

**SUPREME COURT OF VICTORIA
COURT OF APPEAL**

S EAPCR 2025 0123

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

v

DAMIAN RAUX

First Respondent

S EAPCR 2025 0124

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

v

RAWIRI TALANOA

Second Respondent

JUDGES:	PRIEST, OSBORN and KAYE JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	9 October 2025
DATE OF JUDGMENT:	27 October 2025
MEDIUM NEUTRAL CITATION:	[2025] VSCA 258
JUDGMENT APPEALED FROM:	<i>DPP v Raux</i> (County Court of Victoria, Judge Blair, 23 May 2025)

CRIMINAL LAW – Appeal – Sentence – Crown appeal – Home invasion – Armed robbery – Theft – First respondent subject to two-year community correction order at time of offending – Low intellectual capacity and autism spectrum disorder – Whether judge erred in finding first respondent’s impaired mental functioning satisfied requirements of s 5(2H)(c)(ii) of the *Sentencing Act 1991* – Whether judge ought to have imposed custodial sentence otherwise than in combination with community correction order for category 2 offending – Burden of imprisonment materially greater by reason of first respondent’s impaired mental capacity – First respondent at greater risk of ongoing institutionalisation – Statutory discretion existed to impose combination sentence – No error.

CRIMINAL LAW – Appeal – Sentence – Crown appeal – Whether sentence manifestly inadequate – First respondent assessed as unsuitable for community correction order – Expert evidence given in respect of earlier offending that first respondent at high risk of future violence – Whether judge failed to give due weight to need for denunciation and general deterrence – Personal circumstances upon which judge placed significant weight do not justify leniency of sentences – Sentence manifestly inadequate – Appeal allowed – First respondent’s moral culpability reduced to some degree on account of relative youth, intellectual disability, autism spectrum disorder and history of childhood deprivation – First respondent substantially served custodial element of sentence – First respondent resentenced to total effective sentence of 5 years and 6 months’ imprisonment – Exercise of residual discretion cannot be justified.

CRIMINAL LAW – Appeal – Sentence – Crown appeal – Home invasion – Armed robbery – Theft – Judge found offending was not so serious as to entirely displace principles that apply to sentencing of young offenders — Whether judge erred in finding combination of mitigating factors including youth, intellectual disability and childhood deprivation constituted substantial and compelling reasons that are exceptional and rare pursuant to s 5(2H)(e) of the *Sentencing Act 1991* – Whether judge ought to have imposed custodial sentence otherwise than in combination with community correction order for category 2 offending – Offending is of a kind commonly perpetrated by young offenders including persons of low intelligence who have suffered some childhood deprivation – Not open to judge to regard mitigating factors as giving rise to rare and exceptional circumstances – Sentence imposed beyond power – Appeal allowed.

CRIMINAL LAW – Appeal – Sentence – Crown Appeal – Whether sentence manifestly inadequate – Sentence does not adequately reflect gravity of offending – Sentence manifestly inadequate – Appeal allowed – Second respondent’s moral culpability reduced to some extent on account of his youth, intellectual disability and childhood deprivation – Second respondent’s intellectual disability does not offer ready explanation for offending – Second respondent at high risk of further violent offending – Custodial element of current sentence almost complete – Second respondent resentenced to a total effective sentence of 5 years and 2 months’ imprisonment.

Azzopardi v The Queen (2011) 35 VR 43; *Veen v The Queen (No 2)* (1998) 164 CLR 465; *DPP v Lombardo* (2022) 302 A Crim R 329, applied.

Bugmy v The Queen (2013) 249 CLR 571; *Muldock v The Queen* (2011) 244 CLR 120, considered.

Sentencing Act 1991, ss 5(2H)(c)(ii), 5(2H)(e).

Counsel

Appellant:	Ms EH Ruddle KC with Mr L Andrews
First Respondent:	Ms CA Boston SC with Ms OM Thompson
Second Respondent:	Mr DA Dann KC with Mr T Glass

Solicitors

Appellant:	Ms A Hogan, Solicitor for Public Prosecutions
First Respondent:	Chester Metcalfe Lawyers
Second Respondent:	Slink & Keating Solicitors

PRIEST JA
OSBORN JA
KAYE JA:

Introduction

- 1 In the early hours of the morning of 29 April 2024 the respondents, Raux and Talanoa, travelled to a house in Clayton.
- 2 Each was wearing a black mask as face covering, dressed in black clothes, and was wearing gloves and armed with a steel rod. On arrival, Talanoa forced entry into the house by kicking in the front door (charge 1 – home invasion).
- 3 The two offenders then entered the house and confronted the five occupants as they moved through it. They forced their way into occupied bedrooms, threatened the occupants with violence and demanded phones, laptops and car keys. They stole an iPhone mini and two sets of car keys from the occupants (charge 2 – armed robbery).
- 4 After leaving the house, the offenders stole a Mercedes motor vehicle from the driveway (charge 3 – theft). Police were able to track the Mercedes via GPS and arrested the offenders a short time later in the vicinity of the stolen car.
- 5 In consequence of the offending, the first respondent contravened an existing community correction order (‘CCO’) to which he was subject.
- 6 Following pleas of guilty, the first respondent (Raux) was sentenced in the County Court on 23 May 2025 as follows:

Charge	Offence	Maximum	Sentence	Cumulation
Indictment C2400284				
1	Home invasion (contrary to s 77A of the <i>Crimes Act 1958</i>)	25 years' imprisonment	15 months' imprisonment and a 2 year CCO	Base
2	Armed robbery (contrary to s 75A of the <i>Crimes Act 1958</i>)	25 years' imprisonment	15 months' imprisonment and a 2 year CCO	3 months
3	Theft (contrary to s 74 of the <i>Crimes Act 1958</i>)	10 years' imprisonment	2 year CCO	N/A
Contravention of CCO (Re-Sentencing)				
4	Attempted aggravated carjacking (contrary to ss 79A and 321M of the <i>Crimes Act 1958</i>)	20 years' imprisonment	6 months' imprisonment (aggregate sentence)	1 month upon the sentence imposed on Indictment C2400284
10	Unlawful assault (contrary to s 23 of the <i>Summary Offences Act 1966</i>)	3 months' imprisonment		
Total Effective Sentence		19 months' imprisonment with a 2 year CCO		
Non-Parole Period:		N/A		

Pre-Sentence Detention declaration pursuant to s 18(1) of the Sentencing Act 1991:	389 days
Section 6AAA Statement:	3 years' imprisonment with a non-parole period of 18 months
Other relevant orders:	Cancellation of driver's licence for 3 months

- 7 Following pleas of guilty, the second respondent (Talanoa) was also sentenced on 23 May 2025 as follows:

Charge	Offence	Maximum	Sentence	Cumulation
1	Home invasion (contrary to s 77A of the <i>Crimes Act 1958</i>)	25 years' imprisonment	15 months' imprisonment and a 2 year CCO	Base
2	Armed robbery (contrary to s 75A of the <i>Crimes Act 1958</i>)	25 years' imprisonment	15 months' imprisonment and a 2 year CCO	3 months
3	Theft (contrary to s 74 of the <i>Crimes Act 1958</i>)	10 years' imprisonment	2 year CCO	N/A
Total Effective Sentence		18 months' imprisonment with a 2 year CCO		
Non-Parole Period:		N/A		
Pre-Sentence Detention declaration pursuant to s 18(1) of the Sentencing Act 1991:		389 days		
Section 6AAA Statement:		3 years' imprisonment with a non-parole period of 18 months		
Other relevant orders:		Cancellation of driver's licence for 3 months		

- 8 The Director now appeals the sentences pursuant to s 287 of the *Criminal Procedure Act 2009*.

- 9 The grounds of appeal raise two issues:

- (a) whether in each case the sentencing judge failed to give effect to provisions requiring the imposition of a custodial sentence (otherwise than in combination with a CCO) in respect of charges of home invasion and armed robbery committed in company; and
- (b) whether the sentences imposed are manifestly inadequate?

- 10 For the reasons which follow, we are satisfied that:

- (a) a statutory discretion existed to impose the sentence which was imposed upon the first respondent;
- (b) nonetheless, that sentence was manifestly inadequate;
- (c) the sentence imposed upon the second respondent was beyond power because it imposed a CCO; and
- (d) moreover and in any event, the sentence imposed upon the second respondent was also manifestly inadequate.

