SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2021 0123

BEAU BUCKLEY — Applicant

v

THE QUEEN — Respondent

JUDGES:	MAXWELL P and T FORREST JA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	7 March 2022
DATE OF JUDGMENT:	14 July 2022
MEDIUM NEUTRAL CITATION:	[2022] VSCA 138
JUDGMENT APPEALED FROM:	[2022] VCC 1186 (Judge Tiwana)

CRIMINAL LAW – Appeal – Sentence – Mandatory sentencing – Aggravated carjacking – Mandatory custodial sentence, minimum 3 year non-parole period 'unless special reason exists' – Judge not satisfied of 'substantial and compelling circumstances that are exceptional and rare' – Whether conclusion reasonably open – Applicant just 18 at time of offending – Immaturity, mental ill-health, substance abuse, vulnerability in custody – Need for rehabilitative disposition – Sentencing court prohibited from considering applicant's prospects of rehabilitation – Exception not applicable – Leave to appeal refused – *Farmer v The Queen* [2020] VSCA 140 distinguished – *Sentencing Act 1991* s10AD.

CRIMINAL LAW – Sentence – Sentencing principles – Mandatory sentencing – Statutory obligation to imprison – Exclusion of recognised sentencing principles – Purported exception practically impossible to satisfy – Effective removal of discretion – Judge as instrument of injustice – Breach of equal justice principle – Adverse impacts of imprisonment – Public interest in rehabilitation of offenders – Benefits of non-custodial dispositions – Need for review of mandatory sentencing provisions – *DPP v Tokava* [2006] VSCA 156, *Azzopardi v The Queen* (2011) 35 VR 43; [2011] VSCA 372, *Boulton v The Queen* (2014) 46 VR 248; [2014] VSCA 342, *DPP v Bowen* [2021] VSCA 355 considered.

Counsel

Applicant:	Mr P J Smallwood
Respondent:	Ms K Hamill

Solicitors

Applicant:	James Dowsley & Associates
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

MAXWELL P
T FORREST JA:

Summary

1 Over the past decade, the Victorian Parliament has introduced mandatory sentencing provisions for a range of offences. In a case to which one of these provisions applies, the sentencing court is effectively compelled — by law — to impose a custodial sentence and to fix a minimum term of imprisonment. The court is prohibited from making a non-custodial order, even as part of a combination sentence with a term of imprisonment. The obligation to imprison applies where the offender is aged 18 or over, and it therefore applied to the present applicant, who was barely 18 at the time of the offence.[1]

2 Each of the mandatory sentencing provisions includes what purports to be an exception to the obligation to imprison. That exception applies if the sentencing court is satisfied that 'a special reason exists which would justify' a different disposition. A judge can only find that a 'special reason' exists if he or she is satisfied (relevantly) that there are 'substantial and compelling circumstances which are exceptional and rare' and which would justify a different disposition.

3 As this Court said recently, 'that requirement is — no doubt quite deliberately — almost impossible to satisfy'.[2] Assuming that there is a difference between 'exceptional' and 'rare', the inclusion of both words exposes the legislature's clear intention that, in nearly every case to which the mandatory sentencing provisions apply, the offender should go to gaol.

4 In deciding whether this near-impossible test is satisfied, the court is expressly prohibited from taking into account the offender's previous good character, prospects of rehabilitation and (if relevant) early plea of guilty, and must disregard 'parity with other sentences.'[3] In any other case, those considerations would be of critical importance to the determination of a sentence which punishes the offender 'to an extent and in a manner which is just in all of the circumstances', as referred to in s 5(1) of the *Sentencing Act.*

5 Mandatory minimum sentences are wrong in principle. They require judges to be instruments of injustice: to inflict more severe punishment than a proper application of sentencing principle could justify, to imprison when imprisonment is not warranted and may well be harmful, and to treat as identical offenders whose circumstances and culpability may be very different.[4] Mandating imprisonment in this way must be seen to reflect the ascendancy of a punitive sentiment and a disregard of the demonstrated

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1 Under s 10AD(2) of the *Sentencing Act 1991* (*'Sentencing Act*') (as amended), the mandatory sentence does not apply to an offender who is under 18 at the time of the offence.

2 *DPP v Bowen* [2021] VSCA 355, [11] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA) ('*Bowen*').

