IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY **No. S 281 of 2015**

B E T W E E N:

JOEL BETTS

Appellant

and

THE QUEEN

Respondent

10 **RESPONDENT'S ANNOTATED SUBMISSIONS**

Part I: Publication

I certify that this submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

1. Whether the appellate redetermination undertaken once error is established is a hearing de novo to be undertaken by the original sentencing court or a fresh exercise of the sentencing discretion by the appellate court based on the material before the sentencing court together with any relevant material of post sentence
20 events.

2. Whether new evidence is admissible on the redetermination for the purpose of overturning the sentencing judge's unchallenged findings.

Part III: Section 78B of the Judiciary Act

It is certified that this appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth)*. No such notice is required.

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Part IV: Statement of contested material facts

4. 1 The respondent does not contest the appellant's outline of the facts.

4. 2 This matter proceeded by way of Agreed Facts. There was no challenge to those facts nor to the sentencing judge's findings on appeal.

PART V: Applicable Legislative provisions

The appellant's list of legislative provisions is accepted.

PART VI: Statement of Argument

The usual basis

10 6. 1 The appellant submits that the CCA erred in not permitting the two new psychological reports to be used to challenge the sentencing judge's findings that the offence was planned and not attributable to the appellant's childhood experiences and drug use (AWS [6.1] – [6.2]).

6. 2 Those findings were not challenged in the appeal. There were 4 grounds of appeal, none of which averred that those findings were wrong or not reasonably open. Nor was it submitted orally or in the written submissions that the findings were not reasonably open.

6. 3 The appellant now submits that those unchallenged findings should be overturned.

20 6. 4 The new psychological reports were tendered for two purposes. The first and primary purpose was to provide information on the appellant's personal circumstances, with particular emphasis on his circumstances at the time of the appeal. The two reports were tendered along with certificates of completion of a Domestic Abuse program, participation in a university course and a number of character references. This provided additional background information on the appellant and his progress since sentence in the event that there was to be a resentence. This was the usual basis on which such reports are tendered ***R v***

Deng (2007) 176 A Crim R 1 at [28]. There was no objection to the admission of the two reports and the other material on that basis.

6. 5 The second and separate purpose for adducing the reports was to overturn the findings made by the sentencing judge that the offence was planned and not attributable to the appellant's childhood experiences or his drug use (CCA Written Submissions [18] - [21] AB 292). The reports were held inadmissible for this purpose (CCA [47] AB 388.55).

6. 6 The distinction between the two purposes was not always clear during the hearing of the appeal as there was some equivocation in the oral submissions as to whether the reports were being tendered in relation to the appellant's subjective circumstances (the first purpose) or to overturn the findings on culpability (the second purpose).

6. 7 The findings were unchallenged in the written submissions on the appeal. However, at the end of the written submissions under the heading "VI Re-sentencing" (AB 292) the appellant submitted that in the event that error was established he sought to be re-sentenced on a different basis to that adopted by the sentencing judge.

6. 8 The appellant particularly relied on Dr Nielssen's concluding opinion that the appellant's intoxication with a mind altering drug together with his underlying emotional state "was a significant contributing factor to his sudden decision to end his life and to his offending behaviour". The written submissions contended that any re-sentence should reflect this opinion and not the sentencing judge's "infirm" approach (AB 292.40).

6. 9 At the start of oral submissions, senior counsel indicated that the two reports were tendered in the event of a re-determination:

> *"In our written submissions we refer at para 19 and subsequently to some material which would only be admissible in the event the Court were minded to re-sentence. In particular, that material relates to the reports of Dr Nielssen and that material relates particularly to a re-sentencing on a basis that differed from the findings his Honour made concerning the mental health of the applicant .....*" (Transcript of CCA hearing 4/11/14 AB 321.27, 339.10).

6. 10 At later stages of the oral submissions senior counsel appeared to suggest that the challenge to the sentencing judge's findings was his alleged failure to give the subjective circumstances appropriate weight.

6. 11 Hulme AJ noted that these submissions did not relate to any of the grounds of appeal (AB 327.30) and senior counsel responded that these submissions related to grounds 1, 2 and 4, which averred error in respect of the findings of aggravating circumstances and special circumstances. It was not suggested that the findings were otherwise wrong or not reasonably open.

