

Mental Health and Sentencing

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Mental health issues are something that may be taken into account on sentence. This is so whether the disorder or disability was in existence at the time of the commission of the offence, or at the time of sentence.¹ This paper outlines ways that mental illness may be relevant to the sentencing process in a general sense and examines recent cases in which mental health in sentencing is examined.

In *R v Hemsley* [2004] NSWCCA 228 (at [33] – [36]) Sperling J detailed four ways in which mental illness may be relevant on sentence:

First, where mental illness contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced; there may not then be the same call for denunciation and the punishment warranted may accordingly be reduced...

Secondly, mental illness may render the offender an inappropriate vehicle for general deterrence and moderate that consideration...

Thirdly, a custodial sentence may weigh more heavily on a mentally ill person...

A fourth, and countervailing, consideration may arise, namely, the level of danger which the offender presents to the community. That may sound in special deterrence...

More recently in *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194, the ways in which mental health issues may be taken into account in the sentencing process were detailed as follows:

Where an offender is suffering from a mental illness, intellectual handicap or other mental problems the courts have developed principles to be applied when sentencing...

They can be summarised in the following manner:

- Where the state of a person's mental health contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced. Consequently the need to denounce the crime may be reduced with a reduction in the sentence...

¹ *R v Anderson* [1981] VR 155; (1980) 2 A Crim R 379

- It may also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed...
- It may mean that a custodial sentence may weigh more heavily on the person. Because the sentence will be more onerous for that person the length of the prison term or the conditions under which it is served may be reduced...
- It may reduce or eliminate the significance of specific deterrence...
- Conversely, it may be that because of a person's mental illness, they present more of a danger to the community. In those circumstances, considerations of specific deterrence may result in an increased sentence.²

These factors provide a general guide to the manner in which mental health may impact upon the sentencing process.

1. PROSPECTS OF REHABILITATION

When assessing the prospects of rehabilitation of an offender at sentence, mental health may be an important consideration, even in situations where the mental disorder has no causal connection to the commission of the offence.³

In *R v Engert* (1995) 84 A Crim R 67 Gleeson CJ said at 71:

... there may be a case in which there is an absence of connection between the mental disorder and the commission of the offence for which a person is being sentenced, but the mental disorder may be very important to considerations of rehabilitation, or the need for treatment outside the prison system.

2. OBJECTIVE SERIOUSNESS AND MORAL CULPABILITY

The position on the interaction between mental illness and assessing the

² *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 at 177 per McClellan CJ at CL

³ *Benitez v R* (2006) 160 A Crim R 166

objective seriousness of an offence has been the subject of recent judicial consideration in *Muldock v The Queen* [2011] HCA 39; 244 CLR 120. The current position in the wake of *Muldock v The Queen* is uncertain.

In an earlier case of *Hammond v R* [2008] NSWCCA 138 an issue was whether the sentencing judge was required to take the offender's mental illness into account when determining the objective seriousness of the offence. There was evidence on sentence regarding the offender's mental illness, but none as to the causal relationship between his condition and the offending.⁴ It was held that for mental illness to be relevant to an assessment of the objective seriousness of an offence it must be demonstrated that the mental illness contributed causally to the offence, the Court is not permitted to speculate.⁵ It was said that a lesser sentence should not be an automatic consequence in circumstances even in situations where a causal relationship was evidenced.⁶

Following *Muldock v The Queen*, however, it is uncertain to what extent (if any) a person's mental condition is relevant to the assessment of objective circumstances at least in the context of applying standard non-parole period provisions.

The High Court said in *Muldock v The Queen* [2011] HCA 39 at [27] that:

The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.

It was said in *Yang v R* [2012] NSWCCA 49 at [28] per RA Hulme J (with whom R S Hulme J and Macfarlan JA agreed):

... the High Court of Australia in *Muldock v The Queen* [2011] HCA 39; (2011) 85 ALJR 1154 at [27] appears to have rejected the notion propounded in *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [86] that matters

⁴ *Hammond v R* [2008] NSWCCA 138 at [22] – [28]

⁵ *Hammond v R* [2008] NSWCCA 138 at [32] – [34] per McCallum J with whom Spigelman CJ and Price J agreed

⁶ *Hammond v R* [2008] NSWCCA 138 at [35]

personal to an offender, including a mental illness, can be said to affect the objective seriousness of an offence. I have said, "appears to have rejected", because it has not been universally accepted.

