PARTIES:	THE QUEEN
	v
	NAGAS, Carmel Yvonne
TITLE OF COURT:	COURT OF CRIMINAL APPEAL
JURISDICTION:	COURT OF CRIMINAL APPEAL EXERCISING TERRITORY JURISDICTION
FILE NOS:	No. CA 14 OF 1995
DELIVERED:	Darwin 13 October 1995
HEARING DATES:	2 October 1995
JUDGMENT OF:	Gallop, Angel and Thomas JJ

CATCHWORDS:

Criminal law - Crown appeal against sentence - Whether manifestly inadequate - Relevant considerations

Criminal law - Crown appeal against sentence - General deterrence - Female offender - Significance where incidence of criminal activity is considered law - Relevant considerations

Criminal law - Sentencing principles - Jurisdiction and discretion of appellate court - Relevant considerations

R v Tait and Bartley (1979) 46 FLR 386, followed

Cranssen v The King (1936) 55 CLR 509, applied

Harris v The Queen (1954) 90 ClR 652, followed

Kovac v The Queen (1977) 15 ALR 637, referred to

Griffiths v The Queen (1977) 137 CLR 293, followed

The Queen v Osenkowski [1982] 30 SASR 212, approved

The Queen v Raggett & Ors (1990) 50 A Crim R 41, approved

The Queen v Ah Sam (unreported, CCA NT, 15 March 1995), approved

Criminal law - Sentencing principles - Hardship to family - relevant considerations

Yardley and Betts v The Queen (1979) 1 A Crim R 329, applied

The Queen v Wirth (1970) 14 SASR 291, approved

The Queen v Rocco Adami (1989) 51 SASR 229, referred to

The Queen v Okutgen (1982) 8 A Crim R 262

Criminal law - Sentencing principles - Significance of antecedents - relevant considerations

REPRESENTATION:

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Appellant: R Nobel

Respondent: J Lawrence

Solicitors:

Appellant: Director of Public Prosecutions

Respondent: North Australian Aboriginal Legal Aid Service

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

No. CA 14 of 1995

BETWEEN:

THE QUEEN

Appellant

AND:

CARMEL YVONNE NAGAS

Respondent

CORAM: GALLOP, ANGEL and THOMAS JJ.

REASONS FOR JUDGMENT

(Delivered 13 October 1995)

THE COURT: This is a Crown appeal against leniency of sentence pursuant to s.414(1)(c) of the **Criminal Code**. The respondent was arraigned on an indictment containing seven counts. Upon arraignment she pleaded guilty to three counts in the indictment and the Crown accepted her pleas of guilty in full discharge of the indictment.

The counts upon which she was arraigned and to which she pleaded guilty were:

"(1) That on 12 March 1994 at Darwin in the Northern Territory of Australia she unlawfully caused grievous bodily harm to Roland Claude Falckh contrary to s.181 of the Criminal Code.

(2) That on 12 March 1994 at Darwin ... she deprived Roland Claude Falckh of his personal liberty by compelling the said Roland Claude Falckh to drive her to several locations in the Darwin area against his will contrary to s.196(1) of the Criminal Code; and

(3) That on 12 March 1994 at Darwin ... she stole a Tupperware container, personal papers and $47.00 in cash contrary to s.210 of the Criminal Code."

The facts giving rise to the commission of the offences were set out in a statement of agreed facts which was handed to the sentencing Judge but not marked as an exhibit. We state those facts as found by the primary Judge.

The offences took place over a short period of time in the early morning of 12 March 1994. The respondent had been out most of the night, nightclubbing with two female friends. During the course of the night she drank whisky and Coca-Cola, which was not her usual drink, and she had much more to consume than was normal for her. She went to bed at about 3.00 or 4.00 o'clock in the morning.

Nothing untoward had occurred during the time that she was out with her friends. She was affected by liquor and her companions thought she was drunk. When they woke up at about 6.00 am she was missing. She had left the house, taking with her a kitchen knife, and gone to a nearby public telephone

and called for a taxi. There was a telephone in her home and she had no legitimate reason to use a taxi at that hour of the morning.