3 *Sentencing Act*, s 10A(2B).

4 See, eg, *Trenerry v Bradley* (1997) 6 NTLR 175, 187 (Mildren J).

benefits of non-custodial orders and — in cases like the present — the vital importance of rehabilitating young offenders.

6 In our view, mandatory sentencing reveals a profound misunderstanding of where the community's best interests lie, especially in the sentencing of young offenders. As has been pointed out repeatedly, sending young people to adult gaol is almost inevitably counterproductive.[5] It also reveals a wholly unjustified mistrust of those on whom the sentencing discretion is conferred. Sentencing courts are much better equipped, and much better placed, than legislators to determine what type and length of sentence will satisfy the sentencing objectives in a particular case.

7 The present applicant committed the serious offence of aggravated carjacking, to which a mandatory minimum of 3 years' imprisonment applies.[6] He committed the offence just four weeks after his 18th birthday. The unchallenged expert evidence provided to the sentencing judge showed that the applicant was exceptionally immature and would be vulnerable in prison, having never been in detention before. Since, however, those circumstances could not be described as 'exceptional and rare', the judge was obliged to send him to gaol for a minimum of 3 years. The head sentence was 3 years and 6 months.

8 This was a case which, in our view, called for a disposition directed at the applicant's rehabilitation. The community expects, and needs, sentencing courts to fashion dispositions which will minimise the risk of re-offending. The link between rehabilitation and risk reduction is axiomatic, as is the paramount importance of rehabilitating young offenders.[7] In this case, had it not been for the constraints of the legislation, that objective could have been achieved either by an order detaining the applicant for a period in a Youth Justice Centre ('YJC'), or by a community correction order ('CCO') with tight therapeutic conditions.[8]

9 A YJC order would have resulted in the applicant being detained in one of Victoria's two youth justice facilities, for a period that could theoretically have been as long as four years. Typically, young offenders are released on parole after serving a portion of their detention period. While detained, young offenders are educated; required to participate in rehabilitation programs;[9] subject to mental health assessment, and treatment if necessary; offered cultural support; and individually prepared for release on parole.

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5 See, eg, *DPP v Tokava* [2006] VSCA 156 [22]–[24] ('*Tokava*'); *Azzopardi v The Queen* (2011) 35 VR 43, 46–7 [4] (Redlich JA); [2011] VSCA 372 ('*Azzopardi*'); C Cunneen, B Goldson and S Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28 *Current Issues in Criminal Justice* 173, 176–7.

6 *Sentencing Act*, s 10DA.

7 *R v Mills* (1998) 4 VR 235, 242 (Batt JA, Phillips CJ and Charles JA agreeing) ('*Mills*').

8 Neither a CCO nor a YJC order is a 'term of imprisonment' for the purposes of s 10AD(1) of the *Sentencing Act*.

9 For example, specialised violence programs, drug rehabilitation programs and youth-focussed sex offender programs.

10 The Youth Parole Board has arrangements with a number of service providers, including Jesuit Social Services and Anglicare, to assist in the implementation of these measures. These programs continue during the parole period and participation in them is usually a condition of youth parole. Relatively small numbers of young persons are serving youth parole (under 50 at present) and parole is closely supervised. Youth Justice Centres are certainly not problem-free, but they provide young offenders, often from very troubled circumstances, with a pathway to a useful and fulfilling life. Importantly, young detainees are not exposed to the corrosive influence of older, hardened criminals.

11 In *Boulton v The Queen*[10] this Court explained the serious disadvantages of a term of adult imprisonment, as follows:

> There is the loss of personal autonomy and of privacy, and the associated loss of control over choice of activities and choice of associates. The prisoner is subject to strict discipline, restriction of movement, forced association with other prisoners and — for a substantial part of each day — confinement in a small cell (in many instances, a cell shared with a cellmate not of the prisoner's choosing). There is, moreover, exposure to the risks associated with the confinement of large numbers of people in a small space — violence, bullying, intimidation.
>
> …
>
> Importantly for present purposes, these features of the restrictive prison environment also have the consequence that the opportunities, and incentives, for rehabilitation are very limited. For example, there is no access to sustained treatment for psychological problems or addiction. Access to anger management and sex offender treatment programs is rationed, and such programs are often unavailable to those sentenced to short prison terms.
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> In addition, imprisonment is often seriously detrimental for the prisoner, and hence for the community. The regimented institutional setting induces habits of dependency, which lead over time to institutionalisation and to behaviours which render the prisoner unfit for life in the outside world. Worse still, the forced cohabitation of convicted criminals operates as a catalyst for renewed criminal activity upon release. Self-evidently, such consequences are greatly to the community's disadvantage.[11]

