SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2023 0209

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

THOMAS SEWELL — Respondent

S EAPCR 2023 0210

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

JACOB HERSANT — Respondent

JUDGES:	EMERTON P, KENNEDY and BOYCE JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	22 March 2024
DATE OF JUDGMENT:	23 April 2024
MEDIUM NEUTRAL CITATION:	[2024] VSCA 70
JUDGMENT APPEALED FROM:	[2023] VCC 1937 (Judge Blair)

CRIMINAL LAW – Director's appeal – Sentence – First respondent sentenced to 1 month and 7 days' imprisonment for one charge of violent disorder and one charge of commit indictable offence whilst on bail – Second respondent sentenced to 3 days' imprisonment with community correction order of 14 months for one charge of violent disorder – Guilty pleas entered following sentence indication – Whether judge erred in characterisation of respondents' prospects for rehabilitation – Whether judge erred in assessing seriousness of the offending – Whether sentences manifestly inadequate – Where judge took into account that first respondent had spent over 6 months in custody in solitary confinement in respect of the offending – Where prosecution did not challenge judge's treatment of this time in custody – Held not appropriate to interfere with first respondent's sentence – Held second respondent's sentence manifestly inadequate – Ground of appeal established in relation to second respondent.

CRIMINAL LAW – Director's appeal – Sentence – Residual discretion – Where undesirable to return second respondent to custody – Where second respondent completed all 200 hours of unpaid community work of community correction order – Sentence imposed enhances

prospects of rehabilitation – Young offender – Where possible to still provide appellate guidance – Residual discretion exercised – Appeal dismissed.

Crimes Act 1958, s 195I.

Director of Public Prosecutions v Lombardo [2022] VSCA 204, applied. *Director of Public Prosecutions v Akok* [2021] VCC 1795; *Director of Public Prosecutions v Leek* [2022] VCC 1071; *Director of Public Prosecutions v Puoch* [2022] VCC 1063; *R v Tafa* [2022] VSC 466, distinguished.

Counsel

Appellant:	Mr BF Kissane KC with Mr L McAuliffe
For the Respondent Sewell:	Mr D Dann KC with Mr M McGrath
For the Respondent Hersant:	Mr C Carr SC with Mr A Patton

Solicitors

Appellant:	Ms A Hogan, Solicitor for Public Prosecutions
For the Respondent Sewell:	KPT Legal Pty Ltd
For the Respondent Hersant:	SLKQ Lawyers

EMERTON P
KENNEDY JA
BOYCE JA:

Introduction and summary

1 On 1 August 2023, following a sentence indication,[1] Thomas Sewell and Jacob Hersant (‘the respondents’) each pleaded guilty to a charge of violent disorder.

2 On 26 September 2023, a plea hearing took place. On this date, Mr Sewell also pleaded guilty to committing an indictable offence whilst on bail.

3 On 27 October 2023, Mr Sewell was sentenced by a County Court judge as follows:[2]

Charge on Indictment	Offence	Max Penalty	Sentence	Cumulation
1	Violent disorder[3]	10 years’ imprisonment	1 months’ imprisonment	Base
Related Summary Offences				
15	Commit indictable offence whilst on bail[4]	30 penalty units or 3 months’ imprisonment	7 days’ imprisonment	
Total Effective Sentence:		1 month and 7 days’ imprisonment		
Non-Parole Period:		N/A		
Pre-sentence Detention Declared:		37 days		
Section 6AAA Statement:		Total Effective Sentence 18 months’ imprisonment Non Parole-Period 12 months’ imprisonment		
Other Relevant Orders: 1. The pre-sentence detention be reckoned as time served.				

1 The sentence indication hearing occurred on 27 July 2023, and the judge gave a sentence indication on 28 July 2023: see below [33].
2 *DPP v Sewell & Hersant* [2023] VCC 1937 (Judge Blair), [80] (‘Sentencing Reasons’).
3 Contrary to *Crimes Act 1958*, s 195I.
4 Contrary to *Bail Act 1977*, s 30B.

4 On the same date, Mr Hersant was sentenced as follows:[5]

Charge on Indictment	Offence	Max Penalty	Sentence	Cumulation
1	Violent disorder[6]	10 years' imprisonment	3 days' imprisonment with community correction order ('CCO') of 14 months	N/A
Total Effective Sentence:		3 days' imprisonment with CCO of 14 months		
Non-Parole Period:		N/A		
Pre-sentence Detention Declared:		3 days		
Section 6AAA Statement:		Total Effective Sentence 18 months' imprisonment Non Parole-Period 12 months' imprisonment		
Other Relevant Orders: 1. The pre-sentence detention be reckoned as time served. 2. 200 hours of unpaid community work.				

5 The Director appealed against Mr Sewell and Mr Hersant's sentences on the same grounds as follows:

> Ground 1. The sentence imposed on charge 1 is manifestly inadequate.
>
> Ground 2. The sentencing judge erred in assessing the seriousness for the offending towards the lower end of seriousness for offending of this type with reference to:
>
> (a) The fact that [Mr Sewell / Mr Hersant] did not wear a face cover; and/or
>
> (b) [Mr Sewell's / Mr Hersant's] individual role in the offending.
>
> Ground 3. The sentencing judge erred in the characterisation of [Mr Sewell's / Mr Hersant's] prospects for rehabilitation.
>
> Ground 4. The sentencing judge erred in assessing the value of the guilty plea.

