SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2023 0243

DUNG YAT — Applicant

v

THE KING — Respondent

JUDGES:	WALKER and BOYCE JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	15 April 2024
DATE OF ORDERS:	1 May 2024
DATE OF REASONS:	13 May 2024
MEDIUM NEUTRAL CITATION:	[2024] VSCA 93
JUDGMENT APPEALED FROM:	[2023] VCC 1638 (Judge Chambers)

CRIMINAL LAW – Appeal – Sentence – Offences involving assaults of custodial officers – Whether sentence manifestly excessive – Serious offending – Youthful offender – Where significant delay between offending and charges – Where offender had spent nearly three years in solitary confinement by time of sentence – Significant weight to be given to burdensome conditions of imprisonment – Appeal allowed – Applicant re-sentenced.

Sentencing Act 1991 ss 11(2), 11(3), 16(3).

R v Stevens [2009] VSCA 81; *R v Males* [2007] VSCA 302; *R v Liddy [No 2]* [2002] SASC 306; *R v Lian* [2023] SASCA 122; *Packard (a pseudonym) v The Queen* [2022] VSCA 128; *R v AB [No 2]* [2000] NSWCCA 467; *Western Australia v O'Kane* [2011] WASCA 24; *Milenkovski v Western Australia* [2014] WASCA 48; *R v Brady* [2005] SASC 277; *Azzopardi v The Queen* (2011) [2011] VSCA 372, discussed. *Bekink v The Queen* [1999] WASCA 160; *R v Faure* [2005] VSCA 91; *R v Mills* [1998] 4 VR 235; *Tones v The Queen* [2017] VSCA 118; *Worboyes v The Queen* [2021] VSCA 169; *R v Verdins* [2007] VSCA 102, applied.

Counsel

Applicant:	Mr C Mandy SC with Ms K Ballard
Respondent:	Ms D I Piekusis KC

Solicitors

Applicant:	Slades & Parsons Solicitors
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

WALKER JA
BOYCE JA:

1 Dung Yat pleaded guilty to three offences involving the assault of three corrections officers while he was serving a sentence for other offending. He was sentenced as follows:[1]

Charge on Indictment	Offence	Maximum Penalty	Sentence	Cumulation
1	Assault emergency worker on duty[2]	5 years	10 months	2 months
2	Causing injury recklessly[3]	5 years	11 months	Base
3	Assault emergency worker on duty[4]	5 years	6 months	1 month
Total Effective Sentence:		14 months' imprisonment		
Non-Parole Period:		8 months		
Pre-sentence Detention Declared:		n/a		
Section 6AAA Statement:		Total Effective Sentence 18 months Non Parole-Period 12 months		

2 Yat sought leave to appeal against that sentence, on the sole proposed ground that it was manifestly excessive. A significant aspect of his appeal turned on the delay between the offending and the filing of the charges. The offending occurred in June 2020; the charges were filed in March 2022, some 21 months later. No explanation for the delay was given by the prosecution. Yat was sentenced in July 2022 for other offending, and ultimately sentenced for the present offending in September 2023.

3 Yat also relied upon the fact that, after the offending and by the time of his sentence, he spent a total of 1,079 days (close to three years) in a management unit, with severe restrictions on his time outside his cell and his interaction with other prisoners.[5] Those conditions were, in effect, solitary confinement. That was comprised of 433 days attributable to the present offending, followed by a further 646 days due to a further incident in the prison.

4 Yat required an extension of time within which to file his notice of appeal.

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1 *R v Ahmed* [2023] VCC 1638 (Judge Chambers) ('Reasons').
2 Contrary to s 31(1)(b) of the *Crimes Act 1958*.
3 Contrary to s 18 of the *Crimes Act 1958*.
4 Contrary to s 31(1)(b) of the *Crimes Act 1958*.
5 The material before the Court revealed that Yat spent a further 58 days in a management unit after he was sentenced for the present offending, meaning that by the time of the appeal he had spent more than three years in solitary confinement. However, for present purposes it is sufficient to focus on the 1,079 days.

5 On 1 May 2024 we granted the application for an extension of time for leave to appeal, granted leave to appeal and allowed the appeal. A period of close to three years in solitary confinement is quite extraordinary, particularly for a young man in his early 20s, and in this case required a significant mitigation of sentence. We re-sentenced Yat to a total effective sentence of 12 months and 1 day's imprisonment with a non-parole period of 6 months.

6 Our reasons for making those orders are as follows.

Key facts

7 At the time of the offending, Yat and his co-accused, Ahmed, were held at Barwon Prison in the mainstream Cassia Unit. On 27 June 2020, Officers Doherty, Marsh and Lee were on duty in that unit. Also working that day was Officer Brown. A prisoner count was called at around 2:00 pm. Some prisoners ignored directions from prison guards to stand by their cell doors. Yat joined the inmates who were not complying. He ignored Officer Doherty's demands to stand by his door.[6]

8 Officer Doherty told Yat (and other prisoners) that he would take their televisions if they did not stand by their doors. After some time, Yat and the others complied, and the count was completed.[7]

9 Shortly after the count, Officer Doherty told Yat that he would be taking his television for a night as punishment for his behaviour during the count. Yat walked into his cell and Officer Doherty told him to hand over his television. Yat refused. Officer Doherty then told Yat to give him the aerial from the wall. Yat refused. The co-accused Ahmed was observing the interaction.[8]

10 After unsuccessful attempts to negotiate with Yat, Officer Doherty directed him to go to the holding cell to isolate. Yat became agitated and moved towards the door of his cell where Officer Doherty was standing with Officers Lee and Brown. Officers Doherty and Brown attempted to close the door to shut Yat in his cell. Officer Doherty pushed Yat to the chest in a bid to keep him inside his cell, but Yat pushed his way out. Officer Doherty stepped back from the doorway of the cell and Officer Brown called a code blue on the prison radio network.[9]

11 Ahmed then moved in close and threw a punch towards Officer Doherty's head, but narrowly missed. Yat threw two punches at Officer Doherty's head using his left and right hand. Officer Doherty fell to the floor. (This conduct was the subject of charge 2). Officer Lee tried to assist, but Ahmed punched him to the head and he fell down. Yat then punched Officer Lee three to four times as he lay on the floor.[10]

