

AUSTRALIA / JUDGMENT

Drew v R [2016] NSWCCA 310

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Court of Criminal Appeal

Supreme Court

New South Wales

Medium Neutral Citation: Drew v R [2016] NSWCCA 310

Hearing dates: 12 October 2016

Decision date: 16 December 2016

Before: Gleeson JA at [1]

Fagan J at [2]

N Adams J at [20]

Decision: (1) Leave to appeal against sentence granted.

(2) Appeal dismissed.

Catchwords: CRIMINAL LAW – sentence appeal – serious domestic violence-related stabbing - whether sentencing judge erred in finding that the offence was aggravated by reason of the fact that the victim was Aboriginal and therefore vulnerable – whether sentencing judge erred in finding that offence was in the "worst case" category - whether sentence manifestly excessive

CRIMINAL LAW – offences of domestic violence – whether Indigenous victims vulnerable as a class because of "culture of ostracism and silence" – need for evidence in each case to establish beyond reasonable doubt that particular victim was a member of a vulnerable class of victims

Legislation Cited: Crimes Act 1900 (NSW), ss 18, 27, 33(1)

Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 14(1)

Crimes (Sentencing Procedure) Act 1999, s 21A(2)(l)

Criminal Appeal Act 1912 (NSW), s 5(1)(c)

Criminal Procedure Act 1986 (NSW), s 166, Chapter 6, Part 4B

Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014 (NSW)

Evidence Act 1995 (NSW), s 38(1)

Cases Cited: Abdulrahman v R [2016] NSWCCA 192

AM v R [2012] NSWCCA 203

Bugmy v The Queen (2013) 249 CLR 571; [2013] HCA 37

De Jong v R; Tuimaualuga v R; Zechel v R: Puru v R [2015] NSWCCA 32

Dennis v R [2015] NSWCCA 61

Fernando v The Queen (1992) 76 A Crim R 58

Filippou v The Queen (2015) 256 CLR 47; [2015] HCA 29

House v The King (1936) 55 CLR 499; [1936] HCA 40

Hudson v R [2016] NSWCCA 30

Ibbs v The Queen (1987) 163 CLR 447; [1987] HCA 46

Jonson v R [2016] NSWCCA 286

Kennedy v R [2016] NSWCCA 123

Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37

Kiernan v R [2016] NSWCCA 12

Little v Regina [2010] NSWCCA 201

Markarian v The Queen [2006] 228 CLR 357; [2005] HCA 25

McCullough v R (2009) 194 A Crim R 429; [2009] NSWCCA 94

Mulato v R [2006] NSWCCA 282

Munda v Western Australia (2013) 249 CLR 600; [2013] HCA 38

Ollis v R [2011] NSWCCA 155

Parker v Director of Public Prosecutions (1992) 28 NSWLR 282

Pasinis v R [2014] VSCA 97

Perrin v R [2006] NSWCCA 64

The Queen v Bara [2006] NTCCA 17

R v Ali [2010] NSWCCA 35

R v Betts [2015] NSWCCA 39

R v Dacey [2014] NSWSC 1452

R v Daley [2010] NSWCCA 223

R v Dyer [2006] NSWCCA 274

Regina v Twala (NSWCCA, unreported, 4 November 1994)

R v Hamid (2006) 164 A Crim R 179; [2006] NSWCCA 302

R v Hudson [2013] VSC 184

R v Ibrahami [2005] NSWCCA 153

R v McNaughton (2006) 66 NSWLR 566; [2006] NSWCCA 242

R v Morris [2007] NSWCCA 127

R v Olbrich (1999) 199 CLR 270; [1999] HCA 54

R v Storey [1998] 1 VR 359

R v Westerman [2004] NSWCCA 161

Stevens v R [2007] NSWCCA 152

The Queen v Kilic [2016] HCA 48

Veen v The Queen (No 2) (1988) 164 CLR 465; [1988] HCA 14

Texts Cited: Australian Institute of Criminology, 'Non-disclosure of violence in Australian Indigenous communities' (2011) Trends and issues in crime and criminal justice, No. 405

Judicial Commission of NSW, Equality before the Law Bench Book (at Update 08, June 2014)

Category: Principal judgment

Parties: Thomas Frederick Drew (Applicant)

Regina (Respondent)

Representation: Counsel:

Mr M Smith (Applicant)

Ms B Baker (Respondent)

Solicitors:

Lisa De Luca (Applicant)

Solicitor for Public Prosecutions (Respondent)

File Number(s): 2013/361064

Publication restriction: Nil

Decision under appeal Court or tribunal: District Court

Jurisdiction: Criminal

Date of Decision: 26 August 2015

Before: Wells DCJ

File Number(s): 2013/361064

Judgment

1. GLEESON JA: I agree that leave to appeal against the severity of sentence should be granted, but the appeal be dismissed. I agree that ground 1 is made out for the reasons given by Fagan J. I agree that grounds 2 and 3 are not made out for the reasons given by N Adams J. I also agree with the additional reasons given by Fagan J in relation to these grounds. With respect to re-sentence, in the exercise of my independent sentencing discretion I am satisfied that no lesser sentence is warranted in law for the reasons given by N Adams J and also by Fagan J.
2. FAGAN J: I have read the judgment of N Adams J in draft and can express my reasons briefly in reliance upon her Honour's summaries of the objective facts of the offence, the applicant's long criminal record of personal violence and his other antecedents.

Ground 1 – aggravation by reason of victim's vulnerability

1. The factual finding of the learned sentencing judge impugned in ground 1 is quoted by N Adams J at [61]. From the appeal papers it does not appear to me that her Honour had evidence upon which it was open to her to make findings, which I take to be comprehended in the passage of her remarks which is attacked under this ground, that:
 1. there is a culture of silence within the Aboriginal community of New South Wales, generally, such that female victims of domestic violence at the hands of their male partners are expected not to complain to police or other authorities;
 2. those who do complain in contravention of this expectation tend to be ostracised by others in the Aboriginal community;
 3. this culture of silence and of ostracism was applicable in the particular segment of the New South Wales Aboriginal community at Grafton of which the victim and the applicant were members and
 4. because of these cultural phenomena and the importance the victim placed upon her relationship with the applicant, she would have been reluctant ("less likely") to seek help outside the community for protection against the applicant's violence or to complain of that violence to authorities.

1. The general propositions in items (1) to (3) above may or may not be valid but in order for them to be taken into account as relevant to the sentencing of the applicant they would have had to be proved by evidence tendered in the proceedings and they were not. Without evidence to establish the first three propositions about cultural phenomena it was not open to her Honour to make the finding regarding the impact on the victim, as summarised at item (4).
2. Her Honour's ultimate conclusion from these propositions, relevant to sentencing the applicant, was that the victim was vulnerable and that that was an aggravating feature of the offence. Putting to one side the connotation of vulnerability as that concept is used in s 21A(2)(l) of the Crimes (Sentencing Procedure) Act 1999 (NSW), an ultimate finding of vulnerability of the victim in the more general sense of being under an impaired ability to avoid physical conflict with the applicant or to defend herself if conflict should occur was well open as an inference from primary facts. The victim was in a relationship of emotional dependency with the applicant. That was strikingly shown by her incredible recantation, in February 2013, of her earlier evidence that the applicant had on 14 November 2012 knocked her to the ground by striking her over the head with a piece of wood and had stabbed her in both legs. The circumstances are referred to in more detail by N Adams J at [57] - [58].
3. The victim had remained in a domestic and intimate relationship following that incident of 14 November 2012 and following her recantation of the evidence about it in February 2013, up to the date of the nearly lethal assault upon her on 29 December 2013 which is the subject of the sentence for which leave to appeal is now sought.
4. It was a circumstance of the subject offence, relevant to determining an appropriate sentence, that because of the victim's emotional and intimate attachment to the applicant she was less likely than any other potential victim of his violence to try to avoid him, to put herself out of harm's way. The degree of her attachment was exhibited on the evening of this near fatal attack when, after the applicant had threatened to "get her" at about 6:30 pm and then chased her up the street at about 9:30 pm shouting similar threats, she nevertheless returned to the house. Even after she had been stabbed there multiple times she pleaded with the applicant on the basis that she loved him, before fleeing into the street, pursued by him still attempting to inflict more knife wounds.
5. I have accepted that the learned sentencing judge erred in forming her opinion about vulnerability on the basis of generalisations concerning the culture of Aboriginal communities. I also accept that I am bound by a prior decision of this Court to hold that s 21A(2)(l) is only engaged where the victim is one of a class that is vulnerable by reason of some common characteristic. But individual vulnerability of the victim, in the sense discussed above, was an inescapable conclusion from the evidence I have referred to and had, in practical terms, the same consequence for assessment of the objective seriousness of the offence as her Honour's finding differently arrived at.