6 However, at the hearing of the appeals the Director abandoned reliance on ground 4.[7]

7 For the reasons set out below, the appeals will be dismissed.

---

5 Sentencing Reasons, [81]–[83].

6 Contrary to *Crimes Act 1958*, s 195I.

7 Although the Director still complained about the weight given to the pleas under ground 1.

Statutory framework

8 The offence of violent disorder was introduced in 2017 by the *Crimes Legislation Amendment (Public Order) Act 2017*. That Act abolished the common-law offences of affray, rout and riot and introduced two new statutory offences of affray (contrary to s 195H of the *Crimes Act 1958*) and violent disorder (contrary to s 195I of the *Crimes Act 1958*). Section 195I reads as follows:

> **195I Violent disorder**
>
> (1) Violent disorder occurs where 6 or more persons (the ***participants***) who are present together use or threaten unlawful violence with a common goal or intention and the conduct of them, taken together, causes injury to another person or causes damage to property.
>
> (2) For the purposes of subsection (1)—
>
> (a) violent disorder may occur in private as well as public spaces; and
>
> (b) it is immaterial whether or not the participants use or threaten unlawful violence simultaneously; and
>
> (c) the common goal or intention may be inferred from the conduct of the participants.
>
> (3) A participant in violent disorder commits an offence and is liable to—
>
> (a) level 5 imprisonment (10 years maximum); or
>
> (b) level 4 imprisonment (15 years maximum) if, at the time of committing the offence, the participant is wearing a face covering used primarily—
>
> (i) to conceal the participant's identity; or
>
> (ii) to protect the participant from the effects of a crowd-controlling substance.
>
> (4) A person is guilty of an offence under subsection (3) only if the person intends to use or threaten violence or is reckless as to whether the person's conduct involves the use of violence or threatens violence.
>
> (5) Subsection (4) does not affect the determination for the purposes of subsection (1) of the number of persons who are engaging in the conduct referred to in subsection (1).

9 Key elements of the offence of violent disorder are that there are six or more participants; who 'together' use or threaten unlawful violence; and who share a 'common goal or intention'; where the conduct 'taken together' causes injury or damage to property. The offending is hence quintessentially directed to the conduct of a group. Nevertheless, to be guilty of the offence described in s 195I a person must intend to use or threaten violence or be reckless as to whether the person's conduct involves the use

of violence or threatens violence. Moreover, while the maximum penalty for the statutory affray offence is 5 years' imprisonment or, if the offender was wearing a face covering, 7 years' imprisonment, the violent disorder offence carries a higher maximum (10 years' imprisonment or, if the offender is wearing a face covering, 15 years' imprisonment).

Circumstances of offending[8]

10 Mr Hersant was at the relevant time the leader of an organisation called the National Socialist Network ('NSN'). Mr Sewell was at the relevant time the leader of the European Australian Movement ('EAM'). EAM used a distinctive organisational emblem based on the Celtic Cross.

11 On 8 May 2021, Mr Hersant and Mr Sewell were present, along with other members of the two organisations, in the Cathedral Ranges State Park to hike and camp.

12 A separate group of six friends had been holidaying at an Airbnb at a nearby town and were also visiting the Cathedral Ranges for a hike on 8 May 2021.

13 Sometime between 12:00 pm and 1:30 pm members of the EAM and NSN groups ('the EAM/NSN groups') parked their vehicles at the 'Sugarloaf Saddle' carpark and hiked towards 'Sugarloaf Peak'. Police attended the carpark and recorded some of the vehicle registrations.

14 At about 2:00 pm, the separate group of six arrived at the Sugarloaf Saddle carpark in two vehicles. They parked near the toilets at the start of the hiking trail to Sugarloaf Peak. They hiked up towards the peak together in two groups. During their hike up, they crossed paths with some members of the EAM/NSN groups who were walking down from the peak. Some of the males in each group exchanged friendly words. The EAM/NSN groups were wearing black t-shirts with a white emblem consistent with the Celtic Cross. On the way up one of the group of six observed a sticker on a tree stating, 'Australia for the white man.'

15 When the group of six arrived at the peak they observed a large group of the males, dressed in black with the white chest emblem. Some of the group of six speculated that the other groups may be neo-Nazis but did not say much more about it. After about an hour, they began their descent to the carpark.

16 At about 3:40 pm the group of six reached the carpark. There were about 15–20 males of the EAM/NSN groups a short distance away. All were wearing black t-shirts with the white Celtic Cross emblem. They put on backpacks and walked towards the Messmate trail. These males were also observed by another witness, who was driving past in her vehicle.

17 The group of six returned to their respective vehicles, a Volkswagen and Skoda. One of the group was going to use the toilets, but after seeing the EAM/NSN groups decided to continue to his vehicle. When the group of six went to leave in their vehicles one of them googled neo-Nazi symbols on his phone and saw a Celtic Cross image. He decided

---

8 See Sentencing Reasons, [5]–[42].

to take a short video of the EAM/NSN groups using his iPhone. He made a short recording through the closed car window of some of the members of the groups walking past on the trail.

18 Two members of the group of six heard someone yelling ‘ANTIFA’. Two males threw down their backpacks, pulled up scarves over their faces to conceal their identity and ran towards the Volkswagen. One of the occupants of the car yelled at the driver ‘go go go!’ and ‘lock the doors’. The two males reached the vehicle first and tried to open the driver’s side door, but the driver hit the central locking in time.

19 About 10–15 males from the EAM/NSN groups ran towards the Volkswagen and surrounded it. Most, if not all, had put on balaclavas or face scarves that covered their faces. The group of males surrounded the Volkswagen on each side, kicking and punching the vehicle, as the driver tried to leave. This caused minor damage to the panels.

20 One of the males hit the front passenger window with his hand causing it to smash. Another hit the front driver’s window causing it to smash. The driver of the Volkswagen drove forward to get away and in the process hit a large rock that was to the left of the carpark entrance/exit. He realised his engine had been turned off by someone. He looked around and saw a male slightly behind him by the driver’s window holding a knife in a ‘ready stance’. He urinated on himself in fear.

21 One of the males said ‘grab the keys’. More than one male reached in through the driver’s window and tried to grab the key and turn the ignition off, causing the Volkswagen to stall. This happened at least three times, with the front passenger putting the Volkswagen in park and telling the driver to start it again. The driver said, ‘what have we done, what do you want’. The males were hanging on to the car and yelling at them to get out.

22 The prosecution alleged that Mr Sewell injured his right wrist on the broken passenger window, either by striking the window itself or by reaching inside the Volkswagen. The prosecution also alleged that Mr Hersant reached into the Volkswagen through the driver’s side window and touched the ignition, either to turn the engine off or to try and grab the car key.

23 One of the occupants of the car saw two males with Stanley knives standing at the driver’s side window of the Volkswagen and another male with a hunting knife which had a curve at the tip. This occupant also observed one of the males thrust his Stanley knife through the smashed front driver’s window and feared the driver would be stabbed.

