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HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND GORDON JJ

JOEL BETTS	APPELLANT
AND	
THE QUEEN	RESPONDENT

Betts v The Queen
[2016] HCA 25
15 June 2016
S281/2015

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

S J Odgers SC with P D Lange for the appellant (instructed by Murphy's Lawyers)

L A Babb SC with N L Williams for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

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CATCHWORDS

Betts v The Queen

Criminal law – Sentencing – Where appellant appealed against severity of sentences – Where additional material produced by appellant admitted on "usual basis" that it may be taken into account if appellate court came to re-sentence – Where additional material contained evidence inconsistent with appellant's case at sentence hearing – Where appellate court found error, engaged in re-sentencing appellant and refused to take into account additional material – Whether miscarriage of justice occasioned.

Words and phrases – "fresh evidence", "miscarriage of justice", "power of remittal", "re-sentencing discretion", "supplemental powers", "usual basis".

Criminal Appeal Act 1912 (NSW), ss 5(1)(c), 6(3), 12.

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1 FRENCH CJ, KIEFEL, BELL, GAGELER AND GORDON JJ. This appeal is concerned with the exercise of the appellate court's sentencing discretion under the common form criminal appeal provisions. Is the appellate court's assessment of whether some other sentence is warranted in law made on the evidence that was before the sentencing court, or does the exercise of the sentencing discretion afresh[1] require a hearing de novo at which new evidence of the circumstances of the offence, and the causes of the offending, is to be received?

2 As a general rule, the appellate court's assessment of whether some other sentence is warranted in law is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation in the period since the sentence hearing. For the purposes of that assessment, an offender is not permitted to run a new and different case. This general rule does not deny that an appellate court has the flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice. In this appeal, the general rule applied because the new evidence sought to be adduced by the appellant was inconsistent with the case that he ran in the sentencing court and its rejection in the circumstances did not cause justice to miscarry.

Procedural history

3 The appellant pleaded guilty in the District Court of New South Wales to wounding the complainant with intent to murder[2] and detaining the complainant without her consent with intent to obtain a psychological advantage and, immediately before the detaining, occasioning actual bodily harm to her[3]. On 18 May 2012, the appellant was sentenced to a non-parole period of 11 years' imprisonment with a total sentence of 16 years for the offence of wounding with intent to murder, and to a concurrent fixed term of eight years' imprisonment for the detaining offence.

4 The appellant appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales (Meagher JA, Hidden J and RS Hulme AJ) against the severity of the sentences on grounds which contended error in the application of sentencing principle; none of the grounds challenged Judge Toner's factual

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1 *Kentwell v The Queen* (2014) 252 CLR 601 at 618 [42] per French CJ, Hayne, Bell and Keane JJ; [2014] HCA 37.

2 *Crimes Act* 1900 (NSW) ("the Crimes Act"), s 27.

3 Crimes Act, s 86(2)(b).

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findings. A folder of material was handed up at the commencement of the hearing in the Court of Criminal Appeal on the basis that it would be admissible in the event that the Court came to re-sentence the appellant. The prosecutor did not object to the Court receiving the material "on the usual basis". The material included reports by Dr Nielssen, a psychiatrist, and Mr Roberts, a psychotherapist. The Court of Criminal Appeal upheld two of the grounds of appeal but dismissed the appeal, having determined that no lesser sentence was warranted in law[4]. The Court of Criminal Appeal declined to take into account the opinions in Dr Nielssen's and Mr Roberts' reports concerning the factors that had caused or contributed to the commission of the offences. The Court held that the sentence hearing had been the occasion to address these matters and the appeal did not provide "an opportunity for a second bite of those issues."[5]

5 On 11 December 2015, Kiefel, Bell and Gageler JJ granted the appellant special leave to appeal. The sole ground of appeal is that the Court of Criminal Appeal erred in failing to take into account new evidence bearing on the causes of the appellant's offending in determining whether a less severe sentence was warranted in law[6]. The appellant's broad case is that the Court of Criminal Appeal wrongly confined its discretion, which he sources in s 12(1) of the *Criminal Appeal Act* 1912 (NSW) ("the CAA"). He submits that, once error was identified and the Court of Criminal Appeal turned to consider re-sentencing, there was little or no room to apply the restraint that governs the reception of new evidence on the hearing of the leave application or the appeal[7].

