SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2023 0077

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

LUKE MERRYFULL — Respondent

S EAPCR 2023 0078

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

SHAUN BLOOMFIELD — Respondent

JUDGES:	EMERTON P, MACAULAY and TAYLOR JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	2 October 2023
DATE OF JUDGMENT:	13 October 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 244
JUDGMENT APPEALED FROM:	*DPP v Bloomfield & Anor* [2023] VCC 427 (Judge Brookes)

CRIMINAL LAW – Sentence – Crown appeal – Rape – Sexual assault – One offender sentenced to 1 year and 7 months' imprisonment and 2 year community correction order – Other offender sentenced to 1 year and 7 months' imprisonment and 3 year community correction order – Whether judge erred by mitigating sentence on basis of rehabilitation limb of delay – Whether judge erred in moderating general deterrence – Whether sentence manifestly inadequate – Delay in proceedings significant and unusual – Proceedings subject of successful conviction appeal resulting in retrial – Further delay in retrial – Total delay of 7 years between charge and sentence – 19 months' imprisonment already served by each offender – No remorse but significant rehabilitative steps taken – No error in sentence demonstrated – Appeal dismissed.

Boulton v The Queen (2014) 46 VR 308; *Tones v The Queen* [2017] VSCA 118, considered.

Counsel

Appellant:	Mr B F Kissane KC with Ms S Clancy
For the Respondent Merryfull:	Mr R F Edney with Ms S A Stafford
For the Respondent Bloomfield:	Mr R Nathwani with Ms L Thies

Solicitors

Appellant:	Ms A Hogan, Solicitor for Public Prosecutions
For the Respondent Merryfull:	Emma Turnbull Lawyers
For the Respondent Bloomfield:	Furstenberg Law

EMERTON P
MACAULAY JA
TAYLOR JA:

Introduction and overview

1 On 23 August 2022, following a 12 day trial, a jury in the County Court convicted Luke Merryfull of one charge of rape (charge 2) and Shaun Bloomfield of two charges of rape (charges 1 and 4) and one charge of sexual assault (charge 3). The offending involved a single complainant ('C').

2 Following a plea in the County Court on 12 December 2022, Merryfull was sentenced on 12 April 2023 as follows:

Charge on Indictment	**Offence**	**Max Penalty**	**Sentence**	**Cumulation**
2	Rape	25 years	19 months; 2 year community correction order ('CCO')	N/A
Total Effective Sentence:			1 year 7 months' imprisonment 2 year CCO	
Non-Parole Period:			N/A	
Pre-sentence Detention Declared:			19 months' imprisonment	
Section 6AAA Statement:			N/A	
Other Relevant Orders: Nil				

3 Bloomfield was sentenced on the same day as follows:

Charge on Indictment	**Offence**	**Max Penalty**	**Sentence**	**Cumulation**
1	Rape	25 years	19 months	N/A
3	Sexual assault	10 years	6 months	N/A
4	Rape	25 years	19 months; 3 year CCO	Base
Total Effective Sentence:			1 year 7 months' imprisonment 3 year CCO	
Non-Parole Period:			N/A	
Pre-sentence Detention Declared:			19 months' imprisonment	
Section 6AAA Statement:			N/A	
Other Relevant Orders: 1. Sentenced as a serious sexual offender pursuant to s 6F of the *Sentencing Act 1991* in respect of charge 4.				

4 The appellant appeals against sentence with respect to both respondents, on the following grounds:

1. The sentencing judge erred by mitigating the sentence(s) imposed on the respondent on the basis of the rehabilitation limb of delay.

2. The sentencing judge erred in moderating general deterrence.

3. The sentence imposed in respect of charge 2 is manifestly inadequate (Merryfull).

   The individual sentences in respect of charges 1, 3 and 4 and each of the orders for cumulation are manifestly inadequate (Bloomfield).

5 For the reasons that follow the appeals should be dismissed.

Circumstances of the offending

6 The respondents and C were known to each other. They were each guests at a birthday party held at a rural property in Victoria on 2 April 2016. Alcohol was consumed at the party. C had about five cups of strong alcoholic punch. She described herself as 'tipsy to drunk'.