12 Officer Doherty regained his footing, but then Yat punched him again, causing him to hit his head on the cell door and fall down again. (This conduct was also the subject of

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6 Reasons, [5]–[10].
7 Reasons, [1].
8 Reasons, [12]–[14].
9 Reasons, [16].
10 Reasons, [17]–[18].

charge 2). Yat then turned and ran back towards Officer Lee, who was attempting to get up. Yat kicked him to the head and then Ahmed stomped on him in the areas of his head and neck. (This conduct was the subject of charge 1). Officer Marsh approached with his hands up in a non-confrontational manner and Yat threw several punches towards his head, knocking him to the floor. (This conduct was the subject of charge 3).[11]

13 In response to the code blue, another officer attended and regained control. That officer demanded that Yat get on the ground, otherwise capsicum spray would be used. Yat then lay facedown on the floor.[12]

14 All officers were examined at hospital and released the same day.

(a) Officer Doherty had some pain and was found to have minor soft tissue injuries to his face and neck as well as a tendon injury to his right ring finger. The finger required a splint and a referral to the outpatient hand clinic for further advice and management, however an x-ray confirmed there were no broken bones.

(b) Officer Lee suffered a scratch on his left ear, bruising on his left arm, abrasions on his left elbow and soreness in his neck and jaw. He had not suffered any fractures or brain injury.

(c) Officer Marsh complained of a headache and had bruising and tenderness above his left eye.[13]

15 Officer Marsh provided a victim impact statement, saying that the assault had a significant impact on many aspects of his life. It has prevented him from returning to work with prisoners due to his mental trauma and resulting anxiety. He said that flashbacks of the incident make him angry, upset and anxious and that this has affected his quality of life.[14]

16 The Court was provided with the CCTV footage of the incident and invited to view the footage, which we did.

17 It is necessary to set out some additional matters concerning Yat's time in custody. He was sentenced to a term of imprisonment in February 2020 for the offence of home invasion with intent to steal.[15] It was this offending for which Yat was in prison at the time of the present assaults.

18 In June 2020, following the present assaults, he was placed in a management unit and in July 2020 he was classified as a long term management ('LTM') prisoner.[16] He left

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11 Reasons, [19]–[20].
12 Reasons, [21].
13 Reasons, [23]–[26].
14 Reasons, [46].
15 Reasons, [69]. That sentence resulted from a breach of a community correction order that had initially been imposed for this offending, along with a sentence of 12 months' imprisonment.
16 Reasons, [71]. Prisoners are classified as LTM prisoners when there is a reasonable belief that placement outside a management or high security unit will pose an unacceptable risk to prison security, the community, the prisoner or any other person.

the management unit on 3 September 2021. This period in a management unit was 433 days.

19 On 15 December 2021 a further incident occurred in Port Phillip Prison, about which this Court had limited information and in relation to which no charges were laid against Yat. As a consequence of this altercation, Yat was again classified as an LTM prisoner and placed in a management unit.[17]

20 In March 2022 the charges for the present offending were filed.

21 In July 2022 Yat was sentenced for other, unrelated offending, including carjacking, assault and drug offences. A total effective sentence of 3 years and 6 months' imprisonment was imposed, with a non-parole period of 2 years and 4 months.[18]

22 In September 2023 Yat was sentenced for the present offending.

23 In November 2023, Yat was released from the management regime, having spent more than three years in a management unit in total.

24 There was no dispute that Yat's time in the management units involved him being confined alone to his cell for 22 or 23 hours every day. His time out of his cell involved a period for exercise in a small caged area around 12 square metres in size. He had limited visits in this period (54 in total prior to August 2023) and was entitled to make phone calls. In addition, there were lockdowns on six days, on which Yat was not permitted to leave his cell for exercise. He was also subject to a handcuff regime from time to time. Due to Yat's strict management regimes, including a handcuff regime, his ability to participate in education and specific offence programs was limited.

25 In addition, during Yat's first period in a management unit he was not credited with the emergency management days that were given to mainstream prisoners as a consequence of Covid-19 measures that had impacted on prisoners.[19] The Court was informed by the respondent that in 2020 and early 2021 management units were exempt from half-day lockdown measures for Covid-19. Prisoners in management units received their normal allocated out of cell hours, so did not receive emergency management days.

The judge's sentencing reasons

26 The judge's reasons were careful and thorough. Her Honour addressed all the matters she was required to address for the purposes of the sentence, and there is no suggestion to the contrary.

27 After outlining the key facts, including the delay in bringing the charges, the judge turned to the objective gravity of the offending. She observed that it was extremely serious offending and it was only a matter of luck that the officers in question were not

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17 Reasons, [71].

18 Reasons, [70].

19 It appears that Yat might have received two emergency management days during his first period in a management unit. But it is clear that, at the very least, for a substantial portion of the 433 days of the first relevant period of management, Yat was not entitled to, and did not receive, any credit for emergency management days.

more seriously injured. The conduct, in company, involved multiple distinct acts of violence. Her Honour observed that great weight should be given to general deterrence in relation to such offending. Furthermore, Yat's moral culpability was high.[20]

28 The judge then turned to Yat's personal circumstances, which in summary included the following matters:

(a) Yat was born in Egypt in May 1997 and moved to Australia when he was three years old. He has Australian citizenship. He enjoyed a positive childhood as part of a close, law-abiding family. However, during his teen years his behaviour began to deteriorate, coinciding with escalating use of cannabis and alcohol. He was asked to leave his school in Noble Park during Year 9. His parents then sent him to an international boarding school in Kenya for 12 months. Over this period, he was expelled from three different schools.

(b) In 2013, before returning to Australia, Yat travelled to South Sudan to visit family. While he was there, conflict erupted and he was trapped in a rural area. He was eventually rescued, but witnessed some of the horrors of the civil war. He fled to a United Nations refugee camp and was ultimately flown to Uganda and then to Australia. He was 16 at this time. As the judge observed, this was undoubtedly a traumatic experience for him at that age.