24 One or more males by the window were demanding ‘give us your phones’ and ‘get out of the car’. One of the occupants of the car said ‘What do you want? Take my phone’ and held out his phone. The driver immediately handed over his iPhone to the male through the driver’s window. One male took another iPhone from the rear passenger’s hand. The front seat passenger threw his phone under his seat. Some of the males were still yelling at them to get out of the car and started hitting or kicking the vehicle again.

25 Mr Hersant appeared at the vehicle's driver's side window. He was not wearing a face covering and was holding phones taken from the occupants. He said 'Do you want your phones? Get out of the car.' One of the occupants of the car thought Mr Hersant appeared to be the leader as he seemed to be confident and in a position of authority with the others.

26 As the group of males from the EAM/NSN groups attacked the Volkswagen, two males stood in front of the Skoda and put on balaclavas. One said, 'We're not attacking you, we just need you to stay put'. One of the group of six sat down on the ground in front of the Skoda. When another occupant took out her mobile phone, the male said not to take any photos or call anyone.

27 Eventually the driver was able to start the Volkswagen engine and accelerate out of the carpark. The others from the group of six got in the Skoda and also drove out of the carpark.

28 The violent conduct of Mr Hersant, Mr Sewell and the group towards the occupants of the Volkswagen caused a minor injury to the rear passenger's right index finger. All the occupants of the car were in fear of being assaulted or killed.

29 The others in the group in the Skoda and the witness from the carpark were also terrified by the violence that occurred.

30 Later on the same day, police seized and examined the Volkswagen. Mr Sewell's fingerprints were located on the outside of the rear passenger side window. Blood was located on the outside of the rear passenger trim of the Volkswagen. On DNA analysis, the blood appeared to belong to Mr Sewell. DNA appearing to belong to Mr Hersant was found on the Volkswagen ignition barrel.

31 On a later date, the respondents were arrested. A forensic medical officer examined Mr Hersant and noted that he had a group of linear scratches to both of his forearms as well as some bruises to his left arm. Linear abrasions suggested the object that caused them would be narrow and they could be caused by, for example, thorns, tree branches or broken glass. Mr Sewell's injured right hand was also examined by a forensic medical officer. There were five sutured wounds on the front inner part of his right wrist, and some signs of early scabbing and infection. The forensic medical officer was unable to comment on the cause of the wounds due to the wounds being sutured.

32 At the time of the offending, Mr Sewell was on bail in relation to charges of affray and recklessly causing injury, in relation to the assault of a security guard.[9]

Judge's sentencing remarks

33 The judge commenced her reasons by recording the procedural history of the matter. She noted that, on 28 July 2023, she had given a sentence indication pursuant to s 207(1)(a) of the *Criminal Procedure Act 2009*:

---

9 Ibid [70]–[71].

(a) of a 1 month term of imprisonment and a 20 month CCO (with conditions of supervision and work) in respect of Mr Sewell; and

(b) of a 1 month term of imprisonment and a 30 month CCO (with conditions of supervision and work) in respect of Mr Hersant.[10]

34 The judge recorded that she had subsequently received an extended pre-sentence report from Corrections Victoria in respect of each respondent dated 15 September 2023 ('the pre-sentence reports').[11]

35 After setting out the circumstances of the offending in some detail,[12] the judge turned to consider the nature and gravity of the offending. She noted that violent disorder is an 'inherently serious offence'. She also recorded that neither Mr Sewell or Mr Hersant wore face coverings, meaning that the maximum penalty was 10 years' imprisonment.[13] She stated:

> Each of you, Mr Sewell and Mr Hersant offended with a group of approximately 10–15 males. Whilst it is accepted by the prosecution that neither of you covered your faces, the majority of the group wore scarves or balaclavas. Your group set upon a vehicle containing people attempting to leave the carpark by punching and kicking the vehicle as the victims tried to drive off. The vehicle had two windows smashed and knives were produced by members of the group.[14]

36 The judge noted the submissions of counsel that the offending was towards the lower end of seriousness.[15] She recorded that the prosecution accepted that there was no evidence of either respondent carrying or producing a weapon, making a threat, or engaging in a specific act of violence, but submitted that both respondents were 'active participants' in the offending.[16]

37 The judge had regard to the limited number of comparable cases referred to by the prosecution which all involved retributive, organised gang violence.[17] She considered that these cases indicate that the offenders were sentenced according to their age, role, prior convictions and whether they caused injury to others. The use and possession of a weapon or a knife was an aggravating feature that significantly elevated the seriousness of the role of the particular offender.[18]

---

10 Ibid [2].
11 Ibid [4].
12 Ibid [5]–[42].
13 Ibid [43]. *Crimes Act 1958*, s 195I(3) provides that the maximum penalty for violent disorder is 15 years' imprisonment if the offender is wearing a face covering used primarily to conceal their identity or protect them from the effects of a crowd-controlling substance. The maximum penalty is otherwise 10 years' imprisonment. See above [8].
14 Sentencing Reasons, [44].
15 Ibid [45]–[48].
16 Ibid [50].
17 Being *R v Tafa* [2022] VSC 466; *DPP v Puoch* [2022] VCC 1063; *DPP v Leek* [2022] VCC 1071; *DPP v Akok* [2021] VCC 1795.
18 Sentencing Reasons, [51].

38 The judge agreed with the submissions made by counsel for Mr Sewell and Mr Hersant that their offending should be seen 'towards the lower end of seriousness for offending of this type', stating:

> This is because your offending was not planned, there was an absence of any animosity, it was spontaneous, neither of you wore face coverings, neither of you had a weapon, neither of you instigated the offending or engaged in any specific act of violence. That is not to say that I do not consider this incident of offending to be serious.[19]

39 While the offending had arisen in part because of the respondents' associations with the EAM/NSN groups, the judge did not consider the offending to be directly or causally related to their political views. She accepted that their offending was 'reactive' and that there was no evidence to suggest that the offending was politically or racially motivated.[20]

40 The judge stated:

> Despite the absence of victim impact statements it is clear that each of the victims were terrified at being set upon by your group of angry, armed and masked associates. It is the pack mentality and violence perpetrated as a group that is the real gravamen of the offence of violent disorder.[21]

