IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S309 of 2017

BETWEEN:

DL
Appellant

and

The Queen
Respondent

10

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: Concise Statement of Issues

2. Did the Court of Criminal Appeal ("CCA") err in making different factual findings
20 that were available from the evidence before the CCA for the purpose of determining whether some other sentence was warranted in law pursuant to s 6(3) of the *Criminal Appeal Act 1912*?

3. In the circumstances of this case, was there a denial of procedural fairness?

Part III: Notice under s 78B of the *Judiciary Act 1903*

4. The Respondent considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

30

Filed on behalf of the Respondent by:

C Hyland, Solicitor for Public Prosecutions (NSW)
Level 17, 175 Liverpool Street
Sydney NSW 2000
DX 11525 Sydney Downtown

Date of this document: 2 March 2018

Ref: Carolyn Griffiths
Telephone: 02 9285 8789
Facsimile: 02 9285 8970
Email: cgriffiths@odpp.nsw.gov.au

Part IV: Factual matters in contention

Background

5. On 27 March 2008, a jury found the Appellant guilty of the murder of a 15 year old schoolgirl, TB. On 19 July 2005, the Appellant, who was then 16 years old, approached TB in an internal laneway in the car park of the Forresters Beach Resort shortly after she had got off her school bus. At this time, TB was taking a shortcut through the laneway from the bus stop to her home, which was a short distance away (CCA [30] – [31] CAB 68 – 69).

6. The Appellant stabbed TB 48 times with a knife, including to the head, neck and chest (CCA [23] CAB 67). One of the wounds penetrated two chambers of TB's heart (ROS [2] CAB 42). The assault only ceased when the Appellant fled after he was confronted by a guest of the resort who demanded that he stop (CCA [23] CAB 67, CCA [121] CAB 93). TB died a short time later as a result of the wounds inflicted.

7. During the incident the Appellant sustained a cut to his hand (ROS [4] CAB 43). On the afternoon of the murder, the Appellant gave three different accounts to witnesses as to how he sustained the cut, namely, that he had fallen over a rock, that he had cut his hand on a rose bush and that he had cut his hand on barbed wire (ROS [4] CAB 43).

8. When police knocked on the front door of the Appellant's house that evening, the Appellant left the house via the back door and moved away down the side of the house, whereupon he was arrested (ROS [5] CAB 43).

9. The Appellant has never accepted responsibility for the killing (CCA [174] CAB 103).

10. The Appellant was convicted by a jury on 27 March 2008. He was sentenced on 14 November 2008. The sentence appeal was not heard by the CCA until more than 11 years after the offence, and 8 years after the original sentencing proceedings had taken place.

The psychiatric evidence at the sentencing proceedings

11. After being taken into custody on the day of the murder, the Appellant was assessed, closely supervised and treated by Justice Health psychiatrists. In the period of just over 3 years between the Appellant's arrest and the sentencing proceedings, no evidence of psychosis was discovered.[1]

12. Three psychiatrists gave evidence at the sentencing proceedings in August and September 2008. Dr Neilssen was of the opinion that the Appellant probably had a brief psychotic episode at the time of the killing as part of the early development of schizophrenia. Neither Dr Allnutt nor Dr Kasinathan formed the opinion that the Appellant was suffering psychosis or schizophrenia at the time of the attack.

13. Dr Kasinathan, an adolescent forensic psychiatrist who worked for Justice Health, first assessed the Appellant the day after the murder and then assessed and treated him approximately 20 to 30 times.[2] His opinion was that the Appellant had an anxiety disorder with depression. He had been treating the Appellant for that condition for the previous 2 years.[3] He also thought it was possible that the Appellant had some autistic traits.[4]

14. The only time Dr Kasinathan noticed any abnormalities in the Appellant's thought form was on the first day he assessed him. He did not see any symptoms or signs of psychosis over the following 3 years during assessment and treatment.[5]

15. Dr Kasinathan was of the opinion that the Appellant was not in the prodromal phase of schizophrenia at the time of the offence. (The prodromal phase of schizophrenia is the phase of the illness between a decline in social function and the emergence of frank psychotic symptoms. The phase is usually only apparent in retrospect when the