12 By contrast, a CCO obliges the offender to take responsibility for his/her life, while at the same time enabling sometimes quite intensive treatment conditions to be attached, designed to address the causes of offending including drug addiction and, importantly, psychological instability. As the Court said in *Boulton*:

> The availability of the CCO dramatically changes the sentencing landscape. The sentencing court can now choose a sentencing disposition which enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence.

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10 (2014) 46 VR 308; [2014] VSCA 342 (*'Boulton*').

11 Ibid 333–4 [104]–[105], [107]–[108] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

> The CCO option offers the court something which no term of imprisonment can offer, namely, the ability to impose a sentence which demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places. The CCO also enables the offender to maintain the continuity of personal and family relationships, and to benefit from the support they provide.
>
> In short, the CCO offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her.[12]

13 Neither a term of detention in a YJC nor the imposition of a CCO is a 'soft' sentencing option. Both involve significant punitive sanctions, but leave open a clear pathway to rehabilitation, should the young offender wish to make that journey.

14 In this case, the judge was prevented by law from considering either a period of detention in a YJC or a CCO appropriately conditioned. This blunt, oppressive sentencing regime is contrary to the public interest and incompatible with modern sentencing jurisprudence.

Statutory framework

15 Aggravated carjacking is an offence against s 79A of the *Crimes Act 1958*. It is a 'category 1 offence'.[13] Section 10AD of the *Sentencing Act* provides as follows:

> (1) In sentencing an offender (whether on appeal or otherwise) for an offence against section 79A of the Crimes Act 1958, a court must impose a term of imprisonment and fix under section 11 a non-parole period of not less than 3 years unless the court finds under section 10A that a special reason exists.
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> Note
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> Section 11(3) requires that a non-parole period must be at least 6 months less than the term of the sentence.
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> (2) Subsection (1) does not apply to an offender who is under the age of 18 years at the time of the offence.

16 The *Sentencing Act* defines what will qualify as a 'special reason' and specifies what the court may and may not take into account in deciding whether a special reason exists. Section 10A relevantly provides as follows:

> (2) For the purposes of section … 10AD … a court may make a finding that a special reason exists if—
>
> …

[12] Ibid 335–6 [113]–[116] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

[13] *Sentencing Act*, s 3.

(e) there are substantial and compelling circumstances that are exceptional and rare and that justify doing so.

(2B) In determining whether there are substantial and compelling circumstances under subsection (2)(e), the court—

(a) must regard general deterrence and denunciation of the offender's conduct as having greater importance than the other purposes set out in section 5(1); and

(b) must give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence; and

(c) must not have regard to—

(i) the offender's previous good character (other than an absence of previous convictions or findings of guilt); or

(ii) an early guilty plea; or

(iii) prospects of rehabilitation; or

(iv) parity with other sentences.

(3) In determining whether there are substantial and compelling circumstances under subsection (2)(e), the court must have regard to—

…

(ae) the Parliament's intention that a sentence of imprisonment should ordinarily be imposed and that a non-parole period of not less than 3 years should ordinarily be fixed for an offence covered by section 10AD; and

...

(b) whether the cumulative impact of the circumstances of the case would justify a departure from that sentence and, where relevant, minimum non-parole period.

(4) If a court makes a finding under subsection (2), it must—

(a) state in writing the special reason; and

(b) cause that reason to be entered in the records of the court.

(5) The failure of a court to comply with subsection (4) does not invalidate any order made by it.

Factual background

17 The victim (‘LZ’) was 25 years old. He operated his own business selling what are called ‘cream chargers’ or ‘nangs’. According to the prosecution opening, chargers are

commonly used in handheld whip dispensers with balloons for the purpose of inhaling nitrous oxide in order to feel intoxicated or 'high'.

