HIGH COURT OF AUSTRALIA

BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

THE QUEEN APPELLANT

AND

YAVAZ KILIC RESPONDENT

The Queen v Kilic
[2016] HCA 48
7 December 2016
M105/2016

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2 to 7 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 8 December 2015 and in their place order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of Victoria

Representation

G J C Silbert QC with B L Sonnet for the appellant (instructed by Solicitor for Public Prosecutions (Vic))

D A Dann QC with G F Connelly for the respondent (instructed by Doogue O'Brien George)

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

CATCHWORDS

The Queen v Kilic

Criminal law – Sentencing – Intentionally causing serious injury – Where respondent and victim in domestic relationship – Where victim 12 weeks pregnant with respondent's child – Where respondent caused serious injury to victim by dousing her with petrol and setting her alight – Where instant offence at upper end of range of seriousness for offence of intentionally causing serious injury – Whether Court of Appeal erred in use of expression "worst category" of offence – Whether Court of Appeal erred in consideration of current sentencing practices – Whether sentence imposed by sentencing judge manifestly excessive.

Words and phrases – "comparable case", "current sentencing practices", "maximum prescribed penalty", "spectrum of seriousness", "upper end of the range of seriousness", "worst category", "yardstick".

Crimes Act 1958 (Vic), s 16.
Sentencing Act 1991 (Vic), ss 1(a), 5(2)(b).

1 BELL, GAGELER, KEANE, NETTLE AND GORDON JJ. Upon pleading guilty before a judge of the County Court of Victoria to one charge of intentionally causing serious injury[1] by dousing the victim with petrol and setting her alight, the respondent was sentenced for that offence ("the principal offence") to 14 years' imprisonment. The respondent also pleaded guilty to two uplifted[2] charges, one of using a prohibited weapon[3] and one of dealing with suspected proceeds of crime[4] ("the summary offences"), and was sentenced to further terms of 12 months' imprisonment for each of those offences. The sentencing judge (Judge Montgomery) cumulated six months of each of the sentences imposed for the summary offences upon each other and upon the sentence imposed for the principal offence, making a total effective sentence of 15 years' imprisonment. His Honour set a non-parole period of 11 years[5].

2 On the respondent's appeal to the Court of Appeal of the Supreme Court of Victoria (Redlich and Whelan JJA), their Honours held that there was "such a disparity between the sentence imposed [for the principal offence] and current sentencing practice as illustrated by the authorities relied upon by the parties" that it was apparent that there had "been a breach of the underlying sentencing principle of equal justice"[6]. The Court of Appeal allowed the appeal[7], quashed the sentences imposed by Judge Montgomery and resentenced the respondent for the principal offence to 10 years and six months' imprisonment, and for the summary offences to six months' and three months' imprisonment respectively

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1 *Crimes Act* 1958 (Vic), s 16.

2 Section 145 of the *Criminal Procedure Act* 2009 (Vic) governs the circumstances in which, on the committal for trial of an accused charged with an indictable offence, the Magistrates' Court of Victoria must transfer related charges for summary offences against the accused to the court to which the accused has been committed for trial.

3 *Control of Weapons Act* 1990 (Vic), s 5AA.

4 *Crimes Act*, s 195.

5 *DPP v Kilic* [2015] VCC 392.

6 *Kilic v The Queen* [2015] VSCA 331 at [67].

7 It should be noted that the Court of Appeal refused the respondent leave to appeal on a "fresh evidence" ground that has not been pursued further.

(of which three months of the first sentence and one month of the second were cumulated upon each other and upon the sentence imposed for the principal offence), making a total effective sentence of 10 years and 10 months' imprisonment. The Court of Appeal set a non-parole period of seven years and six months.

3 By special leave granted by Kiefel and Gordon JJ, the Crown appeals to this Court on five different grounds which, in the course of argument, conduced to a primary question of principle of whether the Court of Appeal erred in their consideration of "current sentencing practices" by holding that the difference between the sentence imposed by Judge Montgomery and the sentences imposed in some other cases to which the Court of Appeal referred warranted the conclusion that the sentence imposed by Judge Montgomery was manifestly excessive. For the reasons which follow, that question should be answered in the affirmative and the appeal should be allowed.