(c) When he returned to Australia, he enrolled in school but left soon after. He began to use methylamphetamine regularly. He attempted, but did not complete, an electrical pre-apprenticeship and has not held steady employment since leaving school.[21]

29 The judge then turned to Yat's criminal history, which she described as 'relevant and concerning'. It commenced with appearances in the Children's Court in 2015, including breaching a probation order imposed for offending including robbery and burglary. In 2016, Yat was convicted and fined $1,000.00 for resisting an emergency worker on duty. In August 2017 he was sentenced to an 18-month community correction order ('CCO') for offences including assaulting a police officer, assaulting an emergency worker on duty, resisting a protective services officer and other offences whilst on bail. He was sentenced to a further 12-month CCO in September 2017 for the offence of robbery, two charges of assault in company, a charge of unlawful assault and failing to answer bail.[22]

30 Yat breached both of those CCOs. In June 2018 he was sentenced to 6 months' imprisonment for theft of a motor vehicle and dangerous driving while pursued by police.[23]

31 In April 2019, Yat was sentenced to 12 months' imprisonment in combination with a 2-year CCO for the offence of home invasion, with intent to steal. In February 2020, he

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20 Reasons, [34]–[35], [42].
21 Reasons, [62]–[66].
22 Reasons, [67].
23 Reasons, [68].

was found to have breached the CCO and was resentenced to 1 year and 9 months' imprisonment with a non-parole period of 14 months.[24]

32 In July 2022 Yat was sentenced to a term of 3 years and 6 months' imprisonment with a non-parole period of 2 years and 4 months for the offences of carjacking, common assault, possession of drugs of dependence and other offences.[25]

33 The judge observed that Yat had been eligible for parole since September 2022, but had not applied due to the present matter. In December 2021, Yat was involved in another violent altercation with another prisoner (for which he has not been charged) and was classified as a LTM prisoner in January 2022.[26] The judge further observed that, at that time, Yat was in a management unit at Barwon Prison, where he remained in his cell other than for one to two hours per day.

34 The judge then referred to a 'positive note' in relation to Yat's time in prison, observing that he commenced employment as a billet within his unit in July 2023, demonstrating a willingness to take on a role of responsibility within the unit.[27]

35 The judge also observed that Yat continued to enjoy the support of family and that he received regular visits from his mother, who returned from Alice Springs and, along with other family members, attended his plea hearing to demonstrate her support for him.[28]

36 The judge then turned to matters in mitigation, which in summary were as follows:

(a) a plea of guilty at the earliest opportunity, and at a time when there were court delays as a consequence of the Covid-19 pandemic, which warranted a 'significant sentencing discount';

(b) the substantial delay associated with the proceeding, through no fault of Yat, which heightened the need to consider the principle of totality because it deprived him of the opportunity to have these charges determined at or around the time he was sentenced in July 2022 for other offending;

(c) the fact that Yat had remained in a management unit, involving restrictive custody, for much of the time since the offending, which constitutes a form of extra-curial punishment and which also limited his access to programs and interventions designed to reduce the risk of re-offending;

(d) the restrictions on prisoners as a result of the pandemic, in particular the restrictions on face-to-face visits;

(e) Yat's youth at the time of the offending;

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24 Reasons, [69].
25 Reasons, [70].
26 Reasons, [71].
27 Reasons, [72].
28 Reasons, [74].

(f) Yat's diagnosis of complex post-traumatic stress disorder ('PTSD') and a depressive disorder of at least moderate severity, although the PTSD symptoms have declined over time, so as to engage limbs 1–4 of the principles in *R v Verdins* in a limited way and, in addition, *Verdins* limb 5.[29]

37 In relation to Yat's prospects of rehabilitation, the judge observed that it was difficult to assess those as positive given his criminal history; but her Honour did not conclude that Yat had 'no hope of rehabilitation'.[30]

38 The judge then turned to the effect of s 5(2G) of the *Sentencing Act 1991*, which requires a sentence of imprisonment for the offence on charge 2, and s 10AA(4), which requires the sentence to be at least 6 months, unless the Court finds that a 'special reason' exists, under s 10A of the Act. Furthermore, s 16(3) of the *Sentencing Act 1991* requires that a cumulative sentence be imposed on any uncompleted sentence where it is imposed in respect of a prison offence, unless exceptional circumstances exist. The judge held that the unexplained delay of 21 months between the offending and the filing of the charge, and the effects of that delay, constituted a 'special reason' for the purposes of s 10A and exceptional circumstances for the purposes of s 16(3).[31]

39 Her Honour observed that the sentencing task before her was a difficult one:

> You … have a number of powerful matters that operate in mitigation of sentence. Against that however, this was serious, violent offence against custody officers, who were just doing their jobs. As the authorities make clear, the sentencing considerations of general deterrence and denunciation are considerations of great weight, and eclipse other matters in mitigation. Additionally, given your prior criminal convictions, the sentence must also operate to deter you specifically from future acts of violence. I have ultimately concluded that a sentence of imprisonment with a non-parole period fixed is the only available sentencing disposition to meet these sentencing considerations.
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> I have however, attached considerable weight to the cumulative impact of delay and the onerous conditions of your time in custody, in imposing a considerably lower sentence on each of the individual offences than I would otherwise have imposed, and in determining appropriate periods of cumulation, having regard to the sentencing principle of totality. That said, some measure of cumulation is necessary to reflect the offending against separate victims.[32]

The parties' submissions

40 Yat conceded that his offending was serious, and aggravated by its commission in company. However, he submitted that the offending episode was brief and that it was not pre-planned or pre-meditated.

41 Yat then pointed to the following matters in mitigation (all of which were considered by the judge):

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29 Reasons, [76]–[98]. See *R v Verdins* (2007) 16 VR 269; [2007] VSCA 102 ('*Verdins*').
30 Reasons, [99]–[100].
31 Reasons, [111]–[112].
32 Reasons, [115]–[116].

(a) his plea of guilty, which was entered early and had additional utility due to the pandemic backlog;

(b) the fact that he had already been in custody for approximately eight months at the time of the offending and that there were restrictions imposed on prisoners by reason of the pandemic;

(c) his report to a forensic psychiatrist that he felt 'othered' as an African person in Barwon Prison, the tension between him and the prison staff in the lead up to the offending, and the fact that he 'snapped' in the moment;

(d) the fact that he has been in a management unit, in restricted custody, for much of the period between the offending and November 2023 (a period of over three years), and at various times subject to a handcuff and shackle regime — conditions that are 'of real concern' for a young person suffering from PTSD;

(e) his history of trauma and his consequent PTSD (as outlined above), which enlivened limbs 1 and 3 of the *Verdins* principles;

(f) his persistent depressive disorder, which enlivened limb 5 of the *Verdins* principles;

(g) the fact that he was a youthful offender at the time of the incident and at the date of sentence, such as to moderate the deterrent and punitive aspects of sentencing;[33]

(h) that ongoing imprisonment would, in effect, undermine his prospects of rehabilitation; and

(i) the inordinate delay between the offending and the charge.