It was not necessary in *Yang v R* for the Court to determine the point, however it was noted that it would be a relevant matter if the contention was that the judge overestimated the seriousness of the offence. In *Yang v R* the sentencing judge did not express a particular finding about the relative seriousness of the offence, in those circumstances it was not open for the Court to say that a finding was made that was not open on the evidence.⁷

In *MDZ v R* [2011] NSWCCA 243 it was said at [67] per Hall J (Tobias AJA and Johnson J agreeing) (which was cited in *Yang v R* at [29]):

In my opinion, in light of the High Court's judgment in *Muldrock* (above), it is open to conclude that the mental condition of the applicant at the time of the offence may bear upon the objective seriousness of the offences: *Muldrock* Certainly, in the present case, the sentencing judge, on the evidence, was required to expressly determine the moral culpability of the applicant in assessing the seriousness of the offences and in determining the appropriate sentences to be imposed in relation to them. In this case, the evidence required a finding that the applicant's moral culpability was reduced by his mental health issues.

In *Ayshow v R* [2011] NSWCCA 240 (which was discussed in *Yang v R* at [30]) it was said at [39] per Johnson J (with whom Bathurst CJ and James J agreed):

To the extent that a question arises whether the Applicant's mental state at the time of the offence may bear upon objective seriousness ... it remains a relevant factor on sentence in an assessment of moral culpability. Accordingly, if there is evidence to support a finding that an offender's moral culpability is reduced by a relevant mental condition, the offender is entitled to have it called in aid on sentence.

⁷ *Yang v R* [2012] NSWCCA 49 at [37]

In terms of approaches at first instance, a number of decisions were discussed in *Yang v R* (at [31] – [36]), a number of those examined specifically the relationship between mental health and an assessment of the objective seriousness of an offence.

In *R v Biddle* [2011] NSWSC 1262 it was said at [88] per Garling J:

In making this assessment, and concordant with my understanding of *Muldrock*, I will not take into account the facts and circumstances relating to Mr Biddle's mental health, which I am persuaded amounted, within the meaning of the legislation, to " *a substantial impairment by reason of abnormality of mind*".

In *R v Mohammed Fahda* [2012] NSWSC 114 it was said at [38] per Harrison J:

I accept that the offender suffered from post-traumatic stress disorder that was caused and evident prior to the commission of the offence and that this was associated with hyper-vigilance, paranoia, auditory hallucinations, depression and inverted sleep patterns. I also find that the offender was substantially impaired by an abnormality of mind arising from an underlying condition in the form of post-traumatic stress disorder or an anxiety disorder and a probable psychotic illness. I have taken all of this into account in mitigation of the objective criminality of the offence.

However it was said later at [50]:

The objective seriousness of the offence is to be determined without reference to the personal attributes of the offender, but "wholly by reference to the nature of the offending": *Muldrock* at [27]. However, such factors remain particularly relevant to any determination of the appropriate sentence to be imposed.

In *R v Cotterill* [2012] NSWSC 89 it was said at [30] per McCallum J:

It nonetheless remains an important aspect of the sentencing task to assess the objective seriousness of the offence, which may include consideration of circumstances personal to the offender that are causally connected to the

commission of the offence. I do not understand the decision of the High Court in *Muldrock* to hold otherwise.

Her Honour went on to say, at [45]:

... I have had regard to the fact that the psychiatric and psychological material before the Court strongly supports the conclusion that, by reason of his severe behavioural and psychological difficulties, the offender is ill-equipped psychologically to control his anger and impulsive behaviour... I think it would be wrong to disregard those considerations altogether in assessing the seriousness of the offender's conduct. I am satisfied that the seriousness of the offence is mitigated to some slight degree by the offender's impaired control due to his several psychiatric disorders. However, that factor must not be allowed to overwhelm proper consideration of the ferocity of the attack and the fact that a life was taken.

3. GENERAL DETERRENCE

In *Muldrock v The Queen* it was said at [53]:

General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others

The authorities are clear that if an offender is suffering from a mental illness, the principle of general deterrence may not have the same application as for a person of sound mind.⁸ Mental illness may render the offender an inappropriate vehicle for general deterrence.⁹ It has been held that punishment of a person not in full control of his or her conduct may form a poor vehicle for promoting general deterrence.¹⁰

⁸ *R v Engert* (1995) 84 A Crim R 67 at 71 per Gleeson CJ; *R v Israil* [2002] NSWCCA 255 at [22]; *R v Hemsley* [2004] NSWCCA 228 at [34].

⁹ *R v Engert* (1995) 84 A Crim R 67 at 71 per Gleeson CJ; *R v Letteri* (NSW CCA, 18 March 1992, unreported); *R v Israil* [2002] NSWCCA 255; *R v Pearson* [2004] NSWCCA 129 at [42]

¹⁰ *R v Windle* [2012] NSWCCA 222 at [41] per Basten JA (with whom Price J agreed, Campbell J agreeing with differing reasons)

In *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 it was said at [178] per McClellan CJ at CL (with whom Simpson J and Barr AJ agreed):

I should stress that the mental health problems of an offender need not amount to a serious psychiatric illness before they will be relevant to the sentencing process. The circumstances may indicate that when an offender has a mental disorder of modest severity it may nevertheless be appropriate to moderate the need for general or specific deterrence: *R v Skura* [2004] VSCA 53; *R v Verdins* [2007] VSCA 102; (2007) 16 VR 269 at [5].