6 The appellant accepts that, had the Court of Criminal Appeal taken the new evidence into account, it would have been necessary to resolve inconsistencies between the opinions expressed therein and the opinions expressed in other evidence on which he relied at the sentence hearing. He submits that the proper exercise of the Court of Criminal Appeal's discretion was

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4 *Betts v The Queen* [2015] NSWCCA 39 at [48] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

5 *Betts v The Queen* [2015] NSWCCA 39 at [47] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

6 *Criminal Appeal Act* 1912 (NSW), s 6(3).

7 *R v Lanham* [1970] 2 NSWR 217; *R v Cartwright* (1989) 17 NSWLR 243 at 257-258 per Hunt and Badgery-Parker JJ; *Goodwin* (1990) 51 A Crim R 328 at 329 per Hunt J; *Fordham* (1997) 98 A Crim R 359 at 377-378 per Howie AJ.

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to remit the proceeding to the District Court under s 12(2) of the CAA. He seeks orders in this Court setting aside the orders of the Court of Criminal Appeal, quashing the sentences imposed by Judge Toner and remitting the proceeding to the District Court.

7 The Court of Criminal Appeal was not asked to remit the proceedings to the District Court. For that reason, their Honours were not required to consider whether the general power conferred by s 12(2) applies to the determination of an appeal under s 6(3). For the reasons to be given, the appeal must be dismissed. In this circumstance, and given that the question was not raised below, it is inappropriate to determine whether the Court of Criminal Appeal is empowered to remit the determination of an offender's sentence to the court of trial.

8 The contention that, as a general rule, the appellate court when exercising its sentencing discretion is not confined to the material before the sentencing court is contrary to principle. This conclusion does not dispose of the appellant's narrower case, which is that, in the particular circumstances, the refusal to take into account new evidence casting light on the causes of his singular offending has resulted in a miscarriage of justice. It will be necessary to refer in some detail to the facts and the conduct of the appellant's case below in order to explain why this case must also be rejected. Before doing so, there should be reference to the principles governing the reception of new evidence on the determination of appeals under s 6(3) of the CAA. In light of the parties' submissions, there should also be some reference to the powers of the Court of Criminal Appeal in determining such appeals.

The determination of appeals under s 6(3)

9 Section 5(1)(c) of the CAA confers on a person convicted on indictment a right to appeal by leave of the Court of Criminal Appeal against the sentence passed on the person's conviction. Where leave is granted, the determination of an offender's appeal is governed by s 6(3):

> "[T]he court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

10 Notwithstanding its wide terms, it is well settled that the Court of Criminal Appeal's power to intervene is not enlivened unless error in any of the

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ways explained in *House v The King*[8] is established[9]. The identification of error will ordinarily be by reference to the sentencing judge's reasons on the material that was before the court. However, the Court of Criminal Appeal has recognised that there are bases upon which error at first instance may be disclosed by new or fresh evidence[10]. Generally, the Court of Criminal Appeal insists upon proper grounds being established as a foundation for the exercise of its discretion to receive fresh evidence[11]. Evidence qualifies as fresh evidence if it could not have been obtained at the time of the sentence hearing by the exercise of reasonable diligence[12]. None of this is to deny that the Court of Criminal Appeal has the flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice[13].

11 It is accepted, however, that the appellate court may receive evidence of the offender's progress towards rehabilitation in the period since the sentence hearing[14]. Evidence of this description is routinely received by the Court of Criminal Appeal on the limited basis that it may be taken into account in the

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8 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; [1936] HCA 40.

9 *Skinner v The King* (1913) 16 CLR 336 at 340 per Barton ACJ; [1913] HCA 32; *Markarian v The Queen* (2005) 228 CLR 357 at 370-371 [25] per Gleeson CJ, Gummow, Hayne and Callinan JJ; [2005] HCA 25; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 579-581 [11]-[14] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10; and see *Sidlow* (1908) 1 Cr App R 28 at 29 per Lord Alverstone CJ.

10 *R v Vachalec* [1981] 1 NSWLR 351 at 353 per Street CJ delivering the judgment of the Court.

11 *R v Lanham* [1970] 2 NSWR 217 at 218.

12 *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ; [1974] HCA 35.

13 *Abbott* (1985) 17 A Crim R 355; *Goodwin* (1990) 51 A Crim R 328; *Araya* (1992) 63 A Crim R 123 at 129-130 per Gleeson CJ; *Fordham* (1997) 98 A Crim R 359 at 377-378 per Howie AJ; see also *Gallagher v The Queen* (1986) 160 CLR 392 at 395 per Gibbs CJ; [1986] HCA 26.

