IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M105 of 2016

BETWEEN:

THE QUEEN

Appellant

- v -

YAVAZ KILIC

Respondent

APPELLANT'S SUBMISSIONS

Part I: Suitability for internet publication

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

Part II: Concise statement of the relevant issues

2.1 This appeal raises the following questions for consideration –

(a) can a sentence of 14 years imprisonment imposed for an offence carrying a maximum penalty of 20 years imprisonment be properly described as manifestly excessive in circumstances where the offence in question is described as falling within the "worst case" category? [**see ground 1**]

(b) are there variations in offence gravity within the "worst case" category for the purposes of sentencing an offender? [**see ground 2**]

(c) is the sentencing principle of parity engaged in circumstances where a court is required to have regard to "current sentencing practices" in sentencing an offender for an offence? [**see ground 3**]

(d) what is meant by the legislative (or common law) requirement to have regard to "current sentencing practices" for the purposes of sentencing an offender? [**see ground 4**]

(e) what are the powers of an appellate court in reviewing a sentence on a ground of manifest excess? [**see ground 5**]

Part III: Notice under the Judiciary Act 1903

3.1 The appellant certifies that the question of whether notice should be given under section 78B, Judiciary Act 1903 (Cth) has been considered – such notice is not considered to be necessary in this appeal.

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Part IV: Citation of reasons for judgment

4.1 The decision of the sentencing judge is cited as *DPP v Yavaz Kilic* [2015] VCC 392.

4.2 The decision of the appellate court is cited as *Yavaz Kilic v The Queen* [2015] VSCA 331.

Part V: Statement of relevant facts

The charges

5.1 The respondent was charged on indictment in the County Court of Victoria with 1 count of intentionally causing serious injury contrary to section 16, Crimes Act 1958 (Vic).[1] The relevant offence carries a maximum penalty of 20 years imprisonment.

5.2 The respondent was also charged with two summary offences – using a prohibited weapon without exemption contrary to section 5AA, Control of Weapons Act 1990 and dealing with property suspected of being proceeds of crime contrary to section 195, Crimes Act 1958 – each of these offences carries a maximum penalty of 2 years imprisonment.

Criminal history

5.3 The respondent admitted a previous criminal history at his plea hearing. This history related to 5 court appearances between January 2009 and March 2013 involving convictions (or findings of guilt) in respect of 30 offences. Importantly, on 28 March 2013 the respondent had been sentenced to an aggregate term of 3 months imprisonment in respect of trafficking in a drug of dependence (methylamphetamine) and possession of a firearm whilst a prohibited person; and on the same date the respondent was also sentenced to be released on a community correction order (after service of the relevant prison sentence) for a period of 24 months in respect of various weapon, drug and dishonesty offences.[2]

5.4 Thus, at the time of the relevant offences, the respondent was subject to the operation of a community correction order designed for the purposes of his rehabilitation – conditions of that order included supervision, assessment / treatment for drug dependency, assessment / treatment for mental health, participation in offending behavior programs and judicial monitoring. Further, the respondent was also on a bail undertaking for unrelated offences. These two factors were conceded to be aggravating circumstances on the plea and accepted as such on the appeal.[3]

Circumstances of offences

5.5 The circumstances of the offences are set out in the Summary of Prosecution Opening – this document was tendered as "Exhibit 1" at the plea hearing and read into the transcript.[4] It is noted that counsel for the respondent did not take issue with the summary of facts.[5]

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[1] See Indictment E12531140

[2] The relevant offences are listed on the Victoria Police Criminal History Report as possession of a weapon without exemption, possession of ammunition without licence, possession of a drug of dependence (amphetamine), possession of a drug of dependence (prescription drug), possession of a drug of dependence (gamma hydroxybutyrate), handling stolen goods, fraudulently using a registration label, forging a registration label, receiving stolen goods, possession of a narcotic plant (cannabis) and possession of unauthorised thing in police gaol

[3] See *DPP v Yavaz Kilic* [2015] VCC 392, at 9, 11 20; *Yavaz Kilic v The Queen* [2015] VSCA 331, at [59]

[4] See *DPP v Yavaz Kilic* [2015] VCC 392, at 2-11; note that the relevant facts are also summarised by the sentencing judge in his Reasons for Sentence – see *DPP v Yavaz Kilic* [2015] VCC 392, at 36-38 [4]-[13], and in the judgment of the Court of Appeal – see *Yavaz Kilic v The Queen* [2015] VSCA 331, at [5]-[7]

[5] See *DPP v Yavaz Kilic* [2015] VCC 392, at 2, 36 [3]

5.6 The victim, Shae Heaton, was in a relationship with the respondent at the time of the offences. The victim was aged 23 years and the respondent was aged 22 years. The victim was 12 weeks pregnant with the respondent's child.

5.7 The relationship had become ruled by the respondent's paranoia and controlling behaviour. Both were using methylamphetamine during the relationship. At the end of March or early April 2014, the victim moved into the respondent's home at Ardeer. After the victim moved into the house, the respondent set up a camera outside the house. The victim described the respondent as being with her everywhere she went – however, the victim refused to accept this level of control over her. This level of paranoia and control was the cause of many arguments within the relationship.

5.8 During the weekend of 26 and 27 July 2014, the victim decided she needed time away from the respondent. She stayed overnight at a friend's house. However, during that night, the victim received constant telephone calls and in excess of 50 text messages from the respondent.

5.9 On 27 July 2014 the respondent was in company with Wanda Ahu, Dylan Bond and Raniera Scott. During the course of the day Ahu sought to act as an intermediary between the victim and the respondent and counsel them over their relationship issues. During the evening, Ahu arranged to meet the victim. On her way to meet the victim, Ahu attended at the respondent's house and spoke with him. Ahu observed the respondent to be angry because the victim would not talk to him or meet him. The respondent called the victim a "slut". However, the respondent started to calm down. Ahu telephoned the victim and she agreed to meet at the respondent's home.

5.10 At about 10.40 pm, the victim was driven to the respondent's home. Near the house, the victim observed Bond and Scott on the side of the road next to Bond's vehicle – they were refueling the vehicle with a fuel container. After the vehicle was refueled, the container was placed in the back seat (about 1 litre of fuel was left in the container). The victim then exited the vehicle she was in and was driven by Bond to the respondent's home.

5.11 As Bond went to open the door to get out of his vehicle, he observed the respondent running across the road in an aggressive manner holding a samurai sword above his shoulders and pointing it at him. The respondent thrust the sword through the open driver's side window towards the steering wheel. The respondent walked away from the vehicle and verbally abused Bond, Scott and the victim. The respondent yelled at the victim, stating "you're just a fucking slut".

5.12 Bond followed the respondent into the front yard of the house and told him to calm down. The respondent filled a plastic bottle with water and placed it onto a table. The respondent then swung the sword and hit the bottle which flew off into a bush. The respondent stated "this would take some cunt's head off".

5.13 The respondent went inside the house and Bond followed him. The respondent placed the sword on the kitchen bench. Bond kept trying to calm the respondent down. After the respondent went to his bedroom, Bond hid the sword inside a bathroom exhaust fan.

5.14 However, the respondent then went outside and walked up to Bond's vehicle. The victim was sitting in the back seat of the vehicle on the right hand side. She locked the door, fearing for her safety. The respondent attempted to open the door. The victim was frightened – she stated the respondent had a terrifying look on his face. The respondent

went to the left hand side of the vehicle and opened the rear door, and sat in the back seat next to the victim.

