IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S281 of 2015

BETWEEN:

JOEL BETTS
Appellant

AND

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

PART I. CERTIFICATION

1.1 It is certified that these submissions are in a form suitable for publication on the Internet.

PART II. A CONCISE STATEMENT OF ISSUES

2.1 Where an appellate court has found error in the exercise of the sentencing discretion and proceeds to exercise the discretion afresh, may it decline to take into account new evidence adduced by the appellant bearing on the factors causing or contributing to the offence on the basis that an appeal against sentence "does not provide an opportunity" to have taken into account evidence that should have been adduced in the original sentencing proceedings?

2.2 What limitations does the *Criminal Appeal Act 1912* NSW ("the Act") place on the discretion of the Court of Criminal Appeal to receive new evidence in an appeal against sentence?

2.3 How should that discretion be exercised when the Court of Criminal Appeal is exercising the sentencing discretion afresh?

Filed on behalf of the Appellant
Dated: 29 January 2016

THE APPELLANT'S SOLICITOR IS:
Murphy's Lawyers, Suite 820, Level 8, 185 Elizabeth Street, Sydney NSW 2000
Telephone: (02) 9264-2144
Facsimile: (02) 9283-1997

Ref.: Bryan Wrench

2.4 In what circumstances may the power to remit in s 12(2) of the Act be exercised?

PART III. CERTIFICATION WITH RESPECT TO SECTION 78B

3.1 It is certified that the appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and it is considered that no notice should be given.

10

PART IV. REPORTS

4.1 The judgment of the NSW Court of Criminal Appeal has the following internet citation: *Betts v The Queen* [2015] NSWCCA 39.

PART V: A NARRATIVE STATEMENT OF THE RELEVANT FACTS

20 5.1 The appellant entered pleas of guilty to two offences:

1. on 17 April 2010 wounding Samantha Holland with the intent to murder her; and

2. on 17 April 2010 detaining Samantha Holland without her consent and with the intent to obtain an advantage, namely psychological advantage, and immediately before the detaining actual bodily harm was occasioned to her.

5.2 In the sentencing proceedings before Toner J in the NSW District Court, some facts were agreed between the parties and a document entitled "Agreed Facts" was received by
30 the sentencing judge. In summary, it was agreed that the appellant and the victim commenced a relationship in 2007 but it had broken down by 5 April 2010. The victim moved out of the unit they had lived in together, and the appellant arranged to sell it. It was agreed the victim would move her possessions out of the unit on 17 April 2010 and the appellant told her he would not be present when she went there. However, he was there and they talked for some time. The appellant attempted to repair the relationship saying there was no reason for them to be apart. However, the victim rejected this. As she moved to leave the unit, he began to stab her repeatedly in the back. At some point, the appellant stabbed himself in the chest. He continued to stab her. She made several unsuccessful attempts to escape. The appellant continued to stab her and cut his own wrist and stabbed
40 himself in the neck. He said "We will die here together. Then we can be together for eternity". When the victim said she "should have a turn with the knife", the appellant obtained a knife from the kitchen, handed it to her and the victim stabbed him in the stomach. The appellants said "That was a good one". They stabbed each other several more times. The victim again attempted to escape without success. The appellant sent several text messages on the victim's phone. When the victim asked the appellant "why did you do it?" he answered "You kept saying that it was over. That the damage had been done." The victim eventually escaped and the police were called, arresting the appellant.

Police located a piece of paper in the unit which had on it the words written by the appellant "You know I love you, but I hate you because I know I could never replace you".

5.3 In the Agreed Facts it was not stated from where the appellant had obtained the first knife used in the attack (although it was agreed that the second knife was "grabbed" by the appellant "from the kitchen"). However, the appellant testified that he picked up the first knife from the kitchen bench just before he attacked the victim (T 19) and this assertion was not challenged in cross-examination (T 31).

5.4 In the defence case in the sentencing proceedings, evidence was adduced in an attempt to establish that:

(a) the appellant, when he was a child, was subjected to sustained physical and emotional abuse at the hands of his mother's partner; and

(b) there was a causal link between this abuse and the offences.

There was also evidence adduced that the appellant took a hallucinogenic drug named dimethyltryptamine (DMT) on 14 April and again on 17 April 2010 (the day of the offences) and his subjective experience of this drug was that "nothing was really making sense, changes in perceptions of the environment and perhaps frank perceptual disturbances" (report of Dr Bruce Westmore, 29.9.2011, 2.3).