41 The judge then turned to consider the personal circumstances of each offender.

42 In relation to Mr Hersant, the judge noted that he was 22 years old at the time of the offending. At the time of sentencing, he maintained a close relationship with both of his parents. His father had submitted a reference which indicated that both parents fully supported him. He was unemployed at the time of sentencing, but intended to undertake an apprenticeship as an electrician (which was supported by a former employer).[22] Mr Hersant had also been in a committed 'strong and supportive' relationship for over four years and had a 10 month old son. He was the main carer for his son. The judge had regard to character references including from Mr Hersant's partner, a friend of his partner and his mother-in-law. The judge considered that each of the letters suggested that he is an intelligent and good person who has positive impacts on those around him.[23]

43 The judge found that, at the time of sentencing, Mr Hersant had a limited prior criminal history. In 2018, he was found guilty of stating a false name, trespassing and posting bills without permission. In 2019, those charges were dismissed due to his compliance with the bond imposed by the Magistrates' Court. Mr Hersant also had a pending summary matter, but the judge did not take that into account.[24]

---

19 Ibid [52].

20 Ibid [53].

21 Ibid [54].

22 Ibid [55], [57], [59].

23 Ibid [58]–[61].

24 Ibid [62]. By way of update, his counsel accepted that he had been convicted and fined in relation to that offence (which was posting stickers). His counsel also submitted that a subsequent summary matter was to be contested in the Magistrates' Court and was hence irrelevant.

44 In relation to Mr Sewell, the judge noted that he was 28 years old at the time of the offending. He had been in a stable relationship since 2019 and was engaged to be married. He had a young daughter born in 2023 and also had a testimonial from his father.[25] The judge described Mr Sewell's employment as varied, which included time in the army and also work in residential care for children at risk. At the time of sentencing, he worked for a plumber who provided a testimonial which described him as a dependable worker upon whom he relies.[26]

45 The judge noted that Mr Sewell had no criminal convictions prior to this incident. However, he was subsequently convicted on 12 January 2023 for offences of affray and recklessly causing injury in respect of the assault of a security guard (which had occurred on 1 March 2021). He was sentenced to a work order only CCO for a period of 18 months. He was on bail for the assault at the time of the commission of the violent disorder offence. The judge opined that he was likely refused bail in respect of the violent disorder offence as a result. She noted that Mr Sewell consequently spent over 6 months on remand in 'extremely onerous conditions'.[27]

46 The judge characterised the prospects of rehabilitation of each offender as 'good' in circumstances where each:

(a) have considerable family support;

(b) are young fathers;

(c) have good employment prospects; and

(d) have limited involvement in the criminal justice system.[28]

47 In relation to the pleas of guilty the judge stated:

> A trial date was set for 7 August 2023, and you both accepted a sentence indication provided on 28 July 2023. In this context your pleas cannot be seen as early ones. However, you have spared the victims the need to give evidence again which no doubt would have been a harrowing experience for them. Further, your pleas have freed up valuable court time. In these circumstances, your pleas have significant utilitarian value and have demonstrated your desire to facilitate the course of justice. I propose to allow a considerable discount for your pleas of guilty.[29]

48 She continued:

> Further, I take into account the benefits of these pleas in the context of the court backlog, which though now easing, was still a relevant issue when your matters entered the court process. Consistent with the principles enunciated in the case

---

25 Ibid [63], [69].
26 Ibid [65]–[68].
27 Ibid [70]–[71].
28 Ibid [73].
29 Ibid [74].

of *Worboyes*, your pleas will attract a greater amelioration of sentence.[30]

49 The judge considered that the relevant sentencing principles were deterrence (both general and specific), denunciation, protection of the community, rehabilitation and just punishment. She also had to be mindful of the principles of parsimony and proportionality.[31]

50 The judge then indicated that, having weighed up the submissions of counsel, the testimonials, and the comparable cases, she had decided to depart from her original sentence indication.[32]

51 In respect of Mr Sewell, she did not impose the CCO as she had previously indicated. She considered that the punishment he had endured in having spent more than 6 months in 'very difficult' conditions in custody was sufficient punishment, and that to impose a CCO would be excessive in the circumstances of his case.[33]

52 The judge also did not order that Mr Hersant serve a 1 month period of imprisonment in addition to his time served. She considered that there was 'little utility' in returning Mr Hersant to custody. It was her view that it would be more appropriate for Mr Hersant to perform his punishment in the community. She also imposed a CCO of 14 months with 200 hours of work (which was different to the 30 month CCO previously indicated).[34]

Grounds

53 It is convenient to consider ground 3, prior to considering the more substantive grounds 1 and 2, on which the Director placed primary reliance.

Ground 3 — Characterisation of the respondents' prospects for rehabilitation

Submissions

54 In written submissions, the Director contended that the judge did not consider or weigh the contents of the pre-sentence reports in respect of both respondents. These reports recorded that the respondents challenged the prosecution case, demonstrated a lack of remorse and displayed entrenched anti-social attitudes. Therefore it was not open for the judge to find that the respondents enjoyed good prospects for rehabilitation.

55 In oral submissions the Director again highlighted that the respondents had disputed the prosecution opening. She also relied on the fact that both were assessed as a medium risk of reoffending and had entrenched views. Such factors impacted on remorse and prospects of rehabilitation.

---

30 Ibid [75].
31 Ibid [76]–[77].
32 Ibid [78].
33 Ibid [80].
34 Ibid [81]–[82].

Consideration

56 In order to assess this ground, it is necessary to understand the way the matter was run before the judge.

57 First, in the prosecution submissions on the sentence indication, the Director accepted that Mr Hersant's prospects of rehabilitation were 'reasonable.' Although Mr Sewell's prospects were described as 'more guarded,' the Director accepted that he had not reoffended.

58 The pre-sentence reports were then provided on 15 September 2023. As the Director contends, they include references to each respondent disagreeing with the way the prosecution put its case — particularly in the case of Mr Sewell — and identified certain views or attitudes each held. Each was assessed as having a medium risk of re-offending in the light of their 'procriminal attitudes/orientation'.

59 However, the judge did not ignore these reports at the plea hearing, but invited submissions about them and raised the prospect of the authors being called.

60 Moreover, in making reference to these reports, the Director stated that it was not for Corrections Victoria to 'police a person's thoughts', though this should be distinguished from whether that person had resorted to violence. Counsel for the Director also accepted the judge's observations that Mr Hersant had been able to negotiate having his views with living a law abiding life.

