HIGH COURT OF AUSTRALIA

BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

PHILIP NGUYEN APPELLANT

AND

THE QUEEN RESPONDENT

Nguyen v The Queen
[2016] HCA 17
4 May 2016
S271/2015

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

P M Wass SC with G E L Huxley for the appellant (instructed by Legal Aid Commission of NSW)

J H Pickering SC with H Baker for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Nguyen v The Queen

Criminal law – Sentencing – Manslaughter – Excessive self-defence – Where deceased a police officer – Where appellant taken to have shot deceased in honest but mistaken belief that deceased was person posing as police officer with intent to rob appellant – Whether sentencing judge erred in assessment of objective gravity of offence by taking into account absence of circumstance which if present would render subject offence a different offence – Relevance of *R v De Simoni* (1981) 147 CLR 383.

Criminal law – Sentencing – Totality principle – Where appellant convicted of manslaughter and wounding with intent to cause grievous bodily harm – Whether open to sentencing judge to impose wholly concurrent sentences – Whether appellate court erred in partially accumulating sentences – Whether sentence imposed manifestly inadequate.

Words and phrases – "accumulation", "concurrency", "*De Simoni* principle", "manifestly inadequate", "objective gravity", "totality".

Crimes (Sentencing Procedure) Act 1999 (NSW), ss 3A(a), 21A(1).

1 BELL AND KEANE JJ. This appeal raises two issues concerning the application of common law principles governing the sentencing of offenders. The first issue is whether the principle enunciated in *R v De Simoni*[1] applies to preclude a sentencing judge from taking into account favourably to the offender the absence of a factor which, had it been present, would have rendered the offender liable for a more serious offence. The second issue concerns the scope of the sentencing judge's discretion to impose wholly concurrent sentences for offences that are the product of the same act. This is an aspect of the application of the principle referred to as totality in sentencing. The issues arise in the context of sentencing under the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act"), which, relevantly, preserves the application of both principles[2].

The procedural history

2 On 19 July 2012, the appellant pleaded guilty in the Supreme Court of New South Wales to the manslaughter of Constable William Crews[3] and to wounding Constable Crews with intent to cause grievous bodily harm to him[4]. Manslaughter and wounding with intent to cause grievous bodily harm are offences that are each subject to a maximum penalty of imprisonment for 25 years[5]. A standard non-parole period of seven years is prescribed for the wounding offence[6]. The sentencing judge (Fullerton J) took into account a further offence in sentencing him for manslaughter[7]. This was the appellant's

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1 (1981) 147 CLR 383; [1981] HCA 31.

2 Sentencing Act, s 21A(1).

3 *Crimes Act* 1900 (NSW) ("the Crimes Act"), s 18(1)(b).

4 Crimes Act, s 33(1)(a).

5 Crimes Act, ss 24, 33(1).

6 Sentencing Act, s 54A, Table item 4.

7 Section 33(2) of the Sentencing Act provides that a sentencing court may take a further offence into account in dealing with the offender for the principal offence if the offender admits guilt to the further offence and indicates that the offender wants the court to take the further offence into account in dealing with the offender for the principal offence and, in all of the circumstances, the court considers it appropriate to do so. The offence taken into account was charged under s 7(1) of the *Firearms Act* 1996 (NSW).

unlawful possession of the firearm that was used in the commission of the wounding offence.

3 On 15 March 2013, the appellant was sentenced to a term of nine years and six months' imprisonment with a non-parole period of seven years for the manslaughter offence, and to a concurrent term of six years and three months' imprisonment with a non-parole period of four years and nine months for the wounding offence[8]. The sentences commenced on 8 September 2010. The sentence for the manslaughter offence was expressed to expire on 7 March 2020. The first date on which the appellant was eligible for release on parole was 7 September 2017.

4 The Director of Public Prosecutions ("the Director") appealed against the sentences to the Court of Criminal Appeal of the Supreme Court of New South Wales (Beazley P, Johnson and RA Hulme JJ)[9]. The Director's appeal was brought on four grounds[10]. The first ground contended that the sentencing judge erred in assessing the objective seriousness of the manslaughter offence by taking into account that the appellant did not know that the deceased was a police officer when, if he had known that fact, he would have been liable to conviction for murder. The Court of Criminal Appeal upheld this ground and in so doing referred to the principle in *De Simoni*[11].

5 The second ground contended error in the failure to impose a sentence consonant with the sentencing judge's assessment of the objective seriousness of the wounding offence[12]. The Court of Criminal Appeal treated this ground as a particular of the fourth ground, which contended that each sentence was manifestly inadequate[13]. The third ground contended error in the determination that the appellant's overall criminality could be comprehended by the sentence for manslaughter[14]. This ground was upheld[15], as was the fourth

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8 *R v Nguyen* [2013] NSWSC 197 at [72].

9 *Criminal Appeal Act* 1912 (NSW), s 5D.

10 *R v Nguyen* (2013) 234 A Crim R 324 at 327 [7].

11 *R v Nguyen* (2013) 234 A Crim R 324 at 335 [50]-[52], citing (1981) 147 CLR 383.

12 *R v Nguyen* (2013) 234 A Crim R 324 at 336 [56].

13 *R v Nguyen* (2013) 234 A Crim R 324 at 338 [70].

14 *R v Nguyen* (2013) 234 A Crim R 324 at 339 [75].

15 *R v Nguyen* (2013) 234 A Crim R 324 at 340 [84].

ground[16]. The Court of Criminal Appeal was satisfied that the sentence imposed for each offence was manifestly inadequate and that there was no discretionary basis for declining to intervene.

