SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2019 0231

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

MICHAELA SNOW (a pseudonym)[1] — Respondent

JUDGES:	MAXWELL P, BEACH JA and CROUCHER AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	6 March 2020
DATE OF JUDGMENT:	26 March 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 67
JUDGMENT APPEALED FROM:	*DPP v [Snow]* (Unreported, County Court of Victoria, Judge Allen, 11 November 2019)

CRIMINAL LAW – Appeal – Sentence – Crown appeal – Recklessly cause serious injury, sexual penetration of stepchild – Plea of guilty – Sentenced to 4 years' imprisonment with non-parole period of 1 year – Whether sentence manifestly inadequate – Whether proportionate to objective gravity – Extremely serious offending – Victim aged 5 – Respondent was carer – Life-threatening injuries – Grave breach of trust – Powerful mitigating factors – Background of disadvantage, violence, sexual abuse – Moral culpability substantially reduced, general deterrence substantially moderated – Discretion of mercy exercised – Exceptional circumstances – More severe sentence not required – Appeal dismissed – *Bugmy v The Queen* (2013) 249 CLR 571, *Munda v The Queen* (2013) 249 CLR 600, *DPP v Miceli* (1997) 94 A Crim R 327 applied.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Miss M Mahady and Ms A Roodenburg	Ms A Hogan, Solicitor for Public Prosecutions
For the Respondent	Mr I Hill QC with Mr M Dempsey	Tony Hargreaves and Partners

[1] To ensure that there is no possibility of identification of the victim of the sexual offending, this judgment has been anonymised by the adoption of pseudonyms in place of the name of the respondent and victim.

MAXWELL P
BEACH JA
CROUCHER AJA:

Summary

1 On 18 October 2017, the respondent ('MS') was at home alone, looking after her fiancé's two small children, a girl aged five ('K) and her younger brother. Suddenly, and inexplicably, MS attacked the five year old girl, causing life-threatening injuries to the girl's liver and pancreas. She also penetrated K's vagina with her finger, causing significant injury to her genitals.

2 MS subsequently pleaded guilty to one charge of causing serious injury recklessly[2] and one of sexual penetration of a step-child.[3] She was sentenced to two years on the first charge and three years on the second. With cumulation of one year, the total effective sentence was 4 years' imprisonment. An unusually short non-parole period of one year was fixed.

3 The Director of Public Prosecutions has appealed against the sentence on the ground of manifest inadequacy. Counsel for the Director accepted that the judge had properly taken into account the strong mitigating factors on which MS relied but submitted that, whatever the combined weight of those mitigating factors, the sentence arrived at was not reasonably open as it simply did not reflect the extreme seriousness of the offending.

4 This was, on any view, a most lenient sentence. The judge correctly described the offending as 'horrific', and its seriousness as aggravated by the vulnerability of the child victim and the grave breach of trust which the offending represented. As will appear, however, the matters relied on in mitigation were extraordinarily powerful and, in addition, the judge considered that the circumstances of the case called for an exercise of the discretion of mercy.

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2 Contrary to s 17 of the *Crimes Act 1958*.

3 Contrary to s 50D(1) of the *Crimes Act 1958*.

5 A factor of great significance in the exercise of the sentencing discretion was that the respondent had spent her first twelve years in a remote Indigenous community in circumstances of profound deprivation, violence and sexual abuse. As will appear, the judge applied established authority in holding that there was a 'nexus' between MS's disadvantaged background and this offending. As a result, his Honour concluded, both her moral culpability and the need for general deterrence were 'substantially moderated'. Those conclusions were not challenged on the appeal.

6 Nor was there any challenge to his Honour's conclusion that this was a case which called for the exercise of mercy. As set out more fully below, his Honour was here following principles repeatedly affirmed and applied by this Court.

7 His Honour described the case as 'in many ways unique'. We respectfully agree. For reasons which follow, we are not persuaded that the sentence imposed was outside the range reasonably open, given the very specific circumstances which his Honour properly took into account. The appeal must therefore be dismissed.

Circumstances of the offending

8 On the day in question, K's father (W) went to work, leaving MS to look after K and her brother. At some time during the day, MS punched and kicked K, causing her serious injury. She also caused injury to K by penetrating her vagina with her finger.

9 When W returned home that evening, he sought medical attention for K, who was subsequently airlifted to the paediatric intensive care unit at the Royal Children's Hospital. Examination revealed that she had sustained the following injuries:

- a grade 5 laceration to the liver (greater than 75 per cent of the hepatic lobe) with extensive intra-abdominal haemorrhage;
- a small pancreatic laceration;
- bruising to the external genital area;

- a tear of the posterior fourchette, extending posteriorly in the mid-line of the perineum;
- bruising within the vaginal vestibule;
- a complete transection of the hymen;
- bilateral periorbital bruising;
- patterned abrasions and bruising to the chest, thigh, right arm, shoulder, neck and left ear;
- red discolouration at the base of the hairline.

10 K remained in hospital until 6 November 2017. The injuries to her liver and pancreas were life-threatening. Expert medical opinion indicated that the injuries may have resulted in death had treatment not been promptly administered. The opinion of Dr John Gall, Victorian Forensic Paediatric Medical Practitioner, was that 'the amount of force required to cause both the liver and pancreatic injuries is significant and it [was] a type of injury associated with high velocity forces such as motor vehicle accidents'.

11 On 19 October 2017, the day after the offending, MS gave a statement to police providing a false explanation for the injuries. She claimed K had fallen off play equipment.