14 *Kentwell v The Queen* (2014) 252 CLR 601 at 618 [43] per French CJ, Hayne, Bell and Keane JJ, citing *Douar v The Queen* (2005) 159 A Crim R 154 at 178 [124] per Johnson J.

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event the Court comes to re-sentence[15]. It is evident that the Court of Criminal Appeal treated the material tendered on the appellant's behalf as having been admitted on this limited basis[16].

12 The appellant's argument accepts that the restraint exercised by the Court of Criminal Appeal in receiving new evidence on the hearing of a sentence appeal is an aspect of the principled administration of adversarial criminal justice. He contends that the same consideration loses its force once error is shown and the appellate court is itself engaged in the exercise of the sentencing discretion. At this stage, so the argument goes, the issue is simply whether the new evidence is admissible and whether it has the potential to affect the determination of the appropriate sentence. A submission along the same lines was rejected in *R v Deng*, in which it was held that the principles governing the admission of new evidence on the appeal apply to the re-sentencing discretion[17].

13 Contrary to the conclusion in *Deng*, the appellant submits that, once error below is demonstrated, there can be no justification for the exclusion of evidence that is capable of bearing on the appellate court's determination of the appropriate sentence for an offence. He proposes an analogy with the outcome of a successful appeal against conviction where the consequential order is for a new trial: there is no constraint on the way the accused chooses to conduct the second trial. The analogy is hardly apt. When the Court of Criminal Appeal quashes a conviction and orders a new trial[18], the successful appellant is restored to the status of an unconvicted person to whom the presumption of innocence applies. The fact that the accused may choose to adduce evidence at the new trial, on which he or she did not rely at the first trial, does not undermine adversarial criminal justice.

14 Forensic choices are made in the conduct of the offender's case at the sentence hearing. These include the material that is to be relied upon in mitigation of penalty and whether any of the facts are to be contested. The circumstance that the sentencing judge's discretion is vitiated by *House* error

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15 *R v Deng* (2007) 176 A Crim R 1 at 8 [28] per James J.

16 *Betts v The Queen* [2015] NSWCCA 39 at [43] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

17 (2007) 176 A Crim R 1 at 11 [45] per James J.

18 CAA, s 8(1).

Retrieved from AustLII on 26 July 2016 at 17:55:37

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does not, without more, provide a reason for not holding the offender to these forensic choices. Justice does not miscarry by reason of the refusal to allow an appellant to run a new and different case on the question of re-sentence. Exceptional cases apart, the question of whether some other sentence is warranted in law is answered by consideration of the material that was before the sentencing court and any relevant evidence of post-sentence conduct.

The Court of Criminal Appeal's supplemental powers

15 Section 12 of the CAA confers wide powers on the Court of Criminal Appeal[19]. The chapeau to s 12(1) provides that the Court may, if it thinks it necessary or expedient in the interests of justice, have recourse to any of the powers that are set out in pars (a) to (e). Those powers enable the Court of Criminal Appeal to, among other things, order the production of any document, exhibit or other thing connected with the proceedings; compel persons (other than the appellant) to attend and give evidence before the Court of Criminal Appeal or an officer of the Court; refer questions to a commissioner for inquiry and report; and appoint assessors. In addition, the Court may:

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

16 The appellant relies on the wide discretion conferred by s 12(1) on the Court of Criminal Appeal to exercise any of the powers that the Supreme Court may exercise on appeals or applications in civil matters where the Court thinks it necessary or expedient in the interests of justice. He submits that the power to receive new evidence is such a power. Accepting that is so does not advance the appellant's case. It is not in issue that the Court of Criminal Appeal has the power to receive new evidence in the determination of an appeal under s 6(3). It is unnecessary to consider whether its power to do so is confined to the supplemental powers conferred by s 12(1) or whether the power is incidental to the authority to determine an appeal against sentence under s 6(3). In either case,

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19 Section 12(1) is modelled on s 9 of the *Criminal Appeal Act* 1907 (UK). The history leading to the enactment of the latter statute is traced by Professor Pattenden: *English Criminal Appeals: 1844-1994*, (1996).

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for the reasons already given, when the Court of Criminal Appeal exercises its sentencing discretion, the interests of justice will not usually be served by the reception of new evidence of matters that are the subject of the sentencing court's unchallenged factual findings.