7 At about 3:00 am the following morning, the party was winding down. C decided to go to bed. She had originally planned to sleep in a swag, but SM, the host of the party, made up a bed for C in a caravan. SM and C went to the caravan to sleep.

8 At one end of the caravan was a double bed. At the other was a set of bunk beds. In the middle was a cooking and dining area. The double bed extended across the width of the rear of the caravan.

9 At some stage SM and C were joined in the caravan by a small group, including both respondents. After about 15 to 20 minutes of 'mucking around', everyone left except C, Merryfull and Bloomfield. Merryfull suggested that he, Bloomfield and C, who were all on the double bed, engage in sex as a threesome. C said no.

10 Merryfull put his hands under C's top and touched her breasts. C said no and used her elbow to try to push his hands away. At the same time, Bloomfield put his hand into C's pants and rubbed his fingers over her vagina. He began kissing her face and neck and penetrated C's vagina with his finger (charge 1 — rape).

11 Merryfull removed C's pants and underwear and penetrated her vagina with his penis (charge 2 — rape). As he was doing so, Bloomfield took C's hand and placed it on his erect penis (charge 3 — sexual assault). Merryfull ejaculated. After he did so, he got up and said to Bloomfield words to the effect of 'she's all yours now' before leaving the caravan. Bloomfield then penetrated C's vagina with his penis (charge 4 — rape). C pushed against his chest. Bloomfield ceased the penetration and left.

12 C, in considerable distress, contacted a friend who had been at the party earlier. That friend and her mother, LH, collected her from the caravan. C spoke with police and underwent medical examinations later that day.

Procedural history

13 It is convenient to note the following in relation to the procedural history of this matter before considering the grounds of appeal.

14 The offending took place in April 2016. The respondents were charged on 21 December 2016 and committed to stand trial on 22 August 2017. They first stood trial, and were convicted by a jury, in February 2019. It would appear from the sentencing remarks of Judge Mullaly that trial dates shifted several times and the venue of the trial was changed to accommodate its listing.[1]

15 On 10 April 2019, Judge Mullaly sentenced Bloomfield to a total effective sentence of 5 years and 8 months' imprisonment with a non-parole period of 3 years and 4 months. His Honour sentenced Merryfull to 4 years and 10 months' imprisonment with a non-parole period of 2 years and 10 months.

16 On 11 April 2019, LH, who had been a Crown witness at the trial, prepared a document in the form of a statement which she provided to the lawyer representing Merryfull and Bloomfield. The document recorded new details of a conversation between LH and C which indicated that C might have consented to sexual activity with Merryfull but not Bloomfield. Both respondents sought leave to appeal against conviction. Both relied in part on LH's fresh evidence. On 17 September 2020 this Court granted leave to appeal, allowed the appeals and ordered that both respondents be retried.[2] They were admitted to bail that same day.

17 Numerous attempts at a retrial followed:

(a) A retrial listed to commence in October 2021 was vacated due to the suspension of jury trials because of COVID-19.

(b) A retrial commenced in January 2022. The jury was discharged because the prosecutor tested positive to COVID-19.

(c) A retrial commenced in April 2022. The jury was discharged because of juror misconduct.

18 A fourth trial commenced on 8 August 2022. It culminated in findings of guilt and the sentences which are the subject of this appeal.

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1 *DPP v Bloomfield & Anor* [2019] VCC 509, [42].

2 *Bloomfield v The Queen* [2020] VSCA 241 (Niall, T Forrest and Weinberg JJA) ('*Bloomfield*').

