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Weekly Criminal Law

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Executive Summary

Parente v R (NSWCCA) - criminal law - drug offences - sentencing - severity appeal - whether *Clark* "principle" that imprisonment is the appropriate sentence, should be revisited - proper sentencing approach in drug supply cases identified - extra curial punishment - loss of right to practise as solicitor - Clark "principle" no longer to be applied - error identified, but appeal dismissed

Green, Al v R (NSWCCA) - criminal law - withdrawal of plea - principles identified - relevance of mental illness considered - historical sexual offences - sentencing principles identified - relevance of historical sentencing practices considered - appeal dismissed

Ohanian v R (NSWCCA) - criminal law - drug offences - dysfunctional childhood and continuing drug addiction & mental health problems - application of *Bugmy* - whether the mitigating effects of dysfunctional childhood diminish over time - error identified - resentenced

R v PJ (NSWCCA) - criminal law - sexual offence - child in "special care" - former teacher - whether ongoing instruction required - "in connection with" considered - DPP appeal against permanent stay - appeal dismissed

The Queen v Nikat (VSC) - criminal law - infanticide - period of pre-sentence custody taken into account - 12-month CCO imposed

Munn v the Police (SASC) - criminal law - traffic - failing to stop as directed - panic attack - defence - onus and standard of proof considered - appeal by way of rehearing - relevant

principles - appeal partially successful

Kelly v The State of Western Australia (WASCA) - criminal law - police questioning - admissibility of record of interview - voluntariness - unfairness discretion to exclude - interview properly admitted - appeal dismissed

Maddox v Tasmania (TASCCA) - criminal law - sentence - unlawful act causing injury - serious assault rendering victim permanently incapacitated - mitigating factors considered - youthfulness of appellant considered - serious example of offence - sentencing range considered - more sever sentence appropriate - sentence of 10 years, NPP 5 years confirmed - appeal dismissed

Summaries With Link (Five Minute Read)

Parente v R [2017] NSWCCA 284
Court of Criminal Appeal of New South Wales
MacFarlan JA, Hoeben CJ at CL, Leeming JA & R A Hulme J
Criminal law - drug offences - severity appeal - the applicant, who was a solicitor, made a sudden right-hand turn in front of a police vehicle at 12.05 am and was apprehended after a search of his vehicle - a later search of his home discovered MDA (16.8g), GBL (1.3728 Kg), 1,4 Butanediol (338.8g) and cash ($3,000) - he pleaded guilty to 2 counts of supply (s25(1) *Drug Misuse and Trafficking Act 1985* (NSW), with further counts taken into account - the applicant was sentenced to an aggregate term of imprisonment of 4 years, NPP 2 years - in seeking leave to appeal the severity of his sentence, the applicant submitted, inter alia, that the sentencing judge impermissibly constrained his sentencing discretion and failed to take into account that the applicant would never be permitted to practise as a solicitor - held: (i) loss of right to practise as a solicitor - the applicant's likely loss of the privilege off pursing a promising career in the legal profession was a relevant matter on sentence (Oudomvilay v R [2006] NSWCCA 275, [19]-[20]; *Kenny v R* [2010[NSWCCA 6, [47]-[49]; *Einfeld v R* (2010) 200 A Crim R 1, [95]-[97]; *Michael v R* [2014] NSWCCA 2, [149]; *Kearsley v R* [2017] NSWCCA 28, [13]; , [76]-[80]) - however, the sentencing judge referred to the applicant's "tragic descent" and there was no doubt that he took this matter into account - ground rejected; (ii) whether the sentencing discretion was impermissibly constrained by the judge's approach to "exceptional circumstances" in drug supply cases (the Clark "principle" [*R v Peter Michael Clark*, CCA (NSW) 15 March 1990 (unreported)] - the *Clark* decision reconsidered by the bench of five judges to determine whether the "principle" has any continuing application - decisions post *Clark* examined (*R v Ozer* (CCA (NSW), unreported 9/11/1993); *R v Cacciola* (1998) 104 A Crim R 178; *Smaragdis v R* [2010] NSWCCA 276; *Polley v R* [2015] NSWCCA 247 - today the sentencing legislation is vastly different and makes a number of provisions on topics for which recourse previously was to the general law - of most significance is the repeal of the *Sentencing Act* and the enactment of the *Crimes (Sentencing Procedure) Act 1999* (NSW) - features of this