61 Consistent with the approach of the Director at the plea, the judge had to be careful not to assess prospects of rehabilitation by reference to political views, even if those views are anti-social and repugnant. This is particularly the case here where the judge did not consider that the offending was causally related to the political views held. Of more concern was the respondents' challenge to the prosecution opening, though this had to be weighed against other more conventional factors, including whether there was any relevant criminal history. The reports ultimately recommended that each respondent was suitable for a CCO. The report in respect of Mr Hersant also recorded that he had acknowledged that his actions were criminal and inappropriate.

62 The judge expressly had regard to appropriate factors in making her assessment. As referred to above, she considered the limited involvement of each respondent in the criminal justice system, that each had considerable family support, that each was a young father, and that each had good employment prospects.

63 In the case of Mr Sewell, the judge expressly noted that he was on bail at the time of the offending, but that he had not committed any further offences since May 2021.[35] This included the period after his release in December 2021 when he was on strict conditions of bail and during which he also complied with the conditions of the CCO imposed in January 2023. Although it might have been generous to describe his prospects as 'good', we are not satisfied that this finding was not open in light of the various factors taken into consideration by the judge.

---

35 Ibid [72].

64 In the case of Mr Hersant, he had a very limited criminal history and was a young offender in circumstances where the Director had accepted that he had ‘reasonable’ prospects of rehabilitation. Consistent with the Director’s own approach, there was no error made in respect of Mr Hersant.

65 Ground 3 is thereby rejected.

Grounds 1 and 2 — Manifest inadequacy and assessment of the seriousness of the offending

Director’s submissions

66 The Director submitted that the sentences imposed were ‘wholly outside the range of sentences available’ to the judge in the reasonable exercise of the sentencing discretion. The Director contended that the judge did not give proper weight to the sentencing purposes that she identified as relevant — being general and specific deterrence, denunciation, protection of the community and just punishment. She submitted that the judge failed to denounce the offending and failed to impose sentences likely to deter others from similar conduct. The Director referred to the admissions by the respondents, by the terms of their pleas, to active participation in unprovoked, cowardly and violent offending. Further, both respondents had ‘relatively modest matters in mitigation’.

67 In advancing this ground the Director focused mainly on the objective seriousness of the offending. In oral submissions she also submitted that too much weight had been given to the pleas.

68 Turning first to objective seriousness, the Director submitted that the judge’s approach at [52] of the Sentencing Reasons led to a specific error given:[36]

(a) that the judge ought not have used the absence of a face mask to further reduce an assessment of the seriousness of the offending. She noted that had the respondents worn face masks, the maximum penalty would have been 15 years’ imprisonment, rather than 10 years’ imprisonment. Therefore the judge ought not to have ‘double counted’ by referring to the absence of a face mask; and

(b) that the judge ought not to have separated out the specific role of each offender when determining the seriousness of the offence. One of the elements of violent disorder under s 195I(1) of the *Crimes Act 1958* is conduct which ‘taken together, causes injury to another person or causes damage to property’. The Director emphasised that it is the common goal or intention which is important for sentencing purposes. However, in oral submissions this was put somewhat differently given that the Director ultimately accepted that the judge was entitled to look at the individual roles of each respondent. She nevertheless submitted that the judge erred in failing to give appropriate emphasis to the mob activity of the group. This led to error in the assessment of the gravity of the offending.

69 In oral submissions, counsel for the Director submitted that this was a serious example of the offence of violent disorder, based on the objective nature of the offending.

---

36 See above [38].

Counsel focused particularly on the actions of the group, noting that there were in fact two groups. He highlighted that there were a large number of males; they were effectively wearing a uniform (black t-shirts with a Celtic cross emblem); some had knives; they inflicted damage to a car as well as some injury to a person (even if minor); and a number of the members of the group donned balaclavas or masks adding to the terrifying nature of the offending.

70 The Director's submission was that the judge erred in characterising this offending as towards the 'lower end' of seriousness (at [52] of the Sentencing Reasons).

71 In relation to Mr Sewell, the Director made a number of important concessions. First, she accepted that the time he had spent in custody of more than 6 months was related to this offending. Second, she made no challenge to the way the judge took this period into account as part of the punishment imposed in respect of this offending. Third, she accepted that, if Mr Sewell had received a sentence of 6 months' 'straight' imprisonment, then it may be that the appeal would not have been instigated.

72 However, the Director maintained the submission that the judge should have imposed a combination sentence with a lengthier period of imprisonment and a CCO (as submitted to the judge) and that 37 days was manifestly inadequate.

73 The Director accepted that Mr Sewell's position was distinguishable from that of Mr Hersant. In particular, Mr Hersant was younger, did not commit the offence whilst on bail, and only had a limited criminal history. However, she maintained that the sentence, which included only 200 hours of work, was manifestly inadequate.

74 Although the Director abandoned ground 4, she submitted that too much weight had been given to the pleas of guilty. She submitted that the respondents could have pleaded guilty to the charge at a much earlier time in early 2022. Although other charges were laid at that time and the offence was in the aggravated form, it was open for the respondents to offer to plea to the lesser charge. She submitted that by the time of the pleas in August 2023, the *Worboyes v The Queen* ('*Worboyes*')[37] discount should have been 'negligible.'

Mr Sewell's submissions

75 Mr Sewell submitted that the Director had failed to demonstrate manifest inadequacy. He highlighted that the Director had submitted that a combination sentence was open and did not contend at the sentence indication that time served would be insufficient in terms of a period of imprisonment to be served.

76 Insofar as the judge did not ultimately impose a combination sentence, Mr Sewell contended that the judge was entitled to take into account the 208 days he had served on remand during the lockdowns imposed because of the Covid-19 pandemic. In oral submissions, counsel for Mr Sewell emphasised that Mr Sewell spent this time in solitary confinement[38] (which was not challenged by the Director).

---

37 [2021] VSCA 169.

38 Citing *DPP v Milson* [2019] VSCA 55, [58] (Priest and Weinberg JJA) ('*Milson*').

77 Mr Sewell submitted that the judge was entitled to not only recognise that the lower maximum penalty applied in his case, but also that it was not suggested that he had worn any sort of face covering. He contended that the Director's submission regarding the face coverings was misconceived, given that violent disorder is the one offence which can carry different maximum penalties. Mr Sewell submitted that the judge was perfectly entitled to say that he was not masked, and in any event, the absence of a face covering was only one of many matters the judge took into account in describing his role.