Sentencing Reasons

19 The sentencing judge commenced his reasons by summarising the offending.[3] His Honour said the respondents fell to be sentenced on the basis that each knew that C was not consenting.[4] The judge adopted the earlier observations of Judge Mullaly that:

> The gravity of each of the crimes is high. The victim was a friend who trusted you to understand and importantly accept her words that she did not want to have sex with either of you. She was entitled to safely enjoy, as so many young people do in the city and the country, 21st birthday celebrations of a friend by drinking, and then going off to sleep on the property with other friends around them. She was entitled to feel safe in that environment. To be sexually violated, raped by two men whom she trusted, is a grave thing. The crimes are serious examples of rape by a known acquaintance. It is aggravated by reason of there being two of you involved, though you are not complicit in each other's offending. The moral culpability of each of you is high.[5]

20 His Honour next summarised the victim impact statements, noting in particular the long lasting effects of the offending on C's mental health, her diminished capacity to trust others and the need to relocate, at a significant cost, after being ostracised by the small community in which she had lived.[6]

21 Next the judge summarised the personal circumstances of each of the respondents.[7]

22 Bloomfield was 21 years' old at the time of the offending and 28 at the time of sentencing.[8] He left school at the age of 15 then completed an apprenticeship as a diesel mechanic and rose to become a senior mechanic.[9] He had a good work ethic. Bloomfield's mother died in the months after the offending. He was supported by his family and girlfriend. In January 2014, at the age of 19 years, Bloomfield rescued two drowning men near Port Fairy and received The Royal Humane Society of Australasia's certificate of merit for doing so. The judge described his prospects as 'solid'.

23 Merryfull was also 21 at the time of the offending and 28 at the time of sentencing. He excelled at sport and became an important member and leader of his local football team. His mother died of cancer shortly after the offending incident. Merryfull finished schooling to year 12 before working in the mining industry in both Victoria and Western Australia. He then obtained an electrician's apprenticeship and has retained the support of his employer. He was also described to have 'solid prospects of resuming a lawful, productive life after release.'

24 Addressing the issue of delay, the sentencing judge referred to the three year delay between the offending and sentence following the first trial, as well as Judge Mullaly's

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3 *DPP v Bloomfield & Anor* [2023] VCC 427, [3]–[10] ('Reasons').
4 Reasons, [11]–[15].
5 Reasons, [15].
6 Reasons, [16]–[21].
7 Reasons, [22]–[23]. The judge quoted, and adopted, portions of the sentencing reasons of Judge Mullaly following the first trial.
8 Reasons, [43].
9 Reasons, [23], [46].

observation that neither respondent had contributed to it.[10] His Honour then stated that a further four years had passed in which there had been a successful appeal to this Court and the commencement of three County Court trials, with only the third reaching conclusion.[11] The judge noted each respondent's submission that the resulting delay was extraordinary and exceptional and had thereby caused unusual anxiety and stress, and that the seven year lapse of time was relevant to the assessment of each respondent's prospects of rehabilitation.[12] His Honour then continued:

> It is further submitted that the original sentence imposed by His Honour Judge Mullaly can in truth no longer be considered appropriate, given everything that has happened since that sentence was imposed four years' ago [sic] on 10 April 2019. In particular, it is highlighted that you were 21 years of age at the time and are now 28. Further the anxiety and stress visited upon you has been compounded and magnified over a number of years and has had a substantial impact upon you.
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> Second, delay is a further substantial mitigating factor because [of] the productive way, following your release on bail on 17 September 2020, by the Court of Appeal, that you have used your time on bail while awaiting your re-trial. It is submitted that following your release, you have led an exemplary life while under the enormous pressure that you may or may not have … to return to custody. It is submitted that you have worked consistently throughout that period, and you have attempted as best you can, to live your life in spite of not knowing what the outcome will be of any re-trial.[13]

25 Turning specifically to Merryfull, the sentencing judge referred to the effect of the COVID-19 pandemic on the custodial conditions he experienced over 19 months[14] and addressed the evidence of his otherwise good character.[15] His Honour accepted the submission that the period of incarceration had had a major impact upon Merryfull and that there was no longer any role for specific deterrence in the sentencing exercise.[16] While no reliance was placed on *Verdins*,[17] the judge accepted a submission, based on a report authored by Mr Patrick Newton, psychologist, that a return to a custodial environment would likely have an negative impact on Merryfull's mental health. His Honour referred to Mr Newton's observations of the 'significant stressors' that had impacted upon Merryfull in the last seven years, one of them being the 'length and tumultuous nature' of the criminal proceedings.[18]