5.5 A number of expert reports adduced by the defence were admitted into evidence in the sentencing proceedings including:

(a) Exhibit 5: two reports of Dr Bruce Westmore, forensic psychiatrist, dated 3 January 2011 and 29 September 2011; and

(b) Exhibit 6: one report of Dr David Lake, general practitioner and psychotherapist, dated 16 June 2011.

5.6 In his report of 3 January 2011, Dr Westmore stated at 8.2:

> I do not believe he has a psychiatric defence to the matters now before the court but it is likely he was depressed at the time of the offending behaviour and that might be considered by the court by way of mitigation. He had financial difficulties, his relationship had broken down, he felt generally unsupported and he was being evicted from his accommodation.

Dr Westmore also stated at 7.9:

> [T]here is no clear evidence or indications to suggest that he was suffering from a drug induced psychosis at the time of the offending behaviour.

In his supplementary report of 29 September 2011, Dr Westmore stated at 2.5 - 2.7:

> [I]t is likely he was adversely affected by the drug DMT at the relevant time including perceptual disturbances and an altered perception of his environment. Despite that however, I am again not able to indicate that he was suffering from a frank drug induced psychosis which might have relevance to the offence itself. ... Mr Betts certainly describes altered experiences arising from his use of the substance DMT, but again I cannot confirm that he developed a psychotic illness as a result of the use of the drug ...

5.7 In his report of 16 June 2011, Dr Lake stated that he had a number of "sessions" with the appellant between December 2003 (when he presented "as a young man in a crisis") and 2 October 2008 (when "he had settled from his crisis").

5.8 On 18 May 2012, the appellant was sentenced by Toner J. The sentencing judge accepted that the crimes were "incongruous" to a person with no criminal record who demonstrated the following characteristics: "a generous, loving, honest, reliable man of integrity and gentility" (at [44]-[45]). The sentencing judge also accepted that between his relatively early teenage years and into his early adulthood the appellant was subjected to sustained physical and emotional abuse at the hands of his mother's partner (at [48]). However, the sentencing judge was not satisfied that there was a causal link established between the childhood abuse suffered by the appellant and the offences (at [49]-[54], [58]). Equally, the sentencing judge found that the appellant's culpability was not in any way mitigated because of the influence of any drug upon him (at [56], bearing in mind that no submission was made on behalf of the appellant that it was mitigated). The sentencing judge was satisfied beyond reasonable doubt that:

> - the offence was planned in that the appellant had intended to try to persuade the victim to resume their relationship but also intended to kill her if he could not persuade her to reunite with him (at [34]);
>
> - the appellant was "driven by a profound jealousy" inspired by the break-up of his relationship with the victim (at [59]);
>
> - the intention to kill her was not a "fleeting" one and he made a sustained and determined attempt to kill her (at [37], [42]);
>
> - the appellant was trying to kill himself at the same time that he was trying to kill the victim (at [82], [92]).

The appellant was sentenced in respect of the first offence to imprisonment for 16 years with a non-parole period of 11 years. A wholly concurrent lesser sentence was imposed in respect of the second offence.

5.9 The appellant brought an application for leave to appeal against sentence to the NSW Court of Criminal Appeal. The Court heard the application on 4 November 2014. At the application, the appellant tendered two expert reports ("the new reports"):

> (a) a report of Webber Roberts, psychotherapist, dated 4.2.2013; and

(b) a report of Dr Olav Nielssen, psychiatrist, dated 3 May 2014.

In addition, the appellant tendered a number of character references, the appellant's academic record, and relevant custodial records.

5.10 The appellant made a written submission that the new reports should be taken into account "in the event that this Court concludes that the learned sentencing judge fell into error" and the appellate court proceeded to consider whether a lesser sentence was warranted in law. It was submitted that the evidence showed that factual findings made by the sentencing judge with respect to the absence of any causal link between the childhood abuse and the offending, and between the appellant's drug use and the offending, were "infirm".

5.11 The new evidence was "admitted" by the Court (see Judgment of RS Hulme AJ at [43]).

5.12 In his report, Mr Roberts expressed the opinion that the appellant's personality was affected by a build-up of repressed anger towards his "step father" and chronic depression, and this played a role in the commission of the offences.

5.13 In his report, Dr Olav Nielssen concluded at 8.5:

> From the history provided by Mr Betts and the information in the documents provided, I believe his intoxication with a drug with unpredictable mind altering effects, together with an underlying emotional state shaped by violence and sexual abuse, and a pattern of substance use, was a significant contributing factor to his sudden decision to end his life and to his offending behaviour.

