

Alcohol and Mitigation: will the Green Can Stand-Up

Preliminary Remarks

The case which drew my attention to this topic (apart from the numerous matters I deal with on a daily basis where alcohol features, almost as a character in the legal drama) is the recent NT case of *The Queen v Ronald Djana* [2008] SCC 20713045. His Honour Mildren J began his findings of fact with the following:

‘On the morning of Monday 7th May 2007 which was a public holiday you sent Ronald Stevens to buy a carton of VB for you.’

The case involved a gruesome murder of a woman described by Mildren J as ‘brutal to the extreme’. Djana’s assaults against his wife were clustered around the consumption of three cartons of VB. By the third cartoon Djana’s rage textualised his wife as a ‘*slut*’ who would ‘*go with any man*’. At this point he knocked her unconscious with a rock. He ended her life by impaling her with a stick through the vagina.

The murder of his wife came shortly after Djana’s release from gaol for a previous serious assault against her. In fact, he had assaulted her on five separate occasions. Djana’s personal life was dysfunctional to the extreme. Apart from being illiterate and possessing no real skill, both his parents were alcoholics; he himself had commenced drinking at the age of 15, and by the age of 18 was displaying signs of alcohol abuse.

Objectively, Mildren J described the murder as ‘brutal in the extreme’. Djana was brandished ‘*a brutal bully with no respect to women, no control over your jealousy and no respect for the orders of the court*’.

Djana’s perceived lack of remorse and his indifference to previous court orders to address his alcoholism (which in the words of Mildren J “*came to nothing*”) only aggravated sentencing matters. Mildren J fixed a non-parole period of 27 years which is to run concurrently with the life sentence: one of the longest sentences in the NT.

What I found troubling about the case is its silences. No forensic reports were tendered. Mention was made of previous efforts at targeting Djana’s alcohol abuse, but no detail is provided as to those ‘*efforts*’. Djana had spent considerable custodial periods (more recently, in connection with his wife), yet, Mildren J provides no details as to any rehabilitation programs offered to him whilst in custody. In fact there is no discussion as to rehabilitation. Foremost in Mildren’s J sentencing remarks are the principles of general and specific deterrence and denunciation.

Scope of Paper

This paper seeks to survey the current state of law as to alcohol and mitigation, with cases across the juridical map of Australia.

The question it asks is what is the attitude of the courts towards alcohol/intoxication (when it features almost as a silent co-offender) in the crime, and when do the courts acknowledge alcohol's role, whether they respond to alcohol/intoxication as a matter in aggravation or mitigation or to given a neutral assessment. Finally, in arriving at their determination, what evidence do the courts rely upon.

I have structured this topic into 4 areas: the person (including character); mental condition (eg psychological/psychiatric disorders/mental state); the person's social environment, and finally, policy.

The General Principle:

On general principle¹ I refer you to the much cited case of *R v Coleman* (1990) 47 A Crim R where Hunt J said:

*“Only one matter of general principle was debated, and that was the extent to which the appellant was entitled to have his intoxication at the time of his offence taken into account in mitigation. The degree of deliberation shown by an offender usually a matter to be taken into account; such as intoxication involved in the offender's breach of the law. In some circumstances, it may aggravate the crime because of the recklessness with which the offender became intoxicated; in other circumstances, it may mitigate the crime because the offender has by reason of that intoxication acted out of character (refers to Sewell and Walsh (1981) 29 SASR 12 at 14-15; 5 A Crim R 204 at 207). Where the reason for the offender's intoxication is a self-administered drug rather than alcohol, the cases suggest that that fact may well be more likely to aggravate than mitigate.”*²

This mollifies the harshness of common law's motto: *“Qui Peccat Ebrius luat sobrius”* (He who does wrong when drunk must be punished when sober).

The simplicity of this general principle belies its 'devilish' complexity, especially when attempting from a defence position, to rely on it.

Is it simply a case of submitting, as Defence Counsel did, in the matter of *R v Bennett* [2007] QCA 324, (where the offender 'glasses' another male at a pub) that:

“Unfortunately for my client alcohol seems to have a very detrimental effect. He says that he is not an alcoholic and he doesn't drink that often but when he does he drinks until he has no memory and obviously lacks control. In speaking with him he is an extremely insipid young man. He is about as meek and mild as one can get. But when he takes alcohol it seems there is some Jekyll and Hyde element to his personality because he obviously behaves in a fashion which is completely out of character with his usual demeanour in society”.³

Counsel sought to argue that his client's act 'was irrational and out of character' – that a term of imprisonment should be wholly suspended so that his client could utilize the benefits of rehabilitation.

The appellate judge thought otherwise, especially since the appellant had prior convictions where alcohol featured heavily. Jones J found that if the appellant was aware of the transformation which alcohol wrought

¹ For a historical case review of this principle see *R v Dwyer* [2008] QCA 117. See also *R v Keith Honkeong Chong* [2008] VSC119; *R v Benjamin Adam Steveson* [2000] VSCA 161; *R v Sully Grasi* [2008] VSCA 51 at para 53 'Drug or alcohol induced conditions have not as a general rule required any significant moderation of sentencing considerations such as denunciation and deterrence'.

² p.327.