26 Then turning specifically to Bloomfield, the sentencing judge referred to his background in more detail, including that Bloomfield had cared for his mother in the last few months of her life.[19] Shortly after his mother's death, Bloomfield commenced an intimate relationship which endured despite his incarceration and provided him

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10 Reasons, [24].
11 Reasons, [25].
12 Reasons, [25]–[31].
13 Reasons, [32]–[33].
14 Reasons, [34].
15 Reasons, [35]–[40].
16 Reasons, [40].
17 *R v Verdins* (2007) 16 VR 269; [2007] VSCA 102.
18 Reasons, [41].
19 Reasons, [44].

considerable emotional support.[20] The judge noted the seriousness of Bloomfield's offending, notwithstanding a submission that the two rapes and sexual assault occurred in short compass during a fairly short incident and that Bloomfield withdrew his penis and stopped the penile-vaginal rape as soon as C pushed him away.[21] His Honour addressed the evidence of Bloomfield's otherwise good character, including volunteering to fight bushfires after his release from custody[22] and his attainment of the privileged role of prison listener during his time in custody.[23] His Honour accepted the submission that Bloomfield had made a significant contribution to the community and that this should form part of the determination of his character.[24] The judge also referred to Bloomfield's post-release employment.[25] The judge accepted that the difficulties of his experience of incarceration consequent upon the pandemic were intensified by it being his first time in custody.[26]

27 His Honour next returned to the issue of delay and found, with respect to each respondent, that the period of seven years and the steps taken to reform behaviour were considerable mitigating factors,[27] particularly as it focused attention on rehabilitation and fairness.[28]

28 The judge also took into account that each respondent had undergone a sentence of imprisonment of about 19 months prior to being admitted to bail by this Court.[29]

29 His Honour referred to current sentencing practices, as far as were discernible from the authorities referred to him,[30] before recording the competing prosecution and defence submissions as to the need for a further period of incarceration.[31] The judge also referred to the principles of totality and parsimony[32] and the assessment of each respondent as being suitable for a CCO.[33] His Honour noted that both respondents maintained their innocence. Merryfull, but not Bloomfield, had some empathy for C.[34]

30 His Honour again returned to the issue of the seven year delay, none of which he considered could be visited at the feet of either respondent.[35] After referring to authorities[36] concerning the length of delay between offending and sentence and the

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20 Reasons, [45].
21 Reasons, [48].
22 Reasons, [49].
23 Reasons, [50].
24 Reasons, [50]; *Sentencing Act 1991*, s 6(c).
25 Reasons, [51].
26 Reasons, [52]–[53].
27 Reasons, [55].
28 Reasons, [56], [70].
29 Reasons, [57].
30 Reasons, [59].
31 Reasons, [60]–[61], [67]–[69].
32 Reasons, [62].
33 Reasons, [63]–[65].
34 Reasons, [66].
35 Reasons, [70].
36 The sentencing judge considered *DPP v Keller (a pseudonym)* [2021] VSCA 334, [91] (Maxwell P, Kaye and Sifris JJA); *Bourne v The Queen* [2011] VSCA 159, [30] (Maxwell ACJ, Buchanan and Bongiorno JJA) and *Stafford v The King* [2022] VSCA 229 (Priest AP and Niall JA).

steps taken by an offender during that time to reform his or her behaviour, his Honour continued:

> Having both been found suitable for a satisfactorily tailored CCO, the essential question and [sic] in exercising my instinctive synthesis, is whether a combination sentence can be considered or whether, as submitted by the prosecution, a further term of actual imprisonment is required. Neither the prosecution nor the offenders challenged Judge Mullaly's sentence with respect to its adequacy. It is nearly four years since that sentence was delivered and the offenders have served a further 522 days of imprisonment before being released on bail by the Court of Appeal on 17 September 2020.
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> Both offenders have demonstrated significant rehabilitative measures, such that I am satisfied that neither of you is a significant risk of reoffending. I am also satisfied that specific deterrence does not loom large as both of you have undergone a significant salutary experience of commencing four trials with two verdicts and a successful Court of Appeal outcome. I find that the delay of nearly seven years since the offending is a significant mitigating factor as per the authorities cited above.
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> …
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> If one accepts that His Honour's sentence was within range when handed down in 2019, which I do, I should still take into account the mitigating factors of the further four years delay over double the time of delay considered by His Honour, the commencement of three further trials and an appeal to the higher court. Further to the task, the fact that significant rehabilitative matters including stable employment and relationships are to be weighed in the balance.[37]

31 His Honour next found that general deterrence was of lesser importance because of each respondent's youth and good character[38] and referred to the need for just punishment[39] and denunciation.[40] The judge also found a 'modicum of mercy' when administering justice[41] to be another applicable factor.

32 Ultimately his Honour found that this was 'one of the rare cases where ordinary members of the community would not necessarily expect a further term of imprisonment to be imposed in either case.'[42]

Submissions of the parties

Ground 1 — rehabilitation limb of delay

33 The Director submitted that the sentencing judge erred in treating evidence of each respondent's otherwise good character as evidence of significant rehabilitative

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37 Reasons, [75]–[76], [78].
38 Reasons, [79].
39 Reasons, [80].
40 Reasons, [82].
41 Reasons, [81]. See also [42].
42 Reasons, [90].

measures undertaken by each respondent, thereby giving full weight in mitigation to the rehabilitation limb of delay. The Director argued that there was no evidence of reformation in respect of the risk of committing further sexual offences and, as neither respondent accepted responsibility for his offending, neither was entitled to any discount at all under the rehabilitation limb of delay.

34 Although not forming part of her written case, the Director argued in oral submissions that the learned sentencing judge also placed too much weight on the unfairness limb of delay because the second period of delay between the grant of bail by this Court on 17 September 2020 and the concluded August 2022 trial was not 'untoward' and there was no particular evidence of anxiety on the part of either respondent.

35 Counsel for each respondent argued that, properly understood, ground 1 was not a complaint of specific error, but a complaint as to weight. Accordingly it should be treated as part of the argument as to manifest inadequacy of the sentences (ground 3).

36 Bloomfield submitted that the prosecution during the plea had conceded that the rehabilitation limb of delay should be given some weight, albeit not full weight given the absence of remorse. Further, there was evidence of his improvement during the 19 months he spent in prison, and upon his release.[43] As to the unfairness limb, Bloomfield argued that the total period of 6 years and 8 months should be included in the consideration of delay as he did not receive a fair trial until August 2022. Mr Newton's report contained evidence of the impact of that delay on him.

37 Merryfull submitted that the period of delay had allowed him, as a young offender, to rehabilitate and mature. Having served 19 months' imprisonment as a first time prisoner, he obtained employment on his release and has worked consistently since. There was also evidence in the psychological report prepared on his behalf that he had reflected on his offending behaviour. As to the unfairness limb, Merryfull also argued that Mr Newton's report contained evidence of the impact of that delay on him.

Ground 2 — general deterrence

38 The Director argues that the learned sentencing judge erred by moderating general deterrence on the bases of each respondent's prior good character and youth. It was submitted that while good character can be used to moderate the weight given to both specific deterrence and community protection, it has no role to play in the weight general deterrence is to be accorded in the sentencing exercise. The Director further argued that, at 28 years of age, neither respondent was a youthful offender and, therefore, the primacy of rehabilitation in sentencing young or youthful offenders and the consequent moderation of general deterrence did not apply to them.

39 Again counsel for each of the respondents argued that, properly understood, this ground was not a complaint of specific error, but of weight. Accordingly, like ground 1, it ought to be considered as part of the argument under ground 3.

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43 Counsel referred to the remarks of the sentencing judge, detailed at paragraph 26 above.

40 Both respondents submitted that at the plea the prosecution had not opposed their submissions that general deterrence should be moderated. In any event, his Honour was entitled to moderate general deterrence in the manner that he did.