In *Muldock v The Queen* the High Court of Australia (citing Young CJ in *R v Mooney* unreported, Victorian Court of Criminal Appeal, 21 June 1978 at 5) confirmed the way that an offender's mental condition may be taken into account in terms of general deterrence at sentence (at [53]):

One purpose of sentencing is to deter others who might be minded to offend as the offender has done. Young CJ, in a passage that has been frequently cited, said this:

“General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others.”

The Court continued at [54]:

The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community. (*Footnotes excluded.*)

It has been noted that not all mental conditions categorised and recognised by the *Diagnostic and Statistical Mental Disorders Manual* (4th ed, 2000), attract the sentencing principle that less weight is given to general deterrence. It may be that particular conditions do not attract the principle.¹¹

In *R v Wright* (1997) 93 A Crim R 48 the Court held that it is accepted that general deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality. Such an offender is not an appropriate medium for making an example to others. However, it was held that in situations where the offender acts with knowledge of what he or she is doing and the gravity of those actions, the moderation of sentence need not be great.¹²

In *R v Wright* (1997) 93 A Crim R 48 the issue of self-induced mental health issues was discussed. In that case, by a failure to take medication combined with drug taking were the relevant issues. It was said that as the offender was reckless in bringing on psychotic episodes that made him a danger to the community there would be a reduction or even an eradication of the mitigation he would otherwise receive in relation to his mental condition.¹³

In *Benitez v R* (2006) 160 A Crim R 166 the Court cited *R v Wright*. *Benitez v R* involved an offender who suffered from depression and had pleaded guilty to two charges of soliciting to murder. It was said (at 175) per Simpson J (with whom Hunt AJA and Rothman J agreed):

But the influence of the depression must remain in perspective...Here, it must be accepted that the applicant, although acting out of depression, also acted with knowledge of what he was doing and of the gravity of his actions. That gives some guide to the extent to which his depression ought to have been taken into account in mitigation of sentence. In the circumstances of this terrible crime, it cannot weigh too heavily.

¹¹ *Regina v Lawrence* [2005] NSWCCA 91 at [23] per Spigelman CJ (with whom Grove J and Bell J agreed)

¹² *R v Wright* (1997) 93 A Crim R 48 at 51 per Hunt CJ at CL

¹³ *R v Wright* (1997) 93 A Crim R 48 at 51 – 52

In *Taylor v R* [2006] NSWCCA 7 the offender drank beer and smoked marijuana prior to commission of offence. His psychological functioning was impaired, both prior to and at the time of the accident, as a result of unexpected and traumatic family events that occurred immediately prior to the accident. It was said at [30] per McClellan CJ at CL (with whom Howie J and Latham J agreed):

... having regard to the finding that the applicant, on his own admission, was aware of the state he was in and the effect upon him of sleep deprivation, together with the effect of beer and marijuana, but nevertheless elected to drive, his impaired psychological state could not play a significant part in determining the ultimate sentence.

In *Carrion v R* [2007] NSWCCA 174 evidence had been adduced that the offender had a very low IQ and his intellectual functioning was “at the upper end of the mildly intellectually handicapped range.”¹⁴ It was held that it was open to the judge to find that the evidence as to the mental capacity of the offender was of no relevance when considering general deterrence. It was held that the significance of the offender’s mental incapacity is to be weighed and evaluated in the light of the particular facts and circumstances of the individual case.¹⁵ It was held that there is no general principle that a low intellectual capacity requires that less weight be given to considerations of general deterrence.¹⁶ It was held that it was open to the sentencing judge to afford no moderation in the consideration of general deterrence.¹⁷

¹⁴ *Carrion v R* [2007] NSWCCA 174 at [11] per Hislop J (with whom McClellan CJ at CL agreed)

¹⁵ *Carrion v R* [2007] NSWCCA 174 at [13], citing *R v Bus* (NSWCCA unreported 3 November 1995) [Hunt CJ, Grove and Allen JJ].

¹⁶ *Carrion v R* [2007] NSWCCA 174 at [13], *R v Elchami* (NSWCCA unreported 15 December 1995) [Hunt CJ, Allen and Dunford JJ].

