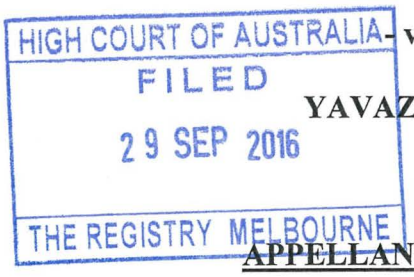
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M105 of 2016

BETWEEN:

THE QUEEN

Appellant



- v -

YAVAZ KILIC

Respondent

APPELLANT'S REPLY

Part I: Suitability for internet publication

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

Part II: Reply to argument of respondent

Grounds 1 & 2

2.1 In response to these grounds of appeal, the respondent raises for consideration the legal meaning of the descriptor "worst case category" for purposes of sentencing.

2.2 Before embarking on an analysis of the meaning of the relevant term, it is important to note the approach of both the sentencing judge and the Court of Appeal to this question.

2.3 During the plea in mitigation, the following exchange occurred between the sentencing judge and defence counsel:[1]

HIS HONOUR: Can you imagine a worse example of this type of offending?
MR LEWIN: Yes, Your Honour, I can.
HIS HONOUR: I admit, thirty-eight years of practice, I can't think of one.
MR LEWIN: Well I'm addressing his personal circumstances.
HIS HONOUR: I understand that.
MR LEWIN: In terms of the gravity of the offending, I won't for a moment submit that it is not a very serious example of this type of offence. There are factors, there are factors which make this short of a worse case example.
HIS HONOUR: What are they?
MR LEWIN: There is an absence of significant premeditation which there often are in cases of intentionally causing serious injury in extreme circumstances.
HIS HONOUR: Yes.
MR LEWIN: This is essentially a spontaneous incident. A weapon was opportunistically used and that was a weapon that was available and obviously I'm talking about the gasoline. There is an absence here, in terms of his culpability of prior criminal history for matters of violence which would aggravate his culpability....
...
MR LEWIN: There's other mitigating factors which - - -

[1] See *DPP v Yavaz Kilic* [2015] VCC 392, at 15-16

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HIS HONOUR: What are they?
MR LEWIN: His plea of guilty.
HIS HONOUR: Yes.
MR LEWIN: I mean that was entered into at the committal hearing, but before any cross-examination of witnesses took place.
HIS HONOUR: Had witnesses been asked for?
MR LEWIN: Witnesses had been asked for, Your Honour. None were cross-examined.
HIS HONOUR: So it wasn't at the first earliest opportunity?
MR LEWIN: It wasn't at the earliest, Your Honour, but very close to insofar as not putting a complainant, or a victim I should say - - -
HIS HONOUR: Was he initially charged with something more serious?
MR LEWIN: No, he was not, Your Honour.
HIS HONOUR: Very well.
MR LEWIN: So the victim hasn't gone through the trauma of cross-examination. This is not an exercise in sentencing following a trial, and a declaration or a protestation of innocence. It is an acceptance of responsibility which would bring this down from a worst case scenario.
HIS HONOUR: It brings it down from running a trial and being convicted.
MR LEWIN: Yes. Your Honour, I'm not, and perhaps there's no confusion in my submissions. I'm not, for a moment, submitting that this is not a very serious offence. Not for a moment. Perhaps, I'm just addressing Your Honour's query about worst case examples. [emphasis added]

2.4 The above exchange demonstrates that the sentencing judge and defence counsel appear to be somewhat at cross-purposes – the judge is clearly confining the "worst case" descriptor to the gravity of the offence alone, whereas defence counsel was submitting that the judge was not dealing with a "worst case example" due to the presence of personal mitigating factors.

2.5 In the reasons for sentence, Judge Montgomery returned to this topic by stating:[2]

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. [emphasis added]

2.6 Thus, it is plain that the sentencing judge was using the "worst case" (or "worst example") descriptor solely by reference to the objective features or gravity of the offence.

2.7 Likewise, the Court of Appeal confined the use of the descriptor in the same manner as the sentencing judge. The Court stated:[3]

The intentional setting on fire of 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.* [emphasis added]

2.8 That this is so is reinforced by the Court's later observation in relation to current sentencing practices for the offence of intentionally causing serious injury:[4]

Notwithstanding the *unequivocal seriousness of the present offending*, which justifies its categorisation as a worse case offence, it must be recognised that the *objective gravity of cases falling within this category* will vary as will the characteristics of the offenders. [emphasis added]

2.9 The term was referred to in the joint judgment of this Court in *Veen v The Queen (No. 2)*:[5]

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. A sentence which imposes the maximum penalty offends this principle only if the case is recognisably outside the worst category.