18 At 3:30 am, LZ received a phone call on his business phone. The caller ordered 500 cream chargers to be delivered to a particular address for the agreed sum of $300. The caller requested that the chargers be delivered as soon as possible.

19 LZ arrived at the delivery address at about 4:40 am. He noticed that there was no one in the street and there were no lights on in the nearby houses. LZ called the number he had been given but it did not connect.

20 Five or 10 minutes later, the applicant and his co-offender approached LZ's vehicle from behind and waved to him. LZ put his car window down and asked them if they had ordered the cream chargers, which they confirmed.

21 LZ then got out of his car and requested payment for the chargers. The applicant pretended to pat his pockets down, as if looking for cash, and pulled out a folding knife, approximately 10 centimetres in length, which he pointed at LZ. The co-offender also pulled out a knife, approximately 30 centimetres in length.

22 Both offenders got closer to LZ with their knives pointed at him. The applicant said, 'Give me the key if you don't want to get hurt'. LZ handed over his car keys to the applicant. The co-offender asked LZ for his phone, which he handed over. The applicant and the co-offender then entered the vehicle and drove off.

23 Later that day, police attended at the applicant's home and arrested him. He gave police six boxes of cream chargers from under his bed, telling the police that all of the other items were with the co-offender or in the stolen vehicle, which was subsequently recovered.

24 As the judge recorded in his reasons, the applicant participated in a group conversation on Snapchat after the offending but before he was arrested. He said:

> He 'had the knife up to his neck the whole time'.
> 'When me and [the co-offender] said we were gonna do a CJ one day we meant it:)'.
> We 'made sure to take his phone to so he could not call the cops.'
> The victim 'thought it was the last time he was going to see the planet earth.'[14]

Gravity of the offending

25 The sentencing judge described aggravated carjacking as 'an inherently serious offence'. This was demonstrated, his Honour said, both by the maximum penalty of 25 years' imprisonment and by 'the mandatory non-parole period of 3 years in the case of offenders aged 18 and over.'

26 His Honour continued:

> The victim arrived in his car outside the address in the middle of the night. The

[14] Reasons, [13].

> circumstances indicate that the offending was premeditated. Both you and [the co-offender] were armed with a knife. You and your co-offender pointed your respective knives at the victim and succeeded in creating a fear in him as a result of which, following a threat by you, he parted with his keys allowing you to steal his vehicle. Of course, being armed with a knife is not an aggravating feature as it is an element of the offence. However, the fact that two knives were produced and directed at the victim by two offenders made the offending more serious. Thankfully, no actual force was applied, but one can easily comprehend the fear the victim would have felt in circumstances where he was alone and isolated in a dark street with two knives pointed in his direction. The impact upon him was significant such that he contemplated leaving Australia. At the time of this offending, you were on a probation order. This was serious offending and certainly cannot be described as at a lower level.[15]

Personal circumstances

27 As noted earlier, the applicant committed this offence four weeks after his 18th birthday. He was still 18 at the time of sentence. He had served 167 days on remand in adult custody. Although he had a criminal record, his previous findings of guilt had resulted in non-conviction dispositions. All of his prior matters had been dealt with by the Children's Court. He had never been sentenced to detention.

28 In December 2020, the applicant was placed on probation for nine months. A pre-sentence report had recommended probation, noting that since May 2020 the applicant had successfully complied with Youth Justice Supervised Bail. At the same time, an assessment using the Massachusetts Youth Screening Instrument had identified the following concerns:

> problematic behaviour associated with Alcohol and Other Drugs (AOD) use, self-medicating with AOD, polysubstance use, irritable, easily frustrated, anger related issues, worrying, feeling alone and anxiety.

29 The report also recorded the following observations by the applicant's mother:

> poor relationship with his father, lack of adult supervision, lack of engagement in his education or employment, [and] negative peer associations [had] contributed to his decline in mental health, substance use, poor consequential thinking and offending behaviours.

30 Dr Aaron Cunningham assessed the applicant on 23 June 2021. He reported that the applicant:

> stated that his mother was caring, loving, and supportive. He struggled to have a relationship with his father. He stated that his father had been unfaithful and was an aggressive person who yelled and screamed and would threaten to hit Mr Buckley's mother. He felt emotionally abused by his father and described himself as an emotional wreck. Mr Buckley's mother realised he was deteriorating and so returned from [country Victoria]. Mr Buckley lived with his mother in Sunshine. He stated that he was doing well and was stable. He stated that he had a fight with his mother and then decided to call his drug dealer.