¹⁷ *Carrion v R* [2007] NSWCCA 174 at [15]

Relevance of Lengthy Criminal History

[See also 'Protection of the Community']

R v Bugmy [2012] NSWCCA 223 was a Crown appeal in which it was argued that too much weight was given by sentencing judge to the offender's subjective case. It was held that it was erroneous for the sentencing judge to assume that because there was a diagnosis of mental illness this automatically had the effect that the offender was to some extent an inappropriate vehicle for general deterrence.¹⁸

The offender had been convicted of more than 43 prior offences involving violence. It was held on appeal that the sentencing judge should have given greater weight to the antecedents of the offender, beyond referring only to s 21A(2)(d) *Crimes (Sentencing Procedure) Act 1999*.¹⁹ It was held that it was not a case where the offender lost control of himself because of a pre-existing condition which might demonstrate a diminished capacity for self-control, warranting a reduction in the need for general deterrence.²⁰

It was held that if the mental illness or its symptoms were directly involved in the commission of the offence, it would be a subjective circumstance particular to the offender that would take him or her outside the general population. This has the result that the principles of general and specific deterrence have little or no application.²¹ Alternatively, the nature of the mental illness may be such as to reduce an offender's ability to control his or her actions, which indirectly contributes to the commission of the offence.²²

Note that special leave to appeal the decision of the Court of Criminal Appeal in *R v Bugmy* was granted by the High Court of Australia on 10 May 2013.

¹⁸ *R v Bugmy* [2012] NSWCCA 223 at [45] per Hoeben JA, with whom Johnson J and Schmidt J agreed

¹⁹ *R v Bugmy* [2012] NSWCCA 223 at [41] – [42]

²⁰ *R v Bugmy* [2012] NSWCCA 223 at [43] – [44]

²¹ *R v Bugmy* [2012] NSWCCA 223 at [46]

²² *R v Bugmy* [2012] NSWCCA 223 at [46]

In *Watts v R* [2010] NSWCCA 315 the offender was sentenced for malicious damage to a Department of Housing residence that he lived in by setting it on fire. It was found that he was motivated to become “eligible for emergency housing assistance which would obtain for them a new house and get them away from the filthy conditions they were living in”.²³

There was evidence before the Court on sentence from two psychiatrists diagnosing various mental health issues, although one psychiatrist said that the offender did not suffer from a mental illness or disorder as defined in the *Mental Health Act 2007*. It was held that the relevance of an offender’s mental disorder transcends a matter of mitigation under section 21A(3)(j) of the *Crimes (Sentencing Procedure) Act 1999*.²⁴

It was held that the sentencing judge failed to give due weight to the uncontested psychiatric opinions in evidence before the Court at first instance.²⁵ Whilst the applicant was not diagnosed with a mental illness or a psychiatric disorder as far as those terms are relevant to the provisions of the *Mental Health Act 2007*, one of the reports provided the opinion that the applicant’s mental condition may have resulted in his having less capacity than a normal person to reflect on his decisions. The Court found that this was evidenced somewhat in the reasoning behind his motivation for setting fire to the house.²⁶ The Court found that whilst there were varying opinions of the severity of the offender’s mental disorders, they were still relevant to an assessment of the offender’s culpability for his actions and the degree to which the sentence should reflect general deterrence.²⁷

²³ *Watts v R* [2010] NSWCCA 315 at [9]

²⁴ *Watts v R* [2010] NSWCCA 315 at [24]

²⁵ *Watts v R* [2010] NSWCCA 315 at [25]

²⁶ *Watts v R* [2010] NSWCCA 315 at [25] -[26]

²⁷ *Watts v R* [2010] NSWCCA 315 at [27]

4. SPECIFIC DETERRENCE

The requirement for specific deterrence on sentence may be moderated or extinguished in circumstances where an offender suffers from a mental illness. The importance of personal deterrence may be much reduced if the mental illness affecting the decision-making capacity of the individual offender is an ongoing condition.²⁸

In *R v Verdins* [2007] VSCA 102 it was said at [32]:

...Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.²⁹

5. PROTECTION OF THE COMMUNITY

A reduction in the importance of general deterrence (in situations where there is a causal connection between the mental disorder and the offence) may be a double-edged sword, in that the importance of specific deterrence or the need to protect the public may be increased.³⁰

The level of danger that an offender presents to the community may become a countervailing consideration and indicate a need for special deterrence.³¹ Protection of the community is a relevant sentencing consideration.³²

In *Veen v The Queen (No 2)* (1988) 164 CLR 465 the majority said at 476:

²⁸ *R v Windle* [2012] NSWCCA 222 at [41] per Basten JA

²⁹ Cited with approval in *Leach v The Queen* [2008] NSWCCA 73 at [10]

³⁰ *R v Engert* (1996) 84 A Crim R 67 Gleeson CJ at 71

³¹ *R v Israil* [2002] NSWCCA 255 at [24]

³² *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 per Gleeson CJ at [20]

... a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter.

The countervailing effects were described in *R v Engert* (1995) 84 A Crim R 67 per Gleeson CJ at 68:

... in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender.