4 There is also a secondary complaint that the Court of Appeal impermissibly substituted their own views for the findings of Judge Montgomery as to whether the principal offence is appropriately to be characterised as unpremeditated; as to the extent of the respondent's criminal antecedents; and as to the respondent's prospects of rehabilitation. As will be explained, that complaint should be rejected.

The facts

5 At the time of commission of the principal offence on 27 July 2014, the respondent was 22 years of age and in a relationship with the victim which had begun in February 2014. The victim was 23 years of age and she was 12 weeks pregnant with the respondent's child. Their relationship was described by the victim as "dysfunctional and controlled by drug use". Both the respondent and the victim used the drug known as "ice" (crystal methamphetamine).

6 Towards the end of March 2014, the victim began living with the respondent in a house where he resided with his father. On 26 July 2014, as a result of what the victim considered to be the constant paranoid, controlling behaviour of the respondent, she left the house and stayed overnight with a friend. During the following day, a mutual friend, Ms Ahu, attempted to counsel the couple. Early in the evening of that day, Ahu arranged to meet the victim to discuss the relationship issues and, on the way, Ahu stopped at the respondent's home to collect some belongings and to speak to the respondent. Ahu observed him to be in a highly agitated state and angry that the victim would not speak to him or meet him. He alleged that the victim had been cheating on him and he

called the victim a "slut". Later, he calmed down and said that everything was "going to be ok".

7 Ahu telephoned the victim from the respondent's home and the victim arranged to meet Ahu there. Hence, at about 10.40 pm, the victim's uncle and cousin commenced to drive the victim towards the respondent's home. On the way, the victim observed two of her and the respondent's friends, Mr Bond and Mr Scott, who were on the side of the road refuelling their car with petrol from a fuel can. The victim therefore got out of the car in which she had been travelling and, when Bond and Scott had finished refuelling the car, drove on with them to the respondent's home. At that stage, there was still approximately a litre of petrol remaining in the fuel can, which was on the back seat.

8 When they arrived at the respondent's home, Bond parked in the street directly opposite the front entrance. As Bond was about to get out of the car, he observed the respondent running across the street towards him holding a samurai sword above his shoulders and pointing it at Bond. As the respondent reached the car, he thrust the sword through the open driver's window where Bond was sitting but, at the last moment, the sword veered towards the steering wheel. The respondent then walked away from the car, verbally abusing Bond, Scott and the victim as he went. He yelled at the victim: "you're just a fucking slut". Bond followed the respondent into the front yard of the house and attempted to calm him down. The respondent filled a plastic bottle with water, swung the sword at the bottle and said to Bond: "this would take some cunt's head off".

9 The respondent and Bond went into the house and, when the respondent was in his bedroom, Bond hid the sword inside the exhaust fan in the bathroom ceiling. While Bond was in the bathroom, the respondent again went outside to the car, where the victim was sitting in the back seat on the driver's side. The victim observed the respondent to have a terrifying look on his face, and, fearing for her safety, she locked the back driver's side door. The respondent, however, went around to the other side of the car, opened the other rear door and sat on the back seat next to the victim. A struggle ensued as the victim attempted to fight the respondent off. At that point, he emptied the contents of the fuel can over her, dousing her with petrol. He then got out of the car leaving her on the back seat, crying, wet and cold.

10 A few minutes later, the respondent returned to the car and again got into the back seat next to the victim. She attempted to climb out of the car backwards but the respondent grabbed her by her jumper and pulled her back into the car. He then said "you wanna make my heart burn, now you can burn bitch". As he did, he held a cigarette lighter to her chest, igniting the petrol. Immediately, the

victim's hair, face and clothing were engulfed in flames. She stumbled from the car and attempted unsuccessfully to extinguish the flames. Bond and Ahu ran from the house and they, along with Scott, assisted her. The respondent dialled 000 and then threw the telephone at Bond and said "here you talk to them", which Bond did. The respondent returned to the house to obtain an ice pack to put on the burns to his hands that he appears to have sustained while attempting to extinguish the flames soon after lighting the fire. He then left the scene when Bond told him to "fuck off".

11 The victim was taken to hospital in a critical condition. Her injuries were horrendous. She was admitted to the intensive care unit, intubated and placed in an induced coma for five days on a ventilator. She had sustained burns to 20 per cent of her total body surface area, including burns bordering on extensive burn wounds to areas essential for life such as airways; burns to sensitive areas such as the head, face, neck, breasts, hands and wrists; and burns to multiple other body parts, constituting a combination of injuries with accumulative effect. To a large extent, the burn injuries were deep – that is, partial and full thickness skin burns – and required complex surgery and skin grafting, with skin harvesting from other parts of the victim's body rendering it necessary to wound further areas not affected by the fire. In the result, only a small skin area was left unhurt.