6. 12 The sentencing judge had found that there was nothing in Dr Westmore's report to say that the offence was driven from some deep well of psychologically generated motivation springing from the appellant's experiences in adolescence (ROS [54] AB 268.5). Senior Counsel submitted that:

"*Now it was never our case that the crimes were driven from some deep well of a psychologically generated motivation springing from what had occurred to him in his adolescence. That however is not to disparage the existing state of depression and the childhood abuse which made him the personality that he was, that he was putting in evidence on the subjective material.*

That to exclude the subjective material on the basis that it doesn't meet that standard is not to do it justice at all." (AB 326.57) ....

... ...

"*The material was not simply there for the purpose of trying to prove a particular motivation or a particular consequential effect after so many years of child abuse but was there and subjective material is classically used for to show the nature of the person with a view to ascertaining the overall effect of sentence on such a person.*" (AB 327.7).

6. 13 Senior counsel expressly disavowed that the appellant's case was that the offence was driven from some deep well of psychological motivation springing from the appellant's childhood experiences. Given that express disavowal, the reports appeared to be adduced, not to establish that the offence had been

caused by the childhood experiences, but to ensure that appropriate consideration was given to the subjective circumstances in any redetermination.

6. 14 To that end, the two reports provided a detailed account of the appellant's childhood difficulties, his educational and employment background, his medical history and his history of drug use. The two reports also addressed the appellant's progress since sentence in understanding his personality traits and their contribution to the offence. That was, as senior counsel put it, the "classic" use of such material. That appeared to be the way the Crown Prosecutor understood the purpose of the tender and, on that basis, the admission was not objected to as the reports did not appear to add anything new to the material already tendered at sentence (AB 338.30).

6. 15 Accordingly, the two reports were correctly admitted for the primary purpose and appropriately taken into account to the extent that they were of assistance. The CCA noted that the reports, the certificates of completion of courses undertaken while in custody and the character references reinforced the material before the sentencing judge (CCA [46] AB 388.40).

6. 16 However, on the second and separate purpose of challenging the findings on culpability, the reports were correctly excluded.

New evidence

6. 17 The appellant appears to submit that, once error is found, the redetermination to be undertaken involves a fresh hearing of all the matters relevant to sentence. Where no new evidence is adduced the appeal court may adopt the findings of the sentencing judge but is not obliged to do so. However, where new evidence is adduced which raises factual issues then the redetermination should be remitted to the court of trial for redetermination (AWS [6.8]). Error is said to play little or no part in the redetermination (AWS [6.7]).

6. 18 Accordingly, the appellant submits the present matter should be remitted to the District Court for redetermination because the psychological reports support "quite different findings" (AWS [6.12]) to those made by the sentencing judge.

6. 19 The appellant does not address the inherent contradiction in contending that unchallenged findings should be overturned, nor the unfairness that "quite different findings" be made where no error nor any suggestion the original findings were not reasonably open is alleged.

6. 20 The original findings are apparently to be disregarded and an entirely fresh hearing, a hearing do novo, conducted but it is not clear what role the original evidence is to play, nor what the court is to make of the inconsistency between the case originally presented and that presented on resentence. In the present case, there is a considerable inconsistency between the case now presented and that presented at sentence.

6. 21 The appellant submits there is no particular difficulty in overturning the sentencing judge's unchallenged findings because there is no, or only a minor inconsistency between the new reports and the agreed facts (AWS [6.19] – 6.21]).

6. 22 In fact, the inconsistencies between the account given to Dr Nielssen and the Agreed Facts is significant. The version now sought to be presented also contradicts the case presented at sentence, and in one respect even traverses the plea itself.

6. 23 The appellant gave evidence at sentence describing what occurred in the commission of the offences and at no time did he suggest that he had a drug induced psychosis or that the offences were caused by a mental disorder or by his childhood experiences. On the contrary, he said he waited at the unit to see Ms Holland (AB 37.45) and spoke to her for approximately an hour about their relationship (AB 38.10) before the attack and there was no suggestion that he was psychologically or chemically affected during that time such as to impair his ability to think rationally or to conduct that conversation. When Ms Holland got up to leave, he said "Sam, please don't leave yet" and picked up the knife (AB 39.35). He said it was unplanned, "spur of the moment", "very spontaneous":

> *Q. So before you picked up that knife, had you been planning, the hour or so that you were talking with Samantha in the apartment had you been planning to attack her?*

A. No I had not

Q. Had the thought crossed you mind at all that you would attack her?

A. Not during our conversation, maybe six, seven – maybe 10 seconds beforehand we were standing at a bench if this detail is relevant, Samantha was sitting or standing against the bench and there were knives behind her and that's the first time that I actually saw a knife and that something went through my head which included stabbing myself and then I just freaked in a moment of panic when Samantha was walking out the door and I picked up a knife" (AB 38.47).