Act identified [85] - Intensive Corrections Orders were introduced and periodic detention abolished - today there are more sentencing options available to courts than there were at the time *Clark* was decided - the option of an intensive corrections order may be significantly more onerous than its predecessor of periodic detention - doubts have been raised about the apparent "prescriptiveness" of the "principle" (*Robertson v R* [2017] NSWCCA205, [51], [60], [61]-[66], [69]-[71] (*Robertson*)) - general principles of sentencing referred to (*Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584, [75]-[77]; *Markarian v The Queen* (2005) 228 CLR 357, [27]) - the Clark "principle" has been given an interpretation in its practical application of dictating the particular path that a sentencing judge must follow - it is inconsistent with the flexibility to be afforded to a sentencing judge in the exercise of the sentencing discretion - see *Hili v The Queen* ((2010) 242 CLR 520, [44]) referred to - Simpson JA was correct to refer to the "principle" as one "that crosses the boundary between identifying the 'unifying principles' to be applied in any sentencing decision and imposing an unlegislated judicially created constraint on the sentencing discretion" (*Robertson* [89]-[90]) - the "principle" (that drug trafficking alone in any substantial degree should normally lead to a custodial sentence and it will only be in exceptional circumstances that a non-custodial sentence will be appropriate) should no longer be applied in sentencing for drug supply cases; (iii) sentencing approach in drug supply cases - proper approach identified at [107]-[113] - see *Robertson* [97]; *R v Foster* [2001] NSWCCA 215; *R v Zamagias* [2002] NSWCCA 17, [22]-[29]; *Douar v R* (2005) 159 A Crim R 154, [70]-[72] - that approach is to determine (1) whether no sentence other than imprisonment (however to be served) is appropriate; (2) if so, the length of the sentence; (3) whether an alternative to full-time incarceration is available and appropriate - in considering whether an sentence of imprisonment is to be served in an alternative way see *R v Zamagias* ([2002] NSWCCA 17, [28]) & *Douar v R* ((2005) 159 A Crim R 154, [72]) ; (iv) conclusion - here, there was error in the exercise of the sentencing discretion by the judge having regard to and purporting to apply the *Clark* "principle" - leave to appeal granted - applicant resentenced - no other sentence appropriate - appeal dismissed.
Parente

Green, AL v R [2017] NSWCCA 282
Court of Criminal Appeal of New South Wales
Basten JA, R A Hulme & Garling JJ
Criminal law - conviction appeal - historical sexual assault - in 1984, a 17 year old woman was sexually assaulted at Marulan in NSW - the applicant was arrested in 2012 after his DNA profile was matched to semen taken from the complainant's jumper - in 2013 the applicant entered pleas of guilty to 5 counts of sexual intercourse without consent and detaining for advantage - the applicant then failed to appear on sentence - after the applicant was again arrested, a hearing determined that he was unfit to be tired and the matter was referred to the Mental Health Review Tribunal - by 2015, however, the applicant had become fit to plead and in 2016 a further hearing found that he was (still) fit and the judge heard an application to withdraw his pleas of guilty - that application was refused and an aggregate sentence of 7 years 10 months, NPP 4 years 4 months, was imposed - the applicant then sought to appeal both his convictions