6. Whilst error is thus demonstrated under Ground 1, it should not be surprising that, approaching the matter the way her Honour did, she may have arrived at a sentence that this Court would not find excessive and which could comfortably have been arrived at upon the legitimate consideration of the victim's individualised vulnerability rather than upon the unsupportable finding relating to her membership of a class.

Ground 2 – category of objective seriousness

1. As her Honour allowed a discount of a little over 10% in credit for the applicant's late plea of guilty, her starting point sentence must have been approximately 13 years and 10 months including a non-parole period of 10 years and 4 months. That is well short of the maximum penalty provided for by the section under which the charge was laid, namely 25 years' imprisonment. In those circumstances the High Court would disapprove her Honour's statement that this offence "falls into the worst category of offences for offences of its kind". That Court has recently said, in *The Queen v Kilic* [2016] HCA 4 at [19]:

"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."

1. Judgment in *The Queen v Kilic* was published on 7 December 2016, well after her Honour's sentencing remarks were made. It is apparent her Honour did not consider that this offence, serious as it was, should attract the maximum penalty. If her Honour thought it was in the "worst category" in the strict sense to which the High Court has now said that expression should be limited, one would have expected her Honour to impose the maximum sentence because there was nothing in the applicant's record or other antecedents which would attract lenience.
2. With due respect to the applicant's counsel, I regard this ground as a quibble with respect to usage of inherently general and imprecise terminology for the categorisation of objective seriousness. Without comparison to the facts of other cases and without attempting to conceive of a more serious set of circumstances, is a sufficient to dispose of this ground that the wounding inflicted by the appellant involved multiple thrusts of a carving knife into the vital organs of a defenceless, intoxicated female victim who, whilst under attack, offered no resistance, pleaded for her life and tried to escape. Further context of the seriousness of the offending is given by the consideration that the victim would have died of her wounds but for the courage and humanity of a passing taxi driver, the skill of emergency medical personnel in Grafton, an airlift by helicopter to a Sydney hospital for further skilled emergency surgery and a stop on the way at Coffs Harbour for interim surgical intervention to keep her alive.

3. This particular knife attack could perhaps only have been more serious if death had ensued, in which case it would not have been charged under s 33(1) but under s 18 with a maximum penalty of life. It is most relevant to the level of punishment for a serious infringement of this section that the mental element is the same as for murder: *AM v R* [2012] NSWCCA 203 at [67] – [68].
4. The applicant's submission that the objective seriousness of the offence is reduced by the circumstance that the victim has been left without permanent impairment has no merit. It is true that in these cases a significant factor affecting level of penalty is the degree of permanent injury to the victim. However there are other factors to be taken into account and one must not take any single factor too far. This victim's terrifying ordeal brought her close to death. The absence of "permanent impairment" is due to the intervention of a good Samaritan, airmen and surgeons, not to any restraint of the applicant in his attack.
5. I also reject the applicant's submission that he was too intoxicated for it to be inferred that he was consciously targeting vulnerable parts of the victim's body with the knife. By his plea he has admitted an intent to cause grievous bodily harm. Any part of the body is vulnerable to deliberate thrusts of a carving knife delivered with that intent. There would be no basis for concluding that perhaps the applicant only intended to stab victim in the extremities.
6. Contrary to the applicant's submission that the attack was not prolonged, it was sustained in three separate locations in the home and on the street, as the applicant pursued his victim. The attacks ceased only when the applicant was satisfied with the harm he had inflicted and could say to a bystander "I just fucking killed her" and "I finally got her". It did not stop as result of second thoughts or any instinct of restraint or mercy.

Ground 3 – manifestly excessive sentence

1. I agree with N Adams J that the sentence imposed is not manifestly excessive. The offence was one of very great brutality perpetrated by a man who for 35 years has inflicted violence and harm upon numerous victims, including women, his own son (at 12 years), law enforcement officers and fellow prisoners. He is, demonstrably, a danger to anyone who may be near him. His record exhibits seemingly incorrigible repetition of violent offending, one such crime succeeding another including during parole periods. The considerations of specific deterrence and protection of the community demand a substantial term of imprisonment in this case.
2. Limited weight could be given to any allowance for the applicant's disadvantaged background under the principles in *Bugmy v The Queen* (1990) 169 CLR 525; [1990] HCA 18 against these pressing requirements of the objectives of sentencing relative to this case.
3. Ground 1, only, is made out; and then in circumstances where the error involved is not likely to have influenced her Honour's exercise of her sentencing discretion towards a result any different from that which would have been arrived at treating the victim's vulnerability as arising from her individual circumstances and applying general principles of sentencing

rather than invoking s 21A(2)(l). Notwithstanding this error, exercising my own independent judgment I do not consider that any lesser sentence than that imposed by her Honour is warranted in law. I would grant leave to appeal but dismiss the appeal.

4. N ADAMS J: The applicant seeks leave pursuant to s 5(1)(c) of the Criminal Appeal Act 1912 (NSW) to appeal against the sentence imposed upon him by Wells SC DCJ at the District Court at Lismore on 26 August 2015 in relation to a serious violent assault committed on his then domestic partner on 29 December 2013.
5. The applicant was initially charged with wound with intent to murder contrary to s 27 of the Crimes Act 1900 (NSW). He was committed for trial on 29 October 2015 from the Local Court at Grafton on that charge. On 15 June 2016, he entered a plea of guilty in the District Court at Lismore to a charge of wound with intent to cause grievous bodily harm contrary to s 33(1) of the Crimes Act. The maximum penalty for that offence is 25 years' imprisonment, with a standard non-parole period ("SNPP") of seven years.
6. The plea of guilty was entered one week prior to the commencement of the applicant's trial, which was due to commence on 22 June 2015. The applicant also pleaded guilty at that time to one count of contravening an Apprehended Domestic Violence Order ("ADVO") contrary to s 14(1) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW). The latter offence was a summary matter before the District Court as a result of the operation of s 166 of the Criminal Procedure Act 1986 (NSW).
7. The proceedings on sentence were conducted on 15 June 2015 and her Honour reserved her decision. On 26 August 2015, the applicant was sentenced to a total term of imprisonment for 12 years and six months, with a non-parole period of nine years and four months. A concurrent sentence of 12 months' imprisonment with respect to the charge of contravening the ADVO was imposed. The sentence was backdated to 29 December 2013 to reflect the time that the applicant had spent in custody prior to sentence. He will be eligible for parole on 29 March 2023.

Circumstances of the offending

1. A statement of agreed facts was before the sentencing judge. It outlined the following.
2. In 2013, the applicant and Cheryl Lee Cutmore ("the victim") were in a domestic relationship. They resided together in Grafton. There was a history of domestic violence in the relationship. On 6 February 2013, an ADVO was taken out at Local Court at Grafton by police, naming the victim as the person in need of protection. The facts giving rise to that order being taken out will be discussed further below at [55]-[59].
3. About a week before 29 November 2013, a neighbour gave the applicant a lift in his car. The applicant was intoxicated at that time and made a number of threats to harm the victim.