Dr Nielssen diagnosed the appellant with "anxiety disorder" (at 7.9-8.1)

> on the basis of the history of panic attacks and anxiety symptoms in many situations, and the history of treatment for anxiety and depression with paroxetine. Factors contributing to the emergence of anxiety symptoms include a possible inherited vulnerability to psychiatric disorder, the understandable effects of sexual and physical abuse in late childhood and early adolescence, the effects of bullying at school and the effects of substance use, especially use of cocaine, which is a potent trigger for anxiety symptoms.

Dr Nielssen also diagnosed the appellant with "substance use disorder" and expressed the opinion that intake of the hallucinogenic drug DMT "had a catastrophic alteration on his perception of events and a loss of capacity for logical thinking around the time of the offence" and resulted in a "psychotic disorder or an equivalent state induced by an hallucinogenic or dissociative drug".

5.14 On 24 March 2015, the Court of Criminal Appeal granted leave to appeal but dismissed the appeal notwithstanding that the Court upheld two grounds of appeal against sentence. The first (see [30]) was that the sentencing judge erred in finding that the offences were aggravated on the basis that the victim was "vulnerable" within the meaning of s 21A(2)(l) *Crimes*

(Sentencing Procedure) Act 1999. The second (see [36]-[38]) was that the sentencing judge failed to take into account the appellant's injuries when determining the appropriate head sentence for the offences. The Court dismissed the appeal pursuant to s 6(3) *Criminal Appeal Act 1912* on the basis that it was not satisfied that a less severe sentence than that imposed was warranted.

5.15 As regards the two reports that were admitted in the appeal proceedings on 4 November 2014, RS Hulme AJ (Meagher JA and Hidden J agreeing) held at [47]:

> Insofar as the reports of Dr Nielssen and Mr Roberts seek to canvass the factors causing or contributing to the offence, they are inadmissible. The time of the sentence was the appropriate occasion for such matters to be addressed – as they were – and an appeal does not provide an opportunity for a second bite of those issues. Mr Roberts' opinion that the Appellant has an improved ability to address his re-development is relevant but of limited weight given that Toner DCJ made no findings on this or any similar topic.

PART VI. THE ARGUMENT

6.1 While the new reports were "admitted" by the Court of Criminal Appeal, it was held at [47] that that evidence could not be used to canvass the factors causing or contributing to the offence. The reason given was that "the time of the sentence was the appropriate occasion for such matters to be addressed – as they were – and an appeal does not provide an opportunity for a second bite of those issues".

6.2 It is submitted that the determination as to whether to permit such use of the evidence miscarried. To make good that submission, it is necessary to determine the powers of the Court of Criminal Appeal to admit and use evidence on an appeal against sentence, to determine what is involved in a Court of Criminal Appeal "exercising the sentencing discretion afresh" and to assess the potential significance of the new evidence.

6.3 The Court of Criminal Appeal may receive evidence that was not adduced in the sentencing proceedings in respect of which the appeal is brought. The power to receive such evidence falls within the scope of the powers conferred in s 12(1) of the Act, although the proviso to s 12(1) precludes a sentence being "increased" on the basis of "any evidence that was not given at the trial". It may be accepted that the introductory words of s 12(1) apply generally, so that the Court of a Criminal Appeal has a discretion whether or not to admit evidence that was not adduced in the sentencing proceedings. It may also be accepted that this discretion has application to the use that may be made of evidence that has been admitted. The discretion is to be exercised by considering "the interests of justice". Common law principles relating to the receipt of fresh evidence do not control the exercise of that statutory discretion: cf *CDJ v VAJ* (1998) 197 CLR 172, McHugh, Gummow and Callinan JJ at 198 [97]. The interests of justice will vary depending on the issue being addressed by the Court of Criminal Appeal: cf *CDJ v VAJ* (1998) 197 CLR 172, McHugh, Gummow and Callinan JJ at 200 [104].

6.4 Notwithstanding the breadth of the language in s 6(3) of the Act, it is settled that the appellate court's authority to intervene "is dependent upon demonstration of error": *Kentwell v*

R [2014] HCA 37, 252 CLR 601 at 615 [35]. Once error is demonstrated, the appellate court then proceeds "to exercise the discretion afresh taking into account the purposes of sentencing and the factors that the Sentencing Act, and any other Act or rule of law, require or permit": *Kentwell* at 618 [42]. The appellate court "may conclude, taking into account all relevant matters, including evidence of events that have occurred since the sentence hearing, that a lesser sentence is the appropriate sentence for the offender and the offence" (*Kentwell* at 618 [43]).

6.5 There are significant differences between a "determination of error" and an exercise of the sentencing discretion afresh. Consideration of the interests of justice in the latter context will play out differently than it would in the former context. The discretion must be exercised by consideration of what the interests of justice require in the particular case. In the former context, the focus is on the question whether the original sentencing proceedings resulted in a miscarriage of justice. Intervention is not permitted simply on the basis that the appellate court considered that a different sentence would have been just.[1] In the latter context, the focus is on the Court of Criminal Appeal determining for itself a just sentence.