5.15 There was a struggle between the respondent and the victim – she was trying to fight the respondent off. The respondent then picked up the fuel container and poured petrol all over the victim. The respondent got out of the vehicle, leaving the victim covered with petrol on the backseat. The victim was crying.

5.16 A few minutes later, the respondent returned to the vehicle and got into the back seat. The victim attempted to get out of the vehicle, but the respondent grabbed her by the jumper and pulled her back into the vehicle. The respondent then said "you wanna make my heart burn, now you can burn bitch". As he said this, the respondent held a cigarette lighter to the victim's chest, igniting the petrol. The victim immediately became engulfed in flames.

5.17 The victim stumbled out of the vehicle, screaming for help. Ahu, Bond and Scott assisted the victim. The victim was in horrific pain and struggled to breathe. Whilst lying on the grass, the victim thought that she was going to die. Whilst Bond was assisting the victim, the respondent dialed "000" and threw his mobile telephone at Bond stating "here you talk to them". Bond told the respondent to leave the scene.

The victim's injuries

5.18 The victim was taken to the Alfred Hospital in a critical condition and admitted to the Intensive Care Unit (ICU). The victim was intubated and placed in an induced coma for 5 days. During this period, the victim was placed on a ventilator in order to breathe. The victim remained in ICU for 9 days.

5.19 The victim's injuries were photographed (some 2 weeks later in August 2014) and the photographs were tendered as "Exhibit 2" at the plea hearing. The photographs of the injuries were described in the judgment of the Court Appeal as "objectively horrific".[6]

5.20 Dr Jason Schreiber, a forensic physician employed at the Victorian Institute of Forensic Medicine, reported on the victim's injuries as follows:[7]

(i) evidence of burns to almost 20% of the total body surface area, bordering on extensive burn wounds including areas essential for life such as the airways and sensitive areas such as the head, face, neck, breasts, hands and wrists as well as multiple other body parts

(ii) moderate to severe burns can cause injuries to nerves with pain or loss of sensation, injury with bleeding and blood clots to blood vessels, dehydration by loss of water, loss of protein with other important blood ingredients, swelling with internal body structure and organ compression, inflammation, immunological defence system impairment and infection, as well as scars, and place the patient at high risk of complications; burns render the application of necessary treatments harder for medical staff

(iii) to a large extent, these burn injuries were deep, that is partial and full thickness skin burns requiring complex surgery and skin grafting with skin harvesting from the patient's own body rendering it necessary to therapeutically wound more areas of skin that were initially not involved

(iv) the injury to the airways and the areas of moderate and high degree burns are substantial

(v) the wounds sustained in the course of life saving and urgent treatments and procedures aid to the substantiality

(vi) the entity of inflicted injuries and wounds from necessary medical and surgical procedures involve a vast body area and leave only a small skin area unhurt

(vii) multiple complex life-saving and urgent assessments, investigations and treatments were involved to stabilise the patient

(viii) there is no doubt that the patient would have died without the treatments in hospital; the injuries were life-endangering

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[6] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [60]

[7] See *DPP v Yavaz Kilic* [2015] VCC 392, at 8-9

(ix) many of these treatments and procedures normally carry an inherently high risk of complications and side effects, in particular, when carried out in a patient who had already been compromised by injuries
(x) complications of the injuries themselves and the necessary treatments occurred requiring more interventions
(xi) infections relating to the injuries occurred
(xii) it is estimated that the degree of pain and discomfort was high
(xiii) the patient required large multiple specialist teams and medical resources
(xiv) the protracted risk of future thrombosis, infections, immobility and a decreased immunological defence system is high
(xv) the patient will remain scarred, possibly to large areas of her body including in sensitive areas such as the face, breasts and hands with protracted cosmetic and social implications
(xvi) the future functionality of her hands and limbs will be diminished
(xvii) the patient's future quality of life will be diminished
(xviii) the patient will require ongoing care in different medical and mental health areas.

5.21 Importantly, the above findings and conclusions were not challenged by counsel for the respondent during the plea hearing.[8]

5.22 Due to the nature and seriousness of the victim's injuries and her long-term prognosis, the victim terminated her pregnancy on 13 August 2014. As a consequence, the victim suffered depression requiring psychiatric intervention.[9]

5.23 The victim was discharged from hospital on 14 August 2014 but has since had numerous outpatient appointments for rehabilitation and physiotherapy.

Arrest of respondent

5.24 On 28 July 2014 the respondent was arrested by investigating police. Later that day, a search of his house found three bank cards which did not belong to the respondent.

5.25 On 29 July 2014 the respondent declined to participate in a record of interview with investigating police. He was charged and remanded into custody.

5.26 The respondent also suffered burn injuries to his arms as a result of the offending which required hospital treatment.[10]

Plea in mitigation

5.27 The respondent entered a plea to the indictment charge and two summary offences. On 30 March 2015, a plea in mitigation was conducted before Judge Montgomery.[11]

5.28 During the plea hearing, the sentencing judge stated he could not imagine "a worse example of this type of offending" in 38 years of practice [in the criminal law].[12] In response, counsel for the respondent submitted that the offending did not fall within the "worst case" category as there was an absence of significant premeditation, no criminal history for matters involving violence and the entry of a plea of guilty. However, counsel conceded that the offending in question was a "very serious example" of this type of offence.[13]

5.29 Counsel for the respondent accepted that the offending called for the imposition of a "significant" or "substantial" term of imprisonment. In making that concession, counsel

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[8] See *DPP v Yavaz Kilic* [2015] VCC 392, at 17-18
[9] See Statement of Dr Jason Schreiber, dated 10 March 2015, at p 5 [statement tendered as part of Exhibit 1]
[10] See *DPP v Yavaz Kilic* [2015] VCC 392, at 39 [18]
[11] See *DPP v Yavaz Kilic* [2015] VCC 392, at 13-34
[12] See *DPP v Yavaz Kilic* [2015] VCC 392, at 15
[13] See *DPP v Yavaz Kilic* [2015] VCC 392, at 15-16, 24, 28

accepted that both general and specific deterrence were significant factors in the sentencing exercise.[14]

5.30 Counsel for the respondent handed up two sentencing decisions which he described as being of "limited assistance" (and not for the purposes of any analysis of parity) – namely, *The Queen v Rossi* [2010] VSC 602 and *The Queen v Huitt* [1998] VSCA 118.[15] It was also accepted by counsel that the infliction of serious injury by ignition was not a commonly committed crime.[16]

Reply by prosecutor

5.31 In reply, the prosecutor made the following submission:[17]

> Your Honour, as has been acknowledged, an immediate term of imprisonment is called for. This is an extremely bad example of the charge of intentionally causing serious injury and at the high end for the purposes of sentencing. The victim has suffered horrific and very painful injuries. She's permanently disfigured. She faces long term treatment and rehabilitation and she's endured enormous suffering, not only physical but psychologically.
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> The offending was committed in a context of a relationship that involved behaviour by the prisoner that constituted family violence. Whilst the victim has acknowledged that it wasn't physically violent, it was nevertheless emotionally and psychologically abusive and controlling. The offending is aggravated by the fact that she was vulnerable, not only in the context of the family violence situation, but that she was pregnant with the prisoner's child.
>
> Specific and general deterrence are of considerable importance along with denunciation and just punishment.

5.32 The prosecutor also handed up a number of sentencing decisions for assistance – namely, *The Queen v Alipek* [2006] VSCA 66; *Rossi v The Queen* [2012] VSCA 228; *Emery v The Queen* [2011] VSCA 212 and *Pasinis v The Queen* [2014] VSCA 97.