10 ....

"It was very spontaneous." (AB 40.30).

6. 24 The appellant said he did not believe he had the intent to murder as what happened was "in the spur of the moment" (AB 43.35) however, he knew he must accept responsibility even if he had the intent fleetingly: "even if it's only for a fleeting moment" (AB 44.27). He said the stabbing lasted about 30 seconds, maybe a minute (AB 50.60).

6. 25 The appellant acknowledged that after the initial stabbing attack he used Ms Holland's phone to send text messages to her brother who was waiting outside saying "We're looking like staying together for now at least. I'll call you soon.
20 Thanks for coming today bro" in order to get him to leave (AB 52.60). This suggested he had sufficient presence of mind after the attack had begun to take steps to enable it to continue. He admitted that once the attack started he was not going to allow Ms Holland to leave alive (AB 53.45).

6. 26 Nor did the appellant seek to attribute the attack to his childhood experiences:

Q. On this – you're not suggesting your experiences as traumatic as they were as a young person that it was in any way responsible for the way you acted when you committed these offence?

A. In what way do you mean responsible.

Q. Well you're not suggesting that because you had lived though as a young person these traumatic times that they in any way caused you to act in the way you did?

A. I'm not trying to excuse my actions by pointing to my – I accept responsibility for what I did. (AB 49.5)

6. 27 It was put to the appellant that he attacked Ms Holland because his ego was wounded by her leaving him and there he claimed that it was not simply a matter of wounded ego:

"It's difficult to discount the trauma that I endured for the first 20 odd years of my life and the pressure that I was under leading up to that but to attribute this entirely to the wounding of my ego, I see, I'm trying to come to terms with the reasons for this everyday, I'm trying to understand this more and more everyday so I don't believe it's the case simply that this was a matter of a wounded ego. I have a lot to live for and I've always – I can't agree with you there." (AB 53.50).

6. 28 Again there was no mention of psychosis or mental disorder.

6. 29 The appellant's evidence was inconsistent with the Agreed Facts in a number of respects. He said the stabbing lasted for about 30 seconds, maybe a minute however, senior counsel for the appellant acknowledged that it lasted for 30 – 45 minutes, as the Agreed Facts indicated (AB 72.40). The appellant said that Ms Holland tried to escape over the balcony and he pulled her back "on one occasion" (AB 51.36) but the Agreed Facts described two attempts by Ms Holland to escape over the balcony and on both occasions the appellant pulled her back (Agreed Facts [23] & [27] AB 11.53 & 12.37). On the second occasion Ms Holland lost consciousness after he pulled her back into the bedroom and when she woke the appellant's foot was on her neck.

6. 30 The psychiatric reports tendered at sentence were from the appellant's psychiatrist, Dr Westmore. A second report was obtained from Dr Westmore specifically to address the effects of DMT and Dr Westmore confirmed his earlier opinion that he did not consider there was a drug induced psychosis (AB 240.30). When senior counsel sought to tender the two reports the Crown

Prosecutor indicated that there may be an issue about the suggestion of drug taking and senior counsel indicated that there would be no issue about that (AB 26.20). In the event, the issue of intoxication was not raised (ROS [56] AB 268.33). However, on appeal, it was sought to raise a drug induced psychosis even though that was contrary to the evidence of the appellant's psychiatrist and had been disavowed by his counsel. The suggestion that the sentencing judge's approach was "infirm" reflected that contradiction for his Honour had based it on his acceptance of Dr Westmore's reports (ROS [50] – [58] AB 266.55). Therefore, the thrust of the submission on appeal was that the sentencing judge was wrong to accept the appellant's psychiatric evidence.

6. 31 In relation to the appellant's childhood experiences, the submission by senior counsel on sentence was not that the attack was attributed to, or caused by, those experiences but that they were a "possible" explanation in the absence of any other explanation. Senior counsel noted that the appellant was well educated and intelligent, had no prior criminal convictions and had not displayed any such violent behaviour in the past (AB 72.55 – 76.50). In the absence of any other major trauma or stressor or mental illness or psychological problem that had presented itself, the only possible explanation was that this conduct was related to his childhood experiences (AB 75.60). His Honour doubted that the evidence supported that conclusion and commented that this submission seemed a default position. Defence counsel acknowledged that it was a default position because the evidence was "effectively silent" on the issue (AB 76.30).