12 On 22 November 2017, police placed a listening device in MS's home. She was subsequently recorded as saying:

> I kept going and kept get more worse. I kept doing it and doing it … but the reason I stopped was like, she couldn't get up.
>
> …
>
> I don't know why I fucking did it. I don't know even why I half killed her in the bedroom.
>
> …
>
> I don't know why I fucking did it. If my Mum was here, I'd be fine.

13 MS was also heard admitting that she had penetrated K's vagina with her finger. She was heard to say 'I don't know why the fuck I did it', and 'basically I wondered

what it was like to finger another girl'. She said that she only penetrated K's vagina once.

14 Police interviewed K on 3 December 2017. During the course of the interview, K said that MS punched and kicked her. MS was subsequently arrested, interviewed and remanded in custody. She made a no comment record of interview.

Respondent's background

15 MS was born in a small, remote Indigenous community. The evidence on the plea was that it was a community marred by alcohol and drug abuse, physical violence, sexual violence, poverty and, to some extent, depravity. The evidence disclosed that MS witnessed or experienced all of these features during the early years of her life.

16 MS is the only child of her parents, who separated after her birth. She lived with her mother and her extended family in the township. Her mother worked as a school attendant, and was involved in training and programs as well as community welfare. In December 2003, when MS was seven, her father was stabbed to death by his then girlfriend.

17 While living with her mother and extended family, MS was forced to endure attempts to sexually assault her on at least four occasions. There were occasions when 'brother cousins' would attempt to touch her genitals while she was asleep. On another occasion, when she was aged eight, she awoke to find an unknown man on top of her. He ran away when she screamed and thrashed about. On yet another occasion, police became involved in relation to a man who it was said was attempting to stalk her.

18 In 2008, when MS was 12, she moved to a regional city in Victoria as part of a philanthropic scholarship program which brings Indigenous children to Victoria for education in their secondary years. MS completed Years 7 to 12 in that city, living sequentially during those years with three host families. In 2014, she successfully

completed her Year 12 VCE. The evidence on the plea was that, of the more than 50 students who have attended schools in Victoria under the scholarship program since 2002, MS was the only one who had successfully graduated with a VCE certificate.

19 Upon finishing school, MS obtained employment as a teacher's aide and mentor at another school in country Victoria. In that employment, MS mentored and assisted other young Indigenous girls who were boarding at that school. MS found this employment difficult because of her close proximity in age to the age of her charges, and the fact that she was expected to have the detachment that older staff would normally possess.

20 MS met W when she was aged 19. He was aged 29 and had two children, one of them being K. MS moved in with W. They lived in another regional city in Victoria. In this city, MS was subjected to ongoing racial abuse and toxic verbal attacks which gave rise to significant emotional turmoil. W worked very long hours, requiring MS to look after his two children on a fulltime basis.

21 At the time of her offending, MS was 21 years of age. She was 23 at the time of sentencing. She had no prior convictions, and she has not offended since her assault on K.

22 Following her arrest, MS was remanded in custody. After five days in custody,[4] she obtained bail on what the judge described as 'onerous bail conditions, which ... significantly restricted [her] liberty'.[5] A son, to whom MS gave birth after her offending, was removed from her at birth. MS's contact with him has been severely restricted under the supervision of the Department of Human Services. Her ability to visit him was also restricted by a bail condition preventing her from leaving Victoria (her son having resided in Western Australia in the 18 months prior to sentencing).

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4 The balance of MS's pre-sentence detention was served after the judge remanded MS back into custody at the end of the first day of the plea hearing.

5 *DPP v [Snow]* (Unreported, County Court of Victoria, Judge Allen, 11 November 2019) ('Reasons') [9].

23 While awaiting her plea hearing, MS engaged in extensive treatment and counselling, which included attending in excess of 70 sessions of psychotherapy.

The plea hearing

24 The plea hearing was conducted over two days. The facts surrounding MS's offending were not in dispute. Neither were the facts and circumstances of MS's background, including her having endured, in the judge's words, 'a childhood which was marked by what could only be described as extreme deprivation and disadvantage'.[6]

25 During the course of the plea, four witnesses gave evidence: Mrs Maria Myers AC, Professor John Boulton, Ms Jennifer Gerrand and Ms Elizabeth Myers. The evidence spanned MS's life from when she first met Mrs Myers in 2001. It was impressive evidence, which was not the subject of challenge, describing in some detail MS's extremely disadvantaged background, her circumstances and her otherwise outstanding efforts to make the most of her life. The offending against K was said to be totally and utterly out of character. An array of glowing references were tendered on behalf of MS, together with reports from experts in the field of psychiatry, psychology and counselling.

26 In his report, Dr Danny Sullivan, a consultant forensic psychiatrist who examined MS in May 2018, expressed the following opinion:

> [MS] is a 22 year old woman who was raised in [an Indigenous community] ... She is charged with sexual and violent offences against her stepdaughter.
>
> …
>
> Her upbringing was in a community which was afflicted with violence, involving fighting, sexual assaults and suicide. She reportedly experienced parental separation, and paternal murder. [MS] came to Victoria for secondary schooling and managed adequately in a private Catholic secondary school, while living with host families. She completed secondary schooling and had limited work as a teacher's aide before forming a relationship and moving to [a regional city].

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6 Ibid [4].

> [MS] has no reported or apparent history of any mental disorder. There is no indication that she has suffered depression or anxiety, psychotic illness or self-harming ideation. There is no evidence of cognitive impairment or of substance use disorder.
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> [MS's] upbringing and cultural translocation may leave her vulnerable to the difficulties faced by those whose early childhood involved trauma and insecurity. In particular, witnessing violence, knowing of her father's violent death, and being subject to attempts at sexual assault, may all be relevant to risk of future mental disorder. However at present [MS] appears resilient and stable in mental health.
>
> I do not consider that she currently requires any medication or psychological intervention.