There was some dispute as to the knife, but his Honour held that that did not matter. The victim thought it was some six or seven inches in length and about one and a half inches wide, but the respondent thought it was a vegetable knife taken by her from the kitchen. She later found that one was missing and she would have put it as being of somewhat lesser dimensions. Whatever, it was capable of and did inflict serious injury on the victim.

There had been another cab driver who had spoken to the respondent and who had no difficulty understanding her. He observed that she appeared to be moving all right and gave no indication to him of being intoxicated. But he was unable to accept her request that she be taken to Palmerston.

The victim then attended in answer to her call. He had been a taxi driver for some years. He is about 62 years of age and at around 6.20 am on that morning picked her up in response to her call. According to him she appeared to be speaking and walking normally and there was nothing to suggest that she was intoxicated.

The respondent asked to be taken to Flockhart Road in Palmerston. According to her evidence, she knew nobody who lived in that area and in fact she had only ever been to Palmerston once before and that was to see her brother.

There was general conversation between the respondent and the victim. She asked him for an estimate of the cost of the trip and inquired as to whether there was some way she could work it out rather than pay money, but he told her he only worked for money. She confirmed that she wanted to go to Palmerston. He took her there and, while looking for Lockhart Road, she produced the knife and pressed it hard into his ribs, saying: "No more fooling around, just drive". At her direction, and under threat of the knife, he drove her around for quite a time. At one stage she asked him to take her to Katherine, but he told her that that was not possible as he did not have enough fuel, and she then directed him to drive back towards Darwin.

She told him where to go, and when she reached a place near the cemetery, she said: "That is where I will finish you off". She continued to direct the victim until she stopped him at an isolated spot in Brandt Street. The victim asked her to forget the whole thing and offered to take her home and she said: "I hate white men. All white men at the Dolphin are suckers, rubbish". She also said, "That's where you'll get

yours". On saying that she stabbed him in the chest area. He drew his left arm across his chest in self-defence and the blade of the knife penetrated completely through the biceps of his left arm. She removed the knife from his arm and then stabbed him in the side of the neck just under the jaw. He put his head down to protect his back and she stabbed him in the top of the back.

He then noted that she was bringing the knife in the direction of his left ribs, and he grabbed her hand, which he was able to hold, and after a short struggle she relaxed and said, "You old bastard, you'll bleed to death. We'll wait here for you to die", or words to similar effect. The victim was able to escape from her, bleeding heavily, and the police and ambulance were notified.

At about a 7.45 a motorist saw the respondent wandering around the Holmes Jungle area and spoke to her. According to that witness, she appeared to be calm, in no hurry, and she did not appear to be drunk. At about 8.30 that person saw the police and told them of his sighting of the respondent and at about 8.55 she was located by the police in the Holmes Jungle area. She told them that she had thrown the knife away somewhere along the path that she had followed from Brandt Street. She also told the police that a Tupperware container, then in her possession, was the taxi driver's.

She apparently had some recollection of the recent events of that morning, at least. At the time of the attack the victim had a coin dispenser with about $50 in change in the cab and the Tupperware container which held some papers, some keys and a small amount of money, and it was that container which the police found. They also found upon her person $47 in change, but the coin dispenser, which had been removed from the cab, was never recovered, nor was the knife, although she did endeavour to assist the police to find them.

It was estimated that the victim was under her control by her use of the knife for about 30 to 35 minutes whilst the cab covered about 14 kilometres under her direction.

She told the police that she was drunk and she could not remember much after having returned to her home at four o'clock that morning. She said she could remember only getting out of the taxi somewhere down in the bush and that she remembered having a knife in her hand and the taxi driver running away. She said she panicked and took off into the bush but she recalled, at one stage, telling the cab driver to go to the top of Palmerston. She admitted she had taken the Tupperware container from the taxi, where it had been between the two front seats, and she was able to tell the police what she had done after she left the cab when the victim escaped.

She could give no explanation for her conduct, including the stabbing of the taxi driver. She claimed to have blacked out. She blamed the blank in her recollection on the effect of liquor upon her. She said she did not normally carry a knife with her, that she had not taken one when she went out partying with her girlfriends, but she identified that which she had seen in her hand as being from her kitchen. She said she was not on any medication or psychiatric treatment.