---

[1] Transcript of proceedings on sentence, T 1/08/08 7.11 – 7.35 AFM 3; T 12/09/08 35.31 – 35.42 AFM 29; T 12/09/08 37.14 – 37.15 AFM 31; CCA [20] CAB 66; CCA [147] CAB 98.
[2] T 12/09/08 35.15 – 35.17 AFM 29.
[3] T 12/09/08 38.5 – 38.23 AFM 32; CCA [147] CAB 98.
[4] T 12/09/08 39.43 – 39.47 AFM 33.
[5] T 12/09/08 35.31 – 35.41 AFM 29; T 12/09/09 37.10 – 37.40 AFM 31.

acute symptoms are evident.[6]) In so concluding, Dr Kasinathan observed that the Appellant had not in fact developed schizophrenia whilst he had been treating him.[7] Dr Kasinathan considered that the prospect that the Appellant may develop symptoms which would justify a future diagnosis of schizophrenia was less than one per cent.[8]

16. The Appellant had no symptoms or signs of psychosis after being in custody for 18 months. The Appellant's fitness to plead was considered at that stage and, as a result, he underwent a 6 week trial period with antipsychotic medication. There was no change in the Appellant, apart from a side effect of tiredness and the treatment was ceased. Dr Kasinathan, who had not agreed with that treatment, did not observe any benefit from it. He had not seen any evidence of a psychotic illness that required treatment by such medication.[9]

17. Dr Kasinathan could not find any psychiatric explanation for the attack.[10] When asked about a possible explanation, he proffered that the offence may have been committed as an explosive response to some kind of slight.[11] He noted that, due to the Appellant's anxiety (symptoms of which the doctor had later observed), the Appellant may have become preoccupied by the slight and may have acted in response to it.[12]

18. Forensic psychiatrist Dr Stephen Allnutt, who carried out a clinical evaluation of the Appellant and reviewed his custodial psychiatric records, also gave evidence. Dr Allnutt was of the opinion that upon the evidence then available, a diagnostic conclusion could be made that the Appellant suffered from depressive and anxiety symptoms, probably with obsessive compulsive symptoms.[13]

---

[6] AFM 97.25 – 97.30.
[7] T 12/09/09 36.48 – 31.15 AFM 30 -31.
[8] T 12/09/08 39.19 – 39.25 AFM 33.
[9] T 12/09/08 35.30 – 36.25 AFM 30-31.
[10] T 12/09/08 44.46 – 45.5 AFM 38 – 39; CCA [16] CAB 65, CCA [147] CAB 98.
[11] T 12/09/08 45.18 – 45.25 AFM 39; CCA [147] CAB 98.
[12] T 12/09/08 45.25 – 45. 45 AFM 39.
[13] T 1/08/08 6.40 – 6.45 AFM 2; CCA [146] CAB 98.

19. In his opinion, the clinical evidence did not enable a conclusion of psychosis at the time of the offence.[14] He considered it was significant that no evidence of psychosis was discovered given that since going into custody the Appellant had been frequently assessed by psychiatrists in depth and observed continually over a lengthy period of time.[15]

20. Dr Allnutt gave evidence that, whilst he thought it was unlikely, he could "*not rule out entirely*" a possible brief psychotic episode, after which the symptoms may have resolved rapidly.[16] He noted, however, that "anything is possible".[17] He explained that brief psychotic episodes generally come on rapidly in response to a significant stressor and there was no evidence of any stressor prior to the offence. Further, he stated that such disorders generally occur in the third and fourth decades of life. Dr Allnutt also observed that such a diagnosis is typically made where the person reports that they have hallucinations or delusions, is seriously disorganised in speech or has catatonic behaviour, and there was no evidence the Appellant had experienced such symptoms.[18]

21. In his report, Dr Allnutt had opined that whilst there remained the possibility of a primary brief psychosis at the time of the offence, if this were the case, then there would have been a relatively rapid recovery, a scenario which he considered to be unlikely.[19] He was of the view that the absence of motive did not allow a conclusion to be drawn that the offence must be irrational.[20]