42 In relation to the delay, Yat contended that it was relevant in mitigation in various different ways:

(a) criminal charges were inevitable, thus he had the matter hanging over his head, not knowing the outcome, for three years;

(b) he would likely have been sentenced at a much earlier time had charges been brought in timely manner;

(c) he lost the opportunity to have the matter determined at or around the time of the 2022 charges, and therefore lost the opportunity to make submissions about totality;

(d) he did not make an application for parole in relation to the 2022 sentence because of this matter;

(e) the delay heightened the significance of the principle of totality; and

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33 Yat referred to *Azzopardi v The Queen* (2011) 219 Crim R 369, 382–3 [38] (Redlich JA); [2011] VSCA 372 ('*Azzopardi*').

(f) the increased burden of imprisonment by reason of Yat's mental health is relevant to the issue of delay.

43 In his oral submissions Yat placed significant emphasis on the delay and on the conditions of his custody while in the management unit. These conditions involved being confined alone to his cell for 22 or 23 hours every day, with time outside his cell being confined to a caged area 12 square metres in size, for a total of 1,079 days, or almost three years, by the time he was sentenced below. He submitted that 433 days of this period was attributable to the current offending and constituted a form of extra-curial punishment. He submitted that the other 646 days were also relevant as constituting a more burdensome prison environment, in particular in relation to a youthful offender. They also prevented him from accessing programs directed to his rehabilitation. He accepted that the judge had taken this into account, but submitted that her Honour had given it insufficient weight.

44 Ultimately, Yat submitted that the extraordinary delay in this matter, when combined with the other matters in mitigation, was such that it necessitated a significantly lower sentence than might otherwise have been appropriate in cases of similar offending.

45 In response, the respondent submitted that all the matters in mitigation upon which Yat relied before this Court had been taken into account by the sentencing judge, and that the sentence her Honour imposed was within the range open to her. The respondent pointed to the seriousness of the offending and to Yat's criminal history and his poor prospects of rehabilitation.

46 In relation to Yat's reliance on the conditions of his imprisonment, the respondent referred to *R v Stevens*[34] and noted that no reference had been made to that case before the sentencing judge. The respondent submitted that it was 'doubtful' that Yat's conditions of detention entitled him to any leniency, given that 'it was his own violent conduct' that led to his placement in a management unit. In oral argument the respondent accepted that Yat's time in a management unit could be properly characterised as 'extra-curial punishment', but submitted that the effect of *Stevens* was that this matter should be given 'limited weight'.

Consideration

The application for an extension of time

47 The applicant's notice of application for leave to appeal was filed some two and a half months out of time. He thus seeks an extension of time, which was opposed by the respondent on the basis that the proposed ground of appeal lacks merit.

48 The principles applicable to the application are uncontroversial and were summarised by this Court in *Madafferi v The Queen*.[35] In particular, it is necessary to consider both

34 [2009] VSCA 81 ('*Stevens*').
35 [2017] VSCA 302 ('*Madafferi*').

the reasons for the delay and the prospects of success of the application for leave to appeal.[36]

49 In the present case Yat filed an affidavit from a legal practitioner explaining the delay in some detail. The affidavit reveals that Yat gave prompt instructions to proceed with an appeal. The delay of approximately two and a half months in the filing of the leave application appears to mostly be due to delay associated with Yat's legal team obtaining the sentencing remarks and preparing the written case. It is apparent that the delay cannot be attributed to Yat personally, as the respondent accepted.

50 For the reasons given below, we have formed the view that Yat's proposed ground of appeal is meritorious. For that reason we would grant his application for an extension of time for leave to appeal.

The merits of the proposed ground of appeal

51 The proposed ground of appeal is that the sentence imposed on Yat was manifestly excessive.

52 This Court has frequently observed that an appeal against sentence on the basis of manifest excess or inadequacy requires 'stringent' proofs.[37] It is not enough that the appellate court would have imposed a different sentence. Rather, the sentence being considered must be one that is 'wholly outside the range of sentences available to the sentencing judge in the reasonable exercise of the sentencing discretion'.[38] In the absence of specific error, the sentence being considered must on its face reveal underlying error. This is no easy task.[39]

53 In the present case, we consider that the sentence was manifestly excessive once proper weight is given to the various matters Yat relied upon in mitigation, in particular the period of time that he spent in a management unit, in what was in effect solitary confinement.

54 The offending was objectively serious, as Yat quite properly accepted. Offending against prison officers required significant weight to be given to general deterrence. Yat also had a number of relevant prior convictions, thus requiring weight to be given to specific deterrence. Plainly a sentence of imprisonment was warranted, as he also accepted. Furthermore, the offending involved three different victims, thus requiring a degree of cumulation. In fact, the cumulation ordered by the judge was moderate, being 2 months on charge 1 and 1 month on charge 3. That plainly reflects the judge's application of the principle of totality.

55 Considered by reference only to the seriousness of the offending and the principles of general and specific deterrence, the sentence the judge imposed was within range;

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36 *Madafferi* [2017] VSCA 302, [11] (Priest, Hansen and Coghlan JJA).

37 *Clarkson v The Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA); [2011] VSCA 157 ('*Clarkson*').

38 *Lai v The King* [2023] VSCA 151, [16] (T Forrest and Osborn JJA) ('*Lai*'). See also *Osman v The Queen* [2021] VSCA 176, [97] (Priest, T Forrest and Emerton JJA).

39 *Lai* [2023] VSCA 151, [16] (T Forrest and Osborn JJA).

indeed, it might have been regarded as lenient. Furthermore, the judge was pessimistic about Yat's prospects for rehabilitation, which also supports the total effective sentence she imposed.

56 However, when all of the matters in mitigation are considered, in our opinion it was not open to the judge to impose a total effective sentence of 14 months' imprisonment.