³ p.3.

on his character, and he was, given prior offending, then, it stands to reason that the appellant “*must have been aware of the menace which he presents when he voluntary determines to drink to excess. The risk to the community is considerable.*”⁴

Be warned, as held in *R v Munster* [2007] VSC 386 “*the resort to alcohol or any other form of anaesthetizing agent does not excuse the commission of these crimes.*”⁵

1. Character – the person

Matters are not as problematic when a person has an ‘unblemished character’ (no criminal convictions, no relevant convictions) and the offences are minor (including assaults).⁶ Or, where the offence, although serious was spontaneous and at the low end scale of seriousness, and is of such a nature where too often the offenders are people of good character.⁷

However, where the offender has a long history of alcohol abuse (combined with illicit drug abuse) the issue is whether s/he knew the adverse effects of alcohol/illicit drug abuse upon her/him. If the evidence points to self-knowledge, then, alcohol may be an aggravating feature,⁸ or treated as neutral⁹ or given little weight.¹⁰ A spontaneous criminal act when under the influence of “the devils of alcohol and drug addiction”¹¹ can also be treated as non-aggravating.¹² Despite general deterrence still applying, it may be moderated where the offender has an intellectual impairment making him cognitively delayed for his age group.¹³

Yet, policy considerations may have leniency (in particular rehabilitation) defer to principles of general and specific deterrence and denunciation, such as where the serious offences were committed in company and were planned.¹⁴

In *R v Karen Kramer* [2005] NSWCS 910, Kramer had killed her elderly parents one year prior to her admission of guilt. Police had come to her house for the purpose of making simple enquiries as to her parent’s whereabouts. They were not expecting the following confession:

The police said, "Miss Kramer, we received a telephone call from your cousin in England, she has concerns for your parents. Can you please tell me where they are?"

She said, "They're both dead."

The police said, "When did they die?"

She said. "They both died about a year ago, on the same day."

The police said, "So where are your parents?"

⁴ p.5.

⁵ Per King J at para 13.

⁶ In *Pappin v R* [2005] NTCCA 2 at para 24-25.

⁷ In *The State of Western Australia v Redman* [2009] WASCA 1.

⁸ In *Sproates v R* [2009] NSWCCA29.

⁹ In *Regina v David Eric Ballangarry* [2001] NSWSC 642.

¹⁰ In *R v Stewart* [2008] NSWSC 1359.

¹¹ *DPP v Anthony Shane Green* [2008] VSCA 36.

¹² In *Stephenson v R* [2008] NSWCCA 266; *R v DN* [2007] NSWSC 1252.

¹³ *DPP v Lovett* [2008] 268 per Maxwell P at para 37.

¹⁴ In *R v Quin* [2009] NSWCCA 16.

She said, "They are both dead."

The police said, "Are you sure?"

She said, "Yes."

The police said, "What really happened?"

She said, "I killed them both."

The police said, "Are you kidding?"

She said, "No I stabbed them both"

The police, "Miss Kramer, are you suffering from any illness?"

She said, "Yes, I'm schizophrenic, and I'm taking medication."

I stabbed them both, and put them under the house. I'm so glad you are here. I've been waiting for you to come for all this time. I keep looking out the window waiting for you to get me. I'm glad it's over, I've taken a couple of pills to calm me down.

The police said, "What about the smell?"

She said, "I used silicone to block the gaps."

The police said, "What made you think of that?"

She said, "I saw it on T.V."

The police said, "Why did you kill them?"

She said, "I was on a drunken rampage, I needed money."

The police said, "Where is the knife?"

She said, "It's in the kitchen, come and I'll show you."

Kramer suffered from schizophrenia. She was also an incorrigible abuser of alcohol. Buddin J found her to be a person of good character since her actions were clearly not premeditated, and she had no criminal record. In holding such, his Honour added 'that is no mean feat given the state of her mental health as well as her alcohol dependency.'¹⁵

When alcohol fuelled offending occurs within the context of serious sex offending limited weight is given to character as there is a "strong element of general deterrence".¹⁶ This even extends to offenders who suffer from cognitive impairment which interfere with interpreting social clues, such as Asperger's Syndrome.¹⁷

Or, courts consider the offences too 'evil.' In *SGJ v R; Ku v R* [2008] NSWCCA 258, an appeal against severity of sentence for child sex offences (15/14 counts respectively) committed by a husband and wife team against children in their care, the sentencing appellate judge remarked:

*"The offences carry very considerable criminality. The actions of both co-offenders are outrageous and disgusting. They involve gross breaches of trust of very young children left in their care, be they nieces or children left to be cared for whilst their parents were otherwise engaged. Their conduct is nothing short of evil."*¹⁸

¹⁵ para 50.

¹⁶ In *Kite v Regina* [2009] NSWCCA 12.

¹⁷ In *Hopper v R* [2003] WASCA 153

¹⁸ para 64.

SGJ had a minor criminal record and no convictions for offences of a sexual nature. On the other hand, KU was found to be a person of good character, not just because she had no criminal record whatsoever, but importantly, the appellate court found her to be under the psychological control of her husband, SGJ.¹⁹

The offences occurred within the context of illicit drug experimentation (methamphetamines) and alcohol. At first instance and at appeal, the Court made no allowance for SGJ for utilizing substance abuse as a means for coping with significant life stressors. With KU, the Court adopted a more 'cautious' approach and was more willing to make allowance for her dis-inhibiting behaviour (because of substance abuse) by factoring rehabilitation in the sentence.

Serious child pornography cases are considered likewise. In *William James Hewitt Furber v R* [2008] WASCA 233 the appellate was found with 830 still images and 18 movies of bestiality; 750 images and three movies. Sentencing judge at first instance described the material as 'abhorrent' and 'sickening.' The offender claimed that a combination of personal stress (marriage breakdown) and alcohol abuse affected his judgment. Good character was raised rejected at both first instance and before the appellate court.

Judgment

Where it is argued that the excessive consumption of alcohol has affected the offender's judgment, in a non-clinical sense, the court must be persuaded on the balance of probabilities that her/his acts were explicable solely in terms of that consumption or even substantially in terms of it.²⁰

Remorse

Normally, remorse is a category in its own right, however, I have subsumed it under this heading since it connects to the person.