6. 32 The submission made was that the lack of an explanation meant that an explanation had to be sought and in the absence of any other explanation his childhood experiences were offered as a "possible" explanation (AB 76.35).

6. 33 This suggestion of a possible explanation was very different to the submission now put that the childhood experiences, drug induced psychosis and mental disorder caused the attack.

6. 34 The sentencing judge's findings that the offence was planned (ROS [36] AB 265.12), a sustained and determined attempt to kill Ms Holland (ROS [42] AB 265.40), driven by profound jealousy (ROS [59] AB 269.10), with the intention, not "fleeting" (ROS [37] AB 265.15), to kill Ms Holland if he could not persuade her to

reunite with him (ROS [34] AB 264.50) were not challenged because they reflected the elements of the offence, the Agreed Facts, the appellant's evidence and the submissions made.

6. 35 The offence was wound with intent to murder (AB 2.20). That offence entailed an intent to kill. Therefore, the finding that the intent was to kill Ms Holland was simply a concomitant of the offence itself.

6. 36 The finding that the intent to murder was not fleeting was also based on the Agreed Facts and the appellant's own evidence. The Agreed Facts showed that the appellant was in the unit with Ms Holland for over 2 hours and the stabbing attacks took place over about 45 minutes. There were CCTV and phone records which helped establish those times (AB 97 – 99). Defence counsel acknowledged that the stabbing occurred over about half an hour to three quarters of an hour and the appellant agreed that once he started the attack he was not going to allow Ms Holland to leave the unit alive (AB 53.45). The Agreed Facts also showed that late in the attack the appellant spoke of them dying together indicating that even at that stage the intention was that the victim die. It was unexceptional to describe the infliction of 28 stab wounds over a 45 minute period as a "sustained and determined attempt to kill Ms Holland" (ROS [42] AB 265.40).

6. 37 The findings that the appellant's intention was to kill Ms Holland if he could not persuade her to reunite with him (ROS [34] AB 264.50) and that the attack was driven by profound jealousy (ROS [59] AB 269.10) were also based on the Agreed Facts. The appellant agreed in his evidence that he had waited at the unit to see Ms Holland and in the first hour he kept reiterating to her that there was no reason they should be apart (Agreed Facts at [13] AB 9.55). After he stabbed her the first time he said "We will die here together. Then we can be together for eternity" (Agreed Facts at [19] AB 11.7). Later, while they were in the bedroom she asked "Why did you do it?" and he replied "You kept saying that it was over. That the damage has been done." (Agreed Facts at [20] AB 11.20).

6. 38 The finding that the offence was planned also derived from the Agreed Facts and the appellant's evidence. The appellant admitted that he had planned to be at the unit that morning despite having agreed he would not be there (AB 37.35). He waited for her because she had not responded to him in the previous 3 days.

6. 39 The appellant also admitted that he wrote the words "*You know I love you, but I hate you because I know I could never replace you.*" (Agreed Facts at [32] AB 13.58) about a week, or a week and a half, before the offence (AB 49.35). He said they were not about Ms Holland, they were the lyrics of a song he had written down to memorise them. He acknowledged that the words resonated with him and that he had "mixed emotions" following the break up (AB 49.43). The sentencing judge noted that it seemed odd that the appellant had written down only those words which coincidentally echoed the very sentiments he expressed during the attack rather than the all the lyrics of the song as might be expected if he was trying to learn the lyrics (ROS [18] – 20] AB 262.50).

6. 40 These findings were not challenged on appeal.

6. 41 The appellant contends that Dr Nielssen's report supports findings that the attack was caused by the appellant's childhood experiences, a mental disorder and a drug induced psychosis (AWS [6.16] - [6.18]). Such findings are said not to involve any inconsistency with the Agreed Facts.

6. 42 Dr Nielssen's opinion appeared to be based on the appellant's account that the attack lasted 45 seconds and ended when he bent the knife (AB 343.10). Contrary to the appellant's submission, the difference between a 45 second stabbing attack and a 45 minute stabbing attack is not a "minor inconsistency" (AWS [6.21]) and not a matter likely to be "disregarded" in assessing the appellant's mental state at the time. A 45 second attack might be described, at least from the assailant's point of view, as "sudden" but a 45 minute attack is aptly described as "sustained" and deliberate".