6 The Court of Criminal Appeal quashed the sentences imposed in the Supreme Court and, in their place, sentenced the appellant to a term of 16 years and two months' imprisonment with a non-parole period of 12 years for the manslaughter offence, and a term of eight years and one month's imprisonment with a non-parole period of six years for the wounding offence[17]. The sentence for the manslaughter offence was accumulated by 12 months on the sentence for the wounding offence[18]. The aggregate sentence was a term of 17 years and two months' imprisonment with a non-parole period of 13 years[19]. It will expire on 7 November 2027. The earliest date on which the appellant will be eligible for release on parole is 8 September 2023[20].

7 On 11 December 2015, Kiefel and Gageler JJ granted the appellant special leave to appeal on grounds which contend that the Court of Criminal Appeal erred (i) in its application of the principle in *De Simoni* to justify the imposition of a sentence of greater severity; and (ii) in concluding that, in circumstances in which the appellant's single act was the genesis of both offences, it was necessary to partially accumulate the sentences. These grounds do not, in terms, challenge the Court of Criminal Appeal's conclusion that each sentence was manifestly inadequate. The appellant seeks to overcome this difficulty by contending that the "*De Simoni* error" infected the Court of Criminal Appeal's assessment of the inadequacy of the sentence for manslaughter. If that proposition were to be made good, it might affect the Court of Criminal Appeal's allied conclusion that the manslaughter sentence could not comprehend the criminality of both offences. Nonetheless, for the reasons to be given, the proposition is not made good. The Court of Criminal Appeal's conclusion that each sentence was manifestly inadequate stands. It follows that the appeal must be dismissed.

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16 *R v Nguyen* (2013) 234 A Crim R 324 at 343 [113].

17 *R v Nguyen* (2013) 234 A Crim R 324 at 345 [128].

18 *R v Nguyen* (2013) 234 A Crim R 324 at 344 [123].

19 *R v Nguyen* (2013) 234 A Crim R 324 at 345 [126].

20 *R v Nguyen* (2013) 234 A Crim R 324 at 345 [128].

The factual background

8 The appellant was living in a unit in Bankstown and had the use of Garage 8, which was located in the basement of the unit complex. About two weeks before the events giving rise to this matter, the appellant was the victim of an attempted robbery. He was inside Garage 8 when two masked men armed with cricket bats entered. The appellant shouted at them and they fled, leaving a mobile telephone behind. Following this incident, the appellant obtained a pistol with a view to defending himself against any further attempted robbery. He did not have a licence to possess the pistol.

9 On the evening of 8 September 2010, the appellant and an associate, Tan Chung, were in Garage 1 of the unit complex discussing a drug deal with three other men. Earlier that day, the police had obtained a warrant to search the appellant's unit and Garage 8. Shortly after negotiations over the drug deal came to an end and the three men left Garage 1, the police entered the basement of the unit complex.

10 Detective Senior Constable Roberts was in charge of the execution of the search warrant. Eight officers were involved in the operation. Three were in uniform and the remainder were in civilian clothing. They did not anticipate that the appellant would be armed and the operation was assessed as a low risk one.

11 Detective Roberts and the deceased, in civilian clothes, were the first officers to enter the basement of the complex. Detective Roberts was carrying a battering ram and the deceased was carrying a folder containing the search warrant and other documents. They walked towards Garage 1 in the mistaken belief that it was Garage 8. Other officers also in civilian clothes were close behind them. None had drawn a firearm. They announced that they were police several times as they approached Garage 1. The deceased was in front of Detective Roberts. Detective Roberts heard the deceased call out "gun, he has a gun".

12 The appellant emerged from Garage 1 in a crouched position holding a pistol and pointing it at the police. The deceased and Detective Roberts identified themselves as police officers and instructed the appellant to put down the gun. The appellant fired at the deceased. The bullet penetrated the soft tissue of the deceased's left upper arm. The deceased responded by firing three shots in quick succession but none hit the appellant. Detective Roberts drew his firearm and took cover behind a brick wall. From this position he fired at the appellant. The bullet struck the deceased in the neck. This was the fatal wound. As the deceased lay bleeding on the ground, the appellant attempted to fire again. His pistol appeared to be jammed. He then picked up the battering ram and simulated its use as a gun, pointing it towards the police. He and Chung then retreated into the garage, from which they made their way to the appellant's unit.

The appellant repeatedly told Chung that the men were "fake police" who thought that he had money.

13 When it became clear to the police that the appellant was no longer in the basement, they were able to render first aid to the deceased. He was taken by ambulance to hospital, where death was pronounced. The appellant was arrested later that evening in his unit.

14 The police searched Garages 8 and 1 and located items associated with prohibited drugs, including a set of scales, empty resealable plastic bags and 3.21 grams of N,N-Dimethylamphetamine. Samples of the appellant's blood and urine taken after his arrest revealed relatively minor concentrations of morphine, amphetamine and methylamphetamine. The results were consistent with the appellant's history of habitual drug use. The consumption of this quantity of drugs would not have had any relevant impact on the appellant's perception of events at the time of the shooting.

15 In an interview with the police after his arrest, the appellant gave an account that he had seen two men standing at the entrance to the garage and that he believed they were there to rob him. He told the police about the earlier attempted robbery. The police confirmed that account. They traced the robbers from the mobile telephone that had been dropped during the attempted robbery.

16 The appellant told the police that he and Chung had gone to the garage to smoke heroin. He said that, at the time of the incident, Chung was organising a deal involving eight ounces of cocaine. At the sentence hearing, the appellant accepted that his account that he was not involved in this transaction was false. The extent of his involvement was not further explored.

The basis of the appellant's plea of guilty to manslaughter

17 At the sentence hearing, the prosecutor tendered a document styled "Crown Case Summary", which contained an agreed statement of facts and the prosecutor's analysis of the basis of the appellant's liability for each offence. Liability for the manslaughter of the deceased was put on the basis that the prosecution could not negative the partial defence of excessive self-defence, which is provided in s 421 of the Crimes Act. The appellant accepted that his act in firing the pistol caused the death of the deceased because it substantially contributed to the exchange in which the fatal shot was fired and that consequence was reasonably foreseeable[21].