27 Following her offending, MS received extended treatment from a psychologist and counselling from a psychotherapist. That treatment and counselling was ongoing at the time of the plea hearing. MS was described as a 'very immature woman' whose progress in psychological treatment had at times been slow. Nevertheless, she had persisted and was said to have responded 'very well indeed to trauma-informed counselling'.

28 On the plea, senior counsel for MS accepted that the judge had no alternative other than to sentence her to a term of imprisonment together with an appropriate non-parole period.

Sentencing reasons

29 The judge's reasons are a model of detail and clarity. In the first 20 paragraphs, the judge succinctly summarised his reasons for the sentence he imposed. The judge then proceeded to deliver what he described as his 'full sentencing remarks', in which he dealt with the evidence in considerable detail, before discussing a number of relevant sentencing considerations under the following headings:

- Deprivation and Social Disadvantage;
- Youth and Immaturity;
- Emotional Stress;
- Guilty Plea;

- Remorse;
- Extra-curial Punishment;
- Delay and Rehabilitation;
- Unusual Hardship; and
- Mercy.

30 The judge commenced his reasons for sentence by describing MS's offending as 'horrific'. Her offences were 'extremely grave and serious examples' of the offences of causing serious injury recklessly and sexual penetration of a stepchild.[7] The judge noted that the victim was a helpless child in MS's care, and that the offences represented a 'grave breach of trust', which had had devastating consequences upon K and her extended family.[8]

31 The judge said that there was no alternative but to sentence MS to a substantial term of imprisonment, together with an appropriate minimum non-parole period.[9] At the same time, his Honour said, the case was 'in many ways unique'.[10] As the judge put it:

> The offending was committed by a person who had endured a childhood which was marked by what could only be described as extreme deprivation and disadvantage. You were surrounded by, for the first 12 years of your life, significant alcohol abuse, and very serious sexual and physical violence, including the murder of your own father.[11]

32 The judge said that, on the evidence before him, none of which had been challenged, MS's background had left her with 'significant psychological and emotional scars, which partially explain[ed] [the] offending, although of course [did] not excuse it'.[12] The judge also observed that MS fell to be sentenced as a youthful

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7 Reasons [1].

8 Ibid.

9 Ibid [2].

10 Ibid [3].

11 Ibid [4].

12 Ibid [5].

first offender — and one who was also 'unusually immature and naïve' by reason of her background.[13]

33 The judge then referred to the evidence which he said revealed that, at the time MS offended, she was 'suffering immense psychological and emotional stress, by reason of the circumstances in which [she was] living and [her] own particular vulnerabilities and difficulties'.[14]

34 Next, the judge referred to the intensive treatment that MS had undergone since offending; her lack of any subsequent offending, or 'coming under the notice of police in any adverse way'; the stringency of her bail conditions; and the fact that she had suffered 'significant extra-curial punishment' as a consequence of her offending and prosecution, by the removal of her son from her at birth.[15]

35 The judge observed that MS had pleaded guilty at the earliest practical opportunity and that the evidence demonstrated that she experienced 'profound regret, shame and remorse in relation to [her] appalling conduct'.[16]

36 As to the issues of MS's support and her prospects of rehabilitation, the judge said:

> Unlike your situation at the time you offended, when you were isolated and alone, you now have the most remarkable, exceptional level of support in the community. In my view, your prospects of rehabilitation, provided that you resume appropriate intensive treatment in the community as soon as possible, could only be described as excellent.[17]

37 Next, the judge referred to what he said was 'an unusually heavy burden of hardship' that would be involved with MS's imprisonment. That 'burden of hardship' was said by the judge to be 'far and above that which is suffered by [the respondent's] fellow inmates'. The additional burden related to the housing of MS

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13 Ibid [6].

14 Ibid [7].

15 Ibid [8]–[11].

16 Ibid [12].

17 Ibid [13].

in a protection unit; the fact that she had been ostracized and intimidated and lived in fear of being attacked; the fact that she was separated by thousands of kilometres from her family and her infant child; and the fact that, while she remained in custody, her child would not be permitted to visit.[18]

38 The judge then said that MS's case was one which 'call[ed] out loudly for the exercise of the discretion of mercy, to reflect … the underlying sense of humanity which guides proper sentencing'.[19] The judge then said:

> During the course of his evidence, Professor Boulton, who gave expert evidence about the psychological impact of living in a community such as yours, was asked whether he could proffer any hope for the future given that it was inevitable, as Mr Hill conceded and put to him, that you would be going to gaol. He said he accepted that there were considerations which demanded that you go to gaol, but hoped that any sentence would be 'balanced by practical measures underpinned by compassion … to allow this woman to in fact reinvent the life she wanted'.
>
> Those words reminded me of the statement, made many years ago by King CJ. When referring to sentencing powers given to courts that are designed:
>
> > … to assist in rehabilitating persons by keeping them out of prison and thereby avoiding the disruptive effect of imprisonments on an offender's life and the undesirable associations and stigma which are the inevitable accompaniments of a term of imprisonment.
>
> His Honour spoke of the need to, 'exercise such powers with compassion and imagination as well as with wisdom and prudence'.[20]

39 The judge then imposed the sentences and order for cumulation that led to a total effective sentence of four years, before turning to the non-parole period and saying:

> In the exceptional and compelling circumstances of your case, I propose to fix an unusually low but, on the evidence, justifiable, minimum non-parole period of one year.[21]

40 In the course of what the judge described as his 'full sentencing remarks', the judge dealt in greater detail with the matters to which we have already referred. He also dealt with a victim impact statement made by K's grandmother — describing

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18 Ibid [14].

