



Court of Criminal Appeal New South Wales

Medium Neutral Citation: Ng v R [2011] NSWCCA 227

Hearing Dates: 6 September 2011

Decision Date: 14/10/2011

Jurisdiction:

Before: Bathurst CJ at 1
James J at 1
Johnson J at 1

Decision: Leave to appeal granted with respect to sentences imposed in the Supreme Court of New South Wales on 20 August 2003.

Sentence imposed for the offence of aggravated armed robbery, being a sentence of imprisonment for a fixed term of seven years, commencing on 6 July 2001 and expiring on 5 July 2008, is confirmed.

Sentence imposed for the offence of murder is quashed and, in its place, the Applicant is sentenced to imprisonment for a total term of 30 years, comprising a non-parole period of 22 years and six months commencing on 6 July 2002 and expiring on 5 January 2025, with a balance of term of seven years and six months commencing on 6 January 2025 and expiring on 5 July 2032.

The earliest date upon which the Applicant will be eligible for release on parole is 6 January 2025.

Catchwords: CRIMINAL LAW - sentence after trial - Applicant convicted of murder and aggravated armed robbery - application for extension of time to appeal against sentence - claim of denial of procedural fairness in sentencing process - ground established - claim of justifiable sense of grievance by reference to sentence imposed on co-offender - assessment of dangerousness of Applicant and co-offender - parity ground established - Applicant resentenced

Legislation Cited: Criminal Appeal Act 1912
Crimes Act 1900
Crimes (Sentencing Procedure) Act 1999
Crimes (Administration of Sentences) Act 1999
Criminal Appeal Rules

Cases Cited: Edwards v R [2009] NSWCCA 199
Darwiche v R [2011] NSWCCA 62
R v Teck Lee Lew [2004] NSWCCA 320
R v Lo [2003] NSWSC 582
R v Ng; R v Lew [2003] NSWSC 781
Baroudi v R [2007] NSWCCA 48
Button v R [2010] NSWCCA 264
R v Pham [2005] NSWCCA 94
R v Thompson [2005] NSWCCA 340; 156 A Crim R 467
Weir v R [2011] NSWCCA 123
Veen v The Queen (No. 2) [1988] HCA 14; 164 CLR 465
GAS v The Queen [2004] HCA 22; 217 CLR 198
Ahmad v R [2006] NSWCCA 177
House v The King [1936] HCA 40; 55 CLR 499
R v Merritt [2004] NSWCCA 19; 59 NSWLR 557
R v O'Donoghue (1988) 34 A Crim R 397
Fardon v Attorney General for the State of Queensland [2004] HCA 46; 223 CLR 575
R v Garforth (NSWCCA, 23 May 1994, unreported)
Ali v R [2010] NSWCCA 35
Tatana v R [2006] NSWCCA 398
Youkhana v R [2011] NSWCCA 37
R v Swan [2006] NSWCCA 47
Gurney v R [2011] NSWCCA 48
Dwayhi v R [2011] NSWCCA 67; 205 A Crim R 274
R v Li [2005] NSWCCA 154
Lewins v R [2007] NSWCCA 189
R v Wei Pan [2005] NSWCCA 114
England v R; Phanith v R [2009] NSWCCA 274
Jimmy v R [2010] NSWCCA 60; 77 NSWLR 540
Smale v R [2007] NSWCCA 328

Pearce v The Queen [1998] HCA 57; 194 CLR 610
Cahyadi v R [2007] NSWCCA 1; 168 A Crim R 41
R v Lett (NSWCCA, 27 March 1995, unreported)
R v Villa [2005] NSWCCA 4
McGrath v R [2010] NSWCCA 48; 199 A Crim R 527
Hejazi v R [2009] NSWCCA 282
Attorney General's Application Under Section 37 of the Crimes (Sentencing Procedure) Act 1999 (No. 1 of 2002) [2002] NSWCCA 518; 56 NSWLR 146
Chow v Director of Public Prosecutions (1992) 28 NSWLR 593
Ollis v R [2011] NSWCCA 155
R v Fernando [1999] NSWCCA 66

Texts Cited: ---
Category: Principal judgment
Parties: David Ng (Applicant)
Regina (Respondent)
Representation: Australian Criminal Law Specialists Pty Limited (Applicant)
Solicitor for Public Prosecutions (Respondent)

Mr PR Boulten SC; Mr D Barrow (Applicant)
Mr DU Arnott SC (Respondent)
File Number(s): 2002/2357

DECISION UNDER APPEAL

Before: Adams J
Date of Decision: 20/08/2003
Medium Neutral Citation: R v Ng; R v Lew [2003] NSWSC 781
Court File Number(s): ---
Publication Restriction: ---

JUDGMENT

- 1 **THE COURT** : The Applicant, David Ng, seeks an extension of time to apply for leave to appeal against sentences passed by Adams J on 20 August 2003 for the crimes of murder and aggravated armed robbery.
- 2 By Notice of Application for Leave to Appeal filed 10 January 2011, the Applicant sought leave to appeal with respect to conviction and sentence and notified grounds of appeal.
- 3 On 2 September 2011, the Applicant signed a Notice of Abandonment with respect to his appeal against conviction. Having forwarded the Notice of Abandonment to the Registrar, the application for an extension of time to seek leave to appeal against conviction is deemed to have been refused by the Court: Clause 27 *Criminal Appeal Rules* .

The Application for Extension of Time to Appeal Against Sentence

- 4 There remains the application for an extension of time to seek leave to appeal against sentence under s.5(1)(c) *Criminal Appeal Act 1912* .
- 5 In the context of an application for extension of time to seek leave to appeal against sentence, this Court said in *Edwards v R* [2009] NSWCCA 199 at [8], [13]:

"8 The Court has a discretion with respect to extension of time under s.10(1)(b) Criminal Appeal Act 1912. In exercising that discretion, the Court has regard to the prospects of success on the application for leave to appeal itself: R v Young [1999] NSWCCA 275 at [30]ff. The Court will usually require some satisfactory explanation as to why an appeal was not brought within the time allowed, especially if the delay is considerable: R v Beattie [2000] NSWCCA 201 at [17].

...

13 The principle of finality of litigation is relevant on an application such as this. Although it may be, as here, that the Crown cannot point to any actual prejudice because of the delay in bringing the application, there is a public interest in avoidance of delay, and the finality of litigation, in the area of sentencing as with litigation generally. In many cases, the prospect of sentence being reopened long after the event may impact adversely upon victims of crime."

- 6 When considering the interests of justice in relation to an application for an extension of time, regard should be had to the interests of the Crown (representing the community) and the administration of justice generally, as well as the interests of the applicant for leave: *Darwiche v R* [2011] NSWCCA 62 at [39].
- 7 At the hearing on 6 September 2011, the Crown indicated that there was no objection to the application for an extension of time to appeal against sentence.
- 8 It remains a matter for the Court as to whether an extension should be granted.
- 9 The application for leave was filed more than seven years after the Applicant was sentenced in the Supreme Court. The Applicant relied upon his affidavit sworn 7 December 2010 and the affidavit of his solicitor, Nicholas Bryan Boyden, affirmed 23 December 2010 in support of the application for an extension of time.
- 10 The Applicant's affidavit revealed a sorry history of his attempts to appeal to this Court. The problems disclosed appear to lie with his past legal representatives, and not with the Applicant personally.
- 11 Mr Boyden's affidavit outlines the more recent history with respect to an assessment of whether arguable grounds existed for an appeal to this Court against conviction and sentence.
- 12 After the Court had been taken to material explaining the delay, and in light of the Crown concession that an extension was appropriate, together with the arguability of the grounds, the Court indicated on 6 September 2011 that an extension of time would be granted.