- 11 Accordingly, (subject to the question of the Court’s residual discretion¹) each respondent must be resentenced.
- 12 Our conclusions with respect to manifest inadequacy are founded in our view of the gravity of the offending.
- 13 The community expects, and the *Sentencing Act 1991* contemplates, that save in exceptional cases, offending of the type with which we are concerned will result in a substantial custodial sentence without the benefit of a reduction by combination with a CCO.
- 14 Considerations of just punishment and general deterrence in general require this to be so. In the present case, considerations of specific deterrence and protection of the community reinforce these factors.
- 15 The personal circumstances of the offenders upon which the sentencing judge placed very significant weight do not, in our respectful view, justify the leniency of the sentences which were imposed.
- 16 Further, although the Court retains a residual discretion with respect to the increase of sentence upon an appeal by the Director (and putting to one side the effect of the category 2 *Sentencing Act* provisions), the discrepancy between the sentences imposed and those which should be imposed in this case is such that the exercise of the residual discretion in favour of the respondents cannot be justified.
- 17 Accordingly, the Director’s appeals must be allowed.
- 18 In order to explain these conclusions it is necessary for us to address the gravity of the offending; the personal circumstances of the respondents; the reasoning of the sentencing judge; the application of the statutory control upon sentencing disposition which is the subject of the first ground of appeal in each case; our reasoning and conclusions as to the adequacy of the sentences imposed at first instance which are the subject of the second ground of appeal in each case; and our decisions with respect to re-sentencing.

The gravity of the offending

- 19 As the sentencing judge recognised at the outset of her reasons, home invasions and armed robberies committed in company are inherently very serious offences. Such offending involves a very serious assault upon the personal safety and sense of security and personal integrity of both victims and the community generally.
- 20 In consequence, a relative increase in the prevalence of home invasions in recent years is a matter of serious community concern.
- 21 In response to the seriousness of offences of this kind, Parliament has imposed a maximum term of 25 years’ imprisonment for each offence of home invasion and armed robbery. This penalty underlies the gravity of each offence.

¹ See s 290(1) *Criminal Procedure Act 2009*.

- 22 Parliament has also designated each offence, when carried out in company, as what is called a category 2 offence. The consequence of this characterisation is that the Court must impose a custodial sentence other than a custodial sentence forming part of a combined sentence with a CCO, unless one of a series of special circumstances set out in s 5(2H) of the *Sentencing Act* is established.
- 23 In the present case, both the offences of home invasion and armed robbery were carried out in company and accordingly they each constituted category 2 offences.
- 24 Moreover, the combination of means which the offenders adopted was cumulatively calculated to enhance the impact of the offending upon the victims.
- 25 Each offender was masked, dressed in black and carried a steel rod. They entered the house after dark in the early hours of the morning by kicking in the door. The steel rods which they carried were used to threaten and intimidate the occupants. The use of the rods occasioned genuine fear. The invasion of the house was comprehensive. The offenders moved through the house sequentially confronting each of the five victims. The invasion was utilised to facilitate the theft of valuable personal belongings and a motor vehicle.
- 26 Although short in duration, the home invasion was pre-planned, deliberately confrontational, and coupled with armed robbery and consequent theft. In the case of the first respondent, it was further aggravated by the fact that at the time of the offending he was the subject of a CCO.
- 27 The sentencing judge correctly characterised the offending as a whole as demonstrating a brazen, violent and outrageous disregard for the safety and security of others. She further found that it constituted a serious example of the kind of offending in issue.² We respectfully agree and endorse that conclusion.
- 28 We also agree that considerations of parity require broadly similar penalties to be imposed upon each offender despite some differences in both the circumstances of their offending and personal backgrounds.³ The gravity of the joint offending supports this conclusion.

Personal circumstances of the first respondent

- 29 The sentencing judge addressed the personal history of the first respondent in careful detail.⁴ We will seek to summarise what we take to be the most significant matters.
- 30 The first respondent was born on 9 August 2001 and was 24 years of age at the date of the sentence in issue.
- 31 His parents emigrated from Sri Lanka and he was born and raised in the southeastern suburbs of Melbourne.

² *DPP v Raux* (County Court of Victoria, Judge Blair, 23 May 2025), [26] ('Reasons').

³ Reasons, [110].

⁴ Reasons, [29]–[46].

- 32 He has four siblings to whom he remains close, but his childhood was marred by domestic violence on the part of his father.
- 33 He did not flourish at school and left early. He did not successfully obtain any employment until many years later.
- 34 He was ‘kicked out’ of home at the age of 15 following an argument with his father and became homeless thereafter.
- 35 He commenced substance abuse at an early age and was using alcohol, cannabis, ice and cocaine during the period in which the offending occurred.
- 36 The first respondent is of low intelligence and an assessment undertaken in 2008 placed his IQ in the first percentile. Subsequent assessments have placed him in the range of borderline to extremely low intellectual capacity.
- 37 Psychological assessments in 2014 and 2022 also found that the first respondent meets the criteria for autism spectrum disorder.
- 38 A report from Mr Matthew Staios, neuropsychologist, of 4 August 2022 confirmed that the first respondent has low intellectual capacity and autism spectrum disorder. The report stated in part:

Overall, he displayed limited capacity for tasks assessing reasoning skills, vocabulary knowledge, general knowledge, spatial processing, attention and working memory, speed and information processing, and his memory for information presented in verbal format was inefficient and unreliable. Tasks assessing executive functioning, including verbal fluency and divided attention also fell within the extremely low ranges.

Mr Raux’s overall cognitive profile is consistent with previous psychological assessments conducted throughout the course of childhood and adolescence noting that his overall level of intellect has generally [fallen] within the borderline too [sic] extremely low range ... While previous assessments have noted variations in his general level of intellectual functioning, his profile as of 2022 indicates further reductions in overall cognitive function, which are likely reflective of a lack of ongoing education to [assist] with maintaining his previous discrete cognitive strengths and the possibility of substance use which has likely serve[d] to further reduce his already limited cognitive skill-set.

- 39 Prior to 2022, the first respondent had come before the Children’s Court and the Magistrates’ Court on a number of occasions and has convictions for theft, deception, assault, robbery, affray, possession of a controlled weapon and breach of bail.
- 40 Most significantly, in December 2022 the first respondent had come before the same judge who imposed the current sentences. On that occasion he was sentenced to two years imprisonment for serious offences of aggravated carjacking and theft. For other offences of attempted aggravated carjacking and unlawful assault, the first respondent was placed on a two year CCO with conditions requiring supervision, a Justice Plan and judicial monitoring.

41 The circumstances of the aggravated carjacking deserve specific notice. On 10 January 2021, the first respondent approached a car which had stopped at traffic lights in Hallam. He opened the driver's side door and held a 30 cm long hunting knife against the driver's throat. He told the driver 'if you don't get out, I will kill you'. He then dragged the driver out of his car and punched him to the head several times. The victim fell to the ground and lay with his eyes closed, finding it difficult to see. The first respondent and a co-offender then stole the victim's wallet which contained bank cards and other personal cards together with \$540 in cash and a gold iPhone X.⁵

42 As her Honour's 2022 sentencing reasons record, the following day after a co-offender had persuaded a second victim to drive her to a bus stop, the following occurred:

At the bus stop, you entered the car and sat in the rear passenger seat behind your co-offender. She asked Mr Faieq to drive you both to the Dandenong railway station. During the drive, you produced a knife, held it to the neck of your second victim, and demanded that he 'stop the car or I will kill you'. Mr Faieq stopped the car on Kidds Road in Doveton and got out. You also got out of the car still holding the knife and walked towards him. He ran away. Your co-offender got into the driver's seat of the vehicle, and you entered the passenger seat and your co-offender drove away. Mr Faieq attempted to hold on to the driver's side door, as a result he fell to the ground. This conduct gives rise to Charge 3, aggravated carjacking.⁶

43 On January 2021, the first respondent and his co-offender attempted to hijack a further car. It is this offending which underlies the CCO forming the basis of charge 4 and summary charge 10 in the present case. Again, as her Honour's 2022 sentencing reasons record:

Your co-offender entered the car and asked if Mr Shah had any drugs with him. When he told her that he did not, she produced a knife, 10 to 15 centimetres in length, and pointed it at the victim, demanding that he give her his car keys. You confronted Mr Shah when he stepped out of his car. You called Mr Shah a paedophile. Both you and your co-offender pushed Mr Shah. He did not surrender his vehicle. Mr Shah thinks he was stabbed by your co-offender at this point – the prosecution concede that you are not responsible for the stabbing of Mr Shah, and you were not charged with that offending and accordingly you will not be sentenced for it.

