“One Punch Manslaughter”, an aspect of sentencing in a modern society

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“HAIL TO THE CHIEFS!”

1 In 1683, George Jeffreys, then Chief Justice of Chester was appointed by King Charles II as Lord Chief Justice of the King's Bench. He became known as the "Hanging Judge" following the failure of the Monmouth Rebellion and the sentences imposed at the trials of the supporters of the Duke of Monmouth at the "Bloody Assizes".

2 James Scott, 1st Duke of Monmouth, an illegitimate son of Charles II, attempted to overthrow King James II but was defeated at the Battle of Sedgemoor on 6 July 1685.

3 In total 1381 people who were accused of participating in Monmouth's Rebellion were tried, most were convicted and sentenced to die. Of this number about 200 were hanged, most of the remaining convicted offenders were transported to the West Indies for indentured servitude. Chief Justice Jeffreys reportedly bragged that he had hung more traitors than all his predecessors together since the Norman Conquest.

4 It is said that the Chief Justice took great pleasure in pronouncing the sentences he imposed. He would pronounce in fine detail the suffering that the offender would experience. For instance, when he sentenced a woman to be whipped at the cart's tail, he shouted;

> "Hangman, I charge you to pay particular attention to this lady! Scourge her soundly man. Scourge her till the blood runs down!"

5 His sadistic delight in detailing the punishments he imposed was not limited to women. As the historian Thomas Macaulay noted, Jeffreys "*always appeared to be in a higher state of exhilaration when he explained to Popish priests that they were to be cut down alive, and were to see their own bowels burned*."

6 In our modern society, I think that it is fair to say that there are no judges who are as harsh, vindictive and unfeeling as Chief Justice Jeffreys. Nevertheless, judges are mere mortals and notwithstanding the generally high level of

judicial competence, there will sometimes be human weakness which affect judgment. At the Old Bailey in 1981, an English judge told a defendant that she would be put on probation for her criminal offence, rather than be sent to prison because "*you have caught me on a good day… I became a grandfather this morning again*".

7 Perhaps the desire to capture the festive spirit explains what has seemed to me over the years, to be an increase in sentence appeals and bail applications close to Christmas. When I was asked as Chief Judge of the District Court to speak at this conference, I thought that I would deal with an important and difficult area of the work of District Court Judges – sentencing. You may be interested to know that in 2013, the Judges of the District of NSW imposed 2,451 sentences.

8 The purpose of this paper is not to give an overview of sentencing practice in New South Wales in 2014 – that would be too vast a task but I propose to concentrate on a particular area that has been controversial in the last twelve months.

9 Before I embark on that journey, it is important to recognise that the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides a sentencing regime for an offender committing a New South Wales offence. When sentencing for a Federal offence, the *Crimes Act 1914* (Cth) applies. Speaking generally, notwithstanding these statutory regimes, common law principles continue to be of relevance.

10 Key sections in the *Crimes (Sentencing Procedure) Act* are s 3A which sets out the purposes of sentencing and s 21A which provides for a list of aggravating and mitigating factors that a sentencer may take into account in setting an appropriate sentence. Part 4 Division 1A of the *Act* introduced standard non-parole periods, for the offences in the Table located at the end of s 54D.

11 Many of you would be aware that the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 held that the approach taken by the Court of Criminal Appeal in *R v Way* (2004) 60 NSWLR 168 should not be applied. In short, the High Court determined in a single judgment that whilst a court is to continue to assess the objective seriousness of the offence, there was no need to "classify" the offending or assess whether it falls in the middle range of objective seriousness. Furthermore, the Court of Criminal Appeal erred by treating the standard non-parole period as having determinative significance in sentencing the appellant.

12 The *Muldrock* decision has lessened the role accorded to the standard non-parole period in the sentencing exercise: *R v Koloamatangi* [2011] NSWCCA 228 per Basten JA at [18]-[19].

13 It is worth dwelling for a moment on the seven purposes "for which a court may impose a sentence on an offender" that are detailed in s 3A *Crimes (Sentencing Procedure) Act*. They are:

> (a) *to ensure that the offender is adequately punished for the offence.*

14 Section 3A(a) incorporates the principle of proportionality which requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: *Veen v The Queen* (No 2) (1988) CLR 465 at 477.

15 I think that we might all agree that the horrific methods by which Popish priests met their death when sentenced by Chief Justice Jeffreys paid no regard to the principle of proportionality.

> (b) *to prevent crime by deterring the offender and other persons from committing similar offences.*

16 Section 3A(b) enshrines the common law principles of specific and general deterrence. General deterrence rests on the assumption that the harsher the punishment the greater the deterrent effect. The cruelty of Chief Justice Jeffreys' punishment of Popish priests undoubtedly contained an element of general deterrence.

(c) *to protect the community from the offender*

17 Section 3A(c) reflects the common law principle that a purpose of punishment was to protect the community from crime. However, whilst the protection of the community is a consideration, a sentence should not be increased beyond what is proportionate to the crime merely to protect the community from the risk of further offending: *Veen v The Queen* (No 2) [1988] HCA 14 at 472.

18 Chief Justice Jeffreys' sentences of Popish priests were likely intended to protect England from the return of Catholicism but the cruelty of the sentences extended beyond what was appropriate to the crime.