Grounds of Appeal Concerning Sentence

- 13 The Applicant gave notice of the following grounds of appeal relating to sentence (Grounds 1-3 relate to the abandoned conviction appeal):
 - (a) Ground 4 - his Honour erred in concluding that the Applicant was "*markedly more dangerous*" than Wai Kit Lo ("Lo").
 - (b) Ground 5 - the sentences imposed upon the Applicant leave him with a justifiable sense of grievance when compared to the sentence imposed upon Lo.
- 14 At the hearing before this Court, the Applicant was granted leave to add further grounds of appeal with respect to sentence in the following terms:
 - (a) Ground 6 - the Applicant was denied procedural fairness in that the sentencing Judge failed to warn those acting for him that he proposed to impose a sentence longer than that indicated during the proceedings on sentence.
 - (b) Ground 7 - his Honour erred in partially accumulating the sentence for the aggravated armed robbery offence upon the sentence imposed for the murder offence.

The Sentences

- 15 The Applicant was convicted by a jury of murder and aggravated armed robbery following a trial between 26 May 2003 and 20 June 2003. On 20 August 2003, Adams J sentenced the Applicant.
- 16 On 26 March 2004, the sentencing of the Applicant was reopened to correct an error (which is not presently relevant). The operative sentences imposed upon the Applicant are as follows:

Offence	Maximum Penalty	Sentence Imposed
Count 1 - Murder of Nigel Stiffe on 22 May 2001 contrary to s.19A <i>Crimes Act 1900</i>	Imprisonment for Life (no standard non-parole period applied as the offence was committed before February 2003)	Imprisonment for a total term of 35 years, comprising a non-parole period of 25 years and nine months commencing on 6 July 2003 and expiring on 5 April 2029, with a balance of term of nine years and three months commencing on 6 April 2029 and expiring on 5 July 2038
Count 2 - Aggravated armed robbery (being armed with a	Imprisonment for 25 years	Fixed term of imprisonment for seven years commencing 6 July 2001 and expiring 5 July 2008

Offence	Maximum Penalty	Sentence Imposed
dangerous weapon) on 22 May 2001 contrary to s.97(2) Crimes Act 1900		

- 17 The total effective term of imprisonment imposed upon the Applicant for the offences comprised a full term of imprisonment for 37 years with an effective non-parole period of 27 years and nine months.
- 18 Tried with the Applicant, and also convicted, was Teck Lee Lew ("Lew"). Lew appealed against sentence to this Court: *R v Teck Lee Lew* [2004] NSWCCA 320. Given the difference in charges between Lew and the Applicant, Lew's sentences and appeal are not relevant to the Applicant's sentence appeal.
- 19 The position is different, however, with respect to Lo, who pleaded guilty and was sentenced by Adams J on 9 May 2003: *R v Lo* [2003] NSWSC 582. Lo was called by the Crown to give evidence in the trial of the Applicant and Lew.

Facts of Offences

- 20 On the morning of 22 May 2001, Nigel Stiffe, the manager of the Market City Tavern in Haymarket, was found dead in his office at the Tavern. He had been shot in the back of the head and his throat had been cut. At the time of his murder, he had been counting money from the Tavern's takings.
- 21 Two persons were responsible for the attack. Lo admitted to being one of those persons and he gave evidence for the Crown at trial. There was no issue that three weapons were used in the attack upon Mr Stiffe, being a gun, a knife and a metal pole.
- 22 The issue in the trial was the identity of the other attacker. By its verdicts, the jury was satisfied beyond reasonable doubt that the second attacker was the Applicant.
- 23 It should also be kept in mind that Lo and Sam Man Tran ("Tran"), on 14 May 2001, had committed an offence of attempted robbery of Mr Stiffe at the Tavern. The Applicant was not charged with the offence of 14 May 2001. This aspect is relevant to submissions made comparing the positions of Lo and the Applicant with respect to the parity ground.
- 24 Adams J made the following findings of fact for the purpose of sentencing the Applicant: *R v Ng; R v Lew* [2003] NSWSC 781 at [3]-[8]:

"[3] Mr Stiffe was the manager of the Market City Tavern. Wai Kit Lo had been employed there for about six months but had resigned, perhaps involuntarily, some months before the offences. Teck Lee Lew was supervisor or shift manager at the Tavern and it was on his recommendation that Lo obtained work there. However, after Lo left that employment he and Lew remained in contact with each other. It was Lo's evidence that Lew suggested to him that the Tavern should be robbed and that he should find a gun for that purpose. Although the offender, Lew, admitted that he was a party to the plan to rob the Tavern he said that it was Lo's idea and that as he was then in desperate need of money he agreed to turn a blind eye to its commission. He denied that he ever discussed the possibility of the use of a gun or, for that matter, a knife in the robbery. He said that the only plan discussed was that Lo would use a metal bar, later described as a shopping trolley pole, to render Mr Stiffe unconscious by a blow to the head. On the whole I am minded to believe Lew's evidence on this point. Certainly Lo had something to gain, and he probably thought it would be a good deal, from alleging that Lew instigated the crime and proposed the use of a gun and not him. Furthermore, there is evidence, which I am minded to accept, that Lew at an earlier time warned Mr Stiffe that Lo had talked about a robbery and asked to ban him from the Tavern. In the absence of any supporting evidence I do not think that Lo's credibility is such that I could believe his evidence either as to Lew's instigating the offence, or as to the gun, or, for that matter, as to the knife.

[4] On 14 May 2001, Lo and Tran were armed with a metal pole taken from a dismantled shopping trolley and a knife belonging to Lo's brother. In the result when it came to the point of actually attacking Mr Stiffe they desisted and left the premises before any alarm was raised.

[5] So far as the offences that occurred on 21 May are concerned, Ng became involved some days before, although the precise date is uncertain. On the day of the crime Lo and Ng went from Lo's home to the Tavern, taking with them a change of clothes, including tracksuits and balaclavas, a metal pole, Lo's brother's knife and a pistol. The evidence does not permit me to conclude who of Lo or Ng obtained the gun though I think that Lo procured the knife and the pole. I have no doubt that Ng was well aware that the pole, knife and gun were being taken to the robbery. Nothing turns on who obtained or who carried what. The two men remained hidden overnight in the fire stairs where, later, fingerprints of Ng and cigarette butts containing his DNA were found. At about 6.40am on Tuesday 22 May, Mr Stiffe arrived for work at the Tavern and about an hour later he entered the cool room/office area where he normally counted the Tavern's overnight takings. A few minutes later Ng and Lo entered the office area wearing balaclavas and caps to conceal their identities from the closed circuit television cameras operating throughout the premises and also from Mr Stiffe. Again, who was armed with what is uncertain since I cannot accept Lo's evidence on this point beyond reasonable doubt. This is immaterial since I am satisfied that both of them had agreed that the respective weapons would be used as necessary although I accept that they expected that it would be sufficient to obtain Mr Stiffe's compliance if he were threatened with one or more of them. As the offenders entered the office Mr Stiffe got up and walked into the cool room and was struck from behind with a metal pole, it being again planned that he would be rendered unconscious. This, however, did not disable him and a struggle ensued during which the balaclavas worn by the offenders came off. Eventually Mr Stiffe was overpowered and forced to lie on the floor. He was then killed, the autopsy revealing that he suffered a fatal wound inflicted by the knife to his throat as well as a bullet wound to the back of his head.

[6] Lo's account of what happened was calculated to reduce his own responsibility for the acts of killing Mr Stiffe but although there is good reason for believing that Ng indeed played the major role I am not satisfied beyond reasonable doubt that this was so. However, whoever took the major role I have no doubt that both offenders were fully complicit and for all practical purposes equally culpable.