6.6 It is well settled that "error" may be established on the basis of new evidence not adduced in the sentencing proceeding. Thus, it is well established that appellate intervention may occur in cases where the sentencing court could not be said to have erred on the basis of the evidence before it in terms of process or reasoning, but new evidence reveals that there has been "a miscarriage of justice"[2] in the determination of sentence requiring appellate intervention on the basis that the sentence imposed is erroneous. However, determination of whether the original sentencing proceedings resulted in a miscarriage of justice will usually give considerable significance to whether or not the new evidence is "fresh" (in the sense of evidence which could not have been obtained with reasonable diligence).[3] A number of (overlapping) considerations explain that approach:

---

1 See *Skinner v R* [1913] HCA 32, 16 CLR 336, Isaacs J at 342.

2 See *Araya and Joannes* (1992) 63 A Crim R 123, Gleeson CJ at 129-130; *John Wayne Tsiakas v R* [2015] NSWCCA 187 at [43]; *R v Maniadis* [1996] QCA 242, [1997] 1 Qd R 593 at 596-97 ; *R v Wallace* [2015] QCA 62 at [36]; *"M" v The Queen* [2004] WASCA 236 at [7], [14], [73]; *R v Knights* (1993) 70 A Crim R 105 at 110; *Romero v The Queen* [2011] VSCA 45 at [11]; *R v Hallett* [2012] SASCFC 143 at [7], [34]. In Tasmania, s 402(1) *Criminal Code (Tas)*, which confers a right of appeal where "on any ground whatsoever there was a miscarriage of justice" applies not only to appeals against conviction but also to an appeal against sentence: *Plumstead v R* [1997] TASSC 158, 7 Tas R 206. In Western Australia, there is also authority that the applicable test is "whether a different sentence should have been imposed": *Wheeler v The Queen [No 2]* [2010] WASCA 105 at [53]; *The State of Western Australia v Hyder* [2011] WASCA 256 at [25]; *KWLD v The State of Western Australia [No 4]* [2013] WASCA 185 at [105]; *Carter v The State of Western Australia [No 2]* [2015] WASCA 59 at [46]-[55].

3 *R v Lanham* [1970] 2 NSWR 217 at 218; *Springer v R* [2007] NSWCCA 289, 177 A Crim R 13 at 15 [3]; *SM v R* [2014] NSWCCA 137 at [36]; *R v Smith* (1987) 44 SASR 587 at 588-9; *R v Hallett* [2012] SASCFC 143 at [7], [107]; *R v Duy Duc Nguyen* [2006] VSCA 184 at [37].

- in an adversarial proceeding, a sentencing proceeding will not become unfair where the defence has failed to adduce evidence that could have been adduced with the exercise of reasonable diligence (see *Ratten v R* (1974) 131 CLR 510, Barwick CJ at 517);

- the possible adverse effect on the victim, or on the community generally, occasioned by re-opening a concluded criminal proceeding (see *Kentwell* at 614 [32]);

- the desirability of "finality" in litigation;[4]

- as a general rule, an offender is bound by the way in by the way the sentencing process is conducted by counsel, regardless of whether that was in accordance with the wishes of the client.[5]

On the other hand, just as with appeals against conviction[6], there is no invariable rule that the evidence must be "fresh".[7] In *Veen v The Queen [No 2]* (1988) 164 CLR 465, Wilson J observed at 490 (Gaudron J agreeing at 499) that "the established principles governing the admission of fresh evidence do not apply so as to limit the materials to which an appellate court in its discretion may have regard when hearing and determining an appeal with respect to sentence" (the plurality judgment did not express a contrary view: see at 473).

6.7 When exercising the sentencing discretion afresh, the focus is on determining a just sentence, "taking into account all relevant matters" (*Kentwell* at 618 [43]). The primary considerations would be whether the evidence would be admissible in sentencing proceedings and whether the evidence has the potential to affect the exercise of the sentencing discretion so as to lead to the conclusion that a lesser sentence is warranted in law and should be imposed. The latter consideration would, in turn, require consideration of any inconsistency between the new evidence and the agreed facts and the potential significance of the new evidence to the critical factual issues. However, in this context, the considerations referred to at para 6.6 above have little or no role to play.

---

4 *R v Lanham* [1970] 2 NSWR 217 at 218; *R v Hallett* [2012] SASCFC 143, Kourakis CJ at [7]; *Bland v R* [2014] NSWCCA 82 at [91].