Remorse may be limited if the offender appears to demonstrate a selective memory or refrains from making a full disclosure and acknowledges the events immediately preceding his attack upon the victim.²¹ The client is not assisted if the sentencing judge finds the remorse to be self-serving or staged. In the *State of WA v Hillier* [2008] WASCA 184 the respondent, late in the evening, after having consumed a number of glasses of wine went to the kitchen; armed himself with a knife; went to the bedroom, where his wife was asleep, and placed a pillow over her head and stabbed her twice, once in the right eye socket and once in the left side of her neck. Whilst stabbing her he uttered animalistic noises, repeating the word "Satan".

The respondent claimed he had no memory of his offences, however, he made admissions to Police that he intended to murder wife. Up to then the Respondent had had a blameless life. Psychiatrists concluded that he may have had an "abnormal reaction to alcohol in combination with parasomnia (a type of sleep disturbance). This argument was rejected by the appellate court. The court held that the respondent's behaviour fell within the "worst category of offending".²² The forensic report noted that when the respondent was admitted for medical assessment he had access to the internet and had downloaded information on "schizophrenia. The consulting psychiatrist found that there was no mental illness that could account for respondent's actions. The psychiatrist concluded that the respondent had subsequently fabricated symptoms of schizophrenia".²³

"Counsel for the respondent suggested, in this respect, that there was evidence of considerable remorse (the respondent had expressed remorse to the complainant and to police officers and had frequently been

¹⁹ para.101.

²⁰ In *Ta'ala v R* [2008] NSWCCA appellant pleaded guilty of murder of two persons. After killing one he commented "*I hit him for six, Don Bradman would have been proud of me*".

²¹ *R v Dalley Stuart Robinson* [2007] NSWCR 460.

²² para 18.

²³ para. 27.

observed to be crying). However, the evidence concerning remorse is equivocal. I have mentioned that Dr Pascu said that there had been no display of genuine remorse by the respondent and that he had not asked about the wellbeing of the complainant. Counsel for the respondent pointed out, in this last respect, that the respondent had been told by police that his wife was all right. However, Dr Pascu also reports that, while at the Frankland Centre, the respondent had been 'cool, calm, with stoned [sic] emotions', that he had discussed events in a 'matter of fact manner' and that he had been preoccupied with playstation games."²⁴

Rehabilitation: A Glimmer of Light

Mitigation may be considered where there is evidence which may allow the court to proceed if not with full confidence, then, at least with caution. *R v Phillip Lay* [2008] VSCA 120 involved a "savage attack" by the appellant (21 at the time) and his co-offenders who were affected by excessive usage of drugs/alcohol. The appellant pleaded guilty to one count of intentionally causing serious injury. The circumstances of the attack placed the seriousness of the offence at the upper end. The victim suffered grave head injuries.

Neave JA reiterated that

*'Members of the public are understandably concerned about violent, alcohol-fuelled attacks in public places. The gravity of the offence made it necessary for his Honour to impose a sentence which gave considerable weight to the need to denounce such conduct and to deter the appellant and others from committing similar offences. It was also necessary for his Honour to take account of the seven year term of imprisonment imposed on Mr Chong [co-offender] for the same offence, which this Court has upheld.'*²⁵

However, the above statement was tempered when the appellant, since committing the offences, had utilized his bail conditions to make very impressive attempts to address his offending behaviour. For instance, apart from ceasing abusing drugs/alcohol, he had also paid for his own participation in anger management courses, and further, initiated participation in an employment and education program. In allowing the appeal his Honour cited and applied the decision of *R v Merrett, Piggott and Ferrari* (2007) 14 VR 392 where Maxwell P said

*"[T]he sentencing court looks to the future as well as to the past. There is very great benefit to the community at large, as well as to the individuals themselves and their immediate families, if future criminal activity can be avoided. It is important that this court, by its own sentencing decisions, recognise and reward efforts at rehabilitation ... It is important to reinforce in the public mind the very considerable public interest in the rehabilitation of offenders. The preoccupation with retribution which characterises much of the public comment on sentencing is understandable, but it focuses on only one part of what the sentencing court does."*²⁶

In *DPP v Anthony Shane Green* [2008] VSCA 36 Vincent CJ dismissed the Crown appeal against the respondent stating that at first instance

*"his Honour determined in the interests of the community and those of the respondent himself would be best served by a disposition directed to increasing his 'capacity to return to life in the community free of the devils of alcohol and drug addiction which are causing him to commit these offences.'*²⁷

The Respondent had pleaded guilty to a number of counts including one count of intentionally causing injury (assaulting a woman with a steering lock over a \$25 debt). His Honour Vincent JA calculated that the respondent had "61 previous convictions arising from 19 court appearances between 4 September 1989 and 18 December 2002. They related to a number of driving and firearm offences, various forms of dishonesty and conduct against public order. Of significance, for present purposes, I note three prior convictions for assault by kicking, one for assaulting a police officer in the lawful execution of duty, one conviction for recklessly causing serious injury, two for recklessly causing injury, two for unlawful assault,

²⁴ para 28.

²⁵ para 32.

²⁶ p.403

²⁷ para 24.

*two for intentionally causing serious injury and one for common assault for which he was later convicted.*²⁸

Or, in the case of *Ugle v WA* [2007] WASC 199 where the appellate court allowed the sentence severity appeal in part, finding that while on the one hand the appellant has been provided with prior opportunity to address his alcohol and drug abuse problems and he has not done so “...*there is no clear expression of empathy or remorse in relation to the earlier sexual offences and he had denied any recollection of the circumstances in which the current offences occurred.*”²⁹

To aggravate matters, the appellant had made it clear to the probation and parole report writer that he was ‘unwilling’ to cease his use of alcohol.