(d) *to promote the rehabilitation of the offender*

19 Section 3A(d) is aimed at re-establishing the offender as a law-abiding citizen in the community: *R v Pogson* (2012) 82 NSWLR 60. This is sometimes addressed by concentrating on the underlying issues that may have been a factor in the offending, such as excessive alcohol use, drug addiction or anger management.

20 The sentences imposed by Chief Justice Jeffreys for Popish priests did not contain an element of rehabilitation. However, in a modern society rehabilitation is an important consideration at the time of sentencing.

(e) *to make the offender accountable for his or her actions.*

21 Section 3A(e) incorporates the long-held principle that an offender should be accountable for what the offender has done. Chief Justice Jeffreys' sentencing certainly emphasised accountability.

(f) t*o denounce the conduct of the offender.*

22 Section 3A(f) incorporates the important sentencing principle of public denunciation of the unlawful conduct of an offender. Chief Justice Jeffreys' sentencing contained a strong element of public denunciation of the efforts of Popish priests to restore Catholicism to England.

(g) *to recognise the harm done to the victim of the crime and the community.*

23 Section 3A(g) at the very least reflects the obligation of a sentencer to take into account the impact of the offending on the victim for the purpose of determining the culpability of an offender.

24 The impact these purposes of sentencing will have in a particular case will essentially depend upon the nature of the offence and the personal circumstances of the offender. The purposes overlap, they sometimes point in different directions but they are guideposts in the Judges' discretionary decision in imposing an appropriate sentence: *Veen v The Queen* (No 2); *R v Engert* (1995) 84 A Crim R 67.

One punch manslaughter

25 What I wish to discuss with you this morning are the sentencing principles for so-called "one punch manslaughter" offences. These offences commonly involve a single punch or push causing the victim to fall to the ground striking his or her head thereby sustaining fatal injuries. The offender is not charged with murder as the mental elements of murder cannot be established. The Crown cannot prove that the offender had an intention to kill, or an intention to cause grievous bodily harm or recklessness (which requires the Crown to

prove beyond reasonable doubt that the offender turned his mind to the possible consequences of his action before he acted).

26 The maximum penalty for manslaughter is 25 years imprisonment. There is no standard non-parole period for manslaughter.

27 Late last year, there was a deal of controversy following the sentencing of Kieran Loveridge who punched 18 year-old Thomas Kelly to the head with a "king hit". The agreed facts were that as Mr Kelly and his companions were peacefully walking along Victoria Street Kings Cross at about 10.03pm, the offender who had been standing against the wall of the Mercure Hotel took two or three steps towards Mr Kelly and for no reason, and without notice, punched Mr Kelly to the head whilst he was speaking on the telephone. The punch knocked Mr Kelly to the ground, causing him to hit his head on the pavement. He sustained a severe skull fracture and severe brain injuries, which proved to be fatal. Mr Kelly died two days later.

28 The offender pleaded guilty to manslaughter. He was also charged with offences of violence towards other victims on the same night which included elbowing another member of the public above the left eyebrow lacerating his skin and drawing blood in Victoria Street a few minutes before Mr Kelly was attacked. This attack was also without warning and for no apparent reason. Mr Loveridge's victim, just like Mr Kelly was a stranger to him. For this offence, the offender was charged with assault occasioning actual bodily harm.

29 For the offence of manslaughter, the sentencing Judge sentenced the offender to imprisonment comprising of a non-parole period of 4 years with a balance of term of 2 years. The total effective sentence of imprisonment (which included the other offences) involved a non-parole period of 5 years and 2 months with a balance of term of 2 years.

30 When considering this sentence it should be borne in mind that the sentencing Judge allowed a 25 per cent discount for the utilitarian benefit of the pleas of guilty. His Honour was also obliged to apply the principle of totality in accordance with *Pearce v The Queen* (1998) 194 CLR 610.

31 It was accepted that the offender was well affected by alcohol at the time of his offending. The offender was 18 years old at the time of the offence. He was of Aboriginal descent and his parents had separated when he was of a young age. The psychological report disclosed that the offender displayed rebellious behaviour at school. His high school education had been dislocated, partly due to expulsion for his involvement in juvenile criminal activities. He had shown promise as a rugby player and reported attending school and undertaking a traineeship at the time of the offences.

32 Psychological testing showed that the offender was not suffering from an intellectual disability or a global limitation in intelligence. However, his intelligence was in the lower half of the average range and he was literate to an adequate degree.

33 The offender's prior criminal history disclosed offences of violence. An aggravating factor was that he had been ordered to undertake supervised probation by the Children's Court for an offence of assault occasioning actual bodily harm a month before he attacked Mr Kelly. The offender was therefore subject to conditional liberty at the time of the manslaughter.

34 The sentence imposed by the sentencing Judge was widely criticised as being too lenient. Paul Sheehan in an article in the Sydney Morning Herald entitled *Judge with no sense of real world* wrote that the Judge "*paid lip service to the grief of the victims and the standards of society, then imposed a sentence that made a mockery of both*". Mr Kelly's father was reported as saying the verdict had left his family "*cold, shocked and just beyond belief*".