5 *"M" v The Queen* [2004] WASCA 236 at [74].

6 See *Ratten v R* (1974) 131 CLR 510 at 517-8; *Gallagher v R* (1986) 160 CLR 392 at 395.

7 For example, an appeal against sentence may be allowed on the basis of new evidence that is not fresh, where the new evidence was not adduced by reason of incompetent or inadequate representation of the offender: *Munro v R* [2006] NSWCCA 350 at [25]; *Khoury v R* [2011] NSWCCA 118, 209 A Crim R 509 at 533 [137]-[139]; *Ryan v R* [2011] NSWCCA 69 at [56]-[58]; *Tsiakis v R* [2015] NSWCCA 187; *R v Verrall* [2015] QCA 72 at [28]. Another example is where the offender did not realise the significance of the evidence at that time and did not inform his or her legal advisers of the evidence for that reason: *Many* (1990) 51 A Crim R 54 at 61-2; *Springer* [2007] NSWCCA 289, 177 A Crim R 13 at 15 [3]; *Zaki v R* [2012] NSWCCA 109 at [20]-[22]. Even if those circumstances are not present, other "exceptional circumstances" may be present where a failure to adduce the Court "compelling material" has resulted in a miscarriage of justice: *Pym v R* [2014] NSWCCA 182 at [75].

6.8 As regards determination of facts material to the appropriate sentence, these must be determined as part of the re-sentencing exercise. Unless new evidence is admitted in the appellate court, the appellate court would be entitled (although certainly not obligated) to adopt the factual findings made by the original sentencing court, given the relevant advantage possessed by that original sentencing court in determining the facts. Where new evidence is adduced, however, which raises factual issues relating to the circumstances of the offending, the NSW Court of Criminal Appeal has power pursuant to s 12(2) of the Act to remit "a matter of issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made". This may be appropriate where factual issues require resolution. In *R v Kreutzer* [2013] SASCFC 130, Kourakis CJ stated at [12]:

> So what is the Full Court to do if it is satisfied that there has been a process error but practical considerations suggest that resentencing is more appropriately managed in the sentencing court? For example, the Full Court may take the view that the submissions as to the appropriate sentence could more conveniently be heard in the sentencing court because the parties intend to adduce further material which, in the interests of justice, should be received. Yet again, as in this case, there may be a dispute over material facts which have not been satisfactorily resolved by findings of the sentencing judge. Quite apart from the inefficiency of having three judges preside over a sentencing hearing which is better managed by a single judge, a hearing before the Full Court would deny a defendant the ordinary avenues for appellate review of the determination of a factual dispute and the resulting sentence.

6.9 The court to which a sentencing matter is remitted may determine the question of sentence upon the evidence adduced before that court. In *R v McLean* [2001] NSWCCA 58, 121 A Crim R 484 the NSW Court of Criminal Appeal quashed a sentence imposed on the appellant and remitted the sentencing proceedings "to the District Court for determination of the appropriate sentence in relation to that count, after taking into account any evidence or material presented to that Court of relevance to the appellant's objective criminality" (Wood CJ at CL at [62], Beazley JA and Greg James J agreeing). It cannot be correct that evidence that would have been taken into account if the re-sentencing had been remitted to the District Court should be disregarded by the Court of Criminal Appeal when itself re-sentencing the appellant.

6.10 Several examples may be given of cases where the NSW Court of Criminal Appeal has utilised the power to remit conferred by s 12(2) after allowing the appeal against sentence and quashing the sentence imposed at first instance.[8] In *Pantorno v R* [1989] HCA 18; (1989) 166 CLR 466, all members of the High Court implicitly accepted that, under substantially the same Victorian legislation[9], it was open to the Victorian Court of Appeal

---

8 *Munro v R* [2006] NSWCCA 350 at [26]-[28]; *Leete v R* [2001] NSWCCA 337, 125 A Crim R 37 at 43 [33]; *R v Cooney* [2004] NSWCCA 255 at [34]; *O'Neil-Shaw v R* [2010] NSWCCA 42 at [37], [59].

9 *Crimes Act 1958*, s 568(4): "On an appeal against sentence, the Full Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal".

to allow an appeal against sentence, set aside the sentence imposed at first instance and remit the matter to the County Court for resentencing. Indeed, the High Court exercised that power for itself, ordering that the appeal against sentence to the Victorian Court of Appeal be allowed, the sentence imposed at first instance be set aside and the matter remitted to the County Court for resentencing.