[7] It is clear that Mr Stiffe was executed because he was able to identify the offenders, although he only knew Lo from previous acquaintance. Although the offenders had not planned on killing Mr Stiffe so that in that sense his death was not premeditated nevertheless it was a deliberate execution in cold blood. The offender, Lo, gave evidence on his plea as to the circumstances of the killing. I was prepared to accept that he was the follower, not the instigator, of the lethal assaults and the murder was not premeditated in the sense that it was planned from the beginning (taking and wearing the balaclavas being the strongest evidence of this) and thus that the case was not in the worst category of case. The evidence does not permit me to find as against Ng that he was the instigator of the killing. So far as he is concerned, therefore, I find that the crime does not fall into the worst category of case but not by much.

[8] The offenders stole about \$50,000 in cash from the office safe and fled taking money, knife, metal pole and pistol with them. In all the circumstances I think it likely that Ng became involved in the crime by agreement with Lo who was its instigator but he needed no persuading and thereafter enthusiastically participated in it so that the distinction in culpability is, I think, relatively slight. The aftermath of the offences is sufficiently set out in my reasons for sentence in respect of Lo and I do not intend to repeat them here."

The Applicant 's Subjective Circumstances

25 There was a question in this Court as to the Applicant's correct age and date of birth. Given certain findings of the sentencing Judge, the Applicant's age is relevant to the appeal. It was common ground that the Applicant was born on 14 December 1975 so that he was aged 25 years and six months at the time of the offences and 27 years and eight months at the time of sentence.

26 Adams J summarised the Applicant's subjective circumstances at [13]-[14] of the remarks on sentence:

[13] I come now to the subjective features of the case. David Ng is twenty-eight years of age and was born in Hong Kong, arriving in Australia with both parents when he was five years old. His father was a chef working in a restaurant in Chinatown and his mother confined herself to domestic duties. His upbringing was normal and unremarkable.

[14] Ng was educated at a number of State schools, obtaining his Higher School Certificate in 1993. Since leaving school he attempted a business management course at TAFE but discontinued after six months. Since then he has worked selling clothes and toys door to door for a time then worked selling mobile telephones. He also worked part time as a waiter in various Chinese restaurants. He made a substantial profit from a fortunate real estate purchase. He has no physical or mental health problems. Ng claims that although he used cannabis and smoked heroin occasionally he is not and was not ever addicted to any substance. Psychometric testing indicated that he functions in the above average range with no significant personality issues. Ng has no relevant criminal record."

27 The Applicant had a limited criminal history before the commission of these offences. In May 1994, he was fined \$400.00 in the Downing Centre Local Court for common assault. In August 1995, he was fined \$450.00 in the Burwood Local Court for possession of a prohibited drug.

Some Further Findings of the Sentencing Judge

28 Adams J made some additional findings concerning the Applicant which are pertinent given the grounds of appeal on sentence. His Honour said at [15] and [17] of the remarks on sentence:

"[15] If Ng so desired I have little doubt that he is capable of living in a law abiding and productive manner. Whether he wishes to do so it is impossible to say. It seems that he needed little, if any, encouragement to become involved in a very serious crime involving the use of potentially lethal weapons. The crime itself demonstrated a frightening degree of indifference to fundamental moral standards. He has not demonstrated any contrition or remorse. I am unable to see any signs that there are reasonable prospects for rehabilitation and therefore can make no allowance in his favour in this regard. His crime shows that he is a dangerous man and there is no reason to infer that he will be any less dangerous in the future. Of course, this does not mean that he should be sentenced for crimes that he has not committed but it does mean that the element of personal deterrence and protection of the community is more significant in his case than it was in the case of the offender, Lo.

...

[17] In many ways both Ng and Lew have been model prisoners, especially the offender, Lew, who has undertaken responsible work assisting Asian inmates to adjust to the correctional centre environment and avoid potential conflicts. An additional factor in Lew's case is that he pleaded guilty to the attempted robbery charge and indicated that he would do so at an early stage. He has also pleaded guilty to the charge of being an accessory before the fact of robbery and I should repeat here, as I have already pointed out, that this was robbery with an offensive, rather than a dangerous weapon, which is an important distinction in point of seriousness. Although in the circumstances his trial on the charge of murder was not thereby averted the plea simplified the trial significantly and involved admissions as to his complicity which the Crown could by no means have been confident of proving to the requisite degree of certainty. It seems to me that I should acknowledge the significance of those pleas in the sentence which I intend to impose. I regard it as significant from the point of view of the offender's chances of rehabilitation as well as reflecting on the seriousness of the crime that he did not participate in the crime in the result although his withdrawal was insufficient to comprise a defence to the charge. I accept that Lew's involvement in this crime was an aberration and that he is most unlikely to offend again. The extent of his actual involvement does not demonstrate nearly the level of criminal culpability shown by the offender, Ng, or, for that matter, the offender, Lo."

29 His Honour referred to a number of factors in comparing the sentence imposed upon Lo with the circumstances of the Applicant. His Honour said at [19]-[20]:

"[19] As is obvious from the sentence imposed on Wai Kit Lo the starting point before the deduction of forty per cent as provided by s22 and s23 of the Crimes (Sentencing Procedure) Act 1989 was thirty years' imprisonment. That figure reflected all the objective and subjective features of his case except the matters for which a discount was justified in the public interest. Thus I accepted that there were reasonable prospects of Lo's rehabilitation and accordingly I gave considerable weight to the importance of this consideration in

respect especially of young offenders not only for their own sake but also in the public interest.

[20] The offender, Ng, however, is significantly older than Lo and I do not think that his age gives rise to the same consideration that applied in Lo's case. As I have mentioned, there is not any evidence that Ng has accepted the need for rehabilitation. Leaving aside, therefore, the s22 and s23 considerations, the only potentially significant difference between them favouring Ng is that Lo was the instigator of the offence but he is considerably younger than Ng and has shown signs suggesting reasonable prospects of rehabilitation and whilst Ng did not instigate the offence he was a willing participant. He is older and without signs of rehabilitation. He is a markedly more dangerous man. I have also borne in mind that Lo's sentence for murder included an allowance for the robbery which was taken into account on a Form 1. This mode of dealing with Lo should be treated as part of the process of inducing him to plead guilty and give evidence against Ng and Lew. Ng must be separately sentenced for that offence and I do not regard the fact that it was taken into account in Lo's case requires that Ng should have the same effective result. I have concluded that I must impose on Ng a longer sentence than the sentence used as the starting point for the calculation of Low's [sic] discounted sentence. The armed robbery offence is so closely connected with the murder of Mr Stiffe that most of the sentence in respect of it, but not all, should be served concurrently with the sentence for murder. In this respect I have taken into account the requirement that the total term of imprisonment should not exceed the total criminality of the offences having regard to the sentence which I intend to impose with the consequent effect on the length of the non-parole period if there is no departure from the statutory calculation provided for in s44 of the Crimes (Sentencing Procedure) Act 1999. I do not consider that there are special circumstances which would justify a departure. So far as Lew is concerned his culpability is significantly less, as I have already said, than that of either Lo or Ng since not only did he play no part in the killing of Mr Stiffe and did not intend or foresee the infliction of grievous bodily harm upon him, though, as I have said, I think that he did foresee significant injury, at least amounting to a wounding, he did withdraw from active participation in the crime. His sentence should reflect some allowance for his pleas of guilty which operated not only in respect of those charges but also to reduce the issues which would otherwise have significantly complicated his trial as an accessory before the fact in respect of the murder of Mr Stiffe. As I have mentioned, I consider that his involvement in this offence was an aberration and am satisfied that it is most unlikely that he will offend again."

Ground 6 - The Claim of Denial of Procedural Fairness in the Sentencing Process

- 30 It will be convenient to commence with the sixth ground of appeal. Before doing so, however, mention should be made of the overlap between the grounds.
- 31 In one way or another, each of the Applicant's grounds relate to a comparison of the Applicant's case with the sentence imposed upon the co-offender, Lo, by Adams J on 9 May 2003.
- 32 In passing sentence upon Lo, Adams J used a starting point of imprisonment for 30 years. His Honour allowed an overall discount of 40% for that offender's voluntary admission of the crime to police upon arrest, his plea of guilty at the first practicable opportunity and his undertaking to give evidence against his accomplices. Taking into account the offence on a Form 1 (the offence of attempted armed robbery of Mr Stiffe committed on 14 May 2001), Adams J sentenced Lo to a full term of imprisonment for 18 years commencing on 3 July 2001 and expiring on 2 July 2019, with a non-parole period of 13 years and six months expiring on 2 January 2015.