12 The multiple complex life-saving assessments, investigations and treatments involved in stabilising the victim's condition carried and continue to pose a high risk of complications and side-effects. In the course of treatment, she suffered complications, which required further interventions, and infections that would likely have caused her a high degree of pain and discomfort. She is now faced with a protracted risk of future thrombosis, infections and immobility, and a decreased immunological defence system. At the sentencing hearing, it was understood that she would remain scarred, possibly to large areas of her body including sensitive areas such as her face, breasts and hands, with protracted cosmetic and social implications, and that the functionality of her hands and limbs would remain diminished. It was also understood that her future quality of life would be reduced and that she would require ongoing care in different medical and mental health areas. There is no doubt that she would have died without the treatment which she received.

13 Due to the nature and seriousness of her injuries, and her long-term prognosis, the victim's pregnancy was terminated at her request on 13 August 2014. Since her discharge from hospital, she has had numerous outpatient appointments for rehabilitation and physiotherapy.

The sentencing judge's reasons

14 In assessing the nature and gravity of the offence, Judge Montgomery remarked that he found it hard to recall a more serious example of intentionally causing serious injury in his 38 years of working in criminal law. He stated that he took into account that the respondent was only 22 years of age at the time of the offending but added that he considered that the circumstances of the offending tended to push the significance of the respondent's age into the background. He observed that it was necessary to impose a sentence adequate to express his denunciation of the offence and to send a message to the community that violence against women will not be tolerated. His Honour stated that he took into account that the offending was spontaneous, opportunistic and not planned, and also that the respondent had attempted to do something to stop the fire. He also accepted that the respondent was remorseful. But, as his Honour observed, the respondent had a number of previous convictions for minor offences not involving violence, and also a number of convictions in relation to the possession of weapons; and, despite those previous convictions, the respondent had offended again, even while on bail and serving a community correction order in respect of previous offending. Consequently, there was a need for specific deterrence. His Honour noted that he had not been provided with any psychiatric assessment of the respondent that might have served to explain the offending, and he remarked that it was difficult to assess the respondent's prospects of rehabilitation. His Honour observed, however, that it was necessary to consider protection of the community and that someone who had acted in the way the respondent had was a risk to the community. He added that he had taken note of the sentences imposed in a number of other cases which the Crown and defence counsel had drawn to his attention. On balancing each of those considerations, his Honour concluded that it was necessary to impose the sentence he did, and he declared that, but for the respondent's plea of guilty, he would have imposed a total effective sentence of 18 years' imprisonment with a non-parole period of 15 years.

The Court of Appeal's reasons

15 The Court of Appeal stated that they considered the offending in this case to be "truly horrific" and that the "intentional setting on fire of any person with ensuing and entirely predictable life-threatening burns to a large part of the body" placed this case within the "worst category of this offence"[8]. Their Honours also specifically observed that the aftermath of the victim's injuries had involved

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8 *Kilic v The Queen* [2015] VSCA 331 at [31].

numerous surgical procedures, which entailed their own risks and complications, that the victim had required skin grafts taken from healthy parts of her body, and that, due to the physical and mental impact of her injuries, the victim had elected to terminate her pregnancy. The Court of Appeal took the view, however, that, although the use of fire intentionally to cause serious injury is a rarity in the criminal law, when one looked to the few cases involving the deliberate causing of serious injury by fire, and also to cases of intentionally causing serious injury by means other than fire that were in what was said to be the "worst category", it was apparent that the sentence imposed by Judge Montgomery was manifestly excessive. The Court of Appeal thus allowed the appeal, quashed the sentences imposed and resentenced the respondent.

16 The cases of intentionally causing serious injury by fire to which the Court of Appeal referred were *R v Alipek*[9], *R v Huitt*[10], *Emery v The Queen*[11] and *R v Rossi*[12] (the latter two cases arising from the one event) and the cases of intentionally causing serious injury by means other than fire which were said also to be in the "worst category" were *Director of Public Prosecutions v Terrick*[13], *Arthars v The Queen*[14] and *Ali v The Queen*[15]. It will be necessary to consider those cases in greater detail later in these reasons. Before doing so, however, it is appropriate to say something about the Court of Appeal's use of the expression "the worst category of this offence".