19 Ibid [15]. His Honour here cited *DPP v O'Neill* (2015) 47 VR 395, 410 [59] ('*O'Neill*').

20 Reasons [16]–[17] citing *Uznanski v Searle* (1980) 26 SASR 388 [390].

21 Ibid [20].

her victim impact statement as 'probably one of the most tragic' he had ever read or heard.[22] The judge said that he gave full weight to the serious damage that K suffered.[23]

41 In relation to the purposes of sentencing and matters specific to MS, the judge said:

> I am also required by the law to take into account matters concerning the offender. The purposes of sentencing are manifold: punishment; denunciation, that is making it clear to the offender and the community that conduct of this kind cannot be tolerated; protection of the community; general deterrence, to deter others; specific deterrence, to deter the particular offender from reoffending; rehabilitation and protection of the community.
>
> It is often said, and I think correctly, that rehabilitation and the protection of the community go hand in hand. Usually, particularly in the case of youthful first offenders, and even more particularly in the case of youthful first offenders who come before the court having been raised in circumstances of extreme deprivation and hardship, protection of the community is best achieved by way of rehabilitation.[24]

42 The judge accepted that MS's offending occurred in a context where she was 'isolated and lonely, in … a dysfunctional relationship at the age of 20 and 21, innately immature, naïve and vulnerable, [and] without any support, assistance or check on [her] welfare whatsoever'.[25]

43 When discussing the objective circumstances of the applicant's offending, and reiterating the 'extreme seriousness of these horrific attacks on [a] helpless child',[26] the judge said that he had to 'bear in mind a number of features of [the] offending that [did] not bear certain hallmarks often seen with offending of this kind', and which distinguished it from even more serious cases.[27] The judge identified seven such features, as follows:

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22 Ibid [33].

23 Ibid [37].

24 Ibid [38]–[39].

25 Ibid [89].

26 Ibid [90].

27 Ibid.

- such conduct had not occurred previously and had never been repeated. It was isolated;
- the circumstances giving rise to the charge of sexual penetration were confined to a single instance of digital penetration;
- the charge of causing serious injury related to a single blow by hand to the victim's abdomen. It was not a case of repeated blows to the area in question;
- that incident was not accompanied by the use of a weapon;
- there was no evidence of verbal threats, intimidation or subsequent threats to keep these matters a secret;
- the incident during which these offences were committed was short-lived and impulsive, occurring in the heat of the moment, at a time when MS was experiencing 'immense emotional stress'; and
- as the listening device material revealed, MS was genuinely shocked when she realised that she had injured K so seriously.[28]

44 The judge took into account as 'mitigatory matters' MS's deprivation and social disadvantage; her youth and immaturity; the emotional stress from which she had suffered at the time of her offending; her guilty plea; her remorse; the extra-curial punishment involved in the removal of her newborn son at the time of his birth; delay and rehabilitation; the unusual hardship suffered by MS; and mercy.[29]

45 In relation to deprivation and social disadvantage, the judge said that he had substantially moderated the sentencing objective of general deterrence because, in his view, MS's moral culpability 'should be so moderated in light of [her] disadvantaged background, and also bearing in mind [her] youth and immaturity'.[30]

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28 Ibid.

29 Ibid [117].

30 Ibid.

46 With respect to the specific issue of MS's youth and immaturity, the judge, following what was said by Redlich JA in *Azzopardi v The Queen*[31] and by the Court in *Director of Public Prosecutions v Anderson*,[32] said that he 'tailored' the sentence he imposed on MS:

> by acknowledging the gravity of [her] conduct through the imposition of a significant sentence, and then imposing a short minimum non-parole period in order to facilitate [her] ongoing rehabilitation, a process which, I emphasise, is already well and truly under way.[33]

47 With respect to emotional stress, the judge referred to what was said by Brennan J in *Neal v The Queen*,[34] as follows:

> Emotional stress which accounts for criminal conduct is always material to the consideration of an appropriate sentence, though its mitigating effect can be outweighed by a countervailing factor … . The sentencing court takes account of emotional stress in evaluating the moral culpability of the offender just as it is entitled to have regard to the motive for the offence.[35]

The judge said that he had taken into account what he said was 'the strong evidence' of MS's emotional and psychological stress at the time she offended.[36]

48 In relation to MS's guilty plea, the judge said that her plea demonstrated genuine remorse and prospects of rehabilitation. It was entered at the earliest practical opportunity. It saved the State a trial and saved witnesses both the trauma and inconvenience of giving evidence. The judge said that he had made a 'significant discount' because of that plea.[37]

49 Beyond MS's plea of guilty, the judge said there was evidence of 'strong remorse' in this case. The evidence came from numerous sources, which all spoke of the depth of MS's shame, guilt and remorse. The judge referred to the authorities in

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31 [2011] VSCA 372, [35].

32 (2013) 228 A Crim R 128, 140 [49].

33 Reasons [117].

34 (1982) 149 CLR 305 ('*Neal*').

35 *Neal* (1982) 149 CLR 305, 324.