The fact that the offender is considered to be a danger to society cannot have the effect of leading to a heavier sentence than would otherwise be appropriate (if the offender had not been suffering from a mental abnormality).³³ A sentence may not be extended merely by way of preventive detention.³⁴

The consideration of the protection of society at large is one that can be given relatively little weight in the sentencing exercise.³⁵ This is so even in the situation where there is no evidence supporting a conclusion that there will be an improvement of the offender's condition in the immediate future.³⁶

Punishment for the crime must not exceed a proper sentence, notwithstanding any need to protect society.³⁷ It has been said that the appropriate mechanism for protecting society cannot be found in the criminal law; the need for protection arises from mental illness and it is through mental health legislation that such protection as may be available must be sought.³⁸

³³ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477; *R v Scognamiglio* (1991) 56 A Crim R 81 at 85

³⁴ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 473

³⁵ *R v Windle* [2012] NSWCCA 222 at [57] per Basten JA

³⁶ *R v Windle* [2012] NSWCCA 222 at [57]

³⁷ *R v Windle* [2012] NSWCCA 222 at [57]

³⁸ *R v Windle* [2012] NSWCCA 222 at [57]

Criminal Antecedents

In *Veen v R (No 2)* [1988] 164 CLR 465 at 477 it was said by the High Court (per Mason CJ, Brennan, Dawson and Toohey JJ):

It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.

Personality Disorders

R v Adams [2002] NSWCCA 448 was a case in which it was held that there was a compelling need to have regard to the protection of the community. There was before the Court that the offender suffered from a personality disorder with borderline and antisocial features among other things. It was said (at [54] per Smart AJ with whom Ipp JA and Bell J agreed):

The psychiatric evidence did not support substantial impairment of her capacity to understand events or to judge whether her actions were right or wrong. However, it did support that her capacity to control herself was substantially impaired. This is a case where there is a compelling need to have regard to the protection of the community. She also needs protecting from herself. Of course, the sentence imposed must not, on these accounts, be extended beyond what is otherwise correct.

Where a person has been diagnosed with an Antisocial Personality Disorder there may be a particular need to give consideration to the protection of the public.³⁹

(See also *R v Windle* [2012] NSWCCA 222 on borderline personality disorder and antisocial personality disorder.)

³⁹ *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 at 177 per McClellan CJ at CL citing *R v Lawrence* (2005) NSWCCA 91 at [24] per Spigelman CJ

Fact finding in Respect of the Likelihood of Reoffending

In *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 Gleeson CJ said at [12]:

No doubt, predictions of future danger may be unreliable, but, as the case of *Veen* shows, they may also be right. Common law sentencing principles ... permit or require such predictions at the time of sentencing, which will often be many years before possible release.

Findings as to future dangerousness and likelihood of reoffending do not need to be established beyond reasonable doubt.⁴⁰ It has been held to be sufficient, for the purpose of considering the protection of the community, if a risk of re-offending is established by the Crown.⁴¹

Retribution

It was said in *R v Windle* [2012] NSWCCA 222 that a proper purpose of the criminal law is not to give effect to the irrational prejudices of ill-informed public opinion in terms of the community's expectation that an offender will suffer punishment and particular offences will merit severe punishment. The urge for retribution should be treated as diminished in the case of the mentally ill.⁴²

6. WEIGHT OF CUSTODIAL SENTENCE

Courts have held that a custodial sentence may weigh more heavily on a mentally ill person.⁴³ It may be helpful if advancing this point to be able to provide some kind of evidence that is indicative of the particular difficulties

⁴⁰ *R v SLD* (2003) 58 NSWLR 589 at [40]

⁴¹ *R v Harrison* (1997) 93 A Crim R 314 at 319

⁴² *R v Windle* [2012] NSWCCA 222 at [42] per Basten JA

⁴³ *R v Hemsley* [2004] NSWCCA 228 at [35]; *R v Israil* [2002] NSWCCA 255 at [26]; *R v Jiminez* [1999] NSWCCA at [25]; *R v Tsiaras* [1996] 1 VR 398 at [400]

that the offender will face in custody as a result of their mental health problems.

