57–9.

rehabilitation.[62]

91 The prosecutor's submission on the plea was that CH's prospects of rehabilitation were 'guarded at best', such that the mitigatory effect of his youth had little, if any, role to play. In this Court, the Director acknowledged — by reference to the judgment of Redlich JA in *Azzopardi v The Queen*[63] — that youth is ordinarily given prominence in the sentencing process:

> because the community has an interest in enhancing the prospects of rehabilitation for young offenders, and because the courts recognise the potential for young offenders to be redeemed and rehabilitated.

92 In the present case, the Director submitted, CH's youth was a relevant consideration but it must not be 'permitted to overshadow how serious the offending has been and the consequences of the offending'.[64] The Director relied on the following statement of Vincent JA in *Director of Public Prosecutions v SJK*:

> In this case, given the seriousness of the offence and of the offending and the lack of any real remorse shown by the [offenders] in relation to their crimes and given that there is little evidence to show that they have reasonable prospects of rehabilitation in the near future, the principles of general and specific deterrence and the need for the court to express denunciation of the crime assume considerable significance for sentencing purposes so that there is correspondingly less scope for leniency on account of the [offenders'] youth.[65]

93 The judge's finding on CH's prospects of rehabilitation, and the significance of his youth, was as follows:

> Dr Carroll noted a number of factors which led him to conclude that you have favourable prospects of rehabilitation. You are open and willing to engage in treatment, and are working well with your mental health team in custody. You have no major cognitive deficits, or residual symptoms of enduring mental illness, which would impede rehabilitation. The maturation of your central nervous system over the next few years should assist with the development of improved emotional regulation, and other higher order cognitive and social skills. There are a number of remediable, relevant, dynamic risk needs that can usefully be addressed over the coming years. Finally, there is evidence that the angry type of sexual homicide offender,

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62 Reasons [94]–[95].

63 [2011] VSCA 372.

64 *Todd* [2020] VSCA 46, [49] (Ferguson CJ, Priest and Beach JJA).

65 [2002] VSCA 131, [66] (Phillips CJ, Chernov and Vincent JJA).

> such as yourself, can eventually be rehabilitated, if provided with appropriate treatment, support and supervision.
>
> Although Associate Professor Brewer was a little more circumspect than Dr Carroll regarding your prospects of rehabilitation, I accept that you do have fair prospects of rehabilitation if you are given appropriate treatment, support and supervision.
>
> Somewhat remarkably, given the chaotic life you were living before the start of this year, you have no prior convictions. Your offending demonstrated the spontaneous, ill-considered features with which the young offender principles are concerned. Although the mitigatory effect of your youth is substantially reduced because of the seriousness of this offending, it still has some role to play in sentencing you.[66]

94 Importantly, the Director did not contend that there was any error in these findings. She accepted that the description of CH's prospects of rehabilitation as 'fair' reflected an assessment that those prospects were better than 'poor' but could not be described as 'good'. The Director's submissions sought to emphasise, nevertheless, the following qualifications expressed by Dr Carroll in his report:

> The history of his living on the margins of society at the time of offending indicates that in the event of future release, he would require substantial support, ongoing assessment and supervision involving appropriate professionals from a range of disciplines. Any future release into the community would need to be via a carefully graduated, supervised series of step-downs into progressively less secure environments: an abrupt release into an unsupported, inadequately supervised context would inevitably put him at significant risk of criminal reoffending.

95 According to the Director's written submission:

> At its highest, the evidence of Associate Professor Carroll was that he could not rule out rehabilitation. Even then, the possibility of rehabilitation was predicated upon [CH] engaging in treatment whilst in prison and being subject to the intense supervision and support available on parole. The only other evidence, that of Associate Professor Brewer, was that [CH]'s prognosis was 'poor'.
>
> In view of the evidence regarding the ongoing risk posed by [CH], protection of the community was paramount. The limited moderation that might be provided because of [CH]'s personality disorder and youth was entirely balanced out by consideration of the danger to society he poses. Further, the evidence regarding risk and rehabilitation — and in particular, the evidence regarding the level of supervision required to manage [CH]'s risk — had to be taken into account in structuring an appropriate sentence that adequately protected the community.

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66 Reasons [97]–[99] (citations omitted).

96 As the judge herself noted, the significance of protection of the community as a sentencing consideration was heightened by the risks associated with the link — which the evidence established — between the offending and CH's background of disadvantage and impaired mental functioning. As her Honour noted by reference to *Bugmy*:

> The inability of an offender to control their violent response to frustration may decrease moral culpability, but increase the importance of protecting the community.[67]

97 The same was true, her Honour said, of CH's personality disorder. In that regard, the Director relied on the following statement from this Court in *Brown*:

> [A] sentencing court's acceptance that offending conduct is attributable to an impairment of mental functioning can affect the sentencing decision in divergent ways. On the one hand, the Court may be persuaded that the causal significance of the impairment is such as to lessen the offender's moral culpability. On the other hand, especially if the impairment is permanent or likely to recur, that causal connection may point to a heightened need for community protection.[68]

98 On the plea, the prosecutor drew attention to Associate Professor Brewer's observations that CH's 'unstable personality development leaves him easily overwhelmed by significant levels of anger' and that CH has 'a propensity for poor emotional regulation … and poor ability to be moderated by awareness of the impact of his behaviour upon others'. These features were all said to demonstrate that there was a serious risk of reoffending, such that 'protection of the community may well be, with general deterrence, the most important sentencing considerations for the court'.