Ground 3 — manifest inadequacy

41 The Director submits that rape is an inherently serious offence. There were aspects of each respondent's offending that elevated its gravity. Each committed a serious example of the offence and the moral culpability of each was high. Other than otherwise good character, neither respondent could rely on much to mitigate sentence. There was no utilitarian discount for entering a plea of guilty. There was no remorse. The delay that followed the first sentence by Judge Mullaly did not warrant a significant reduction. The Director argued that consequently, in arriving at the sentence he did, the judge allowed evidence of otherwise good character to 'swamp' the sentencing task.

42 Bloomfield submitted that the sentences imposed and the orders for cumulation were well within the range of available sentences. While the offending was serious, it was not planned in advance, it did not involve the use of threats or additional violence, was a single transaction and of limited duration. The totality principle therefore had work to do. Further, Bloomfield had available significant matters in mitigation of his sentence including good character, delay, the impact of COVID-19 on his time in custody, his work history and family support, as well as the fact that he was assessed as not being a significant risk of sexual reoffending. The sentence did not need to reflect specific deterrence. Further, it was appropriate that the judge had exercised a modicum of mercy, being a matter agitated without opposition at the plea hearing.

43 Merryfull submitted that the sentencing judge balanced the gravity of the offending and his moral culpability with the powerful mitigating circumstances available to him. These included his good character, work history, young age at the time of offending, the fact that he had served a substantial term of imprisonment — and during the pandemic — as well as the evidence that a return to prison would negatively impact his mental health. Furthermore, the sentence did not need to reflect specific deterrence. Like Bloomfield, Merryfull submitted that it was appropriate for the principle of mercy to be invoked. Further, in oral submissions, counsel for Merryfull argued that having offended at the age of 21, it was 'quite remarkable' that the sentence imposed would only expire when Merryfull turned 30.

Consideration

Ground 1 — delay

44 It is beyond doubt that significant delay between the time an offender is charged and ultimately sentenced can be a powerful mitigating factor.[44] There are two limbs to the consideration of such delay: unfairness and rehabilitation.[45] In the absence of a prosecution concession as to their applicability, an offender seeking to rely on either or

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44 *R v Merrett* (2007) 14 VR 392 (Maxwell P, Chernov JA and Habersberger AJA); [2007] VSCA 1.

45 *R v Cockerell* (2001) 126 A Crim R 444, 447 [10] (Winneke P, Buchanan and Chernov JJA); [2001] VSCA 239.

both limbs will be expected to adduce some evidence to support them.[46] A sentencing judge is not obliged to make separate reference to each limb, but reference to only one may give rise to a question as to whether the other received any weight in the sentencing synthesis.[47]

45 The unfairness limb concerns the anxiety caused by a charge hanging over an accused's head. A report by a psychologist may satisfy the evidentiary requirement but '[t]here will also be cases where, depending on the duration, cause and other circumstances of the delay, a court may readily accept the delay caused anxiety to the offender without the need for supporting evidence.'[48]

46 The rehabilitation limb concerns whether, during the period of delay, an accused made progress towards rehabilitation. There are two aspects to this limb: remorse and reform. The first requires evidence of acceptance of responsibility for the offending, acknowledgment of its wrongfulness and expression of contrition. The second requires evidence of the steps an offender has taken to reform. Such evidence might include obtaining counselling or other professional assistance, refraining from committing any further offences and contributions made to the community.[49] Both remorse and reform must be demonstrated for a sentencing judge to give full weight to the limb. 'Less than full weight will be accorded where reliance is placed merely on abstinence from further offending.'[50]

47 The specific error alleged in ground 1, which relates only to the rehabilitation limb of delay, is not established.

48 Each of the respondents could point to the fact that they had, during the period of delay, refrained from further offending. The consideration of that fact as part of the rehabilitation limb of delay is orthodox. It triggers the need for the sentencing judge to determine what weight to give that limb and does not conflate issues of good character and reformation. If the absence of further offending was all that each respondent could rely upon with respect to that limb (and, for reasons detailed below, it was not), it would perhaps attract very little weight,[51] but criticism of the weight actually accorded in the sentencing synthesis could never amount to specific error.

