

Malyschko v The Queen [2014] NTCCA 1

PARTIES: MALYSCHKO, Christopher
v
The Queen

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF
THE NORTHERN TERRITORY

JURISDICTION: CRIMINAL APPEAL FROM THE
SUPREME COURT EXERCISING
TERRITORY JURISDICTION

FILE NO: CA 1 of 2013 (21136198)

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JUDGMENT OF: KELLY, BLOKLAND & BARR JJ

APPEAL FROM: MILDREN J

CATCHWORDS:

CRIMINAL LAW—Sentencing—Crown appeal against sentence—Non-parole period—Whether trial judge erred in fixing non-parole period less than 20 years—Whether trial judge erred in finding exceptional circumstances existed—Held that evidence supported finding of exceptional circumstances—Appeal dismissed

CRIMINAL LAW—Sentencing—Appeal against sentence—Non-parole period—Whether finding of exceptional circumstances necessitates significant departure from 20 year non-parole period—Whether 18 year non-parole period manifestly excessive—Held that exceptional circumstances allow sentencing judge to fix non-parole period of any appropriate length—Held that 18 year non-parole period not manifestly excessive—Appeal dismissed

Sentencing Act 1995 (NT) s 53(1), s 53A(1), s 53A(2), s 53A(4), s 53A(6), s 53A(7), s 53A(8)

REPRESENTATION:

Counsel:

Appellant: J Adams
Respondent: L Taylor SC with M Thomas

Solicitors:

Appellant: Louise Bennett
Respondent: Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Malyschko v The Queen [2014] NTCCA 1
No. CA 1 of 2013 (21136198)

BETWEEN:

CHRISTOPHER MALYSCHKO
Appellant

AND:

THE QUEEN
Respondent

CORAM: KELLY, BLOKLAND & BARR JJ

REASONS FOR JUDGMENT

(Delivered 15 January 2014)

THE COURT:

Background

- [1] Bronwyn Buttery, Christopher Malyschko and Zak Grieve were each charged with the murder of Raffaeli Niceforo (“Niceforo”) on or about 24 October 2011. Following a lengthy trial a jury found Christopher Malyschko and Zak Grieve guilty of murder, and Bronwyn Buttery guilty of manslaughter. A third man, Darren Halfpenny, pleaded guilty to murder and gave evidence at the trial.

- [2] Bronwyn Buttery is the mother of Christopher Malyschko. She met Niceforo in 2007 when she was living in South Australia. Following a very brief friendship, Niceforo returned to the Northern Territory, but they kept in contact by phone.
- [3] In September 2007 Ms Buttery flew to Darwin to meet Niceforo; they formed a successful relationship over a period of a week and then she returned to Adelaide. In November 2007 she moved to Katherine and obtained employment as head house keeper for the All Seasons Motel. She saw Niceforo (who was working in Darwin) each weekend.
- [4] In February 2008 Niceforo began working for a mining company in Pine Creek and he and Ms Buttery lived together at unit 1, 39 Victoria Highway Katherine. In 2008, Ms Buttery bought the Waterworks Laundry business in Katherine from Niceforo's brother for \$50,000, and she and Niceforo both worked in the laundry. Ms Buttery financed the purchase price by arranging a line of credit secured by her property in South Australia.
- [5] Over the ensuing years the relationship between Ms Buttery and Niceforo deteriorated considerably. He regularly called her degrading and insulting names including 'stupid coon cunt'. Despite this, she was still in love with him and, at his request, in about September 2008 she agreed to have a child by him. She went through in vitro fertilisation on two occasions in an effort to get pregnant, but she was unsuccessful, and the disappointment which

this caused seems to have been a major factor in accelerating the change of the deceased's attitude towards her.

- [6] Despite everything, on Ms Buttery's 50th birthday (14th October 2009) she accepted Niceforo's proposal of marriage in the hope that things would eventually get better. They did not.
- [7] Over a period of about two to three years she was subjected to a series of violent acts. Niceforo choked her by putting his hand around her neck and lifting her off the floor; he deliberately burnt her with a cigarette; he pushed her onto the floor and stood on her chest; he grabbed her right arm and twisted it up behind her back towards the nape of her neck; he grabbed the middle finger of her right hand and twisted it back onto her thumb; he assaulted her with a hammer, pushing her up against a wall and at the last minute striking the bathroom door instead of her; he pointed a gun at her and he threatened to 'give her both barrels' if she did not keep her mouth shut; he forced himself upon her sexually; and all the time he was swearing at her constantly, belittling her in front of others and using grossly insulting words and gestures.
- [8] In addition, his behaviour towards other employees at the laundromat was nothing short of scandalous and led to resignations. On some occasions he purported to fire staff for no good reason, even though the business was not his and he was not acting in a managerial role.