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21 *R v Nguyen* [2013] NSWSC 197 at [33].

18 Section 421(1)(c) applies to a person who uses force involving the infliction of death where that conduct is not a reasonable response in the circumstances as the person perceives them but the person believes the conduct is necessary in self-defence or defence of another. In such a case, s 421(2) provides the person is not criminally responsible for murder but, on a trial for murder, is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter. The prosecution conceded that, at the time the appellant presented his firearm, it could not disprove that he considered it necessary to do what he did in order to defend himself in circumstances in which he believed that "the men approaching him may well be people involved in the drug trade who were trying to 'rip him off'." The prosecution contended, and by his plea the appellant accepted, that his conduct was not a reasonable response in the circumstances as he perceived them to be.

19 The basis of the appellant's liability for what would otherwise have been the murder of the deceased was not further explored below or in this Court. Murder is defined under s 18(1)(a) of the Crimes Act. The mental element of the offence requires that the accused's act causing the death charged is done with reckless indifference to human life, or with the intent to kill or to inflict grievous bodily harm upon some person. The appellant's plea to the wounding offence acknowledged that, at the time he fired the pistol, he had the intention of inflicting grievous bodily harm.

The sentencing judge's findings

20 The sentencing judge referred to the appellant's background by reference to a report prepared by the Probation and Parole Service[22]. In summary, the appellant was aged 55 years at the date of the offences. He had a criminal history, which included a conviction in mid-2006 for the supply of a commercial quantity of a prohibited drug. He was sentenced for this offence by the District Court of New South Wales to a term of three years' imprisonment with an 18 month non-parole period.

21 The appellant was a habitual user of prohibited drugs. He had become dependent on drugs following the death of his first wife. His drug use led to the breakdown of his relationship with his three children. He had remarried and was living with his second wife at the date of the offences but the two had separated while he was a remand prisoner.

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22 *R v Nguyen* [2013] NSWSC 197 at [59].

22 The sentencing judge accepted that the appellant had shown remorse for the offences but her Honour found the weight of this factor was largely overwhelmed by the aggravating features of the offences[23]. A discount of 10 per cent was allowed to reflect the utilitarian value of the appellant's pleas of guilty.

23 The sentencing judge took into account three circumstances of aggravation, which applied to both offences: its commission involved the use of a firearm[24]; it was carried out without regard to public safety[25]; and the victim was a police officer and the offence arose because of his occupation[26]. Her Honour assessed that each offence was objectively serious[27].

24 To the extent that it was relevant to assess where the wounding offence lay within a range of such offences[28], the sentencing judge determined that it was within the mid-range. This conclusion took into account "some allowance" for the fact that the appellant believed the men were robbers and that the wound itself was not serious[29]. The offence nonetheless was of mid-range of seriousness because it involved the use of a firearm[30].

The *De Simoni* issue

25 The prosecution submitted that each offence was within the category of "worst case". The sentencing judge's reasons for rejecting that submission are set out in [57] of her reasons. The last two sentences of that paragraph gave rise to the Director's first ground in the Court of Criminal Appeal[31]:

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23 *R v Nguyen* [2013] NSWSC 197 at [65].

24 *R v Nguyen* [2013] NSWSC 197 at [43], citing Sentencing Act, s 21A(2)(c).

25 *R v Nguyen* [2013] NSWSC 197 at [55], citing Sentencing Act, s 21A(2)(i).

26 *R v Nguyen* [2013] NSWSC 197 at [53], citing Sentencing Act, s 21A(2)(a).

27 *R v Nguyen* [2013] NSWSC 197 at [57].

28 *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39.

29 *R v Nguyen* [2013] NSWSC 197 at [58].

30 *R v Nguyen* [2013] NSWSC 197 at [58].

31 *R v Nguyen* [2013] NSWSC 197 at [57].

> "I am not persuaded, however, that either offence is in the worst category. It would have been otherwise were the offender to have shot at Constable Crews intending to inflict grievous bodily harm knowing or believing he was a police officer, or were he with that same state of awareness to have pleaded guilty to manslaughter on the basis that Constable Crews was killed by his unlawful and dangerous act in shooting at him."

26 The Director submitted that the sentencing judge wrongly discounted the seriousness of the manslaughter by taking into account that the appellant did not know the deceased was a police officer. In the Director's submission, this was a breach of the sentencing principle stated in *De Simoni*[32]. The appellant did not take issue with the Director's invocation of the *De Simoni* principle in the Court of Criminal Appeal. The focus of the appellant's response to this ground in that Court was on the discretionary nature of the sentencing judge's assessment of objective seriousness[33].

27 It will be recalled that the Director's first ground of appeal was expressed in terms that the sentencing judge erred in the assessment of the objective seriousness of the manslaughter offence[34]. The Court of Criminal Appeal upheld this ground, stating that error had been demonstrated "in the finding of reduced objective seriousness by reference to an impermissible factor."[35] The impermissible factor was the appellant's lack of knowledge or belief that the deceased was a police officer. The Court of Criminal Appeal observed that, had the appellant known that he was shooting at a police officer, the basis of his liability for manslaughter, and not murder, would have been removed[36]. In reasoning to this conclusion, the Court accepted the Director's submission that the error constituted a breach of the principle in *De Simoni*[37]. The Court of Criminal Appeal said that the *De Simoni* principle is breached when, in assessing the objective seriousness of an offence, the sentencing court takes into account the absence of a factor that would warrant conviction for a more serious

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32 *R v Nguyen* (2013) 234 A Crim R 324 at 334 [41], citing (1981) 147 CLR 383 at 389 per Gibbs CJ.

33 *R v Nguyen* (2013) 234 A Crim R 324 at 334 [44].