49 It follows that ground 1 must fail.

Ground 2 — general deterrence

50 In written and oral submissions before the sentencing judge, Bloomfield acknowledged that general deterrence was of particular significance in the sentencing exercise but

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46 *Tones v The Queen* [2017] VSCA 118, [38] (Maxwell P, Redlich and Kyrou JJA) ('*Tones*').
47 *Tones* [2017] VSCA 118, [43] citing *Rodriguez v DPP (Cth)* (2013) 40 VR 436, 446 [37] (Warren CJ and Redlich JA).
48 *Tones* [2017] VSCA 118, [39].
49 *Tones* [2017] VSCA 118, [41].
50 *Tones* [2017] VSCA 118, [42].
51 *Tones* [2017] VSCA 118, [42], citing Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 431.

needed to be tempered by the circumstances of the case and the matters relied upon in mitigation. Merryfull did not directly address this issue. Neither did the prosecutor.

51 Considering the Reasons as a whole, the sentencing judge did not moderate general deterrence by reason of the good character of each of the respondents. It is to be noted that his Honour said

> I do take into account that in this current case, general deterrence is of lesser importance because of your youth and because of your good character. Correspondingly your rehabilitation should be at the forefront of the court's consideration when determining a sentence in this matter. This approach has been commented upon favourable [sic] in the well-known case of *Queen v Mills* [1998] 4 VR 235 [sic] and also in the case of *The Queen v Azzopardi & Ors* [2011] VSCA 372.[52]

52 This observation simply reflected that general deterrence was a principle to be taken into account and balanced with and weighed against other principles, one of which was rehabilitation. And, youth and good character are clearly relevant to an offender's prospects of rehabilitation, both separately and in combination.

53 Further, it is to be remembered that although both respondents were aged 28 years at the time of sentencing, each was aged 21 years at the time of the offending.

54 The specific error alleged under ground 2 is not established. It follows that ground 2 must fail.

Ground 3 — manifest inadequacy

55 As has been said many times, it is not necessary to identify any specific error on the part of the sentencing judge in order to establish manifest inadequacy.[53] A sentence will be manifestly inadequate only if the Court is persuaded that the sentence was 'wholly outside the range' of sentencing options available to the judge.[54] It must be demonstrated that something has gone 'obviously, plainly or badly wrong'[55] such that the Court is 'driven to conclude that there must have been some misapplication of principle'.[56]

56 The Director's complaints of manifest inadequacy are framed differently consequent upon Merryfull being convicted of the single charge of rape and Bloomfield of two charges of rape and one charge of sexual assault. Nonetheless, the substance of the arguments with respect to both respondents was the same and, in oral submissions, the Director argued ground 3 compendiously. We adopt the same approach.

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52 Reasons, [79].

53 *Dinsdale v The Queen* [2000] 202 CLR 321, 325 [6] (Gleeson CJ and Hayne J); [2000] HCA 54.

54 *DPP v Karazisis* (2010) 31 VR 634, 663 [127] (Ashley, Redlich and Weinberg JJA, Warren CJ and Maxwell P agreeing at [1]); [2010] VSCA 350.

55 *Ayol v The Queen* [2014] VSCA 151 [30] (Maxwell P), quoting *Clarkson v The Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA); [2011] VSCA 157.

56 *R v Pham* (2015) 256 CLR 550, 559 [28] (French CJ, Keane and Nettle JJ); [2015] HCA 39.

57 There can be no doubt that the offending by each of the respondents was serious. Each knew that C was not consenting. Their offending was a massive breach of the trust that had hitherto been integral to their friendship with C, having grown up together in a small community. Bloomfield digitally raped C while Merryfull was present and remained while Merryfull raped C with his penis. Bloomfield took advantage of C's vulnerability at that moment by placing her hand on his penis. Merryfull's comment to the effect of 'she's all yours' and Bloomfield's further act of penile/vaginal rape involved particular degradation and humiliation of C.