78 Mr Sewell also contended that the judge was entitled to separately consider the role of each offender.[39] He highlighted that at [52] of the Sentencing Reasons, the judge described the offending as 'serious' offending, in the context of the activities of the whole group. She also identified that the activity of the group was the 'gravamen' of the offending (at [54] of the Sentencing Reasons).[40]

79 Finally, he submitted that the judge was acutely aware of the timing of the plea and referred to the timing of the plea in her reasons. The plea was also given close to the first reasonable opportunity — that is, 29 May 2023 — which was the first time the charges took the current form. It had significant utilitarian value given the length of the trial avoided. He also submitted that the Director was seeking to change her position on *Worboyes*, which she ought not be permitted to do given that she had accepted that *Worboyes* 'would apply' (on the sentence indication).

Mr Hersant's submissions

80 Mr Hersant generally adopted the submissions of Mr Sewell insofar as they were relevant. He submitted that one could legitimately form the view that the present offending, which involved the infliction of fear but no injury of any moment, by a young man with a criminal history of no real moment and good future prospects, could be properly met by the sentence that was ultimately imposed by the judge. Therefore, the sentence actually imposed is not manifestly inadequate.

81 In oral submissions, counsel for Mr Hersant submitted that if, as the Director accepts, 6 months' imprisonment is within the realm of permissible exercise of discretion in relation to Mr Sewell, then a 14 month CCO with 200 hours must necessarily be within the range in the case of Mr Hersant. He highlighted that Mr Hersant had significant matters to differentiate him from Mr Sewell, including that he had no other violent offences, no priors of any moment (only one irrelevant one), he was not on bail at the time and is six years younger than Mr Sewell. He also submitted that, on the basis of his father's reference, the offending was uncharacteristic.

82 In relation to the objective seriousness of the offending, counsel submitted that, given it was spontaneous and involved only minor injury, it was correctly characterised as being at the lower end of the spectrum. He also highlighted that at [52] of the Sentencing Reasons, the judge took into account the group nature of the offending, since the first

---

39 Citing *DPP v Russell* (2014) 44 VR 471, 477–9 [37]–[44] (Maxwell P, Weinberg and Santamaria JJA); [2014] VSCA 308; *R v Sari* [2008] VSCA 137, [62]–[65] (Lasry AJA); *DPP v Luca* [2016] VCC 1573, [15] (Judge Kidd).

40 See above [38], [40].

three matters identified by the judge (that the offending was not planned, there was an absence of animosity and it was spontaneous) were not exclusively relevant to individual offenders.[41]

83 Mr Hersant also submitted that, if he was incarcerated, he would inevitably spend time in solitary confinement which was a relevant matter.

84 In relation to the plea, he submitted that it was not until 29 May 2023 that the offence took its ultimate form. He cited recent authority where this Court has held that the principles in *Worboyes* apply in respect of pleas entered after the date on which the pleas were entered in this case.[42]

85 He also submitted that the Court ought to treat the CCO as if the entire term (14 months) needed to be served even if it later transpired that the CCO was completed in less time.[43]

86 Counsel also made a specific submission that, given that the sentencing indication constrained the judge's subsequent sentencing discretion,[44] her ultimate sentence did not demonstrate error in accordance with *House v The King*.[45]

Consideration

87 In order to establish manifest inadequacy, the Director must demonstrate that the sentences were wholly outside the range of sentencing options available to the trial judge.[46] Manifest inadequacy is a stringent ground of appeal, difficult to make good. It must be shown that something has gone obviously, plainly or badly wrong in the exercise of the sentencing discretion.[47] An appellate court must be 'driven to conclude that there must have been some misapplication of principle'.[48]

88 In this case, the ground of manifest inadequacy is said to arise, in large part, from the judge giving insufficient weight to the seriousness of the offending.

89 Although we accept that the specific involvement of any participant may be considered, the judge was correct to find that it is the pack mentality and violence perpetrated as a group which is the essence of the offence of violent disorder.

90 There are a number of features which suggest that the offending was indeed serious in this case. Thus, there were in fact two groups which came together to constitute a larger

---

41 See above [38].

42 Citing *Moran v The King* [2024] VSCA 13; *DPP v Tran* [2024] VSCA 16.

43 Citing *Boulton v The Queen* (2014) 46 VR 308; 342 [155] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA); [2014] VSCA 342.

44 *Criminal Procedure Act 2009*, s 209(1).

45 (1936) 55 CLR 499; [1936] HCA 40.

46 *R v Abbott* [2007] VSCA 32, [13]–[15] (Maxwell P, Eames JA agreeing at [22], Habersberger AJA agreeing at [23]). See further *DPP v Karazisis* (2010) 31 VR 634, 662–3 [127]–[128]; [2010] VSCA 350 (Ashley, Redlich and Weinberg JJA) ('*Karazisis*').

47 *Clarkson v The Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA); [2011] VSCA 157. See also *Young v The Queen* [2016] VSCA 149, [128] (Ashley, Whelan and Kaye JJA).

48 *R v Pham* (2015) 256 CLR 550, 559 [28] (French CJ, Keane and Nettle JJ); [2015] HCA 39, cited in *DPP v Weybury* [2018] VSCA 120, [50] (Maxwell P and Hargrave JA).

group of some 10–15 black-uniformed males which 'set upon' the innocent hikers so as to intimidate them and force them to hand over their phones. The threat of unlawful violence was particularly serious in circumstances where members of the group were armed with knives, including a hunting knife. The fact that one of the participants was brandishing a knife was so frightening that it caused one of the hikers to urinate on himself. There was also serious damage to the Volkswagen by reason of the window smashing. In such circumstances it is not surprising that the judge found that each of the victims was 'terrified'. The conduct was inherently likely to produce such an effect.

91 Against this, however, there were other factors which the judge correctly took into account in assessing the level of the seriousness. Critically (and fortunately), the physical injury inflicted was minor. Moreover, the offending was not planned, was spontaneous and reactive, and was not politically or racially motivated. Consistent with concessions made by the prosecution, the judge also found that there was no evidence that either offender had a weapon, or engaged in any specific act of violence. We also consider that the judge was entitled to take into account the absence of a face covering in circumstances where it was alleged that many of the participants did wear such coverings.