- [9] He was a bully who always wanted his own way. Nothing could ever satisfy him, no matter how hard Ms Buttery or others tried. Ms Buttery was cowed into doing his bidding at every turn, and was very frightened of him.
- [10] In about February 2011, Christopher Malyschko decided to go to Katherine and to work in the laundry. He had two reasons for doing this: one was to save some money because he was planning on marriage, and the other was to help his mother leave Niceforo. He moved into the unit next door, unit 2, 39 Victoria Highway. Christopher Malyschko and Niceforo never got on. Niceforo constantly belittled Malyschko and treated him abominably.
- [11] On 2 June 2011, Ms Buttery and Mr Malyschko obtained a full non-contact domestic violence order against Niceforo, and they both moved out of the Victoria Highway units to other accommodation.
- [12] Niceforo breached the domestic violence order by sending texts to Ms Buttery that he still loved her. Niceforo's family made representations to her as well and she decided to give him another chance. She agreed to a variation of the domestic violence order to allow contact between them, but did not return to live with him at unit 1, 39 Victoria Highway. The DVO was not altered so far as Mr Malyschko was concerned.
- [13] After the domestic violence order was put in place, Niceforo no longer worked in the business but Ms Buttery continued to pay him a wage. She had also financed his car collection. He smoked marijuana and took other drugs. He relied on Ms Buttery for money. By the end of 2011 he had cost

her so much money that she was effectively bankrupt. The sentencing judge described her as Niceforo's 'cash cow'.

- [14] In September 2011, Ms Buttery went to Darwin with a female friend for the weekend to get away from Katherine. By this time, she had lost a lot of weight, and she clearly needed a break. When she returned he interrogated her about the weekend. He believed that she had gone with another man, and sent her a number of abusive text messages, although at this stage not threatening ones.
- [15] On 19 September 2011, Niceforo went to the laundromat and ordered two of Ms Buttery's staff to leave saying there was no work for them anymore. Then he began yelling at Ms Buttery, demanding to know the name of the man she had been with on the weekend in Darwin. At one stage he got her into a corner, and flicked her breasts, then pushed a shopping trolley into her so that she could not move, and screamed into her face, demanding to know who she had been with in Darwin and how many times she had had sex, and calling her a slut as well as other things.
- [16] At one stage Niceforo demanded that Ms Buttery launder some tea towels for a friend and when she told him that she was not going to do it, he said that his lawyer would ring her and tell her that she had to do it; then he stormed out.
- [17] That evening (ie 19 September) Niceforo sent Ms Buttery a series of text messages in which he demanded copies of the bank balances, demanded that

the tea towels be done, and said that he intended to come the next morning and take over the business. Those text messages included one in the following terms: ‘You better realise your genetic code sitting beside you will disappear and there’s no turning back.’ As the learned sentencing judge found, this was clearly a threat to kill Christopher Malyschko.

[18] Further very abusive and threatening texts followed. The next morning she received a further text from Niceforo: ‘You had better think about – you are doing real quick today could be the day you lose someone close to you.’ Again the sentencing judge found that she interpreted that, not unreasonably, as a threat to kill her son Christopher.

[19] On the morning of 20 September the tyres on a van used in the business had been slashed. Then the deceased arrived at the laundromat. He was angry and his eyes were bulging. He started yelling at Christopher, calling him a faggot and a poof, and threatened to ‘rip his dick off’. He came up close to Ms Buttery and whispered in her ear: ‘Today could be the day that you lose someone close to you.’ He then demanded coins to use the coin operated washing machines to wash the tea towels, and left the premises to walk to the public laundromat.

[20] In the meantime the police were called, and the door to the business was locked to keep Niceforo out. When the police arrived they saw that Ms Buttery and Christopher Malyschko were both pale, shaking and plainly distressed, and were having difficulty even speaking properly.