Events Giving Rise to the Claim of Denial of Procedural Fairness

- 33 The events upon which the Applicant relies, in support of the claim of a denial of procedural fairness during the sentencing process, commence with a discussion between the trial Judge and trial counsel for the Applicant soon after the jury had returned verdicts on 20 June 2003. During that discussion, his Honour said to counsel for the Applicant (T1-2, 20 June 2003) (emphasis added):

"You will recall that my starting point for Mr Lo was 30 years. You don't pass a sentence of that kind of severity by sleeping on it overnight, so what I would propose to do would be to hear submissions and then stand it over to a date to be fixed, depending on my own obligations in the Court, probably in a week or so I would expect. I would have no doubt a day would be enough.

From your client's point of view, Mr McColm, there's not, you would probably wish to make submissions on the facts?

MCCOLM [Applicant's trial counsel] : *The facts.*

HIS HONOUR: But I can indicate now that I will certainly not make adverse findings against your client on the basis of anything that Lo said about what happened in that room that sought to reduce his responsibility my view would be, at the present time at least, that they were equally responsible.

MCCOLM: That's what I would have put, so whatever occurred in the room, that on the material, that your Honour should not see it on the basis of anyone doing a particular act, and that's what my submissions would have been.

HIS HONOUR: You are pushing an open door there. That's my view, unless the Crown persuades me otherwise.

BARRETT [Crown Prosecutor] : I will not be making submissions."

- 34 The sentencing hearing proceeded on 21 July 2003. The Applicant's counsel tendered a report of Katherine Barrier, psychologist, dated 15 July 2003. The following exchange took place between the sentencing Judge and counsel for the Applicant (T28-30, 21 July 2003) (emphasis added):

"HIS HONOUR: Is it fair to say there is nothing in Ms Barrier's report which suggests your client has any mitigating, or for that matter, psychological features?

McCOLM: That is correct. In fact there is a term of being a normal and unremarkable--

HIS HONOUR: Murderer. There is no reason to think he is more dangerous than the acts which he has already committed would demonstrate or no reason to think that there is any psychological problem which mitigates his responsibility.

McCOLM: That is correct.

HIS HONOUR: Subject to what the Crown says my present view is that as between him and Lo I would frankly not believe what either of them said about who did what .

McCOLM: Your Honour indicated as much on the last occasion .

HIS HONOUR: In some respects there are some aspects of Lo's evidence which make him more persuasive but ultimately I could not be satisfied beyond reasonable doubt about matters adverse, in particular I could not be satisfied beyond reasonable doubt it was your client rather than he who either shot or used a knife and frankly I don't think it matters much . I think I said in my sentence reasons on Lo I didn't think it matters much and that is still my view .

McCOLM: It follows whatever the evidence was given in the course of the prosecution case as to what occurred in that room whatever did occur. Your Honour on the last occasion said 30 years was the starting point as far as the sentence was concerned. Your Honour has repeated as much again in dealing with Mr Higgins' [counsel for Lew] submissions . Lo got a 40 per cent discount in respect of his plea of guilty and assistance to authorities plus other subjective--

HIS HONOUR: There is one possible difference between Lo and your client and that is Lo was certainly planning this robbery before your client got involved .

McCOLM: It can't be said--

HIS HONOUR: The significance of that is something that has to be looked at carefully but it is a factor.

McCOLM: He definitely was not the instigator or planner of the robbery. Whatever the planning was he was not involved in that initial planning.

HIS HONOUR: He was involved in the planning enough on the crucial night. I am not sure it matters much but I think it is the same difference .

McCOLM: The other difference is while there was evidence he was present on 14 May and evidence he was aware as to what transpired on 14 May, he was not involved--

HIS HONOUR: He has not been charged with it.

McCOLM: Another difference is the difference in criminal records. David Ng has two offences on his criminal record, one for use of cannabis and one for the matter of assault occurred in 1995 which is a bond. He used cannabis and received a fine. Ricky Lo had a number of matters on his record.

HIS HONOUR: That is true, although out of his own mouth he used heroin. It was not significant in Lo's case and it is not significant in yours.

McCOLM: Lo was on a recognisance at the time he committed these offences.

HIS HONOUR: I had no record to that. He has never been caught. On his own confession he was guilty of offences relating to heroin.

McCOLM: While he never had been caught, or contravened a court order of any kind.

HIS HONOUR: That is true.

McCOLM: They are the only differences I can point to between Ricky Lo and David Ng. As you see from the background in the report of Kathleen Barrier he is a young man 27 years of age. Up until recent times he had a steady work record. He was described as an unremarkable man. Came from Hong Kong and it is nothing to explain this behaviour in any way, his involvement in this matter by way of his background. Those are all the submissions.

HIS HONOUR: I don't want you to think you should be in a position that you are precluded from persuading me that the 30 year starting point which I imposed on Lo was too high. Obviously I have come to a view about it and I must have regard to what the law says because parity is a question but at the same time if there are any material matters which suggest that that starting point is too high from your client's point of view you should not be precluded from making those submissions and I will look at that independently and fairly from your client's point of view .

McCOLM: The main one is he was not the planner or instigator of this plan to rob the tavern. Secondly he must have been involved at a later stage. It was not his idea.

HIS HONOUR: Is there any reason why I should not accept the evidence that he split the proceeds equally with Mr Lo, leaving Mr Lew's account out of consideration?

McCOLM: There is no evidence I can point to to reject that.

HIS HONOUR: Except Lo's general unreliability?

McCOLM: No. Lo didn't account for what he did with his share so I can't go any further than that. It is just Lo's unreliability as to what occurred. While it is not the regime which is to be applied in this case the starting point under the Crimes (Sentencing Procedure) Act is 20 years as a standard non-parole period.

HIS HONOUR: For what offence?

McCOLM: For murder.

HIS HONOUR: There are murders and murders. This is a bad murder.

McCOLM: There are two counts on the indictment. Any sentences should be imposed for those two matters in the circumstances applicable to David Ng and they should be concurrent. They arise clearly within the same series of facts and were part of the one enterprise, although one that ended in such tragic circumstances."

(emphasis added):

"BARRETT: Whether there was an earlier offence or not pales into insignificance. There is no distinction because they both clearly embarked on the offence, both deliberately took place in an execution style. Killing to avoid detection for their otherwise crime and they are responsible for it, whoever did what.

HIS HONOUR: Is the point you are making this : accepting for a moment there is an instigation issue so far as the robbery is concerned which is overwhelmingly the more serious it is clear they were equally involved. One didn't instigate the other. They were both involved. I understand that.

BARRETT: The sentence should be the same. It is artificial to distinguish between the culpability of Lo from Ng as to whoever was involved in an earlier robbery and whether Ng was or was not involved in the earlier robbery.

HIS HONOUR: The effect might be I might impose, leaving aside the discounts for a moment, a higher sentence on Lo for instigating the robbery but you would not distinguish between them when it came to the murder.

BARRETT: That is right. Ultimately there is no effective distinction between the conduct. I am talking about the ultimate sentence imposed on Mr Ng should not be distinguished, that would have been imposed on Lo but for the discount issues. These are the only submissions I make in relation to Mr Ng."

- 36 At the conclusion of the Crown Prosecutor's submissions, the Applicant's counsel made the following brief submissions in reply (T38, 21 July 2003) (emphasis added):

"McCOLM: In response to the Crown's assertion there was evidence Ng got the gun, the Crown referred to the evidence of Tran and the evidence of Tran was also at that time Lo was present while the gun was being used and played with, that he came into the room while the gun was being played with.