22. Dr Allnutt's evidence was that it could only be determined that a person had been in the prodromal phase of schizophrenia if the schizophrenia consequently developed. As there was no evidence that such symptoms had emerged, Dr Allnutt stated that he could not conclude that the Appellant had prodromal symptoms of schizophrenia at the time of the offence.[21]

---

[14] T 1/09/08 7.5 – 7.10 AFM 3; CCA [16] CAB 65, CCA [146] CAB 98.
[15] T 1/08/08 7.12 – 7.30 AFM 3.
[16] T 1/08/08 8.40 – 8.47 AFM 4.
[17] T 1/08/08 20.27 AFM 16.
[18] T 1/08/08 8.43 – 8.50 AFM 4.
[19] AFM 20.30 – 20.35.
[20] T 1/08/08 9.23 – 9.25 AFM 5.
[21] T 1/08/08 9.43 – 10.12 AFM 5 – 6.

23. In contrast, Dr Nielssen who, like Dr Allnutt, was not the Appellant's treating psychiatrist, but had carried out a clinical evaluation of the Appellant, concluded that at the time of the offence the Appellant "*was probably in the early phase of psychotic illness*"[22], namely the prodromal phase of schizophrenia. He accepted that the illness had not since emerged in the way that he had expected.[23] Dr Nielssen stated that the Appellant probably had a brief psychotic episode at the time of the offending as part of the early course of schizophrenia.[24]

24. Dr Nielssen opined that when he first interviewed the Appellant, he was confident that he would develop a typical schizophrenic illness within a few years, although he was not so certain at the time of giving evidence.[25] He stated that he thought it was still more likely than not, that at some stage during the Appellant's early adult life, he would develop a typical syndrome of schizophrenia.[26]

The sentencing judge's findings

25. At the sentencing proceedings, the Crown submitted that the sentencing judge should find that the Appellant was not suffering from a psychosis at the time of the offence and that the Appellant had an intention to kill TB.

26. The sentencing judge observed that there was "s*cant evidence that might explain the killing*" (ROS [7] CAB 43). His Honour found that "*on any view, there was much irrationality about what occurred*" (ROS [18] CAB 46).

27. As to the competing psychiatric opinions, the sentencing judge stated that there was nothing in the reports or evidence of the three experts which would cause him to prefer the opinion of one rather than another (ROS [36] CAB 50). His Honour concluded "[w]*hile I do not do so with any confidence, if I had to choose between the competing psychiatric opinions, that of Dr Nielssen seems to me to best explain or accord with what occurred and it also seems to me more probable than a simple, if*

[22] T 12/09/08 49.23 – 49.26 AFM 43.
[23] T 12/09/08 49.20 – 49.27 AFM 43; CCA [20] CAB 66, CCA [143] – [144] CAB 97.
[24] T 12/09/08 52.4 – 52.8 AFM 46; CCA [15] CAB 65, CCA [143] CAB 97.
[25] T 12/09/08 51.37 – 51.40 AFM 45.
[26] T 12/09/08 51.43 – 51.45 AFM 45.

extreme, overreaction to some conduct of [the deceased]" (ROS [38] CAB 51). His Honour accordingly found that it was probable that the Appellant was "*acting under the influence of some psychosis at the time of the murder*" (ROS [38] CAB 51]).

28. The sentencing judge concluded that he was not satisfied beyond reasonable doubt that the Appellant's intention was to kill (ROS [46] CAB 53). Instead, he found that the Appellant had an intention to do grievous bodily harm.

29. His Honour also noted Dr Nielssen's opinion that if the Appellant were properly treated, he was unlikely to re-offend (ROS [44] CAB 52). Again, on the basis of Dr Nielssen's opinion, his Honour concluded that the Appellant was unlikely to re-offend, although his Honour stated that he was "*unwilling to find that* [the Appellant's] *prospects of rehabilitation are good*" (ROS [44] CAB 52 - 53).

30. In assessing the objective seriousness of the offence in respect of the then standard non-parole period, the sentencing judge observed that the "*ferocity and persistence of the attack argues for a conclusion that his offence was well above midrange*" (ROS [47] CAB 53). The age of the deceased would also have fortified this conclusion if it was not a factor that had already been reflected in the standard non-parole period (ROS [47] CAB 53). On the other hand, his Honour was of the view that the psychiatric evidence and his unwillingness to find premeditation or intent to kill pointed to the offence being below the midrange (ROS [48] CAB 53). His Honour ultimately found that the offence was "*a little below the mid-range*" (ROS [49] CAB 53).