6. 43 Dr Nielssen also noted that the appellant admitted that he detained Ms Holland against her will (count 3 on the indictment) but said "there was a blurred line with what intention I formed in my head" (AB 343.15). The appellant said he must have experienced some sort of psychosis. This was incorrect and appeared to traverse the plea. There was no blurred line as to intention. The offence entailed a specific intent, namely, the intent to murder Ms Holland.

6. 44 Dr Nielssen did not refer to the note written a week before the offence stating "You know I love you, but I hate you.....I know I could never replace you" so there was no assessment of its significance in understanding the appellant's

mental state. Dr Nielssen also did not mention that the appellant had waited at the unit for Ms Holland in contravention of their arrangement that he not be there.

6. 45 Dr Nielssen noted that Judge Toner found that the crimes were planned and not a fleeting decision on the appellant's part (AB 346.38) however this was also not strictly correct. The finding that the offence was planned was not part of the finding about the fleeting nature of the intent. The finding that the offence was planned related to the appellant's conduct and state of mind in the period up to a week or so before the offence. The finding that the intention to kill was not fleeting related to the appellant's intention in the 45 minutes during the commission of the offence itself. It was the essential mental element of the offence. Planning was not.

6. 46 These were significant errors and omissions in Dr Nielssen's report.

6. 47 The appellant particularly relies on Dr Nielssen's concluding opinion that "his intoxication with a drug with unpredictable mind altering effects together with an underlying emotional state shaped by violence and sexual abuse, and a pattern of substance abuse, was a significant contributing factor to his sudden decision to end his life and to his offending behaviour." It would appear that Dr Nielssen was in no position to offer that opinion either because the subject matter was outside his area of expertise or because he did not have the information necessary to form the opinion.

6. 48 Dr Nielssen stated that the decision to commit the offence was "sudden". If what was meant was that the offence was unplanned then that was a factual matter arguably outside Dr Nielssen's area of expertise. The finding that the offence was planned was in large part based on objective evidence of the appellant's conduct in the week or so leading up to the offence. Whether or not that conduct occurred and the inferences to be drawn from that conduct were matters of fact in respect of which Dr Nielssen had no particular expertise. Even if Dr Nielssen was qualified to express an opinion about the appellant's mental preparation in the week leading up to the offence, he did not appear to have the relevant information on which to form that opinion as he did not appear to know of the conduct on which the finding was based. He also appeared to be under a

significant misapprehension about the seriousness of the attack and of the specific intent involved.

6. 49 Dr Nielssen was also not in a position to express an opinion as to the level of the appellant's intoxication. It is not clear that the toxicology of DMT and alcohol is within Dr Nielssen's area of expertise. Such evidence is usually given by specialists in pharmacology. Even if Dr Nielssen was qualified to give such an opinion he did not have sufficient information on which to form that opinion. As Dr Nielssen noted, his opinion was based "from the history provided by Mr Betts" (AB 348.10) which was that an "unknown" quantity of DMT and a "moderate" quantity of alcohol were ingested. It was clearly not possible to determine the appellant's level of intoxication from an unknown quantity of drug.

6. 50 Dr Nielssen's opinion was at first expressed in qualified terms : "it seems he was affected" (AB 348.10). However, his concluding opinion was that the appellant's intoxication was a significant contributing factor to the offence (AB 348.30). If Dr Nielssen meant, as he had first expressed it, that the appellant was affected to some unknown degree, then it was unobjectionable and did not differ from Dr Westmore's report. Dr Westmore had also reported that the appellant was adversely affected by the drug DMT but that there was no evidence of psychosis (AB 247.55).

6. 51 However, if it was sought to contradict Dr Westmore's report and the judge's unchallenged findings, then the basis of the opinion appeared inadequate. It also placed the Court in an impossible position of being presented with two sets of psychiatric reports from the appellant's psychiatrists and invited to reach contradictory conclusions even though both had been tendered by the appellant with no submission that the first reports from Dr Westmore were wrong or inadequate and no explanation why the later reports should be preferred over the first.

Nature of the redetermination

6. 52 The appellant submits that, error having been established, any redetermination is to be an entirely fresh hearing. When new evidence is adduced the resentencing should be remitted to the sentencing court to allow a complete

rehearing. Presumably, the sentencing court would arrive at a new sentence which would then be appellable in the normal way. On appeal, if any error is found in that new sentence, the redetermination may be remitted again to the sentencing court for another rehearing. On that rehearing another new sentence may be determined which would then be appellable, and so on. Redetermination on appeal would thus be replaced by rehearing on remitter.