HIS HONOUR: These are straws in the wind. In the end I don't think I could decide as between your client and Lo who found the gun. Each has a motive for lying about it Lo's is obvious, as is your client's motive."

- 37 Adams J reserved his decision on sentence. On 20 August 2003, his Honour sentenced the Applicant and Lew. There is no dispute that his Honour did not call for further submissions between 21 July 2003 and 20 August 2003 on any issues pertinent to the sentencing of the Applicant.

Submissions

- 38 Mr Boulten SC, for the Applicant, submits that practical injustice to the Applicant has resulted in this case as a result of the course of events between the delivery of verdicts by the jury and the sentencing of the Applicant. Put shortly, it is submitted that:

(a) his Honour identified a starting point by way of an upper limit of imprisonment of 30 years on the murder count, subject to any submission from counsel for the Applicant (to seek to reduce this figure) or from the Crown on that issue - the Crown did not submit that a longer sentence was required and, in fact, accepted the appropriateness of that starting point - despite this, and without providing the Applicant with an opportunity to make further submissions, his Honour proceeded to sentence the Applicant to a full term of imprisonment for 35 years on the murder count;

(b) in determining to sentence the Applicant for murder to imprisonment for 35 years, his Honour took into account (in a manner adverse to the Applicant) findings that the Applicant was "a markedly more dangerous man" than Lo (ROS [20]) and that the Applicant was "significantly older than Lo" and that his age did not "give rise to the same consideration that applied in Lo's case" (ROS [20]) when no such submissions had been made by the Crown, nor had such possible findings been identified by his Honour for comment by the Applicant's counsel.

- 39 Mr Boulten SC submitted that the failure of the sentencing Judge to provide an opportunity to the Applicant to make submissions on these issues, in particular after his Honour had identified an intention to proceed by way of a starting point of 30 years, constituted a denial of procedural fairness: *Baroudi v R* [2007] NSWCCA 48; *Button v R* [2010] NSWCCA 264. It was submitted that the proceedings miscarried as a result of these matters, and that the Applicant was denied procedural fairness by virtue of the failure to give any indication that the sentencing Judge might impose a significantly longer sentence than was indicated during the sentencing hearing.

- 40 The Crown submitted that the comments made by his Honour during the course of submissions should be construed as an acceptance that the objective criminality of the Applicant and Lo should be treated as the same, but not an indication that a starting point of 30 years' imprisonment was appropriate in the Applicant's case. It was submitted that counsel for the Applicant before Adams J had an opportunity to make submissions on sentence and that the Court should not conclude that a denial of procedural fairness had occurred.

Decision

- 41 This Court has observed that it will not normally find an error of principle from interchanges between the Bench and counsel, since judicial views expressed during submissions do not necessarily reflect a considered decision: *R v Pham* [2005] NSWCCA 94 at [11]; *R v Thompson* [2005] NSWCCA 340; 156 A Crim R 467 at 474-475 [32]. It is the judgment of the Court which ought be considered for this purpose, and not exchanges between the Bench and

counsel during the course of submissions.

42 Of course, the Applicant does not seek to rely here upon exchanges during submissions to demonstrate an erroneous view of law or fact on the part of the sentencing Judge. Rather, the Applicant submits that the course of events demonstrates a denial of procedural fairness to the Applicant.

43 The relevant principles to be applied when such a complaint is made were summarised helpfully by Garling J (Macfarlan JA and Johnson J agreeing) in *Weir v R* [2011] NSWCCA 123 at [64]-[67]:

"64 It is clear that an offender is entitled to procedural fairness during criminal proceedings, including proceedings on sentence: Pantorno v The Queen (1989) 166 CLR 466 at 472-3 per Mason CJ and Brennan J, 482-483 per Deane, Toohey and Gaudron JJ; Parker v DPP (1992) 28 NSWLR 282; Baroudi v Regina [2007] NSWCCA 48; Button v Regina [2010] NSWCCA 264.

65 The particular form which procedural fairness dictates may vary. That is because the content of the requirement of fairness may be affected by what is said and done during the proceedings: Re Minister for Immigration & Multicultural and Indigenous Affairs; ex parte Lam (2003) 214 CLR 1 at [34] per Gleeson CJ. Here the relevant process was the sentencing of Mr Weir by King DCJ in circumstances where, the applicant contends that, King DCJ indicated the sentence that he proposed to impose.

66 The key to determining whether there has been a breach of the requirement of procedural fairness is to ascertain the consequence of any departure from the dictates of proper procedure because what is ultimately in issue is whether unfairness has resulted from the process: See Lam at [34]. The concern of the law is to avoid practical, and not merely theoretical, injustice: Lam at [37].

67 One common basis for demonstrating that practical injustice and unfairness has occurred is where an individual has lost the opportunity to make submissions to the decision maker in opposition to a proposed course and in support of a course which he urges: Lam at [36]; Button at [18]."

44 It is, of course, necessary to read fairly the entirety of the sentencing transcript and the remarks on sentence, for the purpose of determining whether practical injustice has been demonstrated in this case.

45 It is apparent that his Honour articulated to counsel the 30-year starting point, utilised in sentencing Lo, as a prima facie starting point for the sentencing of the Applicant for murder. Soon after the jury had returned verdicts, his Honour stated this approach. His Honour's later comments reinforced this construction and understanding.

46 His Honour expressed this view as being subject to any submissions from the Crown. The submissions of the Crown Prosecutor did not contend for a different conclusion. In fact, the Crown submitted that *"the sentence should be the same"* (T33.7, 21 July 2003).

47 The Applicant's trial counsel approached the issue of sentence, as a matter of practical reality, upon the basis that an upper limit of 30 years constituted the starting point for the murder count, subject to any reduction flowing from acceptance of the Applicant's submissions. In circumstances where the Crown effectively endorsed the sentencing Judge's approach, it is understandable that the Applicant's counsel did not seek to address further on that issue.

48 We are satisfied that there has been a practical injustice, and substantial unfairness to the Applicant in this case in at least two respects.

49 Firstly, the Applicant received a longer sentence of imprisonment on the murder count than that which had been identified clearly by the sentencing Judge in the course of submissions, without any indication from his Honour that his view had altered in this respect, accompanied by an opportunity to make further submissions on the issue.

50 Secondly, the finding that the Applicant was *"a markedly more dangerous man"* than Lo (as an apparent basis for moving upwards from the 30-year starting point) had not emanated from any submission from the Crown nor from any exposure of his Honour's provisional thought processes during the sentencing hearing. To the extent that the question of dangerousness was referred to at all in submissions, his Honour had said *"There is no reason to think he is more dangerous than the acts which he has already committed would demonstrate or no reason to think that there is any psychological problem which mitigates his responsibility"* (T28.17, 21 July 2003) (see [34] above).

51 Nor was any submission made by reference to the principles in *Veen v The Queen (No. 2)* [1988] HCA 14; 164 CLR 465. The Applicant had a very limited criminal history (see [27] above). In sentencing the Applicant, his Honour observed that he *"has no relevant criminal record"* (ROS [14] at [26] above).

52 It is important to observe that this ground does not contend that his Honour was bound to impose a particular sentence because of the Crown concession on sentence or the common position expressed by counsel. It is for the Court to decide on sentence. The sentencing discretion is to be exercised in the public interest: *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 606E-F. There is no such thing as a plea agreement which restricts the sentencing Judge: *GAS v The Queen* [2004] HCA 22; 217 CLR 198 at 210-211 [27]-[32]; *Ahmad v R* [2006] NSWCCA 177 at [21]-[26].

53 The present ground arises from the course of events which commenced with the expression of a 30-year starting point as a ceiling on the murder count, an expression which continued throughout the sentencing hearing.