17 The question of whether the appellate court is empowered to remit the determination of a sentence appeal under the supplemental powers conferred by s 12(1) of the CAA and its analogues is controversial[20]. A general power of remittal was introduced into the CAA in 1987[21]. It is contained in s 12(2), which provides:

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

18 To the extent that the extrinsic material affords any assistance in identifying the object of the inclusion of the general power of remittal, it does not provide support for the conclusion that s 12(2) qualifies the conditional re-sentencing obligation imposed by s 6(3)[22].

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20 See *R v T* [1995] 2 Qd R 192; *R v Wong* (1995) 16 WAR 219; *Webber* (1996) 86 A Crim R 361 at 365 per Winneke P; *R v Ferrari* [1997] 2 Qd R 472; *R v Palmieri* [1998] 1 VR 486 at 501-502 per Charles JA; *Thompson* (2000) 113 A Crim R 295; *R v Kreutzer* (2013) 118 SASR 211 at 214 [9] per Kourakis CJ, 227 [55] per Gray and Blue JJ.

21 *Criminal Appeal (Amendment) Act* 1987 (NSW), s 3, Sched 1 Item 3.

22 In his speech on the second reading for the Supreme Court (Appeals) Amendment Bill and the Criminal Appeal (Amendment) Bill, the Attorney-General referred to the introduction of the general power of remitter in this way:

> "This power will be of great assistance in matters where, for example, there are deficiencies in the evidence or where there are further matters to be considered which can be better attended to before a first-instance judge. These bills are a rationalization of existing avenues of appeal from interlocutory applications in criminal proceedings on indictment in the District Court and the Supreme Court, while ensuring that issues can be dealt with which justice requires should be resolved prior to the completion of a trial."

(Footnote continues on next page)

Retrieved from AustLII on 26 July 2016 at 17:55:37

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19 As the Court of Criminal Appeal recognised in *O'Neil-Shaw v The Queen*, there is a tension between the terms of s 6(3) and recourse to the power of remittal[23]. The utility of a power of remitter in a case such as *O'Neil-Shaw*, where the sentence hearing has been tainted by procedural irregularity, is evident. The question of whether it is available is not reached in this case. It might be a matter for consideration by the legislature.

The Court of Criminal Appeal's refusal to take into account the additional material

20 It remains to consider whether the Court of Criminal Appeal's refusal to take into account the additional material in the exercise of its sentencing discretion occasioned a miscarriage of justice. As earlier explained, this requires reference to the facts and to the conduct of the appellant's case in the District Court and the Court of Criminal Appeal.

The conduct of the proceedings in the District Court

21 The offences were committed on 17 April 2010. The appellant was committed for trial to the District Court and the trial was listed to commence on 27 February 2012. On that day, the appellant pleaded guilty to both offences. He was represented on that occasion by the first of the three senior counsel who have appeared for him in the proceedings. The matter was stood over for sentence hearing to 27 April 2012. The hearing was concluded on the basis of agreed facts. What follows is a summary of those facts.

The agreed facts

22 The appellant and the complainant commenced an intimate relationship around December 2007. By 5 April 2010, the relationship had broken down and the complainant had moved out of their shared apartment. They had agreed that the complainant would return to the apartment to collect her belongings on the morning of Saturday, 17 April 2010. They had also agreed that the appellant would not be at the apartment.

New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 November 1987 at 16088-16089.

23 [2010] NSWCCA 42 at [30] per Basten JA, [56] per Johnson J.

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23 The complainant had arranged for her brother, Todd, to meet her at the apartment to help her with the move. The appellant was inside the apartment when she arrived. The appellant said that he had been trying to contact her and that he wanted to talk. The appellant kept saying that there was no reason for them to be apart. The complainant responded that the damage to their relationship had already been done. They talked for over an hour.

24 About an hour and a quarter after her arrival the complainant sent a text message to Todd saying "Give me a couple of minutes. Joel is here. Sorry." Sometime after sending this message, the complainant went to leave the apartment, telling the appellant that she was going to let Todd in. The appellant blocked the front door, took hold of her and stabbed her with a knife repeatedly in the back. There followed a murderous assault on the complainant lasting 40 to 45 minutes, during which she was stabbed many more times to the back, neck and face. In the course of this sustained attack, the appellant also stabbed himself to the chest, neck, leg and wrist. At one point, the complainant attempted to escape through the front door but the appellant took hold of her and continued his assault. She told him "You're going to go to gaol. Todd's downstairs and he will know it was you." He responded, "We will die here together. Then we can be together for eternity."