36 Reasons [117].

37 Ibid.

which it has been suggested that it is 'perhaps rare to encounter convincing evidence of genuine remorse, but where it is found, it deserves to be reflected in the sentence imposed'. The judge accepted that remorse of the kind shown by MS was indicative of realistic prospects of rehabilitation and reduced the need for specific deterrence.[38]

50 Next, the judge again said that he had taken into account the significant extra-curial punishment that MS had already endured and would continue to endure as a result of being separated from her son.[39]

51 As to delay and rehabilitation, the judge said that he took into account that there had been a significant delay from the time of the offending until the time of sentence. He said that the delay was relevant in two ways: first, as to the extent to which MS had achieved rehabilitation during the period of delay, which was relevant to specific deterrence and prospects of rehabilitation; and, secondly, because the delay itself constituted a form of punishment, 'given the anxious uncertainty that has hung over [the respondent's] head for … two years, awaiting sentencing'.[40] The judge accepted that MS 'could not have done any more to achieve any greater rehabilitation during the period of the [two year] delay'.[41]

52 As to the issue of 'unusual hardship', the judge quoted the following statement from this Court's decision in *Markovic v The Queen*:

> An offender's anguish at being unable to care for a family member can properly be taken into account as a mitigating factor. For example, if the court is satisfied that this will make the experience of imprisonment more burdensome or that it materially affects the need for specific deterrence or of the offender's prospects of rehabilitation. [42]:

He continued:

> In my view, each of those three factors applies here. Your anguish at being separated from your child, in particular, and the other members of your family, does make your imprisonment more burdensome. It has materially

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38 Ibid. See also *Phillips v The Queen* [2012] VSCA 140, [101].

39 Reasons [117].

40 Ibid.

41 Ibid.

42 (2010) 30 VR 589, 595 [20].

> affected the need for specific deterrence and it is relevant to your prospects of rehabilitation. Your greatest motive to achieve full rehabilitation is to become a good and decent mother for your infant son.[43]

53 The judge then turned to the question of mercy, noting the statement in *Markovic*[44] that there must always be a place in sentencing for the exercise of mercy 'where a judge's sympathies are reasonably excited by the circumstances of the case'. In his Honour's view, the circumstances of the present case 'strongly justif[ied] a merciful sentence'.[45]

54 The judge finally turned to the issue of an appropriate non-parole period, noting that the authorities established that prospects of rehabilitation are a matter of high significance in determining the minimum time that an offender must serve consistent with the requirements of justice. The judge again observed that MS had 'outstanding prospects of rehabilitation'.[46] He said that those prospects would be harmed the longer she spent in gaol, but would be enhanced the sooner she were released.[47] Additionally, the judge said that the authorities showed that youth and immaturity in themselves are matters to be given significant weight in determining an appropriate minimum non-parole period.[48]

55 Finally, the judge observed that, while this Court has said that a very short non-parole period relative to a head sentence will invite scrutiny, such a non-parole period may be justified by 'special factors'. The judge said that there was no doubt in his mind, on the evidence before him, that very strong special factors were present in this case.[49]

Parties' contentions

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43 Ibid (footnote omitted).

44 (2010) 30 VR 589, 590 [1].

45 Reasons [17].

46 Ibid [119].

47 Ibid.

48 Ibid [120].

49 Ibid [122].

56 In contending that the sentence imposed by the judge was manifestly inadequate, the Director submitted that the judge:

- failed to give sufficient weight to the nature and objective gravity of the offending and the culpability of MS;
- failed to have sufficient regard to the maximum penalties prescribed for the offences of causing serious injury recklessly (15 years) and sexual penetration of a stepchild (25 years);
- failed to give sufficient weight to the principles of general deterrence, just punishment and denunciation; and
- gave too much weight to factors in mitigation.

57 The Director submitted that the following features warranted the objective gravity of the offending being characterised as 'extremely grave and serious':

- the offending was against a five year old child, incapable of defending herself in any way;
- the digital penetration occurred in the context of physical violence that caused serious, life-threatening injuries to the child;
- the digital penetration caused injuries to K's vagina;
- the offending involved a gross breach of trust and abuse of parental authority on the part of MS towards her stepchild, who was entitled to feel safe in her own home;
- notwithstanding K's serious injuries, the applicant failed to seek any medical treatment for her;
- the offending against K was grievous, having regard to the victim impact statement of her grandmother that addressed the extreme impacts of the offending on K; and
- MS provided a false explanation for the injuries to K, first to her partner, and then when she was originally questioned by

police.

58 The Director conceded that there were strong mitigating factors (namely, MS's plea of guilty; remorse; prospects of rehabilitation; delay; youth; deprived background; emotional stress at the time of offending; and the hardship of imprisonment due to the need for MS to be in protection, her separation from her family and infant child, and her loss of career opportunities). According to the submission, however, the judge erred in giving too much weight to these factors, which were to be balanced against the gravity of MS's offending and the attendant aggravating features. In her written case in this Court, the Director contended:

> Notwithstanding the matters put in mitigation, the circumstances of the offending called for a higher term of imprisonment and a longer non-parole period that 'sent to the community a message of crystal clarity that conduct of this kind is intolerable in a civilised society'.

59 In response, MS contended that the present case was an exceptional one. The judge had taken into account all of the matters relied upon by the Director, and it had not been demonstrated that the sentences were so far outside the range as to demonstrate error of principle.

60 MS noted that no argument was made by the Director that the judge erred in extending a measure of mercy to MS. The personal history of MS was 'replete with compelling matters in mitigation', and the judge was entitled, in the unique circumstances of the case, to extend a measure of mercy to her. Notwithstanding the gravity of MS's offending, when all matters were properly synthesised it could not be said that the sentence was manifestly inadequate.