34 *R v Nguyen* (2013) 234 A Crim R 324 at 327 [7(a)].

35 *R v Nguyen* (2013) 234 A Crim R 324 at 336 [54].

36 *R v Nguyen* (2013) 234 A Crim R 324 at 335 [47].

37 *R v Nguyen* (2013) 234 A Crim R 324 at 335 [50], [52].

offence[38]. That proposition was illustrated by saying that it would be a breach of the *De Simoni* principle to take into account the absence of the infliction of grievous bodily harm in assessing the objective seriousness of an assault occasioning actual bodily harm[39].

The *De Simoni* principle

28 The principle in *De Simoni*, stated by Gibbs CJ, is that[40]:

> "[A] judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."

29 The appellant is correct in submitting that the *De Simoni* principle operates for the benefit of the offender and does not apply to preclude a sentencing court from taking into account the absence of a factor which, if present, may have rendered the offender guilty of a more serious offence. This is because the *De Simoni* principle is an aspect of the fundamental principle that no one should be punished for an offence of which the person has not been convicted[41]. This is not to say that the Court of Criminal Appeal was wrong to hold that a judge sentencing an offender for an offence of assault occasioning actual bodily harm would err if the judge assessed the seriousness of the offence by taking into account that the offender had not inflicted grievous bodily harm upon the victim. The judge would err because, plainly enough, that fact is irrelevant to the assessment of the seriousness of an assault occasioning actual bodily harm.

30 The Court of Criminal Appeal's adoption of the Director's reference to *De Simoni* was misplaced. However, as their Honours made clear, the Director's first ground was upheld because the Court of Criminal Appeal considered that the sentencing judge allowed "an extraneous or irrelevant consideration" to affect her decision[42]: this was an error of the second kind identified in *House v The*

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38 *R v Nguyen* (2013) 234 A Crim R 324 at 335 [51].

39 *R v Nguyen* (2013) 234 A Crim R 324 at 335 [50].

40 (1981) 147 CLR 383 at 389.

41 (1981) 147 CLR 383 at 389 per Gibbs CJ.

42 *R v Nguyen* (2013) 234 A Crim R 324 at 335 [52].

King[43]. The appellant's perception, that the deceased was a robber and not that he was a police officer, was not material to the assessment of the objective seriousness of the manslaughter[44]. The gravamen of that offence was the taking of a life in self-defence where the act was not a reasonable response to the circumstances as the appellant perceived them.

31 The appellant submits that, correctly understood, the sentencing judge was not making an assessment of the objective seriousness of the manslaughter of which he was convicted in the impugned passage: her Honour was positing an hypothetical case of manslaughter by unlawful and dangerous act to explain her rejection of the prosecutor's "worst case" submission.

32 It may be, as the appellant submits, that the Court of Criminal Appeal did misapprehend the sentencing judge's analysis in the concluding sentence of [57]. The Court of Criminal Appeal referred to an "additional difficulty" in the sentencing judge's analysis arising from the reference to a "different approach" being available had the appellant "pleaded guilty to manslaughter on the basis that Constable Crews was killed by his unlawful and dangerous act in shooting at him."[45] Their Honours said, "it is difficult to see how the act of shooting at a police officer *with intent to inflict grievous bodily harm* could be characterised merely as an unlawful and dangerous act for the purpose of the law of manslaughter."[46]

33 In the last sentence of [57], the sentencing judge addressed the prosecutor's "worst case" submission in relation to each of the offences in turn. Her Honour observed, with respect to the wounding offence, that to have fired at the deceased intending to inflict grievous bodily harm knowing or believing that he was a police officer would have come within the worst category of offence. Next, her Honour turned to the manslaughter offence and observed that had the appellant with "that same state of awareness" – a reference to knowledge or belief that the deceased was a police officer – been convicted of manslaughter based on his unlawful and dangerous act of shooting at him, that offence, too, would have been in the worst category of offence. Contrary to the Court of Criminal Appeal's statement, the sentencing judge was not discussing liability for manslaughter in circumstances in which the firing of the weapon was accompanied by the intent to do grievous bodily harm.

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43 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; [1936] HCA 40.

44 *R v Nguyen* (2013) 234 A Crim R 324 at 341 [95].

45 *R v Nguyen* (2013) 234 A Crim R 324 at 335-336 [53].

46 *R v Nguyen* (2013) 234 A Crim R 324 at 336 [53] (emphasis added).

34 In sentencing for any offence, it will seldom assist in determining whether a case is in the worst category to hypothesise some different case which is arguably more heinous[47]. That proposition has even more force in the case of sentencing for manslaughter, the most protean of all offences. Here, in dealing with the prosecutor's "worst case" submission, the sentencing judge proposed that the involuntary manslaughter of the deceased (by unlawful and dangerous act) in circumstances in which it was known that the deceased was a police officer was a more objectively serious offence than the voluntary manslaughter (murder reduced to manslaughter by reason of excessive self-defence) with which she was dealing[48]. The determination of whether the appellant's offence was in the category of "worst case", and for that reason deserving of the maximum penalty, was hardly assisted by comparison with the improbable hypothesised offence. Nonetheless, it was not legal error for the sentencing judge to illustrate her rejection of the prosecutor's submission in the way that she did. Nor was it error to consider that a case of involuntary manslaughter may be more objectively grave than a case of voluntary manslaughter[49].

35 The Court of Criminal Appeal did not hold that the sentencing judge erred by rejecting the prosecutor's "worst case" submission. Contrary to the appellant's argument in this Court, the Court of Criminal Appeal did not conclude that the offence was in the worst category of case[50]. The Court of Criminal Appeal reasoned that the hypothesised case suggested that the sentencing judge wrongly considered that the appellant's lack of awareness that the deceased was a police officer lessened the objective seriousness of this manslaughter[51]. This conclusion served to explain the imposition of a sentence which was manifestly inadequate[52]. It is the latter conclusion that must be overcome if the appellant is to succeed.