25 The complainant believed that her only chance of survival was to weaken the appellant. She suggested that if they were going to "do this together" she should have a turn with the knife. The appellant showed her that the knife was broken. The tip was embedded in her back. He picked up another knife from the kitchen and handed it to her. The complainant stabbed him forcefully in the abdomen. Thereafter she stabbed him several more times and he continued to stab her. She again tried to escape through the front door but on this occasion the appellant was lying against it and she was too weak from her injuries to move him.

26 At a point, the complainant's mobile telephone rang or a text alert sounded and the appellant left her to collect the phone. She managed to get out onto the balcony. The appellant pulled her back inside the apartment and she passed out. When she came to, the appellant was standing with his foot on her neck. He suggested that they both have a drink and she agreed. He took hold of a bottle of shochu, a Japanese spirit, and they both drank from it. The complainant asked, "Why did you do it?" He replied, "You kept saying that it was over. That the damage has been done." During the assault, the appellant sent text messages using the complainant's mobile telephone to the complainant's mother and to Todd. In one message, sent to Todd at 1:39pm, he wrote "We're looking like

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staying together. For now at least. I'll call you soon. Thanks for coming today bro. X".

27 Ultimately the complainant succeeded in escaping onto the balcony and climbing over it to the one below. From there, she succeeded in attracting the attention of passers-by, who came to her aid. She was taken to hospital where she was treated for a total of 28 stab wounds to her face, neck and back. She had also suffered two collapsed lungs and a fracture of the spinous process of the eighth thoracic vertebra.

28 The appellant was arrested and taken to hospital, where he was treated for multiple stab wounds, including a wound from which his abdominal contents were protruding. He underwent surgery in which a section of his small bowel was removed. Following his initial discharge from hospital on 23 April, he was re-admitted for treatment of complications the following day. The appellant continues to suffer difficulties with his bowel function as a result of the abdominal wound.

29 When the police searched the apartment, they found a piece of paper on which the appellant had written "You know I love you, but I hate you because I know I could never replace you."

The appellant's case at the sentence hearing

30 The appellant was aged 30 years at the date of the offences and 32 years at the date of the sentence hearing. He had no criminal convictions. He is a university graduate who had established his own business involving giving promotional support to charitable organisations. In 2002, he was a contestant on a television show called "Australian Survivor".

31 The appellant gave evidence before Judge Toner. He said that he had picked up the knife from the kitchen bench just before attacking the complainant and that the decision to stab her had been a spontaneous one. He said he had written the words "You know I love you, but I hate you because I know I could never replace you" because they are the lyrics of a song that he had been learning. He accepted that the words had "resonated with me in the days following the break up". He gave no evidence of being under the effects of a hallucinogenic drug at the time of the offences. He acknowledged his responsibility for his offending and he expressed his remorse for the ordeal to which he had subjected the complainant.

Retrieved from AustLII on 26 July 2016 at 17:55:37

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32 A number of character witnesses gave evidence on the appellant's behalf attesting to the incongruity of the offending behaviour. Judge Toner accepted this evidence as demonstrating that the appellant was considered a generous, honest, loving and reliable individual. Evidence was also led to establish that, in the appellant's early teenage years and continuing into early adulthood, he had been subjected to sustained physical and emotional abuse by his stepfather. Judge Toner described the latter as a "vicious and calculating brute". His Honour found that the stepfather's behaviour had been designed to humiliate the appellant and his mother and brother and subject them to his will.

33 A report from Dr Lake, a general practitioner, referred to counselling sessions that he had conducted with the appellant on occasions in the years between 2003 and 2008. Dr Lake recorded that the appellant had described feelings of helplessness associated with the emotional and physical abuse inflicted on his mother by his stepfather.

Dr Westmore's evidence

34 Two reports prepared by a psychiatrist, Dr Westmore, were tendered on the appellant's behalf. In the first report, dated 3 January 2011, Dr Westmore set out the "detailed and complex history" that he had obtained from the appellant in an interview in December 2010. This history included the appellant's account that three days before the offences he had taken an illicit hallucinogenic drug known as DMT, which had felt "like a death experience". The appellant told Dr Westmore that he had taken some more DMT earlier on the morning of the offences, with the result that "I felt like I saw eternity, my mind was just overwhelmed, overcome with these things." Other features of the history included an account of the domestic violence to which the appellant and his mother had been subject.