The evidence about prospects of rehabilitation

99 Given the centrality of this issue to the appeal, the Director invited the Court to take 'a very deep dive' into the expert evidence on CH's prospects of

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67 Reasons [64] paraphrasing *Bugmy* (2013) 249 CLR 571, [44]; [2013] HCA 37 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

68 [2020] VSCA 212, [70] (Maxwell P, Niall, T Forrest, Emerton and Osborn JJA).

rehabilitation. The Court needed, she submitted, to 'understand and explore the depth' of the evidence. That investigation would demonstrate, it was said, that the judge had given too much (mitigatory) weight to the prospect of CH being rehabilitated in the future.

100 For that purpose, it is necessary to set out in full the section of Dr Carroll's report in which he addressed CH's prospects of rehabilitation and made recommendations for future treatment:

> **What are his prospects of rehabilitation and the likelihood of reoffending?**
>
> At this stage, it is premature to make any meaningful comments with respect to the likelihood of reoffending. This will clearly need to be re-explored nearer to the time of any anticipated release, since it will largely hinge on the level of 'dynamic' (changeable) risk factors that are likely to be significantly different then compared to now.
>
> In terms of his prospects of rehabilitation, his tendency to avoid painful emotions may eventually be a challenge in therapy, but in and of itself this need not impede his long-term rehabilitation.
>
> I note the following factors that indicate favourable prospects in terms of rehabilitation, if effective rehabilitative treatments are made available to him:
>
> i. Mr Herrmann is open and willing to engage in treatment and is working well with his team, including a clinical psychologist, at MAP.
>
> ii. As outlined in [the next] paragraph, there are a range of remediable, relevant dynamic risk needs that can usefully be addressed over the coming years.
>
> iii The maturation of his central nervous system over the next few years should assist with the development of improved emotional regulation and other higher order cognitive and social skills.
>
> iv. There are no major cognitive deficits of a kind that would impede efforts at rehabilitation.
>
> v. He has no residual symptoms of enduring mental illness that would impede rehabilitation.
>
> vi The limited evidence base that exists on such offenders indicates that the 'angry' type of sexual homicide offender, of which Mr Herrmann is an example, can eventually be rehabilitated, provided appropriate treatment, support and supervision is in place.[69]

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[69] Rajan Darjee and Emily Baron, 'Managing Perpetrators of Sexual Homicide in the Community' in Jean Proulx et al (eds), *Routledge International Handbook of Sexual Homicide Studies* (Routledge, 2018) 382.

Recommendations or proposals for future treatment

Best-practice treatment will involve reducing Mr Herrmann's risk of future offending by addressing his various dynamic risk needs:

i. He requires long-term psychological treatment to gradually address the psychological deficits outlined [earlier].[70] It is unlikely that such deficits can be entirely eradicated, but improvement and recovery to the extent that they no longer put him at high risk of reoffending is a realistic aim.

ii. He will require specialist sex-offender assessment and treatment. I suspect that he would struggle with the standard group-based format of treatment delivery, given his level of interpersonal anxiety. He will be more responsive to a 1:1 treatment modality.

iii. Clearly, his propensity for substance abuse needs to be addressed. His psychological work will go some way to achieving this. In the event of future release however, tight levels of supervision in this area would be required.

iv. It would not be unreasonable for him to continue with antipsychotic medication for a period of time, but within a year or two, it would be appropriate for him to undergo a trial without antipsychotic treatment, with psychiatric monitoring, if he remains free of psychotic symptoms.

v. He would benefit from access to prosocial activities in his future environments, which in themselves will be beneficial for his mental health. Within prison, access to education, training and employment will be important for him — in part to bolster his fragile sense of personal agency and in part to develop prosocial options for him in the event of future release.

vi. Currently, he appears to have limited capacity even in very basic independent living skills such as money management, meal preparation and self-care. Ideally these would be addressed in relevant prison programs.

vii. The history of his living on the margins of society at the time of offending indicates that in the event of future release, he would require substantial support, ongoing assessment and supervision involving appropriate professionals from a range of disciplines. Any future release into the community would need to be via a carefully graduated, supervised series of step-downs into progressively less secure environments: an abrupt release into an unsupported, inadequately supervised context would inevitably put him at significant risk of criminal reoffending.

101 In cross-examination, Dr Carroll acknowledged that the rape showed CH's

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[70] See above [58]–[62].

'capacity' for deviant sexual arousal and that this was a risk factor for reoffending in the future. At the same time, Dr Carroll reiterated, it was 'very difficult to say anything meaningful' about CH's risk of reoffending because

> best practice risk assessment involves looking at dynamic changeable factors and those factors are going to change between now and the time of any future release.