Sentence

5.33 The respondent was sentenced on the count of intentionally causing serious injury to 14 years imprisonment and 12 months imprisonment on each of the summary offences – and cumulation of 6 months was ordered in respect of each of the summary offences. This resulted in a total effective sentence of 15 years imprisonment with a non-parole period of 11 years imprisonment.

Appeal

5.34 The respondent sought leave to appeal against sentence and on 12 August 2015 leave was granted on a ground of manifest excess (ground 1).[18]

5.35 On 8 December 2015, the Court of Appeal allowed the appeal against sentence and re-sentenced the respondent on the count of intentionally causing serious injury to 10 years 6 months imprisonment, on the summary charge of using a prohibited weapon without exemption to 6 months imprisonment (with an order for cumulation of 3 months) and on the summary charge of dealing with property suspected of being proceeds of crime to 3 months imprisonment (with an order for cumulation of 1 month). This resulted in a total effective sentence of 10 years 10 months imprisonment with a non-parole period of 7 years 6 months imprisonment fixed by the Court.

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[14] See *DPP v Yavaz Kilic* [2015] VCC 392, at 27, 29
[15] See *DPP v Yavaz Kilic* [2015] VCC 392, at 32-34
[16] See *DPP v Yavaz Kilic* [2015] VCC 392, at 34
[17] See *DPP v Yavaz Kilic* [2015] VCC 392, at 34-35
[18] Note a proposed ground 2 (fresh evidence) was referred to the Court of Appeal for determination on the appeal

Application for special leave

5.36 The appellant filed an application for special leave and on 28 July 2016 this Court granted leave on 5 grounds of appeal.

Part VI: Statement of argument

Reasons for sentence

6.1 In sentencing the respondent, Judge Montgomery took into account the sentencing purposes of general deterrence, specific deterrence, denunciation and protection of the community. The sentencing judge described the offence as a "horrific example" of violence and stated that the respondent had acted in a "cowardly manner".[19]

6.2 As to the sentencing purpose of general deterrence, the judge stated:[20]

> I have to take into account the principle of general deterrence, that is, I have to impose a sentence that will deter other people from committing similar type offences. As I expressed during the course of the plea, I find it hard to recall a more serious example of this type of offending in my 38 years in the criminal law.
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> The courts have to send a message to the community that violence against women will not be tolerated under any circumstances. The problems of differences in a relationship and the use of drugs such as ice in no way excuse the horrific violence that you inflicted on someone you supposedly cared for. Can we open the newspapers on any day without an account of some man inflicting violence on a woman in a minor or major way?
>
> I made the comment before that it leads me to a conclusion that for some men, it seems like there is a war on women. So I have to impose a sentence that sends a message to the community that this just will not be tolerated.

6.3 This approach by the sentencing judge was consistent with recent Victorian appellate authority. Acts of domestic violence require strong condemnation by the courts.[21] For example, in *Marrah v The Queen*, the Court of Appeal observed:[22]

> Offending of this nature is too often perpetrated by men whose response to difficulties in a relationship is one of possessive, violent rage. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. The sentences must convey the unmistakeable message that male partners have no right to subject their female partners to threats or violence. The sentences must be of such an order as to strongly denounce violence within a domestic relationship.

6.4 As to the sentencing purpose of specific deterrence, the judge stated:[23]

> ... I have to take into account what is called specific deterrence. That is, to deter you from doing it again. You have numerous convictions, admittedly none for violence, but at the time, you were on bail and on a community corrections order. Seemingly that was imposed to assist you to overcome your drug use. It does not seem to have had any effect. So although you are young, in my view, specific deterrence still has a role to play because of those factors.

6.5 As to the sentencing purposes of denunciation and protection of the community, the judge stated:[24]

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[19] See *DPP v Yavaz Kilic* [2015] VCC 392, at 41, 42 [29], [31]
[20] See *DPP v Yavaz Kilic* [2105] VCC 392, at 40 [22]-[24]
[21] See, for example, *DPP v Muliaina* [2005] VSCA 13, at [21]; *The Queen v Robertson* [2005] VSCA 190, at [13]; *DPP v Smeaton* [2007] VSCA 256, at [13]; *The Queen v Hester* [2007] VSCA 298, at [19]; *The Queen v Earl* [2008] VSCA 162, at [23]; *The Queen v Smith* [2010] VSCA 192, at [11]; *Pasinis v The Queen* [2014] VSCA 97, at [57]; *Filiz v The Queen* [2014] VSCA 212, at [23]
[22] [2014] VSCA 119, at [25]
[23] See *DPP v Yavaz Kilic* [2015] VCC 392, at 41 [25]
[24] See *DPP v Yavaz Kilic* [2015] VCC 392, at 41 [26]

> In addition, you have a number of convictions in relation to possession of weapons. You seemingly have taken no notice of previous court appearances for it and armed yourself with a samurai sword here. I have to express my denunciation. That is, my opinion of your offending and I think I have done that. I also have to consider the protection for the community. Clearly, someone who has acted in the way that you did poses a risk to the community. I have been provided with no psychiatric or psychological reports to explain your offending.

6.6 In sentencing the respondent, the judge took into account the respondent's age, plea of guilty, expression of remorse, personal circumstances and prospects of rehabilitation.[25]

6.7 Importantly, as to the respondent's age, the sentencing judge stated:[26]

> Your age is a factor that has weighed heavily on my mind, upon my first reading the depositions in this matter. However, there must come a time when the circumstances of the offending push the age of the offending [sic] into the background. In my view, this is such a case. I would have imposed a heavier sentence than what I am about to if you had been older, but the sentence I am imposing is a substantial one, in any event.

6.8 None of the above findings made by the sentencing judge were challenged or upset on appeal. Importantly, the Court of Appeal stated:[27]

> The instinctive synthesis required the judge to give proper weight to the enormity of the appellant's offending including its obviously devastating effect upon the victim. The fact that the injuries were inflicted within a relationship of trust between the appellant and the victim is an aggravating circumstance. The circumstances required significant weight to be afforded to general deterrence, specific deterrence and denunciation.

Court of Appeal – sentence is manifestly excessive

6.9 The Court of Appeal allowed the appeal against sentence on ground 1 only.[28] That ground reads as follows:

> The individual sentences, orders for cumulation and non-parole period fixed are manifestly excessive; in particular, the learned sentencing judge gave too much weight to aggravating factors and too little weight to mitigating factors, current sentencing practices, the applicable maximum penalties, and the principle of totality.

6.10 The appellant notes ground 1 is a conventional complaint of manifest excess – no specific error was alleged, but rather that the sentencing judge had incorrectly "weighted" the relevant sentencing considerations so as to produce an "unreasonable or unjust" sentence.

6.11 In ruling that the sentence was manifestly excessive, the appellant submits that the Court of Appeal has erred by failing to properly apply the legal principles governing the appellate review of a discretionary judgment. [**see ground 5 of appeal**]

Statutory powers – appeal by offender against sentence

6.12 Part 6.3 of the Criminal Procedure Act 2009 deals with appeals from the County Court to the Court of Appeal. Section 278 provides that a person sentenced for an offence may appeal to the Court of Appeal against the sentence imposed if leave to appeal is granted.

6.13 Section 281 provides for the determination of a sentence appeal as follows:

> (1) On an appeal under section 278, the Court of Appeal must allow the appeal if the appellant satisfies the court that –
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> (a) there is an error in the sentence first imposed; and
> (b) a different sentence should be imposed.