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15 Ibid [27].

> This resulted in a relapse into drug abuse and association with drug abusing peers. Within several days, he was charged with his current offences.

31 The applicant's history of drug use, and his drug use at the time of offending, were noted by Dr Cunningham:

> Mr Buckley used cannabis from the age of 13. He was using the drug daily during year eight. He was smoking significant amounts of cannabis. He used MDMA in social settings. He stated that his main drug of abuse was cocaine and Xanax. He would use methylamphetamine every third day. During the offence, he was abusing ketamine, Xanax and cannabis. He has engaged with drug and alcohol counselling.

32 As to the applicant's mental state, Dr Cunningham said:

> Mr Buckley was prescribed Avanza, Diazepam and Valium in the community. He was prescribed benzodiazepines as he was having seizures due to withdrawing from benzodiazepine abuse. He continues to suffer muscle twitches, but does not suffer seizures. He stated that his sleep was bad until using Avanza. He has nightmares about his grandparent's death that occurred when he was aged around 15 or 16. He reported depression, anxiety and stress. He would bite the hairs from his arms during grade five and six, and then began cutting himself on the arms around year seven. He began cutting himself after reading a book about a youth that self-harmed. He struggles with feelings of self-hatred. He has had thoughts of suicide that increased when he was first incarcerated. He has feelings of worthlessness. He presented as emotionally immature.

33 In Dr Cunningham's view, the applicant presented as 'immature, naïve and impressionable'. He 'would be at risk of further contamination and manipulation in an adult prison …'. The report stated:

> Mr Buckley lacked connection with his father and did not have a male role model or mentor. He struggled at school in the context of undiagnosed verbal learning impairments. At the age of fifteen, Mr Buckley moved to live with his father after his mother relocated to [country Victoria]. He came into significant conflict with his father and felt emotionally abused. His adjustment was made more [difficult] by the loss of his grandparents. He rebelled and began associating with negative peers in his area. His drug use escalated at this point. In my opinion, Mr Buckley's association with negative peers and drug abuse are the main contributors to his offence behaviour. *Underlying these risk factors, Mr Buckley presents with significant emotional and psychological immaturity. This is consistent with his verbal learning impairment and history of poor emotional regulation.* He has a history of self-harm in response to dysphoric emotional states. In the time leading up to his current offences, Mr Buckley engaged in drug abuse to cope with the stress of conflict with his mother.[16]

[16] Emphasis added.

'Substantial and compelling circumstances …'

34 The sole ground of appeal was in these terms:

> Ground 1: There was an error in the sentence first imposed arising from the sentencing judge not finding that there were substantial and compelling circumstances that were exceptional and rare and that justified a finding that a special reason existed pursuant to s 10A(2)(e) of the *Sentencing Act 1991*.

35 On the plea, defence counsel (who did not appear on this application) filed a helpful written outline of submissions addressing the 'substantial and compelling' exception. The focus of the submission was on the applicant's youth and on what the expert evidence showed as to his 'significant emotional and psychological immaturity'. Reliance was placed on the decisions of this Court in *Tokava*[17] and *Azzopardi*.[18]

36 According to the submission, the clear legislative intent of the *Sentencing Act* was that 'youth is a highly relevant factor to sentencing, especially in the context of the imposition of mandatory minimum non-parole periods'. Counsel pointed out that, since the mandatory minimum did not apply to an offender under 18, it should be viewed as 'a matter of significant weight' that this offending occurred only four weeks after the applicant's 18th birthday. At the same time, the plea submission acknowledged the seriousness of the charge, and that the offence had had a significant psychological impact on the victim.

