The Queen v Syrch and Burns [2006] NTCCA 20

PARTIES:	THE QUEEN v SYRCH, Diane Elise and BURNS, Jeramiah Nicholas James
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NOS:	CA 8 of 2006 (20423420) CA 9 of 2006 (20423152)
DELIVERED:	5 October 2006
HEARING DATES:	13 September 2006
JUDGMENT OF:	MARTIN (BR) CJ, SOUTHWOOD J and MARTIN AJ
APPEAL FROM:	Northern Territory Supreme Court, 11 May 2006, SCC 20423420 and 20423152

CATCHWORDS:

CRIMINAL LAW - appeal – Crown appeal against sentence – manslaughter – sentencing process attended by error – conduct after killing was an aggravating circumstance – sentences within the proper range of the sentencing discretion – appeals dismissed.

Criminal Code (NT), s 305(4)

R v Austin (1985) 121 LSJS 181; *R v Teremoana* (1990) 54 SASR 30; *R v Garforth*, unreported NSWCCA, 23 May 1994; *R v D* [1996] 1 Qd R 363; *DPP v England* [1999] 2 VR 258; *Knight v Regina* [2006] NSWCCA 292, applied.
The Queen v De Simoni (1981) 147 CLR 383; *The Queen v Riley* [2006] NTCCA 10, followed.

REPRESENTATION:

Counsel:

Appellant:	R Coates & E Armitage
First Respondent:	J Lawrence
Second Respondent	J Tippett QC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
First Respondent:	Halfpennys Lawyers
Second Respondent:	Northern Territory Legal Aid Commission

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

The Queen v Syrch and Burns [2006] NTCCA 20
Nos. CA 8 of 2006 (20423420), CA 9 of 2006 (20423152)

BETWEEN:

THE QUEEN
Appellant

AND:

SYRCH, Diane Elise
First Respondent

and

BURNS, Jeramiah Nicholas James
Second Respondent

CORAM: MARTIN (BR) CJ, SOUTHWOOD J and MARTIN AJ

REASONS FOR JUDGMENT

(Delivered 5 October 2006)

Martin (BR) CJ:

Introduction

[1] On 28 July 2004 at Darwin Mr Shane Patrick Thomas murdered Mr Marshall Haritos. The respondents, Ms Diane Syrch and Mr Jeramiah Burns, were implicated in the killing and pleaded guilty to manslaughter.

[2] On 11 May 2006 the learned sentencing Judge sentenced Mr Thomas to imprisonment for life and fixed a non-parole period of 20 years. His Honour

sentenced Mr Burns to imprisonment for 10 years and fixed a non-parole period of five years. A sentence of four years and six months was imposed on Ms Syrch with a non-parole period of two years and six months.

[3] The Director of Public Prosecutions appeals against the sentences imposed upon Mr Burns and Ms Syrch on the basis that the sentencing process was attended by an error of principle. In the case of Mr Burns the Crown acknowledged that even if the Judge erred, this Court could take the view that the sentence is within the proper range of the sentencing discretion and decline to interfere. As to Ms Syrch, the Crown contended that, independently of the error, the sentence is manifestly inadequate.

Facts

[4] In order to understand the grounds of appeal and the roles of the respondents in the killing of the deceased, it is necessary to set out the facts in detail. Rather than endeavour to summarise the facts, I set out below the Crown facts presented to the Judge which provided the basis of each of the sentences imposed:

> "Marshal Nicholas John Haritos, hereinafter referred to as 'the deceased', was born on 21 June 1978. He was aged 27 years at the time of his death.
>
> For some ten months prior to his death, the deceased had been in an on/off relationship with Diane Elise Syrch whose date of birth is 1 November 1985. They stayed together on occasions whilst Mr Haritos was living in rented accommodation in Fannie Bay in late 2003. Ms Syrch moved out on 13 December 2003 and left for Queensland the following day. The deceased followed her there and they spent several weeks together in Noosa in January 2004. The

deceased returned to Darwin in February 2004 and Ms Syrch returned to Darwin on 21 February 2004.