- [21] The police returned to the police station to confirm the status of the domestic violence order. In the meantime, Niceforo returned, banged on the locked doors, demanded more coins, made rude gestures and continued to yell and behave, as the sentencing judge described it, “like a spoilt child in a tantrum”.
- [22] Not long after, the police returned. They arrested Niceforo, but granted him bail later that day on conditions similar to that of a full non-contact domestic violence order. He was bailed to appear at the Katherine Magistrates Court on 20 October 2011. Ms Buttery was advised of this by the police, and she and Christopher Malyschko went to the police station where they both made statements.
- [23] In the meantime, Niceforo drove past the premises and made a threatening gesture with his hands. By this time Ms Buttery had reached the point where she did not feel that she could ever be free of Niceforo, and believed that eventually he might kill her or her son.
- [24] At this time, Christopher Malyschko was living in a unit at 8/33 Victoria Highway, Katherine which he was sharing with Trevor Tydd, otherwise known as “Nipper.” Nipper was also a friend of Ms Buttery.
- [25] On 20 September, Christopher Malyschko decided that Niceforo had to die. At some point he approached his mother and asked her if she wanted Niceforo killed. She said yes, and Christopher Malyschko approached Zak Grieve to help him do it. Malyschko told Zak Grieve that he also wanted a

third person to help and Zak Grieve arranged to introduce Darren Halfpenny to Malyschko.

[26] There were differences in the accounts given by Malyschko, Grieve and Halfpenny as to the nature of the financial arrangements that were entered into, but the sentencing judge found that the agreed price was \$15,000, and that this was the sum which Malyschko told his mother she needed to find to have Niceforo killed.

[27] Ms Buttery already had some money set aside, described by the sentencing judge as her escape money. She had been trying to sell the business for some time, but had not been successful. By late September she paid the money to her son in two lots, \$10,000, and shortly thereafter a further amount of \$5,000. She was not told who would carry out the killing, nor when nor how this was to occur.

[28] The planning of the killing was carried out by Malyschko, and both Halfpenny and Grieve were aware of the plan before the killing took place. The original plan was to gain entry to Niceforo's unit at night when he was asleep using a key to which Malyschko had access. They planned to knock Niceforo unconscious, and then remove him to a site along the Florina Road, kill him, and dispose of the body down a sink hole. The plan was that he would disappear and be treated by the authorities as a missing person.

[29] Malyschko and Grieve claimed in their evidence before the jury that Halfpenny received the whole \$15,000. The sentencing judge did not accept

that. He found that the participants were initially to receive \$5,000 each; that Halfpenny received at least that sum; that Grieve received at least an initial \$2,500 and quite possibly more; and that he was unable to find that Malyschko kept any of the money. As he said in one of his conversations with his mother whilst in custody,¹ he had his own reasons for killing the deceased. His Honour found it inconceivable that Malyschko wanted any of the money for himself: no large sums of money were ever found in his flat despite two police searches, and there was no evidence that he was spending up big around that time.

[30] To implement the plan, Malyschko bought shower caps and disposable rubber gloves from Woolworths. He also purchased some rope and obtained a canvas sheet to wrap the body in. He showed the others where Niceforo lived, and a sketch of the layout of his flat. The plan included the weapons that would be used. Malyschko was to use a large wrench, Halfpenny was to use a baseball bat, and Grieve a steel pipe. They also planned that the clothes that they were intending to wear, the gloves and the shower caps would be disposed of in a fire pit in Halfpenny's residence.

[31] They first planned to kill Niceforo on the night of Tuesday 18 October 2011. Malyschko collected the others in his work Ford Econovan and drove to his flat, which was very close to Niceforo's flat. From time to time, Malyschko left the flat to check whether Niceforo was at home. He and the others

¹ These were taped pursuant to a warrant.

played X-box and watched anime while they waited. When Niceforo's car had not arrived by 4 am they abandoned the attempt.

[32] On Wednesday 19 October 2011, they tried again. They went through the same routine with the same result.

[33] On Thursday 20 October 2011, the three of them discussed via text messages whether a third attempt should be made that night. The sentencing judge found that by this time Grieve was having second thoughts about whether he wanted to be involved, and he advised by text that he was unavailable for the next few days.