35 A few days after the sentence on Mr Loveridge was imposed, the Director of Public Prosecutions announced that he would appeal against the sentence on the basis that it was manifestly inadequate. However, this did not stop the strong expressions of public disquiet about the leniency of the sentence. Over 60,000 people were reported to have signed a petition for sentencing reform so that there would be tougher sentences for acts of drunken violence.

36 You may also recall at about this time only metres away from where Mr Kelly was struck in Kings Cross, Daniel Christie, an 18 year old, was attacked. Mr Christie sustained a fractured skull and succumbed to his injuries 11 days later.

37 King hit punches have claimed 90 lives since 2000, according to the Monash University's forensic medicine department. The study found NSW had the highest toll - with 28 victims. The current law for manslaughter was said to be "outdated" and significantly out of step with community expectations.

New offences of assault causing death

38 On 21 January 2014, the then NSW Premier Barry O'Farrell announced plans to introduce mandatory minimum sentences for violent offences committed while intoxicated in NSW. The then Attorney-General Greg Smith SC announced that one of these new offences would be introduced to cover situations where assaults caused death and would carry a maximum penalty of 20 years imprisonment. Sections 25A and 25B *Crimes Act* 1900 were subsequently enacted and commenced on 31 January 2014. Section 25A creates the basic form of the new offence of assault causing death. It provides a person is guilty of an offence if:

> (a) The person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person; and
> (b) The assault is not authorised or excused by law; and
> (c) The assault causes the death of the other person

The maximum penalty for the offence is 20 years imprisonment. The standard non-parole provisions do not apply to this offence.

39 The real sting in the tail of this legislation concerns assaults causing death when the offender is found to be intoxicated: s 25A(2) *Crimes Act*. This is the aggravated form of the offence of assault concerning death. An offender

above 18 years of age if found guilty of this offence is liable to a maximum term of imprisonment for 25 years (the same maximum as manslaughter). However, s 25B(1) requires the court to impose a sentence with a non-parole period of not less than 8 years for a person guilty of an offence under s 25A(2). The law now provides for a person guilty of an assault causing death when intoxicated to be sentenced to a mandatory minimum of not less than 8 years imprisonment.

40 Provision is made under s 25A(5) for defences under s 25A(2) but not s 25A(1). It is a defence for an offence under s 25A(2) if the intoxication of the accused was not self-induced (within the meaning of Part 11A *Crimes Act*) or if the accused had a significant cognitive impairment at the time the offence was alleged to have been committed. Cognitive impairment is defined in s 25A(10) to include an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia, a mental illness or a brain injury.

41 It is important to note that s 428E *Crimes Act* has been amended so that where evidence of intoxication results in the accused being acquitted of murder, self-induced intoxication cannot be taken into account in determining whether the person has the requisite *mens rea* for an offence under s 25A. Offences under s 25A(1) and 25A(2) are not offences of specific intent for the purpose of intoxication under Part 11A *Crimes Act*.

42 In order to prove intoxication for the purpose of the aggravated offence under s 25A(2), s 25A(6)(a) provides that evidence may be given of the presence and concentration of any alcohol, drug or other substance in the accused's breath, blood or urine at the time of the alleged offence as determined by an analysis carried out under Part 10 Div 4 *Law Enforcement (Powers and Responsibilities) Act 2002*.

43 Section 25A(6)(b) provides that an accused "*is conclusively presumed to be intoxicated by alcohol if the prosecution proves in accordance with an analysis carried out in accordance with Division 4 of Part 10 of the Law Enforcement*

(Powers and Responsibilities) Act 2002 that there was present in the accused's breath or blood a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood". This reading is equivalent to the prescribed concentration of alcohol for a high range drink driving offence.

44 Schedule 2 of the *Act* inserts Pt 10 Div 4 into the *Law Enforcement (Powers and Responsibilities) Act 2002*. Division 4 creates special police powers for testing accused persons for intoxication for an offence alleged under s 25A(2) or if a police officer believes that a person would be liable to be charged with an offence under s 25A(2).

45 Section 138F(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides a breath test or breath analysis may only be required to be undertaken within 2 hours after the commission of the alleged offence. Section 138G(3) provides a blood or urine sample may only be required to be provided within 4 hours after the commission of the alleged offence.

46 Section 25A(7) provides that in trials for murder or manslaughter the jury can return an alternative verdict for offences under ss 25A(1) or 25A(2). Where an accused is tried for an offence under s 25A(2) the jury can return an alternative verdict of guilty to an offence under s 25A(1).

47 These offences under s 25A do not require the Crown to prove beyond reasonable doubt as in a charge for murder that, at the time the accused did the deliberate act which caused the death of the deceased, the accused had an intention to kill or to inflict grievous bodily harm upon the deceased or that the act which caused death was done with reckless indifference to human life.

48 Prior to the introduction of the offences under s 25A, an accused was often charged with manslaughter by an unlawful and dangerous act where a single blow caused death. In order to establish this offence, the Crown must prove beyond reasonable doubt:

1. The death of the deceased was caused by an act of the accused.
2. The accused intended to commit the act that caused death.