"Worst category" of this offence

17 As was earlier observed, in the course of considering the "[c]ircumstances of offending" the Court of Appeal described the principal offence as being within

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9 [2006] VSCA 66.

10 [1998] VSCA 118.

11 [2011] VSCA 212.

12 [2010] VSC 602.

13 (2009) 24 VR 457.

14 (2013) 39 VR 613.

15 [2010] VSCA 182.

"the worst category" of the offence of intentionally causing serious injury[16]. Later in their reasons[17], they added that, in assessing whether the sentence imposed was manifestly excessive, it was important to recognise the limitations on the use that may be made of the "worst category offending authorities".

18 What is meant by an offence falling within the "worst category" of the offence is that it is an instance of the offence which is so grave that it warrants the imposition of the maximum prescribed penalty for that offence[18]. Both the nature of the crime and the circumstances of the criminal are considered in determining whether the case is of the worst type[19]. Once it is recognised that an offence falls within the "worst category", it is beside the point that it may be possible to conceive of an even worse instance of the offence[20]. Thus, an offence may be assessed as so grave as to warrant the maximum prescribed penalty notwithstanding that it is possible to imagine an even worse instance of the offence.

19 Where, however, an offence, although a grave instance of the offence, is not so grave as to warrant the imposition of the maximum prescribed penalty – as the offending was agreed to be here – a sentencing judge is bound to consider where the facts of the particular offence and offender lie on the "spectrum" that extends from the least serious instances of the offence to the worst category,

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16 *Kilic v The Queen* [2015] VSCA 331 at [31].

17 *Kilic v The Queen* [2015] VSCA 331 at [66].

18 *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452; [1987] HCA 46; *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478 per Mason CJ, Brennan, Dawson and Toohey JJ; [1988] HCA 14. See also *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31] per Gleeson CJ, Gummow, Hayne and Callinan JJ; [2005] HCA 25.

19 *R v Tait* (1979) 24 ALR 473 at 485. Compare the narrower approach said to be required in a different statutory context: *R v Twala* unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 4 November 1994 at 2, 6 per Badgery-Parker J (Carruthers and Finlay JJ agreeing).

20 *Veen [No 2]* (1988) 164 CLR 465 at 478 per Mason CJ, Brennan, Dawson and Toohey JJ; *Bensegger v The Queen* [1979] WAR 65 at 68 per Burt CJ; *R v Lawrence* (1980) 32 ALR 72 at 110-111 per Moffitt P.

properly so called[21]. It is potentially confusing, therefore, and likely to lead to error to describe an offence which does not warrant the maximum prescribed penalty as being "within the worst category". It is a practice which should be avoided.

20 There is also another reason to avoid use of the expression "the worst category" of an offence. Not infrequently where an offence does not warrant the maximum prescribed penalty, a sentencing judge may observe in the course of his or her sentencing remarks that, although the offence is a serious, or perhaps particularly serious, instance of the offence, it is not within the "worst category". To do so is not inaccurate and it may be thought a convenient form of legal shorthand. But lay persons are unlikely to be familiar with the legal signification of the expression and, as a result, might wrongly take it to mean that the judge has underestimated the seriousness or effects of the offence. In order to avoid difficulties of that kind, sentencing judges should avoid using the expression "worst category" and instead, in those cases where it is relevant to do so, state in full whether the offence is or is not so grave as to warrant the maximum prescribed penalty.

Current sentencing practices

21 Section 5(2)(b) of the *Sentencing Act* 1991 (Vic) required Judge Montgomery, and the Court of Appeal, to have regard to "current sentencing practices". The evident purpose of that requirement is to promote consistency of approach in the sentencing of offenders[22]. Consideration of "current sentencing practices" will include, where appropriate, the proper use of information about sentencing patterns for an offence[23]. The requirement of currency recognises that sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some forms of offending. For

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21 *Ibbs* (1987) 163 CLR 447 at 452; *Elias v The Queen* (2013) 248 CLR 483 at 494 [27]; [2013] HCA 31.

22 *Sentencing Act* 1991 (Vic), s 1(a).