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[25] See *DPP v Yavaz Kilic* [2105] VCC 392, at 38-40 [14]-[20], 41-42 [27]-[31]
[26] See *DPP v Yavaz Kilic* [2015] VCC 392, at 41 [28]
[27] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [65]
[28] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [4]

(2) In any other case, the Court of Appeal must dismiss an appeal under section 278.

6.14 Common form provisions of the above kind have been enacted throughout the various Australian jurisdictions. In relation to this provision, the Explanatory Memorandum to the Act makes express reference to this Court's decision in *House v The King* and the concept of error as developed in that case.[29] This approach is consistent with authority of this Court.[30]

6.15 The imposition of sentence involves the exercise of discretionary judgment.[31] There is no single correct sentence for any particular set of offending.[32] As Heydon J observed in *Hili v The Queen; Jones v The Queen*:[33]

> [I]t is possible for two courts, each acting on an identical legal principle, making no error of fact, omitting no relevant consideration and taking into account no irrelevant consideration, to arrive at different sentences without either of them being "wrong". As McHugh, Hayne and Callinan JJ said in *Pearce v R*: "Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision". The circumstances of particular crimes and the "character, antecedents and conditions" of particular offenders are so various, the combinations in which they can occur are so numerous, and the relationship between these factors and the purposes which criminal sentences are to serve can be so impalpable, that the application to them of discretionary judgment permitting a range of legitimate outcomes is inevitable.

6.16 Importantly, an appeal against sentence is constrained by the principles of appellate review of discretionary decisions as set down by this Court in *House v The King*:[34]

> It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

6.17 As this Court later observed in *Lowndes v The Queen*, the primary duty of sentencing reposes in sentencing (and not appellate) courts:[35]

> Of particular importance in the present case is the principle that a court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. This is basic. The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.

6.18 Thus, it is often observed by appellate courts that a complaint that a sentence is manifestly excessive is difficult to establish.[36] As Bell and Gageler JJ recently observed in *The Queen v Pham*:[37]

> It is only if the sentence is found to be "unreasonable or plainly unjust" that the challenge of manifest excess succeeds. Manifest excess is a conclusion, relevantly in the context of sentencing for this offence, that the

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[29] See Explanatory Memorandum – *Criminal Procedure Bill 2008*, published by Department of Justice, at p 104
[30] See, for example, *Lacey v Attorny-General (Qld)* (2011) 242 CLR 573
[31] See, for example, *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58, at 70-71 [24]-[28]
[32] See, for example, *Pearce v The Queen* (1998) 194 CLR 610; *The Queen v Pham* (2015) 325 ALR 400
[33] (2010) 242 CLR 520, at 543 [74]
[34] (1936) 55 CLR 499, at 504-505; see also *Markarian v The Queen* (2006) 228 CLR 357, at 370-371 [25]
[35] (1999) 195 CLR 665, at 671-672 [15]
[36] See, for example, *DPP v Karazisis, Bogtstra & Kontoklotsis* (2010) 31 VR 634, at 662-663 [127]; *Clarkson v The Queen* (2011) 32 VR 361, at 384 [89]
[37] (2015) 325 ALR 400, at 412-413 [56]

sentence is manifestly too long. To observe that a sentence is "very heavy" when compared with other sentences is not, without more, to conclude that it exceeded the bounds of the sentencer's discretion.

Other sentencing decisions – infliction of injury by fire

6.19 The sentencing judge was provided with a number of sentencing decisions (involving the infliction of injury by fire) during the plea hearing. In sentencing the respondent, the judge stated he took into account the cases that had been handed up.[38]

6.20 On appeal, it was contended by the respondent that the decisions provided to the sentencing judge were "similar" in nature – thus demonstrating the manifest excessiveness of the sentence imposed by the judge as it was out of kilter with those sentences.[39] It should be noted that this approach was different to that taken before Judge Montgomery where such decisions were described by counsel as being of "limited assistance" (see para 5.30 above).

6.21 In any event, the appellant submits the relevant sentencing decisions did not provide a sentencing range for this example of the offence – whilst the decisions had a common feature of using fire to inflict injury, there were many distinguishing features. In short, the cases formed no more than a general "yardstick" which the sentencing judge was bound to have regard to but in no way did any of the decisions dictate what the appropriate sentence should be.[40]

6.22 Importantly, none of the decisions provided to the judge involved "worst case" offending.

6.23 As to these sentencing decisions, there were important differences in the circumstances of the offending and the personal circumstances of the offender. For example:

- in *The Queen v Alipek*, a sentence of 12 years imprisonment was imposed on a charge of attempted murder in circumstances where the victim had been set alight by the offender who was a jealous ex-partner – importantly, the sentence had been reduced by the judge on the basis of the offender's depleted psychiatric condition at the time of the offending[41] – on appeal, the Court of Appeal concluded that the sentence was "within range";[42]

- in *The Queen v Huitt*, a sentence of 4 years 6 months imprisonment was imposed on a charge of intentionally causing serious injury in circumstances where the victim had been set alight by a co-offender – the co-offender and the victim had been involved in an earlier altercation where the victim had punched the offender – the offender was suffering from a compromised mental state – on appeal, the sentence was described as merciful rather than excessive;[43] and

- in *Emery v The Queen* and *The Queen v Rossi*, the victim was set alight by Rossi – the victim did not suffer life-threatening injuries – Rossi suffered a depressive order and depleted psychological state[44] – Rossi was sentenced to 7 years imprisonment following a jury trial – Emery suffered a substantial personality disorder[45] – Emery was sentenced to 5 years imprisonment following a plea (confirmed on appeal).[46]

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[38] See *DPP v Yavaz Kilic* [2015] VCC 392, at 42 [32]
[39] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [32]
[40] See *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520, at 535-537 [49], [53]-[54]
[41] [2004] VSC 206, at [44]
[42] [2006] VSCA 66
[43] [1998] VSCA 118
[44] [2010] VSC 602, at [23]
[45] [2010] VSC 478, at [29]
[46] [2011] VSCA 212

Categorisation of offending as "worst case"

6.24 In his reasons for sentence, Judge Montgomery stated that he found "it hard to recall a more serious example of this type of offending in my 38 years in the criminal law".[47]

6.25 On appeal, the Court of Appeal concluded that the offending plainly fell within the "worst case" category:[48]

> The offending in this case was truly horrific. The intentional setting on fire any person with ensuing and entirely predictable life-threatening burns to a large part of the body, clearly places the case within the worst category of this offence. The injuries resulted in a period of intense and relentless pain. The aftermath of the injuries involved numerous surgical procedures each of which involved their own risks and complications. The victim required skin grafts taken from healthy parts of her body to replace damaged skin. Due to the physical and mental impact of the injuries, the victim elected to terminate her pregnancy." [emphasis added]

Variations of offence gravity within "worst case" category

6.26 Notwithstanding the conclusion that the offending fell within the "worst case" category, the Court below held that there were variations in the objective gravity of cases falling within this category.[49] The appellant submits that this statement of principle is contrary to law [**see ground 2 of appeal**].

6.27 In short, there are no variations in offence gravity within the "worst case" category – once an offence is so classified, it is inutile to speak of an offence falling at either the "lower end", the "middle range" or at the "higher end" of the category based on a comparison with other cases so classified. The appellant cannot locate any authority which supports such a proposition. Such variations would create artificial distinctions – for example, it is often difficult to draw meaningful differences between long-term physical and mental impairment.

6.28 Classification of an offence as falling within the "worst case" category is significant in that a sentencing court is then required to steer by the maximum penalty prescribed for the relevant offence. Whilst the appellant accepts that a sentencing court is not bound to impose the maximum penalty in all such cases (often due to variations in the personal circumstances of an offender), it is of course open to do so in an appropriate case.