In a recent decision of *R v Wright* [2013] NSWCCA 82, it was noted that there was an absence of evidence at first instance as to whether or not the offender would be able to obtain treatment in custody for his mental illness, or as to whether or not his mental illness would place him in protected or segregated custody. The Court was not persuaded in those circumstances that imprisonment would be more onerous for the offender because of his mental illness, despite the fact that the Court at first instance appeared to have overlooked the consideration of the onerousness of the offender's time in custody.⁴⁴

7. DELAY IN PLEA OF GUILTY

In *Hatfield v R* [2011] NSWCCA 286 pleas of guilty were entered five months after the offender had been found fit to stand trial. The finding of fitness occurred two years after his arrest. The sentencing judge allowed a discount of 15 percent for the pleas of guilty, finding that they had not been made at the first reasonable opportunity. It was held that a discount of 20 percent should have been allowed because it would not have been reasonable for the offender to have entered guilty pleas until after he had been found fit to stand trial.⁴⁵ The delay following the finding of fitness was found to have been properly taken into account in the determining of the discount to be allowed for the pleas entered.⁴⁶ It follows that had there not been a further delay, the offender would have been entitled to a full 25 percent discount if the plea had been entered at the first opportunity following the finding of fitness.⁴⁷

In *Hawkins v R* [2011] NSWCCA 153 the offender had a long history of mental

⁴⁴ *R v Wright* [2013] NSWCCA 82 at [50] – [54] per Price J with whom Macfarlan JA and Hulme AJ agreed

⁴⁵ *Hatfield v R* [2011] NSWCCA 286 at [52]-[54] per Hall J, with whom the other members of the Court agreed (allowing the appeal)

⁴⁶ *Hatfield v R* [2011] NSWCCA 286 at [52] per Hall J

⁴⁷ *Hatfield v R* [2011] NSWCCA 286 at [54] per Hall J

illness. He entered pleas of guilty to two offences in the Local Court. When the matter went to the District Court, the Crown presented an indictment containing three offences – the two to which the plea had been entered in the Local Court, and a third charge. Ultimately the Crown did not proceed on the third charge and a plea was accepted to the first two charges. There were delays in the offender entering pleas of guilty in both the Local and District Court due to various inquiries being made regarding his mental health, one of which was a fitness hearing. The sentencing judge gave the offender a discount of 20 percent for the plea. On appeal, the Court held that the discount should have been 25 percent.⁴⁸ It was held that the utilitarian value of those pleas was not reduced by the fact that they were the subject of negotiation whereby other charges were not pursued.⁴⁹ (See also *R v Sharrouf* [2009] NSWSC 1002 at [67] and *R v Zeilaa* [2009] NSWSC 532 which concerned similar situations and were decisions at first instance where a discount of 25 percent was imposed.⁵⁰)

8. EACH CASE SHOULD BE ASSESSED ON ITS FACTS

In *R v Engert* (1995) 84 A Crim R 67, it was said that a “sensitive discretionary decision” is called for when sentencing an offender who suffers from a mental disorder.⁵¹ This means that the particular facts and circumstances of the case should be applied to the often overlapping and disparate purposes of criminal punishment as detailed in *Veen v The Queen* (No 2) (1988) 164 CLR 465 at 488. It was said in *R v Engert* per Gleeson CJ that it is erroneous in principle to approach sentencing:

... as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the

⁴⁸ *Hawkins v R* [2011] NSWCCA 153 at [25]- [26] per Hidden J

⁴⁹ *Hawkins v R* [2011] NSWCCA 153 at [26] per Hidden J

⁵⁰ *Hawkins v R* [2011] NSWCCA 153 at [25]- [26] per Hidden J

⁵¹ *R v Engert* (1995) 84 A Crim R 67 at 67 per Gleeson CJ

sentencing exercise.⁵²

9. PRACTICAL CONSIDERATIONS: MAKING CONCESSIONS AND PROVIDING EVIDENCE

In *BT v R* [2012] NSWCCA 128 counsel on appeal made submissions that were different from those made on sentence, in support of a contention that the sentence was manifestly excessive. The Court noted that concerns had been expressed over that approach in *Zreika v R* [2012] NSWCCA 44 (*Zreika*) at [79]–[81].⁵³ An appeal is not an opportunity to recast the case presented to the sentencing judge. Nonetheless the submissions were considered to determine whether there had been an error demonstrated. Counsel on sentence made the concession that there was no evidence of any causal connection between the offender’s mental health problems and the offence.⁵⁴ The concession was consistent with what the offender told Justice Health, in that he denied that any of his psychotic symptoms were particularly related to the offence.⁵⁵ The sentencing judge also considered contradictory statements in another Justice Health report.⁵⁶ The offender did not give evidence at the sentence hearing. In light of the concession made by counsel and the lack of evidence given by the offender, the Court held that there was no error by the sentencing judge in respect to taking into account the offender’s mental illness.⁵⁷

10. PREVIOUS VERDICTS OF NOT GUILTY BY REASON OF MENTAL ILLNESS ON CRIMINAL HISTORY

In *Heatley v R* [2008] NSWCCA 226 the offender was being sentenced for

⁵² *R v Engert* (1995) 84 A Crim R 67 at [68]