31. On 14 November 2008, the sentencing judge sentenced the Appellant to a sentence of 22 years, comprised of a non-parole period of imprisonment of 17 years, with a balance of term of 5 years. In arriving at this sentence, the sentencing judge gave primary significance to the then standard non-parole period of 25 years, which applied where the victim of the murder was under the age of 18 years.[27]

---

[27] ROS [39] – [40] CAB 51, [51] CAB 54; CCA [4] CAB 61, CCA [130] – [131] CAB 95.

The appeal

32. As noted above, nearly 8 years after the Appellant was sentenced, he sought leave to appeal against his sentence. On appeal, the Respondent accepted that, in sentencing the Appellant for an offence in relation to which a standard non-parole period applied, the sentencing judge had applied sentencing principles that were found to be erroneous in *Muldrock v The Queen* (2011) 244 CLR 120 ("*Muldrock* error").

33. As a consequence, the CCA granted the Appellant an extension of time and leave to appeal. Further, in accordance with its statutory duty under s 6(3) of the *Criminal Appeal Act*, the CCA proceeded to exercise the sentencing discretion afresh: *Kentwell v The Queen* (2014) 252 CLR 601 ("*Kentwell*") at [42] (CCA [133] CAB 96).

34. This resentencing exercise fell to be determined under very different circumstances to those that had existed at first instance, some 8 years earlier (CCA [5] CAB 62). In the intervening period, an amendment had been made to the standard non-parole period provisions, which had the effect of removing standard non-parole periods from the sentencing process in respect of juvenile offenders (CCA [135] CAB 96). The age of the deceased became a relevant factor in an assessment of objective seriousness, given that no issue of "double counting" could arise.

35. For the purposes of the resentencing exercise, the parties had tendered material relating to evidence of events that had occurred in the intervening period (CCA [5] CAB 62). This included an affidavit summarising the Appellant's case management file, Juvenile Justice records and Justice Health records. The Justice Health material covered the Appellant's medical treatment, including psychological treatment, whilst in custody.[28]

36. It was apparent from that material that the Appellant had not been diagnosed with schizophrenia since the original sentence had been imposed. The Appellant was 27 years old at the time of the CCA hearing.

---

[28] AFM 104 - 138.

37. On 13 April 2017, the CCA dismissed the Appellant's appeal against his sentence: *DL v R (No 2)* [2017] NSWCCA 58, per Leeming JA and Wilson J, Rothman J dissenting. In their reasons for judgment, Leeming JA and Wilson J departed from the sentencing judge's finding that the objective seriousness of the offence was "a little below the mid-range". Leeming JA concluded that the offence was a "*very serious killing*", whilst Wilson J found that the offence was "*an extremely serious example of murder*" (CCA [36] CAB 70, CCA [157] CAB 100).

38. Leeming JA and Wilson J each concluded that the Appellant was not in the prodromal phase of schizophrenia at the time of the murder (CCA [20] CAB 66, CCA [141] CAB 97). Their Honours noted the competing views of the psychiatrists in 2008 and that there was no suggestion in the evidence that the Appellant had developed schizophrenia in the 11 years since the offence had been committed (CCA [20] – [23] CAB 66 – 67, CCA [148] CAB 98). There being no other reasonable explanation for the attack in the absence of psychosis, Leeming JA and Wilson J concluded that, given the marked ferocity of the attack, the Appellant had intended to kill the deceased (CCA [22] – [24] CAB 67, CCA [150] CAB 99).

39. Whilst Wilson J was of the view that the murder was, to some extent, premeditated, Leeming JA did not so find (CCA [35] CAB 70, CCA [154] CAB 99-100). Leeming JA and Wilson J were unable to conclude that the Appellant was unlikely to re-offend (CCA [36] CAB 70, CCA [175] CAB 103).

40. In view of these findings, Leeming JA and Wilson J concluded that no lesser sentence was warranted in law (CCA [40] CAB 72, CCA [177] CAB 103).