23 See and compare *Wong v The Queen* (2001) 207 CLR 584 at 591-593 [6]-[12] per Gleeson CJ, 605-608 [57]-[66] per Gaudron, Gummow and Hayne JJ; [2001] HCA 64; *Hili v The Queen* (2010) 242 CLR 520 at 536-537 [53]-[54] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 45; *R v Pham* (2015) 256 CLR 550 at 559-560 [28]-[29] per French CJ, Keane and Nettle JJ; [2015] HCA 39.

example, current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim. So, too, may current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations.

22 Their Honours in the Court of Appeal observed, correctly, that examination of cases of causing serious injury by fire may provide a relevant "yardstick"[24] by which a sentencing court can attempt to achieve consistency in sentencing and in the application of relevant sentencing principles but that the requirement to have regard to the sentences imposed in those cases does not mean that the range of sentences imposed in the past fixes the boundaries within which future sentences must be passed[25]; rather the range of sentences imposed in the past may inform a "broad understanding of the range of sentences that would ensure consistency in sentencing and a uniform application of principle"[26].

23 It is apparent, however, that the Court of Appeal ran into error, in the significance they attributed to the sentences imposed in those cases, when their Honours went on to conclude that, despite what they considered to be the "latitude" that had to be extended to a sentencing judge when sentencing for an offence at the upper end of the spectrum of seriousness, there was[27]:

> "such a disparity between the sentence imposed and current sentencing practice as illustrated by the authorities relied upon by the parties, that we are satisfied that there has been a breach of the underlying sentencing

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24 *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1 at 71 [304] per Simpson J, quoted with approval in *Hili* (2010) 242 CLR 520 at 537 [54] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. See also *Pham* (2015) 256 CLR 550 at 560 [29] per French CJ, Keane and Nettle JJ. Another "yardstick" is the statutory maximum: *R v Hoar* (1981) 148 CLR 32 at 39 per Gibbs CJ, Mason, Aickin and Brennan JJ; [1981] HCA 67. See also *Sentencing Act*, s 5(2)(a).

25 *Director of Public Prosecutions (Vic) v OJA* (2007) 172 A Crim R 181 at 196 [30]-[31] per Nettle JA (Ashley and Redlich JJA agreeing at 206 [71], [72]).

26 *Kilic v The Queen* [2015] VSCA 331 at [48].

27 *Kilic v The Queen* [2015] VSCA 331 at [67]-[68].

principle of equal justice. The sentence imposed is unjustifiably disparate from other sentences imposed for worst category offending by offenders in comparable circumstances.

Subtle distinctions between serious injuries should be eschewed but without minimising the horrific injuries suffered by the victim, there is a clear distinction to be made here from those cases where the victims have sustained lifelong major physical or mental disabilities. When this consideration is combined with the lack of premeditation, the [respondent's] genuine remorse, youth and lack of relevant prior offending, and prospects for rehabilitation, the conclusion is, on our view, inescapable that the sentence imposed on the primary charge was well beyond a reasonable exercise of the sentencing discretion." (footnote omitted)

24 As the Crown submitted, despite the Court of Appeal's correct observations of principle earlier referred to, the Court of Appeal's reasoning in effect impermissibly treated the sentences imposed in the few cases mentioned as defining the sentencing range and, on that basis, concluded that, because the sentence imposed in this case exceeded the sentences imposed in all but one of the cases referred to, the sentence imposed in this case was beyond the range of available sentences.

25 Cases of intentionally causing serious injury by fire are not common. The few cases mentioned by the parties could not properly be regarded as providing a sentencing pattern. There were too few of them[28], one dealt with a different offence, another was more than 12 years old and, in any event, as will be explained, the circumstances of the offending in each of those cases were too disparate. At best they were representative of particular aspects of the spectrum of seriousness[29].

Lack of comparability of cases referred to

26 Although the circumstances of the offending in *Alipek* were not dissimilar to those here, and Alipek was convicted, following trial, of attempted murder,

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28 Cf *Johnson v The Queen* [2011] VSCA 348 at [23]-[24] per Buchanan JA (T Forrest AJA agreeing at [43]).

29 *Ibbs* (1987) 163 CLR 447 at 452.

Alipek's offending was mitigated by his psychiatric condition[30]. It is also to be observed that it is now more than 12 years since Alipek was sentenced and that sentencing practices in cases of intentionally causing serious injury have evolved considerably in that time[31].