57 First, Yat pleaded guilty at a time when such a plea had an additional utilitarian value due to the backlog in the courts due to the Covid-19 pandemic. That required a 'palpable amelioration' in sentence.[40]

58 Secondly, the delay between the offending and the filing of charges, and then the imposition of sentence, was inordinate. It was unexplained, and it was not attributable to Yat. Delay is relevant in the manners identified by this Court in *Tones v The Queen*:

> It is well established that significant delay between the time that an offender is interviewed by police and the time that charges are laid, and delay between the laying of charges and trial, can be a powerful mitigating factor. There are two limbs to delay. The first limb concerns unfairness to the offender, in the sense that the relevant charge — or the prospect of such a charge — was 'hanging over' the accused's head and caused him or her anxiety ('unfairness limb'). The second limb concerns whether, during the period of the delay, the offender made progress towards rehabilitation and whether there were good prospects of ongoing rehabilitation ('rehabilitation limb').[41]

59 In the present case, Yat relied on the unfairness limb. In addition to having the charge 'hanging over his head', he also pointed to various other effects of delay in this particular case.

60 We accept that delay in this case had the following relevant effects:

(a) Criminal charges arising from the offending were inevitable, thus Yat had the matter hanging over his head, not knowing the sentencing outcome, for some three years.

(b) There was no dispute that Yat would likely have been sentenced at a much earlier time had charges been brought in timely manner. The delay thus meant that he lost the opportunity to have the matter determined at the time of the 2022 sentence, and therefore lost the opportunity to make submissions then about totality, which could have resulted in a greater degree of concurrency between the sentence imposed for that offending and the sentence imposed in relation to the present offending than the sentencing judge ultimately allowed.

(c) Yat did not make an application for parole in relation to the 2022 sentence because of this matter.

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40 *Worboyes v The Queen* (2021) 96 MVR 344, 345 (Priest, Kaye and T Forrest JJA); [2021] VSCA 169.

41 *Tones v The Queen* [2017] VSCA 118, [36] (Maxwell P, Redlich and Kyrou JJA) (citations omitted) ('*Tones*').

61 Thirdly, Yat's youth at the time of the offending was relevant, in light of the principles set out in *R v Mills*[42] and *Azzopardi v The Queen*.[43] As this Court said in *Mills*, youth of an offender is a primary consideration for a sentencing court. In relation to a youthful offender, rehabilitation is generally more important than general deterrence.[44] As noted above, in this case the judge was pessimistic about Yat's prospects of rehabilitation. Nonetheless, rehabilitation is in the interests of both the offender and the community.[45] In that regard, the psychological report in this case noted that 'ongoing periods of incarceration will perpetuate [Yat's] risk of institutionalisation, criminal associations, and unfavourable attitudes towards convention' — in other words, a longer period of incarceration will reduce Yat's prospects of rehabilitation.

62 Of course, this Court has also recognised that there are cases in which factors such as youth and rehabilitation must take a 'back seat' to other sentencing considerations.[46] Offending of this kind — assault upon prison officers, which requires significant emphasis on general deterrence — is such a case. For this reason, although not irrelevant, Yat's youth can be given only limited mitigatory weight as an independent factor in the sentencing exercise. However, as we discuss below, it assumes greater relevance in the assessment of Yat's conditions of detention and his time in a management regime.

63 Fourthly, Yat was able to call in aid several limbs of *Verdins*, namely limbs 1, 3 and 5.[47] This was a consequence of Yat's earlier diagnosis of, and continuing symptoms of, PTSD and his diagnosis of persistent depressive disorder. His psychologist opined that she considered his PTSD 'to have contributed to' his offending behaviour. That engaged the first limb of *Verdins*, namely that Yat's condition could reduce the moral culpability of the offending conduct (as distinct from his legal responsibility). In such circumstances, denunciation may be given less weight as a sentencing objective. These diagnoses also enlivened limb 3 of *Verdins* — that general deterrence may be moderated as a sentencing consideration — and limb 5 of *Verdins* — that the existence of his PTSD symptoms and his persistent depressive disorder at the date of sentencing may mean that a given sentence would weigh more heavily on Yat than it would on a person in normal health.

64 As already noted, the judge took into account all the above matters. If there were nothing more that Yat was able to call in aid, we would have regarded the sentence imposed by the judge as being within range. However, there is a final mitigating factor that, in our view, requires the conclusion that the sentence was not within range. That factor is the placement of Yat in a management unit immediately after the offending and then again on another occasion, with the ultimate effect that by the time he was sentenced, he had

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42 [1998] 4 VR 235 ('*Mills*').

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

44 *Mills* [1998] 4 VR 235, 241 (Batt JA, Phillips CJ agreeing at 236, Charles JA agreeing at 236).

45 *Azzopardi* (2011) 35 VR 43, 54 [35] (Redlich JA, Coghlan AJA agreeing at 70 [92], Macaulay AJA agreeing at 70 [93]); [2011] VSCA 372.

46 *Azzopardi* (2011) 35 VR 43, 55 [38] (Redlich JA, Coghlan AJA agreeing at 70 [92], Macaulay AJA agreeing at 70 [93]); [2011] VSCA 372.

47 The trial judge focused on limb 5 of *Verdins*, but we accept Yat's submission that limbs 1 and 3 were also engaged, based on the material before the Court.

spent 1,079 days in a form of solitary confinement. As noted above, that is a period of almost three years.

65 It is well accepted that the conditions under which a sentence of imprisonment is served are to be taken into account when considering the severity and impact of the penalty imposed in the particular circumstances.[48] There are various circumstances where it has been accepted that the fact that the prisoner's experience of custody is more burdensome when compared to the general experience of other prisoners will warrant mitigation of penalty. These include the following:

(a) where the harshness of conditions of incarceration arises due to a prisoner's need for protection on account of his or her status as an informer,[49] or as a person who had previously held a position of authority (where the offences are not related to the prisoner's previous office);[50]

(b) where the harshness arises due to ill health or other personal issues affecting the prisoner.[51]

66 It can be seen that these involve circumstances of imprisonment that cannot be attributed to the prisoner's own misbehaviour.

67 A more vexed question is whether mitigation can flow if the harshness of a prisoner's custodial experience arises due to the nature of their offending, or of their behaviour while in custody, or as result of risks that are voluntarily assumed by a prisoner.[52] We did not receive detailed submissions on this question, other than a reference to this Court's decision in *Stevens*, which we discuss below. Rather, as noted above, the respondent accepted that Yat's periods of time in a management unit were relevant to the sentence to be imposed upon him. However, we consider it appropriate to address some of the relevant authorities.