Part V: Argument

<u>The making of different factual findings to the sentencing judge</u>

41. It is well established that where error is found in an appeal against the severity of a sentence, the duty of the CCA is to exercise the sentencing discretion afresh, "*taking into account all relevant matters, including evidence of events that have occurred since the sentence hearing*": *Kentwell* at [42] – [43].

42. In the present case, in circumstances where the CCA had found error, it was "*necessary for* [the CCA] *to exercise its discretion to resentence the* [Appellant], *rather than to focus on correcting the discrete component of the sentence which was subject to error*": *Lehn v R* (2016) 93 NSWLR 205 ("*Lehn*") at [60] per Bathurst CJ. As the Appellant's sentence was affected by error, there was a need for him to be sentenced according to law: *O'Grady v The Queen* (2014) 252 CLR 621 at [13]; *Lehn* at [70]. The CCA was required to form its own view of the appropriate sentence, although not necessarily to resentence: *Kentwell* at [43].

10

43. When considering the task which is undertaken pursuant to s 6(3) of the *Criminal Appeal Act*, the CCA was required to proceed on the basis of the facts as they existed at the time of the CCA hearing, insofar as the Court permitted evidence of those facts to be placed before the Court: *Baxter v R* (2007) 173 A Crim R 284 at [10] per Spigelman CJ.

44. In forming its own view of the appropriate sentence, the CCA was required to adopt the instinctive synthesis approach. This task required the CCA to identify all factors relevant to the sentencing discretion, consider their significance and make a value
20 judgement as to the appropriate sentence: *Markarian v The Queen* (2005) 228 CLR 357 at [51] per McHugh J.

45. Unlike the situation in *Betts v The Queen* (2016) 258 CLR 420 ("*Betts*"), the additional evidence placed before the CCA in this instance related to post-sentence developments. The additional evidence related to the Appellant in the 8 years since sentence and contained details of his treatment and management in custody for health issues (including mental health issues). The determination of the question of whether some other sentence was warranted in law was properly answered by consideration of all of the material before the original sentencing court, together with any evidence
30 of post-sentence developments that was before the CCA: *Betts* at [14].

46. The independent exercise of the sentencing discretion did not require the Court to proceed only on the basis of the findings made by the sentencing judge. The CCA

was entitled to take into account the evidence of post sentence events. As was observed in *Kentwell* at [44], "[t]*he issue for the Court's consideration was whether upon the hearing of the appeal it might conclude, taking into account the full range of factors including the evidence of the Appellant's progress in custody and current mental state, that a lesser sentence is warranted in law.*"

47. The Appellant accepted before the CCA that the Court was entitled to make its own finding as to the objective seriousness of the Appellant's offence. Senior Counsel for the Appellant made the following oral submission:

> "[Findings of objective seriousness] *should be put to one side because the sentencing discretion is being exercised afresh by this Court, and it is for this Court to make their own findings completely unfettered by any findings of the original sentencing judge. The sentence* [has] *miscarried and this Court must simply come to its own conclusion."*[29]

The Appellant does not contend otherwise in his appeal to this Court.

48. The Appellant also acknowledges that in many resentencing cases there will be additional evidence of events post-dating the original sentencing hearing, such as progress made towards rehabilitation, changes in an offender's health, unexpected hardship in custody, further re-offending, assistance to authorities and ongoing hardship to third parties, that will be relevant to whether a lesser sentence is warranted in law and will require consideration by the CCA (AS [41]).

49. The Appellant accepts that the further material in this case did require the CCA to consider the "*issues of hardship in custody, prospects of rehabilitation and the like afresh, in accordance with 'the usual basis' of the tender of that material*" (AS [41]). As a result, "*it was open to the Court to arrive at conclusions on those issues that differed from those made at first instance in 2008*" (AS [41]).

---

[29] T 10/11/2016 p 74.36 – 74.45 AFM 196; cited at CCA [10] CAB 64.