6.29 In this Court's decision in *Veen v The Queen (No. 2)*, the plurality observed:[50]

> The second subsidiary principle material to this case is that the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: *Ibbs v R*.... That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness.

6.30 The relevance of the maximum penalty to sentencing was explained in the judgment of the plurality in this Court's decision in *Markarian v The Queen*:[51]

> Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance....
>
> It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

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[47] See *DPP v Yavaz Kilic* [2015] VCC 392, at 40 [22]
[48] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [31]
[49] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [49]
[50] (1988) 164 CLR 465, at 478
[51] (2005) 228 CLR 357, at 372 [30]-[31]

Other sentencing decisions – "worst case" category

6.31 It was contended by the respondent in the Court below that other sentencing decisions dealing with "worst case" offending (but not involving the use of fire as a weapon to inflict injury) demonstrated the manifest excessiveness of the sentence imposed.

6.32 In the three sentencing decisions selected for comparison, the sentences imposed varied from as low as 9 years 6 months imprisonment to as high as 15 years imprisonment.[52] The Court of Appeal noted that the respondent's sentence was the "second highest" sentence for the offence of intentionally causing serious injury ever imposed.[53]

6.33 Several things must be said in response. First, it is hardly remarkable that the sentence under examination was the "second highest" sentence ever imposed as there were only three other sentencing decisions falling within the "worst case" category. Secondly, as this Court recently observed in *The Queen v Pham*, "it is not meaningful to speak of a pattern of past sentences in the case of offences which are not frequently prosecuted and where a relatively small number of sentences make up the set".[54] This observation is particularly important as there were only three decisions under examination for comparison purposes and, as the Court below observed, "[t]he use of fire to intentionally inflict serious injury is a rarity within the criminal law".[55] Thirdly, the three cases relied upon by the respondent do not support a claim as to manifest excessiveness – here the victim's injuries are also grave and permanent in nature and the circumstances of the attack are properly described as "truly horrific". Finally, and in any event, the sentence imposed upon the respondent did not fall outside the parameters of the relevant sentences under examination.

6.34 As to these sentencing decisions involving "worst case" offending, the following should be noted:

- in *DPP v Terrick, Marks & Stewart*, 3 offenders were involved in an unprovoked violent attack on a tourist in a public street; the victim suffered permanent physical and mental injuries; the offenders were grossly intoxicated; the offenders were aboriginal and had suffered deprived social upbringings; Terrick and Marks pleaded guilty to intentionally causing serious injury; both had extensive prior convictions; on a Crown appeal, Terrick and Marks were re-sentenced to 11 years 6 months imprisonment – however, the appellate court expressly reduced the sentence due to the application of double jeopardy;[56]

- in *Arthars & Plater v The Queen*, the offenders went to the victim's home where he was attacked; the victim was left with permanent brain injury and physical disabilities; Arthars and Plater pleaded guilty to intentionally causing serious injury; Arthars had a long history of psychiatric problems; delay of almost 4 years between offending and sentence; both offenders had very good prospects of rehabilitation; Arthars was sentenced to 9 years 6 months imprisonment and Plater was sentenced to 10 years imprisonment;[57] on appeal, both sentences were held to be within the permissible sentencing range;[58] and

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[52] See *DPP v Terrick, Marks & Stewart* (2009) 24 VR 457; *Arthars & Plater v The Queen* (2013) 39 VR 613; *Ali v The Queen* [2010] VSCA 182

[53] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [8], [45], [47]

[54] (2015) 325 ALR 400, at 411 [49]; see also *GC v The Queen* (2013) 39 VR 363, at 372 [39]-[40]; *Bao v The Queen* [2016] NSWCCA 16, at [70]-[72]

[55] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [32]

[56] (2009) 24 VR 457, at 479 [93]

[57] Unreported, Vic County Court, 20/06/2012

[58] (2013) 39 VR 613

- in *Ali v The Queen*, the offender was sentenced to 15 years imprisonment on a count of intentionally causing serious injury; the offender engaged in an unprovoked attack on a fellow prisoner; the victim suffered a severe brain injury; the offender had extensive prior convictions; the offender pleaded not guilty – the sentencing judge reduced the sentence on the basis (i) that the offender had endured both anxiety and delay in the resolution of the proceedings (3 trials and 2 appeals over long period of time) and (ii) by 7 months by virtue of the application of totality (service of sentences for unrelated matters during the remand period);[59] on appeal, a complaint that the sentence was manifestly excessive was dismissed.[60]

6.35 Thus, there were important differences in the nature of the offending and the personal circumstances of each of the offenders in the above decisions. Importantly, the sentences imposed did not purport to mark out the boundaries of the available sentencing range – indeed, the judgments in both *DPP v Terrick, Marks & Stewart* and *Ali v The Queen* expressly recognise that higher individual sentences could have been imposed.

Conclusion as to manifest excess

6.36 The Court of Appeal expressly recognised the limitations on the use that may be made of the sentencing authorities relied upon by the respondent.[61] Notwithstanding these limitations, the Court below concluded that the sentence imposed fell outside current sentencing practices for "worst case" offending:[62]

> Notwithstanding the latitude that must therefore be extended to sentencing judges, particularly when sentencing for an offence falling within the worst category, there is such a disparity between the sentence imposed and current sentencing practice as illustrated by the authorities relied upon by the parties, that we are satisfied that there has been a breach of the underlying sentencing principle of equal justice. The sentence imposed is unjustifiably disparate from other sentences imposed for worst category offending by offenders in comparable circumstances. [emphasis added]

6.37 Importantly, the Court of Appeal added that there was a distinction to be made between cases where a victim has suffered "lifelong major physical or mental disabilities" and the injuries suffered by the victim in this case.[63] This conclusion was in conformity with the Court's earlier observation that there are variations in the gravity of cases falling within the "worst case" category (see para 6.26 above). However, such a distinction is quite artificial – either a case objectively falls within the "worst case" category or it does not – and here, the Court had already concluded that it plainly did.

6.38 Furthermore, the appellant submits that it was simply not open on the evidence for the Court of Appeal to draw such a distinction in this case – the unchallenged medical evidence plainly demonstrated the long-term and invasive nature of the injuries suffered by the victim. The victim suffered deep burns to her body with only "a small area of her skin unharmed" after the necessary medical procedures. The injuries were life-threatening but for urgent and complex medical intervention. The victim has suffered long-term scarring to her body. The victim has suffered a diminution in the functionality of her hands and limbs. In short, as Dr Schreiber opined, the victim's quality of life has been diminished. In addition, the sentencing judge was bound to take into account the termination of the pregnancy as part of the long-term impact of the offence on the victim.[64]

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[59] (2007) VSC 350, at [27], [28]
[60] [2010] VSCA 182
[61] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [66]
[62] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [67]
[63] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [68]
[64] See section 5(2)(daa), Sentencing Act 1991; note the definition of "victim" in section 3(1), Sentencing Act 1991 – "victim", in relation to an offence, means a person who ... has suffered injury, loss or damage (including grief, distress,

6.39 The conclusion by the Court of Appeal betrays the following errors:

(i) "current sentencing practices" did not demonstrate that a sentence of 14 years imprisonment (for the offence of intentionally causing serious injury) fell outside the permissible sentencing range open to the judge; **[see ground 1 of appeal]**

(ii) consistency in sentencing means consistency in application of legal principle and not "numerical" consistency; and

(iii) the findings made by the sentencing judge in relation to the personal circumstances of the offender differs to the findings made by the Court of Appeal.