Referring to another part of the conversation which she had with the cab driver, she confirmed to police that she knew a woman who had to go to court for stabbing her footballing friend. According to the cab driver, she said that the woman was to go to court the following Monday but she told the police she did not think that that was the case.

The victim was admitted to Royal Darwin Hospital and three of his wounds required expiration. On the left side of his neck, a deep wound went through the muscle and exposed but did not damage the internal jugular vein. And there were other wounds on the upper left back and left arm which required cleaning and stitching. He was kept in hospital for about three days.

The doctor who examined him shortly after the event, and again in December last year, found that his left arm was 10%

less powerful than the right as a result of the scar tissue which formed in the left bicep following the wound caused by her stabbing him, and the doctor thought that that loss would be permanent. There is a suggestion that his condition might improve, to some extent, with exercise.

The respondent gave evidence and the primary Judge made the following assessments of her as a witness of credit and findings of fact. He held that the accused appeared to be frank and open. He found that she was, at the date of sentencing, 28 years of age and most recently employed as a relief manager with the Aboriginal Hostels Limited in Darwin.

She accepted that the facts put forward by the Crown accurately reflected what she had done, but that she simply did not remember what happened. She confirmed that she had been out drinking on the night prior to the relevant events and could not explain why she acted in such a dramatic way, simply blaming the drink. His Honour noted, however, that none of the persons who saw her suggested that she was drunk, but his Honour was prepared to accept that she had been heavily drinking during the night and was affected by alcohol to some extent. How it may have affected her mood and temperament he was unable to say.

He found that the respondent had two children, aged 11 and 5 who were both asthmatics. About a month prior to

sentencing on 13 July 1995, she had arranged for them to go and stay with relatives in Gladstone where she had family background. Prior to 13 July 1995 she had only been separated from the children on occasions when they went on holidays for up to about four weeks at a time. He found that the respondent was very concerned about them and obviously felt bad about the separation, as the children did. Living in Gladstone, it would not be possible for the respondent and the children to see each other as long as she was retained in gaol.

When asked about possible motives for the attack upon the taxi driver, the respondent disclaimed that she had needed any money. She was not in financial difficulty and had been paid only three or four days beforehand. His Honour rejected any other fanciful theories as to why she did what she did.

He found that her general reputation was that of a not violent person, that she had never been in a fight, not been subjected to physical abuse, and not having any particular antagonism towards men in general or white men in pubs in particular who try and pick up women drinking in hotels and so on. He found that, notwithstanding two personal relationships with men, she bore no resentment towards either of them.

His Honour went on to find that the victim had taken proceedings for criminal compensation for his injuries and the

respondent expected to have to pay whatever it was that he was awarded. He accepted her expression of sorrow for what she had done and what had happened to the victim, and found that she was genuinely remorseful. He further found that the pleas of guilty were brought forward as soon as agreement was reached between her legal advisers and the Director of Public Prosecutions as to the appropriate charges to be pursued, and a psychiatric report commissioned on her behalf was available.

She had no prior convictions whatsoever. His Honour found that she was not a violent person and was a person who had led a productive and worthwhile life. She was born in Queensland and had resided in the Territory since 1988. His Honour went on to make a number of uncontentious findings of a subjective nature about the respondent.

Having considered the psychiatric evidence his Honour found that the respondent's inability to recall the relevant events of the offences was due to the fact that she was suffering substantial amnesia. He held that that did not mitigate the seriousness of the offences but did explain her lack of co-operation with police investigators. His Honour noted that the respondent had, since the offences, reduced her drinking to the occasional glass or two of wine and that there was no suggestion that she had abused alcohol since the offences over 12 months prior. He held that the offending was out of

character and that the possibility of repetition of the conduct was small.

Having remarked that it was an exceptional case in that it is not often that the Court finds itself confronted with a woman of mature years and of good character engaging in totally foreign criminal conduct, he was satisfied that she was sincerely sorry for what had happened and had accepted her responsibility for what she had done.