50. However, the Appellant contends that, in exercising the sentencing discretion afresh (AS [27]), it was not open:

(i) for Leeming JA and Wilson J to find that the Appellant intended to kill, rather than to inflict grievous bodily harm (CCA [22] – [24] CAB 67, [150] CAB 99);

(ii) for Leeming JA and Wilson J to find that the Appellant was not suffering psychosis at the time of the offence (CCA [24] CAB 67, CCA [36] CAB 70, CCA [141] CAB 97, CCA [148] CAB 98);

(iii) for Leeming JA and Wilson J to find that they were unable to conclude that the Appellant was unlikely to re-offend (CCA [36] CAB 70, [175] CAB 103);

(iv) for Wilson J to find that there was premeditation (CCA [152] – [154] CAB 99 - 100); and

(v) for Wilson J to decline to find special circumstances (CCA [176] CAB 103).

51. In considering the Appellant's contentions in this respect, it is important to bear in mind the overlap in the findings outlined above. In particular, findings (i) and (ii) were inextricably linked. In the absence of a finding that the Appellant had a mental illness at the relevant time, no rational conclusion was open other than that the Appellant intended to kill, given the number and severity of the injuries and with the areas of the body to which many of the blows were directed (CCA [150] CAB 99). As Leeming JA observed, the evidence that the deceased had been stabbed 48 times, including to the head, neck and chest, "*point*[ed] *inexorably to* [the Appellant] *having an intention of killing his victim*" (CCA [23] CAB 67).

52. Similarly, Wilson J's conclusion that there was some degree of premeditation was inextricably linked to her Honour's finding that there was an absence of mental illness affecting the Appellant at the time of the offence (CCA [152] CAB 99). Her Honour concluded that there was no evidence that the Appellant was carrying a knife that day for some purpose unrelated to the attack on the deceased (CCA [153] CAB 99).

53. Further, the conclusion of the sentencing judge that, if the Appellant was properly treated, he was unlikely to re-offend, was premised on an acceptance of Dr Nielssen's opinion that the Appellant was suffering from a psychosis at the time of the offence. Having come to the conclusion that the Appellant was not suffering from a psychosis at the time of the murder, Leeming JA and Wilson J could not conclude that the Appellant was unlikely to re-offend.

54. As to finding (v), Wilson J indicated that she would not make a finding of special circumstances because the features relied upon by the sentencing judge had already been taken into account as ameliorating the sentence and, therefore, involved double counting in the Appellant's favour (CCA [176] CAB 103). It was open to her Honour to make her own determination in respect of this issue, bearing in mind the additional evidence in respect of the intervening period.

55. In this case the factual findings made by the CCA were open in a proper re-exercise of the sentencing discretion.

Procedural fairness

56. The Appellant also alleges that, in making findings that were different to those of the sentencing judge, the CCA denied him procedural fairness.

57. It is accepted that the independent re-exercise of the sentencing discretion must be performed by the CCA in accordance with the requirements of procedural fairness. What those requirements involve will depend upon the circumstances of the particular case: *R v R H McL* (2000) 203 CLR 452 at [123] per Kirby J, citing *Kioa v West* (1985) 159 CLR 550 at 615; *J v Lieschke* (1987) 162 CLR 447; *Annetts v McCann* (1990) 170 CLR 596. That is because the requirements of procedural fairness may be affected by what is said and done during the proceedings: *Re Minister for Immigration & Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [34] per Gleeson CJ.

58. As was observed by Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [25] – [26]):

> *"The relevant question is about the* [decision-maker's] *processes, not its actual decision* [and] *the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires,* [while] *the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case."*

This was an unusual case given the passage of time that had passed and the additional evidence before the CCA.

59. There will be no denial of procedural fairness where an issue has been raised in the re-sentencing proceedings, either as:

a. a necessary aspect of that process (including as a consequence of errors asserted and then found, or as a result of additional evidence in respect of post-sentence events); or
b. in the submissions of the parties; or
c. a matter that is raised by the Court.