[34] The actual killing took place at some time on the evening of Sunday the 23rd and in the early hours of the morning of Monday 24th October. At about 10 pm that night, Grieve and Halfpenny were collected by Malyschko from the home of a friend in Katherine.

[35] Malyschko, Grieve and Halfpenny all went to Malyschko's unit. They played X-box games and watched anime, and kept surveillance on Niceforo's flat, waiting for him to return home. From time to time, they went out for drinks.²

Eventually, Malyschko discovered that Niceforo had returned home, and preparations were made to put the weapons in the van, and for all of them to

² Malyschko was seen on CCTV buying drinks at the BP Service Station at 10.50 pm. There were apparently three people in the car.

get into the van, which was to be parked in a nearby side street. The sentencing judge found that at this stage Grieve found the courage to tell Malyschko that he could not go on with it. Malyschko accepted that, and drove him home, where he went to sleep.

[36] After Malyschko returned, he and Halfpenny went to Niceforo's flat. The power to the flat was turned off, and Niceforo had left the door open.

Malyschko and Halfpenny entered the flat and attacked Niceforo.

Halfpenny grabbed him around the throat from behind and held him in a headlock and Malyschko hit him over the head several times with a spanner or wrench. Niceforo died in the flat.

[37] Malyschko then tried to tie up Niceforo's body with the rope he had bought. He tied it around Niceforo's neck, but did not manage to tie up his wrists properly because of the amount of blood on Niceforo's arms and hands.

[38] Malyschko went back to where he had parked the van, and drove it into the car park behind Niceforo's flat. He and Halfpenny wrapped the body in a sheet and a doona from Niceforo's bed then loaded it into the back of the van. They decided that because Grieve knew that they had planned to dump the body on a site off Florina Road, they would look for a new location. They drove along the Gorge Road heading out of Katherine looking for somewhere to dump the body.

[39] Eventually they stopped the van, took the body out, and dumped it into a shallow ditch. Malyschko then drove to Halfpenny's address, and they both

removed all of their clothing except their underwear, and Halfpenny burnt the clothes and the rubber gloves in a fire pit in his back yard. They then returned to Malyschko's unit where they enlisted the help of Nipper to return to Niceforo's flat and remove the weapons which they had left behind. Nipper later disposed of the weapons. After they had showered and changed their clothes Malyschko and Halfpenny drove back to the BP Service Station and bought a drink. By this time it was almost 5.00 am.

[40] Halfpenny, Grieve and Malyschko were arrested on 27 October 2011. Neither Grieve nor Malyschko made any admissions and declined to participate in a record of interview.

[41] Ms Buttery was not arrested until 27 November 2011. She was interviewed on several occasions prior to her arrest, but denied any knowledge of the matter. Eventually on 27 November she participated in a lengthy record of interview where she made full admissions, claiming that she acted in self-defence.

[42] At the trial Christopher Malyschko raised self-defence, defence of his mother, lack of intent to kill or cause serious harm at the time of the killing, and provocation. Each of these defences was rejected by the jury's majority verdict of guilty of murder.

[43] At the sentencing hearing, counsel for the Crown submitted that the objective seriousness of the offending in Christopher Malyschko's case was such that a non-parole period of more than 20 years was warranted. The

learned sentencing judge rejected that submission and found, on the contrary, that there were exceptional circumstances within the meaning of that term in s 53A of the *Sentencing Act* which warranted the imposition of a non-parole period of less than 20 years. His Honour imposed a non-parole period of 18 years.

[44] The Crown has appealed against the sentence on the grounds that the learned sentencing judge erred:

- (a) in failing to fix a non-parole period longer than the standard non-parole period of 20 years;
- (b) in finding “exceptional circumstances” existed such as to justify fixing a non-parole period shorter than the standard period of 20 years; and
- (c) in finding that Malyschko did not intend to keep any of the \$15,000 in cash given to him by Ms Buttery.

[45] Christopher Malyschko has also appealed against his sentence on the ground that the non-parole period of 18 years is manifestly excessive in all of the circumstances of the case.

(a) The Crown Appeal

(b) Failure to fix a non-parole period greater than 20 years

[46] Section 53(1) of the *Sentencing Act* provides that where a court sentences an offender to be imprisoned for life, as was the case here, the court must fix a

period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate.