In respect of the offence of unlawful assault, he sentenced the respondent to 15 months' imprisonment. In respect of the offence of depriving the victim of his liberty, he sentenced her to nine months' imprisonment, and as to the stealing, six months' imprisonment. He ordered that all the sentences be served concurrently and fixed a non-parole period expiring on 23 December 1995, the head sentences and non-parole period to run from 10 July 1995.

The grounds of appeal relied upon by the Crown and variously expressed are that the primary Judge erred in imposing an ultimate sentence which was manifestly inadequate in all the circumstances of the case, and erred in fixing a non-parole period that was manifestly inadequate. A further ground was that he misdirected himself in concluding that general deterrence was not as significant because the respondent was a

female and the incidence of criminal activity of the kind charged by females was low. The Crown seeks an order that this Court quash the sentences and substitute alternative sentences which should have been passed, including the non-parole period.

Prior to the enactment of the **Criminal Code**, an appeal against sentence by the Crown lay to the Federal Court of Australia pursuant to s.24 of the **Federal Court of Australia Act** 1976. In *R v Tait & Bartley* (1979) 46 FLR 386, a Full Court of the Federal Court considered that the principles limiting the exercise of an appellate court's jurisdiction with respect to a discretionary sentence were the same whether the Crown or the convicted person was appealing. The principles the court took to be applicable were those expressed in *Cranssen v The King* (1936) 55 CLR 509 and *Harris v The Queen* (1954) 90 CLR 652, followed by the Federal Court in *Kovac v The Queen* (1977) 15 ALR 637. In *Cranssen v The King* it was stated by the court (at pp.519-520):

> "The jurisdiction to revise such a discretion must be exercised in accordance with recognized principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when

> considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears unreasonable, or has not been fixed in due and proper exercise of the court's authority".

In *Griffiths v The Queen* (1977) 137 CLR 293 Barwick CJ reiterated this approach in relation to the New South Wales Court of Criminal Appeal, a court like the Federal Court, invested with a general power on appeal. He said (at p.310):

> "Inadequacy of sentence, an expression not found in the **Criminal Appeal Act** but which is the form in which the ground of the Attorney-General's appeal is expressed, is not satisfied by a mere disagreement by the Court of Appeal with the sentence actually imposed. It means, in my opinion, such an inadequacy in the sentence as is indicative of error or departure from principle."

There is an additional factor in an appeal by the Crown. As was stressed in *R v Tait* (1979) 46 FLR 386, a Crown appeal against sentence puts the offender in a "double jeopardy" situation - his "freedom" is put in jeopardy before the trial judge and on appeal. Their Honours there said (at pp.389-390):

> "Although the existence of error is the common ground which entitles the appellate court to intervene in appeals by the Crown and by the defendant ... there would be few cases where the appellate court would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error, or if the defendant were unduly

> prejudiced in meeting for the first time on appeal the true case against him."

It was not suggested in this appeal that the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error.

The above principles have been reiterated time and again since 1979, both in this Court and in others. Several decisions have quoted with approval observations of King CJ of the South Australian Supreme Court in *The Queen v Osenkowski* [1982] 30 SASR 212 at 212-213. We do the same:

> "It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform. The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."

It was expressly stated that it was to achieve the first and third objectives that the present appeal was brought.

The principles have been most recently reiterated by this Court in *The Queen v Raggett and Ors* (1990) 50 A Crim R 41, and even more recently in *The Queen v Ah Sam*, unreported

decision delivered 15 March 1995, where Martin CJ and Priestley J said:

> "Sentencing being a matter of discretion, there is a strong presumption that the sentences imposed are correct. In order for this Court to interfere, the Crown must demonstrate that the sentences are so very obviously inadequate that they are unreasonable or plainly unjust; the learned sentencing Judge must be shown by the Crown to have either made a demonstrable error or have imposed a sentence that is so very obviously inadequate that it is manifestly unreasonable or plainly unjust, that is, the sentence must be clearly and obviously, and not just arguably, inadequate. It must be so disproportionate to the sentence which the circumstances required to indicate an error of principle. In this regard it is sufficient to refer to **Griffiths** (1977) 137 CLR 293, *Tait and Bartley* (1979) 24 ALR 473, *Anzac* (1987) 50 NTR 6, and *Everett* (1994) 124 ALR 529."