68 There is relatively clear authority in South Australia and Western Australia that holds that the harshness of a prisoner's custodial experience that arises in consequence of a prisoner's misbehaviour in custody, thereby constituting a breach of prison rules, will

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48 *Bekink v The Queen* (1999) 107 A Crim R 415, 418–19 [11]–[14] (Ipp J), 421–2 [29] (Heenan J); [1999] WASCA 160; *R v Faure* (2005) 12 VR 115, 121 [28] (Williams AJA, Callaway JA agreeing at 116 [1], Batt JA agreeing at 116 [2]); [2005] VSCA 91.

49 *R v Liddy [No 2]* (2002) 84 SASR 231, 261 [113] (Mullighan J), 291 [214] (Gray J); [2002] SASC 306 ('*Liddy [No 2]*').

50 *R v Lian* [2023] SASCA 122, [68] (Kourakis CJ) ('*Lian*').

51 *Liddy [No 2]* (2002) 84 SASR 231, 260 [111] (Mullighan J), 291 [214] (Gray J); [2002] SASC 306; *Packard (a pseudonym) v The Queen* (2022) 300 A Crim R 55, 77–8 [97]–[99] (Kyrou and Walker JJA); [2022] VSCA 128.

52 Suggesting that the nature of a prisoner's offending may not matter: see *R v AB [No 2]* (2000) 117 A Crim R 473, 483 [56] (O'Keefe J); [2000] NSWCCA 467; *R v Everett* (1994) 73 A Crim R 550, 566 (Ipp J); *Liddy [No 2]* (2002) 84 SASR 231, 269 [146] (Williams J); [2002] SASC 306. To the contrary: *Liddy [No 2]* (2002) 84 SASR 231, 263 [119] (Mullighan J); [2002] SASC 306; *Western Australia v O'Kane* [2011] WASCA 24, [69] (Pullin and Newnes JJA and Mazza J); *Milenkovski v Western Australia* (2014) 46 WAR 324, 330 [16] (McLure P); [2014] WASCA 48 ('*Milenkovski*').

either attract no mitigation[53] or will not be required to be taken into account in mitigation.[54]

69 To like effect, the most recent edition of Professor Freiberg's *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* contains the following, rather absolute, statement:

> A person whose conditions of imprisonment are more onerous because of their own violent behaviour, or refusal to comply with prison rules, or because of their drug use, or because they may pose an escape risk, will not have that fact accorded any weight in sentencing.[55]

70 However the authorities in Victoria are not so clear. In *R v Males*,[56] this Court left open the question whether the fact that a prisoner was kept in 'protection' was a legally irrelevant consideration in circumstances where the protective custody was the result of the offender's conduct in custody in the period leading up to the date of sentencing or a decision of the prison authorities that the offender presented an unacceptable risk of violent behaviour while in gaol.

71 Kellam JA and Whelan AJA declined to decide that issue, but considered that, in circumstances where the reasons for Males' protection status were a matter of controversy, his status as a 'protection prisoner' was a relevant consideration to be taken into account in favour of the appellant.[57] Maxwell P said that the issue would 'require careful attention in an appropriate case, and a close examination of the authorities'. Maxwell P went on to say that:

> until that occurs, sentencing judges are entitled to treat the matter of protection as a relevant consideration. The weight to be attached to it will of course depend on the circumstances of the case and the evidence before the court. No authority has been cited by the Crown which holds that protection is irrelevant in any particular class of case. That is the decision which the Crown has made clear it wants this Court to make.[58]

72 The matter was revisited, if only obliquely, in *Stevens*. In that case, acting upon a Crown concession of error, this Court resentenced the appellant. The sentencing judge in *Stevens* had outlined the nature of the appellant's conditions of custody. After he was first arrested, the appellant had been locked down for 'something like 23 hours a day' with one hour out for exercise. During that time the appellant could make telephone calls, but his ability to socialise with other prisoners was described as 'limited'. This particular regime had lasted, according to the sentencing judge, for 'something like' two

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53 *Lian* [2023] SASCA 122, [71] (Kourakis CJ), [169] (Doyle JA).

54 *R v Brady* (2005) 92 SASR 135, 144 [46] (Duggan J, Perry J agreeing at 137 [2], Sulan J agreeing at 145 [50]); [2005] SASC 277; *Milenkovski* (2014) 46 WAR 324, 330 [15] (McLure P), 342 [106]–[107] (Buss JA); [2014] WASCA 48.

55 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook, 3rd ed, 2014) [6.135] (citations omitted).

56 [2007] VSCA 302 ('*Males*').

57 *Males* [2007] VSCA 302, [5] (Whelan AJA), [36] (Kellam JA).

58 *Males* [2007] VSCA 302, [49].

years and three months. The sentencing judge considered this state of affairs 'an indictment on the lack of proper facilities containing prisoners in this State'.[59]

73 The appellant in *Stevens* sought to rely on the fact that he had been, and would remain, 'subject to a very strict management regime' which would 'render [the appellant's] time in custody more stressful and deny him access to rights and opportunities generally available to others within the prison system'.[60]

74 Affidavit material relied on by the Crown in *Stevens* outlined that the appellant's designation as a 'protection prisoner' was 'due to his history of violent behaviour towards other prisoners, non-compliance with prison rules and drug use'. The Crown affidavit disclosed, also, that 'the defendant has said he was settled in Melaleuca Unit and wished to remain there'.[61]

75 By the time of the hearing before this Court, it was apparent that the appellant's custodial regime had been very much relaxed. The appellant was, by that stage, permitted to be outside his cell for six hours per day and could mix with other prisoners during periods of exercise. He also participated in a cooking program.[62]

76 The appellant in *Stevens* did not, apparently, 'challenge the stated reasons for his initial designation' as a protection prisoner. Rather, he submitted that, whatever the reasons for the imposition of this regime, the Court should take into account the reality that his conditions of detention were more onerous than those to which other persons undergoing their sentences in ordinary prison conditions would be subject.[63]

77 This Court in *Stevens*, in resolution of the issue whether the appellant's status as a protection prisoner was relevant to sentence, made the following observations, upon which the respondent relied.