Mr Shah began running from both of you calling for help as you pursued him. CCTV depicts your co-offender chasing him with the knife in her hand. You caught up with Mr Shah, and punched him in the head several times, causing him to fall to the ground. You put Mr Shah in a headlock. (related summary charge 10 aggravated unlawful assault). Witnesses who heard this incident called Triple 0, and heard Mr Shah yelling 'Help, they are going to kill me'. Another witness who heard Mr Shah cry for help attempted to deescalate the situation and witnessed your co-offender attempt to stab Mr Shah. Eventually both you and your co-offender stopped and left the area. This conduct gives rise to Charge 4, attempted aggravating carjacking.

⁵ *DPP v Raux* (County Court of Victoria, Judge Blair, 14 December 2022), [3]–[4] ('Reasons (2022)').

⁶ *Reasons (2022)*, [7].

- 44 This sequence of offending carries the hallmarks of serious confrontational violence in company which characterises the current offending. It is of material contextual significance to the sentencing exercise in this case.
- 45 Ms Catherine Leigh-Smith acted as a treating psychologist assisting the first respondent from 2020 to late 2022 (funded through an NDIS package provided in respect of the first respondent's intellectual disability). She gave evidence on the plea hearing in 2022 that the first respondent had experienced alienation and marginalisation for most of his life, having poor planning and organisational skills and a very rigid and inflexible thinking style. He struggled to accurately interpret the intentions and behaviours of others, which resulted in him being vulnerable to their influence. She held concerns that he was at risk of becoming institutionalised.⁷
- 46 At the time of the 2022 plea hearing, a comprehensive report had also been received from Dr Bonnie Albrecht, forensic psychologist, which both summarised the first respondent's problems and identified consequent risks.
- 47 Dr Albrecht reported that the first respondent had experienced early and repeated exposure to violence and disrupted living situations, and that he struggled to understand and cope with his father's violence. He experienced distress and ruminative thinking related to his homelife, and inattentiveness at school which, in Dr Albrecht's view, was likely related to joint contributions of trauma, a learning disorder and potential neurodevelopmental disorders interfering with his attention, behavioural regulation, social interactions and understanding. She reported that he struggled to navigate the additional stress caused by the school's attempts to provide him with support, and that this led to him avoiding school and channelling his anger towards others.
- 48 She expressed the opinion that:
- Unfortunately, this precluded his cognitive and mental health needs being attended to in a consistent manner, and fostered early development of violent behavioural templates, building on behavioural models of his father's violence, and reinforced by the fiscal benefits of robbing strangers, catharsis from anger, and social recognition from his older brother and, later, antisocial peers.
- 49 Dr Albrecht reported that the first respondent's anger towards others amplified when he was kicked out of home in his mid-teens. He used drugs to improve his mood and remove distressing thoughts, and he continued to engage in offending behaviour for protection, anger expression and offensive purposes. She said that the first respondent has a desire to be accepted and is sensitive to the approval of those around him, which stems from disrupted attachment with his father and feelings of being unloved as a result of being removed from home. This supports his ongoing engagement in violence and means that he is more strongly affected when interpersonal relationships break down.
- 50 She went on to say that the first respondent's untreated cognitive, regulatory and psychological needs influence limitations in his impulse control, emotional reactivity and rigidity in thinking. As prison affords him with structure, stability in living

⁷ Reasons, [44].

arrangement and meals, and an opportunity to self-isolate to support coping or keep safe, criminal justice consequences offer little deterrent effect.

51 In Dr Albrecht’s view, the current offending occurred in the context of these background factors, in addition to more acute distress related to a friendship breakdown and daily substance use. Moreover, the first respondent had a fun, reinforcing relationship with his co-offender (the second respondent). The offending seemed to have provided considerable entertainment and contributed to furthering the first respondent’s reputation, noting his ‘active’ engagement in prison politics and jocular manner when asked about the offending. His use of violence followed internal templates of its helpfulness to effect desired outcomes, such as obtaining cars. He showed little care for the victims.

52 Notably, Dr Albrecht opined that:

Mr Raux is considered a *High* risk of future violence, both in custodial and community settings. Important treatment needs include his violent attitudes, interpersonal sensitivity for acceptance, and coping approaches, as well as close attention to his learning and neurodevelopmental responsivity needs. Treatment and case management will need to be trauma-informed, and he will likely require considerable environmental supports in order to effect change, including exposure to, and reinforcement within, more prosocial networks.

53 Dr Albrecht’s opinion that the first respondent was at high risk of future violence has proved to be prescient.

54 Following his release in mid-January 2023, pursuant to the CCO, the first respondent appeared to make some real progress. He obtained accommodation and, with the help of a behaviour specialist provided under the NDIS, engaged in a series of behavioural programs. He also obtained meaningful employment for the first time.

55 The sentencing judge had the opportunity to observe this progress by way of judicial supervision during the CCO. She was satisfied that the engagement with the behaviour specialist, Ms Markham, had materially benefitted the first respondent. On the other hand, the first respondent had not flourished since his return to custody.⁸

56 A report from Mr Warren Simmons, consulting psychologist, dated 7 March 2025 expressed the following opinion:

Mr Raux’s prospects for rehabilitation must be considered guarded, particularly as he is currently in an environment where he felt that he could assert himself as some sort of powerful figure in the correctional system where he has been aggressive and violent, but has only resulted in him ending in a management unit. He appeared to be unable to recognise that his behaviour is problematic or that it was never going to achieve his stated aims.

57 A report of 2 April 2025 from Mr Ian Berrisford, a mental health clinician employed by Forensicare, confirmed the potential for continuing problems:

Mr Raux reported that he is currently ‘locked down’ in a management unit and

⁸ Reasons, [38]–[41].

isolated for 23-24 hours per day. This was ‘due to an incident’ which he did not expand upon, although commenting that he suspected he had been ‘set up’. He said that he was seen by staff as being easy to manage away from the general population.

However, Mr Raux said that he has found prison ‘a bit like a holiday, my own room, the food’s good’. He has developed his own routine, will read for a while, then watch TV, and work out later. He is comfortable in his own company but stressed that he misses social engagement with others. He said that he keeps positive and keeps himself occupied. He is keen to be released from custody and on several occasions indicated that he intended to both avoid drugs and to not get into legal difficulties again.

...

Mr Raux’s judgment and insight appeared superficially intact today, presenting with a positive outlook and expressed his intention to remain both drug free and not reoffend. However, he has poor problem solving and impulse control issues along with heavy and consistent drug use indicate the potential for poor decision making in future. His impaired judgement did not appear to be the consequence of any chronic or acute mental health issue, but because of the cognitive deficits caused by his intellectual disability.

The sentencing judge’s reasons with respect to the first respondent

- 58 The sentencing judge set out the circumstances of the offending and then described the first respondent’s personal history and circumstances. She noted the terms of the sentence imposed in December 2022 and the fact that a CCO was operating at the time of the current offending. She further recorded the significant support and supervision the first respondent received under the CCO prior to the current offending.⁹
- 59 Her Honour then summarised the evidence as to the intellectual capacity and mental health of the first respondent.¹⁰
- 60 She next addressed the application of the *Sentencing Act* provisions relating to category 2 offending. She concluded that as a result of the first respondent’s impaired mental functioning he is subject to substantially and materially greater than ordinary burdens of imprisonment and substantially and materially greater risks as a result of imprisonment. Accordingly the requirements of s 5(2H)(c)(ii) of the *Sentencing Act*¹¹ were satisfied.¹²
- 61 The sentencing judge then considered the applications of *Verdins* principles.¹³ Her Honour was satisfied that there was a nexus between the combined effect of intellectual disability and autism spectrum disorder on the one hand and the offending on the other hand. Accordingly, the first respondent’s moral culpability was reduced. In turn, the

⁹ Reasons, [37]–[39].

¹⁰ See Reasons, [43]–[46].