and sentence - that appeal was considered within the context of the necessary application for leave to withdraw the pleas of guilty - held: (i) application to withdraw pleas of guilty - applicable legal principles are identified in *Senior v R* [2017] NSWCCA 220, [24]-[29]) - the common bases upon which a party may be permitted to withdraw a plea include a subjective misunderstanding as to the nature of the alleged offending; pleas entered on imprudent or inappropriate legal advice; or entered by fraud or duress - considering the issue of mental illness, the court reaffirmed the principle that a plea will be accepted when it is entered in open court "by a person who is of full age and apparently of sound mind and understanding" - the counter implication is that a court will not act on a plea if satisfied that the person is not of sound mind and understanding (*Meissner v The Queen* (1995) 184 CLR 132, 141 (*Meissner*)) - a plea should be "attributable to a genuine consciousness of guilt" (see Giles JA in *Regina v SL* [2004] NSWCCA 397, [50]) - there may be subjective motivations in entering a pela, but the accused must understand that the action being undertaken involves acceptance of guilt of the charge (see *Meissner* at 157); (ii) sentencing for old offences - referring to s19(1) *Crimes (Sentencing Procedure) Act 1999* (NSW), which required the applicant to be sentenced in accordance with the sentencing law in force at the time of the offending where relevant penalties had been legislatively increased, there remained the question whether the sentencing judge was required to "take into account the sentencing practice as at the date of the commission of the offence", when that practice had since moved adversely to an offender - in *R v MJR* ((2002) 54 NSWLR 368, [31]), Spigelman CJ held that a sentencing judge should not "refuse to take into account" sentencing practices contemporaneous with the offending - but see *RL v R* ([2015] NSWCCA 106) - there may be factors which properly affect the sentence imposed for an old offence (see [52]-[54]); (iii) whether sentence manifestly excessive - there was no basis for challenge to the sentence; leave to appeal convictions granted, appeal dismissed, leave to appeal sentences refused. [Editor's note: R A Hulme & Garling JJ agreeing with Basten JA.]
Green, AL

Ohanian v R [2017] NSWCCA 268
Court of Criminal Appeal of New South Wales
Gleeson JA, Rothman & Hamill JJ
Criminal law - the applicant was sentenced on 1 count of supply a prohibited drug (94.1 g of MDA) & sentenced to 4 years 5 months, NPP 2 years 10 months - a 25% discount for his early plea was allowed and 3 matters on a From 1 were taken into account - the applicant had prior convictions and had mental health issues which arose from his dysfunctional childhood - his father had been physically and emotionally abusive, he had been introduced to drugs at an early age and he was assessed as being "psychologically damaged" and vulnerable - he was "not a particularly intelligent individual" - the sentencing judge found special circumstances (s44 *Crimes (Sentencing Procedure)* Act 1999 (NSW) - the applicant sought leave to appeal his sentence - held:(i) whether the judge erred in concluding that the mitigating effects of his dysfunctional childhood diminished for a mature man - while the sentencing judge found that the applicant came for a dysfunctional background, he said that the "force" [of this] in a mature

man who has had ample opportunity to address his difficulties … may be diminished …" - this statement was contrary to law (see *Bugmy v The Queen* (2013) 249 CLR 571, [25]-[27], [42]-[44]) - ground 1 upheld & sentencing exercise to be exercised afresh; (ii) re-sentencing - deterrence & denunciation are important sentencing considerations in cases such as this - the quantity of drugs involved was substantial and many times more than the indicatable quantity - the applicant's breach of parole was an aggravating factor and personal deterrence and retribution had to play a significant role in the sentencing exercise - taking into account the applicant's dysfunctional childhood and his drug addiction which had resulted in significant and chronic mental health problems and allowing a 25% for the plea, the applicant was resentenced to 3 years 9 months, NPP 2 years. [Editor's note: Gleeson JA & Rothman J agreeing with Hamill J.]
Ohanian