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Examination of "current sentencing practices" for offence

6.40 In Victoria, section 5(2) of the Sentencing Act 1991 sets out a number of factors a sentencing court must have regard to – including the maximum penalty prescribed for the offence, current sentencing practices for the offence, the nature and gravity of the offence, the offender's culpability for the offence, and the impact of the offence on any victim.[65] Thus, "current sentencing practices" is simply one of a large number of factors which impacts upon the proper exercise of the sentencing discretion.

20 6.41 The three cases relied upon by the Court of Appeal to impugn the sentence imposed reveal significant limitations. The decisions were handed down in 2009, 2010 and 2013 – thus, three decisions over the past 7 years were held by the Court below to constitute a reliable sentencing pattern for "worst case" offending. Furthermore, the sentences in question did not mark out the boundaries of the applicable sentencing range, nor did the decisions purport to mark out the correct range for "worst case" offending.

6.42 As noted above, the judge was required to take into account a number of relevant factors in sentencing the respondent. Importantly, the judge was not constrained by sentences imposed in decisions involving other "worst case" offending.[66] The correct approach is
30 stated in the joint judgment of French CJ, Keane and Nettle JJ in *The Queen v Pham*:[67]

> It does not mean that the range of sentences so disclosed is necessarily the correct range or otherwise determinative of the upper and lower limits of sentencing discretion. As was emphasised in *Hili*, and again more recently in *Barbaro v R*, the sentencing task is inherently and inevitably more complex than that.

6.43 A similar observation was made by the Victorian Court of Appeal in an earlier decision of *Likiardopoulos v R*:[68]

> As we have said in our reasons ... using what are described as "worst cases" as a starting point and comparing
40 the circumstances of those cases to the present case is to be deplored. Comparable cases at best are a general guide. A particular sentence is the result of the exercise of a judicial discretion in which the circumstances of the offence and the character and antecedents of the offender are of central importance.

6.44 Notwithstanding the reference to the decision in *Hudson v The Queen*,[69] the appellant submits that the Court below ignored the limitations imposed by sentences imposed in other decisions involving "worst case" offending. The Court below repeatedly stated that the sentence imposed was the second highest sentence ever imposed – yet as the Victorian Court of Appeal observed in *DPP v Terrick, Marks & Stewart*:[70]

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trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender

[65] See section 5(2)(a), (b), (c), (d) (daa), Sentencing Act 1991

[66] See, for example, *DPP v Arney* [2007] VSCA 126

[67] (2015) 325 ALR 400, at 405 [27]

[68] (2010) 30 VR 654, at 690 [172]

[69] (2010) 30 VR 610, at 618-620 [36]-[38]

[70] (2009) 24 VR 457, at 477 [81]

> The highest sentences previously imposed for an offence should not be regarded as creating a ceiling or a sentencing practice which constrains the imposition of higher sentences in "worst category" cases. The need to have regard to current sentencing practices does not mean that the measure of manifest inadequacy is "capped" or "collared" by the highest sentences previously handed down. The possibility is not foreclosed that a sentence near the largest previously imposed may be manifestly inadequate.

6.45 The above observations were forcefully echoed by Nettle JA (as he then was) in the Crown appeal of *DPP v Zullo* where his Honour stated in the context of the offence of intentionally causing serious injury:[71]

> It is said that the longest sentence ever imposed in this State for an offence of causing serious injury intentionally is ten years' imprisonment, and it has been said that it is only the most serious cases of the offence that have attracted a sentence within what is described as "the very top of the range" of between six and ten years. In the past that may have been so. When it was the case, a sentence for this offence of three-and-a-half years' imprisonment with a non-parole period of two-and-a-half years might have been within the range. But it is no longer the case. The so-called "very top of the range" of six to ten years was established when the maximum penalty for causing serious injury intentionally was only twelve years and six months' imprisonment. The maximum penalty is now almost double that amount. Now the "very top of the range" is upwards of fifteen years.

6.46 The above cited decisions correctly set out the relevance of current sentencing practices and/or comparable cases to the exercise of the sentencing discretion. Indeed, this Court recently restated the principles in *Hili v The Queen; Jones v The Queen*:[72]

> Next, in seeking consistency, sentencing judges must have regard to what has been done in other cases. In the present matter, the prosecution produced detailed information, for the sentencing judge and for the Court of Criminal Appeal, about sentences that had been passed in other cases arising out of tax evasion as well as cases of customs and excise fraud and social security fraud. Care must be taken, however, in using what has been done in other cases.
>
> In *Director of Public Prosecutions (Cth) v De La Rosa*, Simpson J accurately identified the proper use of information about sentences that have been passed in other cases. As her Honour pointed out, a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. As her Honour said: "Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and of appellate courts". But the range of sentences that have been imposed in the past does not fix "the boundaries within which future judges must, or even ought, to sentence". Past sentences "are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, *and stand as a yardstick against which to examine a proposed sentence*" (emphasis added). When considering past sentences, "it is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned".

6.47 However, in recent times, the Victorian Court of Appeal has adopted a rather inflexible approach to "current sentencing practices" – allowing such practices to impermissibly constrain or fetter the sentencing discretion. Three recent decisions amply demonstrate this.

6.48 In *Hasan v The Queen*,[73] the offender pleaded guilty to one count of rape and the summary offence of failing to answer bail. The offender sexually penetrated the victim while she was asleep. The offender was not wearing a condom, and ejaculated inside the victim. He was intoxicated. While on bail the offender had left Australia in breach of his bail conditions. He was arrested and returned to Australia more than two years later. The maximum penalty for rape is 25 years imprisonment. The offender was sentenced to six years imprisonment on the rape count and six months imprisonment for failing to answer bail. A non-parole period of four years imprisonment was set. The offender appealed against severity of sentence.

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[71] [2004] VSCA 153, at [10]
[72] (2010) 242 CLR 520, at 536-537 [53]-[54]
[73] (2010) 31 VR 28

6.49 The Court of Appeal (Maxwell P, Redlich and Harper JJA) allowed the appeal holding that the sentence was manifestly excessive:[74]

> Rape is a very serious offence, as the maximum of 25 years fixed by Parliament indicates....
>
> This case was far from the most serious of its kind. It involved no violence, no threats and no weapon. The victim's home was not invaded. On the other hand, advantage was taken of a sleeping woman. She was subjected not merely to an invasion of her body but to an invasion by way of unprotected penile penetration followed by ejaculation. While far from the worst, it was nevertheless a very bad case.
>
> This sentence is just over 20% of the maximum. Were it not for current sentencing practice, the aggravating features of the appellant's conduct would, in our view, indicate that a sentence of six years' imprisonment was merciful, even when full account is taken of his previous good character and his plea of guilty.

6.50 During the course of the judgment, the Court of Appeal reviewed 5 cases involving rape committed upon a sleeping victim – the sentences ranged from 3 to 6 years imprisonment. The Court also reviewed 4 other cases involving a victim who was not asleep – again the sentences ranged from 3 to 6 years imprisonment. The appellant submits that the Court fell into error by not examining whether the current sentencing practices (so identified) disclosed the correct range for the relevant offending. That the Court felt bound by inadequate sentencing practices is made clear in the concluding remarks of the judgment:[75]

> As we have said, but for the constraints of current sentencing practices and the requirement of consistency, we would have dismissed this appeal. This brief survey of recent sentencing decisions underlines, in our view, the need for a review of current sentencing practices for rape....