6. 53 There is nothing in ***R v Kentwell*** (2014) 252 CLR 601 to warrant such an approach. The issue in ***Kentwell*** was whether, error having been established, there was a further intermediate step of assessing whether and to what degree the error affected the result, before the appellate redetermination was undertaken. There was no suggestion that the appellate redetermination was not to be undertaken but remitted to the sentencing court to rehear the matter anew. On the contrary, it was held, quoting a passage from **Douar**, that, "*error having been identified, the Court's discretion to re-sentence was enlivened with the consequence that evidence of events occurring since the sentence hearing was admissible because it was relevant to the determination of the statutory question of whether the Court "is of opinion that some other sentence ... is warranted in law*" (***Kentwell*** at [39]).

6. 54 The redetermination undertaken once error is established is an appellate redetermination. It is not a hearing de novo. It is a redetermination on the evidence at sentence, together with any new evidence of post sentence events.

6. 55 This is partly a matter of statutory construction although the *Criminal Appeal Act* is silent on the procedure to be adopted on a redetermination. Section 6(3) uses a mixture of past and present tense in requiring that the court impose a sentence that ***is*** warranted and ***should have been*** passed. This mix of tenses connotes a redetermination that takes into account the current circumstances to arrive at the appropriate sentence that should have been passed on the basis of the original material.

6. 56 The fresh exercise of the sentencing discretion involves an independent assessment of the material adduced at sentence in the same way that appellate courts commonly undertake an independent assessment from the written record: ***Weiss v The Queen*** (2005) 224 CLR 300 at [39], [47].

6. 57 The redetermination may take into account new evidence as s 12(1) of the *Criminal Appeal Act* allows for new evidence to be adduced where it is "necessary or expedient in the interest of justice". The test of necessity indicates that the admission of new evidence is not the usual or default position.

6. 58 The accepted approach to the reception of new evidence has been that the evidence must satisfy 3 conditions:

i the proposed fresh material is of such significance that it would have been regarded by the original sentencing judge as having a real bearing on the sentence;

ii the significance of the evidence was not known to the applicant at the time;

iii it's existence was not made known to the applicant's legal advisers at the time of the sentence proceedings: ***R v Goodwin*** (1990) 51 A Crim R 328 at 330; ***R v W*** [2001] NSWCCA 172 at [12].

6. 59 This approach was obviously an extension of the test applied to fresh evidence in conviction appeals. However, these rules restricting admission to evidence characterised as truly fresh evidence do not apply strictly in appeals against sentence: ***Veen v R*** (No 2) (1987 – 1988) 164 CLR 465 at 473, 490, 499.

6. 60 Accordingly, evidence not strictly fresh may be admitted where it is regarded as amplifying material already before the sentencing judge the full implications of which were not known at the time: ***R v Ehrenburg*** NSW CCA 14 December 1990 (unreported); ***R v Cozens*** NSW CCA 1 October 1992 (unreported) at p 4; ***R v McKenna*** NSW CCA 16 October 1992 (unreported); ***R v Davies*** NSW CCA 10 March 1995 (unreported); ***R v Wickham*** [2004] NSWCCA 193 at [41]. Evidence may also be admitted where it was plainly significant and the failure to adduce it was attributable to the incompetence of the legal representation: ***R v Abbott*** (1984) 17 A Crim R 355 at 356; ***R v McKenna*** NSW CCA 16 October 1992 (unreported) at p 12.

6. 61 The test has sometimes been stated much more broadly as allowing admission to establish there has been a miscarriage of justice: ***R v Many*** (1990) 51 A Crim R 54 at 62, 65; ***R v Araya & Johannes*** (1992) 63 A Crim R 123 at 130; ***R v***

Fordham (1997) 98 A Crim R 359 at 377; ***R v Fepuleai*** [2007] NSWCCA 286 at [5]; (decision allowing the substantive appeal [2007] NSWCCA 325); ***R v Smale*** [2007] NSWCCA 328 at [110]; ***R v P*** [2003] NSWCCA 298 at [19]; ***R v Colomer*** [2014] NSWCCA 51 at [46], [52].

6. 62 In practice, this very broad formulation involving any miscarriage of justice is applied in special, unusual or exceptional circumstances: ***R v Ashton*** (2002) 137 A Crim R 73 at [11], [44]; ***R v Stumbles*** [2006] NSWCCA 418 at [7] – [8].