6.11 The exercise of the discretion under s 12(1) miscarried because RS Hulme AJ ruled that the evidence was "inadmissible" to canvass the factors causing or contributing to the offence for the reason that "an appeal does not provide an opportunity for a second bite of those issues". This reasoning conveys an unduly restrictive approach to the exercise of the discretion. The fact that the appellant sought "an opportunity for a second bite of those issues" was a consideration material to the exercise of the discretion but not determinative. It was the beginning, not the end, of the relevant inquiry. It had little or no significance once the Court of Criminal Appeal came to exercise the sentencing discretion afresh. In the exercise of the discretion under s 12(1), the Court of Criminal Appeal was required to bear in mind that it must be exercised by consideration of what the interests of justice require in the particular case and that what they will require may be different when exercising the sentencing discretion afresh as opposed to determining error. This RS Hulme AJ failed to do. If RS Hulme AJ had given proper consideration to the significance of the new reports, it would have been concluded that the power to remit conferred by s 12(2) should have been exercised.

The significance of the new reports

6.12 The sentencing judge, without the benefit of new reports, made the following findings:

(a) he was not satisfied that there was a causal link between the serious childhood abuse of the appellant and the offences;

(b) he did not accept that the appellant's culpability was in any way mitigated because of the influence of any drug upon him; and

(c) he was satisfied beyond reasonable doubt that the offence was "planned"; and

(d) he was satisfied beyond reasonable doubt that the appellant was "driven by a profound jealousy" inspired by the break-up of his relationship with the victim (at [59]).

The new reports would support quite different findings.

6.13 The new reports support a finding that the childhood abuse did play a causal role in the offending in that it affected the development of the appellant's personality (Mr Roberts) and was a factor in the development of an anxiety disorder (Dr Nielssen: "an underlying emotional state shaped by violence and sexual abuse") which in turn was a factor in the offending behaviour. In *Bugmy v R* [2013] HCA 37, 249 CLR 571, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ observed at 594 [40]:

> The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.

Similar reasoning applies in respect of an offender who was subjected to sustained physical and emotional abuse at the hands of his mother's partner during his childhood. Further, a background of childhood abuse may allow "the weight that would ordinarily be given to personal and general deterrence to be moderated in favour of other purposes of punishment, including rehabilitation" (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at 596 [46]). Establishing that the childhood abuse experienced by the appellant did play a causal role in the offending would, or at least could, be a significant mitigating factor.

6.14 The new reports support a finding that the appellant experienced "a catastrophic alteration on his perception of events and a loss of capacity for logical thinking around the time of the offence" as a result of taking DMT and, as a result, experienced a "psychotic disorder or an equivalent state induced by an hallucinogenic or dissociative drug" (Dr Nielssen at 8.2, 8.3). "Intoxication", including drug-related intoxication at the time of offending can reduce moral culpability in certain circumstances, particularly where the offender has "by reason of that intoxication acted out of character": *Coleman* (1990) 47 A Crim R 306 at 327.7; *Gordon* (1994) 71 A Crim R 459 at 467.6. If the intoxication had a causal role in the commission of the offence (by, for example, significantly diminishing the offender's self-control, capacity to make reasoned or ordered judgments, or appreciation of the wrongfulness of the conduct) then the intoxication can reduce moral culpability if the offender had no particular reason to foresee that he or she might commit the offence while intoxicated. Prior "good character" will support an inference that the intoxication had a significant causal role in the commission of the offence and a conclusion that the offender had no particular reason to foresee that he or she might commit the offence: *XY v R* [2007] NSWCCA 72 at [31]; *Stanford v R* [2007] NSWCCA 73 at [55] - [56]; *MDZ v R* [2011] NSWCCA 243 at [77](4). Since the appellant's offending (and, indeed, his original sentencing), the NSW Parliament has enacted legislation limiting the availability of self-induced intoxication "as a mitigating factor" but this should not be fatal to the appellant. An offender must, in general, be sentenced in accordance with the sentencing law and practice prevailing at the time of commission of the offence. When an appellate court is called upon to resentence, considerations of justice and equity ordinarily require that the offender be re-sentenced according to the law as it stood at the time when he or she was initially sentenced: *Radenkovic v R* [1990] HCA 54, 170 CLR 623, Mason CJ and McHugh J at 632.