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47 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478 per Mason CJ, Brennan, Dawson and Toohey JJ; [1988] HCA 14.

48 See Fisse, *Howard's Criminal Law*, 5th ed (1990) at 78.

49 *R v Isaacs* (1997) 41 NSWLR 374 at 381 per Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ.

50 *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452 per Mason CJ, Wilson, Brennan, Toohey and Gaudron JJ; [1987] HCA 46.

51 *R v Nguyen* (2013) 234 A Crim R 324 at 335 [52].

52 See *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

The structure of the sentences

36 The appellant's second ground of appeal contends that the Court of Criminal Appeal erred in holding that the sentencing judge was required to partially accumulate the sentences. Her Honour determined that the sentences should be wholly concurrent because, while there were different consequences attending his criminal act, that act was common to both offences. Her Honour considered that the total criminality constituted by the appellant's offending could be comprehended by the sentence for the manslaughter[53]. The Court of Criminal Appeal rejected this analysis, observing that "[a]lthough there was but a short period of time that passed between the offences, they were distinct offences caused by different bullets causing very different consequences."[54] The Court of Criminal Appeal said the nature and seriousness of the wounding offence was such that the sentence for manslaughter could not sufficiently comprehend the criminality involved in it[55].

37 Just as a sentencing judge is accorded as much flexibility as is consonant with the statutory sentencing regime in determining the appropriate sentence[56], so, too, the judge is to be accorded the same flexibility in determining the structure of two or more sentences[57]. The Sentencing Act does not confine the approach to be taken to the structure of two or more sentences. It assumes concurrency in the absence of a direction to the contrary[58]. The sentencing judge was required to impose an appropriate sentence for each offence and to structure the sentences such that the overall sentence was just and appropriate to the totality of the appellant's offending behaviour[59]. As the Court of Criminal Appeal correctly said, the question of concurrency or partial accumulation

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53 *R v Nguyen* [2013] NSWSC 197 at [69].

54 *R v Nguyen* (2013) 234 A Crim R 324 at 339 [81].

55 *R v Nguyen* (2013) 234 A Crim R 324 at 340 [83].

56 *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27] per Gleeson CJ, Gummow, Hayne and Callinan JJ; [2005] HCA 25.

57 *Johnson v The Queen* (2004) 78 ALJR 616 at 624 [26] per Gummow, Callinan and Heydon JJ; 205 ALR 346 at 356; [2004] HCA 15.

58 Sentencing Act, s 55(2).

59 *Mill v The Queen* (1988) 166 CLR 59 at 62-63 per Wilson, Deane, Dawson, Toohey and Gaudron JJ; [1988] HCA 70.

required consideration of whether the sentence for the manslaughter offence could encompass the criminality of both offences[60].

38 In approaching this ground, the Court of Criminal Appeal observed that sentences are not to be made concurrent "because of the similarity of the conduct" or because the conduct may be seen to be part of the one course of criminal conduct[61]. Public confidence in the administration of justice was said to require that sentencing courts avoid any suggestion of a discount for multiple offending[62]. The Court referred in this respect to *R v MAK*[63]. Somewhat different considerations were raised in that case, which was concerned with the application of the totality principle to the sentencing of an offender for sexual offences in circumstances in which the offender was serving sentences for unrelated sexual offences.

39 In this case, the appellant was being sentenced for two offences, each of which arose from his unlawful act in firing the pistol. The appellant was not to be punished twice for the commission of an element that was common to the two offences[64]. Nonetheless, the intent to cause grievous bodily harm, an element of the wounding offence, was not an element of liability for the manslaughter. Accepting this, it remains that the appellant's liability for the manslaughter was inextricably linked to the wounding offence. This offence of voluntary manslaughter, done in excessive self-defence, assumed that the act that in law caused the death was accompanied by the intent to cause grievous bodily harm. In the circumstances, it cannot be said that it was not open to the sentencing judge to impose wholly concurrent sentences provided the criminality of both offences was appropriately reflected in the sentence for the manslaughter.

40 The appellant's second ground succeeds to the extent that the Court of Criminal Appeal is to be understood as holding that the nature and seriousness of the wounding offence was such that an appropriate sentence for the manslaughter was not capable of comprehending the criminality involved in the wounding

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60 *R v Nguyen* (2013) 234 A Crim R 324 at 339 [78].

61 *R v Nguyen* (2013) 234 A Crim R 324 at 339 [78].

62 *R v Nguyen* (2013) 234 A Crim R 324 at 339 [80].

63 (2006) 167 A Crim R 159 at 164-165 [18] per Spigelman CJ, Whealy and Howie JJ.

64 *Pearce v The Queen* (1998) 194 CLR 610 at 623 [40] per McHugh, Hayne and Callinan JJ; [1998] HCA 57.

offence[65]. It is difficult to separate the Court of Criminal Appeal's conclusion that the order for concurrency failed to adequately reflect the appellant's overall criminality from its conclusion that the sentence for each offence was manifestly inadequate. Again, success on this ground does not assist the appellant unless that conclusion is overcome. Moreover, recognition that it was open to impose appropriate concurrent sentences does not mean that it was an error for the Court of Criminal Appeal, in the exercise of its discretion, to provide for partial accumulation in the sentences it imposed.

Manifest inadequacy

41 As earlier explained, the appellant contends that the conclusion of manifest inadequacy, in the case of the manslaughter sentence, is tainted by the Court of Criminal Appeal's recourse to the *De Simoni* principle in assessing the objective seriousness of the offence. The appellant identifies the error for which he contends in the following statement[66]:

> "This was a most serious example of the crime of manslaughter. For reasons explained in the context of the first ground of appeal, the fact that the [appellant] did not know or believe that the persons in the garage were police officers is not relevant to an assessment of the objective gravity of the manslaughter offence."