6. 63 The authority on which the appellant relies (AWS [6.9]), ***R v McLean*** (2001) 121 A Crim R 484, is entirely consistent with this framework. It is a case of incompetence of legal representation (at [54]) where the CCA found that *"there is an identifiable possibility that the lapse of the applicant's advisers meant that the sentencing Judge failed to consider a matter relevant to the determination of the applicant's objective criminality"* (at [58]) and it was possible that the sentencing judge proceeded on an incorrect set of facts which gave rise to a miscarriage of justice (at [46] – [47]).

6. 64 These authorities, except ***Many***[1], were concerned with the use of new evidence to establish error or to show that some other sentence was warranted. They do not deal with the admission of new evidence for the purposes of the redetermination once error is established.

6. 65 That issue was addressed indirectly in ***R v Douar*** (2005) 159 A Crim R 154 and directly in ***R v Deng*** (2007) 176 A Crim R 1.

6. 66 In ***Douar***, the issue was whether the Court could receive evidence of post sentence conduct to determine whether some other sentence was warranted in law or whether the Court was confined to the material before the sentencing judge: (***Douar*** at [100], [105], [122]). The appellant's submission was that the determination of whether some other sentence was warranted should take into account the original evidence and evidence of post sentence conduct.

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[1] In ***R v Many*** (1990) 51 A Crim R 54, specific error was found (at p 59) and on resentence, evidence of the appellant's co-operation with authorities was admitted (at p 62, 65). However, that evidence was limited to the assistance provided at the time of sentence. The assistance provided after the time of sentence was not taken into account on the re-sentence (p 65).

6. 67 That submission was accepted and Johnson J held that the Court could have regard to evidence of post sentence events (***Douar*** at [116], [118], [124]). There was no suggestion that there should be a rehearing of all the evidence and that evidence inconsistent with the material already tendered could be admitted.

6. 68 In ***Deng***, the sentence was found to be manifestly inadequate (***Deng*** at [81]). The respondent sought to adduce new evidence for the purposes of the redetermination which contradicted the agreed facts on sentence (***Deng*** at [18]). It was noted that there was no authority to warrant such a course (***Deng*** at [29]), in fact, the authorities on fresh evidence, which provided some guidance on the question, were to the contrary effect (***Deng*** at [44] – [45]). The Court ruled the new evidence challenging the Agreed Facts inadmissible (***Deng*** at [48]). However, the Court did receive new evidence which showed that the respondent had attended periodic detention regularly and had undertaken a course of study in Agriculture. The new evidence also established the "quite extraordinary hardship" which would be suffered by his mother and brother if he were sentenced to full time custody (***Deng*** at [83]). In light of this material, the Court exercised its discretion not to increase the sentence even though it was found to be manifestly inadequate (***Deng*** at [85]).

6. 69 In upholding this approach to the admission of new evidence, the CCA observed that parties are bound by the way their legal representatives advance their case to the sentencing judge: ***R v Davies*** NSWCCA 10 March 1995. As expressed by Howie J in ***R v Fordham*** (1997) 98 A Crim R 359 at 377: "*Those representing an accused person before the trial court have a wide discretion to conduct the defence as they see fit and this Court should not generally interfere in the exercise of that discretion: Birks at 683 – 685; 490 – 492. I see no reason why that principle should not apply, at least to the same extent, to sentencing proceedings as it does to the actual trial.*"; ***R v Deng*** (2007) 176 A Crim R 1 at [44] – [45], [48]. The CCA also noted in ***R v Lanham*** [1970] 2 NSWR 217 at 218 that "*Indeed, if the Court were to take any other view, it would be lending its encouragement to a situation in which evidence relevant to the issue of penalty might be withheld from a lower Court to be used on appeal in the event that the penalty imposed was thought to be too severe.*"

6. 70 There are avenues available to overturn the findings made by the sentencing judge. The appellant may aver that the findings were wrong or not reasonably open, or may seek to rely on new evidence to show there had been a miscarriage of justice. There are examples of such a course where later psychiatric evidence established an unknown, or more severe condition than was realised at the time of sentence: ***R v Macadam-Kellie*** [2001] NSWCCA 170 at [58]. But there is an inherent contradiction in seeking to overturn the findings made on the basis of the appellant's own psychiatric evidence where that evidence is not challenged or retracted.