R v PJ [2017] NSWCCA 290
Court of Criminal Appeal of New South Wales
Latham, Bellew & Campbell JJ
Criminal law - sexual offence - child in "special care" - the DPP appealed (s5F *Criminal Appeal Act 1912* (NSW)) an order permanently staying 3 counts on an indictment charging offences under s73(3)(c) *Crimes Act 1900* (NSW) - s73(3)(c) provides that it is an offence to have sexual intercourse with a child aged between 17 & 18 years, who is under the "special care" of the offender - the respondent was employed at the complainant's school as a PE teacher, but while the complainant had been in his class in 2011, 2012 and 2013, he had no contact with her in 2014 and in 2015, the year in which the offences allegedly occurred, the only contact he had with her was in the school grounds, when they spoke to each other - the prosecution submitted that the respondent had an established personal relationship with the complainant, having taught her, while the respondent contended that the section required a temporal connection between that relationship and the act of sexual intercourse - the trial judge found that there was no evidence to support the charges and ordered that the counts be permanently stayed - held: (i) the construction of s73(3)(c) - the words "established personal relationship" and "in connection with" must be given some work to do - it cannot be assumed that in every case that a tutor has provided, or is providing instruction to a 17 year old, necessarily exercise the type of authority and control over his/her pupil that gives rise to the capacity to exploit that influence - the question is one of fact and degree which depends upon the circumstances of each case - there is a latent ambiguity in the sub-section which arises because s73 criminalises sexual intercourse when the offender *is* in a defined relationship under (3) (a), (b), (c) or (d) with the victim, whereas (3)(c) appears to include a relevant relationship which has been established before sexual intercourse has taken place, but remains obscure in relation to whether the instruction that engendered the relationship must be ongoing at the time of the sexual intercourse - significant care is traditionally exercised in interpreting the phrase "in connection with" (*R v Orcher* (1999) 48 NSWLR 273, [27]-[32]) - greater care must be exercised when the phrase appears in a criminal statute which must be strictly construed - referring to *JAD v R* ([2012] NSWCCA 73) and secondary materials, "in connection with" signifies that the personal

relationship between the offender and the victim is both a result of the provision of instruction and confined to the ongoing provision of instruction - that construction of the section maintains the necessary causal connection between the occupation of the position of authority and the capacity to exploit the relative vulnerability the child - notwithstanding that the offender may have established a personal relationship with the victim over the course of providing tuition to him or her, it is the ongoing provision of instruction, or tuition, that places the offender in the position of authority contemplated by the section - criminal lability does not arise unless sexual intercourse occurs while that position of authority is being exercised by way of the provision of instruction - appeal dismissed. [Editor's note: Bellew & Campbell JJ agreeing with Latham J.]
PJ

The Queen v Nikat [2017] VSC 713
Supreme Court of Victoria
Lasry J
Criminal law - offender, who had married her husband in an arranged marriage, pleaded guilty to killing her 14 month old baby - offender had at all times been willing to enter a plea to infanticide, however the prosecution would not agree to that course until it received a report from Consultant Forensic Psychiatrist Dr Sullivan, identifying a mood and depressive disorder (an irrational mental state) - the offender spent 529 days in custody prior to sentencing and otherwise did not have a criminal record - Sentence: the pre-sentence custody was, "on any view", a period long in excess of any sentence of imprisonment that the court would have considered imposing - the prosecution submitted that the case as "a very serious example" of the offence of infanticide and that a Community Corrections Order (CCO) was inappropriate - the court held, however, that infanticide is an offence to which, because of its very nature, phrases like "very serious example" do not attach in a simplistic manner (see *R v Azzopardi* [2004] VSC 509) - if the offender had not already served the 529 days in custody, a sentence of 9 months in combination with a 12 month CCO would have been imposed - CCO of 12 months imposed.
Nikat

Munn v The Police [2017] SASC 173
Supreme Court of South Australia
Parker J
Criminal law - traffic offence - appeal - police patrolling in a police vehicle followed the appellant and attempted to have her pull over and stop - on several occasions the appellant appeared to slow, but then accelerated away from the police, until she eventually entered a dead end street - she then drove in circles around a car park until stopping - when police spoke to her she was confused and appeared to be intoxicated - her initial blood alcohol reading was 0.163% - at the police station the appellant had to be directed 6 times to submit to a breath analysis - the appellant was then charged with 2 offences against s47E *Road Traffic Act 1961* (SA): failing to comply with a direction by a police officer to stop her vehicle and refusing to comply with a police direction to submit to a breath test - the appellant relied upon medical evidence