⁵³ *BT v R* [2012] NSWCCA 128 at [20] per Adamson J

⁵⁴ *BT v R* [2012] NSWCCA 128 at [22] per Adamson J

⁵⁵ *BT v R* [2012] NSWCCA 128 at [23] per Adamson J

⁵⁶ *BT v R* [2012] NSWCCA 128 at [26] per Adamson J

⁵⁷ *BT v R* [2012] NSWCCA 128 at [27] per Adamson J

offences of armed robbery. He had previously been found not guilty by reason of mental illness of two earlier offences of armed robbery. The sentencing judge, whilst recognising that the findings were not strictly part of the offender's criminal record, had regard to those matters on sentence and said they had "limited relevance".⁵⁸ The sentencing judge found that the armed robbery offence was not an uncharacteristic aberration and showed an attitude of disobedience to the law.⁵⁹ An act that is committed by a person whilst lacking the mental capacity to commit a crime should not be considered part of his criminal history or reflective of his or her attitude toward obedience to the law. Only offences of which a person has been convicted are relevant to a later sentencing task.⁶⁰ The Court likened this to a situation where an offender has been given a section 10 and a conviction not entered pursuant to the *Crimes (Sentencing Procedure) Act 1999*.⁶¹

11. DISMISSING A CHARGE BEFORE A FITNESS HEARING

In *Newman v R* [2007] NSWCCA 103, accused had been in custody for 17 months pending a trial. The accused's fitness became an issue and a direction was given that a fitness hearing be held pursuant to section 10 of the *Mental Health (Criminal Procedure) Act 1990* (now found under section 10 of the *Mental Health (Forensic Provisions) Act 1990*.) An application was made before the fitness hearing commenced for the charges to be dismissed pursuant to section 10(4) *Mental Health (Criminal Procedure) Act 1990*. The wording of section 10(4) as it presently is in the *Mental Health (Forensic Provisions) Act 1990* is the same. It reads:

If, in respect of a person charged with an offence, the Court is of the opinion that it is inappropriate, having regard to the trivial nature of the charge or offence, the nature of the person's disability or any other matter which the

⁵⁸ *Heatley v R* [2008] NSWCCA 226 at [41] per McClellan CJ at CL with whom the other members of the Court agreed

⁵⁹ *Heatley v R* [2008] NSWCCA 226 at [42] per McClellan CJ at CL

⁶⁰ *Heatley v R* [2008] NSWCCA 226 at [43] per McClellan CJ at CL

⁶¹ *Heatley v R* [2008] NSWCCA 226 at [43] per McClellan CJ at CL referring to the decision in *R v Price* [2005] NSWCCA 285

Court thinks proper to consider, to inflict any punishment, the Court may determine not to conduct an inquiry and may dismiss the charge and order that the person be released.

It was held on appeal that an application under section 10(4) may succeed where the Court would not impose any punishment, including the element of punishment implicit in a conviction. It was held that the section is analogous to the provision now found in section 10 of the *Crimes (Sentencing Procedure) Act 1999*.⁶² The ultimate power of the Court is to dismiss a charge that has been, or may be, proven.⁶³ The general approach adopted to section 10 *Crimes (Sentencing Procedure) Act 1999* (and its predecessor) is the correct approach to adopt for the purposes of section 10(4).⁶⁴ The task is to be conducted in anticipation of a finding of guilt, by either of the courses that can flow from a fitness hearing (being a trial or a special hearing).⁶⁵ Section 10(4) requires the Court to approach an application on the assumption of a finding of guilt, including a finding of qualified guilt (as a result of a special hearing), and then to apply a similar range of considerations as now arise under section 10 of the *Crimes (Sentencing Procedure) Act 1999*.⁶⁶ Where the Court would not impose any punishment, including the element of punishment implicit in a conviction, then the proceedings should be dismissed at the threshold of the fitness hearing without the need for one.⁶⁷

12. LIMITING TERMS

When an accused is found to be unfit to stand trial, a special hearing may be held. 'Limiting terms' are the sentences imposed following a special hearing where it is found on the limited evidence available that an accused person committed the offence charged or some other offence available as an

⁶² *Newman v R* [2007] NSWCCA 103 at [42] per Spigelman CJ (with whom Bell and Price JJ agreed)

⁶³ *Newman v R* [2007] NSWCCA 103 at [44]

⁶⁴ *Newman v R* [2007] NSWCCA 103 at [45]

⁶⁵ *Newman v R* [2007] NSWCCA 103 at [45]

⁶⁶ *Newman v R* [2007] NSWCCA 103 at [46]

⁶⁷ *Newman v R* [2007] NSWCCA 103 at [46]

alternative.