54 We are satisfied that the course of events in the sentencing proceedings gave rise to a denial of procedural fairness to the Applicant. In our view, Ground 6 has been made good.

55 An acceptance of this ground does not mean that this Court will simply substitute what was indicated by the sentencing Judge as the sentence for murder in place of the sentence which was passed. The task of the Court is that described in *Weir v R* at [82], where error of this type was established:

"The Court should re-exercise the sentencing discretion, taking into account all relevant statutory requirements and sentencing principles, with the view to formulating the opinion, for the purpose of s 6(3) Criminal Appeal Act 1912 whether some lesser sentence is warranted in law: Baxter v R [2007] NSWCCA 237; 173 A Crim R 284 at 287 [19]. The Court is obliged to look at the objective seriousness of the criminality involved, the subjective features of the applicant and to consider what sentence achieves the purposes of sentencing set forth in s 3A of the Crimes (Sentencing Procedure) Act."

56 Before exercising this function, however, it is appropriate to consider the other grounds of appeal.

Ground 4 - Challenge to the Conclusion that the Applicant Was "Markedly More Dangerous" Than Lo

Submissions

57 In addition to the procedural fairness ground involving this finding, Mr Boulten SC submitted that the finding itself was erroneous as there was nothing in the Applicant's prior record, or any material before the Court, to warrant the finding.

58 The Crown submitted that the relevant enquiry in this Court was whether it was open to his Honour to make this finding. The Crown submitted that the nature of the crime of murder itself, described by his Honour as *"a deliberate execution in cold blood"* (ROS [7]), taken with the Applicant's lack of remorse and contrition, permitted a contrast between the Applicant and Lo so as to lead to the view that the finding was open to the sentencing Judge.

Decision

59 This ground involves a contention by the Applicant that his Honour erred in making the relevant finding. This Court is bound by findings of fact by the sentencing Judge unless they were not open on the evidence, or unless error is shown in the sense referred to in *House v The King* [1936] HCA 40; 55 CLR 499 at 504-505; *R v Merritt* [2004] NSWCCA 19; 59 NSWLR 557 at 573 [60]-[61]. Error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or if the Judge has misdirected himself, but this Court has no power to substitute its own findings for those of the sentencing Judge: *R v O'Donoghue* (1988) 34 A Crim R 397 at 401.

60 We have already observed that no submission was made to the sentencing Judge by reference to the principles in *Veen v The Queen (No. 2)*. It should also be kept in mind that his Honour's finding was that the Applicant was *"a markedly more dangerous man"* than Lo. In one sense, the finding is one of greater dangerousness (by reference to a class of two persons only) as opposed to a general finding of dangerousness.

61 Whichever way the issue may be approached semantically, it is apparent that this finding was given significant weight by the sentencing Judge, so as to lengthen significantly the foreshadowed sentence on the murder count.

62 His Honour found that the Applicant's crime of murder *"shows that he is a dangerous man and there is no reason to infer that he will be any less dangerous in the future"* (ROS [15] quoted at [28] above). His Honour concluded that the *"element of personal deterrence and protection of the community"* were *"more significant in his case"* than in Lo's case (ROS [15]).

63 In *Fardon v Attorney General for the State of Queensland* [2004] HCA 46; 223 CLR 575, Gleeson CJ observed at 589-590 [12]:

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

64 A sentencing Judge is entitled to take the circumstances of the offence into account in determining the question of future dangerousness. In *R v Garforth* (NSWCCA, 23 May 1994, unreported), the Court (Gleeson CJ, McInerney and Mathews JJ) said:

"We return to the concepts of dangerousness and rehabilitation. It is now well settled that the protection of society - and hence the potential dangerousness of the offender - is a relevant matter on sentence. (Veen v The Queen (No 2) (1988) 164 CLR 465). This factor cannot be given such weight as to lead to a penalty which is disproportionate to the gravity of the offence. But it can be used to offset a potentially mitigating feature of the case, such as the offender's mental condition, which might otherwise have led to a reduction of penalty. Mr Sides concedes that, in the case of homicides involving a high degree of culpability, the fact that the offender will be likely to remain a danger to the community for the rest of his or her life might justify the imposition of life imprisonment. But he argues that this concession can have no application here, as Newman J made no finding as to the applicant's continued dangerousness. As to the applicant's prospects of rehabilitation, his Honour found that they were poor. Mr Sides does not cavil with this

finding, but submits that it is only where there are no prospects of rehabilitation that a life sentence should be imposed.

...

There are some cases in which the circumstances of an offence on their own suggest the possibility of dangerousness. This is one of them. The nature of the applicant's actions leads to a question whether he might act similarly in the future. In the present state of the evidence, no finding adverse to him can be made on this matter. However, by the same token, he cannot obtain a favourable finding on the issue."

- 65 A number of observations should be made in the context of the present case. There was nothing in the Applicant's criminal history nor in the report of Ms Barrier, psychologist, which indicated that a finding of dangerousness was appropriate. There is no doubt that the circumstances of the murder in this case, aptly described as a cold-blooded execution, were capable of reflecting the way in which the Applicant might act, at some time in the future.
- 66 However, there were other features of the case which fell to be considered for the purpose of an assessment of dangerousness. As the sentencing Judge observed (at ROS [17]), the Applicant had been a "model prisoner" since being in custody. Further, any prediction of dangerousness would need to take into account the fact that the Applicant would not be eligible for release on parole until he was a middle-aged man.
- 67 The Applicant was born in December 1975. It would be many years before he was a candidate for release into the community, at which point the State Parole Authority would be in a position to make an assessment of his dangerousness, and the need to protect the safety of the community, in discharge of its statutory functions under s.135 *Crimes (Administration of Sentences) Act 1999* .
- 68 In contrasting the Applicant and Lo, the sentencing Judge referred to Lo's remorse and contrition, which bore upon his prospects of rehabilitation. His Honour observed that a contrast could be made with the position of the Applicant.
- 69 The presence or absence of remorse is relevant to an offender's prospects of rehabilitation. However, remorse is not a precondition to a favourable finding concerning prospects of rehabilitation. In *Ali v R* [2010] NSWCCA 35, this Court said at [47]-[49]:

"47 In R v MAK [2006] NSWCCA 381; 167 A Crim R 159 at 169-170 [41], the Court of Criminal Appeal observed that remorse will be a major factor in determining whether an offender is unlikely to reoffend and had good prospects of rehabilitation and that, without true remorse, it is difficult to see how either finding could be made. Considerations of this type were clearly at the forefront of the sentencing Judge's thinking on this issue.

48 This Court has observed that there can be rehabilitation without confession, and that offenders found guilty after trial are not to be automatically deprived of a finding of good prospects of rehabilitation unless they acknowledge their guilt: Alseedi v R [2009] NSWCCA 185 at [65]. In a different context, it has been said that a medical practitioner who has been deregistered because of proven sexual misconduct is not required to confess before he is reinstated, although continuing vigorous challenge to clearly established guilt may be indicative of continuing unfitness: Zaidi v Health Care Complaints Commission (1998) 44 NSWLR 82 at 100. Similar considerations arise where release on parole is being considered for a sex offender who denies guilt or refuses to undertake a custodial treatment programme: DCU v State Parole Authority of NSW [2006] NSWSC 526 at [46]-[55], [66]-[67]; Lee v State Parole Authority of NSW [2006] NSWSC 1225 at [59]-[64].

49 Evidence of different types may bear upon an assessment of an offender's prospects of rehabilitation and likelihood of reoffending: R v Elyard [2006] NSWCCA 43 at [18]-[20], [86]-[92]. Evidence of an offender's genuine remorse and insight into the offending conduct may be powerful factors supporting a finding of good prospects of rehabilitation and unlikelihood of re-offending: R v MAK at 169-170 [41]."