> It is, of course, well accepted that the conditions under which a sentence of imprisonment is likely to be served — and the personal, physical and social situation of the individual concerned — are to be taken into account when considering the severity and impact of the penalty imposed in the particular circumstances. This aspect of the matter can be significant in situations where it appears that, by reason of the presence of some feature personal to the offender, the serving of a term of imprisonment can be seen to be more onerous than would ordinarily be anticipated for a person who could reasonably be described as a 'mainstream' prisoner.
>
> There would seem to be no real doubt that the conditions under which the appellant has been required to serve his sentence are more restrictive than those applicable to the bulk of the prison population. As noted earlier, however, it is also acknowledged by him that this situation has arisen as a consequence of his behaviour during his periods of incarceration. Moreover, it appears that, for his own reasons, possibly related to his personal security concerns, he prefers to

59 *Stevens* [2009] VSCA 81, [15] (Maxwell P, Vincent JA and Hargrave AJA).
60 *Stevens* [2009] VSCA 81, [16] (Maxwell P, Vincent JA and Hargrave AJA).
61 *Stevens* [2009] VSCA 81, [17]–[18] (Maxwell P, Vincent JA and Hargrave AJA).
62 *Stevens* [2009] VSCA 81, [17] (Maxwell P, Vincent JA and Hargrave AJA).
63 *Stevens* [2009] VSCA 81, [19] (Maxwell P, Vincent JA and Hargrave AJA).

remain in his current placement.

> The circumstances giving rise to the placing of a prisoner in protection are clearly relevant, as are the actual restrictions which result. Thus, it is one thing for a prisoner to be kept apart from other prisoners and subject to a more restrictive management regime because, for example, he is perceived as being at risk of retribution as an informer, or can be seen to be vulnerable to violence or abuse by other prisoners. It is quite another for a person to be similarly situated as a consequence of his violence towards others, or of his drug use, or of his refusal to comply with the ordinary standards that must be maintained if the prison environment is to remain safe and stable, both for those who are employed there and for the prisoners who are perforce obliged to cohabit within its walls.
>
> In the present case, the appellant's placement within the system is attributable to his own past conduct and conforms with his own wishes. That being so, no significance can be attributed to it when considering the sentence to be imposed. It is also relevant that the conditions under which the appellant was being detained at the time of [the Crown's] affidavit were significantly less restrictive than those taken into account by the judge in his sentencing remarks and under which he was apparently being held at that time.[64]

78 Although *Stevens* is cited by Professor Freiberg in support of the statement from *Fox and Freiberg's Sentencing* that is extracted above, it seems to us that, in light of the particular circumstances that applied in *Stevens*, the observations just quoted cannot be interpreted as this Court having taken the step that was declined in *Males*.

79 In other words, we do not take *Stevens* as having decided that a prisoner's endurance of sufficiently harsh conditions in custody will always be irrelevant as a mitigatory matter pertaining to sentence if those conditions arise as a result of the prisoner's own misbehaviour. Maxwell P suggested in *Males* that such a step would only be taken upon a 'close examination of the authorities'. That did not appear to occur in *Stevens*. Nor has it occurred in any subsequent case. Moreover, the ultimate custodial regime in *Stevens* was considerably more relaxed than had earlier applied to that particular prisoner (and, as it happens, more relaxed than that which applied to Yat); furthermore, the regime in *Stevens* complied with the prisoner's wishes.

80 In addition, it is important to note that the question of whether, in Victoria, a prisoner's endurance of sufficiently harsh conditions in custody will always be irrelevant as a mitigatory matter pertaining to sentence would require attention to the *Charter of Human Rights and Responsibilities 2006*, about which we received no submissions.[65] The Charter contains two rights that may be relevant to this question: the right not to be punished in a cruel, inhuman or degrading way (s 10(b)) and the right to humane treatment when deprived of liberty (s 22(1)).[66] It would be necessary, for any

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64 *Stevens* [2009] VSCA 81, [20]–[23] (Maxwell P, Vincent JA and Hargrave AJA) (citations omitted).

65 We note that, in *Collins v The Queen* [2012] VSCA 163, which also concerned harsh conditions of detention, Warren CJ and Redlich JA observed at [12] that it was unnecessary to consider whether the *Charter of Human Rights and Responsibilities* had any effect on the legality of the continued detention of the appellant in that case, because reliance on the *Charter* had been disavowed.

66 See discussion in Tamara Walsh and Helen Blaber, 'Solitary Confinement and Prisoners' Human Rights' (2023) 49(1) *Monash University Law Review* 232.

determination of the question left open in *Males,* to consider the relevance and application of these rights, if any, including their application in other comparable jurisdictions.[67] The operation of the Charter might well provide a basis to distinguish the cases from those from South Australia and Western Australia, to which we referred above.

81 Such an inquiry might also be informed by the provision of relevant evidence to the Court concerning the effects of solitary confinement upon prisoners, noting that it has been observed elsewhere that the adverse health effects of solitary confinement are well-established.[68]

82 Returning to the present case, the initial period of 433 days that Yat spent in solitary confinement arose due to his commission of the present offences. The Court was given only limited information about why Yat was made subject to the later period — the 646 days — of solitary confinement, namely that he had been involved in an altercation with other prisoners. The nature of his role in that altercation was not elaborated on, other than to observe that no charges were laid against Yat in relation to that incident.

83 It is unnecessary in the present case for us to decide whether a prisoner will not be entitled to any mitigation on account of time spent in solitary confinement as the result of their own misbehaviour. This is because the respondent conceded, both before the judge and before this Court, that it was open for the judge and for this Court to take into account both periods of solitary confinement endured by Yat as matters that went in mitigation of penalty. Furthermore, the respondent accepted, before the judge and before this Court, that the first period of 433 days amounted to extra-curial punishment, and submitted that both periods should be given 'limited weight'. We also observe that, in relation to the second period in solitary confinement, there was insufficient material before the Court for us to conclude that that period was a result of Yat's misbehaviour while in custody.

84 There was no submission by either party that this Court should, in the present case, decide the question left open in *Males*. Were that exercise to be undertaken, it would be appropriate to convene a bench of three, rather than two, judges. In those circumstances, we consider that we ought to follow the remarks of Maxwell P in *Males* to the effect that it is permissible for a sentencing judge to take into account the burdensome conditions of custody, even where those conditions arise from the prisoner's own misbehaviour.