4. On 29 November 2013, the applicant and the victim had been drinking and arguing for much of the day. The applicant made a number of threats to the victim during that time. At approximately 6:30pm, a neighbour heard the applicant arguing with the victim. The applicant was heard to say, "You bloody cunt, I hate you bitch, I'm going to get you cunt." At approximately 9:30pm or 10pm a neighbour saw the applicant chasing the victim up the road, yelling out threats to her in terms similar to his earlier threats.
5. Later in the evening, the applicant and the victim were again heard arguing at their home. The applicant had hidden the victim's handbag, phone and money so that she could not leave to go to another house. The applicant and the victim argued about the applicant's missing handbag. The victim said that she wanted to get the bag to purchase more alcohol.
6. When the applicant and the victim were alone, the applicant went to the kitchen and obtained a knife. He said to the victim, "I'm going to stick you." He stabbed at the victim's throat, right arm, and face. The victim begged him not to attack her and began running. The applicant ran out of the front door. He met the victim coming out of the garage and stabbed her in the stomach. The victim again begged him to stop. She told the applicant that she loved him and then she ran out of the garage onto the street and down the middle of the road. The applicant again caught up to her and stabbed her in the stomach.
7. The applicant was able to get the assistance of a passing taxi driver, who heard the victim's calls for help. The victim was covered in blood. The taxi driver saw the applicant in the driveway of the units, yelling out "I'm done with you, you bitch I got you now, bitch." The victim was seriously injured and smelt of alcohol.
8. The taxi driver took the victim to Grafton Hospital where she underwent emergency surgery and a blood transfusion. There was no success in stabilising her injuries and she was airlifted to St George Hospital in Sydney. During the journey, the victim became unstable with very low blood pressure and uncontrolled bleeding from her abdomen. An emergency landing was made at Coffs Harbour for further emergency surgery. The victim was then again airlifted to St George Hospital. She remained in St George Hospital for almost a month. She was discharged on 20 December 2013.
9. After the victim was taken from the scene by the taxi driver, the applicant banged loudly on the front door of a neighbour and yelled "Quick ring my sister, ring the police, I just fucking killed her, I just stabbed her, I stabbed her, I finally got her."
10. When police arrived at the premises at 11:55pm, they noticed a large amount of blood on the garage floor and a blood trail leading from the garage. The applicant was taken to the police station. He was well affected by alcohol so was not interviewed until 10:30am the following morning, at which time he declined to comment. He was uninjured.
11. The carving knife that the applicant used to stab the victim was recovered from an adjacent park. The blade of the knife was 19.5cm long and it had a 12cm handle. It was described by the sentencing judge as a "very dangerous weapon".

12. The victim's injuries were very serious. She suffered a thorough perforation of the transverse colon, a 3mm perforation of the small bowel, a right-sided liver laceration, a collection of blood in the abdominal cavity, a laceration to her spleen and right kidney, a collection of blood in the space behind the abdominal cavity, a stab wound to the left side of her chest and a collection of blood around the lung. There was an oblique, incised 16.2mm deep wound over the victim's right eyebrow and two oblique incised wounds in the neck, being 4.5mm and 24.8mm deep respectively.

The proceedings on sentence

1. At the proceedings on sentence on 19 June 2015, the Crown tendered the agreed facts, a chronology of plea negotiations, a photograph of the knife, four photographs of the victim, a copy of the s 166 certificate handed up at committal, the applicant's criminal records in both New South Wales and Queensland and the applicant's New South Wales custodial history.
2. In addition to the above material, the Crown Prosecutor who appeared on behalf of the Crown on sentence tendered various documents outlining the facts and circumstances of some of the applicant's previous convictions for offences of violence. That material included police facts, statements and court transcript. There was no objection to the tender of that material. It was relied upon to provide further detail concerning the applicant's 35-year period of violent offending. Those offences were committed against numerous separate victims, three of whom were his domestic partner at the relevant time.
3. On behalf of the applicant were tendered documents produced from the Department of Family and Community Services showing that the applicant spent part of his teenage years in a boys' home. In addition, medical documents and a psychologist's report prepared by Isabel Talmacs dated 13 August 2015 were tendered. The applicant did not give evidence in the sentence proceedings.

The applicant's criminal history

1. The applicant's criminal history commenced in the Children's Court in 1970. He has convictions since that time for stealing, break, enter and steal, goods in custody, steal motor vehicle and driving offences. The applicant also has a record in Queensland between 1972 and 1998 for stealing, assaulting police, resisting police and breaching bail. Significantly, he has a long history of committing acts of violence against both men and women. The Crown tendered the facts sheets upon which some of those convictions were based. The relevant convictions for offences of violence and some of the corresponding facts disclose the following history.
2. In 1975, the applicant was convicted of assaulting a female, for which he was fined \$30 or sentenced to six days' hard labour. In 1983, he was convicted on a number of charges of assaulting police and placed on a recognisance to be of good behaviour for three years. He subsequently breached that recognisance and was sentenced to hard labour for three

months. In 1986, he was sentenced to nine months' hard labour for assault occasioning actual bodily harm and common assault. In 1989, he was sentenced in District Court at Lismore to two years' imprisonment with a non-parole period of 18 months for malicious wounding, assault occasioning actual bodily harm and assault. He breached his parole in relation to that sentence and was returned to custody. In 1991, he was sentenced to 18 months' imprisonment for assault occasioning actual bodily harm.

3. In 1991, the applicant was sentenced to six months' imprisonment for assaulting police officers. In 1992, he was sentenced at the Local Court at Casino to two years' imprisonment with a non-parole period of 18 months. The applicant breached that parole and he was returned to custody. In 1995, the applicant was sentenced at the Local Court at Lismore to six months' imprisonment for an assault and, in 1997, he was sentenced to a minimum term of nine months' imprisonment and an additional term of three months for assault occasioning actual bodily harm.
4. In 2003, the applicant was sentenced at the Local Court at Lismore to one month's imprisonment for an offence of assault occasioning actual bodily harm. Later that year, he was imprisoned for 20 months with a non-parole period of eight months for maliciously inflicting grievous bodily harm with intent to do so at the District Court at Coffs Harbour. In 2007, he was imprisoned for four months at the Local Court at Casino for common assault. In 2009, he was sentenced to imprisonment for three months and nine days at the Local Court at Campbelltown for contravening an ADVO. In 2010, he was sentenced at the Local Court at Campbelltown to imprisonment for six months for assault occasioning actual bodily harm in a domestic violence context and in 2011 he was imprisoned for four months for common assault, again in a domestic-violence context.
5. The facts sheets placed before the Court pertained only to some of these offences, but their contents can be summarised as follows.
6. On 15 November 1986, police received information concerning a knife attack upon the applicant's then partner EH by the applicant. As a result of a stab wound to the left side of the victim's chest just under her breast, fluid had drained into her left lung and she was experiencing difficulty breathing. She underwent surgery and required hospitalisation for two weeks. The applicant admitted stabbing her and stated that he did so because he was aware she was "with another fella".
7. On 22 June 1989, the applicant and EH were recently separated. The applicant attended the house where she had been staying. He pointed a rifle and discharged it, striking the victim in the upper leg. She was able to run away, but the applicant followed her. The victim was able to gain assistance and was taken to the hospital.
8. On 16 August 1990, another female victim JK attended Goulburn Police Station and complained of an assault committed on her by the applicant. It was observed that she had a cut to her lip and swelling to the side of her face.