42 The appellant's complaint is that the Court of Criminal Appeal wrongly confined its assessment of the gravity of the offence by the exclusion of any consideration of his mental state. He contends that the determination of whether the sentence imposed by the sentencing judge was unreasonably lenient required that all the circumstances of the offence be taken into account. In particular, the appellant submits it was important to take into account that he acted in the heat of the moment, believing that he needed to fire at the deceased in order to defend himself.

43 The Court of Criminal Appeal well understood that the appellant's plea of guilty to manslaughter was offered, and accepted, on the basis that the prosecution could not negative the partial defence provided by s 421(1) of the Crimes Act. This and the facts were recited earlier in the Court of Criminal Appeal's reasons[67]. As earlier explained, the Court of Criminal Appeal was correct to say that the appellant's perception that the deceased was a robber was

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65 *R v Nguyen* (2013) 234 A Crim R 324 at 340 [83].

66 *R v Nguyen* (2013) 234 A Crim R 324 at 341 [95].

67 *R v Nguyen* (2013) 234 A Crim R 324 at 327-331 [9]-[17].

not material to the assessment of the gravity of the manslaughter[68]. The Court of Criminal Appeal was also correct in assessing that this was a most serious example of the crime of manslaughter[69]. The appellant chose to arm himself with a pistol in order to ward off others involved in the drug milieu from further attempts to rob him. When confronted by men who he believed were out to "rip him off", he fired the pistol, leading to the fatal exchange of gunfire. This took place in the basement of a suburban block of units with the attendant risk to the safety of residents and other members of the public. In the event, a policeman carrying out his lawful duty was killed. As the sentencing judge correctly appreciated, this was a circumstance of aggravation notwithstanding that the appellant did not know the deceased was a police officer at the time he fired at him. The Court of Criminal Appeal's conclusion that a sentence of nine and a half years was manifestly inadequate to reflect the seriousness of the offence was plainly correct. The decision was not attended by material error and, for that reason, the appeal must be dismissed.

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68 *R v Nguyen* (2013) 234 A Crim R 324 at 341 [95].

69 *R v Nguyen* (2013) 234 A Crim R 324 at 341 [95].

Gageler J
Nettle J
Gordon J

44 GAGELER, NETTLE AND GORDON JJ. Upon pleading guilty on arraignment to one count of manslaughter and one count of wounding with intent to cause grievous bodily harm, the appellant was sentenced by a judge of the Common Law Division of the Supreme Court of New South Wales (Fullerton J)[70]. For the offence of manslaughter the appellant was sentenced to a term of imprisonment of nine years and six months (comprised of a non-parole period of seven years and a balance term of two years and six months). For the offence of wounding with intent to cause grievous bodily harm the appellant was sentenced to a term of imprisonment of six years and three months (comprised of a non-parole period of four years and nine months and a balance term of one year and six months). The sentence for each offence was backdated to commence on 8 September 2010. In imposing these sentences the judge correctly took into account an additional offence[71], being the unauthorised possession of a prohibited firearm ("the Form 1 offence").

45 On a Crown appeal to the Court of Criminal Appeal of the Supreme Court of New South Wales, the sentences were quashed and the appellant was re-sentenced[72]. For the offence of wounding the appellant was re-sentenced to imprisonment comprising a non-parole period of six years, commencing on 8 September 2010 and expiring on 7 September 2016, with a balance term of two years and one month, commencing on 8 September 2016 and expiring on 7 October 2018. For the offence of manslaughter the appellant was re-sentenced to imprisonment comprising a non-parole period of 12 years, commencing on 8 September 2011 and expiring on 7 September 2023, with a balance term of four years and two months, commencing on 8 September 2023 and expiring on 7 November 2027. By grant of special leave, the appellant now appeals to this Court against the whole of the judgment and orders of the Court of Criminal Appeal.

The facts

46 In brief substance, the appellant shot and wounded the deceased, who was a police officer, while the deceased was lawfully executing a search warrant in company with other police officers on premises in close proximity to the appellant's home. The shot struck the deceased in the arm, thereby causing him a serious but non-fatal gunshot wound. In the course of the fire-fight which ensued, one of the other police officers fired a shot which was intended for the

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70 *R v Nguyen* [2013] NSWSC 197.

71 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 33(2).

72 *R v Nguyen* (2013) 234 A Crim R 324.

appellant, but which unfortunately instead hit the deceased in the neck, thereby inflicting a wound from which he later died.

47 In the circumstances which obtained, the Crown accepted that it could not exclude as a reasonable possibility that, when the appellant fired at the deceased, the appellant honestly believed that the deceased was someone posing as a police officer who was intent on robbing the appellant and might have posed a serious risk to the appellant's safety.

48 The appellant pleaded guilty to manslaughter. By his plea and agreement with the Crown statement of facts he may be taken to have accepted responsibility for killing the deceased by excessive self-defence on the basis that, by firing at the deceased, the appellant substantially contributed to the ensuing exchange of gunfire in circumstances where it was reasonably foreseeable that someone in the vicinity of the exchange might be fatally, even if inadvertently, shot, and that a reasonable person in the appellant's position would not have considered it necessary so to shoot in defence of himself or of property.

The judge's sentencing remarks

49 The sentencing judge delivered detailed and comprehensive sentencing remarks. For the purposes of this appeal, however, it is necessary to refer to only two aspects of her Honour's reasoning. The first is her assessment of the objective gravity of the offence of manslaughter, of which her Honour said as follows[73]:

> "I accept that the offender was unaware that Constable Crews was a police officer when he shot him and that, although he did not fire the shot that killed Constable Crews, he caused his death. I also accept that when he discharged the pistol that caused his death and the wounding he had a genuine belief (entirely misplaced) that he needed to defend himself against a perceived threat of harm. Notwithstanding those findings, the circumstance in which the offences were committed, including the aggravating factors to which I have referred, render both offences objectively serious. I am not persuaded, however, that either offence is in the worst category. It would have been otherwise were the offender to have shot at Constable Crews intending to inflict grievous bodily harm knowing or believing he was a police officer, or were he with that same state of awareness to have pleaded guilty to manslaughter on the basis that

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73 *R v Nguyen* [2013] NSWSC 197 at [57].