6. 71 The decision in ***Carroll v The Queen*** (2009) 83 ALJR 579; 254 ALR 379 suggests that such a course was not open. It was held in ***Carroll*** that where the Crown appealed on the single ground of manifest inadequacy (***Carroll*** at [8]) it was not open to the CCA, in the absence of a challenge to the findings of fact, to assess whether the sentence was inadequate by discarding the findings made: "*But in the absence of any challenge to the primary judge's findings of fact, it was not open to the Court of Criminal Appeal to evaluate the adequacy of the sentence by discarding reference to why the appellant had acted as he had, or by attributing to him the ability to foresee that his conduct could cause not just serious injury, but severe injury or the possibility of death* (***Carroll*** at [24]). For the same reason that unchallenged findings cannot be discarded in assessing the appropriateness of the sentence they cannot be discarded in determining the appropriate sentence.

6. 72 The two new reports were correctly admitted for the purposes of resentence on the "usual basis". It was possible to read those reports and the other material in a way that did not contradict the evidence presented at sentence.

6. 73 The appellant and his brother gave evidence of the physical and emotional abuse the appellant suffered between the ages of 8 – 18 years. The appellant also gave evidence of his psychiatric history (Transcript 27/04/12 at p 17.45). Mr Webber Roberts gave evidence of his knowledge of the family dynamics (T 27/0412 at p 45.40) and expressed the opinion that he believed that the appellant would suffer behavioural difficulties later in life because of the trauma he had suffered in his family environment (T 27/0412 at p 47.25). Dr Westmore also referred to this in his report. He noted that the appellant had seen a psychiatrist at the age of 16

and was diagnosed with clinical depression. He had also seen a psychotherapist at the age of 25 and was diagnosed with ADHD (Report of Dr Westmore dated 3/11/2011 at p 4).

6. 74 Dr Westmore was of the opinion that the appellant was likely depressed at the time of the offence (Report of Dr Westmore dated 3/11/2011 at p 8) and adversely affected by the drug DMT including perceptual disturbances and an altered perception of his environment (Report of Dr Westmore dated 29/09/2011 at p 2).

6. 75 This was consistent with most of Dr Nielssen's report. However, the final sentence of Dr Nielssen's report stated that ".....I believe his intoxication with a drug with unpredictable mind altering effects, together with an underlying emotional state shaped by violence and sexual abuse, and a pattern of substance abuse, was a significant contributing factor to his sudden decision to end his life and to his offending behaviour." It is not clear what was meant by those factors being "significant contributing factor[s]". Dr Westmore considered that the appellant was likely depressed and adversely affected by DMT at the time of the offence, and on one reading, Dr Nielssen's opinion was not necessarily inconsistent with that, particularly as it had been submitted at sentence that intoxication was not an issue and Dr Westmore's reports were not challenged on appeal . But if what was meant by these factors contributing to the offence was that they were causative, then that was inconsistent with the case presented at sentence and contrary to senior counsel's express disavowal on appeal that the offence was driven by such factors.

6. 76 The effect of the new reports was not entirely favourable on resentence.

6. 77 Mr Roberts noted that the appellant had "limited awareness and insight of the offence" (AB 358.45) but considered that he was in "a healthier emotional and mental position" to address his re-development through the remainder of his sentence." (AB 359.44). That report was dated in February 2013. Dr Nielssen's report was dated in May 2014, and showed that 1 year after Mr Roberts's report, the appellant had not addressed his redevelopment and was continuing to minimise his role in the offence contrary to the Agreed Facts. Dr Nielssen's report also showed that 2 years after the sentence hearing the appellant was still claiming the attack lasted for 45 seconds even though his own counsel had

acknowledged that it lasted much longer. This was relevant on resentencing on the question of the appellant's appreciation of the seriousness of the offence, his remorse, and his rehabilitation.

6. 78 There remains considerable equivocation in the appellant's approach to the new material even in this Court. At [6.13] of the written submissions the appellant submits that the childhood experiences "affected the development of the appellant's personality" and were a factor in the development of an anxiety disorder which in turn was a factor in the offending behaviour.

6. 79 It could hardly be disputed that the appellant's childhood experiences were a factor in the development of his personality, and that his personality was a factor in the offending behaviour. That is the significance of subjective material on sentence. The appellant's personal circumstances were also important in assessing the effect of any likely sentence. However, that is a very different proposition to the contention that the childhood abuse, mental disorder and a drug induced psychosis caused the offence.

6. 80 The new reports were correctly admitted to supplement the subjective material before the sentencing judge but the tender for the separate purpose of overturning the unchallenged findings was misconceived and rightly rejected.

PART VIII: Time Estimate

It is estimated that oral argument will take 1 hour.

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