85 In these circumstances, Yat's conditions of incarceration in a management unit, involving a form of solitary confinement, were relevant to the sentencing exercise. The judge was correct to describe the first part of this period as a form of 'extra-curial punishment'.

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67 See, eg, *Callanan v Attendee X* [2013] QSC 340, [34], [52] (Applegarth J) ('*Callanan*'); *British Columbia Civil Liberties Association v A-G (Canada)* [2018] BCSC 62, [191], [321], [376] (Leask J) (Supreme Court of British Columbia), affd *British Columbia Civil Liberties Association v A-G (Canada)* [2019] BCCA 228, [154]–[157] (Fitch JA, Groberman and Willcock JJ agreeing) (Court of Appeal of British Columbia); *Taunoa v A-G (NZ)* [2008] 1 NZLR 429; *Kudła v Poland* [2000] XI Eur Court HR 197.

68 *Callanan* [2013] QSC 340, [36]–[45] (Applegarth J).

86 We do not accept the respondent's submission that, although relevant, Yat's time in a management unit should be given 'limited weight'. Although we accept that his first period of time in a management unit was the result of his own conduct, that does not mean that only limited weight is to be given to this period. Rather, attention to the particular facts of this case is required.

87 Yat's confinement to his cell was extreme and amounted to a form of solitary confinement. The initial period lasted for 433 days — more than a year. He was 23 years old when he entered a management unit and has suffered from PTSD in the past. He was deprived of most social contact[69] and was not permitted outside his cell, aside from limited exercise periods. The psychologist who provided a report for the purposes of the plea opined that Yat's 'long-term management regime has likely exacerbated his pre-existing mental health difficulties'. In addition, by reason of his time in management, Yat was deprived of access to programs that might have assisted his prospects of rehabilitation. He was also not given the benefit of emergency management days available to 'mainstream prisoners' as a consequence of Covid-19 lockdowns.

88 Yat's first period of time in a management unit was a form of extra-curial punishment to which, in the exceptional circumstances of this case, significant weight ought to be given.

89 We also accept that, although the second period of time in a management unit was not related to the present offending, and thus is not properly characterised as 'extra-curial punishment', it is nonetheless relevant to the exercise of the sentencing discretion. As we have noted, we do not have sufficient information to determine whether this period was the result of Yat's own misbehaviour. In any event, this period demonstrated that his time in custody had been more burdensome. In addition, Yat was in a management unit at the time of his sentence and there was no evidence at that time about when he would be released from the management regime. (In fact he continued to be in a management unit for a period of approximately two months after the imposition of the sentence by the trial judge.)

90 By the time of his sentence, Yat had spent more than a third of his adult life in solitary confinement. As was the case in *R v Milson*, the burdensome nature of Yat's confinement was established — it was 'not a matter of prediction or mere speculation'.[70]

91 Although the judge expressly considered this matter and said that she had moderated the sentences as a consequence,[71] we consider that her Honour must have failed to give appropriate weight to this factor. A period of close to three years in solitary confinement is quite extraordinary and required a significant mitigation of sentence.

92 Ultimately, when regard is had to all of the factors in mitigation — and in particular the harsh conditions of custody — and bearing in mind that the maximum penalty for the offences in question was 5 years' imprisonment, we consider that the sentence imposed was outside the range open to the sentencing judge.

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69 Yat had received around 54 visits by August 2023, a few months before his release from the management unit in November 2023.

70 [2019] VSCA 55, [58] (Priest, McLeish and Weinberg JJA).

71 Reasons, [81], [110].

93 Finally, we note that several of the factors relied upon by Yat on the appeal were relied upon by the judge in reaching the conclusion that exceptional circumstances were established for the purposes of s 16(3) of the *Sentencing Act 1991*. The effect of that conclusion was that the sentence imposed for the present offending was to be served concurrently with the remaining time to be served for the offences the subject of Judge Maidment's sentence (being the offending for which he was in custody at the time of the plea on the present offending). That was a period of some two months. Thus the sentence imposed resulted in an additional 12 months in prison, and an additional eight months before Yat would be eligible for parole. The applicant accepted that an appropriate lens through which to view his submission in relation to manifest excess was to ask whether those increases are within the range reasonably open to the judge. We consider that they are not.

94 Our conclusion that the sentences imposed by the primary judge were manifestly excessive produced somewhat of a sentencing dilemma. As can be seen from the orders that we pronounced in this matter, we reduced Yat's head term of imprisonment from 14 months to 12 months and 1 day and his non-parole period from 8 months to 6 months. From one perspective such a reduction might be viewed as 'tinkering'.[72] We consider it appropriate to record that, given Yat's lengthy experience of solitary confinement, we gave serious consideration to imposing a sentence that was less than 12 months. Had we done so, however, this would have meant that Yat would have been deprived of the opportunity of conditional release on parole.[73] We considered in this case that a non-parole period followed by a supervised period on parole in the community may have some real benefit, and we sought submissions in relation to this question. It would have been wrong, in our view, not to have reduced the sentence simply in order to have preserved the option of parole. Thus it was that, balancing all relevant considerations, we imposed the sentence that we did.

Conclusion

95 For the reasons given, we granted the application for an extension of time, granted leave to appeal, allowed the appeal and resentenced Yat as follows:

Charge 1 — 8 months' imprisonment;

Charge 2 — 9 months and 1 day's imprisonment;

Charge 3 — 6 months' imprisonment;

96 The sentence imposed on charge 2 was the base sentence, and we ordered that 2 months on charge 1 and 1 month on charge 3 be served cumulatively upon the sentence imposed on charge 2. This resulted in a total effective sentence of 12 months and 1 day's imprisonment. We imposed a non-parole period of 6 months.

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72 See, eg, *Green v The Queen* (2011) 244 CLR 462, 487 [73] (French CJ, Crennan and Kiefel JJ); [2011] HCA 49.

73 See ss 11(2), (3) of the *Sentencing Act 1991*.

97 We recorded for the purposes of s 6AAA of the *Sentencing Act 1991* that, had it not been for Yat's plea of guilty, we would have imposed a total effective sentence of 16 months' imprisonment with a non-parole period of 9 months.

THE COURT