The Court must indicate whether, had the special hearing been a normal trial, it would have imposed a sentence of imprisonment.⁶⁸ In situations where the Court would have imposed a sentence of imprisonment, the Court must nominate a term (called a 'limiting term') in respect of the offence. The limiting term is the best estimate of the sentence the Court would have considered appropriate if the special hearing had been a normal trial for that offence and the person had been found guilty of that offence.⁶⁹ A total term only must be nominated, there is no scope for minimum and additional term.⁷⁰

If the Court indicates that it would not have imposed a sentence of imprisonment,⁷¹ the Court may impose any other penalty or make any other order it might have made on conviction of the person for the relevant offence in a normal trial.⁷² Orders made pursuant to subsection (2) are subject to appeal as such orders would be in normal circumstances.⁷³

In nominating a limiting term or imposing any other penalty or order, the Court may take into account (and backdate accordingly) any periods of custody or detention referable to the offence before, during or after the special hearing.⁷⁴ Limiting terms can commence at a later time, so they are served consecutively (or partly consecutively or concurrently) with another limiting term or sentence of imprisonment.⁷⁵ Otherwise, the limiting term is to take effect from the time when it is nominated.⁷⁶

If a limiting term is to be nominated, the Court must refer the person to the

⁶⁸ Section 23(1)(a), *Mental Health (Forensic Provisions) Act 1990*

⁶⁹ Section 23(1)(b), *Mental Health (Forensic Provisions) Act 1990*

⁷⁰ *R v Mitchell* (1999) 108 A Crim R 85at [21]; *R v Mailes* (2004) 62 NSWLR 181at [22] and [29]; *R v AN* [2005] NSWCCA 239at [13].

⁷¹ Section 23(7), *Mental Health (Forensic Provisions) Act 1990*: if the Court indicates that it would *not* have imposed a sentence of imprisonment, it must notify the Tribunal that a limiting term is not to be nominated in respect of the person.

⁷² Section 23(2), *Mental Health (Forensic Provisions) Act 1990*

⁷³ Section 23(3), *Mental Health (Forensic Provisions) Act 1990*

⁷⁴ Section 23(4) and (5)(a), *Mental Health (Forensic Provisions) Act 1990*

⁷⁵ Section 23(5)(b), *Mental Health (Forensic Provisions) Act 1990*. Section 23(6) lists a number of factors that the Court is to take into account when making a direction under subsection (5) (b).

⁷⁶ Section 23(5), *Mental Health (Forensic Provisions) Act 1990*

Tribunal, and may make such order with respect to the custody of the person as the Court considers appropriate (for instance an appropriate interim detention order).⁷⁷ The Tribunal must determine (and notify the Court) whether or not the person is suffering from a mental illness or a mental condition for which treatment is available in a mental health facility. If the person is not in a mental health facility, whether or not the person objects to being detained in a mental health facility.⁷⁸ After being notified of the Tribunal's determinations, the Court may make a final detention order.⁷⁹ There is no power for the Court to order that part of the limiting term be served in detention and part not.⁸⁰ A person who is serving a limited term is a 'forensic patient'.⁸¹

In respect of the length of limiting terms, the offender's mental condition is relevant in similar ways as it is in respect of general sentencing. For instance it can be of relevance in respect of the offender's culpability, likelihood of reoffending and the level of danger that a mentally ill offender presents to the community.⁸²

Imposing a Limiting Term After a Breach of Bond

In *Smith v R* [2007] NSWCCA 39 a special hearing took place (under the *Mental Health (Criminal Procedure) Act 1900*) and the accused was placed on a section 9 good behavior bond. He later breached the bond and was called up on the breach. A limiting term of three years was imposed by a different judge. The ability of the Court to impose a limiting term at that point was in issue on appeal.

⁷⁷ Section 24(1)(a) and (b), *Mental Health (Forensic Provisions) Act 1990* and *Mailes v DPP* [2006] NSWSC 267 at [29]

⁷⁸ Section 24(2) and (3), *Mental Health (Forensic Provisions) Act 1990*

⁷⁹ Section 27, *Mental Health (Forensic Provisions) Act 1990*; *R v AN (No 2)* at [48]; *Mailes v DPP* at [40].

⁸⁰ *R v AN (No 2)* (2006) 66 NSWLR 523 at [83].

⁸¹ Section 42 *Mental Health (Forensic Provisions) Act 1990*

⁸² *Courtney v R* (2007) 172 A Crim R 371 at [26], [59] and [83]; *Agha v R* [2008] NSWCCA 153 at [24].

It was held that there is power to impose a limiting term after revocation of a section 9 bond imposed following a special hearing. It was held that the legislature, in permitting a section 9 bond to be imposed must also be taken to have made available the consequent power to revoke the bond (available under the *Crimes (Sentencing Procedure) Act 1999*). If the power to revoke the bond is then exercised, it was held that the Court may proceed, not to 're-sentence' but to continue to deal with the person under the *Mental Health (Criminal Procedure) Act 1990 (NSW)* (as it then was).⁸³

⁸³ *Smith v R* [2007] NSWCCA 39 at [57] per Hall J, with whom Sully and Howie JJ agreed