Consideration

61 The Director was correct to submit that MS's offending was 'extremely grave and serious'. There was no issue about that, on the plea or in this Court. Indeed, MS accepted the Director's characterisation of the offending. Most importantly, the judge's reasons for sentence demonstrate that he characterised the objective gravity of the offending in precisely the terms used by the Director.[50]

62 The judge described MS's offending as horrific, involving as it did a grave breach of trust with devastating consequences for the victim and her extended family. There was, however, as the Director accepted, a constellation of powerful mitigating factors. Moreover, in oral argument, counsel for the Director accepted that no criticism could be made of the judge's analysis and treatment of any of the matters relied upon as mitigatory. Additionally, counsel for the Director accepted that the judge was entitled to exercise mercy in the exceptional circumstances of this case.

63 The sentencing of an offender involves the proper synthesising of all of the circumstances of the offending, on the one hand, and all of the circumstances of the offender, on the other hand. Neither matter (the circumstances of the offending, or the circumstances of the offender) should be allowed to overwhelm the other. In the present case, the circumstances of the offending pointed towards the imposition of a stern sentence of imprisonment. The circumstances of MS and the matters she was able to call in aid in mitigation, however, pointed to the imposition of a significantly more lenient sentence than might otherwise be imposed.

64 In reasons of the highest quality, the judge demonstrated that he was acutely aware of the extremely serious nature of MS's offending and of its consequences, and also of all of the matters personal to MS that bore on the exercise of the sentencing discretion. In sentencing MS, the judge had to weigh the following matters:

- the truly appalling nature of the offending, coupled with all its circumstances of aggravation as outlined by the Director;

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[50] See [30] above.

- the fact that, despite an upbringing in her formative years that was marred by shocking levels of abuse (both sexual and violent), deprivation and depravity, remarkably MS remained offence-free[51] and was able, quite exceptionally, to complete her VCE and thereafter gain employment;

- the very significant form of extra-curial punishment associated with having her child taken from her at birth;

- the fact that MS's incarceration would be exceptionally burdensome for a number of reasons (including the fact that she was likely to serve the whole of any term of imprisonment in protection);

- the significant attempts made by MS to rehabilitate herself following her offending; and

- her excellent prospects for rehabilitation which were likely to be impeded the longer she spent in custody.

65 The Director's core submission, clearly and repeatedly articulated by her counsel, was that whatever weight was reasonably attributable to the constellation of mitigating factors, the sentence imposed was simply not commensurate with the gravity of the offending. That is, the sentence imposed was not reasonably open, if proper weight had been given to the seriousness of the offending, as well as to the mitigating factors.[52]

66 In the course of argument, the Court explored with counsel on both sides the significance of two particular factors. The first was what the judge described as the 'nexus' between the offending and MS's background of extreme disadvantage. The second was his Honour's express exercise of what he described as 'the judicial discretion of mercy'. We address each of these matters in turn.

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51 It is one thing for a person from a stable home, with the advantages that often brings, to be offence-free. Experience shows, however, it is quite another for a person whose background is at the other end of the advantage spectrum and who has been the subject of serious abuse and deprivation.

52 *DPP v Karazisis* (2010) 31 VR 634, 663 [127].

Disadvantaged background

67 The relevant part of the sentencing reasons was in these terms:

> Pursuant to the principles enunciated by the High Court in *Bugmy*[53] and reiterated by the Court of Appeal in *Marrah*,[54] I take into account the significant [effect] upon you of your traumatic background. *I find that there is, on the evidence, a nexus between the high level of deprivation, abuse and other social [disadvantage] that you experienced or witnessed during your formative years and your offending*. I sentence you on the basis, as stated by the High Court in *Munda*,[55] that general deterrence has 'little rational claim' upon the sentencing discretion in relation to crimes which are not premeditated (and I find that yours were not), in the circumstances where you were the victim of prolonged and widespread social disadvantage in your childhood. Accordingly, in this case the sentencing objective of general deterrence has been substantially moderated because, in my view, your moral culpability should be so moderated in light of your disadvantaged background, and also bearing in mind your youth and immaturity.[56]

68 This was, with respect, a finding of great significance for the sentencing exercise. As can be seen, the finding of 'nexus' led his Honour to conclude that two of the key sentencing considerations — general deterrence and moral culpability — should be 'substantially moderated'.

69 As to moral culpability, we refer (as his Honour did) to what was said by the High Court in *Bugmy v The Queen*,[57] as follows:

> An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.[58]

In the present case, no concern arose about protection of the community, given his Honour's finding that there was 'no realistic prospect' of MS ever re-offending in this way or in any similar way.

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53 *Bugmy v The Queen* (2013) 249 CLR 571.

54 *Marrah v The Queen* (2014) VSCA 119.

55 *Munda v WA* (2013) 87 ALR 1035, [54].

56 Reasons [117] (emphasis added).

57 (2013) 249 CLR 571.

58 At 595 [44].

70 There was uncontested evidence on the plea from Professor Boulton and other experts about 'the lasting damaging effects of growing up in such a deprived, violent and traumatic environment'. Given the unusual breadth and depth of this expert evidence, we set out in full the extracts which appear in the sentencing reasons.