> Constable Crews was killed by his unlawful and dangerous act in shooting at him."

50 The second is her Honour's conclusion that the sentence imposed for the offence of manslaughter and the sentence imposed for the offence of wounding should be wholly concurrent. Of that her Honour said this[74]:

> "Although the consequences of the offender's criminal act are different (in that the bullet he fired caused a wounding while the bullet he caused to be fired caused a death), the same criminal conduct is common to both offences. Detective Senior Constable Roberts has no criminal liability for firing the fatal shot. In these circumstances I am satisfied that the total criminality constituted by his offending can be comprehended by the sentence for the manslaughter, which I accept is the more serious offence by reason of the loss of life."

The decision of the Court of Criminal Appeal

51 The Court of Criminal Appeal (Beazley P, Johnson and RA Hulme JJ) held that the judge erred in her assessment of the objective gravity of the offence of manslaughter by contrasting it with what the judge supposed would have been the gravity of the offence if the appellant had known that the deceased was a police officer. In substance, the Court of Criminal Appeal reasoned that if the appellant had been aware that the deceased was a police officer the offence would have been murder, not manslaughter, and thus that the judge erred by taking into account the absence of a circumstance which, had it been present, would have warranted conviction for a more serious offence than manslaughter. The Court of Criminal Appeal described that as a breach of the principle deriving from *R v De Simoni*[75].

52 The Court of Criminal Appeal also considered that the judge erred by not cumulating part of the sentence imposed for the offence of wounding on the sentence imposed for the offence of manslaughter. Their Honours reasoned that the two offences were "distinct offences caused by different bullets causing very different consequences" and thus that "[a] measure of accumulation was necessary"[76].

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74 *R v Nguyen* [2013] NSWSC 197 at [69].

75 (1981) 147 CLR 383; [1981] HCA 31.

76 *R v Nguyen* (2013) 234 A Crim R 324 at 339 [81], 340 [83].

53 Ultimately, the Court of Criminal Appeal was satisfied that the sentences were manifestly inadequate, having had regard to the nature and gravity of the offences, the circumstances in which they were committed and the personal circumstances of the appellant, including his age and antecedents.

Parties' contentions

54 The appellant contends that the Court of Criminal Appeal erred in its application of what it described as the *De Simoni* principle; erred in holding that the judge was wrong not to cumulate some part of the sentence imposed for the offence of wounding on the sentence imposed for the offence of manslaughter; and, as a consequence, erred in holding that the sentences imposed by the judge were manifestly inadequate.

55 The respondent contends that there is no error disclosed in the Court of Criminal Appeal's reasoning.

Reference to *De Simoni* misplaced

56 The Court of Criminal Appeal was correct in holding that the sentencing judge erred in her assessment of the objective gravity of the offence of manslaughter by contrasting it with what the judge supposed would have been the gravity of the offence if the appellant had known that the deceased was a police officer.

57 Contrary to the appellant's submissions, the judge's comparison of the subject offence with the supposed offence cannot properly be regarded as a comparison with some other hypothetical offence of manslaughter falling short of murder. As her Honour made clear, she was referring to "the offender", and considering how "his" offending might have risen to the "worst category" of manslaughter if the additional circumstance of knowing that the deceased was a police officer were present. The problem with this approach was, as the Court of Criminal Appeal recognised, that if the appellant had known that the deceased was a police officer, and had shot him with intent to cause grievous bodily harm, there would have been no basis for the appellant's invocation of the partial defence of excessive self-defence. The appellant would have been guilty of murder.

58 It is irrelevant in assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder. It is erroneous because it is likely to result in an assessment of the relative gravity of the subject offence which ill-accords with its objective gravity relative to other instances of offences of that kind.

59 Consequently, the judge's comparison of the gravity of the subject offence of manslaughter with what she supposed would have been the gravity of the offence if the appellant had known that the deceased was a police officer was an erroneous comparison that was likely to result, and appears in fact to have resulted, in the judge concluding that the objective gravity of the subject offence of manslaughter ranked lower in the range of gravity of offences of manslaughter than in fact it did.

60 The Court of Criminal Appeal was not correct, however, in characterising the judge's comparison of the subject offence with the supposed offence as a contravention of the *De Simoni* principle. The *De Simoni* principle prohibits a judge taking into account, as an aggravating circumstance of an offence, a circumstance or factor which would render the offence a different and more serious offence[77]. It has nothing to say about the impropriety of a judge taking into account the absence of a circumstance which, if it were present, would render the subject offence a different offence. The latter is erroneous simply because it is irrelevant to, and likely to distort, the assessment of objective gravity.

Accumulation of sentences

61 The Court of Criminal Appeal concluded that it was not open to the sentencing judge to decline to cumulate any part of the sentence imposed for the offence of wounding on the sentence imposed for the offence of manslaughter.

62 That is debatable. The appellant was liable to be convicted of the deceased's manslaughter because he fired a shot at the deceased with intent to cause grievous bodily harm in circumstances where it was foreseeable that one of the deceased's colleagues would return fire and in the process unintentionally kill the deceased. Arguably, within the relatively broad confines of the proper exercise of sentencing discretion[78], including in particular the need to moderate and cumulate individual sentences in accordance with the requirements of the principle of totality[79], the judge might properly have concluded that the criminality of the offence of wounding with intent to cause grievous bodily harm

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77 (1981) 147 CLR 383 at 389 per Gibbs CJ (Mason and Murphy JJ agreeing at 395).