¹¹ See [72] below.

¹² Reasons, [47]–[53].

¹³ *R v Verdins* (2007) 16 VR 269; [2007] VSCA 102 (‘*Verdins*’).

need for just punishment and denunciation were also reduced; and the need for both general and specific deterrence was somewhat moderated.

- 62 Her Honour found that the first respondent's childhood deprivation gave rise to a significant mitigating consideration in accordance with the principles stated in *Bugmy v The Queen*.¹⁴

In your case, I accept your childhood involved significant deprivation as a result of the following factors: your early and repeated exposure to violence at the hands of your father; disrupted living situations when your mother would repeatedly remove herself and the children from the family home for safety, only for the violence to resume upon return; and being 'kicked out' of home at the age of 15 thereby being left to fend for yourself in circumstances where you have an intellectual disability and autism. I note this history was in part confirmed by the report of Shirley Hou in the disability overview report dated 26 October 2022. Ms Hou confirmed that 'according to the departmental file, Mr Raux experienced early and repeated exposure to violence and disrupted living situations'.¹⁵

- 63 Her Honour then referred to the report of Dr Albrecht which we have summarised above and concluded that there was a nexus between the first respondent's childhood deprivation and the current offending. This nexus also reduced the first respondent's moral culpability and provided a context for understanding the first respondent's troubled criminal history.¹⁶
- 64 Next, her Honour noted that at the age of 23 the first respondent remained a youthful offender.¹⁷
- 65 In turn, she concluded that the first respondent had reasonable prospects of rehabilitation in light of the efforts he made pursuant to the previous CCO and continuing contact with his care team.¹⁸
- 66 Her Honour then turned to the contravention by the first respondent of the previous CCO. She found that, despite inconsistent attendance at supervision meetings with the Department of Corrections, the first respondent had largely complied with his CCO for 15 months. He had completed Alcohol and Other Drug counselling as part of his Justice Plan and engaged in disability counselling with Ms Sarah Markham.¹⁹
- 67 Her Honour further took into account the first respondent's early pleas of guilty, considerations of parity, and the purposes for which a sentence may be imposed together with current sentencing practice.²⁰

¹⁴ (2013) 249 CLR 571; [2013] HCA 37 ('*Bugmy*').

¹⁵ Reasons, [60].

¹⁶ Reasons, [61]–[62].

¹⁷ Reasons, [64].

¹⁸ Reasons, [70].

¹⁹ Reasons, [71].

²⁰ Reasons, [109]–[113].

- 68 Lastly, she noted that the first respondent was assessed by Disability Justice as unsuitable for a CCO but was assessed as suitable for a Justice Plan by reason of his intellectual disability.
- 69 Balancing the above matters, her Honour imposed the sentences upon the first respondent which we have set out above.

Ground 1 of appeal with respect to the first respondent – s 5(2H) of the Sentencing Act

- 70 The Director contends that the sentencing judge erred in finding that s 5(2H)(c)(ii) of the *Sentencing Act* applied and that, in consequence, special circumstances existed, which permitted the imposition of a CCO in conjunction with a term of imprisonment in respect of the offending now in issue.
- 71 In order to make good this ground, the Director must show that it was not open to the sentencing judge to come to the conclusion that she did, or that her finding involved some error of fact or law.²¹
- 72 In order to enliven the discretion to impose a CCO the first respondent relied in the first instance on the provisions of s 5(2H)(c)(ii) which exempts an offender from the generally applicable category 2 rule if:

- (c) the offender proves on the balance of probabilities that—
 - (ii) the offender has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment; ...

- 73 The sentencing judge reasoned as follows:

In my view, although there is some evidence that you appear to cope in custody, you have experienced harsh conditions, including long periods of social isolation. Your poor decision-making skills, impaired ability to make rational choices, vulnerability to negative peer influences and lack of appreciation of the wrongfulness or consequences of your actions are all enduring characteristics of your impaired mental functioning associated with ASD and intellectual disorder. In my view your tendency to ‘assert yourself’ in a custodial environment is likely the consequences of your impaired functioning.

In light of the evidence from Dr Bonnie Albrecht, who is a senior forensic psychologist with Forensicare, Cathy Leigh-Smith, psychologist, Matthew Staios, neuropsychologist, Disability Justice co-ordinator Shirley Hou, psychologist Warren Simmons, and MHARS [Mental Health Advice and Response Service] senior mental health clinician, Ian Berrisford, I am satisfied on the balance of probabilities that pursuant to s5(2H)(c)(ii), that a special reason exists in your case. I note I made a similar finding in relation to your previous matter. Mr Raux, I find that you have impaired mental functioning, that is an intellectual disability, diagnosis of autism spectrum disorder and other psychological vulnerabilities, that have resulted in you being subject to

²¹ *Peers v The Queen* (2021) 97 MVR 379, 389 [51] (Niall and Sifris JJA); [2021] VSCA 264.

substantially and materially greater than ordinary burden or risks of imprisonment. I consider that your experience of being contained in management units, the high risk of institutionalisation and the further entrenchment of antisocial and pro-criminal values, exemplify this risk.²²

- 74 In reliance upon the evidence of Mr Simmons and Mr Berrisford, the Director submits that the evidence demonstrates that the first respondent does not find the burden of imprisonment unusually onerous and that insofar as he has been subject to unusually burdensome conditions of imprisonment that is not due to his impaired mental functioning. Accordingly, her Honour's conclusions should be rejected.
- 75 The first respondent submits that the evidence substantiates the conclusion that he is subject to greater than ordinary burdens and risks as a result of the imprisonment. It is further submitted that the respondent's statements to Mr Simmons and Mr Berrisford may be unreliable because of his mental disability.
- 76 In our view, the Director is correct to submit that the evidence establishes that the first respondent does not find the burden of imprisonment subjectively unduly onerous and that his problems whilst imprisoned are largely the products of attempts to run 'crews', i.e. to assert a position of criminal leadership. Conversely, however, it is plain that he struggles with imprisonment and has failed to adapt to it behaviourally. At the time of sentence, he had been placed in management as a result of ongoing aggressive behaviour. On the balance of probabilities his aggressive behaviour is in part a product of his impaired mental functioning. We are satisfied that objectively by reason of his impaired mental capacity the burden of imprisonment is materially greater than it would ordinarily be. Further, the evidence establishes that for the same reason the first respondent is at greater than ordinary risk of ongoing institutionalisation.
- 77 It follows that ground 1 fails. Having reached this conclusion it is unnecessary to deal with alternative provisions of s 5(2H) which the first respondent's counsel relied on by way of a fallback position.

Ground 2 of appeal with respect to the first respondent – manifest inadequacy

- 78 Ground 2 is that:

The sentences imposed on charges 1, 2, 3, 4 and 10, the order for cumulation on charges 4 and 10, and the total effective sentence, are manifestly inadequate.

- 79 In order to establish manifest inadequacy in the sentence imposed at first instance the Director must show that the sentence was 'wholly outside the range' of the sentencing options available to the sentencing judge.²³ The Director must demonstrate that something has gone 'obviously, plainly or badly wrong'.²⁴ The ground is a stringent

²² Reasons, [51]–[52].

²³ *DPP v Karazisis* (2010) 31 VR 634, 662–3 [127] (Ashley, Redlich and Weinberg JJA, Warren CJ and Maxwell P relevantly agreeing at 637 [1]); [2010] VSCA 350 ('*Karazisis*').