3. The act of the accused was unlawful; and
4. The act of the accused was dangerous.

49 The offences under s 25A do not require the Crown to establish beyond reasonable doubt that the accused's act was dangerous. An act is dangerous if a reasonable person, in the position of the accused at the time the act was committed, would have realised that the act exposed another person, whether it be the deceased or not, to a risk of serious injury.

50 Section 21A(5AA) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was also enacted which provides that "*self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor*" in determining the appropriate sentence. This provision does not alter the approach that had been ordinarily taken by sentencing courts to self-induced intoxication. Courts around Australia have consistently rejected the proposition that intoxication can mitigate the seriousness of an offence or reduce the offender's culpability: *Hasan v The Queen* [2010] VSCA 352 at [21]; *R v Loveridge* [2014] NSWCCA 120 at [220].

51 Without delving deeply into the debate about the efficacy of mandatory sentencing, there is considerable opposition to the imposition of mandatory minimum sentences as it is said that they have not been found to reduce crime, they reduce the incentive to plead guilty, offenders go to prison for longer increasing the cost to tax payers and society and as mandatory sentencing does not consider the circumstances of the offence, sentences may be imposed which do not fit the crime – which is a fundamental principle of justice. The exponents of mandatory sentences argue that the minimum sentence reflects community expectations.

52 The *Crimes Amendment (Intoxication) Bill 2014* which was passed by the Legislative Assembly on 6 March 2014 *inter alia* sought to prescribe 6 new mandatory minimum sentences for:

- Reckless grievous bodily harm – in company

- Reckless grievous bodily harm
- Reckless wounding – in company
- Reckless wounding
- Assault police – reckless grievous bodily harm or wounding (not during a public disorder)
- Assault police – reckless grievous bodily harm or wounding (public disorder).

The proposed mandatory minimum sentences are set out in the table below:

Offence	Current maximum sentence	New maximum sentence	New mandatory minimum sentence
Reckless grievous bodily harm – in company	14 years	16 years	5 years
Reckless grievous bodily harm	10 years	12 years	4 years
Reckless wounding – in company	10 years	12 years	4 years
Reckless wounding	7 years	9 years	3 years
Assault police – reckless grievous bodily harm or wounding (not during a public disorder)	12 years	14 years	5 years
Assault police – reckless grievous bodily harm or wounding (public disorder)	14 years	16 years	5 years

53 On 19 March 2014 the Legislative Council substantially amended the Bill. On 20 March 2014 the Legislative Assembly rejected the amendments and on 26 March 2014 the Legislative Council refused to shift its position.

Sentences before *Loveridge*

54 Before I return to the Crown appeal in *Loveridge*, it is useful to mention some sentences that had been imposed in the Supreme Court for "one punch manslaughter" prior to the Court of Criminal Appeal's judgment in *Loveridge*.

55 In *KT v R* [2008] NSWCCA 51, McClellan CJ at CL reviewed various sentences imposed for manslaughter, some of which involved a single blow. His Honour's review included *R v Risteski* [1999] NSWSC 124. *Risteski* had entered a plea to manslaughter committed by throwing one punch during a brawl. Dunford J sentenced *Risteski* on the basis of an unlawful and dangerous act to 5 years 6 months imprisonment with a 3 year non-parole period.

56 In *R v O'Hare* [2003] NSWSC 652, Whealy J imposed a sentence for manslaughter of 6 years with a 3 year 6 month non-parole period. The victim was an old man who received a full-bodied punch to the head from the offender who was a physically vigorous young man.

57 In *R v Maclurcan* [2003] NSWSC 799 Buddin J imposed a sentence for manslaughter after a plea of guilty of 3 years with a non-parole period of 17 months. The victim received one punch to the head. The offender in that case suffered from a bipolar disorder.

58 In *KT*, McClellan CJ at CL referred at [37] to the median sentence for manslaughter for adults in NSW between 1994 - 2001 was 7 years imprisonment with a non-parole period of 4 years and 6 months. For juvenile offenders, the median sentence for manslaughter was 6 years imprisonment with a non-parole period of 3 years. His Honour noted that the statistics for 2000 – 2006 suggested a similar pattern. However, McClellan CJ at CL

cautioned at [41] that in future more significant penalties may be required when sentencing for this type of offence.

59 His Honour had previously noted that it was common for sentences for manslaughter imposed by the court particularly the non-parole periods, to be subject to criticism in the media and by relatives or friends of the deceased.

The facts in *KT*

60 The appellant KT had pleaded guilty to manslaughter. He was sentenced to a term of 6 years imprisonment with a non-parole period of 4 years. KT was 16, almost 17 years of age at the time of the offence. He sought leave to appeal on the ground that the sentence was manifestly excessive.

61 The facts were that KT with other persons had been driving around Auburn carrying eggs with the intention of throwing them at members of the public, a practice described as "egging". The deceased, a Sudanese man, was walking on his way home when KT threw an egg at him which missed. The deceased who became agitated ran after the vehicle but was held back from approaching it by two men. KT and another young person got out of the vehicle and ran towards the deceased. At this time the two men let the deceased go. KT said "*let's fight*" and then punched the deceased heavily on the jaw.