9. On 9 September 1991, whilst he was in custody, the applicant punched another prisoner to the face several times with both his clenched fists. The victim was seated at the time. When the victim fell to the ground, the applicant starting kicking him in the face, throat and back until the victim lost consciousness. The victim was treated for abrasions and swelling to the face, nose and lip and for a subconjunctival haemorrhage to the left eye.
10. On 20 July 1993, the applicant punched TN about the face and grabbed her by the throat. Onlookers managed to pull the applicant away and TN was able to escape. She was treated for abrasions to her neck and throat at hospital
11. On 10 January 1997, the applicant arranged for NY to babysit his four-year-old daughter. At about 7:30pm, the applicant attended her home to collect his child. He provoked a fight with her and then said, "You want me to get locked up?" He then punched the victim to the face with his closed fist and grabbed hold of her shoulders, holding her against the bathroom door. The applicant continued punching the victim in the face, then picked up a pair of scissors from the bathroom. He pressed the scissors against the victim's throat, causing a small puncture wound. The victim's mother-in-law saw this and tried to pull the victim away from the applicant. The applicant then used his fist to punch the victim to the top of her head, causing her to fall against the bathroom sink. He said, "If you get the police I'm gonna come back and kill ya." He then collected his small child and left.
12. On 26 January 2002 at about 9pm, the applicant attended the home of another man, LR, armed with a machete and a length of timber. The applicant demanded that LR come out and fight. The applicant then assaulted LR and his father. The following day, the victim attended hospital and x-rays revealed a fractured scaphoid bone in his wrist.
13. On 11 October 2002, the applicant attacked a man, BD, with a machete. The two men had had an altercation the previous day. The applicant said to BD, "I'm going to chop you up". The victim attempted to run away and then armed himself with a rake. The applicant swung the machete across the victim's back, causing a serious wound. BD was taken to hospital, where he received 20 sutures to the back and three sutures to his right arm.
14. On 13 December 2006, the applicant's then partner RD was approached by the applicant while she was sitting with two other people in front of a house in Coraki. The applicant grabbed her by the hair and said, "Don't be a cheeky little cunt." He then punched RD in the head several times. As he struck her, the applicant said, "I'll kill you, I'll slit your throat." He was charged with common assault and an ADVO was taken out to protect the victim.
15. On 17 July 2010, police were called to Campbelltown Hospital where the applicant's 12-year-old son had been admitted. His son told police that the applicant had "bashed him with a stick". The victim said that the applicant had been drinking and had punched him around the head area about 12 times, hit his legs and shoulder with a stick and punched him in the stomach. The victim had a welt mark on his right thigh, scratches under his left eye and bruising and swelling to his right eye. The victim complained of soreness to the top of his head, left calf area and left shoulder. He walked with the limp and was dizzy. The victim told

police that the applicant "bashes him all the time".

16. On 26 January 2011, the applicant and his former partner LM were drinking together at an Australia Day function when the applicant obtained a silver metal cake knife. He said to the victim, "This will go through your neck before the police get here." Family and friends were able to settle the applicant down but the applicant subsequently retrieved the knife and pointed it at the victim. He said, "I'll stab you with this, I'll do fifteen years in jail." He later said, "I'll kill you in front of everyone here." Police arrived, the cake knife was seized and the applicant was charged with contravening an ADVO.

Circumstances of the ADVO to which the applicant was subject at the time of the offence

1. The applicant was subject to an ADVO, naming the victim as the person in need of protection, at the time of the commission of this offence.
2. Transcript was provided to the sentencing judge of proceedings before Magistrate Heilpern at the Local Court at Grafton on 6 February 2013, some ten months prior to the commission of this offence. On that day, the victim was called as a witness in a prosecution of the applicant for reckless wounding, assault occasioning actual bodily harm and contravening an ADVO. The victim had recorded a Domestic Violence Evidence-in-Chief ("DVEC") with police on 16 November 2012 and had given a statement. She was also required to give her evidence-in-chief in court. [1]
3. In her statement to police, the victim stated that on 14 November 2002 she was drinking with the applicant when they had an argument. The applicant stood in front of her with a long piece of wood in both hands and said to her, "Do you want this cunt up ya." He then swung the wood and hit the victim in the back of the head, which knocked her to the ground. As a result, the victim received a carpet burn on her face near her right eye. She said that when she stood up she remembered a lot of yelling but could not recall what was being said.
4. The victim told police that the applicant then grabbed her from behind and pushed her back towards the kitchen. He grabbed a black handled steak knife from the kitchen sink and stabbed her in both legs. She said in her statement, "This hurt incredibly and I started bleeding." The applicant then said, "Try and run now cunt." He forced her into the bedroom, which he did not allow her to leave until the following day. She was later able to call police.
5. By the time of the hearing on 6 February 2013, the victim had resiled from the version she gave in her statement. She gave evidence-in-chief that she had stabbed herself and was suffering from psychosis at the time she reported the matter to police. The prosecutor sought and was granted leave to cross-examine the victim under s 38(1) of the Evidence Act 1995 (NSW). The DVEC recording was played in court and marked as an exhibit. A reading of the transcript of the proceedings suggests that the complaint was not displaying any symptoms of any psychosis at the time that she recorded her DVEC. Magistrate Heilpern was not able to be satisfied beyond reasonable doubt of the proof of the criminal offences and

accordingly acquitted the applicant. His Honour did, however, grant a final ADVO for a period of two years. That was the ADVO that the applicant breached when he committed the subject offence.

Reasons of the sentencing judge

1. The sentencing judge recounted the facts and injuries suffered by the victim. She appropriately describe the applicant's offence as:

"...a ferocious and prolonged attack with a large, sharp, pointed knife upon a complainant who only luckily survived because she ran for her life and fortunately found a means of escape."

1. Her Honour found that the applicant intended to inflict very serious injuries and that there was a complete absence of remorse. Her Honour then observed:

"The offence was committed in the home of both the complainant and the accused and it is accepted that this was a violation of her expectation of safety and security. He had in addition hidden her handbag so she would be less likely to leave the premises to stay with a friend. Regard, in one sense, must be had to the importance that she would have placed on their relationship, their place in the Aboriginal community making it perhaps less likely that she would leave to seek outside help or indeed, complain. There is a well-known culture of silence and ostracism of those who do complain in relation to acts of violence within the Aboriginal community. In that sense, she is vulnerable though not in the usual sense, but that is an aggravating factor.

In regard to the objective seriousness it is important to bear in mind the very serious injuries inflicted upon the complainant, that she suffered multiple injuries which necessitated emergency surgical intervention and a long period of recuperation. In all, it this offence falls into the worst category of offences for offences of its kind." [emphasis added]"

1. The sentencing judge referred to the applicant's extensive criminal record, which she described as "absolutely shocking". Her Honour observed that there were similarities in the offences, although none as serious as this matter. Her Honour stated that the applicant was not to be sentenced for those matters, but that those matters were relevant to the applicant's prospects of rehabilitation. She observed that the applicant was "very intoxicated" but found that the incident was "typical" of the applicant's behaviour, which was to act violently towards others when intoxicated.

2. As for the applicant's subjective circumstances, her Honour noted that they were:

"...particularly marked by multiple disadvantages that arise as a result of the deprivation suffered by many Aboriginal offenders throughout their lives. These include being subjected to drugs, alcohol and violence for many years. All of these matters have had adverse impacts upon the offender's opportunities for education and employment. It must be taken into account that those circumstances of the impact that his upbringing in a community surrounded by alcohol, abuse, violence and deprivation does mitigate the sentence because such an offender's moral culpability

is likely to be less than offender whose formative years have not been so affected. Nevertheless that feature cannot overwhelm the consideration of the objective seriousness of this particular offence."

1. Her Honour went on to observe that the applicant's disadvantaged background was "somewhat double-edged", noting that, against the mitigation of the applicant's culpability by reason of his disadvantage, there was a need to protect the community against the applicant's "inability to control violent responses to the frustrations that arise when he is released into the community". Her Honour referred to the decisions of the High Court in *Munda v Western Australia* (2013) 249 CLR 600; [2013] HCA 38 ("Munda") and *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37 ("Bugmy") and concluded that:

"Here protection of the community is a most important matter, particularly protection of this particular complainant, of women with whom this offender might have contact and with members of his family and other persons in his community."