²⁴ *Clarkson v The Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA); [2011] VSCA 157.

one, difficult to make good.²⁵ The Court must be ‘driven to conclude that there must have been some misapplication of principle’.²⁶

- 80 The fact that the discretion existed in the first respondent’s case enabling the judge to impose a combined sentence which adopted a CCO as one element, does not mean that the sentencing discretion should necessarily have been exercised to do so.
- 81 The first respondent was formally assessed as unsuitable for a CCO prior to its grant and both the breach of the previous CCO and his prior convictions raise a real question as to the appropriateness of such an order.²⁷
- 82 Moreover, in our view the sentence imposed simply failed to give due weight to the need for denunciation of the serious offending, the need for general deterrence in respect of like offending and the need for protection of the community.
- 83 The offending was dramatically violent and, as we have emphasised, it constituted a totally unacceptable violation of the victims’ home and their sense of security, personal integrity and safety.
- 84 Insofar as general deterrence is concerned, it is apparent both from the scheme of the *Sentencing Act* with respect to category 2 offences and the specific terms of s 5(2HC)(a) that general deterrence is intended to constitute a factor of primary importance in the exercise of the sentencing discretion in cases of this type. There is commensurately less weight capable of being given to circumstances personal to the offender. Accordingly, in our view ground 2 must be upheld in respect of the first respondent.
- 85 We accept that the first respondent’s pleas of guilty, and the evidence as to the first respondent’s intellectual limitations, behavioural disorder, youth and background require some moderation of the sentence which must be imposed in order to give proper effect to denunciation and both general and specific deterrence. Nonetheless, they do not justify a sentence of the order imposed at first instance.
- 86 The violent home invasion and armed robbery in which the first respondent engaged require the imposition of a substantial custodial sentence. The sentence imposed falls well outside the range of the sentencing options open on the facts of the case.

Resentencing of the first respondent

- 87 The first respondent was entitled to call in aid the following matters in mitigation of sentence:
- his early pleas of guilty;
 - his relative youth;
 - his intellectual disability;

²⁵ *Karazisis* (2010) 31 VR 634, 662 [127] (Ashley, Redlich and Weinberg JJA); [2010] VSCA 350.

²⁶ *Pham v The Queen* (2015) 256 CLR 550, 559 [28] (French CJ, Keane and Nettle JJ); [2015] HCA 39.

²⁷ Reasons, [113].

- his autism spectrum disorder; and
- his history of childhood deprivation.

88 Each of these matters demand due weight and we accept that taken together they reduce the moral culpability of the first respondent to some degree, moderate the appropriateness of the first respondent as a vehicle for general deterrence, and qualify the weight which should be given to specific deterrence. Nonetheless, as we have sought to emphasise, the penalty imposed for the offending must, subject to considerations of totality, reflect the gravity of the offending and the need to give due weight to denunciation and both general and specific deterrence.

89 We make the following further observation concerning the matters upon which the first respondent relies. First, the first respondent's early pleas of guilty were of real utilitarian value and constituted some evidence of remorse. In addition, there is evidence of further remorse which has been expressed to his Disability Justice Coordinator during the time the first respondent has been imprisoned.

90 Secondly, although not young at the date of both offending and sentence, the first respondent remained at an age where the evidence tendered on his behalf confirmed that he remained in the process of neural development, i.e. physical development of the brain. As such, his moral culpability was reduced and his prospects of rehabilitation must remain to some extent an open question.

91 On the other hand, the first respondent was far from being a first offender.

92 Moreover, it is well accepted that the greater the seriousness of the offending the less scope is available to regard youth as a moderating factor. In *Azzopardi v The Queen*,²⁸ Redlich JA examined the history of the treatment of youth as a sentencing consideration in this Court. After reviewing the relevant authorities, Redlich JA stated:

The general proposition which flows from these authorities is that where the degree of criminality of the offences requires the sentencing objectives of deterrence, denunciation, just punishment and protection of the community to become more prominent in the sentencing calculus, the weight to be attached to youth is correspondingly reduced. As the level of seriousness of the criminality increases there will be a corresponding reduction in the mitigating effects of the offender's youth.²⁹

93 Further, although youth might theoretically be regarded as moderating the extent to which the first respondent can be regarded as an appropriate vehicle for general deterrence, it is plain that the sentencing regime applicable to the offences in this case was intended amongst other things, to deter young offenders.³⁰ Regrettably young offenders are responsible for a significant proportion of the offending of this type.

94 Thirdly, we accept that the first respondent has an underlying intellectual disability and behavioural disorders which reduce his moral culpability in a general sense.

²⁸ (2011) 35 VR 43; [2011] VSCA 372.

²⁹ Ibid 57 [44] (with whom Coghlan AJA [92] and Macaulay AJA [93] agreed); [2011] VSCA 372.

³⁰ Cf *DPP v Lawrence* (2004) 10 VR 125, 132 (Batt JA); [2004] VSCA 154.

Nonetheless, the offending in this case was deliberate, carefully planned and implemented in coordination with the second respondent. It was not the product of an impulsive or misguided reaction to some perceived provocation. The means adopted reflect the fact that the offending was the product of calculated decision making. This is not a case where the offending can be regarded as the direct product of mental disability.³¹

- 95 Further, as Dr Albrecht’s report makes clear, the first respondent’s mental disability underlies the possibility that he is at a high risk of further violent offending. This raises the conflicting considerations identified by the High Court in *Veen v The Queen (No 2)*:

[A] mental abnormality which makes an offender a danger to society when he is at large, but which diminishes his moral culpability for a particular crime, is a factor which has two countervailing effects: one which tends towards a longer sentence, the other towards a shorter sentence. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.³²

- 96 Fourthly, whilst we accept that the first respondent’s childhood deprivation should be accepted as moderating somewhat his moral culpability in a general way, it cannot be said to explain repeated violent offending in early adulthood.
- 97 Moreover, despite the combination of personal factors to which we have referred and which can be regarded as mitigatory, we take the view in accordance with the opinion of Dr Albrecht expressed in 2022, that the first respondent remains at high risk of future violence.
- 98 The views expressed by Dr Albrecht were amply vindicated by the offending with which we are concerned. Further, the evidence as to the respondent’s behaviour since he returned to custody makes clear that his behaviour is marked by aggression which is sufficiently problematic to require his ongoing supervision under a management regime. This behaviour is both antisocial and pro-criminal.
- 99 The risk with which we are concerned raises a serious issue of protection of the community. It was submitted that the risk is ameliorated by arrangements which have been made for the first respondent’s supported accommodation if he is released under a CCO. We do not accept that these arrangements are sufficient to significantly ameliorate the risk of further violent behaviour when the evidence as a whole is taken into account. Whilst we accept the submission made on behalf of the first respondent that in the long term the protection of the community will be best achieved by the first respondent’s rehabilitation, the community requires and deserves protection in the short term. This is particularly so while the first respondent progresses into adulthood and completes the process of the neural development of his brain.

³¹ See *Alessawi and Snowball v The King* [2025] VSCA 23, 24 [108] citing *DPP v O’Neill* [2015] VSCA 325, [59] (Warren CJ, Redlich and Kaye JJA).

³² (1988) 164 CLR 465, 476–7; [1998] HCA 14 (*‘Veen (No 2)’*). See also *Al Wahame v The Queen* [2018] VSCA 4, 23[90] (Whelan and Kyrou JJA); *Stevens v The Queen* [2021] VSCA 218.

- 100 Despite the mitigating factors we have referred to above, the first respondent's offending requires condign punishment and the imposition of penalties which adequately reflect the need for denunciation and general and specific deterrence together with protection of the community. Because of the related nature of the offending, the total effective sentence must however be moderated to reflect totality.
- 101 In the particular circumstances of this case, the sentence imposed must also be moderated to reflect the fact that the first respondent has substantially served the custodial element of his sentence imposed at first instance. As a result, the first respondent would shortly be released upon a CCO but for the Director's appeal. Accordingly, we have materially moderated the sentences which we would otherwise have imposed to reflect the fact that this resentence will result in an increased burden during the additional period of imprisonment which we propose to impose.
- 102 In all the circumstances and bearing in mind the principle of parsimony, we would resentence the first respondent as follows:

Charge	Offence	Maximum	Sentence	Cumulation
Indictment C2400284				
1	Home invasion (contrary to s 77A of the <i>Crimes Act 1958</i>)	25 years' imprisonment	4 years' imprisonment	Base
2	Armed robbery (contrary to s 75A of the <i>Crimes Act 1958</i>)	25 years' imprisonment	4 years' imprisonment	1 year
3	Theft (contrary to s 74 of the <i>Crimes Act 1958</i>)	10 years' imprisonment	6 months' imprisonment	2 months
Contravention of CCO (Re-Sentencing)				
4	Attempted aggravated carjacking (contrary to ss 79A and 321M of the <i>Crimes Act 1958</i>)	20 years' imprisonment	1 year imprisonment (aggregate sentence)	4 months' imprisonment (upon the sentence imposed on Indictment C2400284)
10	Unlawful assault (contrary to s 23 of the <i>Summary Offences Act 1966</i>)	3 months' imprisonment		
Total Effective Sentence		5 years and 6 months' imprisonment		
Non-Parole Period:		3 years and 6 months' imprisonment		
Section 6AAA Statement:		9 years' imprisonment with a non-parole period of 6 years		
Other relevant orders:		Cancellation of driver's licence for 3 months		

- 103 Having regard to the very substantial difference between the sentences which we regard as appropriate and those imposed at first instance, this is not an appropriate case for the exercise of the residual discretion which the Court may exercise upon appeals by the Director.³³

³³ As to which see *Green v The Queen* (2011) 244 CLR 462, 479 (French CJ, Crennan and Kiefel JJ); [2011] HCA 49.