concerning symptoms of anxiety disorder (panic attacks) - the magistrate, giving reasons *ex tempore*, convicted the appellant - the appellant appealed, submitting, inter alia, that the decision in *Meertens v Falkenberg* ((1981) 43 SASR 307 (*Meertens*)) was good law and that the magistrate erred by finding that she was required to establish the defence under s47E(4)(b) of "good cause" for her refusal (or failure) to comply with the police direction for testing, rather than proceeding upon the basis that it was necessary for the police to prove the elements of the offence under s47E(3) beyond reasonable doubt - on appeal, the respondent submitted that *Meertens* had been2 impliedly overruled by *R v Falconer* (1990) 171 CLR 30 (*Falconer*)) - held: (i) whether *Meertens* remains good law - the court rejected the submission that *Meertens* has been impliedly overruled by *R v Falconer* - the relevant ratio of *Meertens* involves two points: (a) there is an evidentiary onus on a defendant to present credible evidence suggesting that the relevant act was done involuntarily; (b) upon the defendant discharging that evidentiary onus, the prosecution must prove, beyond a reasonable doubt, that the relevant act was done voluntarily - *Police v Barber* (2010) 108 SASR 520; *Jasinski v Police* [2004] SASC 183; *Police v Ghuede* (2007) 99 SASR 280, considered - 2 issued needed to be decided by the magistrate :(1) as established by *Falconer,* whether the evidence led by the appellant concerning her alleged panic attack amounted to credible evidence suggesting an issue with voluntariness; (2) if that evidentiary burden was met by the appellant, whether the prosecution had proved beyond reasonable doubt that she understood the police direction and had wilfully refused, or failed, to comply - rather than adopting that approach the magistrate had considered whether the appellant had established, on the balance of probabilities, that she had good cause under s47E(4)(b) for refusing, or failing to comply with the police direction - in so approaching the matter the magistrate erred; (ii) The appeal & count 2 - the appeal, being by way of rehearing, required the court to apply the principles expressed in *Fox v Percy* ((2003) 214 CLR 118, 125-126) - while the court viewed and listened to the transcripts and medical evidence, the magistrate was in a far better position to determine the genuineness of the appellant's claim that she was unable to understand the police directions because she was suffering from a panic attack - the magistrate, having been led into error and not applying the correct legal test, rejected the appellant's claim - the question then was whether, when read in context, the magistrate's conclusion that the claim was "just not convincing", indicated that he would have been satisfied beyond reasonable doubt if he had applied the correct test - while not convinced of the appellant's defence, there remains the possibility that he might not have been satisfied beyond reasonable doubt that the appellant's refusal was not involuntary and his reasons do not throw light on that question - the appeal being by way of rehearin,g the court's task was to arrive at the decision that the court considered should have been made - appeal on count 2 upheld and matter remitted before a different magistrate; (iii) Appeal & count 1 - while the magistrate provided reasons for finding the appellant guilty on count 1, the question was whether those reasons were adequate - the magistrate did not specifically reject the appellant's contention that she did not realise that the vehicle following her was a police car - the magistrate was highly experienced and the court, however, found that he had taken that contention into account in determining guilt; (iii) Adequacy of reasons - the principles to be applied in determining the adequacy of judicial reasons are stated by Kirby P (as he then was)

in *Soulemezis v Dudley (Holdings) Pty Ltd* ((1987) 10 NSWLR 247, 259) - see also *R v Ricciardi* [2017] SASCFC 128, [100]-[101] - "a tedious examination of detailed evidence or a minute explanation of every step in the reasoning process" is not required, particularly in the case of an *ex tepore* judgment in a busy court (*Frohling v Police* [2011] SASC 53, [22]; *Savage v Police* [2011] SASC 13, [15]; *Chhun Sau v Cth DPP* [2009] SASC 47, [13]) - the issue was whether the magistrate gave adequate reasons for his implicit conclusion that the prosecutor had established that the appellant knew that the relevant vehicle was a police car and that she was being directed to stop - the court considered that he did; appeal in relation to count 1 dismissed. [Editor's note: The court noted that it was unfortunate that the decision in *Meertens* had not been drawn to the magistrate's attention.]
Munn