6.51 In *Ashdown v The Queen*,[76] the offender pleaded guilty to counts of recklessly causing serious injury (charge 1) and assault (charge 2). The offending involved a violent attack upon the offender's former girlfriend and her son. The offender was sentenced to 5 years imprisonment on charge 1 (which carried a maximum penalty of 15 years imprisonment). The offender successfully appealed against severity of sentence to the Court of Appeal (Maxwell P, Ashley and Redlich JJA) – the sentence was reduced to 3 years 6 months imprisonment.

6.52 Maxwell P held that the sentence imposed on charge 1 was exceptionally high under current sentencing practices and that the circumstances of the offending did not warrant such a sentence. Importantly, his Honour held that "[u]nconstrained by current sentencing practices, however, I would have regarded the sentence as unimpeachable".[77] The rationale for this approach was expressed by his Honour as follows:[78]

> The applicable sentencing range for an offender who pleads guilty will to a substantial degree be determined by current sentencing practices. This is so for three reasons. First, the sentencing judge is required by statute to have regard to current sentencing practices. Secondly, the offender's plea of guilty will have been entered on the reasonable assumption that his/her sentencing will be in line with current practice. Thirdly, as this court has repeatedly emphasised, consistency of sentencing is a fundamental objective of the criminal law. The rule of law requires that like cases be treated alike.

6.53 However, the appellant submits that the above rationale is erroneous – an offender only enjoys a legitimate expectation to be sentenced according to law – and if current sentencing practices are incorrect (or deficient), then an offender enjoys no right to be sentenced according to such practices. In short, if it were otherwise, past sentencing practices would operate as precedent, thus frustrating the proper exercise of the sentencing discretion reposed in judges. **[see ground 4]**

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[74] Ibid, at 38 [40]-[42]
[75] Ibid, at 43 [60]
[76] (2011) 37 VR 341
[77] Ibid, at 345 [4]; see also 358 [48], 359 [55]
[78] Ibid, at 345-346 [5]; see also *Pham v The Queen* (2014) 244 A Crim R 252, at 256 [10], 261-262 [42]-[44]

6.54 Whilst agreeing that the sentence appeal should be allowed, Ashley JA eschewed the Court's recent approach to the operation of current sentencing practices in sentencing. After setting out an analysis of the relevant legal principles, his Honour stated:[79]

> [W]hile sentencing range can be informed by "current sentencing practices" and "comparable cases" in the ways which I have described, I do consider that relentless reference by this court to current sentencing practices, and the recitation of statistics, has the capacity to distort the process of instinctive synthesis — a process reliant upon a judge bringing together all relevant circumstances (which travel well beyond the confines of s 5(2)) to produce a sentence which, in the judge's opinion, is appropriate to the circumstances of the offence and the offender.

6.55 However, perhaps the most striking example of the recent approach adopted by the Victoria Court of Appeal to current sentencing practices (i.e. swamping of the sentencing discretion) can be seen in *DPP v Dalgliesh (A Pseudonym)*.[80] In that case, the offender pleaded guilty in the County Court to incest (2 charges), indecent assault and sexual penetration of a child under 16. The Crown appealed, inter alia, against the inadequacy of the sentence imposed on the charge of incest (charge 1) where a sentence of 3 years 6 months imprisonment was imposed – this offence involved the victim (who was 13 years old) falling pregnant to the offender (who was the partner of the victim's mother). A sentence of 3 years imprisonment was also imposed on a second charge of incest – however this offence did not involve the victim falling pregnant. The maximum penalty for incest is 25 years imprisonment.

6.56 The Court of Appeal (Maxwell ACJ, Redlich & Beach JJA) dismissed the appeal holding that the sentence imposed for the relevant charge of incest did not fall outside current sentencing practices. The Court reviewed a number of appellate decisions involving incest where the victim fell pregnant – however, such decisions exhibited significant variations in the nature of the offending and personal circumstances. The Court jointly stated:[81]

> But for the constraints of current sentencing practice, the objective seriousness of the conduct constituting charge 1 demanded a considerably longer sentence than three years and six months, even allowing for the factors in mitigation. CD's [respondent's pseudonym] conduct was opportunistic and abhorrent....
>
> That current sentencing practices are at such low levels clearly demonstrates that the principles of sentencing are not being consistently and appropriately applied. Put simply, current sentencing does not reflect the objective gravity of such offending or the moral culpability of the offender. There is a lack of differentiation between the different categories of seriousness, and that has resulted in an unworkably narrow band within which judges are able to sentence for offending of this nature.

6.57 The Court of Appeal then undertook a review of current sentencing practices for the offence of incest before concluding as follows:[82]

> But for the constraints of current sentencing which – as we have said – reflect the requirements of consistency, we would have had no hesitation in concluding that the sentence imposed on CD [respondent's pseudonym] was manifestly inadequate. On the basis of the principles we have set out, a sentence of the order of seven years' imprisonment was warranted for charge 2, with the aggravating circumstance of pregnancy requiring a significantly higher sentence again on charge 1.

6.58 Thus, the Court dismissed a Crown appeal against sentence notwithstanding its conclusion that the sentences imposed on both charges of incest were manifestly inadequate – in short, past sentencing decisions have been used to arithmetically "cap" the permissible range.

6.59 This novel approach to current sentencing practices is also reflected in other recent decisions of the Victorian Court of Appeal involving a wide range of criminal offences.[83]

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[79] Ibid, at 398 [167]
[80] [2016] VSCA 148 – note this decision is the subject of a pending application for special leave to this Court by the Crown [see M99 of 2016]
[81] Ibid, at [53], [64]
[82] Ibid, at [132]

6.60 The appellant submits that the correct approach was expounded by Nettle JA (as he then was) in an earlier decision of *DPP v OJA, WBA & EBD*. In dealing with a Crown appeal against sentence involving multiple sexual offences, his Honour stated:[84]

> I start from the approach that there is no sentencing tariff as such. Apart from the maximum sentence prescribed by Parliament, the intuitive synthesis approach to sentencing implies an absence of necessary relationship between one case and another....
>
> Secondly, the need to have regard to current sentencing practices does not mean that the measures of manifest excessiveness and manifest inadequacy are capped and collared by the highest and lowest sentences for similar offences hitherto imposed. In fact, as in theory, each case is different and so it is always possible that a sentence may properly rise above or fall below the greatest and lowest sentences previously imposed....
>
> Thirdly, and importantly, it should not be thought that the statutory requirement to have regard to current sentencing practices forecloses the possibility of an increase or decrease in the level of sentences for particular kinds of offences. Over time, views may change about the length of sentence which should be imposed in particular cases and, when that occurs, the notions of manifest excessiveness and manifest inadequacy will be affected.... One must allow for the possibility that sentences to this point have simply been too low.

6.61 Thus the appellant submits that the Court below was wrong to conclude, based upon individual sentences imposed in three cases only, that a sentence of 14 years imprisonment for the crime of intentionally causing serious injury in the relevant circumstances was plainly "unjust or unreasonable". In short, such a sentence fell within the permissible range for a "worst case" – the individual sentence represented only 70% of the maximum penalty.