Personal circumstances of the second respondent

- 104 The second respondent was 21 years of age at the date of sentencing having been born on 5 April 2004.
- 105 He was born in Australia to parents of Māori and Tongan descent. His parents separated soon after his birth. He has three maternal half siblings and five paternal half siblings.
- 106 The second respondent's biological father had a history both of serious violent offending and significant drug addiction. He was incarcerated on multiple occasions. He died when the second respondent was 10 years old, and following his death, the second respondent lost contact with his paternal grandparents and cousins who had been involved in his life up to that point.
- 107 After his parents' separation, the second respondent grew up in the care of his mother. His mother suffered from a significant opioid addiction in his early years and this resulted in intervention from child protection authorities. Nonetheless, it appears that she came to grips with this addiction and was able to provide substantial care for him.
- 108 In turn, the second respondent developed a close and supportive relationship with his mother and stepfather. Unfortunately this deteriorated as he grew older. As the sentencing judge recorded,³⁴ after the death of his father the second respondent demonstrated increasingly aggressive conduct in the family home. Attempted discipline measures resulted in him running away from home and his absconding increased in early adolescence.
- 109 The second respondent experienced difficulties at school with concentration, listening, following directions and hyperactive behaviour. He was diagnosed in prep with attention deficit hyperactivity disorder ('ADHD'). He subsequently exhibited aggressive behaviour towards teachers and students. He left school in year 9 after incurring suspensions and detentions for aggressive behaviour.
- 110 After leaving school, he worked as a labourer with his stepfather and then found employment in a factory packing boxes.
- 111 The second respondent started using cannabis at the age of 14 and commenced using methamphetamines around the age of 19. At the time of the offending, he was using cannabis, methamphetamines, MDMA and ecstasy in large amounts together with alcohol occasionally.
- 112 The second respondent has serious prior convictions for armed robbery, aggravated burglary, affray, property damage and other matters. He has been sentenced to a variety of Children's Court supervisory orders which have consequently resulted in breach proceedings. He has spent several periods in Youth Justice Detention.
- 113 The sentencing judge found that the current offending occurred in the following context:

It appears that your last prior conviction was in October 2021. At that time, you were sentenced to 10 months' Youth Justice Centre order, and 150 days or five

³⁴ Reasons, [78].

months was reckoned as served. On my calculation, had you served this sentence in full you would have been released in approximately March 2022. In the two years from then until April 2024 you were working and had been living at the family home. Several months before your offending, or the offending before this court, one of your cousins, who was also a work colleague of yours, committed suicide. This had a devastating impact upon you, and you relapsed into the use of drugs. The cultural bereavement process was very difficult for you and numerous relatives converged on your family home. Your work performance suffered, and you were terminated from that job. In this context, that is grief, unemployment and drug addiction, you made the decision to steal a car hence you committed the offences of home invasion and armed robbery and theft of motor vehicle.³⁵

- 114 A report from Dr Sami Yamin, a neuropsychologist, dated 3 March 2025 concluded that the second respondent suffers from an intellectual disability of mild severity:

On the whole Mr Talanoa has a severe cognitive impairment with reduced intellectual function, memory and learning and executive function. His performance is consistent with a DSM-V diagnosis of an intellectual disability of mild severity and the reported functional difficulty that he continues to experience. Individuals with his level of function will have difficulties in reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Furthermore, they have deficits in areas of more complex adaptive function such as self-management across life settings, including personal care, school/job responsibilities, money management, recreation, and self-management of behaviour.

- 115 In Dr Yamin's opinion, the deficits outlined represent an immaturity in the second respondent's thinking that would have influenced his behaviour by impairing his ability to exercise appropriate judgment and make clear and rational choices at the time of the offending.
- 116 The sentencing judge also relied on a report from Ms Andrea McNeill, psychologist, dated 10 December 2024.
- 117 Ms McNeill noted that the second respondent stated he adapts well to custody and has no concerns or difficulties with the prison environment.
- 118 Ms McNeill reported that, despite recalling a safe and loving home, the second respondent felt severe rejection and abandonment from his biological father, and commenced acting out at a young age. It is plausible that his experience of shame and belief that no one could manage him caused him to develop an inherent sense of being unlovable and unwanted. He experienced difficulties with attention, concentration, impulse control and aggressive conduct from a young age, and by early secondary school, he was starting to use illicit and licit drugs regularly. It was her opinion that there were clear indications of long-term substance use disorder (Cannabis Disorder, Alcohol Disorder, Stimulant Disorder) and that his criminal offending is directly correlated to long-term substance dependence.

³⁵ Reasons, [86].

- 119 She noted that the second respondent experienced parental incarceration, interrupted school attendance and educational opportunities, juvenile incarceration and periods of unemployment.
- 120 Ms McNeill reported that he has largely remained psychologically untreated and therefore lacks insight into his problems. It was her opinion that the presence of an antisocial personality disorder with narcissistic traits and the legacy of his childhood means that he has struggled to adhere to rules and regulations, failed to respond to discipline measures and seeks to engage in life on his terms. He perceives loyalty as equating to love, which has translated into adult perceptions of low regard for others, reduced empathy and lack of consequential and long-term thinking, and therefore has found belonging in antisocial networks. His personality structure and vulnerabilities have evolved as a response to his childhood experiences, and in his adult life he becomes dysregulated when experiencing relationship loss or abandonment.
- 121 As regards the second respondent's previous diagnosis of ADHD whilst at primary school, Ms McNeill noted that when tested by her he scored in the very low range. She noted that it was plausible the results could be explained by his current structured routine custodial environment and abstinence from illicit substance use. Further, Ms McNeill cautioned that the assessment measures relied on were obtained solely via self-report and, given his lack of mental health insight, it is plausible that he unintentionally minimised his symptoms.
- 122 Ms McNeill noted that the second respondent's psychometric test results indicated he did not have symptoms of depression, anxiety or stress however he presented as flat, detached and uninterested throughout the assessment. Ms McNeill was of the view that the discrepancy between his clinical presentation and normalised test scores may be explained by denial, emotional detachment and resignation to his criminal life.
- 123 It was Ms McNeill's opinion that the second respondent appeared to have adapted well to custody. He displayed some insight and judgment into his offending, identifying precipitating factors related to his offending behaviour and explicitly identifying the relationship between his substance use and offending. She was of the view that he presented as highly institutionalised since a young age and that reinforcing incarceration as the deterrent would expose him to antisocial behaviour and peers rather than opportunities for rehabilitation and development of prosocial skills.
- 124 As regards the risk of reoffending, Ms McNeill expressed the opinion that:
- Mr Talanoa is considered at moderate to high risk of reoffending in the community. He is well entrenched in the criminal lifestyle, has low self-esteem and self-image, and his peer group and supports are essentially all criminal-oriented. His greatest stability is attained in custody to date, reinforcing institutionalised behaviour and thinking and limiting his capacity to cope within the community when experiencing day-to-day demands and responsibilities. Although his self-report does not indicate any acute psychological concerns, it is likely that this is due to his limited insight into his psychological state. It is highly probable that there are underlying unresolved mental health issues and the effects of his personality structure which continue to impact his behaviour and functioning and require intervention.