Despite, these findings, his Honour Owen JA (with whom Wheeler JA agreed) found

*“the appellant represents for society a very real dilemma. He is presently a serious risk to the community and this is recognized in the fact that he must be confined to a prison for a lengthy period...but the picture is not all negative. There are glimmers of light in the darkness and hopelessness that seems to represent this person’s life. He has, for example, avoided serious offending for reasonably long periods. That, I accept, is not much. But at least it is something.”*³⁰

For the sentencing judge at first instance, there was only darkness:

“The offender has ruined the life of another human being. I accept in this case that the offending is at the high end of offending for this type of offence. It incorporates numerous aggravating factors including the prolonged and repeated sexual attacks, the ongoing sexual degradation over two and a half hours, the forced entry into the home, the brutal sexual attacks and the repeated threats. The fact that he armed himself and used physical force on such a number of the offence and that the nature of the offending was degrading and demeaning with no regard to her at all. The prosecutor [contends] that it is among the category of worst cases of its kind and I don’t disagree with that submission. However, it would not be at the very top of the category.

*“I accept in this case that there is a strong need for personal deterrence, for general deterrence and for punishment. A person who treats another human being in this way should be punished and should be seen to be punished by the community.”*³¹

2. Psychological/Psychiatric/Mental Factors

General Principles

If a causal connection is established between the mental condition and the offence, then, as explained by VSCA in *DPP v Jason Lee Weidlich* [2008] VSCA 203 (affirming principles of *R v Verdins* [2007] VSCA 102 per Maxwell P, Buchanan and Vincent JJA. and *R v Tsiaras* [1996] 1 VR 398): “*the presence of a disorder could bear upon the sentencing judge’s assessment of the individual’s motivation, level of culpability, prospects of rehabilitation, the need for specific deterrence and the appropriateness of giving full effect to the principle of general deterrence*”.³²

Nettle JA in *R v Howell* [2007] 16 VR 349 provided further clarification: “*The point of Verdins is that each case depends upon its own facts and in particular the nature of the mental condition in question ... In each*

²⁸ para 2.

²⁹ para 59.

³⁰ para 63.

³¹ para 11.

³² para 17.

*case it will depend on the facts. The theory and reality upon which the intuitive synthesis approach to sentencing is built is that each case is unique ...*³³

Finding the *Verdins* principle interpreted too uncritically, the appellate court in *R v Peter Zander* [2009] VSCA 10 per Dodds-Streeton JJA (Nettle JA agreeing) offered further guidance:

“The principles of *Verdins* do not dictate the automatic mitigation of sentence in an offender simply because he or she has suffered or is suffering from a mental illness, however severe. Rather, *Verdins* requires scrutiny and assessment, based on cogent evidence, of the relationship between the mental disorder and the offending and other relevant matters”.³⁴

*“As I previously stated (R v McIntosh [2008] VSCA 242) I am not persuaded that a sentencing judge is obliged to refer to each factor in Verdins, irrespective of its apparent relevance to the facts of the particular case and whether it has been raised by counsel, as if completing a check list”*³⁵

Where a causal connection is found, the offender may be denied any benefit in mitigation if s/he was aware of the deleterious transformative psychological/psychiatric mental effects of alcohol/illegal drugs on her/his behaviour.

In the Crown appeal *DPP v Alex Arvanitidis* [2008] VSCA 189 the forensic evidence supported the proposition that at the time of the offence, the respondent suffered a drug induced (‘ice’) psychotic episode. Although alcohol was not used, the case is relevant to our topic. The respondent pleaded guilty (amongst other charges) to reckless conduct endangering the life of a police officer and an ambulance officer. Brandishing a shotgun, the respondent believed that he had been ordered by the government to shoot at police. A police seizure followed, with the respondent firing shots at police.

The sentencing judge stated: *“it is not quite as black and white as that as I will explain later on, but in general terms I do not consider that the community would accept the position that somebody who is a frequent an long term user of a drug, and who is well acquainted with its likely consequences in terms of its effect on your psyche and your judgment and decision making, one who is well aware of those features and factors, who takes ice, I do not consider that the community would readily accept the proposition that you should be treated as having a reduced culpability because in that mental state you commit an act that you perhaps otherwise would not do and an act that is in fact a serious criminal offence”*.³⁶

On appeal, the Crown argued that intoxication was an aggravating feature. Defence submitted instead that it was a mitigating factor since the judge must be satisfied beyond reasonable doubt that the respondent was aware only with hindsight, after he was incarcerated and drug free, that he had gained an insight into his drug induced psychosis.³⁷

Rejecting the Defence’s argument, His Honour Redlich JA found that the respondent had considerable experience with drugs and in particular ice, prior to his offending. It was for the respondent to establish on the balance of probabilities that he did not know that the drug would have such effects.³⁸ This he failed to establish.

Redlich JA distinguished *Arvanitidis* from *R v Martin* [2007] VSCA 291³⁹ since *“in that case the trial judge considered the seriousness of the offending was aggravated by the fact that the applicant knew or ought to have known that the probable consequence of taking the drug would be that he would become*

³³ para 24. Affirmed in *R v Justin Dupuy* [2008] VSCA 63 per Buchanan, Ashley JJA, and Forrest AJA at para 34.

³⁴ para 24.

³⁵ para 33.

³⁶ para 20.

³⁷ para 27.

³⁸ para 34.

³⁹ In *R v Martin*, the applicant drove for more than 50 kilometres on the wrong side of the Western Hwy, endangering a number of drivers and eventually colliding with a small sedan, instantly killing the driver. According to their Honours, Maxwell P, Nettle and Redlich JJA, at the time, he was “floridly” psychotic as a result of drug-taking.