62 The deceased was of slender build. He weighed 60kg. KT was thick set. The force of the punch knocked the deceased to the ground. As he fell, he struck his head. There was a loud noise, "*like a loud crack*," which was the sound of the deceased's head hitting the ground. KT said "*you want more? I'll be back*." The deceased was lying motionless on the ground. KT then ran back to the vehicle which was driven away at high speed. When ambulance officers arrived, they found the deceased unconscious, with a haematoma to the back of his head. He subsequently died in hospital.

63 KT had been allowed a 25 per cent discount on sentence for his plea of guilty by the sentencing Judge.

64 After his consideration of sentences imposed in other cases and the sentencing statistics, McClellan CJ at CL said at [39] that one fundamental principle of our system of justice "*is that the sentence imposed on a particular offender, having appropriate regard to relevant matters, must be consistent with the sentences imposed on other offenders for a similar offence.*"

65 His Honour observed that the minimum term of 4 years imposed by the sentencing Judge was greater than that which had been imposed on youthful offenders guilty of a single violent and irresponsible act leading to another's death and constituting the offence of manslaughter. His Honour considered that KT's non-parole period should be reduced to 3 years. This was the statistical median non-parole period for juveniles for manslaughter by an unlawful and dangerous act.

66 The emphasis placed by McClellan CJ at CL on statistical material when sentencing for one punch manslaughter has not subsequently been followed. In any event, Hall J and myself did not agree with his Honour's determination that the sentence was manifestly excessive.

67 Hall J referred at [124] to Gleeson CJ's observation in *Regina v Blacklidge* (CCA, unreported 12 December 1995) that;

> "*It has long been recognised that the circumstances which may give rise to a conviction for manslaughter are so various, and the ranges of degrees of culpability is so wide, that it is not possible to point to any established sentencing tariff which can be applied to such cases. Of all crimes, manslaughter throws up the greatest variety of circumstances affecting culpability*."

68 The protean character of manslaughter makes it very difficult to identify any pattern of sentencing. This has recently been emphasised in *Loveridge* at

[226] and *R v Wood* [2014] NSWCCA 184 at [58]-[59]. The offence of manslaughter may arise by an unlawful and dangerous act, by criminal negligence, intoxication, excessive self-defence, provocation or by substantial impairment. Excessive self-defence, provocation and substantial impairment reduce murder to manslaughter.

69 In *KT*, I took the view at [134] that the upper limit of the sentencing range was not established by the statistical information provided by the Judicial Commission but was the maximum set by Parliament for manslaughter which was 25 years imprisonment. Furthermore, the sentence imposed was within the discretionary range that was open to the sentencing Judge. *KT* was granted leave to appeal but the appeal was dismissed.

The Court of Criminal Appeal decision in *Loveridge*

70 In *Loveridge*, one of the Crown's grounds of appeal was that the sentencing Judge had failed to take into account the additional need for general deterrence due to the prevalence of alcohol-fuelled offences of violence.

71 In upholding this ground, the Court of Criminal Appeal (Bathurst CJ, Johnson and RA Hulme JJ) said in a joint judgment at [105] – [108]:

"The use of lethal force against a vulnerable, unsuspecting and innocent victim on a public street in the course of alcohol-fuelled aggression accompanied, as it was, by other non-fatal attacks by the Respondent upon vulnerable, unsuspecting and innocent citizens in the crowded streets of King Cross on a Saturday evening, called for the express and demonstrable application of the element of general deterrence as a powerful factor on sentence in this case."

72 The Court considered that this was a case where it was necessary for the sentencing Judge to emphasise the substantial role of general deterrence on sentence, and then to give effect to that important sentencing principle in the sentences actually imposed.

73 The Court also upheld the ground of appeal that the sentencing Judge erred by failing to take into account the need for specific deterrence of the respondent. The Court noted that despite his relative youth, he had prior offences of violence. He was subject to conditional liberty for an alcohol-fuelled offence of violence, with that sentence being passed just one month prior to the attack upon Mr Kelly. The Court considered that no foundation existed for a finding that it was very unlikely that the respondent would re-offend, that there was no direct evidence from the respondent before the sentencing Judge of remorse as the respondent had not given evidence at the sentencing hearing. The Court observed as had been previously emphasised by the Court in other cases that a sentencing Judge ought to give very limited weight to statements made by an offender to a psychiatrist or psychologist reproduced in reports: *R v Palu* [2002] NSWCCA 381; 134 A Crim R 174 at 184-185 [39]-[41].

74 During consideration of the grounds of appeal that the sentences, individually and in total were manifestly inadequate, the Court considered a number of United Kingdom cases involving manslaughter arising from violence in public places.

75 One of the decisions the Court referred to was *Attorney General's Reference No 60 of 2009 (Appleby and Ors)* [2009] EWCA Crim 2693; [2010] 2 Cr App R (s) where Lord Judge CJ (all Judges agreeing) observed at [12], that *"… an additional feature of manslaughter cases which has come to be seen as a significant aggravating feature of any such case is the public impact of violence on the streets, whether in city centres, or residential areas… Specific attention should be paid to the problem of gratuitous violence in city centres and the streets."*

76 Lord Judge CJ continued at [12]:

> *"... the manslaughter cases with which we are concerned involved gratuitous, unprovoked violence in the streets of the kind which seriously discourages law-abiding citizens from walking their streets,*

particularly at night, and gives the city and town centres over to the kind of drunken yobbery with which we have become familiar, and a worried perception among decent citizens that it is not safe to walk the streets at night".