71 Professor Boulton was a consultant paediatrician who had, for 10 years from 2005 to 2015, been senior regional paediatrician in the region to which MS's community belonged. He had conducted regular outreach clinics in her community and others. He said:

> The extent of sexual abuse amongst children in communities where I conducted clinics resulted in both widespread sexualised behaviour amongst young children and a state of hypervigilance. These conditions affect the trajectory of neuro development of the pre-frontal cortex, which controls the 'executive functions' of the brain and hence behaviour. Early life trauma is therefore recognised as a powerful toxin with far-reaching consequences from childhood through to adult life. Hence, 'As the twig is bent, the tree inclines'.
>
> This evidence for how early life trauma disrupts the trajectory of the child's emotional development provides a glimpse of its influence on the outcomes in terms of morbidity (depression, suicide) and antisocial criminal behaviour. However, only first-hand experience or anecdotes can tell of the impact of living in such an environment on a child or adolescent's emotional development and hence *her ability to manage future events of stress*.[59]

72 Ms Mary O'Brien, an experienced psychotherapist and counsellor, said:

> Through my training and therapeutic experience, I understand the cumulative effect on a young person's nervous system of growing up in an environment where violence is part of everyday life and where children live in a state of high anxiety and alertness. As a result, fight/flight reactions can be triggered in circumstances of extreme stress.

73 Ms Jennifer Gerrand, a social worker and psychotherapist, said:

> [The relevant community] is an ancient Indigenous culture with its strong connectivity to land, nature, people and communal life, delight in simple pleasures such as swimming and fishing and a non-Western narrative about the world, all of which coexist with shocking, normalised dysfunctional physical and sexual violence. [MS] has appeared to have coped with the dysfunctional and violent aspects of [the relevant community] by developing a great capacity to suppress and compartmentalise difficult feelings … [MS] still has significant suppressed trauma she needs to work through and learn to articulate many shades of feelings instead of pushing things down.

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[59] Emphasis added by sentencing judge.

74 Dr Matthew Barth, a psychologist who had provided MS with extensive treatment, said that she presented as:

> … a very immature woman [who] appeared to have significant difficulties discussing her emotional experiences and I had the impression that she lacked the conceptual framework to discuss such matters. … There is clearly a strong need for [MS] to continue with treatment if she is to address these issues comprehensively in the long term … to explore the impact of the violence and sexual incidents from her personal history in more detail.

75 Plainly enough, this expert evidence — directed at the specific circumstances in which MS grew up — provided a proper foundation for his Honour's finding of 'nexus'. The Director's counsel did not suggest otherwise. The reasons do not elaborate on the nature of the nexus to which his Honour was referring. Read in context, however, we infer that his Honour had in mind either an explanatory nexus or a causal nexus.

76 If the former, his Honour was satisfied that the devastating impact of such an upbringing could help explain what both defence counsel and the prosecutor on the plea described as 'inexplicable' conduct. If the latter, the 'nexus' might be thought to be analogous to what, in the context of impaired mental functioning, has been described as a 'realistic connection' between the impairment and the offending.[60] Most often, what is looked for in that context is a causal connection, in the sense that the offending would not have occurred, or would not have taken the form it did, had it not been for the operative effect of the impairment of mental functioning.[61]

77 It is neither necessary nor possible to be more definitive on this question. What matters for present purposes is that his Honour was entitled to regard the background of severe disadvantage as substantially reducing MS's moral culpability. That finding was not challenged on the appeal.

78 As to general deterrence, the passage from *Munda v The Queen*[62] to which his

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60 See, for example, *Johnston v The Queen* [2013] VSCA 362, [14].

61 See, for example, *Carroll v The Queen* [2011] VSCA 150, [20].

62 (2013) 249 CLR 600.

Honour referred was as follows:

> 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 a 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.[63]

79 This analysis likewise directs attention to the impact on the decision-making of individuals of growing up, and living, in circumstances of 'prolonged and widespread social disadvantage'. At least in relation to unpremeditated crimes of the kind to which MS pleaded guilty, the theory on which general deterrence rests has little or no application. According to *Munda*, it is not to be assumed that the sentence imposed on a person who has suffered the trauma of such an upbringing will have any bearing on the decision-making of other members of that community in relation to similar conduct.

The discretion of mercy

80 As this Court said in *Markovic*, the proposition that 'there must always be a place in sentencing for the exercise of mercy' is of long-standing and high authority, and has been repeatedly affirmed by this Court. Thus, in 1974, in a passage quoted by the sentencing judge, the Court of Criminal Appeal said:

> Justice and humanity walk together. Cases frequently occur where a Court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts.[64]

81 Subsequently, in *DPP v Miceli*, Tadgell JA said that:

> An element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion.[65]

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63 At 620 [54].

64 *R v Kane* (1974) VR 759, 766.

65 (1997) 94 A Crim R 327, 332.

In the same case, Charles JA expressed the view that the sentencing judge had

> to consider whether, on the evidence before him, a reasonable basis existed in well-balanced judgment for adopting a course which might bear less heavily on the applicant than if he were to receive his just deserts. It would be quite wrong for anyone to have thought that our system of justice did not entitle the prisoner standing for sentence to receive proper consideration of any claim he may legitimately have had to the exercise of clemency.[66]

82 More recently, in *DPP v Milson*,[67] the Court said:

> Mercy may justify the imposition of a sentence which may bear less heavily upon an offender than if he or she were to receive his or her just deserts. Mercy thus permits considerations such as extreme disadvantage and hardship to be recognised as a factor mitigating sentence. Mercy may also come into play where a judge forms the view that leniency at that particular stage of the offender's life might lead to reform. Mercy must, however, be exercised 'upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment'.[68]

83 In his seminal 1999 article,[69] '*The Place of Mercy in Sentencing*', Professor Fox identified two distinct ways in which mercy can operate in sentencing. The first, which he considered to be the most common, was when mercy:

> appears as a discretionary feature of the sentencing system which can be activated in determining what *weight* is to be attributed to an established mitigating factor in arriving at the ultimate sentence.[70]

84 This was to be contrasted with what Professor Fox described as 'the true privilege of mercy', which he said was to be found:

> in the residual discretion vested in each sentencer which allows a downward departure from the principle of proportionality outside the principles of mitigation. It can be utilised in exceptional circumstances to allow weight to be given to factors which are ordinarily not regarded as relevant mitigating considerations.[71]

85 It is clear from the sentencing reasons, and was accepted by the parties to the

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66 Ibid 333.