60. The Crown had stated in its written submissions in respect of the re-sentencing exercise (*Muldrock* error having been conceded):

> *"His Honour's conclusion that the offence was a 'little below the mid-range' of objective seriousness was formed in the context of a murder where the victim was a child under the age of 18 years. At ROS [47] his Honour indicated that the age of the victim was a factor arguing for a conclusion that the offence was well above the mid-range, but because that was a factor reflected in the standard non-parole period it was a not a matter taken into account by him in his assessment of the objective seriousness.*

It is submitted that when the victim's age is taken into account as a factor relevant to the assessment of the objective seriousness then the circumstances of this case place it in the high end of the range of objective seriousness of offences of its kind. The [Appellant's] *unprovoked attack on a 15 year old girl as she walked towards her home, having alighted from a bus that she had caught from school, was violent, brutal and sustained. The* [Appellant] *stabbed the deceased 48 times stopping only after he was confronted by a witness who demanded that he stop*" (at [21] – [22]).[30]

61. The Appellant responded in writing with:

"The [Appellant] *submits that this Court would adopt an instinctive synthesis approach to re-sentencing and that, were an assessment of objective seriousness to be done in the context of murder offences, taking into account the age of the victim and other relevant matters, the objective seriousness would not be found to be 'in the high end of objective seriousness of offences of its kind.': cf. RS [22]. The Appellant's immaturity, psychiatric state at the time, youth and hardship in custody all augur for lesser weight to be given to both general and personal deterrence in this case."*[31]

62. The Crown Prosecutor contended in oral submissions that some of the findings of the sentencing judge were "*extremely generous to the* [Appellant] *in the circumstances*".[32] In what was later described as an attempt to highlight that his Honour took into account a number of matters that were "*unduly favourable to the* [Appellant]"[33] the Crown Prosecutor submitted that:

"His Honour, having accepted the psychiatric evidence, none of which, of course, found its way into the trial, that he was acting under some

---

[30] RFM 28.
[31] RFM 33.
[32] T 10/11/16 p 69.46 AFM 191.
[33] T 10/11/16 p 70.8 – 70.12 AFM 192.

> *form of psychosis at the time of the attack, that had a bearing on his Honour's findings of fact. He found, for one thing, that he couldn't be satisfied beyond reasonable doubt the* [Appellant's] *attack on the deceased had any degree of premeditation about it, that because of his mental state that he was not satisfied beyond reasonable doubt that the* [Appellant's] *intention was to kill. This, against the background of 48 stab wounds, in my submission, is a generous finding."*[34]

63. The Crown Prosecutor identified the sentencing judge's conclusion that he was not satisfied beyond reasonable doubt either that the Appellant had an intention to kill or that the murder was premeditated as findings that were unduly favourable.

64. In later oral submissions, the Crown Prosecutor said: "*Your Honours are free to assess the objective seriousness.*"[35] He submitted that the Court would have serious reservations about the Appellant's rehabilitation, having regard to the post-sentence evidence.[36] The Crown Prosecutor ultimately accepted that the sentence needed to be adjusted because of *Muldrock* error, but submitted that "*in taking into account the factors that I'm putting to your Honours now, that adjustment should be minimal, in our submission*".[37]

65. The Crown was then asked and answered the question posed by Rothman J:

> "*ROTHMAN J: But you don't take issue with the, what I will call the substantive findings of his Honour below, that is, either the assessment of criminality, the findings of fact his Honour made or anything of that kind?*
>
> *CROWN: No, your Honour, except to say that in the circumstances, the applicant was well catered for in terms of those features that were taken into account to his considerable advantage.*"[38]

---

[34] T 10/11/16 p 69.49 – 70.8, AFM 191 - 192.
[35] T 10/11/16 p 70.23 – 70.24 AFM 192.
[36] T 10/11/16 p 73.47 – 73.50 AFM 195.
[37] T 10/11/16 p 70.37 – 70.40 AFM 192.
[38] T 10/11/16 74.11 – 74.17 AFM 196.

66. Leeming JA formed the view that in light of the inconsistency with the Crown's earlier written and oral submissions, this response may have been a slip on the Crown's behalf (CCA [9] CAB 63 - 64).

67. Wilson J observed that "*some findings at first instance were unduly favourable to the* [Appellant], *or not borne out by subsequent events*" (CCA [176] CAB 103). Her Honour found that the opinion of Dr Nielssen which was accepted by the sentencing judge (albeit "*without any confidence*") that the Appellant was psychotic, had "*not been borne out by time*" (CCA [142] CAB 97). Her Honour considered that it was notable that the Appellant had never been diagnosed with schizophrenia, either before he was sentenced in 2008 or since that time (CCA [148] CAB 98).