77 The Court of Criminal Appeal in *Loveridge* observed that two particular points emphasised in the United Kingdom cases have currency in New South Wales. The Court said at [215] – [217]:

> "*Firstly, it is not meaningful to speak of one-punch or single-punch manslaughter cases as constituting a single class of offences. The circumstances of these cases vary widely and attention must be given to the particular case before the sentencing court.*
>
> *Secondly, the commission of offences of violence, including manslaughter, in the context of alcohol-fuelled conduct in a public street or public place is of great concern to the community, and calls for an emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence. The United Kingdom decisions involve statements of serious concern by the courts of the type expressed in this State in Hopley v R, R v Carroll and Pattalis v R concerning a similar form of violent offending.*
>
> *General deterrence and retribution are elements that must assume greater importance when the crime in question is a serious one, has been committed in a particularly grave form and its contemporary prevalence is the cause of considerable community disquiet: R v Williscroft [1975] VR 292 at 299*."

78 When referring to the sentencing decisions handed to the sentencing Judge, the Court noted that they did not provide a range of sentences for "one punch manslaughter" offences. The Court observed at [226] – [227]:

> *"There is, in truth, no range of sentences for offences of manslaughter which may be said to have a single common component relating to the mechanism of death (such as the victim's head striking the ground after a blow to the head). To the same effect, there is no range of sentences for manslaughter*

offences said to have been committed by use of a knife or a rock or some other implement.

The myriad circumstances of manslaughter offences render it unhelpful to speak in terms of a range of sentences, or tariff, for a particular form of manslaughter. Gleeson CJ made this clear in R v Blacklidge (see [193] above), in a passage cited regularly in cases such as R v Hoerler [2004] NSWCCA 184; 147 A Crim R 520 at 530 [40]."

79 The Court ultimately decided that the sentence was manifestly inadequate. For the offence of manslaughter, before application of the 25 per cent discount for the guilty plea, a head sentence of 14 years imprisonment was appropriate. This resulted in a term of imprisonment of 10 years 6 months. The sentencing Judge's sentence for manslaughter was 6 years with a non-parole period of 4 years.

80 The overall sentence was increased to 13 years and 8 months with a non-parole period of 10 years and 2 months. The overall sentence imposed by the sentencing Judge was 7 years with a non-parole period of 5 years and 2 months.

What then may be derived from *Loveridge*?

81 In crimes of gratuitous unprovoked alcohol fuelled violence causing death, considerable emphasis will be placed on general and specific deterrence. This type of offending joins offences such as armed robberies, firearm offences, fraud offences defrauding the revenue and violent offences committed in a domestic context where it has been held that weight should be given to deterrence.

82 It further appears that the sentences for this type of offending are likely to be significantly increased.

83 Another matter that emerges from *Loveridge* is that sentencing statistics for manslaughter will be of little assistance to a sentencing Judge.

84 The decision in *Loveridge* was not a guideline judgment. As you may be aware, the Court of Criminal Appeal may give guideline judgments on the application of the Attorney General or on its own motion: ss37 and 37A *Crimes (Sentencing Procedure) Act 1999*. By definition a guideline judgment means a judgment that is expressed to contain guidelines to be taken into account by Courts sentencing offenders. Nevertheless, the judgment raises important matters of legal principle.

The Court of Criminal Appeal decision in *Wood*

85 A recent decision of the Court of Criminal Appeal on this area of sentencing is *R v Wood*. The Court's judgment was handed down two months after the judgment in *Loveridge*.

86 In short, the deceased a 71 year-old lady was walking home along a footpath in Roseberry on 21 May 2010. Shortly after 3.30pm the respondent was riding his pushbike along the same footpath when he came upon the deceased who was walking in the same direction.

87 Whilst approaching the deceased from behind, the respondent was heard by witnesses to be yelling at the deceased. He then rode past the deceased without incident. After overtaking her, the respondent dropped his bike to the ground about 10 metres further down the road. He walked back to the deceased whilst loudly swearing at her and using aggressive words. At that point the deceased had stopped walking and was just standing on the footpath.

88 The respondent then pushed the deceased with two open hands to her upper chest area, causing her to immediately fall backwards striking the back of her head on the concrete footpath. The respondent walked back to his bike, leaving the deceased on the ground.

89 Whilst walking back, he was asked by a witness what had happened and the respondent replied "*the bitch got in my way*". He then rode away on his bike.

90 Witnesses went to the aid of the deceased, but she was unable to speak, unable to get up without assistance and vomited on several occasions. She lapsed into unconsciousness and was taken to hospital by ambulance but died the following day. She had suffered "unsurvivable brain injury."

91 It was an agreed fact that the respondent was under the influence of alcohol that he had consumed earlier in that day. However, alcohol did not play a significant part in the sentencing exercise. In a tendered psychiatrist's report, the psychiatrist recounted being told by the respondent that he "*was going back home to get drunk but [he] hadn't started yet*". The sentencing Judge said that according to that statement, the respondent was not likely to have been affected by alcohol, however, he was bound by the agreed fact. His Honour referred to the CCTV footage of the respondent riding his bicycle before the offence and noted that the respondent was "*entirely capable of riding a bicycle that day*".