92 Whether the judge erred in concluding that the respondents' offending should be seen as 'towards the lower end of seriousness for offending of this type' by reference to the fact that the respondents did not wear a face covering gave rise in argument to the issue whether the offence of violent disorder was one offence able to be committed in two ways (either with or without a face covering), or whether two offences were contemplated.

93 However, in the end, it is unnecessary to decide this matter because we consider that the reference by the judge to 'offending of this type' incorporated acts which included the offending described in both s 195I(3)(a) *and* (b). It is thereby apparent that her Honour cannot have counted in mitigation a matter that was already definitional of the offending.

94 When all these factors are taken into account, we are unable to be satisfied that the judge erred in her characterisation of the seriousness of this offending. Rather, we consider that it was open for the judge to find that, although serious, the offending was at the 'lower end of seriousness for offending of this type.'

95 We note in this regard that the comparable cases to which the judge was referred concerned violent disorders which led to more serious injuries. In *R v Tafa*, the offender participated in a pack attack by striking the victim with a baseball bat.[49] One of the other assailants fatally stabbed the victim.[50] The judge emphasised that the offender was not being sentenced for the fatal stabbing.[51] *Director of Public Prosecutions v Leek*,[52] *Director of Public Prosecutions v Akok*[53] and *Director of Public Prosecutions v Puoch*[54]

---

49 [2022] VSC 466, [20]–[21] (Taylor J).
50 Ibid [21]–[23].
51 Ibid [48], [62].
52 [2022] VCC 1071.
53 [2021] VCC 1795.
54 [2022] VCC 1063.

all arose from a brawl that took place in and around a lift at 200 Spencer Street in March 2021. Some of the victims suffered knife wounds.[55]

96 However, this does not resolve the manifest inadequacy issue since even offending at the 'lower end of seriousness' would ordinarily warrant substantial punishment. The principles of general deterrence, denunciation and community protection dictate such a course in circumstances where the maximum penalty is 10 years' imprisonment.

97 In considering the adequacy of the sentence, however, it is also necessary to consider the personal circumstances of each offender, including any significant matters in mitigation.

98 Turning first to Mr Sewell, he was a leader of one of the groups, was older and committed the offence whilst on bail. Nevertheless, the judge was entitled to give weight to the plea given it saved a lengthy trial, as well as having some regard to *Worboyes* (given the prosecution concession that it applied). She was also entitled to have regard to his prospects of rehabilitation, which the prosecution conceded were 'reasonable'. More significantly, consistent with the concessions of the Director, the judge was entitled to, and did, treat the (more than) 6 months' imprisonment he had served on remand as part of Mr Sewell's punishment in respect of this offending. Not only did he serve a period of 6 months, but he also served that time in extremely harsh conditions.[56] We are not satisfied that the sentence imposed is wholly outside the range when this time served is taken into account.

99 Turning next to Mr Hersant, it is true that his position can be distinguished from Mr Sewell because he was younger and had no relevant criminal history. Nevertheless, he was not only a leader of one of the groups, but was also identified as a leader during the course of the offending.

100 It was submitted to us that once the Director effectively conceded that the full period that Mr Sewell had spent in custody meant that the sentence imposed upon him might not be viewed as manifestly inadequate, then it followed that the sentence imposed on Mr Hersant must also be considered to be within range. We do not agree. In fact, quite to the contrary, we consider that a compelling indicator that something went obviously wrong in the exercise of the sentencing discretion in Mr Hersant's case is the stark difference in punishment that becomes evident when his sentence is compared to Mr Sewell's.

101 Accordingly, we do not consider that his distinguishing features are such that it would be reasonable[57] for him to serve only 3 days' imprisonment with a CCO of 14 months, while his co-offender served 6 months in solitary confinement.

102 The submission based on the sentence indication regime took the matter no further. Given that the judge imposed a sentence which was less than that provided by way of indication (of a 1 month term of imprisonment and a 30 month CCO), there is no basis

---

55 Ibid [5] (Judge Maidment).

56 *Milson* [2019] VSCA 55, [58] (Priest and Weinberg JJA).

57 *Kellway v The King* [2023] VSCA 109, [126] (Emerton P, Niall and Kaye JJA).

for the suggestion that the judge's discretion has somehow been constrained by that regime.

103 Rather, we are of the view that Mr Hersant's sentence was manifestly inadequate.

104 We would therefore uphold ground 1 in respect of the Director's appeal against Mr Hersant, but dismiss the appeal in respect of Mr Sewell.

Residual discretion — Mr Hersant

105 The Director has succeeded in establishing ground 1 in respect of her appeal relating to Mr Hersant. Subject to the application of the residual discretion to refuse relief in the case of Director's appeals, it would follow that Mr Hersant should be resentenced to a term of imprisonment.

Submissions

106 Mr Hersant submitted that if one or more of the grounds of appeal is made out, the Court should exercise its residual discretion not to interfere with the sentence imposed. He points out that the Director bears the burden of negating any reason as to why the residual discretion should be exercised.

107 Mr Hersant advanced four reasons as to why the discretion ought to be exercised. First, that the guidance given by the prosecution in reliance on comparable cases must have contributed to any error (if manifest inadequacy is established); second, the Director could have appealed against the sentence indication but chose not to do so; third, if only specific error is shown, then the Court can give guidance without any increase in sentence; and fourth, to the extent the success depends on arguments not presented before the judge then this is a basis for exercise of the discretion.

108 In oral submissions counsel relied on the fact that all 200 hours of work had been completed; that the Court ought to be hesitant to return Mr Hersant to custody after he has been at liberty; that it would undermine the rehabilitation of a young person; that the Director had adduced new arguments for the first time on appeal; and that the Director had acted unfairly by failing to appeal the sentence indication.

109 The Director submitted that the exercise of the residual discretion would mean that the Court does not give guidance as to the appropriate sentence. Counsel for the Director also highlighted that there was scope to increase the sentence without putting Mr Hersant into custody, eg by increasing the duration, terms and/or conditions of the CCO.