6.15 The new reports could at least create a reasonable doubt as to whether the appellant "planned" the offences and was "driven by a profound jealousy". Planning or premeditation is an aggravating factor which must be proved beyond reasonable doubt. In his evidence before the sentencing judge, the appellant testified that he had not thought about attacking the victim until just before he did (T 19.45). He testified that the attack was "spontaneous" (T 21.25). What was recounted in the Agreed Facts as to what he said to the victim during the attack was consistent with his testimony. The new reports provide support for a conclusion that the offence was not planned. In particular, the report of Dr Nielssen supports a finding that the appellant experienced "a catastrophic alteration on his perception of events and a loss of

capacity for logical thinking around the time of the offence" (p 8.2) as a result of taking DMT and, as a result, experienced a psychotic disorder or an equivalent state induced by drugs. Dr Nielssen considered that the multiple self-inflicted stabs by the appellant on himself "are strongly associated with the presence of psychotic disorder or an equivalent state induced by an hallucinogenic or dissociative drug, and the ability to administer repeated injuries to very pain sensitive organs is consistent with Mr Betts' account of being unaware of pain at the time" (at p 8.3).

6.16 Further, the new reports support a finding that the appellant was suffering from an anxiety disorder at the time of the offending, one of the symptoms of which was "panic attacks" (Dr Nielssen at p 7.9). In circumstances of a reduced capacity for logical thinking, it is possible that the victim's final rejection of any reconciliation resulted in a kind of "panic attack" where he made the irrational decision that they should be together in death. Equally, as Mr Roberts observed, it may be that, "in the moments leading to the offence" the appellant was "forced to confront the hollowness of his fabricated world" (p 11.2) resulting in "a type of emotional and interpersonal crisis" caused by "the factors that span the period of his life" (p 11.3), including the "abuse experienced by Mr Betts at the hands of his step father" and "the repeated abandonment by his mother" (p 9.3). Where an offender was subject to a mental disorder at the time of offending, this may reduce the offender's moral culpability and reduce the weight to be given the sentencing purposes of retribution and general deterrence: see *Muldrock v R* [2011] HCA 39, 244 CLR 120 at 138 [53], 140 [58]. Prospects of rehabilitation will be enhanced if the mental disorder is susceptible to treatment and particularly if the disorder is in remission, as Dr Nielssen has concluded in the present case.

6.17 It should be remembered in this context that the sentencing judge acknowledged that the crimes were "incongruous" to a person with no criminal record who demonstrated the following characteristics: "a generous, loving, honest, reliable man of integrity and gentility" (at [82], [92]). That such a person would do what he did is best explained by the opinions expressed in the reports of Dr Nielssen and Mr Roberts.

6.18 Even if, contrary to the above submissions, a court re-sentencing the appellant were to be satisfied beyond reasonable doubt that the appellant "planned" the offence in the sense that the sentencing judge used that term (he intended to kill the victim if he could not persuade her to reunite with him: at [34]), this would not preclude a finding, based on the new reports and contrary to the findings of the sentencing judge, that:

(a) there was a causal link between the abuse experienced by the appellant as a child and the offences;

(b) the appellant was suffering from a mental disorder at the time of the offending; and

(c) the appellant was experiencing a drug induced psychosis at the time of the offending.

That is, the mental disorder caused in part by the history of childhood abuse could have played a part in the formation of the initial "plan", as well as in the ultimate decision to carry it out. The drug induced psychosis may not have played a role in the formation of the

initial plan but may have been decisive in the appellant actually carrying it out. The new reports are significant as to the nature, extent and degree of planning, as to the appellant's disordered mind, and hence to both his objective and moral culpability. The mitigating effect of such findings might be limited, but it is not inevitable that they would have no effect at all and certainly not inevitable that the appellant's sentence would not be reduced at all.

No inconsistency between new reports and Agreed Facts

6.19 There is no inconsistency between the two expert reports and the Agreed Facts. The Agreed Facts simply recounted the sequence of events and included the finding of the piece of paper in the unit which had on it the song lyrics "You know I love you, but I hate you because I know I could never replace you". At its highest for the prosecution the note showed that the appellant had ambivalent feelings for the victim. It certainly could not prove beyond reasonable doubt that, at the time the appellant wrote the note, he had formed an intention to kill or even assault the victim. Equally, the fact that the appellant chose to be at the unit at a time he had said he would have left could only show that he wanted to meet the victim. As the Agreed Facts noted, he told her "I've been trying to contact you. I've wanted to talk to you" (paragraph 13). He then tried to persuade her that they should continue their relationship.

6.20 The only other aspect of the Agreed Facts which went to the question of any planning was when the victim asked the appellant "Why did you do it?" and he replied "You kept saying that it was over. That the damage has been done" (paragraph 29). That was plainly a reference to the conversation between the victim and the appellant immediately before the attack began (paragraphs 13-16). Thus, the appellant told the victim that he attacked her because of what she had said to him just prior to the attack.