58 The moral culpability of both respondents is high and their unwillingness to accept the returned jury verdicts is, as the sentencing judge articulated, concerning.

59 The sentences imposed by the judge are undoubtedly very lenient. However, after anxious consideration we are unable to conclude, in the unique circumstances of this case, that they are manifestly inadequate. In particular, we do not accept the Director's submission that aside from otherwise good character, neither respondent could rely on much by way of mitigation. In this regard, it is necessary to return to the issue of delay.

60 The respondents were charged in December 2016 and were convicted in August 2022. The distinction drawn by the Director between the first part of that period to February 2019, when they were first convicted, and the period after September 2020 following the order for retrial by this Court, is highly artificial. This Court found that by reason of the fresh evidence of LH there had been a substantial miscarriage of justice in respect of both respondents.[57] Neither respondent is responsible for the further period of delay because he was successful in his appeal but unsuccessful at the subsequent trial. The entire period between 2016 and 2022 is relevant to both limbs of delay.

61 As to the unfairness limb, the procedural history outlined above demonstrates the unusual nature of the proceedings. While the Director submitted that it is common for empanelled juries to be discharged without verdict for a variety of reasons, that common occurrence was of particular frequency in this proceeding. Absent psychological evidence of the impact of the delay on each of the respondents, this is a case where the Court would readily accept that it caused anxiety to each of them. This was all the more so because the second part of the delay was attended with a general anxiety about a possible return to prison which could only have been heightened each time a jury was empanelled. Further, as submitted by counsel for Merryfull, each respondent's CCO will expire when he is about 30 years of age for offending that occurred when he was aged 21. That period is 'quite remarkable'. And as noted above, there was psychological evidence before the sentencing judge about the impact of the delay on each respondent.

62 As to the rehabilitation limb, neither respondent could rely on remorse. However, each could point to rehabilitative steps taken. Having served 19 months of imprisonment, each respondent resisted any negative influence from the custodial environment.[58] Neither further offended in the period before or after that incarceration. Upon release each obtained and retained employment. Each sought to re-establish himself as a community minded and law-abiding citizen. Further, the seven year delay has spanned

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57 *Bloomfield* [2020] VSCA 241, [121] (Niall, T Forrest and Weinberg JJA).

58 *Boulton v The Queen* (2014) 46 VR 308, 334 [108] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA); [2014] VSCA 342 ('*Boulton*').

most of the respondents' 20s, a decade in which it can normally be expected that maturity in thought and behaviour is particularly acquired. For each of the respondents, the experience of 19 months' custody in that time was a very sobering experience.

63 In short, there is nothing in the Reasons nor in the sentences imposed that indicate the judge placed too much weight on the issue of delay. It was appropriate for his Honour to consider the seven year delay and it is clear given the judge's concern as to the absence of remorse that he did not give 'full weight' to the rehabilitation limb.

64 It must be borne steadily in mind that the net result for the respondents is that they have been sentenced to punitive dispositions that extend over, respectively, 55 months (4 years, 7 months) in the case of Bloomfield and 43 months (3 years, 9 months) in the case of Merryfull. Lest it be overlooked, a CCO involves onerous restrictions on the liberty of the person on whom one is imposed and is punitive in character.[59]

65 More generally, there is nothing to indicate that his Honour did not appropriately balance the seriousness of the offending, the moral culpability of each respondent, the need for denunciation, general deterrence — albeit moderated by the need for rehabilitation — and the imposition of just punishment with the matters each respondent could call in aid in mitigation of sentence. These included the delay, prospects of rehabilitation, the fact that they had served 19 months' imprisonment and done so during the COVID-19 pandemic, their otherwise good character, work history and contributions to the community. As he was obliged to do, the judge took into account the principle of parsimony. Finally, in the highly unusual circumstances, it was appropriate for the judge to apply a modicum of mercy.

66 It follows that ground 3 must fail.

Conclusion

67 The appeals must be dismissed.

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[59] *Boulton* (2014) 46 VR 308, 331 [90]–[94] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).