*dangerously psychotic. The applicant had been warned repeatedly that if he consumed illicit drugs he was likely to become psychotic and then would be a danger to himself and other.”*⁴⁰

*“Where there is foresight as to the probability of consequences of the general type constituted by the offending conduct, the offender’s premeditation or recklessness may become an aggravating feature of the offence. It is the degree of deliberation or awareness that taking the drug will predispose the offender to such conduct which aggravates the offence.”*⁴¹

Deprivation

In *Western Australia v Goodin* [2008]WASC 116 the offender (18 ½ years old) pleaded guilty to 5 counts including, deprivation of liberty, indecent assault with a weapon (knife), and aggravated assault. Briefly, he had forced entry into the victim’s home in the early hours while she and her eight year old son were asleep. After inflicting a series of brutal attacks on the victim in the presence of her son (at one point strangulation with a T.V cable), Goodin, released her, and returned the money he had stolen. He conversed with her, and then left. Goodin had been abusing alcohol from the age of 16. He would drink to the point of intoxication on most days. He reported alcoholic backouts, morning drinking and alcohol withdrawal symptoms. He also disclosed that he used cannabis everyday.

His Honour Em Heenan J agreed with the Crown submission that the serious nature of the offences ‘require that for both personal and general deterrence sentences of imprisonment must be imposed’ [para 36]. However, given the extreme personal circumstances of deprivation which Goodin had suffered, as detailed by forensic reports, his Honour focused on one main mitigation factor ‘which should be recognized so that the approach taken by the court should try and avoid destroying utterly any hope for rehabilitation, but instead emphasize the need for Goodin to conform to the requirements of society and endeavour to put him on the road to a fresh start once he has paid his debt to society for these offences. The more so is this a factor in the present case because of the difficulties which Goodin encountered in his youth. I have no doubt that, despite every good wish and effort by his grandparents, *the sense of deprivation* which Goodin had developed because of the loss of interest in him by his parents was a significant factor in leading him into unlawful conduct and then into the course of alcohol and substance abuse, which in my view, is the real cause of his present offending’ [para 39].

Alcoholic recidivism

The courts may refuse to reduce moral culpability where the offender has, after repeated attempts rehabilitation to address her/his alcoholism, reverted to abusing alcohol thus demonstrating an almost willful blindness to the alcohol’s destructive effects.

In *Tilyard v R* [2007] NSWCCA 7 the appellant had pleaded guilty to robbery with a dangerous weapon (hand-gun). It was a pathetically bungled robbery from a Chemist that landed him a mere \$30. The appellant told the psychiatrist that he used to purchase 10 casks of wine on each pension day before his arrest. He was described as a ‘*hopeless*’ alcoholic who drunk (he claimed) up to 6 litres of wine and a carton of beer daily. At one point he had worked as a NT police worker and also as a fire services worker. He further suffered from Post Traumatic Stress Disorder and had been previously diagnosed with Alcohol Related Brain Damage. Counsel for the appellant argued that the appellant had no insight into the effects of alcohol upon him and that it was not appropriate to consider personal or specific deterrence. This submission was rejected by the Court which found that “if he lacks insight and the ability to control his use of intoxicating liquor, as was submitted on his behalf, then it is appropriate to have regard to the protection of the community.”⁴² The Court concluded that the “appellant had been given numerous opportunities to address his alcoholism in the past and there was little to show that he would benefit from an extended parole period if he was provided the opportunity.” [30].

⁴⁰ Per Nettle JA Id para 42.

⁴¹ para 43.

⁴² para 24.

Mental functionality betrayed through offending behaviour

In *Thorn v WA* [2008] WASCA 36, a severity appeal, the appellant broke into the victim's home and committed a number of sexually related offences. The appellant was diagnosed as suffering from schizophrenia and organic psychosis. At the time of the offence he was intoxicated with a combination of morphine-like drugs. Defence Counsel argued that Thorn's rational judgments and choices were seriously compromised by his pharmacological status (which included the drug interferon). This was rejected by Buss JA (with whom Wheeler and Miller agreed) who found that Thorn's offending behaviour betrayed a purposeful and resourceful mind. Thorn had broken into the victim's home in the early hours of the morning after cutting her telephone landline. Also, he wore a facial disguise and was armed with a knife. His use of the knife within the presence of the victim's young child was deliberately designed to instill fear and compliance from the victim.

In *R v DWC* [2007] NCSWCA 1335 concerned a frenzied attack with a knife where the offender (DWC) killed his ex-partner, KAO, aged 35, and her father, SO aged 59, and wounded her mother, DO aged 54 and her daughter, AO, aged 13. He also assaulted his son, DJO, aged 14. Prior to the offence, DWC had been drinking beer with his mate at his local bowling club. The previous day he had made known his anger against his daughter and former wife over an allegation of sexual assault against his daughter which the police were concurrently investigating. Evidence was led by DWC's psychiatrist that he may have suffered frontal lobe damage from long term alcohol abuse. Psychiatric evidence led by the Crown

"found nothing to suggest any major disorder but did note that on neuropsychological testing he had a minor impairment in his verbal and visual memory skills likely to be related to his substance abuse. There was nothing in the offender's background of any significance....In determining that analysis [the psychiatrist] took into account that the offence was impulsive and triggered by a movie that mirrored issues that were pre-occupying his thoughts at the time. The offender's mental state was characterised by feelings of rage and may have been dis-inhibited by alcohol."