[47] Section 53A(1) provides that (subject to this section), where a court sentences an offender to be imprisoned for life for the crime of murder, the court must fix under s 53(1) a standard non-parole period of 20 years (or if any of the circumstances in subsection (3) apply a non-parole period of 25 years). It is common ground that none of the circumstances in s 53A(3) apply.

[48] Section 53A(4) provides that the sentencing court may fix a non-parole period that is longer than 20 years if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

[49] Counsel for the Crown relied on s 53A(2) of the *Sentencing Act* which provides that the standard non-parole period of 20 years referred to in subsection (1)(a) represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies. The Crown contended that the objective and subjective factors applicable to Mr Malyschko and to the crime he committed, both singularly and in combination, take this offence above the

mid-range of objective seriousness for the crime of murder and justify the fixing of a non-parole period greater than 20 years.

[50] In support of this conclusion, the Crown contended that the sentencing discretion failed in two ways. First, it was contended that his Honour failed to give full weight to the objective seriousness of the offence. The particular factors identified by the Crown were:

- (a) the degree of planning involved, in particular the sustained and elaborate steps taken by Malyschko;
- (b) the period of time during which the homicidal intent lasted, which was over a month;
- (c) evidence that Malyschko spoke about stabbing Niceforo and watching the life drain out of his eyes;
- (d) the evidence which pointed to the conclusion that Malyschko was determined to kill Niceforo “come hell or high water”, was not going to allow the charges against Niceforo to proceed through the courts and did not even consider speaking to Niceforo’s brother, a wealthy and influential person who was trusted by Malyschko.

[51] It cannot be said that the sentencing judge failed to take these matters into account.

- (a) His Honour referred specifically to the degree of planning involved. Counsel for the Crown acknowledged this but submitted that he did so

“without illustrating the sustained and elaborate steps taken by [Malyschko] by any reference to the evidence.” That is simply not correct. His Honour said:

I therefore find that there are exceptional circumstances warranting a non-parole period of less than 20 years. Nevertheless this was still a very serious crime. As the Crown submitted there was a lot of planning involved. You were the one who did the planning, bought the rope, the gloves, and the shower caps, decided which weapons were to be used, and plainly you intended to kill the deceased, and harboured this intent for some weeks before the killing took place.

It was you who involved Halfpenny and Grieve. It was you who paid the money to them from the funds provided by your mother. Despite the mitigating factors which I have mentioned, there must be a lengthy term of imprisonment, and it must not be forgotten that the jury rejected the defence of provocation, presumably because the jury was satisfied beyond reasonable doubt that you did not lose control by reason of the provocation, and I so find.

- (b) In the same passage his Honour referred to and took into account the extended time during which the homicidal intent lasted.
- (c) A sentencing judge is not required to refer to every piece of evidence in the trial – particularly a lengthy trial such as this. The fact that his Honour did not refer specifically to the evidence of the conversation in which Malyschko spoke of watching the life drain out of Niceforo’s eyes, or the other evidence referred to by Crown counsel in submissions, does not mean that he did not take into account all of the relevant circumstances. Read as a whole, his Honour’s sentencing remarks paint a fair and balanced picture taking into account both aggravating and mitigating circumstances.

[52] The Crown also submitted that his Honour placed undue weight on subjective factors said to decrease the seriousness of the offence. The sentencing judge rejected the Crown's submission that a non-parole period longer than 20 years was warranted in the following terms:

To begin with, I reject the submission of the Crown that the objective and subjective factors warrant a non-parole period higher than 20 years. There are no subjective factors supporting this argument. The Crown's argument rested solely on the objective circumstances of the killing, the degree of planning involved, the period of time during which the homicidal intent lasted, the vicious and brutal nature of the killing, the extent to which you involved others, and the fact that the killing took place in the victim's own home.

Other matters pressed were that you carried out this killing out of hatred and revenge, and that you accepted \$5000 of your mother's money for your own involvement. There is some force to this submission, but I do not accept that it was proved, for the reasons already expressed that you in fact kept or intended to keep any of the money for yourself. Nor do I accept that the sole motives for the killing were hatred and revenge.