- 70 It should be kept in mind that the sentencing Judge was not able to make a finding as to which of the Applicant or Lo had committed the dreadful acts, including shooting the victim in the head and cutting his throat. The question of sentence was approached upon the basis that the Applicant and Lo should be treated as being equally culpable for these acts.
- 71 The finding of greater dangerousness on the part of the Applicant seems to flow solely from the absence of contrition and remorse and, to a lesser extent, the relatively small age gap between the two men, to which further reference will be made.
- 72 In the circumstances of this case, we are persuaded that it was not open to the sentencing Judge to make the finding that the Applicant was markedly more dangerous than Lo.
- 73 If his Honour had raised this issue with counsel during the sentencing hearing, it may well have been that the issue could have been laid to rest by submissions from the Crown and counsel for the Applicant. However, in the result, the finding was made and then deployed adversely to the Applicant.
- 74 The Court is satisfied that error has been established in accordance with Ground 4.

Ground 5 - The Parity Ground

Submissions

- 75 Mr Boulten SC submitted that, in the circumstances of the case, the Applicant had a justifiable sense of grievance when his sentence was compared with the (undiscounted) sentence relevant to Lo. The submissions advanced in support of this ground overlapped with submissions made for the Applicant in support of other grounds of appeal.
- 76 The Crown pointed to areas of difference between the Applicant and Lo and submitted that the Court ought be cautious before concluding that one offender has a justifiable sense of grievance, when both offenders had been sentenced by the same Judge who had given detailed reasons for imposing the sentences, taking into account the differing circumstances and indicating why the Judge was departing from the co-offender's sentence: *Tatana v R* [2006] NSWCCA 398 at [28]; *Youkhana v R* [2011] NSWCCA 37 at [45].

Some General Principles

- 77 There are significant advantages where related offenders are sentenced by the same Judge, with remarks on sentence containing factual findings and conclusions concerning the relative criminality of the offenders and differing subjective features of each of them: *R v Swan* [2006] NSWCCA 47 at [71]; *Gurney v R* [2011] NSWCCA 48 at [81]-[82]; *Dwayhi v R* [2011] NSWCCA 67; 205 A Crim R 274 at 285-286 [39]-[43].
- 78 Where the same Judge sentences two offenders at the same time and gives detailed reasons for imposing the sentences, having regard to the differing criminality of each, the differing subjective circumstances and relevant sentencing principles, this Court should be cautious before determining that one of the offenders has a justifiable sense of grievance because of different sentencing outcomes: *R v Swan* at [71]; *Gurney v R* at [82]; *Dwayhi v R* at 285 [39]-[41].
- 79 Disparity between sentences is not of itself a basis of appellate intervention, but a factor to be weighed when the Court considers whether the sentencing process has been attended by error and, if so, whether the Court should intervene: *R v Li* [2005] NSWCCA 154 at [44]; *Dwayhi* at 282 [25].
- 80 A complaint of disparity accepts that the sentence imposed on an offender cannot otherwise be challenged. It is the sentence imposed upon a co-offender which is said to give rise to a sense of injustice, not the sentence imposed upon the offender: *Lewins v R* [2007] NSWCCA 189 at [7]; *Dwayhi* at 282 [26].
- 81 The test for determining whether there is a legitimate sense of grievance is objective. What has to be demonstrated by an applicant is not that he or she feels aggrieved, but that a reasonable mind looking overall at what has happened would see that the applicant's grievance is justified: *R v Wei Pan* [2005] NSWCCA 114 at [34]; *Dwayhi* at 280-281 [21].
- 82 Where there is a degree of disparity so as to invite a reduction in the sentence imposed, it is not necessary for this Court to intervene if the result of doing so is to produce a sentence disproportionate to the objective and subjective circumstances. This Court will not necessarily intervene where the co-offender's sentence is so inadequate that the Court should not take it into account: *Lewins v R* at [7]; *Dwayhi* at 280-281 [21].
- 83 A ground asserting disparity is concerned with such markedly and unjustifiably different sentences imposed on co-offenders that they give rise to a genuine feeling on the part of a reasonable and impartial observer that justice has not been achieved because one offender has been unfairly treated, having regard to the sentence passed upon the other offender. What is required is a gross, marked, glaring or manifest disparity: *England v R*; *Phanith v R* [2009] NSWCCA 274 at [61]-[67]; *Dwayhi* at 281-282 [23]-[24].

Decision

- 84 From what has been said so far in this judgment, consideration of other grounds of appeal has demonstrated significant difficulties with a number of findings made by the sentencing Judge, which his Honour relied upon to explain why he was imposing a different and longer sentence upon the Applicant for the murder count, than that which had been imposed (before the 40% discount) upon Lo.
- 85 Even though the Applicant and Lo were sentenced at different times, this Court should still be cautious in finding relevant disparity where related offenders are sentenced by the same Judge (see [78] above). Adopting a cautious approach, we are nevertheless satisfied that the Applicant's submission should be accepted that an objective and justifiable sense of grievance has been demonstrated in this case. The relevant distinguishing features, as between the Applicant and Lo, are affected by error. After consideration of relevant factors, a marked and unjustifiable difference in sentences is demonstrated.
- 86 Counsel for the Applicant has demonstrated further areas of difficulty with the remarks on sentence, from a parity perspective.
- 87 It is clear that Lo was sentenced for murder, with the attempted armed robbery committed one week earlier on 14 May 2001 to be taken into account on a Form 1. This was a serious and separate crime committed by Lo and another

offender (Tran), in which the Applicant was not involved and had not been charged. Adams J observed, in sentencing the Applicant, that "*Lo's sentence for murder included an allowance for the robbery which was taken into account on a Form 1*" (ROS [20]). His Honour had said that the Form 1 matter had been taken into account when sentencing Lo (ROS [31]). Given the seriousness of the Form 1 matter, this Court should approach the matter on the basis that Lo's sentence for murder was increased to some extent, in accordance with the principles in *Attorney General's Application Under Section 37 of the Crimes (Sentencing Procedure) Act 1999 (No. 1 of 2002)* [2002] NSWCCA 518; 56 NSWLR 146 at 158-159 [39]-[44].

- 88 The Court is satisfied that, in sentencing the Applicant, his Honour mistakenly concluded that the aggravated armed robbery offence on 22 May 2001, charged separately against the Applicant, had been taken into account on a Form 1 with respect to Lo. This error is demonstrated by his Honour's statement in sentencing the Applicant, that the Applicant "*must be separately sentenced for that offence and I do not regard the fact that it was taken into account in Lo's case requires that [Ng] should have the same effective result*" (ROS [20] at [29] above). The fact is that it was a different offence committed on 14 May 2001, and not the aggravated armed robbery on 22 May 2001, that was taken into account on a Form 1 in sentencing Lo.
- 89 Further, we accept that his Honour erred in finding that Lo was "*considerably younger*" than the Applicant. Both were adult offenders at the time of the murder. Lo was born on 1 October 1978. The Applicant was born on 14 December 1975. Lo was aged 22 years and eight months and the Applicant was about 25 years and six months' old at the time of the murder. There was no evidence or finding that Lo was immature or that his involvement in the murder was related to youth. Indeed, as Mr Boulten SC submitted, it would be correct to characterise the crimes of both Lo and the Applicant as grave offences committed by adults.
- 90 We have kept in mind that the Crown's discretionary decision not to proceed against Lo at all for the 22 May 2001 aggravated armed robbery offence is a further point of distinction between the Applicant and Lo. This difference between the offenders does not assist the Applicant on the parity ground. It is not the business of the Courts to try and ameliorate the effects of prosecutorial decisions concerning charges against persons involved in a criminal enterprise: *Jimmy v R* [2010] NSWCCA 60; 77 NSWLR 540 at 589 [203], 596 [247]; *Dwayhi v R* at 282-283 [28]-[29].
- 91 That said, the various errors which have been demonstrated under separate grounds serve to undermine the Crown submission, on the parity ground, that the remarks on sentence with respect to the Applicant and Lo explain (without error) the different sentences imposed upon the two men.
- 92 We are satisfied that there is marked and unjustifiable disparity between the sentence of 35 years imposed on the Applicant, and the starting point of 30 years for Lo, on the murder count, so as to give rise to an objective and legitimate sense of grievance on the Applicant's part.
- 93 We uphold the sixth ground of appeal. We will return to the consequences of this finding after considering the final ground of appeal.