Howie J was swayed by the fact that DWC showed purposefulness in his actions. After returning from the bowling club, and sat down to watch T.V. The early hours of the morning DWC decided to leave his home and walk the nine kilometers to reach his ex-wife's home. *"He took with him a kitchen knife and a pair of canvass gardening gloves. He gained entry to the premises through the garage after lifting the roller door. All the occupants were asleep."*⁴³

In the case of *DPP v Jason Lee Weidkich* [2008] VSCA 203 the appellant had pleaded guilty to intentionally causing serious injury, threat to kill, and discharge of a prohibited weapon. At the relevant time the appellant was highly intoxicated. The appellant had been drinking most of the afternoon and evening with his partner. He was jealous that she had not given him much attention. Out of jealousy, he took an electric cattle prod and started jabbing her in the check. She heard him say "It doesn't work." Although she managed to escape, the appellant was able to chase her down. The appellant caught up with V smashed her head against the concrete and attempted to gouge out her eyes. On grabbing her, the appellant attempted to gouge out her eyes. After the attack, he claimed no memory of what occurred.

Forensic evidence suggested that the appellant may have been suffering from a serious depressive disorder or psychotic disorder which at that point of time was not clearly diagnosable as schizophrenia or a drug-induced psychosis. However, no psychiatrist could comment on his mental state at the time of the offence.

Vincent and Weinberg JJA and Mandie AJA relied on the following critical exchange with the between the psychologist and the Crown:

PROSECUTOR: He told you on this day he'd been drinking alcohol all day and had cannabis. Is that right?

MATTHEWS: Yes.

⁴³ para 12.

PROSECUTOR: That is going to be a great dis-inhibitor to somebody who has an anger problem. Do you agree?

MATTHEWS: No. A dis-inhibitor to a range of behaviours but also an exacerbator of any psychiatric condition that he's suffers from.

Dismissing the appeal, their Honours found that the appellant had shown purpose in his actions. The Court found *"the nature and extent of any relationship between respondent's mental state and his offences can be seen to be at best a matter of conjecture"*⁴⁴

His actions appeared purposeful and self-aware when he expressed disappointment that the cattle prod was not working. He pursued her relentlessly. He repeatedly attempted to prod her whilst crying out 'Fuck you.' In his rage he screamed more than once "I'll rather to to gaol for it this time".

In *R v Robert Victor Lange* [2007] SASC 243 the appellant entered the victim's house with a pair of green coloured rubber dishwashing gloves on his hands. He had tucked a knife behind his back. On seeing the female occupant he blurted out 'You're seen my face. I'm going to kill you'. A struggle ensued and the occupant managed to escape and alert police, but not without receiving serious injuries to her hands/arms (from attempting to grab/stop the knife). Psychiatric evidence was tendered on behalf of the Appellant which indicated that he suffered from cerebral atrophy after many years of alcohol abuse. The appellant claimed his daily consumption at one point was 20 pints of beer and 1 bottle of port per day. The court found that although dis-inhibited by alcohol, the appellant demonstrated a capacity for self-restraint.⁴⁵

In the notorious case of *Jessica Ellen Stasinowsky v WA* [2009] WA SCA 20 a severity sentence appeal for willful murder, the appellate court accepted that at the relevant time of the offence, the appellant (a young woman without prior convictions) had consumed a large quantity of alcohol (including ½ bottle of champagne) with 'Stilnox', a relaxant. Moreover, the consulting psychiatrist found the appellant to have a "hardline personality disorder with a concomitant history of poly-substance abuse including alcohol, cannabis, amphetamines opiates, and prescribed medications".⁴⁶ The notoriety of the case is captured in the appellant's replies to a security support officer:⁴⁷

I said "What happened and why was the girl killed"?

She said "We killed her because' she was really annoying and causing shit"

I said "Who was she, how did you know her"?

Jessica said "She was a runaway; we let her stay with us".

I said "How old was the girl"?

She said "16"

I said "How long had you known her for"?

She said "A week".

I said "What happened to her. I mean how did she die"?

She said "We caved her head in and strangled her".

I said "Why did you do that, wasn't she your friend"?

She said "Yes but she caused shit and she wouldn't leave it was all her fault".

Valerie was still hitting her, she wouldn't die so I strangled her.

I said "What did you strangle her with"?

⁴⁴ para 21.

⁴⁵ para 66.

⁴⁶ para 9.

⁴⁷ Para 116.

She said "With a chain".

I said "Where did you get the chain from"?

She said "From around my waist".

I said "Was it like a dog chain"?

She said "Yes I used it as a belt. She wouldn't die we must have hit her about 180 times".

I said "See what happens when you mix alcohol and drugs it makes you do things you normally wouldn't do".

She said "We would have killed her anyway, she was really annoying ...

The court did not dispute the appellant's fractured social background and psychological make-up and her bodily pharmacology (alcohol mixed with 'Stilnox' where her Counsel submitted because of its relaxing effects impaired her ability to judge the seriousness of the behaviour). The appellant claimed that at the time of the offence she was in an almost 'dissociated state', but despite this, it was found that she had enough presence of mind to turn up the volume of music to drown out the sounds of the continual hitting of the deceased with a cement slab.⁴⁸

Touching Credulity

In *Regina v MSK, Regina v Mak, Regina v Mmk* [2006] NSWSC 237, MSK and his brothers were sentenced on a number of charges of sexual assault. Counsel for MSK on the basis of a psychiatric report claimed that whenever his client drank alcohol to the point of intoxication he heard "*Satanic*" voices telling him to do "bad things". This was particularly disturbing for the offender, as his religious background prohibited him from drinking alcohol.