78 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46] per McHugh, Hayne and Callinan JJ; [1998] HCA 57; *Hili v The Queen* (2010) 242 CLR 520 at 543 [74] per Heydon J; [2010] HCA 45.

79 *Mill v The Queen* (1988) 166 CLR 59 at 62-63; [1988] HCA 70.

was sufficiently comprised within the criminality of the offence of manslaughter to warrant that the sentences for each offence be made wholly concurrent[80].

63 Whether or not it was appropriate to make the sentences wholly concurrent depends, however, as much on the sentence imposed for the offence of manslaughter as it does on whether the offence of wounding involved any criminality beyond that comprised in the offence of manslaughter.

64 Ultimately the object of the sentencing exercise is to impose individual sentences that, so far as possible, accurately reflect the gravity of each offence[81] while at the same time rendering a total effective sentence which, so far as possible, accurately reflects the totality of criminality comprised in the totality of offences[82]. That is an exercise which involves a significant measure of discretionary moderation and accumulation of individual sentences according to the particular circumstances of each case[83]. Up to a point, therefore, it is something about which sentencing judges might take different views of which neither could be said to be wrong[84]. Generally speaking, however, the imposition of less severe individual sentences may call for a greater degree of accumulation in order to reflect total criminality whereas more severe individual sentences may necessitate a greater degree of concurrency.

65 It follows that, if the judge had imposed an individual sentence for the offence of manslaughter adequate to reflect the criminality of that offence, it might be that little if any accumulation of the sentence imposed for the offence of wounding would have been required[85]. For the reasons which follow, however,

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80 Cf *Royer v Western Australia* (2009) 197 A Crim R 319 at 328 [21]-[22] per Owen JA.

81 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 3A(a); *R v McNaughton* (2006) 66 NSWLR 566 at 572 [15] per Spigelman CJ.

82 *Mill* (1988) 166 CLR 59 at 62-63; *Pearce* (1998) 194 CLR 610 at 623-624 [43]-[45] per McHugh, Hayne and Callinan JJ.

83 *Mill* (1988) 166 CLR 59 at 62-63; *Director of Public Prosecutions v Grabovac* [1998] 1 VR 664 at 680 per Ormiston JA (Winneke P agreeing at 665, Hedigan AJA agreeing at 690).

84 *Hammoud* (2000) 118 A Crim R 66 at 67 [7] per Simpson J.

85 Cf *R v Jarrold* [2010] NSWCCA 69 at [56] per Howie J (McClellan CJ at CL agreeing at [1], Harrison J agreeing at [79]).

the individual sentence imposed for the offence of manslaughter was not adequate to reflect its criminality.

Manifest inadequacy

66 The Court of Criminal Appeal was correct to hold that the sentence imposed by the judge for the offence of manslaughter and, consequently, the total effective sentence were manifestly inadequate. The nature and gravity of the subject offence of manslaughter was such that a sentence of nine years and six months' imprisonment was so plainly short of the mark as to bespeak error of principle[86] and therefore necessitate appellate intervention[87]. As their Honours observed, the subject offence of manslaughter was a particularly serious instance of the crime which was aggravated by the circumstance that the deceased was a police officer and the appellant ought clearly to have foreseen that possibility[88]. It was also necessary to keep in mind that the Form 1 offence was objectively grave and exacerbated by the facts that the weapon was loaded and kept for use by a person who was engaged in criminal activities. In those circumstances, it was necessary to impose a greater sentence for the offence of manslaughter in order to demonstrate the need for personal deterrence and retribution in relation to the Form 1 offence.

67 In the circumstances, it was appropriate, too, to cumulate a small part of the sentence imposed for the offence of wounding on the sentence imposed for the offence of manslaughter. The offences were separate and distinct[89] and, despite the commonality of the acts which comprised them, the offence of wounding with intent to cause grievous bodily harm involved an element of intent which was absent from the offence of manslaughter. That difference may

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86 *Wong v The Queen* (2001) 207 CLR 584 at 605-606 [58] per Gaudron, Gummow and Hayne JJ; [2001] HCA 64; *Hili* (2010) 242 CLR 520 at 538-539 [59] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

87 *Green v The Queen* (2011) 244 CLR 462 at 486 [69] per French CJ, Crennan and Kiefel JJ; [2011] HCA 49.

88 *Director of Public Prosecutions (Vic) v Arvanitidis* (2008) 202 A Crim R 300 at 314-315 [50]-[52] per Redlich JA (Buchanan JA agreeing at 303 [2], Nettle JA agreeing at 304 [10]).

89 *Pearce* (1998) 194 CLR 610 at 624 [49] per McHugh, Hayne and Callinan JJ; *R v Harris* (2007) 171 A Crim R 267 at 275 [39].

properly be regarded as an additional degree of criminality which should be reflected in some degree of accumulation of the sentences[90].

Re-sentencing

68 Although the Court of Criminal Appeal was incorrect to describe the sentencing judge's error in the assessment of the relative gravity of the offence of manslaughter as involving a breach of the *De Simoni* principle, the misdescription was not a material error. What was important, as the Court of Criminal Appeal appreciated, was that the judge's comparison of the gravity of the subject offence of manslaughter with the gravity of what would have been an offence of murder was likely to result in an under-assessment of the relative gravity of the subject offence and thus may have been the cause of the judge's imposition of an inadequate sentence for the offence of manslaughter.

69 For that reason, and because the sentence imposed for the offence of manslaughter was manifestly inadequate, the Court of Criminal Appeal was correct to quash the sentences imposed by the sentencing judge and re-sentence the appellant as was done. It was not suggested that there was any error in the new sentences so imposed.

Conclusion

70 The appeal should be dismissed.

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90 Cf *Hoad* (1989) 42 A Crim R 312 at 315-316 per Cooper J.