27 The circumstances in *Huitt* were very different from those here and, in any event, Huitt was sentenced in 1998, when sentences for intentionally causing serious injury were very much lower than today. Until 1 September 1997, the maximum sentence for the offence of intentionally causing serious injury was 12 years and six months' imprisonment[32] and thus, as was observed by the Court of Appeal in *Director of Public Prosecutions v Zullo*[33], the "very top of the range" was considered to be between six and 10 years' imprisonment. Following the increase in maximum penalty to 20 years' imprisonment, it came to be recognised that the top of the range is "upwards of fifteen years"[34]. It is also to be remembered that in *Huitt* the Court of Appeal described the sentences as "merciful rather than excessive"[35].

28 *Emery* and *Rossi* involved intentionally causing serious injury by fire with the use of petrol, but the circumstances of the offending were otherwise significantly different from the present. They did not involve violence perpetrated in the course of a domestic relationship against the offender's female partner. They did not involve the abuse of a relationship of trust which such an offence necessarily entails and which, as Judge Montgomery observed, must

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30 *Alipek* [2006] VSCA 66 at [31] per Warren CJ (Buchanan and Vincent JJA agreeing at [33], [34]).

31 See generally *OJA* (2007) 172 A Crim R 181 at 196 [31] per Nettle JA (Ashley and Redlich JJA agreeing at 206 [71], [72]).

32 *Sentencing and Other Acts (Amendment) Act* 1997 (Vic), s 60(1), Sched 1, item 10.

33 [2004] VSCA 153 at [10] per Nettle JA (Winneke P and Batt JA agreeing at [26], [27]), citing Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed (1999) at [12.303].

34 *Zullo* [2004] VSCA 153 at [10] per Nettle JA (Winneke P and Batt JA agreeing at [26], [27]).

35 *Huitt* [1998] VSCA 118 at [16] per Charles JA (Winneke P and Buchanan JA agreeing at [17], [18]).

steadfastly be deterred. The offences were committed following a physical altercation between Rossi and the victim. Rossi's moral culpability was reduced by reason of his depressive disorder and psychological state and, whereas in this case Judge Montgomery found it difficult to assess the respondent's prospects of rehabilitation, Rossi was found to have good prospects of rehabilitation. Critically, by contrast to the victim in this case, who will continue to suffer from the very serious effects of her injuries for the rest of her life (with consequent diminished future quality of life and the need for ongoing care in different medical and mental health areas), in *Emery* and *Rossi* the injuries sustained by the victim were much less to begin with and had significantly resolved by the time of sentencing.

29 *Terrick* is relevant to the extent that, like the present case, it involved some of the most catastrophic injuries that can be imagined in a case of intentionally causing serious injury. But, as in *Emery* and *Rossi*, the circumstances of the offending in *Terrick* were once again very different from those here. It was not a case of domestic violence perpetrated against a woman in abuse of a relationship of trust. It is also apparent that, in circumstances where the offenders were of Aboriginal descent, the sentences imposed at first instance, and thus it would seem on appeal, took into account the mitigatory considerations identified in *R v Fuller-Cust*[36]. Most significantly, the sentences passed on appeal were less than otherwise would have been expected because of the double jeopardy doctrine which then applied to Crown appeals against sentence[37].

30 *Arthars* involved very serious injuries but the circumstances of the offending were entirely different from those here, and, viewed in hindsight, the sentences imposed in *Arthars* present as remarkably merciful. Possibly, that is attributable to the fact that, in *Arthars*, the sentencing judge found that both offenders had good prospects of rehabilitation and that the mental condition of

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36 (2002) 6 VR 496 at 520-524 [78]-[92] per Eames JA. Cf *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37; *Munda v Western Australia* (2013) 249 CLR 600; [2013] HCA 38.

37 See *R v Clarke* [1996] 2 VR 520 at 522-523 per Charles JA (Winneke P and Hayne JA agreeing at 524); *Director of Public Prosecutions (Vic) v Bright* (2006) 163 A Crim R 538 at 542-543 [10] per Redlich JA (Vincent JA agreeing at 541 [6]). See now *Criminal Procedure Act*, s 289(2); *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634 at 637-640 [4]-[13] per Warren CJ and Maxwell P, 644-649 [35]-[56] per Ashley, Redlich and Weinberg JJA.

one of them was a mitigatory consideration. In this case, there was no such mitigatory consideration rising to that level.