His Honour Hidden J found MSK to be 'a witness of no credibility' and rejected the submission that alcohol was a catalyst for demonic voices. In his sentencing remarks Hidden J states "*I accept that the offender was intoxicated at the time of the offences, although to what extent I cannot say. Of itself, however, that does not afford any significant mitigation of the seriousness of his crimes.*"⁴⁹

3. Social

In *R v Fernando*,⁵⁰ his Honour Wood CJ, while reaffirming the general principle that drunkenness is not normally an excuse or mitigating factor, acknowledged that where alcoholic abuse derives from and is against a defined and specific social environment then it may be taken into account as a mitigating factor. Wood CJ was not extending common law but better defining its position towards aboriginals and alcohol.⁵¹

Fernando continues of a more "constructive approach" to sentencing, as recognized in the *Queen v Charlie, Uhl and Nagamarra*, WASC (unreported; 14th August 1987). Burt CJ in final sentencing remarks, on a pack rape case, committed by three aboriginal men against a woman said:

⁴⁸ para 125.

⁴⁹ para 48.

⁵⁰ 76 A Crim R 58; No.70147 of 1991, 13th March 1992, BC 9202738

⁵¹ Regarding aboriginals, the courts have long made allowances for their social-economic disadvantage, especially when alcohol features large for instance: *The Queen v Iginiwuni*, NTSC (unreported 12th March 1975 per Muirhead J pp. 23-5); *Jamieson v The Queen*, Supreme Court of Western Australia; unreported; 7th April 1965; *The Queen v Lee*, NTSCC No 221 of 1974, per Forster J pp. 13-14). In *Friday* (1985) 14 A Crim R 471 per Campbell CJ at 472 Campbell CJ stated: "Crimes of violence by aboriginals, when they occur on aboriginal reserves and after the consumption of alcohol, have been dealt with by the courts in this State more leniently or sympathetically than has been the case with offences of a similar nature committed by Europeans and people of non-aboriginal extraction."

"It is apparent to me, indeed it is obvious that I am dealing with three comparatively young aboriginal men, each of whom has an identifiable tribal community. Over the last ten years or so, each of you has become addicted to alcohol which is in the process of destroying you, both your culture and you personally, and I do not hold you altogether responsible for that. But it is clear to me that your present condition cannot be constructively dealt with by the criminal law in its normal operation; by that I mean your being locked up in a conventional prison. Imprisonment in that character for each of you, I think, is essentially negative, and that has been demonstrated by your record to date. A more constructive approach is called for, and the best that the criminal can do is to structure a sentence which will have within it an element of punishment but will at the same time provide the best chances for your rehabilitation. The only way that can be achieved, I think, is through supervise and strictly controlled parole so enabling you, each of you, under strict supervision and away from alcohol, to serve a significant period of your sentence in your own community and under the supervision of your elders with the help of a parole officer."⁵²

Unfortunately, the sentencing principles which *Fernando* represents have been distinguished to ever narrowing factual propositions. For example, the following indicia attaching themselves to an aboriginal person would be held to be outside the *Fernando* principles (selection of NSWSC cases):

- S/he completed formal education (Yr 10); her/his are parents employed in significant jobs; s/he had opportunity to participate in normal community and social activities;⁵³
- S/he completed formal education (Yr 12); after leaving school found employment as a labourer; enjoyed good physical and mental health;⁵⁴
- S/he suffered a disjointed education; left school at year 9 without mental health issues; experienced a turbulent and unsettled childhood that exposed them to violence and substance abuse from an early age; continued to abuse alcohol and marijuana for much of her/his life, factors said to contribute to her/his aggressive responses to situations; said to lack the social and cognitive resources to cope with living in society; however, the *Fernando* principle is given little weight because of an extensive criminal record that included DVO breaches;⁵⁵
- S/he had a good start in life with intelligence and good opportunities in school and tertiary courses, all backed up with the support of his family; turned her/his back on the opportunities and resorted to a life of drugs, dishonesty and violence. "He alone is responsible for the decision he made."⁵⁶
- Commenced drinking at an early age and progressed to the misuse of drugs; lamentable background but in no way unique or restricted to any particular community group;⁵⁷
- S/he had self-knowledge that alcohol was a problem, and that when s/he drank too much that s/he became angry and violent;⁵⁸

In *Ryan Sunfly v The State of Western Australia* [2009] WASCA 22, an under aged unlawful sex case (the victim being a consenting 13 year old where in her parents were aware of the relationship but opposed to a sexual relationship with the appellant: a community adult male aged 22), the sentencing judge acknowledged that the appellant's dysfunctional social background: a remote aboriginal community "in which children are not adequately protected, nurtured, guided and disciplined so as to provide them with the best opportunities to become responsible law-abiding adults who are themselves equipped to discharge the responsibility of raising children."

⁵² Cited and approved by Malcolm CJ at p.8 in *Mark Rogers v The Queen*; *Albert Murray v The Queen* WASCCA 72 of 1989, 3rd & 4th August, and 14th September 1989.

⁵³ Per Hislop J at para 24, *Anderson v R*, 21st August and 21 September 2008, BC200807959.

⁵⁴ Per Bell, Latham, Fullerton JJ at para 6, *Geoffrey Mathew Croaker v R*, 30th September and 7th November 2008, BC200809817.

⁵⁵ Per Hulme J at para 44, *R v Boney*, 2nd June and 17th December 2008, BC200811267.

⁵⁶ Per Barr J at para 14, *R v Mark Dempsey Knight* 24-28 November 2003, 12th March, 30th April & 11th June 2004, BC 200403515

⁵⁷ *McCull JA, Howie and Shaw JJ* at para 68 *R v Mitchell Newman*; *R v Simpson* [2004] NSWCCA 102.

⁵⁸ Per Berman AJ at para 38 *R v Ian Thomas Darcey* 13 & 15th November, 14th December 2005 BC 200710957.