1. Her Honour noted the "very late" plea of guilty and indicated that a discount of "a fraction just over 10%" would be afforded in respect of that plea. Her Honour declined to make a finding of special circumstances, observing that the parole period would allow more than adequate time for supervision of the applicant in the community. Taking into account the maximum penalty of 25 years' imprisonment and a SNPP of seven years, and the finding that the offence fell into the worst category of cases for offences of this type, the sentencing judge imposed a sentence of imprisonment for 12 years and six months, with a non-parole period of nine years and four months. Her Honour also imposed a wholly concurrent sentence of imprisonment for 12 months with respect to the charge of contravening the ADVO.

Grounds of appeal

1. The applicant lodged a Notice of Intention to Appeal on 28 August 2015, which was subsequently extended to 30 June 2016. A Notice of Appeal was filed on that date relying upon the following three grounds of appeal:
 1. Ground 1: Her Honour the sentencing judge erred when she found that the offence was aggravated by reason of the fact that the victim was Aboriginal and thereby a vulnerable victim.
 2. Ground 2: Her Honour the sentencing judge erred when she concluded that the offence fell into the "worst category" of offending for the offences of this type.
 3. Ground 3: The sentence is manifestly excessive.
1. Mr Smith of counsel appeared on behalf of the applicant at the hearing of the application. He relied upon his written submissions in relation to Grounds 2 and 3 and focused his oral submissions on Ground 1.

Ground 1: Did her Honour err in finding that the offence was aggravated by reason of the fact that the victim was a vulnerable victim?

Submissions of the parties

1. This ground of appeal was based upon the observations by her Honour extracted at [61] above.
2. Mr Smith submitted that, although the categories of vulnerable victim to which s 21A(2)(l) of the Crimes (Sentencing Procedure) Act 1999 (NSW) ("the CSP Act") is directed are not closed, her Honour made a general assertion concerning members of the Aboriginal community that may or may not be accurate in the absence of any evidence that those characteristics necessarily apply to the victim. It was accepted that, even if the sentencing judge could permissibly take judicial notice of the fact that there is a "well-known culture of silence and ostracism" of persons who complain in relation to acts of violence within the Aboriginal community, the ambit of that of which her Honour could take such judicial notice is more problematic.
3. It was submitted that there was no evidence nor argument directed towards this feature being an aggravating factor in the course of the proceedings on sentence. It was submitted that her Honour was entitled to take into account the social dysfunction in traditional Aboriginal communities, but that that was a different issue. There was simply no evidence or discussion about the Aboriginal community in Grafton before her Honour, as opposed to a remote Aboriginal community.
4. It was acknowledged on behalf of the Crown that there was little evidence before the sentencing judge as to the characteristics of the victim in this case. The victim was clearly an Aboriginal woman and a member of the Aboriginal community in Grafton. The issue in dispute under Ground 1 is whether there was sufficient evidence for her Honour to make the finding that the victim was vulnerable because there was a well-known culture of silence and ostracism of those who complained within the Aboriginal community in Grafton.
5. The Crown relied upon the fact that courts have recognised at common law the vulnerability of women in Aboriginal communities in a number of decisions, including Munda and the decision of the Northern Territory Court of Criminal Appeal in *The Queen v Bara* [2006] NTCCA 17.
6. As to whether there was sufficient evidence before the sentencing judge regarding this particular victim's vulnerability, the Crown's response was threefold. First, it was submitted that s 21A(2)(l) operates on the basis of classes of vulnerable victims, rather than of vulnerable individuals. This means that it is sufficient to establish that the victim in this matter was a member of a particular class, rather than that she was personally vulnerable. Second, the Crown relied upon the fact that Wells SC DCJ is an experienced judge who is permanently based in the Lismore area. As such, she was entitled to draw upon her knowledge of Indigenous communities and in particular the experience of Indigenous

women in the Grafton community, which was an area within her jurisdiction, when determining this issue. Third, there was evidence in this case that supported her Honour's inferences and findings; namely, the fact that the complainant had in the past been the subject of extreme violence about which she had resiled from giving evidence before Magistrate Heilpern.

7. The Crown's alternative submission was that, even if error were established in this regard, no lesser sentence was warranted at law. This offence was in the worst category of cases of this type. Further, there were few positive subjective factors. The applicant was subject to an ADVO at the time of the offence. The Crown relied upon the findings made by her Honour with respect to the need to protect the community from the applicant, the fact that this offence occurred in a domestic violence context and the lack of any remorse on the part of the applicant.

Consideration

1. Section 21A(2)(l) of the CSP Act provides that it is an aggravating factor to be taken into account when determining the appropriate sentence where:

"(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant)."

1. Section 21A(2)(l) is concerned with particular classes of victims who require protection because members of that class are vulnerable to criminal offences. It is not concerned with the vulnerability of individual victims.
2. There was no dispute at the hearing of the appeal that the categories of vulnerable victims listed in s 21A(2)(l) are not exhaustive: *Perrin v R* [2006] NSWCCA 64 at [35]; *Ollis v R* [2011] NSWCCA 155 at [96]. It has been recognised that a victim may be "vulnerable" for the purposes of 21A(2)(l) in a variety of circumstances, including the following:
 1. where the victim was a Japanese adolescent travelling alone on public transport: *Ollis v R* at [97];
 2. where the victim was a passenger in a taxi who was heavily intoxicated: *R v Ali* [2010] NSWCCA 35 at [39];
 3. where the victim lived in a rural and isolated location: *Stevens v R* [2007] NSWCCA 152 at [33];
 4. where the victim was a person travelling on a train who was to some degree isolated from other people on the train: *R v Dyer* [2006] NSWCCA 274 at [27] and *R v Ibrahimi* [2005] NSWCCA 153 at [24];

5. where the victim was "unwell and dry retching", so that he was less able to respond to an attack that he otherwise would have otherwise been: *R v Morris* [2007] NSWCCA 127 at [16]; and
6. where the victim was a prisoner confined in a cell after lockdown: *R v Daley* [2010] NSWCCA 223 at [39]
1. In *R v Betts* [2015] NSWCCA 39, this Court was considering the sentence of an offender who stabbed his partner in circumstances where the sentencing judge had characterised the victim as "vulnerable". RS Hulme AJ (with whom Meagher JA and Hidden J agreed) observed of s 21A(2)(l) at [29] and [30]: that:

"The authorities make clear that sub-paragraph (l) is concerned with the weakness of a particular class of victim and not with the threat posed by a particular class of offender" and that "the examples set out in the sub-paragraph suggest that it is vulnerability of a particular kind that attracts its operation" and the fact that a victim does not have the characteristics of a powerful offender with violent tendencies does not make the victim vulnerable within the meaning of sub-paragraph (l) – see *R v Williams* [2005] NSWCCA 99 at [40], [41]; *R v Tadrosse* [2005] NSWCCA 145; (2005) 65 NSWLR 740 at [26], [27]. The paragraph looks to the circumstances of groups or classes of victims inherent in their situation or characteristics as such divorced from any actions of an offender.

...While in one sense the complainant was vulnerable, that vulnerability arose because of the particular events of the day, not because of the characteristics of any group of which she was a member. Those events included that the applicant was able to prevent the victim from communicating with her family by taking her mobile phone and replying to text messages from her brother who was waiting downstairs. Accordingly, his Honour erred and this ground of appeal is made out." (citations omitted)

1. The current matter differs to that in *R v Betts*. The reason why the victim in *R v Betts* was not considered to be vulnerable was because the circumstances in which the victim was contended to be vulnerable (namely, her isolation) were created by the offender. They were not characteristics of the victim as a member of a class of persons. In contrast to *R v Betts*, the vulnerability found by the sentencing judge in the present case was said to be a characteristic of a class of persons of which the victim was a member; namely, Aboriginal women living in an Indigenous community.
2. There was ultimately no dispute at the hearing of the application that, as a matter of general principle, the word "vulnerable" in s 21A(2)(l) is capable of extending to a person who is vulnerable by virtue of being a member of a class of persons who are unable to complain about wrongful conduct because of a culture of silence and ostracism in their particular community. Where the parties joined issue in this matter was whether there was sufficient evidence before the sentencing judge to make that finding in this particular matter, in circumstances where it is accepted that there was neither any evidence led on the issue nor any submissions directed to it during the proceedings on sentence. The significance of the

finding is that her Honour expressly found it to be an aggravating factor and as such it was a matter that the Crown was required to establish beyond reasonable doubt.