Ground 7 - The Complaint of Error in Partial Accumulation of the Sentence for the Aggravated Armed Robbery Offence

- 94 During the course of the hearing on 6 September 2011, Mr Boulten SC sought, and was granted, leave to add a further ground of appeal asserting error in the partial accumulation of the sentence for the aggravated armed robbery offence committed on 22 May 2001.
- 95 This ground emerged from the very fair approach taken by the Crown Prosecutor on appeal, who had drawn the attention of the Court and the Applicant's counsel to the decision in *Smale v R* [2007] NSWCCA 328 at [130]-[133].

Submissions

- 96 Mr Boulten SC submitted that, in circumstances where the murder and aggravated armed robbery committed on 22 May 2001 were so closely associated, an entirely concurrent sentence ought to have been imposed for the latter offence, and that error had been demonstrated in the course taken in this respect by the sentencing Judge.
- 97 The Crown Prosecutor acknowledged that the overlapping criminality between the Applicant's murder and aggravated armed robbery offences attracted application of the principles in *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 at [40], [42] and *Smale v R* at [130]-[133]. The Crown conceded that a greater level of accumulation ought to have been granted by the sentencing Judge, but that some level of accumulation remained appropriate given the additional factual element in the armed robbery offence, being the robbery of a sum between \$80,000.00 and \$90,000.00 (T223.18, 3 June 2003).

Decision

- 98 It is noteworthy that counsel for the Applicant at first instance submitted that the sentences for the murder and armed robbery offences ought be entirely concurrent (T30.30, 21 July 2003). It does not seem that the Crown Prosecutor, in the sentencing Court, advanced a contrary submission.
- 99 Nevertheless, it remained for the sentencing Judge to consider questions of accumulation, concurrence and totality in accordance with the principles in *Cahyadi v R* [2007] NSWCCA 1; 168 A Crim R 41 at 47 [27].
- 100 In the circumstances of this case, it was necessary to have particular regard to the issue of overlapping criminality as between the offences. His Honour determined, in sentencing the Applicant, that the *"armed robbery offence is so closely connected with the murder of Mr Stiffe that most of the sentence in respect of it, but not all, should be served concurrently with the sentence for murder"* (ROS [20]).
- 101 This Court has had the benefit of further submissions from the Crown and Mr Boulten SC by reference to the principles in *Pearce v The Queen*, as applied in *Smale v R*. A conclusion ought be formed that a greater degree of concurrency was appropriate in this case. Nevertheless, some accumulation remained appropriate, given the additional element of the armed robbery offence whereby a substantial sum of money was stolen.
- 102 After applying relevant principles, we are satisfied that the measure of accumulation should not have exceeded a period of one year in this case, and that error has been demonstrated in the level of accumulation adopted in sentencing the Applicant.

Resentencing the Applicant

- 103 The Applicant has demonstrated error in accordance with each of the grounds of appeal against sentence argued before this Court. The question for this Court is whether a lesser sentence for murder is warranted in law for the purpose of s.6(3) *Criminal Appeal Act 1912*. (See the extract from *Weir v R* at [55] above).
- 104 The Crown draws attention to his Honour's finding that the Applicant's crime of murder did *"not fall into the worst category of case but not by much"* (ROS [7]). This finding is not challenged on appeal.
- 105 The gravity of the murder in this case cannot be doubted. The Applicant and Lo went to the Tavern armed with a knife, a gun and a metal pole, intending to rob Mr Stiffe. Once their balaclavas had been dislodged in the course of the robbery, the Applicant and Lo decided to kill Mr Stiffe because of his ability to identify them. This was a deliberate murder to cover up another crime and to assist the murderers from being detected: *R v Lett* (NSWCCA, 27 March 1995, unreported); *R v Fernando* [1999] NSWCCA 66 at [350]; *R v Villa* [2005] NSWCCA 4 at [87].
- 106 The maximum penalty for the crime of murder is imprisonment for life. His Honour's finding meant that this penalty would not be imposed in this case, but that a very substantial term of imprisonment was required.
- 107 This murder was committed before the commencement of the standard non-parole period system, which applies to offences committed after 1 February 2003. It would have been entirely impermissible for the sentencing Judge to have regard to the existence of the standard non-parole period for a murder committed before the commencement of those provisions: *McGrath v R* [2010] NSWCCA 48; 199 A Crim R 527 at 536-537 [37]-[38], 540 [60].
- 108 Although the Applicant's trial counsel, at one stage, raised the existence of the standard non-parole period in the course of submissions (see [34] above), the sentencing Judge did not have regard to it.
- 109 Nor can this Court in resentencing the Applicant.
- 110 In sentencing the Applicant, the Court has regard to the affidavit of the Applicant sworn 2 September 2011, which outlines his activities and employment in custody. It is fair to observe that the sentencing Judge's description of the Applicant as a model prisoner, at the time of sentence in August 2003, remains an apt description in September 2011.
- 111 In our view, having regard to the objective gravity of the Applicant's crime, his subjective circumstances and the sentence imposed upon Lo, it is appropriate to impose a head sentence of imprisonment for 30 years on the murder count. We do not consider that there are special circumstances which would justify a departure from the statutory ratio for the purpose of s.44 *Crimes (Sentencing Procedure) Act 1999*, so that a non-parole period of 22 years and six months ought be fixed.
- 112 The sentence for the aggravated armed robbery offence ought be confirmed, but with accumulation of one year only.
- 113 The total effective sentence will comprise imprisonment for 31 years with an effective non-parole period of 23 years and six months.

- 114 The Court should consider whether this measure of accumulation itself represents "*special circumstances*" given that the effect will be a non-parole period which marginally exceeds 75% of the total head sentence: *Ollis v R* [2011] NSWCCA 155 at [110]-[112].
- 115 We do not consider that a finding of special circumstances should be made on this account. In our view, a non-parole period of 23 years and six months is the least period which the Applicant ought be required to serve for his crimes before being eligible for parole, having regard to all the purposes of punishment: *Hejazi v R* [2009] NSWCCA 282 at [36].
- 116 The Court acknowledges that the reopening of the question of the Applicant's sentence, many years after the tragic events of May 2001, will have reminded the family of Mr Stiffe of those terrible events and their devastating consequences. Adams J referred to the victim impact statement from Mr Stiffe's widow in his remarks on sentence (*R v Ng; R v Lew* at [18]). The loss to the family and the community resulting from the death of Mr Stiffe is very great. The sentencing process cannot, in any way, compensate for that loss. However, the loss must be recognised and this Court should acknowledge that loss which, without doubt, continues to have consequences for the family.
- 117 The Court has granted the Applicant an extension of time to bring the application for leave to appeal against sentence during the course of the hearing on 6 September 2011.
- 118 We make the following orders:
- (a) grant leave to appeal against sentences imposed in the Supreme Court of New South Wales on 20 August 2003;
 - (b) confirm the sentence imposed for the offence of aggravated armed robbery, being a sentence of imprisonment for a fixed term of seven years, commencing on 6 July 2001 and expiring on 5 July 2008;
 - (c) quash the sentence imposed for the offence of murder and, in its place, sentence the Applicant to imprisonment for a total term of 30 years, comprising a non-parole period of 22 years and six months commencing on 6 July 2002 and expiring on 5 January 2025, with a balance of term of seven years and six months commencing on 6 January 2025 and expiring on 5 July 2032.
 - (d) the earliest date upon which the Applicant will be eligible for release on parole is 6 January 2025.

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