35 Dr Westmore's report was obtained at a time when the appellant was contemplating defending the charge of wounding with intent to murder and it is evident that the possibility of a psychiatric defence was being explored. Dr Westmore concluded that there was no clear evidence or indication to suggest that, at the time of the offences, the appellant had been suffering from a drug-induced psychosis. He considered that the appellant did not have a psychiatric defence but that it was likely that the appellant had been depressed at the time of the offending. In this regard, Dr Westmore noted the appellant had been experiencing financial difficulties, his relationship with the complainant had broken down, he was being evicted from his accommodation and he had felt "generally unsupported" at the time.

Retrieved from AustLII on 26 July 2016 at 17:55:37

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36 In September 2011, Dr Westmore was supplied with a copy of Dr Lake's report and with three pages of instructions written by the appellant concerning his experiences with the drug DMT. He was asked whether this material affected the opinions that he had expressed in his earlier report.

37 In a supplementary report dated 29 September 2011, Dr Westmore noted Dr Lake's account of the appellant's feelings of helplessness over his stepfather's violence and that he had been greatly affected by the abuse of his mother. Dr Westmore also noted the appellant's account of his subjective experience of the drug DMT including that "nothing was really making sense, changes in perceptions of the environment and perhaps frank perceptual disturbances".

38 Dr Westmore considered that, based on the appellant's history, "it is likely he was adversely affected by the drug DMT at the relevant time including perceptual disturbances and an altered perception of his environment." Dr Westmore maintained that he was unable to indicate that the appellant was suffering from a frank drug-induced psychosis that might be relevant to the commission of the offence. Dr Westmore explained that any illicit substance results in altered perceptions. The appellant had described altered experiences arising from the use of DMT but Dr Westmore was unable to confirm that the appellant had developed a psychotic illness as the result of that use or that he might have a psychiatric defence to the charges. He observed that the Court might take into account that the appellant had used DMT and that the drug had had an adverse effect on him.

The conduct of the appellant's case

39 In the course of her submissions before Judge Toner, senior counsel for the appellant accepted that the evidence was "effectively silent" on the question of why the appellant acted as he did. Senior counsel invited his Honour to consider, as a possible explanation, that the appellant had been exposed to very serious domestic violence in his youth. Senior counsel also put on the appellant's behalf that "it can take people a long time coming to terms with the violence that they have committed on people … that they have loved" and that the appellant had reached a position of acceptance of responsibility.

Judge Toner's reasons

40 Judge Toner found that the crimes were planned and that there was nothing "fleeting" about the appellant's intention to kill the complainant. His Honour found that, at least from when the appellant first stabbed the complainant, he was determined that she would die at his hands. The text

Retrieved from AustLII on 26 July 2016 at 17:55:37

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message sent to Todd at 1:39pm evidenced the appellant's determination that his intention to kill the complainant should not be thwarted. His Honour concluded that the wounding offence was a "sustained and determined attempt" to kill.

41 Judge Toner rejected that there was a causal link between the appellant's brutal treatment in youth and his commission of the offences. His Honour observed at [54] of his reasons for sentence:

> "[T]here is nothing from Dr Westmore's report to say that the [appellant's] conduct was driven from some deep well of a psychologically generated motivation for these crimes springing from what had occurred to him in his adolescence, which history he had and no doubt considered."

42 It was not submitted that the appellant's culpability should be mitigated because of the influence of drugs on him. Judge Toner considered that the appellant's conduct had been driven by a profound jealousy in the context of the break-up of his relationship with the complainant.

43 His Honour found that the offences were aggravated under s 21A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act") by reason that the injury or emotional harm done to the complainant was substantial[24] and because she was vulnerable because she was alone in the apartment with the appellant and at his mercy[25]. His Honour did not accept that the appellant's injuries amounted to a form of extra-curial punishment. His Honour accepted that the injuries would make the appellant's custody more burdensome and he took this into account as a special circumstance justifying an alteration in the statutory proportion between the non-parole period and the overall sentence[26].

Proceedings in the Court of Criminal Appeal

44 The appellant sought leave to appeal to the Court of Criminal Appeal against the severity of the sentences on four grounds. The first and second grounds contended that the sentencing judge erred in finding that the offences were aggravated under s 21A(2)(g) and (l) of the Sentencing Act respectively.

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24 Sentencing Act, s 21A(2)(g).

25 Sentencing Act, s 21A(2)(l).

26 Sentencing Act, s 44.

Retrieved from AustLII on 26 July 2016 at 17:55:37

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The third ground contended that the sentencing judge erred in failing to treat the appellant's injuries as a form of extra-curial punishment. The fourth ground contended that the sentencing judge erred in not having regard to the appellant's injuries in the determination of the overall sentence.