31 *Ali* was not in any way comparable to this case, apart from the fact that it involved an offence considered to be towards the upper end of the range of seriousness for offences of intentionally causing serious injury. Indeed, one might wonder why the offending in *Ali* was not considered to be so grave as to warrant imposition of the maximum prescribed penalty of 20 years' imprisonment. But, however that may be, the only significance of *Ali* for present purposes is to demonstrate that an offence of intentionally causing serious injury which is towards the upper end of the range of seriousness is liable to attract a sentence upwards of 15 years' imprisonment.

Comparison of injuries

32 In argument before this Court, the Crown further criticised the Court of Appeal's reasoning as involving an unprincipled comparison of the significance of the victim's injuries in this case to the seriousness of the injuries in *Terrick*, *Arthars* and *Ali*, and, on the basis of that comparison, concluding that there is a clear distinction to be made between this case and cases in which "the victims have sustained lifelong major physical or mental disabilities"[38]. In the Crown's submission, that reasoning was a disconnect from the Court of Appeal's earlier stated recognition that the offending in this case was so horrific and productive of chronic, serious injury as to place it at the upper end of the range of seriousness, or a disconnect from what the Court of Appeal had recognised earlier in their reasons as the impropriety of attempting to draw subtle distinctions between the seriousness of injuries which, in each case, place the offences at the upper end of the range of seriousness.

33 Those submissions should be accepted. Having noticed that the maximum prescribed penalty for the offence of intentionally causing serious injury is 20 years' imprisonment, and having observed, correctly, that the offence in this case was at the upper end of the range of seriousness, the question for the Court of Appeal was why a sentence of 14 years' imprisonment for an offence at the upper end of the range of seriousness should be regarded as manifestly excessive. Ultimately, their Honours resolved[39] that question on the basis that there was such a disparity between the extent of the injuries inflicted on the victims in

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38 *Kilic v The Queen* [2015] VSCA 331 at [68].

39 *Kilic v The Queen* [2015] VSCA 331 at [67].

Terrick, *Arthars* and *Ali* and the injuries inflicted in this case that the sentence imposed in this case was "unjustifiably disparate" from the sentences imposed in those other cases. With respect, that is plainly not so.

34 The circumstances of the offending in *Terrick* were very different from this case, and, but for the considerations noted above as to the offenders' Aboriginal descent and the application of the principle of double jeopardy, the sentences imposed on appeal – 11 years and six months' imprisonment for each of the offences of intentionally causing serious injury – would have been greater. The circumstances of the offending in *Arthars* were also very different and, although the injuries inflicted in *Arthars* were severe, it is a matter for subjective perception, as to which views may reasonably differ, whether the injuries in *Arthars* were overall any worse than the injuries here. As has also been observed, the sentences imposed in *Arthars* were remarkably merciful, perhaps on account of the mitigatory considerations[40], which did not arise in this case.

35 *Ali* may be put to one side because of the different circumstances of the offending. As already explained, its only relevance for present purposes is as an indicium or confirmation of the sentencing practice identified in *Zullo*[41] that offences of intentionally causing serious injury towards the upper end of the range of seriousness are liable to attract a penalty upwards of 15 years' imprisonment. The sentence of 14 years' imprisonment imposed in this case is not inconsistent with that practice. Admittedly, it is difficult to imagine worse injuries than were inflicted by Ali or that there could be any greater pain and suffering than the victim in *Ali* might perhaps have experienced for the short time that he lived, in a vegetative state, after Ali's attack on him. But that does not mean that the sentence imposed in this case is manifestly excessive. Whatever the supposed relativities of the injuries inflicted in each case, it remains that the physical and psychological pain and suffering inflicted on the victim in this case were immense and, according to the evidence on the plea, the consequences will continue to attend her for the rest of her life.

36 Granted, Ali was older than the respondent and had numerous prior convictions, many for offences involving violence, and the respondent had relatively few prior convictions and none for offences involving violence.

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40 See [30] above.

41 [2004] VSCA 153 at [10] per Nettle JA (Winneke P and Batt JA agreeing at [26], [27]).