37 Early in the plea hearing, the judge alerted defence counsel to his provisional view that the matters relied on did not fall within the 'substantial and compelling' exception. His Honour drew attention to — and later set out in his reasons — the following passage from the decision of this Court in *Farmer v The Queen*:

> The judge was correct in concluding that a young offender who will be vulnerable in custody and who suffers from anxiety but who has committed a very serious offence is not rare or unforeseen. Generically, the factors relied on by the applicant are often seen.[19]

38 His Honour was not persuaded that the applicant's background and 'any undiagnosed behavioural or learning issues' could be likened to the circumstances dealt with by the Court in *Farmer*.[20] His Honour said:

> *Farmer* was a most unusual case due to the physical disfigurement the applicant suffered from. The disfigurement had a profound impact on his life. Alopecia at the age of 13 or 14 was a rare condition. It led to bullying at school. The applicant became isolated and was afraid to leave home. The effect of the alopecia led to a diagnosis of a Generalised Anxiety Disorder (with depression) and Agoraphobia. It was his disfigurement which provided an explanation for

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17 [2006] VSCA 156.

18 (2011) 35 VR 43; [2011] VSCA 372.

19 [2020] VSCA 140, [54] (Maxwell P, Kaye and Niall JJA) ('*Farmer*').

20 In that case, the Court of Appeal held that the corresponding 'substantial and compelling' exception in s 5(2H)(e) was satisfied.

> his involvement in the offending. There was a direct link between his physical affliction and his decision to become involved in the offending. His moral culpability was significantly reduced. Further, his disfigurement would expose him to bullying and ridicule in prison.[21]

39 As to the applicant's immaturity, his Honour said:

> In relation to your immaturity and vulnerability in custody, despite the concerns raised by Dr Cunningham, your parents' reference paints a more encouraging, and if I may say so, a candid picture of your time on remand. They have had the advantage of daily contact with you via phone, email and letters. You have been able to communicate with them, your sister and girlfriend online as well, once a week. They state that during your incarceration in custody, you have matured significantly and remained positive. They confirm your participation in many courses and in sporting activities. You are keeping yourself fit, eating well and looking after yourself. They say that you are looking forward to a new and positive start.
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> In your letter to the court, you echo the matters raised by your parents. You state that whilst on remand, you have matured greatly and have been reflecting on your criminal offending. You look forward to coming out a much better person.[22]

40 In this Court, counsel for the applicant properly conceded that the 'substantial and compelling' requirement was a stringent one and, furthermore, that the ground of appeal could only succeed if the Court were persuaded that the judge's conclusion (that the requirement was not satisfied) was not reasonably open on the material before him. Counsel nevertheless maintained that the following matters should persuade this Court that the sentencing judge had fallen into error:

> The applicant was a 'young offender'. He was 18 when he was sentenced. He had turned 18 only a matter of weeks before this offending. He was immature. He had a history of mental ill-health. He had undiagnosed verbal learning impairments. He had felt emotionally abused. He had felt a sense of abandonment. He had experienced depression. He had experienced anxiety. He had experienced stress. He had self-harmed. He had hated himself. From about 13 he had used drugs to self-medicate. He had associated with negative peers.
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> There was a plain connection between his background, negative peer associations, poor mental health, drug use, poor consequential thinking, and his offending (including this offending). Those factors could not be disentangled. This offending occurred following a relapse into drug use after a fight with his mother. Those matters were significant in mitigation to the assessment of his moral culpability. So too were his youth and immaturity. That he was not a person of greater maturity was significant in mitigation to the assessment of the nature and gravity of his offending.
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> Collectively, those considerations were also significant in mitigation to the assessment of the weight that fell to be given to general deterrence. In addition, the applicant was vulnerable in adult custody. He had not previously been

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21 Reasons [50].

22 Ibid [46]–[47] (citations omitted).

> sentenced to a custodial disposition. He was naïve. He was impressionable. The hardship that he would endure in adult gaol was informed by his girlfriend having been diagnosed with a serious illness. It was informed by the response to the pandemic. The applicant will have 'very restricted opportunities for contact with family and friends'. Rehabilitative and other programs 'are severely curtailed'. Imprisonment is now 'even more unpalatable than is usually the case'.

41 Referring to s 10(3)(b), counsel submitted that the 'cumulative impact of the circumstances of the case' justified a departure from the minimum non-parole period, given:

(a) the applicant's youth and immaturity;

(b) his personal background, and 'the interconnectedness between that background, his history of mental ill-health, negative peer associations, drug use, poor consequential thinking, and offending';

(c) his relapse into drug use and negative peer associations, to cope with the stress of conflict with his mother; and

(d) his vulnerability in adult custody, and the hardship he would endure while there.