However, he qualified such recognition by further stating:

*“Such deficits and disadvantage may explain the appellant’s offending behaviour as an adult and the complainant’s willingness to engage in sexual relations with multiple partners. On the other hand, there is likely to be relatively greater incidence of sexual abuse of children in dysfunctional communities...[however] I see no reason in principle why the weight or why the weight ordinarily given to general deterrence should not be reduced because of disadvantage of the appellant. That would reduce the protection regarded for this generation of children”.*⁵⁹

The need for protection of women, children and the weak from violent offenders (mostly adult males) was forcefully stated in *The Queen v Innes Wurrumara* [1999] NTCCA 45. In their joint sentencing decision, Mildren, Thomas and Riley JJ stated:

*“The courts have been concerned to send what has been described as ‘the correct message’ to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so.”*⁶⁰

This position was approved, with added force, in *R v Raymour Bara* [2006]NTCCA 17 where Martin (BR) CJ, Angel and Southwood JJ stated that ‘[g]eneral deterrence was of particular importance in the exercise of the sentencing discretion.’⁶¹

4. Policy Concerns

Domestic Violence

In *Shaw, Jason Rober v R* [2008] NSWCCA 58 the appellant drank not an insignificant amount of alcohol. His drinking continued while angrily brooding over denial of access to his son by ex-partner. He decided to stage an aggravated break and enter in the course of which he committed malicious damage. Grove J (McClellan CJ and Fullerton J agreeing) “this Court has made it abundantly clear that in sentencing for DV offences specific and general deterrence assume a particular importance as does the necessity that the sentence imposed be both protective of the community and a powerful denunciation by it of the offender’s conduct.”⁶²

Sexual offences

Sexual offences, especially when they ‘shock the public conscience’ demand the heavy hand of deterrence and clear denunciation. In *R v Rindjarra* [2008] NTCCA 9, the offender took out his revenge on his defacto partner (who had called the police over a DV incident) by kidnapping 10 year old her daughter. He then proceeded to digitally rape her, which seriously tore her vagina.

The respondent was described by his Honour Southwood J as having spent most of his life “either in prison or in the long grass drinking alcohol” [para 51]. His Honour described the respondent’s criminal actions as ‘*the stuff of a nightmare. It is the kind of crime that courses fear in the community. What the respondent did to this young victim was callous and heartless.*’⁶³ The offender’s own dysfunctional background was given “*only limited weight by way of mitigation when viewed against the gravity of [her/his] criminal conduct.*”⁶⁴

Violence in Public Places

⁵⁹ para 23.

⁶⁰ para 26.

⁶¹ para 17.

⁶² para 24. Applies the leading NSW case on DV- *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 at [65]-[88].

⁶³ para 96.

⁶⁴ para 98.

Unless the circumstances are exceptional, general/specific deterrence prevail when offenders, dis-inhibited by alcohol, stage their violence within the public domain.⁶⁵

The principle extends to youth. In *DPP v Kristofer Simpas; DDP v HR* [2009] VSCA 40 the respondents (both 17 years at the time of the offence) pleaded guilty to manslaughter. Both killed a male “*by a voluntary, conscious and deliberate attack with the use of a broken bottle, in the course of a violent escapade, in a public place, regardless of the safety of others.*”⁶⁶ At the material time, the respondents were intoxicated. Both had developed problems with managing their alcohol consumption.

Nettle JA found persuasive merit in the Crown’s submission that in this case the “*primacy of rehabilitation in sentencing youth offenders (as essayed in cases such as R v Mills [1998] 4 VR 235) must yield to the demands of denunciation and deterrence to the effect that youth and the rehabilitation of young offenders are only some among a number of matters to be taken into account and that there are occasions on which those factors must give way to the achievement of other objectives of sentencing law.*”⁶⁷

His Honour was forthright as reason for holding such a position:

“*...youth who roam the streets at night, charged with alcohol and participating in serious acts of criminal violence will not be excused on the basis of youth or immaturity. The nature and the prevalence of that kind of conduct is such that society properly regards it as intolerable and, in those circumstances, the court is bound to do what it can to make clear that such offending will not be tolerated. To that extent, the ameliorating effects of youth and rehabilitation must yield to the needs of deterrence.*”⁶⁸

Vickery AJA concurring with Nettle added “*The moral culpability of the respondents should not be here reduced by reason of their drunken condition.*”⁶⁹

5. Other

Extra curial punishment and mitigation

In *R v Hannigan* [2009] QCA 40 a witness saw a police officer punch Hannigan through his car side window. Unfortunately Hannigan was at the time too intoxicated to remember. Defence Counsel raised the principle in *R v Daetz* (2003) 139 A Crim R 398 at 62 for purposes of sentencing which holds that where an offender has suffered ‘extra-curial punishment’ that this may be considered in mitigation. Rejecting this argument, Chesterman JA held

“*...Daetz has no application. Assuming that the applicant was punched several times in the face by the arresting constable, causing injuries photographed, the suffering inflicted was not such as to bring the case within the principle. The injuries were minor, not serious. Their effect went unnoticed and would in any event been transient...*”⁷⁰ and adds, “*...the applicant felt no pain from the blows because he was effectively anesthetized by the alcohol he had consumed and who has no persisting symptoms to remind him of the folly of driving when drunk. The applicant cannot be regarded as having undergone punishment at the hand of the police officer when he himself was oblivious to the castigation and its aftermath.*”⁷¹

⁶⁵ *R v Keith Honkeong Chong* [2008] VSCA 119 per Obsorn AJA at para 28.

⁶⁶ para 8.

⁶⁷ para 6.

⁶⁸ para 13.

⁶⁹ para 103.

⁷⁰ para 24.

⁷¹ para 25.