- 125 In her view, further treatment for the second respondent's substance abuse is critical and residential treatment such as that provided at Odyssey House would be appropriate.
- 126 On the plea hearing, the prosecutor conceded that the second respondent's intellectual disability resulted in impaired mental functioning and that the disability appeared to be connected to the offending before the court.³⁶

The sentencing judge's reasons with respect to the second respondent

- 127 After describing the circumstances of the offending and setting out details of the second respondent's personal history, her Honour summarised the opinions of Ms McNeill and Dr Yamin.³⁷
- 128 She concluded that the principles stated in *Verdins* and *Muldrock*³⁸ had application to the second respondent's case and that their application justified the conclusion that the second respondent's moral culpability was reduced at the time of the offending. Further, the need for both general and specific deterrence was moderated. She was not satisfied, however, that s 5(2H)(c)(i) of the *Sentencing Act* was enlivened in the second respondent's case.³⁹
- 129 Her Honour further considered that the second respondent's experience of childhood deprivation was such as to enliven the principles stated in *Bugmy* in a general way. The circumstances of the second respondent's childhood supported the conclusion that his moral culpability was somewhat reduced.⁴⁰
- 130 Her Honour then turned to consideration of the second respondent's age and concluded that although the offending before the court was very serious, it was not so serious as to entirely displace the principles that generally apply to the sentencing of young offenders. These principles include:
- (a) that the youth of an offender should be a primary consideration for a sentencing court where the matter properly arises;
 - (b) young offenders are immature and may not fully appreciate the nature, seriousness and consequences of their criminal conduct;
 - (c) courts recognise the increased potential for young offenders to be rehabilitated, which is in the public interest; and
 - (d) incarceration can impair rather than enhance a young offender's prospects of rehabilitation.⁴¹

- 131 In turn, her Honour was satisfied that the second respondent's age and circumstances at the time of offending reduced his level of moral culpability and reduced the weight that

³⁶ Reasons, [96].

³⁷ See Reasons, [87]–[94].

³⁸ *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 ('*Muldrock*').

³⁹ Reasons, [95]–[97].

⁴⁰ Reasons, [100].

⁴¹ Reasons, [102] (citations omitted).

should be put on general deterrence. She was further satisfied that notwithstanding the second respondent's significant prior history he did have prospects for rehabilitation.⁴²

132 Her Honour then turned to the requirements of the *Sentencing Act* with respect to category 2 offending. She concluded that a combination of mitigating factors satisfied the requirements of s 5(2H)(e) of the *Sentencing Act* and constituted substantial and compelling reasons that are exceptional and rare, justifying the exercise of a discretion to make orders for imprisonment coupled with a CCO. The factors relied on were:

- (a) the second respondent's youth;
- (b) the death of the second respondent's cousin and the cultural bereavement process that occurred prior to the offending;
- (c) the second respondent's recent diagnosis of intellectual disability; and
- (d) her Honour's findings with respect to *Muldrock* and *Bugmy*.⁴³

133 Her Honour then recorded that she had taken into account the second respondent's early pleas of guilty, considerations of parity, the purposes for which a sentence may be imposed and current sentencing practice.⁴⁴

134 She noted that the second respondent had been approved as suitable for a CCO but was not granted a certificate of intellectual disability as required for a Justice Plan.⁴⁵

135 Balancing the above matters, her Honour then imposed the sentences which are now under appeal.

Ground 1 of appeal with respect to the second respondent – s 5(2H) of the Sentencing Act

136 Section 5(2H)(e) of the *Sentencing Act* provides an exception to the general rule stated under s 5(2H) where:

- (e) there are substantial and compelling circumstances that are exceptional and rare and that justify not making an order under Division 2 of Part 3 (that is not a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44).

137 The operation of this provision requires the Court first to be satisfied that there are substantial and compelling circumstances justifying the exercise of the discretion, and secondly, that such circumstances are exceptional and rare.

138 In the present case, the Director concedes the existence of substantial and compelling circumstances in the relevant sense, but disputes that they are exceptional and rare. In consequence, it is unnecessary to consider the application of s 5(2HC) and s 5(2I). These

⁴² Reasons, [103].

⁴³ Reasons, [106]–[107].

⁴⁴ Reasons, [109]–[112].

⁴⁵ Reasons, [113].

subsections govern the determination of the question whether there are substantial and compelling circumstances.

139 In *DPP v Lombardo*,⁴⁶ the Court analysed the statutory scheme in the following way:

First, the court must identify whether there are ‘substantial and compelling circumstances’. In that context, ‘substantial and compelling’ means that the circumstances are weighty and forceful or powerful. The issue is whether the circumstances are substantial and compelling so as to justify not imposing a custodial sentence. That is the criterion by which the substance and compulsive force of the circumstances are to be assessed.

The second critical step, if the circumstances are substantial and compelling in the sense described above, asks whether they are also ‘exceptional and rare’. In our view, this is to be regarded as a composite phrase imposing a single test, rather than as two discrete tests. That is because the meanings of the two words overlap; in particular, ‘exceptional’ means ‘out of the ordinary course, unusual, special’, which includes that which is ‘rare’. In that situation, a separate test asking whether something that is ‘exceptional’ is also ‘rare’ would be redundant. Instead, the two words operate together and each influences the meaning of the overall phrase.

The ‘exceptional and rare’ language is not merely a description of the empirical outcome of applying the law of sentencing to a collection of offences. It is a threshold which must be met before it is open to impose a non-custodial sentence. The question then is the meaning of the language used.

In construing the phrase ‘exceptional and rare’, it is relevant that, in the context of deciding whether circumstances are ‘substantial and compelling’, Parliament has stated its intention that imprisonment should ‘ordinarily’ be imposed for a category 2 offence: s 5(2I)(a). This statement of intention is expressed in moderate terms, suggesting that the ‘exceptional and rare’ requirement has a meaning closer to ‘out of the ordinary’.

On the other hand, the expression ‘out of the ordinary’, while capable of describing something that is ‘exceptional’, as well as something that is ‘rare’, does not fully capture the force of the phrase ‘exceptional and rare’. Both the expression ‘exceptional and rare’ and the legislative object that imprisonment should ‘ordinarily’ be imposed are, however, consistent with earlier case law, such as *Hudgson*, which described provisions such as the present as requiring circumstances of a kind ‘wholly outside “run of the mill” factors typical of’ the relevant kind of offending.

Accordingly, in our view that language properly captures the meaning of the phrase ‘exceptional and rare’ in this context. It refers to circumstances that are wholly outside the ordinary factors typical of the relevant offence, in this case dangerous driving causing death.

Applying the two steps of the mandated analysis calls for the sentencing judge to make an ‘evaluative judgment’ once the underlying facts have been established, and unaffected by notions of burden of proof. It is possible that a

⁴⁶ *DPP v Lombardo* (2022) 302 A Crim R 329; [2022] VSCA 204 (*‘Lombardo’*).

set of circumstances may engage the exception in combination, even where the constituent circumstances are mainly, or even wholly, ‘relatively common’.⁴⁷

140 We agree with, and respectfully adopt, this analysis.

141 In *Lombardo* the Court went on to exemplify the application of the relevant concepts as follows:

For example:

- (a) In *Fariah*, this Court considered that in combination, the applicant’s ‘appalling childhood experiences’ of ‘war and conflict’ in Somalia, along with his youth, remorse, lack of criminal history, and risk of deportation, enlivened the exception.
- (b) In *Farmer*, this Court considered that the applicant’s youth, remorse and co-operation with authorities, lack of criminal history, and vulnerability in custody, together with the wide-ranging effects of a medical condition (alopecia) which had given rise to diagnosed mental disorders, and contributed to the offending itself, enlivened the exception and it had not been open to find otherwise.

By contrast:

- (a) In *Al-Anwiya*, this Court considered it was open to find that the exception was not enlivened by a combination of factors including the low objective gravity of the offending, the applicant’s low moral culpability, youth, early guilty plea, remorse, lack of past criminal history, and a debilitating mental illness with its origins in the applicant’s upbringing in a war-torn country.
- (b) In *Makieng*, this Court considered it was open to find that the exception was not enlivened by a combination of factors including the applicant’s youth, childhood of trauma and disadvantage overseas, his assistance to police in relation to a separate investigation (for which he suffered retribution), and his emergence as a positive role model for other offenders.
- (c) In *Buckley*, this Court considered that the same exception to s 10A could not have been enlivened by the applicant’s youth, significant immaturity, difficulties during adolescence, and likely vulnerability in prison. The Court concluded that while that combination of circumstances may well be ‘substantial and compelling’, it could not also be described as ‘exceptional and rare’.⁴⁸

142 In *Lombardo* itself the Court had to consider whether the circumstances of the case were rare and exceptional in the context of a sentence for dangerous driving causing death. The Court concluded that the fact that the offence was committed by a young person of previously impeccable character who was racked with remorse and grief and had excellent prospects for rehabilitation did not render the case rare and exceptional.