3. It is incumbent upon the Crown to establish any aggravating factor in s 21A(2) of the CSP Act beyond reasonable doubt. In *R v Olbrich* (1999) 199 CLR 270; [1999] HCA 54 at 281, the High Court (Gleeson CJ, Gaudron, Hayne and Callinan JJ) held that a sentencing judge may not take facts into account in a way that is adverse to an offender unless those facts have been established beyond reasonable doubt. In so finding, the High Court adopted what was said in *R v Storey* [1998] 1 VR 359 at 369 by Winneke P, Brooking and Hayne JJA and Southwell AJA. This well-established sentencing principle was recently confirmed in *Filippou v The Queen* (2015) 256 CLR 47; [2015] HCA 29 at [24].
4. The only material tendered on the proceedings on sentence capable of being relevant to this issue was the evidence before her Honour showing that the victim had been unwilling to give evidence against the applicant on a previous occasion when he had allegedly stabbed her. That was a matter that made the victim vulnerable in her relationship with the applicant. It did not make her a member of vulnerable class of victims.
5. A question arose during the hearing of the application for leave to appeal as to whether the sentencing judge was entitled to take judicial notice of the under-reporting of domestic violence in Indigenous communities due to a culture of "silence and ostracism" and aggravate the offence on that basis. The question of whether a court may take judicial notice of disadvantage suffered by Aboriginal offenders generally, so as to mitigate their sentence, was considered and rejected by the High Court in *Bugmy*. The plurality, after considering the decision in *Fernando v The Queen* (1992) 76 A Crim R 58, observed at [41] (footnote omitted):

"Mr Fernando was a resident of an Aboriginal community located near Walgett in far-western New South Wales. The propositions stated in his case are particularly directed to the circumstances of offenders living in Aboriginal communities. Aboriginal Australians who live in an urban environment do not lose their Aboriginal identity and they, too, may be subject to the grave social difficulties discussed in *Fernando*. Nonetheless, the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background."

1. Similarly, I am satisfied that a court may not aggravate an offence by taking judicial notice of the fact that some Aboriginal women might be less likely to complain of domestic violence because of a culture of silence and ostracism in their communities. Whether or not the victim in each case is in such a class of vulnerable victims will always be a matter that must be proved beyond reasonable doubt based on the evidence in that case.

2. That is not to say that her Honour was not entitled to note both the high rates of domestic violence in Indigenous communities and the vulnerability of women and children in those communities. In *The Queen v Bara* at [18], in a passage relied upon by the Crown, the Court of Criminal Appeal in the Northern Territory observed:

"Women and children in Aboriginal communities are particularly vulnerable to attacks by men in domestic situations. Such victims lack the support mechanisms that are available in many other sections of our community. These vulnerable victims are entitled to the protection of the law. This Court has repeatedly emphasised over many years that men in Aboriginal communities must recognise that attacks of this nature upon the more vulnerable members of the communities, particularly when dangerous weapons are used, will not be tolerated and will be met with severe punishment."

1. The high rate of violence in Indigenous communities was also noted by King J of the Supreme Court of Victoria in *R v Hudson* [2013] VSC 184. Her Honour was sentencing an Indigenous woman for the manslaughter of her abusive partner. Her Honour observed at [31]:

"There are so many appalling stories within the indigenous community in Australia and it is hard to know where to start to do something about it. What is not to be doubted is that something must be done. We cannot let this continue as a society. We must stop this appalling violence being inflicted one upon the other by members of the indigenous community. Whilst there have been so many attempts to alleviate these problems, we have had, as a community, such limited success."

1. It is recorded in the *Equality before the Law Bench Book*, published by the Judicial Commission of NSW, that Aboriginal women are six times more likely to be victims of domestic and family violence than the average woman in New South Wales and to suffer more serious injury because of that violence. Indigenous men are about eight times more likely to commit assaults related to domestic violence than non-Indigenous men, and Indigenous women are ten times more likely to commit such assaults than non-Indigenous women. [2]
2. It is notorious that offences committed within the context of domestic violence are under-reported and that such under-reporting is not confined to Indigenous communities. As the Victorian Court of Appeal observed in *Pasinis v R* [2014] VSCA 97:

"The victims of such violence are often so enveloped by fear that they are incapable of either escaping the violence or reporting it to the authorities. The key to protection lies in deterring the violent conduct by sending an unequivocal message to would-be perpetrators of domestic violence that if they offend, they will be sentenced to a lengthy period of imprisonment so that they are no longer in a position to inflict harm."

1. High rates of non-disclosure by Indigenous victims of domestic violence have been attributed, among other things, to the potential for stigma and ostracism from family and community members. Indigenous victims may also, for historical and pragmatic reasons, fear contact with police and the courts or regard the authorities as unable to help them. [3]
2. The sentencing judge was entitled to have regard to the serious problem of domestic violence in Indigenous communities and the under-reporting of such violence. It provided context to her sentencing exercise and was relevant to the need for general deterrence and the protection of the community in sentencing for an offence of domestic violence committed upon an Aboriginal woman. The error established is that her Honour went on to find the offence aggravated for that reason, in the absence of evidence capable of establishing beyond reasonable doubt that this particular victim was a member of a particular class bearing those characteristics.
3. I have found that error has been established under Ground 1. It is therefore necessary for this Court to proceed to exercise its sentencing discretion afresh and re-sentence the applicant. I will nonetheless turn to consider Ground 2 as the finding it concerns is relevant to the exercise of this Court's re-sentencing of the applicant.

Ground 2: Was this offence in the "worst category" of offending for offences of this type?

Submissions of the parties

1. The applicant relied upon the fact that the sentencing judge imposed a sentence that was the third highest sentence imposed in respect of offences contrary to s 33(1) of the Crimes Act since the introduction of standard non-parole periods in 2003. The applicant accepted that this Court would be reluctant to disturb the assessment made by a sentencing judge of the seriousness of the offence: *Mulato v R* [2006] NSWCCA 282 at 37; *Kennedy v R* [2016] NSWCCA 123. Despite this, it was submitted that it was not open to her Honour to arrive at the finding of objective seriousness made in this matter.
2. It was submitted on behalf of the applicant that the extent of the injuries inflicted is of great significance when it comes to assessing the objective seriousness of the offence and that the injuries comprehended by the term "grievous bodily harm" extend to injuries that leave the victim permanently disabled or disfigured: *R v Dacey* [2014] NSWSC 1452 at [11]. There was no evidence of any permanent disability or disfigurement before the sentencing judge in this matter.
3. The applicant also submitted that the absence of premeditation was a relevant factor, although it was conceded that the significance of that factor decreases when there is opportunity for the offending conduct to cease which is not taken: *AM v R* [2012] NSWCCA 203 at 73.

4. Reliance was placed upon the principles derived from the decisions in *Little v Regina* [2010] NSWCCA 201 per Hall J at [31] and in *Regina v Twala* (NSWCCA, unreported, 4 November 1994). Applying those principles to the applicant's case, it was submitted that it could not be concluded to the requisite standard that the applicant had apprehended an assault of the severity that ultimately transpired and that, although it was true that the applicant had hidden the victim's bag, it cannot be inferred that he did so for the purpose connected with his later offending. It was submitted that neither of the threats at 6:30pm and 9:30pm could lead to a conclusion that the applicant contemplated the attack involving a knife that ultimately took place. While the offending conduct comprised over six separate stabbing actions at three locations, it was submitted that it could not be said that the offending occurred over an extensive period.
5. It was further submitted that, while it was conceded that "some of the individual stabbings were directed to particularly vulnerable parts of her body", the applicant's intoxication was such that it could not be inferred that he was consciously targeting those vulnerable areas.
6. The Crown relied upon the principles summarised in the recent decision of this Court in *Kiernan v R* [2016] NSWCCA 12 to establish that it was open to her Honour to make the finding that she did regarding the objective seriousness of the offence. The Crown further submitted that the applicant's contention that it could be inferred that the applicant voluntarily desisted from the attack could not be sustained and that no such finding was made by the sentencing judge.