Minor inconsistency between information provided to Dr Nielssen and Agreed Facts

6.21 It may be accepted that the appellant told Dr Nielssen that "the attack actually lasted for about 45 seconds" and that this was inconsistent with the Agreed Facts. However, it is not at all apparent that Dr Nielssen placed any reliance on this aspect of the appellant's account. Dr Nielssen referred to the Agreed Facts and actually took the appellant to them when talking with him. Dr Nielssen made no reference at all to the duration of the attack when expressing his "Opinion" at the end of his report. It is entirely possible that Dr Nielssen disregarded that aspect of what the appellant told him in the light of the Agreed Facts. It is also possible that Dr Nielssen considered that what the appellant told him was consistent with a degree of amnesia regarding what happened. It would be a matter for evidence at a re-sentencing hearing to clarify these matters. In any event, any assessment of (reduced) probative value of the opinions expressed in the reports would be a matter for the court re-sentencing the appellant, in the light of any cross-examination of the authors of the reports and submissions by the parties.

Remittal

6.22 A literal reading of s 6(3) would deny an appellant the right to an effective appeal against sentence where the sentencing process has miscarried but the Court of Criminal Appeal is unable to determine what is a just sentence: *O'Neil-Shaw v R* [2010] NSWCCA 42, Basten JA at [30]. For that reason, the provision should, in the light of s 12(2), be read to permit the Court of Criminal Appeal to direct a re-trial of the issue where the Court of Criminal Appeal is not in a position to determine the matter for itself: *O'Neil-Shaw,* Basten JA at [32], Howie J agreeing at [40], Johnson J agreeing at [57].

6.23 As noted above at para 6.10, in *Pantorno v R* [1989] HCA 18; (1989) 166 CLR 466, all members of the High Court accepted that, under substantially identical Victorian legislation, it was open to the Victorian Court of Appeal to allow an appeal against sentence and set aside the sentence imposed at first instance (without resentencing the appellant), remitting the matter to the County Court for resentencing. Indeed, the High Court exercised that power for itself, ordering that the appeal against sentence to the Victorian Court of Appeal be allowed, the sentence imposed at first instance be set aside and the matter remitted to the County Court for resentencing.

6.24 The order of the Court of Criminal Appeal of NSW dismissing the appeal against sentence should be set aside and in lieu thereof the appeal against sentence allowed, the sentences imposed in the District Court of NSW set aside and the re-sentencing of the appellant remitted to the District Court of NSW for resentencing by a Court differently constituted. The reason for the last order is that the sentencing judge formed views regarding the credibility of the appellant and there is a real risk that a further hearing before the same judge would give rise to a reasonable apprehension of prejudgment.

PART VII. APPLICABLE PROVISIONS

7.1 The applicable provisions, which are still in force, are contained in an annexure.

PART VIII. ORDERS SOUGHT

8.1 The orders sought are: appeal allowed, order of the Court of Criminal Appeal of NSW dismissing the appeal against sentence set aside and in lieu thereof allow the appeal against sentence and set aside the sentences imposed in the District Court of NSW, remit the matter to the District Court of NSW for resentencing by a Court differently constituted and order that the appellant be remanded in custody pending further order of the District Court of NSW. Alternatively, appeal allowed, order of the Court of Criminal Appeal of NSW dismissing the appeal against sentence set aside and remit the appeal against sentence to that Court.

PART IX. TIME ESTIMATE

9.1 It is estimated that 1.5 hours are required for the presentation of the appellant's oral argument.

Dated: 29 January 2016

Stephen Odgers
Telephone: (02) 9390 7777
Facsimile: (02) 8998 8547
Email: odgers@forberschambers.com.au

Peter Lange
Telephone: (02) 8233-0300
Facsimile: (02) 9475-0495
Email: pdl@langelaw.com

Annexure A

Criminal Appeal Act 1912

6 Determination of appeals in ordinary cases

...

(3) On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

12 Supplemental powers of the court

(1) The court may, if it thinks it necessary or expedient in the interests of justice:

(a) order the production of any document, exhibit, or other thing connected with the proceedings, and
(b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the court or before any officer of the court or other person appointed by the court for the purpose, and admit any deposition so taken as evidence, and
(c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable witness, and
(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the court, be conveniently conducted before the court, the court or any judge thereof may refer the question for inquiry and report to a commissioner appointed by the court, and act upon the report of any such commissioner so far as the court thinks fit, and
(e) appoint any person with special expert knowledge to act as assessor to the court in any case in which it appears to the court that such special knowledge is required for the determination of the case,

and exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters, and issue any warrant or other process necessary for enforcing the orders or sentences of the court: Provided that in no case shall any sentence be increased by reason of, or in consideration of any evidence that was not given at the trial.

(2) The Court of Criminal Appeal may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made.