Granted, also, Ali stood trial and the respondent pleaded guilty and was found to be remorseful. But, as Judge Montgomery in effect recognised, the heinousness of the offence in this case was in a category of its own. It surpasses understanding that a man, even one as young as 22 years of age, could set alight the mother of his unborn child. Given the nature and gravity of the offence, the dire consequences for the victim and the personal circumstances and antecedents of the respondent, the sentence of 14 years' imprisonment was not unreasonable or plainly unjust[42].

The secondary complaint

37 The Crown's secondary complaint may be dealt with more briefly. The substance of it is that the Court of Appeal erred as a matter of principle by substituting their own finding of lack of premeditation for Judge Montgomery's finding that the offending was spontaneous, opportunistic and not planned; substituting their own characterisation of the respondent's antecedents as devoid of relevant offending for Judge Montgomery's description of the respondent as having numerous prior convictions, although none involving violence; and substituting their own assessment of the respondent's prospects of rehabilitation for Judge Montgomery's view that it was difficult to assess those prospects. No such substitution is apparent. Read in context, the Court of Appeal's description of the offending as unpremeditated presents as intended to convey the same meaning as Judge Montgomery's finding of spontaneity, opportunism and lack of planning. So also, the Court of Appeal's reference to the absence of relevant prior convictions appears in context as a reiteration of Judge Montgomery's observation that the respondent had no prior conviction for offences involving violence. And, although the Court of Appeal did refer to the respondent's prospects of rehabilitation in a fashion that, standing alone, might be thought suggestive of a positive or favourable assessment of them, in light of the absence of an explicit contradiction of Judge Montgomery's finding, it is not to be supposed that the Court of Appeal intended that effect.

The summary offences

38 It remains to mention that the Court of Appeal were also persuaded that the sentences imposed for the uplifted summary offences were manifestly excessive[43], notwithstanding that their Honours gave no reasons for that

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42 See *Pham* (2015) 256 CLR 550 at 568 [56] per Bell and Gageler JJ.

43 *Kilic v The Queen* [2015] VSCA 331 at [69].

assessment. Contrary to that conclusion, those sentences were not manifestly excessive.

39 The offence of using a prohibited weapon entailed the respondent's use of the samurai sword when he thrust the sword through the open driver's window where Bond was sitting and also when he swung the sword at the plastic water bottle in order to demonstrate that it "would take some cunt's head off". The respondent had prior convictions for possession of a firearm whilst a prohibited person for which he was sentenced to three months' imprisonment in March 2013; possession/use of a prohibited weapon for which he was sentenced to a community correction order for 24 months, also in March 2013; carrying an imitation handgun, possession of a prohibited weapon and possession of a controlled weapon for which he was sentenced to a community correction order for 18 months in August 2012; and possession of a dangerous article for which he was sentenced in June 2010 to an undertaking to be of good behaviour for 12 months. The respondent committed the instant offences while on bail and serving the community correction order imposed in March 2013.

40 The offence of dealing with property suspected of being proceeds of crime related to three stolen credit cards found by police in the respondent's possession when his premises were searched following the commission of the principal offence. The respondent had prior convictions for handling and receiving stolen goods for which he was sentenced to a community correction order for 24 months in March 2013, and for shop theft for which he was sentenced to a community correction order for 18 months in August 2012.

41 The maximum penalty that could be imposed for each of the summary offences was two years' imprisonment[44]. Having regard to the nature of each of the offences and the respondent's antecedents, a sentence of 12 months' imprisonment for each offence with six months of each sentence to be served cumulatively upon the other sentences imposed was not at all excessive.

Notice of contention

42 Finally, it should be mentioned that the respondent filed a notice of contention that the decision of the Court of Appeal should be upheld but on the basis that the Court of Appeal erred in characterising the respondent's offence of intentionally causing serious injury as falling in the "worst category" of cases of

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44 *Control of Weapons Act*, s 5AA; *Crimes Act*, s 195; *Sentencing Act*, s 113A.

intentionally causing serious injury. As has been explained, the Court of Appeal were in error to describe the respondent's offence as falling within the worst category. But, once it is appreciated that the Court of Appeal used that expression in the sense of an instance of the offence of intentionally causing serious injury towards the upper end of the range of seriousness, the point is without relevant consequence.

Conclusion and orders

43 In the result, the appeal should be allowed. Orders 2 to 7 of the orders of the Court of Appeal should be set aside. In lieu thereof, it should be ordered that the appeal to the Court of Appeal be dismissed.