Consideration

110 This Court in *Director of Public Prosecutions v Lombardo* summarised the factors that inform the exercise of the Court's residual discretion as follows:[58]

> In determining a Director's appeal against sentence, this Court retains a residual

---

[58] [2022] VSCA 204, [108]–[110] (McLeish, Niall and Kennedy JJA).

discretion to decline to interfere with a sentence, even where sentencing error is established.[59] Relevantly, factors that inform the exercise of the discretion include whether:

(a) the offender given a non-custodial sentence has complied with its terms for a significant period;[60]

(b) the offender given a 'lenient disposition' has made productive use of that disposition, including by finding 'employment and stability in their personal life';[61]

(c) the offending falls short of 'criminality of the highest order';[62]

(d) there has been a delay between the imposition of sentence and the Crown appeal; and

(e) the sentence first imposed is of a type which enhances the prospects of the offender's rehabilitation, particularly where the offender is young.[63]

The onus is on the Crown to 'negate any reason why the residual discretion … should be exercised'.[64]

It is also relevant to bear in mind that the primary purpose of Crown sentence appeals is to clarify the law and 'lay down principles for the governance and guidance' of sentencing courts in future cases.[65] That purpose may be served by the Court identifying the sentencing error in its reasons for judgment without disturbing the sentence.[66]

111 We should say at the outset that we do not consider that the Director acted unfairly in failing to appeal the sentence indication. Even if such an avenue was open (which we doubt),[67] we see no unfairness in failing to do so in this case given that the judge has in fact imposed a significantly lighter sentence in respect of Mr Hersant than provided by way of sentence indication.

112 The Director's submission that the residual discretion ought not be applied in favour of sentencing Mr Hersant to a further CCO with additional conditions prompted a submission from Mr Hersant to the effect that were a further CCO to be imposed upon

---

59 *Karazisis* (2010) 31 VR 634, 648–9 [52], 652 [73], 657–8 [100] (Ashley, Redlich and Weinberg JJA); see also *Green v The Queen* (2011) 244 CLR 463, 472 [24], 479 [43] (French CJ, Crennan and Kiefel JJ) ('*Green*').

60 *Karazisis* (2010) 31 VR 634, 658 [107].

61 Ibid 659 [108].

62 Ibid.

63 Ibid 659 [111]–[112]; see also *Green* (2011) 244 CLR 463, 479 [43] (French CJ, Crennan and Kiefel JJ).

64 *CMB v Attorney-General (NSW)* (2015) 256 CLR 346, 359 [33]–[36] (French CJ and Gageler J).

65 *Cumberland v The Queen* (2020) 94 ALJR 656, 658 [4] (Bell, Gageler and Nettle JJ); [2020] HCA 21; *Green* (2011) 244 CLR 462, 465–6 [1] (French CJ, Crennan and Kiefel JJ); see also *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ).

66 See, eg, *DPP v Currie* [2021] VSCA 272 [133], [143] (Beach, McLeish and Walker JJA); *DPP v O'Neill* (2015) 47 VR 395, 424 [111] (Warren CJ, Redlich and Kaye JJA).

67 The interlocutory appeal provisions contained in Division 4 of Part 6.3 of the *Criminal Procedure Act 2009* are focused on resolving issues relevant for the proper conduct of the trial: see in particular ss 297(1) and 295(3)(b).

him he would find this eventuality particularly irksome should any new condition of such a CCO require him to be supervised.

113 It seemed to us that there was an air of unreality to these submissions in light of the objective seriousness of the respondents' offending.

114 Thus, as described already, the objective circumstances surrounding this offending — which occurred in a relatively isolated location — were such as to place the occupants of the Volkswagen in a state of mortal terror. As the 'Summary of Prosecution Opening for a Sentence Indication Hearing' made clear, the occupants of the Volkswagen 'all were in fear of being assaulted or killed'. The fact that they had cause to believe that the group of men were white nationalists or 'neo-Nazis' would not have allayed the state of fear engendered. Given their historic antecedents, such groups are known to be violent thugs, whose *raison d'etre* is to intimidate and terrorise using force of numbers.

115 If the EAM/NSN groups wish to congregate in public areas of the community like the Cathedral Ranges State Park, then, like any group, club or association, they must bear the consequences of the attention that they attract.[68] It is simply intolerable in an open, civil society like ours that a group such as the EAM/NSN groups might seek to terrorise innocent members of the community by means of gratuitous, cowardly and entirely unprovoked pack-violence as occurred in this case.

116 It was in this sense that an air of unreality surrounded discussion about the desirability of 'conditions of supervision' on a further CCO in the instance of Mr Hersant. The fact is that, notwithstanding his youth, Mr Hersant's offending called for a custodial sentence and one of sufficient duration not only to punish him but, also, to send a message out into the community that offending of this nature will not be tolerated and will be met with condign punishment. Indeed, even Mr Hersant was prepared to accept a sentence at the sentence indication hearing which would have seen him serve a month in jail.

117 Notwithstanding the lack of merit in Mr Hersant's submission, however, there are a number of other features in this case that weigh in favour of the exercise of the residual discretion, particularly in the light of what has transpired since the commission of the offence:

(a) Mr Hersant has regained his liberty and engaged in rehabilitation such that it is undesirable to now return him to custody;

(b) in the time between the original sentence and the hearing of this appeal Mr Hersant has completed all 200 hours of the CCO imposed on him (within a period of time shorter than the duration of the CCO);[69]

(c) the sentence imposed by the judge is of a type which enhances the prospects of Mr Hersant's rehabilitation in circumstances where he is still a young offender; and

---

68 There was no suggestion in the court below that the filming of the respondents' group was unlawful in any way. See *Surveillance Devices Act 1999*, s 7.

69 See *DPP v Kenneison* [2023] VSCA 321, [58] (Emerton P, Priest and Taylor JJA).

(d) the appeal has enabled this Court to provide appellate governance and guidance in respect of the offence of violent disorder.[70]

118 Taking all these matters into account, we consider that it would be counter-productive to send Mr Hersant back to prison now.

119 Accordingly, we consider that Mr Hersant's case warrants exercise of the residual discretion not to interfere with the sentence imposed.

Conclusion

120 The appeals will be dismissed.

---

70 We were informed that this was the first appellate consideration of this type of offending.