45 The Court of Criminal Appeal upheld the second and fourth grounds of appeal. Their Honours said it was an error to find the complainant was vulnerable for the purposes of s 21A(2)(l) because this statutory circumstance of aggravation looks to the shared characteristic of a class of victims[27]. Their Honours also found that the sentencing judge erred in limiting his consideration of the effect of the appellant's injuries to the determination of the non-parole period[28].

46 Having found error, the Court of Criminal Appeal turned to consider the exercise of its sentencing discretion. The Court referred to the material that had been tendered without objection "on the usual basis". This material included certificates of the completion of courses while the appellant was in custody and a number of references attesting to his efforts to make the most of his custodial situation[29]. As earlier explained, the Court rejected so much of the reports of Dr Nielssen and Mr Roberts as canvassed factors that were considered to have contributed to the offences[30]. Mr Roberts' opinion that the appellant had an improved ability to address his "re-development" was acknowledged to be relevant albeit of "limited weight"[31].

47 Notwithstanding the appellant's favourable subjective case, the Court of Criminal Appeal concluded that no lesser sentences were warranted in law. That

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27 *Betts v The Queen* [2015] NSWCCA 39 at [29] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

28 *Betts v The Queen* [2015] NSWCCA 39 at [38] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

29 *Betts v The Queen* [2015] NSWCCA 39 at [46] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

30 *Betts v The Queen* [2015] NSWCCA 39 at [47] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

31 *Betts v The Queen* [2015] NSWCCA 39 at [47] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

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conclusion took into account that the wounding offence was objectively "very high on the scale"[32] for such offences and that the sentence imposed by the sentencing judge was only half the maximum penalty[33].

48 In this Court, the appellant's complaint is confined to the Court of Criminal Appeal's refusal to take into account Dr Nielssen's opinion. It is convenient at this point to refer to that opinion and to how senior counsel then appearing for the appellant sought to deploy it in the Court of Criminal Appeal.

Dr Nielssen's evidence

49 Dr Nielssen's report is dated 3 May 2014. Dr Nielssen was furnished with, among other things, copies of the indictment, the agreed facts, the reasons for sentence, Dr Westmore's first report, various medical records and a handwritten letter from the appellant. Dr Nielssen interviewed the appellant in person and by video link. He diagnosed the appellant as suffering from "[s]ubstance use disorder, in remission" and "[a]nxiety disorder, in remission". He said that, from the appellant's history, "it seems that he was affected by having taken an unknown quantity of the hallucinogenic drug DMT shortly before the offence, in combination with a moderate quantity of alcohol." He said it seemed that the appellant had "a catastrophic alteration in his perception of events and a loss of capacity for logical thinking around the time of the offence." He observed that multiple self-inflicted stab wounds to the neck, chest or abdomen are strongly associated with the presence of a psychotic disorder or an equivalent state induced by an hallucinogenic drug.

50 Dr Nielssen expressed the following opinion:

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

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32 *Betts v The Queen* [2015] NSWCCA 39 at [40] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

33 *Betts v The Queen* [2015] NSWCCA 39 at [48] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2]).

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The conduct of the appeal in the Court of Criminal Appeal

51 Written submissions were filed in the Court of Criminal Appeal on the appellant's behalf. Under the heading "Re-sentencing", reference was made to the additional material. Judge Toner's conclusion, that there was no persuasive material suggesting that the motivation for the crimes was in some way attributable to the history of domestic violence, was suggested to be infirm and it was submitted that Dr Nielssen's opinion "should be reflected in any sentence" imposed upon the appellant.

52 Nonetheless, contrary to the appellant's submission in this Court, it is by no means clear that senior counsel then appearing for him in the Court of Criminal Appeal squarely invited the Court to set aside Judge Toner's finding and to make a different finding based on Dr Nielssen's opinion. The respondent is right to submit that there was ambiguity in the way the matter was developed before the Court of Criminal Appeal. At the commencement of the hearing senior counsel for the appellant referred to his written submissions and Dr Nielssen's report, noting it contained an opinion which differed from Judge Toner's findings. As noted earlier, a folder of material was handed up on the basis that it would be admissible if the Court came to the question of re-sentence. The prosecutor did not object to the Court receiving the material "on the usual basis". She informed the Court that the material had only been served the preceding afternoon and she had not had an opportunity to look at it.