92 The sentencing Judge determined that the respondent had a high level of moral culpability in relation to his conduct which was not diminished in any way by the agreed fact that the respondent had consumed some unknown quantity of alcohol prior to the offence.

93 It is worth noting that the offender could not have been successfully charged with the aggravated offence under s 25A(2) as the Crown would have had difficulty establishing that he was intoxicated at the time that he committed the offence.

94 The respondent was of Aboriginal and Irish descent. His parents separated when he was young. He had attended a private secondary college as a border. The respondent's mother in her evidence before the sentencing Judge said her son had been subject to intense bullying that included racist remarks

whilst at the college but he was a good student who obtained the Higher School Certificate. The respondent's employment after he left school included working as a prison officer with the Department of Corrective Services for about four years. At the time of the offence, the respondent was employed as a junk mail deliverer.

95 The respondent's prior criminal history included offences of assault and an assault occasioning actual bodily harm. This offence involved the respondent who was riding a bicycle overtaking very closely the victim who was standing on a railway platform. The respondent was questioned by the victim about his conduct. After maintaining he had not done anything wrong the respondent punched the victim in the face a number of times and then rode off. The victim suffered cuts to the face, severe swelling to the left side of the face and a broken nose.

96 The respondent pleaded guilty to manslaughter on the first day of his trial. This was an offence of manslaughter by an unlawful and dangerous act. After making an allowance of 5 per cent for the utilitarian value of the plea of guilty, the sentencing Judge sentenced the respondent to imprisonment with a non-parole period of 5 years with an additional term of 1 year 8 months.

97 The Crown appealed against the inadequacy of the sentence pursuant to s 5D *Criminal Appeal Act*. The respondent sought leave to appeal in one respect against the severity of the sentence. For present purposes, it is unnecessary to elaborate on the respondent's appeal which was dismissed by the Court of Criminal Appeal which was constituted by myself, Garling and Bellew JJ.

98 The Crown's grounds of appeal included a ground that the sentencing Judge erred in his treatment of the sentencing statistics for manslaughter.

99 During his sentencing remarks, the sentencing Judge said:

> "In determining sentence, a Court must have regard to the maximum term that is provided by the legislation, *but the Court is also constrained to provide a*

> *sentence as guided by the overall pattern of current sentencing*. It is for that reason that I have particularly had regard to the overall pattern as shown from the available statistics" (Italics added)

100 The sentencing Judge had analysed the sentencing statistics for manslaughter and arrived at a mean of 7 years for a full term of imprisonment. The starting point of the sentence that the sentencing Judge ultimately imposed was 7 years after allowing a discount of 5 per cent for the plea of guilty.

101 The Court of Criminal Appeal determined that the sentencing Judge was incorrect when he said that "*the Court [was] also constrained to provide a sentence as guided by the overall pattern of current sentencing*".

102 The Court pointed out that sentencing statistics do not act as a restraint in sentencing an offender but in appropriate cases may act as a yardstick against which a proposed sentence may be examined: *Barbaro v The Queen*; *Zirilli v The Queen* [2014] HCA 2 at [41]. The Court quoted what was said by the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) in *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520 at [48] that sentencing consistency:

> *"…is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing Judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were*."

103 Although the offences in *Hili* were federal offences, the plurality's observations are equally apposite for the role that sentencing statistics play in sentencing for State offences.

104 In *Wood*, the Court (as in *Loveridge*) considered that there was not a well recognised group of cases where a single punch or push had resulted in

death. The Court observed that the limited assistance that may be derived from Judicial Commission sentencing statistics is diminished in the case of manslaughter because the offence covers such a wide variety of circumstances. The Court said at [57] – [58]:

> *"In the present case, the Judge analysed the sentencing statistics for manslaughter and arrived at a mean of 7 years for a full term of imprisonment. The starting point of the sentence that his Honour ultimately imposed was 7 years after allowing a discount of 5 per cent for the plea of guilty.*
>
> *In our view, the particular regard that his Honour had to the Judicial Commission sentencing statistics was an error. His sentencing discretion was neither constrained nor guided by an overall pattern shown from the statistical material for manslaughter."*

105 Another ground of appeal was that the sentencing Judge erred by failing to take into account the need for general deterrence. In addressing this ground of appeal, the Court said at [66] – [67]:

> *"The need for general deterrence is not confined to alcohol fuelled violence but includes gratuitous, unprovoked violence on the streets, whether in city centres, or residential areas. People have the right to expect that their streets will be safe: Attorney General's Reference No 60 of 2009 (Appleby and Ors) [2009] EWCA Crim 2693; [2010] 2 Cr App R(S) 46 cited with favour in Loveridge at [209]-[210]; R v McKenna [2007] NSWCCA 113 at [2].*
>
> *This expectation gathers importance as the number of aged and vulnerable persons in our community increases. It must be clearly understood that violence towards the elderly will not be tolerated. In the circumstances of the present offence, a strong element of general deterrence was called for."*

106 The Court held that this was a serious offence of manslaughter. More than a push was involved. The respondent had walked a distance of about ten metres back to the deceased whilst wildly swearing at her and using aggressive words. He knew that she was an elderly woman who had done nothing to provoke his aggression. He had pushed her with two open hands to

the upper chest area, causing her immediately to fall to the ground. He callously walked away and falsely blamed the deceased for his actions.