Summary offences

6.62 In relation to the summary offence of using a prohibited weapon without exemption, the appellant submits that a sentence of 12 months imprisonment is not manifestly excessive in light of the circumstances of the offence and the respondent's prior convictions. The samurai sword was used in a violent manner on two occasions – thrust through the window in front of Bond and then in a demonstration of force on a plastic bottle [see paras 5.11 - 5.12 above]. The respondent had prior convictions for possession of a firearm whilst a prohibited person (sentenced to 3 months imprisonment in March 2013), possess/use a prohibited weapon without exemption (sentenced to a community correction order for 24 months in March 2013), carry an imitation handgun, possession of a prohibited weapon without exemption and possession of a controlled weapon (sentenced to a community correction order for 18 months in August 2012) and possession of a dangerous article (sentenced to an undertaking to be of good behaviour for 12 months in June 2010).[85]

6.63 In relation to the summary offence of dealing with property suspected of being proceeds of crime, again the appellant submits that a sentence of 12 months imprisonment is not manifestly excessive in light of the circumstance of the offence and the respondent's prior convictions. The respondent was found in possession of three stolen credit cards [see para 5.24 above]. The respondent had prior convictions for handling stolen goods and receiving stolen goods (sentenced to a community correction order for 24 months in March 2013) and shop theft (sentenced to a community correction order for 18 months in August 2012).

6.64 Finally, the cumulation orders fixed by the sentencing judge were not excessive as the offending the subject of the summary offences significantly added to the overall criminality of the respondent.

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[83] See, for example, *DPP v DDJ* (2009) 22 VR 444; *DPP v CPD* (2009) 22 VR 533; *Winch v The Queen* (2010) 27 VR 658; *DPP v Leeder* [2010] VSCA 98; *Le v The Queen* [2010] VSCA 199; *Gorladenchereau v The Queen* (2011) 34 VR 149; *Hogarth v The Queen* (2012) 37 VR 658; *Pham v The Queen* (2014) 244 A Crim R 252; *Harrison & Rigogiannis v The Queen* (2015) 74 MVR 58; *Stephens v The Queen* (2016) 76 MVR 90; *Nguyen v The Queen* [2016] VSCA 198

[84] (2007) 172 A Crim R 181, at 195-196 [29]-[31]

[85] See *DPP v Yavaz Kilic* [2015] VCC 392, at 41 [26]

The principle of "equal justice"

6.65 As this Court has repeatedly observed, reasonable consistency in sentencing requires consistency in the application of relevant legal principles – consistency in this sense is not synonymous with numerical equivalence.[86]

6.66 In concluding that the sentence was manifestly excessive, the Court of Appeal applied the concept of "equal justice" – not in the above sense of consistency in the application of sentencing principle but rather in the application of the sentencing principle of parity. In its conclusion on manifest excess, the Court's judgment footnotes the decisions in *Lowe v The Queen*[87] and *Postiglione v The Queen*,[88] both decisions of this Court on parity in sentencing.[89] However, parity is a different sentencing principle altogether – it is concerned with numerical equivalence because fairness dictates joint offenders (who are relevantly identical in terms of their criminality) receive like sentences (provided there is no material variation in their personal histories).[90]

6.67 The principle of "equal justice" was recently examined in the majority judgment of this Court in *Green v The Queen; The Queen v Quinn* – a clear distinction was drawn between the principle of parity and reasonable consistency in sentencing.[91] In short, the weighting of relevant factors by a judge should logically be the same (or relatively similar) when dealing with joint offenders, whereas the weighting exercise may differ between judges when dealing with non-related offenders who commit similar crimes. Thus, the appellant submits that the Court below has erred in seeking to engage parity in sentencing in its comparison of the facts of this case to other cases involving "worst case" offending.[92] **[see ground 3]**

Different weighting – personal circumstances

6.68 In concluding that the sentence was manifestly excessive, the Court of Appeal also took into account (apart from offence gravity) the respondent's personal circumstances including lack of premeditation, genuine remorse, youth, lack of relevant prior convictions and prospects of rehabilitation[93] – however, it is apparent that the Court has weighted some of these factors differently to that of the sentencing judge. In short, the appellant submits that the Court has erred as it has not been demonstrated that Judge Montgomery's weighting of these same factors was wrong.[94] **[see ground 5 of appeal]**

6.69 As to premeditation, the sentencing judge did not accept the submission that the conduct was not premeditated – at most, the judge was prepared to find that the use of petrol as a weapon was opportunistic.[95] This finding was hardly surprising given that the respondent poured petrol over the victim, left the vehicle for some minutes, before returning to ignite the victim whilst uttering the statement "now you can burn bitch". However, the judge did accept that the offence was not planned in advance of the victim arriving at the house.[96] Even on the plea, counsel for the respondent described the conduct as exhibiting an absence

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[86] See *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584, at 608 [65]-[66]; *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520, at 535 [48]-[49]; *The Queen v Pham* (2015) 325 ALR 400, at 406 [28]
[87] (1984) 154 CLR 606, at 610, 616, 623-624
[88] (1997) 189 CLR 295, at 310, 333
[89] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [67] footnote 41
[90] See *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520, at 544 [77]
[91] (2011) 244 CLR 462, at 472-474 [28]-[30]
[92] The correct approach was expounded by Campbell JA (Howie and Rothman JJ agreeing) in the New South Wales Court of Criminal Appeal decision of *Jimmy v The Queen* (2010) 77 NSWLR 540, at 574-575 [136]-[140]
[93] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [68]
[94] See *The Queen v Pham* (2015) 325 ALR 400, at 412-413 [56]
[95] See *DPP v Yavaz Kilic* [2015] VCC 392, at 39 [14]-[16]
[96] See *DPP v Yavaz Kilic* [2015] VCC 392, at 42 [30]

of "significant premeditation"[97] – yet the Court below held that the sentencing judge concluded that the offence was not premeditated.[98]

6.70 As to youth, the sentencing judge moderated the mitigatory weight that normally attaches to this factor in light of the circumstances of the offending.[99] This approach was consistent with authority – as the Court of Appeal acknowledged, the respondent's age could not play a dominant role in the sentencing exercise in light of the offending conduct.[100]

6.71 As to prior convictions, the sentencing judge acknowledged that the respondent did not have any convictions for matter involving violence – however, the respondent did have a criminal history which contained numerous convictions.[101] Furthermore, he had just been released from jail and was subject to a community correction order at the relevant time – both the time in custody and order seemingly not operating as any deterrent.

6.72 Finally, as to prospects of rehabilitation, the sentencing judge stated that it was "difficult to assess" the respondent's prospects of rehabilitation given the respondent's attitude to previous sentencing orders and the "horrific" nature of the offending.[102]

Conclusion

6.73 Whilst the appellant concedes that the sentences imposed on the indictment count and the two summary offences were "heavy", that of itself does not bespeak of error.

Part VII: Applicable constitutional provisions, statutes and regulations

7.1 The applicable statutory provisions have been annexed to these submissions – such provisions are still in force in the same form at the date of these submissions.

Part VIII: Orders sought

8.1 The orders sought are that the appeal be allowed, the orders of the Supreme Court (Court of Appeal) of Victoria be set aside and that the appeal to that Court be dismissed.

Part IX: Presentation of oral argument

9.1 The appellant estimates 1-2 hours are required for the presentation of oral argument.

Dated: 1 September 2016

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[97] See *DPP v Yavaz Kilic* [2015] VCC 392, at 15
[98] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [58]
[99] See *DPP v Yavaz Kilic* [2015] VCC 392, at 41 [28]
[100] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [51]-[52], [55-[56]
[101] See *DPP v Yavaz Kilic* [2015] VCC 392, at 36 [2]-[3], 40 [20], 41 [25], 42 [29]; see also *Yavaz Kilic v The Queen* [2015] VSCA 331, at [59]
[102] See *DPP v Yavaz Kilic* [2015] VCC 392, at 41-42 [29]; see also *Yavaz Kilic v The Queen* [2015] VSCA 331, at [54]