53 In the course of submissions, senior counsel referred to [54] of Judge Toner's reasons and said:

> "Now it was never our case that the crimes were driven from some deep well of a psychologically generated motivation springing from what had occurred to him in his adolescence. That however is not to disparage the existing state of depression and the childhood abuse which made him the personality that he was, that he was putting in evidence on the subjective material."

54 Referring to Judge Toner's conclusion that the appellant had been driven by a "profound jealousy", senior counsel submitted "[n]ow we have to accept that as going to the culpability and gravity of the crime". Senior counsel referred in his reply submissions to the reference to Dr Nielssen's report in his written submissions and put, "[w]hen it comes to resentencing if it should, we submit these are matters that are properly to be taken into account and that that is a matter that goes into the general matrix."

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The significance of Dr Nielssen's opinion

55 Senior counsel for the appellant accepted the finding that the offences were committed in a jealous rage and disavowed that it had ever been the appellant's case that they were the product of deep-seated psychological difficulties stemming from his history of abuse. How, in light of those concessions, it was suggested that, in the event the Court of Criminal Appeal came to exercise its sentencing discretion, it might take into account Dr Nielssen's opinion as part of the "general matrix" was not developed in oral submissions in that Court.

56 In this Court, the appellant relies on Dr Nielssen's opinion that he suffered "a catastrophic alteration in his perception of events and a loss of capacity for logical thinking around the time of the offence" as the result of taking DMT and that he experienced a "psychotic disorder, or an equivalent state induced by an hallucinogenic or dissociative drug". He submits that it is open to find that the effect of the DMT significantly reduced his capacity for self-control and appreciation of the wrongfulness of his conduct, lessening his moral culpability for his offences. He submits that he should be sentenced on the law as it stood at the date of the offences and that the prohibition on self-induced intoxication being taken into account as a mitigating factor when sentencing does not apply in his case[34]. The correctness of this submission may be accepted for the purpose of the appellant's argument.

57 At points in the appellant's argument, it was suggested he had not sought to run a case on sentence in the Court of Criminal Appeal that was inconsistent with his case before Judge Toner. He submitted that it was merely that Dr Westmore had been "unable" to make a causal link between his drug use (and underlying difficulties associated with adolescent abuse) and the offences, leaving their commission unexplained. In contrast, Dr Nielssen had been able to discern the connection. That submission is disingenuous. Based upon largely the same material, save for any difference in the history supplied by the appellant, Dr Westmore and Dr Nielssen came to different conclusions with respect to the causal relation of the drug use to the offences. Indeed,

34 Section 21A(5AA) of the Sentencing Act, which provides that in determining the appropriate sentence for an offence the court is not to take the self-induced intoxication of the offender into account as a mitigating factor, commenced on 31 January 2014.

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Dr Nielssen's opinion that the appellant was in a psychotic state, or its equivalent, would appear to traverse the appellant's pleas.

58 As the respondent submits, Dr Nielssen's opinion is based on a history which would seem to depart from the agreed facts. Dr Nielssen records the appellant's account that the "attack actually lasted for about 45 seconds, and ended when he took the knife and bent it." With respect to the text messages sent from the complainant's mobile telephone during the assault, Dr Nielssen records the appellant's account that "there is a blurred line between what I sent and what she sent". Annexed to the agreed facts was a schedule setting out the terms of the text messages. It recorded that each of the messages transmitted over the period of the assault was composed and sent by the appellant. It may also be observed that Dr Nielssen refers to the effect of the DMT taken in combination with "a moderate quantity of alcohol". This would seem to be a reference to the consumption of the shochu spirit, which occurred well after the assault on the complainant commenced.

Conclusion

59 The case that the appellant submits the interests of justice required the Court of Criminal Appeal to take into account in the exercise of its sentencing discretion is inconsistent with the case that was made before Judge Toner. Had the appellant sought to challenge Judge Toner's finding of the cause of his offending on the hearing of his appeal in the Court of Criminal Appeal, it is accepted that Dr Nielssen's evidence may properly have been rejected because it was not fresh evidence. As earlier explained, there is no principled reason for holding that a finding that was not open to challenge on the appeal is susceptible of challenge on new evidence in the event the appellate court comes to consider re-sentencing. The appellant's case before Judge Toner was not that his ingestion of DMT had significantly contributed to his offending. The forensic choice that was made was to accept responsibility for the offences. Nothing in the new evidence supports the submission that the Court of Criminal Appeal's refusal to permit the appellant to run a different case before it has occasioned a miscarriage of justice.

60 For these reasons the appeal must be dismissed.

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