Consideration

1. The determination of whether offending falls within the "worst case" category requires an evaluation of the particular features of the offence including any aggravating factors: *De Jong v R*; *Tuimaualuga v R*; *Zechel v R*; *Puru v R* [2015] NSWCCA 32 at [55]. That evaluative assessment of the objective seriousness of an offence is only reviewable in this Court on the principles stated in *House v The King* (1936) 55 CLR 499; [1936] HCA 40. As Simpson J (as her Honour then was) observed in *Mulato v R* at [46] (Spigelman CJ and Adams J agreeing):

"The assessment of the objective seriousness of an offence is quintessentially for the sentencing judge. It is, if not a finding of fact, then the exercise of an evaluative process akin to fact finding or the exercise of a discretion. As such it is reviewable in this Court only on the principles stated in *House v The King* [1936] HCA 40; 55 CLR 499. The importance of respecting the role of a first instance judge should never be underestimated. It is not the function of this Court to substitute its own view of objective seriousness for that of the first instance judge. That is not because objective seriousness is something determined by reference to the evaluation of the credibility of witnesses, in respect of which it is conventionally held that the first instance judge is in a superior position. It is because it is a fundamental aspect of the appellate system. Each judicial officer in the hierarchy has his or her own function, and those at appellate level need to take care not to trespass upon the role of those at first instance."

1. This Court has recently considered the relevant authorities concerning the assessment of objective seriousness in cases involving wounding in *Kiernan v R*, a decision relied upon by the Crown. In that case, Hoeben CJ at CL (with whom Davies and Beech-Jones JJ agreed) observed at [41], referring to the decision of this Court in *McCullough v R* (2009) 194 A Crim R 429; [2009] NSWCCA 94 at [37], that:

"While authorities such as *McCullough v R* make it clear that offences of this kind are result based, they also make it clear that the manner in which the wound was inflicted, the reason for its infliction and the circumstances surrounding the wounding are relevant when assessing the seriousness of the offence (*McCullough v R* at [37])."

1. His Honour went on to observe at [44] and [45] that:

"Another relevant feature of the offending was the mode of the attack, which involved the production of the Stanley knife, the pulling back of the victim's head and the cutting of the throat in two motions. Even when the victim sought to defend himself, the attack was maintained leading to a further stabbing in the leg...

That such matters are relevant to the seriousness of offences of this kind is clear from *R v Westerman* [2004] NSWCCA 161, *R v Zhang* [2004] NSWCCA 358; *Matzick v R* [2007] NSWCCA 92 and *AM v R* [2012] NSWCCA 203; 225 A Crim R 481."

1. It was further held in *Kiernan v R* (at [46]) that the location of the wounds inflicted may cause the injuries to be viewed as more serious; for example, a cut to the throat will be viewed as more serious than a cut to the leg. The decision in *Dennis v R* [2015] NSWCCA 61 at [31] was cited as authority for that proposition
2. The relevant finding by her Honour regarding the objective seriousness of the offence in this matter was that "...this is objectively an offence that falls well above the mid-range of objective seriousness and in the worst category of offences for one of its kind". It is to be inferred that her Honour meant that this offence was in the worst category for an assault of the kind before her Honour within the broad spectrum of offending covered by s 33 of the Crimes Act. A finding that a case falls within the worst category of cases for a statutory offence means that the starting point for the offence would be the statutory maximum penalty: *Ibbs v The Queen* (1987) 163 CLR 447; [1987] HCA 46 at 451-452. Her Honour's starting point was well below the maximum penalty for this offence given that she only allowed a discount for the late plea of guilty as being "fractionally" over 10%.
3. The High Court recently considered whether the Victorian Court of Appeal had erred in holding that sentences imposed on the respondent charged with a serious assault on his girlfriend were manifestly excessive in *The Queen v Kilic* [2016] HCA 48. The Court (Bell, Gageler, Keane, Nettle and Gordon JJ) unanimously allowed the appeal, holding that the Court of Appeal had erred in holding that the difference between the sentence imposed by the sentencing judge for the principal offence of causing serious injury and sentences imposed in the other cases referred to by the Court of Appeal in their judgment meant that

the sentence imposed on Mr Kilic was manifestly excessive.

4. Significantly for present purposes, the High Court considered the finding by the Court of Appeal in *The Queen v Kilic* that the principal offence was within "the worst category" of the offence of intentionally causing serious injury and observed the following at [18] – [20] (footnotes omitted):

"[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. Both the nature of the crime and the circumstances of the criminal are considered in determining whether the case is of the worst type. 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. 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, properly so called. 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."

1. For the reasons explained by the High Court in *The Queen v Kilic*, the phrase "worst category" should be avoided unless the finding is one made in the context of imposing the maximum penalty available for that offence. Putting to one side the use of this phrase by the sentencing judge, I am otherwise satisfied that it was open to her Honour to make the finding of objective seriousness that her Honour did for the following reasons.

2. First, the victim suffered injuries to the colon, small bowel, liver, spleen, right kidney, chest, face, neck and upper arm as a result of being stabbed by the applicant. There was also a collection of blood in the abdominal cavity and around her lung. As her Honour found, the injuries sustained were to particularly vulnerable areas of the victim's body. The injuries were so serious the victim had to be airlifted to Sydney for treatment. Her condition became so critical on that flight that there had to be an emergency stop at Coffs Harbour for further surgery. The victim spent approximately three weeks in hospital.
3. Although there was no evidence before the Court that the injuries to the victim resulted in any permanent disability or disfigurement, it is not necessary for the injuries caused to the victim to be of the "worst type" for an offence to fall into the "worst case" category. The nature of the offender's conduct can bring a case within that category: *R v Westerman* [2004] NSWCCA 161 at [17]. It is to be noted that the sentencing judge found that the victim "...only luckily survived because she ran for her life and fortunately found the means of escape."
4. Second, although her Honour was not satisfied that there was any premeditation or planning to a significant degree, the attack was sustained and there were opportunities for the applicant to cease the attack that were not taken: *AM v R* at [73]. There was evidence that the applicant had threatened to harm the victim during a conversation with the neighbour a week prior to the offence and on a number of occasions on the night of the offence. The applicant said to the neighbour after the event that, "I finally got her." That material was contained in the agreed facts.
5. Third, the offence occurred in the context of a domestic relationship that had been marked by violence for some time. At the time of the offence, the applicant was subject to an ADVO put in place after the applicant attacked the victim with a piece of wood. I am satisfied that the commission of this offence in breach of that ADVO was in deliberate disregard of a court order intended to protect the victim and that this increases the objective seriousness of the offence.
6. Fourth, the attack was prolonged. The victim was repeatedly stabbed in the throat, arm and face as she begged the applicant to stop. She was able to flee, but the applicant caught up with her in the garage and once again stabbed her in the stomach. After the victim again attempted to escape by running down the street, the applicant inflicted a further stab wound to her stomach.
7. Fifth, the offence occurred in the victim's home. As Bathurst CJ (with whom Beazley P, Hall, Bellew JJ and I agreed) held in *Jonson v R* [2016] NSWCCA 286 (at [50]) s 21A(2)(eb) of the CSP Act is not limited to cases where the offender is an intruder into the home of the victim. Despite this, his Honour went on to observe at [52] that the fact that s 21A(2)(eb) is not so limited does not mean that in all cases the fact that the offence occurred in a home will be an aggravating factor. It is necessary for the Court to conclude that, having regard to ordinary sentencing principles, it actually aggravates the offence in question. In the present matter, the assault commenced in the victim's home. Although there is a degree of overlap

with this factor and the fact that the offence occurred within a domestic relationship, it is nonetheless a relevant consideration in assessing the objective facts overall that the offence occurred in the victim's home.