And further:

> [W]e are not at a point where one can carry out a valid risk assessment with respect to [CH's] likelihood of reoffending on release. That's a different question from his prospects of rehabilitation. I've outlined a number of reasons why [CH] has some prospects of rehabilitation. Whether they will be realised, whether they would manifest in reality will depend on a number of factors including the provision of appropriate treatment and including [CH]'s engagement and capacity to benefit from those treatments. Now, those are all things that I have no way of knowing at the moment. That's why I've shied away from giving a risk assessment.

102 Dr Carroll was then asked about the significance of CH's personality disorder. He told the judge that there had been 'a wealth of research over recent decades to suggest that personality disorders are far more treatable than was once thought'. Research on borderline personality disorder had tended to focus on women rather than men but there was

> certainly some research to suggest that people with this set of problems, who have committed this kind of crime … their personality disorder can be successfully managed to the extent that they can be safely rehabilitated into the community.

103 Dr Carroll reiterated his opinion that

> it is possible for [CH] to be rehabilitated. Whether that will happen or not depends on an array of factors, which are at this stage unknown to me. His responsiveness to treatment and indeed, probably more saliently, his access to treatment over the coming years. But looking at all of the clinical factors involved, this is not a case where it would be appropriate to say that there were no prospects of rehabilitation.

104 Associate Professor Brewer expressed a more pessimistic view, observing that personality disorder was 'notoriously difficult to treat'. In his view, CH's 'history of engagement with supportive services, along with medication compliance, suggests that he is not likely to establish [the] crucial therapeutic attachment' which is

necessary for treatment to occur. For those reasons, the prognosis regarding treatment was 'poor'.

Consideration

105 In our respectful view, her Honour's finding about CH's prospects of rehabilitation was well open in the circumstances. As her Honour made clear in her reasons, the finding was squarely based on the careful and cogent expert evidence given by Dr Carroll and, in particular, on the factors which led Dr Carroll to conclude that CH has 'favourable prospects of rehabilitation'.[71] Her Honour noted Associate Professor Brewer's 'more circumspect' view but she was not, of course, obliged to accept that view.[72]

106 Crucially, her Honour's finding was expressed in conditional terms. As noted earlier, her Honour said:

> I accept that you do have fair prospects of rehabilitation if you are given appropriate treatment, support and supervision.[73]

Very often, of course, judges are constrained to express their conclusions about prospects of rehabilitation in this conditional form — for example, when a judge sentencing a drug-addicted offender describes the prospects of the offender's rehabilitation as 'reasonable, provided that you are able to wean yourself off the drugs'.

107 In the present case, it was simply not possible for her Honour to have reached any more definitive conclusion. Assessing future risk was, as CH's counsel submitted, an exercise in anticipating 'the far future.' As Dr Carroll said — and he was not challenged on this evidence — it was 'premature to make any meaningful comments with respect to the likelihood of reoffending'. As he explained, there was a range of factors the impact of which would not be apparent until well into the

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71 Reasons [97].

72 Ibid [98].

73 Ibid.

future, not the least of them being 'the maturation of [CH]'s central nervous system over the next few years'.

108 The Director seeks to avoid that uncertainty by asking this Court to adopt a definitive — and pessimistic — approach to the question of rehabilitation. Her submission was that CH had to be sentenced on the basis that he had 'no reasonable prospects of rehabilitation'. As is apparent, however, the expert evidence provided no support for such a conclusion. On the contrary, the evidence on which the judge relied was cautiously optimistic about CH's future rehabilitation, provided always that the necessary supports and treatment were made available to him, both during his long period of incarceration and in the course of a 'graduated', supervised release. On that basis, Dr Carroll said, 'improvement and recovery to the extent that the [personality deficits] no longer put him at high risk of reoffending is a realistic aim'.

109 The Director's submission must therefore be rejected. There are, we accept, rare occasions when a condition found to be causative of offending is effectively untreatable, such that a sentencing judge can predict that there will remain a risk of reoffending even decades into the future. As noted earlier, *Todd* was such a case. But the present, quite plainly, was not.

110 As we have said, the Director's submission — that a life sentence was the only conclusion reasonably open — was expressly founded on the serious risk of reoffending which, it was said, CH would present were he ever to be released unsupervised. Given that we have rejected the premise on which it rested, the submission necessarily fails.

111 Under the sentence which the judge imposed, 30 years will have passed before there can be any question of CH's eligibility for parole. One of the great benefits of Dr Carroll's report is that, through his recommendations for future treatment, he has laid out a path which will maximise CH's prospects of rehabilitation and, accordingly, minimise his risk of reoffending.

112 It is a catchcry of modern governments that 'the safety of the community is our first priority'. Accepting that to be so, the protection of the community — to which the Director quite properly directed our attention — requires that offenders like CH be given access to the support services and specialised treatment on which their rehabilitation depends.

113 It must never be forgotten that the factors which explained this offending — CH's profoundly damaged personality and the associated personality disorder — were not of his making. That is precisely why the judge was right to regard his moral culpability as reduced. He must, of course, remain ready to engage with treatment but the responsibility rests on the State, which controls his incarceration, to ensure that it is made available.