67 [2019] VSCA 55, [51].

68 The passage quoted was from *Kane* [1974] VR 759, 766.

69 (1999) 25 Monash University Law Review 3.

70 Ibid 11 (emphasis in original).

71 Ibid 13.

appeal, that his Honour exercised mercy in the second of these two senses. That is, he was moved by considerations of humanity or compassion, or because his 'sympathies [were] reasonably excited', to fix a sentence below that which the conventional synthesis of aggravating and mitigating factors would have produced. The sentence would therefore be something less than what 'just punishment' or proportionality would have required.

86 The existence of this discretion has been criticised, on the ground that its exercise is idiosyncratic and unpredictable.[72] In our view, this criticism is unjustified. What is of vital importance about the discretion of mercy, in our view, is that its exercise is an expression or embodiment of the essential humanity of the sentencing process.[73] It is a reminder that, in passing sentence on an offender, the judge is making a moral judgment on behalf of the community, within the framework of legal principle, as to the appropriate sentence for the individual offender, based on the judge's assessment of the particular circumstances of the offending and of the offender's own particular circumstances. Viewed in this way, the exercise of mercy is not qualitatively different from the other elements of the sentencing process, in which the judge has to evaluate and weigh up a whole range of considerations and where, as sentencing law accepts, reasonable minds can differ on the ultimate conclusion.

87 As Professor Fox says:

> While sentencing is governed by the intellect, the emotions also have their proper part to play. This includes pity for the offender as well as revulsion. … When judges and magistrates, in response to their feelings of compassion, offer leniency to offenders on the basis of conditions that are generally regarded as irrelevant to sentence, mercy, like equity, is serving an independent function in sentencing. It gives voice to humanitarian considerations which are apparently still lacking within the system.[74]

88 We would respectfully adopt the following statement, quoted by Professor Fox:

> Through its relationship to discretion and the place of discretion within the legal system, mercy is essential to the functioning and workability of the law,

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72 Ibid 23–4.

73 *O'Neill* (2015) 47 VR 395, 410 [59].

74 (1999) 25 Monash University Law Review 3, [23].

> and, more generally, to the culture of the law. No theory of law, therefore, can be adequate without an account of mercy, both as a particular action and as a virtue of the system's officials. Not only has mercy a place within legal justice, but it must be maintained as a possibility and actively promoted, if the law is to operate in a morally acceptable manner and carry out the various functions that it has in our social arrangements. Therefore, rather than being in tension with the law as a system, mercy is an essential component of it.[75]

89 In the present case, it is sufficient for us to say that, having weighed all the circumstances of the case, we are satisfied that the judge was entitled to afford MS a very significant level of mercy consistently with the gravity and severity of her offending. That level of mercy, however, still required the applicant to be sentenced, as the judge did, to a term of imprisonment measured in years (that is, longer than might have been able to be combined with a community correction order).[76]

Conclusion

90 As counsel for the Director properly conceded, the judge in this case was faced with one of the most difficult sentencing decisions that might be imagined. As with all sentencing decisions, there was no one correct answer. The question for this Court is whether the sentence was wholly outside the permissible range so as to show error in point of principle, when all the circumstances are evaluated and a proper allowance is made for the degree of mercy the judge was entitled to show.

91 For the reasons we have given, we are not persuaded that the sentence imposed by the judge was outside the permissible range. As s 5(1) of the *Sentencing Act 1991* provides, the only purposes for which sentences may be imposed are just punishment, specific deterrence, general deterrence, the facilitation of rehabilitation, denunciation and to protect the community from the offender. When sentencing an offender, it is also necessary to bear in mind the common law principle of parsimony, which prohibits a court from imposing a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the

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75 A Brien, '*Mercy Within Legal Justice*' (1998) 24 Social Theory and Practice 83, 85.

76 Section 44 of the *Sentencing Act 1991* permits a community correction order to be imposed in addition to a sentence of imprisonment only if the sentence of imprisonment is one year or less.

sentence is imposed. Section 5(3) of the Act is the statutory enactment of that principle.

92 Having regard to all of the circumstances of the offending and the circumstances of MS, we are not persuaded that a more severe sentence than that imposed by the judge was required to be imposed on MS to achieve the sentencing purposes identified in s 5(1) of the Act. A term of imprisonment of 4 years with a non-parole period of 1 year is stern punishment for a young, vulnerable, first offender.

93 Finally, we wish to say something in relation to the relevance of this case so far as current sentencing practices are concerned. [77] The primary purpose of Crown appeals against sentence is 'to lay down principles for the governance and guidance' of sentencing courts.[78] As we have already stated, this was an exceptional case which produced a sentence that would be inadequate but for the array of matters personal to MS to which we have already referred. When a sentencing court in the future comes to consider current sentencing practices for the offences to which MS pleaded guilty, we would not expect this case to play any part in the analysis.

Conclusion

94 The Director's appeal against sentence will be dismissed.

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77 *Sentencing Act* 1991, s 5(2)(b).

78 *Green v The Queen* (2011) 244 CLR 462, 465 [1].