⁴⁷ Ibid 341–2 [66]–[72] (McLeish, Niall and Kennedy JJA) (citations omitted).

⁴⁸ Ibid 342–3 [73]–[74] (McLeish, Niall and Kennedy JJA) (citations omitted).

- 143 Ultimately, each case must turn on its own facts. The abovementioned cases illustrate the difficulty in meeting the relevant test but they and like cases cannot be used as somehow determining the application of the test in the present case.
- 144 In our view, it was not open to the sentencing judge in the present case to regard the factors upon which her Honour relied as giving rise to rare and exceptional circumstances. The offending in issue is of a kind which is commonly perpetrated by young offenders including persons of low intelligence coming from circumstances of a deprived background. The fact that the offending also occurred in the aftermath of some emotional stress resulting from the death of the second respondent's cousin and subsequent events at his family home likewise does not constitute a rare and exceptional circumstance.
- 145 Counsel for the second respondent emphasised that the question in issue had to be assessed by reference to the combination of matters the second respondent could point to in circumstances where he had already served 333 days by way of pre-sentence detention. We accept that this is so but this circumstance does not elevate the case to the category of rare and exceptional.
- 146 Counsel for the second respondent further emphasised the combined cumulative impact of the factors upon which the second respondent relied, but in our view the combination of factors which was emphasised does not cumulatively amount to rare and exceptional circumstances.
- 147 Accordingly, the first ground of appeal with respect to the second respondent must succeed.

Ground 2 with respect to the second respondent – manifest inadequacy

- 148 Because the sentence that was imposed upon the second respondent did not comply with s 5(2H) it is not strictly necessary to determine ground 2 which raises the allegation of manifest inadequacy.
- 149 Nonetheless, it is appropriate for completeness to summarise our views with respect to this issue.
- 150 We have set out the relevant principles in the course of addressing the appeal relating to the first respondent.
- 151 The Director contended the second respondent's sentence was manifestly inadequate having regard to:
- the objective seriousness of the offending;
 - current sentencing practice; and
 - the moderate weight that should be given to the second respondent's youth, mental limitations, childhood deprivation and the background circumstances concerning the second respondent's offending.

- 152 The second respondent submits that there were powerful matters in mitigation of sentence including:
- cooperation with the police;
 - early pleas of guilty;
 - the second respondent's young age at the time of offending and sentence;
 - the application of *Bugmy* principles resulting in reduced moral culpability;
 - the application of *Verdins* and/or *Muldrock* principles by reason of the second respondent's intellectual disability;
 - the finding that the second respondent still retained prospects for rehabilitation;
 - totality considerations arising from the fact that the three offences comprised closely associated actions; and
 - the significance of the sentencing judge's conclusion that the catalyst for the present offending was the impact of the suicide of a cousin upon the second respondent. The second respondent who had been out of trouble for two years offended in the face of grief, unemployment and drug addiction.
- 153 In our view, despite the matters urged on his behalf, the sentence imposed was manifestly inadequate. In particular, it failed to give due weight to considerations of denunciation, general deterrence and protection of the community. Put simply, the sentence imposed does not adequately reflect the gravity of the offending and the consequent need to give effect to the sentencing purposes we have identified.

Resentencing of the second respondent

- 154 The second respondent was entitled to call in aid the following matters in mitigation of sentence:
- his cooperation with police, early pleas of guilty and apparent remorse;
 - his youth;
 - his intellectual disability;
 - his history of childhood deprivation; and
 - the background of emotional disturbance caused by his cousin's death prior to the offending.
- 155 It is necessary to say something further in respect of each of these factors. First, the second respondent's early pleas of guilty were of considerable utilitarian benefit and together with his cooperation with police constituted evidence of remorse. As his

counsel submitted, remorse was further demonstrated by insight into the impact of the offending on the victims displayed in his record of interview.

- 156 Secondly, the second respondent was relatively young when the offending occurred. His youth should be regarded as reducing his moral culpability to some extent and increasing the potential for his rehabilitation. Nonetheless, as we have sought to explain in addressing the personal circumstances of the first respondent, it is well accepted that the more serious the offending the less that can be excused on the basis of an offender's youth. Moreover, by the date of the current offending the second respondent had a serious criminal record involving offences of violence although he had not previously been sentenced to adult prison.
- 157 Further, on the evidence the second respondent's prospects of rehabilitation must be guarded.
- 158 Thirdly, the second respondent suffers from an intellectual disability of mild severity and ongoing behavioural disorders. We accept that these circumstances also lessen his moral culpability to some extent and reduce to some extent the weight to be given to general and specific deterrence. Nonetheless, the offending was not the product of impulsive behaviour or a disproportionate reaction to provocative circumstances. It was not the product of momentary misjudgement. The offending was calculated and deliberate, carefully planned and well-coordinated with the co-offender. The second respondent intended to obtain a substantial financial advantage through the theft of a luxury motor vehicle. Thus, while the second respondent's intellectual disability must be regarded as contextually relevant to his offending, it does not offer any ready explanation for that offending.
- 159 Further, we accept Ms McNeill's evidence that the second respondent has adapted well to imprisonment and the evidence does not justify a finding that his intellectual disability renders imprisonment more burdensome than would ordinarily be the case.
- 160 Fourthly, we accept that the second respondent's childhood history and subsequent difficulties as a teenager, were such as to enliven the principles articulated in *Bugmy*. They result in some reduction of the second respondent's moral culpability.
- 161 This said, the second respondent's significant criminal history includes ongoing offending involving violence including armed robbery and aggravated burglary. This aspect of his background at the time of sentencing does not assist him.
- 162 Fifthly, we accept that the offending occurred in the aftermath of the suicide of the second respondent's cousin who was also a workmate. This led to an increase in drug use and coincidental overcrowding of the second respondent's home. We accept that the offending occurred in the aftermath of a very difficult family episode and that this also may be regarded as reducing the second respondent's culpability to some extent.
- 163 As against these matters, the evidence as a whole concerning the second respondent's personal circumstances, including the second respondent's criminal record, the nature of the current offending and the opinion of Ms McNeill, support the conclusion that the second respondent is at a relatively high risk of further violent offending. The

circumstances give rise to the need for the sentence to embody an element of specific deterrence and provide for the protection of the community.

- 164 On the other hand, as in the case of the first respondent we accept that the fact the second respondent has almost completed the custodial element of his current sentence, means that any increase in the term of prison sentence will involve an unusual burden. Accordingly, we will materially moderate a sentence which we would otherwise impose.
- 165 Despite the mitigating factors we have referred to above, ultimately the sentence we impose must give due weight to denunciation, just punishment, general and specific deterrence, and protection of the community.
- 166 As we have emphasised in resentencing the first respondent, the offending with which we are concerned was dramatically violent and constituted a totally unacceptable violation of the victims' safety, security and sense of personal integrity. As such it requires condign punishment. Bearing in mind the principle of parsimony, we would resentence the second respondent as follows:

Charge	Offence	Maximum	Sentence	Cumulation
1	Home invasion (contrary to s 77A of the <i>Crimes Act 1958</i>)	25 years' imprisonment	4 years' imprisonment	Base
2	Armed robbery (contrary to s 75A of the <i>Crimes Act 1958</i>)	25 years' imprisonment	4 years' imprisonment	1 year
3	Theft (contrary to s 74 of the <i>Crimes Act 1958</i>)	10 years' imprisonment	6 months' imprisonment	2 months
Total Effective Sentence		5 years and 2 months' imprisonment		
Non-Parole Period:		3 years' imprisonment		
Section 6AAA Statement:		8 years' imprisonment with a non-parole period of 5 years		
Other relevant orders:		Cancellation of driver's licence for 3 months		

- 167 Even if we are wrong in our conclusion with respect to s 5(2H)(e) of the *Sentencing Act* and a discretion existed to allow the sentences imposed at first instance upon the second respondent to stand, we would not do so. In our view, the sentences imposed were manifestly inadequate and the very substantial difference between the sentences we regard as appropriate and the sentences imposed at first instance mean that this is not a case for the exercise of a residual discretion which exists with respect to appeals by the Director.