Kelly v The State of Western Australia [2017] WASCA 221
Supreme Court of Western Australia - Court of Appeal
Buss P, Beech JA & Hall J
Criminal law - police questioning - appellant was convicted of possession of about 13 kg cannabis with intent to sell or supply (s6 (1)(a) *Misuse of Drugs Act 1981* (WA)) - the appellant's fingerprints and DNA were located on items containing the cannabis - it was submitted that this evidence could have been deposited by secondary transfer - at a pre-trial directions hearing the defence applied to have excluded the whole of the appellant's electronically recorded interview with police on the basis of the unfairness discretion - the defence did not contend that the interview was involuntary, but argued that the police had used improper questioning tactics - during the interview, the police told the appellant that they did not believe him, that he was a liar and that he was, in essence, guilty - the trial judge reviewed the whole of the interview and, after noting that certain objectionable parts had been removed, concluded that the behaviour of the police officers was not oppressive , that they had adopted "open-ended" questions and that there was no indication from the appellant's demeanour that he had been "intimidated or overborne or, indeed, unduly bothered by the [police] officers" and admitted the interview - the appellant appealed, submitting that the discretion to exclude the evidence had miscarried - held:(i) voluntariness - it is a fundamental common law requirement that a confessional statement must be voluntary (*R v Swaffield* (1998) 192 CLR 159, [50] (*Swaffield*)) - it is presumed that a confessional statement is voluntary if there is nothing to suggests that it is not (*Hough v Ah Sam* (1912) 15 CLR 452, 457) - if the issue of voluntariness is raised, the prosecution bears the onus of establishing, on the balance of probabilities, that the statement is voluntary (*Wendo v The Queen* (1963) 109 CLR 559, 572-573 (*Wendo*)) - the nature of voluntariness and the applicable test for determining whether a confession is voluntary, are explained by Gibbs CJ & Wilson J in *MacPherson v The Queen* ((1981) 147 CLR 512, 519 (*MacPherson*)) - see also *McDermott v The King* (1948) 76 CLR 501, 511; *R v Lee* (1950) 82 CLR 133, 149 (*Lee*); *Tofilau v The Queen* (2007) 231 CLR 396, [10]-[13], [45], [55]-[65], [123], [245], [283], [323]) - if a confessional statement is not voluntary, it is not admissible in the prosecution's case; (ii) the fairness discretion - even if voluntary, a confessional statement may be excluded in the exercise of the court's discretion - see *Cleland v*

The Queen (1982) 151 CLR 1; *Van der Meer v The Queen* (1988) 62 ALJR 656; *Swaffield* - an accused who asserts that a voluntary confession was improperly, or unfairly obtained, or should otherwise be excluded upon a recognised basis, bears the onus of proving facts that would justify an exercise of the residual discretion in his or her favour *(Lee* (152-153); *Wendo* (565); *MacPherson* (519-520); *Wright v The State of Western Australia* (2010) 43 WAR 1, [115]) - in *Swaffield* [76] Toohey, Gaudron & Gummow JJ observed that it is not always possible to treat voluntariness, reliability ,unfairness to the accused and public policy considerations as discrete issues - *R v Ireland* ((1970) 126 CLR 321) & *Bunning v Cross* ((1978) 141 CLR 54); *Pollard v The Queen* (1992) 176 CLR 177) considered - see also *Ridgeway v The Queen* (1995) 184 CLR 19, 41-42; *Nicholas v The Queen* (1998) 193 CLR 173, [31]-[35]; *Police v Dunstall* (2015) 256 CLR 403, [63]; *R v Clarke* (1997) 97 A Crim R 414, 419); (iii) application of the discretion to exclude - here, the trial judge did not err in her exercise of her discretion to exclude the interview - the police officer's persistent questioning of the appellant was apposite and proper - their conduct was not intimidatory or oppressive - but, in any event, the residual discretion had to be exercised by balancing all of the relevant public policy interests - the nature and extent of any impropriety did not warrant the exclusion of the whole of the interview, having regard to the interest in convicting those guilty of criminal offences; leave to appeal refused, appeal dismissed.
Kelly