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[2] See *DPP v Yavaz Kilic* [2015] VCC 392, at 40 [22]
[3] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [31]
[4] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [49]
[5] (1988) 164 CLR 465, at 478 per Mason CJ, Brennan, Dawson and Toohey JJ

2.10 From this passage, the principle appears to be confined to an assessment of the objective circumstances of the crime[6] – that is hardly surprising given the great variations which attend the personal circumstances of an offender.

2.11 Whilst there are no doubt examples of decisions which deploy the relevant term to include both offence gravity and the personal circumstances of an offender,[7] the term is better understood in terms of an assessment of offence gravity alone – for example, it is often useful to speak of offending as "low range", "mid-range" or "high range" – and the descriptor "worst category" logically falls within this particular terminology.

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2.12 General support for the appellant's contention can be found in the judgment of Badgery-Parker J (Carruthers and Finlay JJ agreeing) in *R v Twala*:[8]

> It is trite law that the imposition of the maximum penalty for any offence is a sentencing option reserved for cases which can properly be characterised as falling within the worst category of cases for which that penalty is prescribed. *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452 ... "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.": *Veen v The Queen (No 2)* (1987-1988) 164 CLR 465 at 478. Sully, J correctly observed *that proper principle, correctly applied, requires a consideration initially of "the gravity of the offence viewed*
> 20 *objectively*": *The Queen v Camilleri* (CCA, unreported 8 February 1990) and stated his view that the objective facts "establish this crime in purely objective terms as a murder of the gravest culpability"....
>
> ...
>
> [I]n order to characterise any case as being in the worst case category, it must be possible to point to particular features which are of very great heinousness and it must be possible to postulate the absence of facts mitigating the seriousness of the crime (*as distinct from subjective features mitigating the penalty to be imposed*). [emphasis added]

2.13 The approach adopted in *R v Twala* [in terms of defining the content of "worst case" category] has been consistently applied in New South Wales both in the Court of Criminal
30 Appeal[9] and Supreme Court divisions;[10] and the decision has also been cited with approval in Queensland.[11]

2.14 As the appellant has already acknowledged, that an offence falls within the "worst case category" does not result in the automatic fixing of the prescribed maximum penalty – that will invariably depend on the relevant subjective features (personal to an offender). Importantly, the designation of an offence as falling within the "worst category" is highly relevant as the prescribed maximum penalty acts as a powerful "yardstick" or "navigational aid" for a sentencing court.[12]

40 2.15 In this case, the sentencing judge did take into account the personal circumstances of the respondent and fixed a sentence of 14 years imprisonment on the charge of intentionally causing serious injury as the appropriate sentence in all the circumstances. Unquestionably, the judge has given full weight to all mitigating factors – and, with respect, such a sentence bears some relativity to the prescribed maximum penalty. And yet the Court of Appeal has

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[6] See also *Bensegger v R* [1979] 1 WAR 65

[7] See, for example, *R v Tait & Bartley* (1979) 46 FLR 386, at 398

[8] Unreported, NSWCCA, 4/11/1994, at 2, 6

[9] See, for example, *R v Harris* (2000) 50 NSWLR 409, at 423 [84]; *R v Rae* [2001] NSWCCA 545, at [14]; *R v Hill* [2003] NSWCCA 128, at [16]; *R v Little* [2010] NSWCCA 32, at [56]; *De Jong & Ors v R* [2015] NSWCCA 32, at [56]

[10] See for example, *R v McKnoulty*, unreported, NSWSC, 6/7/1995; *R v Kalajzich* (1997) 94 A Crim 41; *R v Georgiou* [2001] NSWSC 287; *R v Staples* [2001] NSWSC 990; *R v Tran* [2002] NSWSC 394; *R v Law* [2002] NSWSC 952; *R v Merritt* [2002] NSWSC 1159; *R v Sievers* [2002] NSWSC 1257; *R v MSK & Ors* [2004] NSWSC 319; *R v Wallace* [2006] NSWSC 897; *R v Johnston* [2007] NSWSC 274; *ASP v R* [2007] NSWSC 339; *R v RHB* (2007) 180 A Crim R 320; *R v Farmer* [2008] NSWSC 581

[11] See, for example, *R v D* [1999] QCA 231, at [10]; *R v Rowlingson* [2008] QCA 395, at [34]

[12] See, for example, *Markarian v The Queen* (2005) 228 CLR 357, at 372 [31]; *DPP v Aydin* [2005] VSCA 86, at [12]

concluded such a sentence is manifestly excessive (not reasonably open to the judge in the sound exercise of discretionary judgment) and has proceeded to fix a sentence of 10 years 6 months imprisonment for the offence – such a sentence sits at just above 50% of the maximum penalty, and is fixed in circumstances where the respondent is simply unable to point to a constellation of compelling mitigating features. In short, such a sentence bears no relationship whatsoever to the prescribed maximum penalty and is more akin to the offending being categorised as either "mid-range" or "high range".