On the hearing of the appeal the Crown did not contend that the sentencing judge had overlooked any relevant factual matter, nor that the sentences were not within the range of appropriate and well-balanced sentences in all the circumstances. A useful list of sentences for comparable offences was provided to the Court by the Crown.

The thrust of the Crown submissions was that there was premeditation by the respondent in taking the kitchen knife from her home, calling a taxi from a public phone box, making threats to the driver and directing him finally to an isolated spot. It was submitted that she had armed herself with the knife and gone looking for a victim.

If the sentencing judge had made a finding of fact to that effect there would be more force in the Crown submission that the sentences were inadequate. But, in our opinion, this Court would not be entitled to form that view of the facts when the sentencing judge did not do so. He had the advantage of hearing all the relevant material at first instance, seeing the respondent in the witness box and even asking her questions himself. Indeed he himself put to the respondent when she was in the witness box an hypothesis that she had gone out drinking heavily, spent more money than she should have and decided to try and get some money out of the taxi driver, that she did not ring for a taxi from home because the call might be able to be traced, that she went down to the phone box instead, waited till the taxi driver picked her up, tried to get out of town for some reason and eventually got up enough courage, pulled the knife, ordered the taxi driver to take her down a back street, stabbed him and when he escaped, grabbed his money. The respondent answered that there would be no reason for her to take his money, that she had been paid earlier in the week and still had money in the bank. His Honour obviously accepted that answer and was not prepared to come to the adverse conclusion of her premeditation in accordance with his Honour's question. Premeditation was not a factor and for this reason the Crown submission must be rejected.

The other factual matters relied upon by the Crown were the violence of the attack, the potential harm to the

victim, the vulnerability of taxi drivers as a class, the impact on the victim and the need for personal and general deterrence. It was submitted that effectively the respondent, if granted parole, will have been in custody less than six months, namely, five months and 13 days, for serious offences.

No doubt when one has regard to the matters relied upon by the Crown, the effective period in custody appears lenient. But the sentencing judge gave great weight to the respondent's subjective factors. Indeed, his Honour held that given her background it was an exceptional case. He said:

> "It is not often that the Court finds itself confronted with a woman of mature years and of good character who engages in totally foreign criminal conduct such as this. You are able to offer no explanation for what you did and conjecturing about it will be to no avail."

The Crown submission was that the sentencing judge gave too much weight to the subjective factors of the respondent being a female, a mother of two children, having no criminal record and having been in employment.

But there were other matters justifying a degree of leniency which his Honour took into account. He accepted that she was at least partly intoxicated at the time, and had more or less stopped drinking since the offences; that there was no motive for the attack upon the taxi driver; that she had a general reputation for not being a violent person and not having

any particular attitude towards men which might explain the offences; that she had no prior convictions, and that she has led a productive and worthwhile life. His Honour noted that the respondent had been open and frank in her examination by a consultant psychiatrist, and accepted her evidence and the opinion of the psychiatrist that she suffered substantial amnesia as to the attack. He held that the offending was clearly out of character and that the likelihood of repetition of that sort of conduct is small.

One matter that his Honour did not take into account was the effect of imprisonment upon the respondent's children. In our opinion, that was a factor which could be taken into account. In *Yardley v Betts* (1979) 1 A Crim R 329 at 334, King CJ and Mitchell J. discussed the principles to be applied to offences of assault, which vary greatly in seriousness. They concluded that cases of assault require individual assessment and treatment and there is no presumption one way or another as to whether imprisonment is the appropriate way of dealing with any particular case. Among the factors to be taken into account, their Honours said, is that a term of imprisonment may deprive the offender of the best and most stabilising influence in his life by disrupting a good family situation. That the respondent's family life has been disrupted, at least for the period she is in custody, is beyond doubt.