Maddox v Tasmania [2017] TASCCA 25
Supreme Court of Tasmania - Court of Criminal Appeal
Blow CJ, Wood & Geason JJ
Criminal law - unlawful act causing harm - severity appeal - appellant, who was extremely drunk, attacked a man with a letterbox, rendering him unconscious - the attack continued while the victim lay motionless on the ground - the victim suffered permanent brain damage and was left with a significant intellectual impairment, requiring him to have full time care for the rest of his life - daily activities such as eating, drinking and hygiene have to be performed for him and he has post-traumatic amnesia - the appellant pleaded guilty to committing an unlawful act intended to cause bodily injury (s170 *Criminal Code Act 1924* (Tas)) and was sentenced to 10 years, NPP 5 years - the appellant, who had prior convictions, but none for offences involving serious violence, appealed the severity of his sentence - held: it was of little significance that the attack did not last long, was not premeditated or planned and that the appellant acted impulsively and spontaneously, because of the extreme seriousness of the injuries suffered by the victim - the vicious nature of the attack, the number of blows struck and the permanent incapacitation of the victim made the offence particularly serious - there is something particularly shocking about an attack which persists after the victim has been rendered unconscious (*Hards v The Queen* [2013] VSCA 119, [13]; DPP (Acting) v Morgan [2015] TASCCA 11, [37]) - a number of common mitigating features were absent: the appellant was not a first offender, he was not mentally ill, while was of low intelligence, he was not intellectually impaired and he did not desist from the infliction of the injuries - from his perspective he might have been initially acting in self-defence, however that did not assist him, as the situation was of his own making -

the relevant mitigating factors were that he had no prior convictions for violence, he gave himself up to the police, he was remorseful from an early stage , he facilitated the course of justice by participating in a police interview, confessing and pleading guilty and had prospects of rehabilitation - considering his age (20 years) the appellant was not too young to understand the consequences of his actions and youthfulness is not a significant factor in sentencing for crimes involving considerable physical violence (*R v Pham* (1991) 55 A Crim R 128, 135; *R v AEM* [2002] NSWCCA 58, [97]-[98]; *KT v The Queen* (2008) 182 A Crim R 571, [25]-[26]; *Braslin & Cowen v Tasmania* [2010] TASCCA 1, [29]) - a crime against s170 that involves a specific intent to do grievous bodily harm, is generally considered as more serious offence than an offence against s172 which does not necessarily involve a specific intent (*R v Allen* [1999] TASSC 112, [2]; *Barron v Tasmania* (2010) 20 Tas R 114, [21]; *DPP v Blyth* [2010] TASCCA 10, [8]; *DPP v Blackaby* [2013] TASCCA 4, [8]; *Cordwell v Tasmania* [2017] TASCCA 14, [10]) - for many years a crime against s170 has been punished by a sentence of from 3 to 7 years imprisonment - a particularly bad contravention of s170 can justify a sentence significantly longer than 7 years - having regard to the fact that the victim lost an eye and has been permanently incapacitated as the result of brain damage and having regard to the circumstances of the attack, it was clear that a head sentence significantly longer than 7 years was appropriate - the head sentence of 10 yes was not disproportionate to the seriousness of the offending - the NPP which was equal to half the head sentence and was the shortest that could have been imposed (s68(1) *Corrections Act 1997* (Tas)) - appeal dismissed.
[Editor's note: Wood & Geason JJ agreeing with Blow CJ.]
Maddox

Sonnet 105

By: William Shakespeare

Let not my love be call'd idolatry,
Nor my beloved as an idol show,
Since all alike my songs and praises be
To one, of one, still such, and ever so.
Kind is my love to-day, to-morrow kind,
Still constant in a wondrous excellence;
Therefore my verse to constancy confined,
One thing expressing, leaves out difference.
'Fair, kind and true' is all my argument,
'Fair, kind, and true' varying to other words;
And in this change is my invention spent,
Three themes in one, which wondrous scope affords.
'Fair, kind, and true,' have often lived alone,
Which three till now never kept seat in one.

https://en.wikipedia.org/wiki/William_Shakespeare

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