In my opinion, there was considerable provocation by the deceased which largely brought about his own death. Although you were not aware of the entire history of the treatment which the deceased perpetrated on your mother, you were obviously aware, because of your daily association with your mother in the business and at home, and your close affection for each other, of the extent to which the deceased bullied her, intimidated her, and of the way he treated you and of the threats which he made to yourself.

[53] The Crown contended that the finding that Malyschko "must have been aware of" the extent to which Niceforo had bullied and intimidated his mother was inconsistent with evidence given by Malyschko himself that his mother had not told him about "most of the stuff that I have heard over this last day and a half" in evidence. However, the fact that he may not have

been told the intimate details does not mean he would not have been aware (for the reasons stated by his Honour) of the extent to which she had been bullied and intimidated. There was evidence upon which it was open for his Honour to make those findings, and in our view, there is no reason why this Court should disturb the sentencing judge's findings of fact.

The Crown also took issue with the learned sentencing judge's finding that "there was considerable provocation by the deceased which largely brought about his own death" and submitted that "provocation had nothing to do with it". Again, in our view there was evidence on which his Honour was entitled to form that view and we see no reason to disturb that finding of fact.

(b) Finding that exceptional circumstances existed to justify fixing a non-parole period less than 20 years

[54] Moreover, after rejecting the Crown submission that a non-parole period of more than 20 years was warranted in accordance with s 53A(4), his Honour carefully went through each precondition to a finding that there were exceptional circumstances within the meaning of s 53A(6) so as to enliven the discretion to fix a non-parole period of less than 20 years. In doing so he made detailed reference to the evidence, made relevant findings of fact and concluded that he was satisfied that there were "exceptional circumstances". That process was not vitiated by any error.

[55] (c) Finding that Malyschko did not intend to keep any of the \$15,000

[56] The sentencing judge's finding that Malyschko did not intend to keep any of the \$15,000 given to him by his mother is likewise not vitiated by any error.

In his sentencing remarks his Honour referred to the evidence on which this finding was based. This evidence is summarized at [29] above.

The appeal by Malyschko

[57] Counsel for Malyschko submitted that ‘once “exceptional circumstances” have been found (as in the present case) the sentencing range significantly departs from the “standard non-parole period” of 20 years’. If all that is meant by this is that when there are “exceptional circumstances” the sentencing judge may fix a non-parole period of any appropriate length, depending on the circumstances and the justice of the case, the submission is unexceptional. However if it is suggested that once “exceptional circumstances” have been found, there must necessarily be a significant departure from the standard 20 year non-parole period, the submission must be rejected.

[58] The relevant provisions of the *Sentencing Act* are s 53A(6), (7) and (8).

(6) The sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period.

(7) For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period under subsection (6), the sentencing court must be satisfied of the following matters and must not have regard to any other matters:

(a) the offender is:

- (i) otherwise a person of good character; and
 - (ii) unlikely to re-offend;
 - (b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender.
- (8) In considering whether the offender is unlikely to re-offend, the matters the sentencing court may have regard to include the following:
- (a) whether the offender has a significant record of previous convictions;
 - (b) any expressions of remorse by the offender;
 - (c) any other matters referred to in section 5(2) that are relevant.

[59] As indicated in [56] above, in determining whether there were exceptional circumstances, his Honour went through each of the relevant matters in s 53A(7) and (8) and considered them in detail before coming to the conclusion that there were exceptional circumstances.

[60] To further illustrate the existence of exceptional circumstances counsel for Malyschko referred in his written submissions to evidence he categorised as “Conduct of the victim towards the appellant”, “Conduct towards the appellant’s mother known to the appellant”, and “Character of the deceased”. There is no reason to conclude that his Honour did not have regard to this evidence when assessing the level of the reduction to be given upon a finding of exceptional circumstances.

[61] Counsel for Malyschko submitted that the non-parole period imposed does not have proper regard to the culpability of the offender. In making this submission he relied exclusively on the description by the sentencing judge of the provocation offered by Niceforo as “extreme”, “severe and extreme”, “considerable” and “significant”. However, his Honour was obliged to balance against that the objective seriousness of the offending and did so as referred to in [52](a).

[62] His Honour then fixed a non-parole period of 18 years. We can discern no error of principle in the approach adopted by his Honour and in our view the non-parole period of 18 years was not manifestly excessive.