Notice of contention

2.16 As to the respondent's notice of contention that the Court of Appeal erred in concluding that this case fell in the "worst category" of cases of intentionally causing serious injury, the appellant submits that the conclusion was one "reasonably open" in all the circumstances. Contrary to the respondent's submission, such a categorisation is a finding of fact.[13]

2.17 In short, the respondent intentionally set on fire a young female who suffered life-threatening burns to her body. The injuries required complex surgical interventions. The victim has suffered permanent injuries to her body. The injuries required the victim to terminate a pregnancy. Whilst there was no real planning, there was an aspect of premeditation. The very serious injuries suffered by the victim were entirely foreseeable by the respondent as a consequence of his conduct. The respondent's culpability was not tempered by immaturity, drugs/alcohol ingestion or any mental impairment. The purpose for the attack was to punish the victim for exercising her rights to step away temporarily from a relationship – and, as the sentencing judge remarked, yet another example of domestic violence committed upon a vulnerable female.

2.18 As to categorisation, the Court of Appeal has not erred in its approach by solely focusing on the objective features of the offence – and, adopting the language of Badgery-Parker J in *R v Twala*, the relevant crime is plainly marked out by features of "very great heinousness".

Ground 3

2.19 The appellant generally joins issue with the respondent's submissions on this ground.

Ground 4

2.20 In this case, the Court of Appeal moved to re-sentence in accordance with a purported sentencing range drawn from three cases involving "worst category" offending without first identifying what indeed was the appropriate (or correct) range for such offending. This step in the process is particularly important as sentencing practices may shift or alter over time. However, in Victoria, that step is not undertaken on the ground that an offender has a "legitimate expectation" to be sentenced in accordance with "current sentencing practices" (whether appropriate or otherwise) as they exist at the entry of the plea.

2.21 Thus, an issue requiring resolution is the approach of the Victorian Court of Appeal to cases where adherence to current sentencing practices results in a sentence that is contrary to the proper application of the relevant sentencing principles engaged in the particular case. If this approach is indeed correct, then the step identified above (in para 2.20) is rendered otiose as a sentencing court is simply bound to sentence in accordance with the sentencing practices so identified.

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[13] See, for example, approach adopted in *Ross v R* [2016] NSWCCA 176, at [49]

2.22 In short, the appellant submits that a sentencing court is required to ascertain whether the identified sentencing practices are "appropriate" in all the circumstances (and that was not done in this case). The vice that can be identified in the approach currently adopted by the Victorian Court of Appeal is the reference in judgments to an offender's "legitimate expectation that he or she will be sentenced in accordance with current sentencing practices" – but where sentencing practices are deficient, the correct approach is to sentence in accordance with law [namely the application of all relevant sentencing principles which would involve the according of little or no weight to the deficient sentencing practices that exist at the time]. The advantage of this approach is of course that a court does not simply perpetuate sentencing error.

2.23 Under the cover of this ground, the respondent also refers to the reservations the Court of Appeal had in which the sentencing discretion is exercised – the Court stated it would have been prudent to defer the passing of sentence rather than proceed on the same day given the nature of the offence and the likelihood of the imposition of a substantial term of imprisonment.[14] It is not clear as to why this is so – particularly given the extensive experience the sentencing judge had in the practice of the criminal law; that he had already read the depositions (before hearing the plea); and that the plea submissions did not involve the enlivenment of complex sentencing principles. After all, it used to be the invariable practice of judges in this State for many decades to pass sentence immediately after the conclusion of a plea in mitigation (even in cases involving very serious offences) – a practice that now seems to be frowned upon.

2.24 Otherwise, the appellant generally joins issue with the respondent's submissions on this ground save footnote 27 where the appellant accepts the correction of a typographical error in its filed submissions.[15]

Ground 5

2.25 The appellant generally joins issue with the respondent's submissions on this topic.

Summary offences

2.26 Under the cover of ground 5, the appellant makes a general complaint that the Court of Appeal failed to properly apply the legal principles governing the appellate review of a sentencing decision – this applies both to the main indictment charge (intentionally causing serious injury) and the two summary offences. Whilst the focus of the appeal is obviously in relation to the indictment charge, the erroneous approach adopted by the Court also filters down to the summary offences.

Dated: 29 September 2016

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[14] See *Yavaz Kilic v The Queen* [2015] VSCA 331, at [61]-[64]

[15] At para 6.23 of the Appellant's Submissions, in respect of the decision of *The Queen v Huitt*, the paragraph should read the victim punched the co-offender [and not the offender]