107 In the circumstances of the offence, the Court was satisfied that the starting point of 7 years was manifestly inadequate. In re-sentencing the respondent, the Court increased the starting point to 12 years which was reduced by 5 per cent for the utilitarian value of the plea to 11 years 4 months. The Court found special circumstances and determined that the non-parole period should be 8 years. This was 3 years more than the non-parole period imposed by the sentencing Judge.

What then may be derived from *Wood*?

108 *Wood* confirms that sentencing statistics for manslaughter will be paid little if any attention. The emphasis placed in *KT* by McClellan CJ at CL on statistical material has not been followed. Sentencing statistics do not act as a constraint upon a sentencing Judge.

109 The likelihood of longer sentences for an assault causing death that is charged as manslaughter by an unlawful and dangerous act is strengthened by the judgment in *Wood*.

110 The emphasis on general deterrence in cases of manslaughter by unlawful and dangerous act is not confined to gratuitous unprovoked alcohol fuelled violence causing death but includes gratuitous unprovoked violence on the streets. There will be particular emphasis when the victims of violence are elderly members of our community.

The Future?

111 The new offences under s 25A provide the Crown with various options where an assault has caused death. I understand that one person has been charged with the aggravated offence under s 25A(2). With an increased emphasis on

general deterrence in sentences for manslaughter by an unlawful and dangerous act, it is difficult to predict whether persons will be charged with manslaughter with an alternative verdict of an offence under s 25A(2) being available.

112 Where the Crown alleges that the accused was intoxicated at the time of the assault, it seems to me that the accused is likely to be charged with the offence under s 25A(2) as the maximum penalty is the same as manslaughter (25 years imprisonment) but there is the mandatory minimum of not less than 8 years. On the other hand, in circumstances where intoxication is not alleged or the accused is less than 18 years old the accused is likely to be charged with manslaughter (25 years imprisonment) with the offence under s 25A(1) (20 years imprisonment) being the alternative verdict.

113 I understand that *Loveridge* has applied to the High Court for special leave to appeal on a number of grounds, including what is said to be the Court of Criminal Appeal's failure to properly consider that he was an Aboriginal offender from a deprived background.

114 In *R v Fernando* (1992) 76 A Crim R 58, [62]-[63] Wood J emphasised the importance of an offender's reduced socio-economic circumstances when sentencing an indigenous offender.

115 These principles were referred to in *R v Bugmy* [2012] NSWCCA 223. Hoeben JA (Johnson and Schmidt JJ agreeing) agreed with the sentencing Judge's approach in taking into account the Fernando principles when sentencing the offender. However, Hoeben JA said at [50] that *"… with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account, must diminish".*

116 *Bugmy* was granted special leave to appeal. The High Court (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), (Gageler J agreeing in a separate judgment) concluded in *Bugmy v The Queen* [2013] HCA 37 that the

effects of 'profound childhood deprivation' did not diminish over time or with repeated offending. The plurality said at [43]-[44]:

> *"The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.*
>
> *Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult."*

117 In light of this approach to the issue of the effects of social deprivation, the High Court allowed *Bugmy's* appeal, quashed the sentence imposed in the Court of Criminal Appeal and remitted the Director's appeal to the Court of Criminal Appeal.

118 Another ground of appeal, I am told, relates to the emphasis that the Court of Criminal Appeal placed on general deterrence. According to a press report, *Loveridge* will argue that there "*was no prevalence of one-punch deaths by young offenders within the community that called for a message of deterrence to be sent by the judiciary"* (Louise Hall, 'One-punch killer Loveridge appeals to High Court over doubled sentence', *Sydney Morning Herald*, 28 September 2014).

119 The effectiveness of general deterrence, as a key purpose of sentencing has long been the subject of debate.

> *"General deterrence assumes that offenders are rational and will therefore refrain from engaging in criminal conduct if the consequences of their actions are perceived to be sufficiently harsh. The assumption that offenders are rational—when some do not in fact undertake a rational analysis of their actions prior to committing an offence—is one basis upon which the effectiveness of general deterrence has been challenged"* (Australian Law Reform Commission, *Purposes of Laws Relevant to Family Violence*, 11 November 2010).

120 It is often said that for general deterrence to have any chance of being effective that the conditions must be favourable: the risk of detection must not be too remote, the penalty should be publicised adequately and the penalty should be perceived as a deterrent. (Kate Warner, *Sentencing: From theory to practice*, Canberra, 8-9 February 2014, 9).

121 Despite the criticisms of general deterrence, the High Court in *Munda v Western Australia* [2013] HCA 38 at [54] affirmed the place of general deterrence in sentencing law.

> *"It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to*

the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community".

122 It will be interesting to observe how the law develops in the coming years for offences involving a single punch or push resulting in death.

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