42 The submission relied on the following passage from *Fariah v The Queen*,[23] where the Court (Priest and Beach JJA) said in relation to the identical exception in s 5(2H)(e) that:

> the mere fact that some individual circumstances may commonly be encountered by sentencing judges in the County Court will not by that fact alone necessarily deprive them of their character as substantial and compelling and exceptional and rare. Every case will necessarily depend on its particular facts. Circumstances which individually are relatively common may in combination enliven the exception in s 5(2H)(e). Indeed, in our view, the applicant's appalling childhood experiences, coupled with his youth and other factors relied upon, were sufficient in combination to engage s 5(2H)(e).[24]

Consideration

43 The principal matters relied on by the applicant, both at first instance and in this Court, were his youth, his significant immaturity, his difficulties during adolescence and his likely vulnerability in prison. On ordinary principles, those matters taken in combination might well constitute 'substantial and compelling circumstances' justifying a non-custodial order. But the sad reality of our criminal justice system is that such circumstances — whether alone or in combination — simply could not be described as 'exceptional and rare'. On the contrary, they are all too common.

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23 [2021] VSCA 213.

24 Ibid [25].

44 As we have said, the legislative intention could not be clearer. By adding the words 'that are exceptional and rare', the Parliament intended to make the test 'almost impossible to satisfy'.[25] The express exclusion from consideration of the offender's prospects of rehabilitation bespeaks a deliberate rejection of well-established and well-understood principles about the vital importance — to the community — of rehabilitating young offenders.[26]

45 As to immaturity, counsel for the respondent pointed out that until 2018 it was possible to satisfy the 'special reason' requirement — in the case of an offender aged between 18 and 21 — if it were shown that the offender had 'a particular psychosocial immaturity that [had] resulted in a substantially diminished ability to regulate his or her behaviour'.[27] That provision was repealed in 2018, at the same time as the 'substantial and compelling circumstances' test was made much more stringent by the addition of the words 'that are exceptional and rare'.

46 It follows, in our view, that the sentencing judge was correct to conclude that the exception was not engaged. Indeed, given the language of the provisions, no other conclusion was reasonably open.

Time for reform

47 We would echo the view, expressed by a five member Bench of this Court in *Bowen* last December, that these provisions should be reviewed. The Court said:

> As this Court explained in *Boulton*, a CCO with appropriately tailored conditions can advance the interests of the community in ways that a prison sentence cannot. Given the priority which governments quite properly attach to community safety, consideration should be given to lowering this legislative barrier, so that judges are better able to advance that objective.[28]

48 The effective prohibition of non-custodial orders and YJC orders indicates that a preoccupation with being, and being seen to be, punitive has obscured a proper appreciation of the public interest. The Parliament appears to have ignored the incontestable evidence about the adverse impact of adult gaol on young offenders and, equally, the opportunities which non-custodial orders and YJC orders provide for minimising the risk of reoffending.

49 In relation to young offenders, we would endorse the following observation by Redlich JA in *Azzopardi*:

> Courts sentencing young offenders are cognisant that the effect of incarceration in an adult prison on a young offender will more likely impair, rather than improve, the offender's prospects of successful rehabilitation. While in prison a youthful offender is likely to be exposed to corrupting influences which may

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25 *Bowen* [2021] VSCA 355, [11].

26 *Mills* (1998) 4 VR 235, 242 (Batt JA, Phillips CJ and Charles JA agreeing)*; Azzopardi* (2011) 35 VR 43, 53–57 [34]–[43] (Redlich JA, Coghlan AJA and Macaulay AJA agreeing); [2011] VSCA 372.

27 *Sentencing Act*, s 10A(2).

28 [2021] VSCA 355, [13].

> entrench in that young person criminal behaviour, thereby defeating the very purpose for which punishment was imposed. Imprisonment for any substantial period carries with it the recognised risk that anti-social tendencies may be exacerbated. The likely detrimental effect of adult prison on a youthful offender had adverse flow-on consequences for the community.[29]

Conclusion

50 For these reasons, the application for leave to appeal must be refused. In refusing this application we have been compelled to do the applicant an injustice, and the community a disservice.

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[29] (2011) 35 VR 43, 54 [36] (citations omitted).