There is also a passage in D.A. Thomas, Principles of Sentencing, 2nd Ed., at p.211 under the heading "The Effect of the Sentence on the Offender's Family". The author says that it has been stated on many occasions that the hardship caused to the offender's wife and children is not normally a circumstance which the sentencer may take into account, but this policy appears to be subject to three recognisable exceptions. Family hardship may be a ground for mitigation of the sentence where the particular circumstances of the family are such that the degree of hardship is exceptional and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of imprisonment. A second exception to the principle that family considerations do not have mitigating effect is the case of an offender who is the mother of young children. The third situation in which family hardship may mitigate a sentence is where both parents have been imprisoned simultaneously or other family circumstances mean that the imprisonment of one parent effectively deprives the children of parental care. See also Fox and Freiberg, Sentencing: State and Federal Law in Victoria, at p.466.

In *The Queen v Wirth* (1976) 14 SASR 291 at 293, Bray CJ discussed the various cases dealing with the question of hardship on a prisoner's family, stating that it is not, in normal circumstances at least, a matter which can be taken into account in the offender's favour. He cited the above observations in Thomas' Principles of Sentencing. However, Bray

CJ went on to say that circumstances peculiar to the offender as opposed to circumstances peculiar to his relations can always be taken into account. His Honour said:

> "...if imprisonment will bear with special hardship on him that can always be taken into account; and it may bear with special hardship on him because of its effect on his family."

R v Wirth is still followed, at least in South Australia, see, for example, *R v Rocco Adami* (1989) 51 SASR 229.

All those matters have greater or lesser application to the present case. The respondent deeply feels her separation from the children. The longer the sentence the longer that sense of separation will endure, even though she has made alternative arrangements for their welfare.

In our opinion, the sentencing judge did not fall into error in giving great weight to the antecedents of the respondent. It has been said many times by appellate courts throughout Australia that it is appropriate to do so in the case of a first offender. In *R v Okutgen* (1982) 8 A Crim R 262, the applicant had been convicted of unlawful wounding. He was 40 years of age, had no prior convictions and a good employment record. He was sentenced to two years' imprisonment with a minimum of 12 months. He applied for leave to appeal to the Court of Criminal Appeal, Victoria. In his reasons for ordering the release of the applicant on a five year good behaviour bond,

Starke J. (with whom Crockett and O'Bryan JJ agreed), said (at p.266):

> "A man of this age, when first convicted, can I think call in aid his character and is entitled to ask the court to rely very strongly indeed on the fact that he is of exemplary character and has been at all times up till the moment of conviction. Indeed, under old legislation provisions suggested a first offender should not be imprisoned unless there were special circumstances. I admit, of course, there are many qualifications to that principle. But in this case, added to his good character is the additional fact that, whether it was his fault or whether it was not, I think, is beside the point; he obviously acted in anger and had some justification for that anger. It was not in any sense a premeditated action. In all those circumstances it seems to me that to condemn a man of exemplary character to prison for a substantial period of time is an exercise of undue severity. It is not irrelevant to remember that a man of this sort, perhaps particularly a migrant, although one considers it with shame in this community, being thrown amongst hardened criminals in Pentridge or some other gaol will necessarily do his time very hard, and the punishment to him is considerably greater than that of a hardened criminal."

Those comments have clear application to the present case.

What we have already said is sufficient to justify a conclusion that the sentences imposed were within the exercise of a sound sentencing discretion. But there is one submission to which special reference should be made, namely, that set out as ground 4 in the Notice of Appeal that the sentencing judge misdirected himself that the question of general deterrence was not as significant as it might otherwise have been because the respondent was a female and the incidence of criminal activity

of the kind charged by females was low. His Honour did take that into account as a mitigating factor and expressly said so.

There is judicial and textual authority for the sentencing judge's approach. The cases are discussed in Fox and Freiberg, Sentencing: State and Federal Law in Victoria, at p.465. It is clearly established that allowance is made for the fact that in practice women are commonly treated with less severity than men. There may, as the authors say, be some sense of grievance where male and female co-offenders are sentenced and significant disparities result, but that is not the situation in this case.

Whether the reason for leniency to women is predicated upon the lower recidivism rate of women, prevalence of a particular type of crime, general deterrence, or simply compassion, the principle is well established and his Honour was correct to have regard to it in sentencing the respondent.

For these reasons we would dismiss the appeal.