68. Similarly, Leeming JA did not accept that the Appellant was in the prodromal phase of schizophrenia in 2005 (CCA [20] CAB 66), referring to the "*materially different evidence*" before the CCA (CCA [9] CAB 63). His Honour noted that 3 years after the killing, Dr Nielssen had acknowledged that the Appellant's illness had not developed in the way he had expected (CCA [20] CAB 66). Now, a further 8 years had passed, during which the Appellant had been under the consistent care of psychologists with still no suggestion of the development of schizophrenia (CCA [21] CAB 66- 67). His Honour went on to observe that there was not "*any suggestion rising above speculation of incipient schizophrenia which has somehow been arrested*" (CCA [21] CAB 67).

69. Leeming JA considered whether there was a reasonable possibility that the Appellant was afflicted by a "*temporary psychosis*" and concluded that there was no evidence to sustain that possibility. His Honour could not conceive of a temporary psychosis during which the Appellant had an intention to inflict grievous bodily harm, yet did not have an intention to kill (CCA [24] CAB 67).

70. Contrary to the Appellant's contention (AS [35]), the fact that there was no evidence that the Appellant developed schizophrenia following sentencing was a material change in the nature of the evidence before the sentencing court. This was particularly so given that Dr Nielssen gave evidence at the original sentencing

proceedings that he thought it was more likely than not that at some stage during the Appellant's early adult life he would develop a typical syndrome of schizophrenia.[39] The evidence before the CCA demonstrated that this had not occurred, in circumstances where the Appellant had been under constant clinical observation in custody.

71. The Appellant also relies upon the fact that neither Leeming JA nor Wilson J referred to the evidence at the original sentencing proceedings that it was possible that the Appellant had experienced a brief period of psychosis that flared up and resolved (AS [36]). Leeming JA did consider whether the Appellant was afflicted by a temporary psychosis (CCA [24] CAB 67). Dr Allnutt's evidence in respect of this issue was heavily qualified. Dr Allnutt gave evidence that he "*could not rule it out entirely.*"[40] In his report he had indicated that, given the relatively rapid recovery that would have been involved, he thought it was "*unlikely*".[41] He said that brief psychotic episodes generally follow a significant stressor and there was no such evidence.[42]

72. The CCA was entitled to revisit findings that needed to be reconsidered in light of the identified error and that were affected by the additional evidence before the Court in respect of post-sentence events. This had particular application in the unusual circumstances of this case, where there had been an intervening period of 8 years and an opportunity for the Applicant's mental health to be closely observed.

Conclusion

73. The evidence relied upon for the purposes of re-sentencing was relevant to whether the Appellant had suffered a psychosis at the time of the offence. The admission of the summary of the Justice Health records in respect of the Appellant's management and treatment in the intervening years meant that the finding by the sentencing judge that the Appellant was suffering from a psychosis was open to be reconsidered by the CCA.

---

[39] T 12/09/08 51.43 – 51.45 AFM 45.
[40] T 1/08/08 8.40 – 8.47 AFM 4.
[41] AFM 84.30 – 84.35.
[42] T 1/08/08 8.40 – 8.47 AFM 4.

74. Having re-considered that issue, it was open to the majority of the CCA to revisit the Appellant's intention at the time of the offence as it was inextricably linked with the finding as to psychosis. Similarly, the question of whether he was likely to re-offend was affected.

75. The finding as to whether the Appellant had a mental illness at the time of the offence was affected by the evidence relating to events since the time of sentencing. As a consequence, that issue necessarily arose for consideration by the CCA.

10

Part VII: Estimate

76. The Respondent estimates that one hour is required for presentation of the Respondent's oral argument.

Dated: 2 March 2018

K N Shead
Deputy Director of Public Prosecutions (NSW)
20 Tel: 02 9285 8890
Email: KShead@odpp.nsw.gov.au

T L Smith
Crown Prosecutor
Tel: 02 9285 2560
Email: TSmith@odpp.nsw.gov.au

Counsel for the Respondent