8. Finally, although the applicant was heavily intoxicated at the time of the commission of this offence, the sentencing judge found by his words uttered both before and after the stabbings that he intended to inflict very serious injuries.
9. Taking into account each of these factors, I am satisfied that it was open to her Honour to classify the objective seriousness of the offence as her Honour did. No *House v The King* error has been established.
10. Ground 2 should be dismissed.

Ground 3: the sentence imposed was manifestly excessive

1. Error having been established in relation to Ground 1, the Court is required to independently exercise the sentencing discretion: *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37 at [42]. Therefore, it is unnecessary to address this ground.

Re-sentence

1. An affidavit affirmed by the applicant was filed in the event that this Court found error and was required to re-sentence the applicant. That material disclosed that the applicant has undertaken education courses while in custody and is on the waiting list for both an anger management course and a course designed for perpetrators of domestic violence. His diabetes has worsened since he was sentenced. His brother died recently and he could not attend the funeral. He has had no internal charges in custody.
2. He stated that being from the Stolen Generation has had a "huge impact" on him and that "...my childhood, my culture, traditions, connection to family and my identity have been taken."
3. The applicant expressed remorse for his actions stating, inter alia, "As an Aboriginal man committing a crime of violence on an Aboriginal woman, I do not think it is possible to feel more ashamed than I already do."
4. The expression of remorse in his affidavit is belated. The applicant did not give evidence before the sentencing judge and, as her Honour observed in her reasons, "There has never been an expression of remorse directed towards the complainant and the effect of all of his actions upon her, indicated to the Court." The only evidence touching on the question of remorse before her Honour was a statement by the applicant to his psychologist that he planned to remain single from now on "as he finds romantic relationships too stressful". I give this belated statement of remorse in his affidavit some little weight.

5. As for the evidence of his childhood deprivation, I take this into account in the same manner as the sentencing judge, as set out above at [63]-[64]. The material before this Court shows that the applicant suffered economic and social deprivation during childhood, both while residing with his family on an Aboriginal reserve up until the age of 14 years and then after being placed in a boys' home to learn a trade. He resided at the boys' home until he was 18 years of age, apart from the periods during which he escaped and went home. There is no doubt that the applicant's deprived childhood is a matter for the Court to take into account on sentence. Despite this, as Bell J observed in Munda at [134] (footnote omitted):

"The "Fernando propositions" do not all favour mitigation of sentence. They contemplate the necessity to ensure that Aboriginal Australians are not deprived of the protection which it is assumed punishment provides and to avoid the perception that serious violence in Aboriginal communities will be treated by the law as a matter of little moment. The propositions have internal tensions which fall to be weighed by the sentencing judge along with all of the other factors that bear on the ultimate discretionary determination."

1. The balancing required when sentencing a person who has a disadvantaged background for a serious offence was recently considered in Hudson v R [2016] NSWCCA 30 where RA Hulme J (with whom Bathurst CJ and Hall J agreed) observed at [30]:

"Bugmy v The Queen [2013] HCA 37; 249 CLR 571 is well-known for its discussion of the significance on sentence of an offender having emanated from a background of tragedy and deprivation. In the plurality judgment at [44] there is reference to the various purposes of punishment and the fact that a feature of a particular case might reduce an offender's moral culpability whilst at the same time increasing the emphasis to be given to protection of the community. In the present case the various unfortunate experiences and disadvantages in the applicant's past might serve to explain his entrenched abuse of alcohol and drugs. However, whilst in that way it might explain his frequent interaction with the criminal justice system, there was also a heightened need for personal deterrence and community protection. Further, it is important to bear in mind that whilst the applicant's experiences in early life might justifiably evoke sympathy, it was necessary for the sentence to be proportionate to the gravity of the crime: R v McNaughton [2006] NSWCCA 242; 66 NSWLR 566 at 572 [15] (Spigelman CJ)."

1. In exercising the sentencing discretion afresh, I accept the finding of the sentencing judge that this offence was well above mid-range and, to the extent that her Honour found it to be "in the worst category of offences of this type", I accept that it was a most serious breach of s 33(1) of the Crimes Act for the reasons expressed above at [98]-[114].
2. I have taken into account all of the subjective and objective features that have been set out in this judgment, including that, although his health was described as "good" before the sentencing judge, the applicant's diabetes has now worsened. He is entitled to a discount of just above 10% for his late plea of guilty.

3. The applicant is to be sentenced in relation to an offence that carries a maximum penalty of 25 years' imprisonment and an SNPP of seven years. The maximum penalty is the highest available after life imprisonment. This shows that the legislature views crimes of this nature very seriously.
4. As for the applicant's criminal history, I accept that it cannot be given such weight as to lead to the imposition of a sentence disproportionate to the gravity of this offence: *R v McNaughton* (2006) 66 NSWLR 566; [2006] NSWCCA 242. Despite this, in the present case the needs of specific deterrence and the protection of the community loom large. Even having regard to his background of social disadvantage, the fact remains that the applicant is a recidivist violent offender with convictions for matters of violence stretching over 35 years and committed against 13 separate victims. Three of those victims were the applicant's domestic partners at that time. One of the victims was the applicant's own son. Nine of the instances of violence involved the use of a weapon. As the High Court observed in *Veen v The Queen (No 2)* (1988) 164 CLR 465; [1988] HCA 14 at 477, the applicant's prior record is relevant:

"...to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted."

1. The applicant's sentence for breaching the ADVO is not the subject of this application. He received a sentence of 12 months to be served wholly concurrently with the sentence for the offence contrary to s 33(1) of the Crimes Act. Furthermore, the sentence imposed for the s 33 offence was backdated to commence from 29 December 2013, which was the date when the applicant first went into custody. The applicant was sentenced on 7 April 2014 at the Local Court at Grafton to a term of imprisonment for 12 months, with a non-parole period of nine months, for an offence of driving with a high-range prescribed concentration of alcohol. The result of the backdating was that the high-range PCA offence was also served wholly concurrent with the sentence for the present offence. These are further relevant matters to consider in determining the appropriate sentence.
2. This was a very serious domestic violence offence. As this Court (per Johnson J, with whom Hunt AJA and Latham J agreed) observed in *R v Hamid* (2006) 164 A Crim R 179; [2006] NSWCCA 302 at [86]:

"In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community. Recognition of the harm done to the victim and the community as a result of crimes of domestic violence is important."

1. Taking all of these matters into account, I am satisfied that no lesser sentence is warranted in law. Consistent with what Bathurst CJ observed in *Abdulrahman v R* [2016] NSWCCA 192 at [3] and [4], I do not propose to indicate what that sentence is. In the absence of a "Parker" warning being given to the applicant at the hearing of the appeal (see *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 290), it would not be consistent with practice and procedure on appeals to impose a higher sentence. Instead, and consistent with what the High Court said in *Kentwell* at [43], I make a finding that no lesser sentence is warranted at law and I would dismiss the appeal on that basis.

ORDER

1. I propose that leave to appeal the sentence be granted but that the appeal be dismissed.

Endnotes

1. The Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014 (NSW) came into force on 1 June 2015. It provides for the pre-recording of a complainant's evidence-in-chief in domestic violence matters, known as a DVEC. A DVEC allows police to record the statement of a domestic violence complainant audio-visually and to then use the recording as all or part of the victim's evidence-in-chief in subsequent proceedings. The legislation is to be found in Chapter 6, Part 4B of the Criminal Procedure Act. In circumstances where the complaint was made 18 months prior to the enactment of that legislation, it is to be inferred that the victim's evidence was recorded as part of a trial period of that practice.
2. Judicial Commission of NSW, Equality before the Law Bench Book (at Update 08, June 2014) 2105.
3. Australian Institute of Criminology, 'Non-disclosure of violence in Australian Indigenous communities' (2011) Trends and issues in crime and criminal justice, No. 405.

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