In late May/early June of 2004, Ms Syrch moved into unit 17 at 16 MacKillop Street, Parap which will be referred to as 'the unit'. Unit 17 is situated on the third level of the complex. Access is by stairs only. Vehicular access to the unit complex requires a remote controller to open the sliding gate. At that time, Ms Syrch was employed as a waitress at the Top End Hotel in the city. Syrch and the deceased were not living in a committed relationship. They were each seeing other people during this period.

The accused, Shane Patrick Thomas, was aged 27 years at the time of the deceased's death, his date of birth being 4 May 1977. Thomas, a qualified boilermaker, was employed in mine maintenance around the Territory on a fly in/fly out basis. Just prior to 28 July 2004, he resided at 15 Muckaninnie Court, Palmerston. His belongings were also stored at that address.

On 28 July 2004, he happened to be working in Darwin doing a job at the Trade Development Zone. In about 2002, Syrch was in a girlfriend/boyfriend relationship with Thomas for some six months to a year. She lived with him for a time on his block at Humpty Doo. When that relationship ended, Thomas and Syrch remained good friends. He cared for her and had promised to Syrch's mother that he would look after her. Whenever Thomas was in town he would ring her or look her up.

Thomas first met the deceased after the deceased and Syrch began seeing each other. There was some animosity between the two men. Syrch would sometimes complain to Thomas about relationship difficulties, arguments and fights that had occurred between her and the deceased. Thomas resented the way the deceased treated Syrch. The deceased in turn resented the fact that Syrch associated with Thomas.

Thomas says that on several occasions he overheard telephone conversations between Syrch and the deceased during which there was an unpleasant exchange of views between Syrch and the deceased, resulting in the deceased making threats against Thomas which subsequently came to nothing.

On the weekend prior to the deceased's death, that is Saturday 24 and Sunday 25 July 2005, the deceased and Syrch were seen socializing. They attended a dinner at a restaurant with some friends on the Saturday night and the following day, they visited the deceased's mother and sister and had lunch with them. On Sunday night, they had dinner with the deceased's father at Ludmilla.

On each occasion, they were observed to be happy together and very affectionate towards each other. On the evening of Tuesday 27 July 2004, the deceased spent the night at Syrch's unit with her. She left work early on the morning of 28 July after having an argument with the deceased. As she was leaving the unit the deceased pushed her and threw eggs at her vehicle. She was angry and upset.

Syrch worked three split shifts on this day from 6 am to 9 am, from 11.30 am to 2.30 pm and from 5 pm to 9 pm. She returned to her unit after the first shift and the deceased was not home. She returned to work for her second shift. During this shift the accused, Thomas, went to Lizards Bar at the Top End Hotel and spoke with Syrch. He had lunch there. Thomas had been trying to ring Syrch on her mobile phone but wasn't able to get through. He inquired as to why. She told him that about a week and a half earlier, the deceased had smashed her phone. She also told him that the deceased had broken her car window at the same time. The damage to the car was subsequently confirmed to have occurred by police during their investigations.

Thomas became angry and told Syrch that he wanted to catch up with the deceased. After this shift at Thomas' suggestion, Thomas and Syrch drove back to Syrch's unit at Parap. Thomas had not been there before and wanted to see where she lived. When they arrived at the unit complex, Syrch noticed the presence of a Holden Rodeo utility which the deceased had been driving but was in fact owned by Tony Simmons, a family friend. She informed Thomas of that fact. They entered the unit and found the deceased asleep in bed. She said, 'Let's go' and they left.

Having left the unit and while standing downstairs, Thomas observed that now would be a perfect opportunity to give Marshall a touch-up. She did not lock the unit. They then drove to shed 24, 12 Charlton Court, Woolner, hereinafter referred to as 'the shed', the residence of a mutual friend, Jeramiah Nicholas James Burns.

Thomas had known Burns for about five years and had, on occasions, stayed at the shed. Jeramiah Burns was born on 27 November 1979. He was aged 23 years and 8 months at the time of the offence. He had lived at the shed for almost a year. He shared the shed with a workmate, Paul Dobbe. He worked in the building industry doing contract work in Aboriginal communities. Burns met Syrch when they both attended the Taminmin High School. He met the deceased through Syrch sometime in 2004.

At the shed, Thomas and Syrch spoke further about the deceased and his conduct towards Syrch, including the damage which he had caused to her car window and mobile telephone. There was a discussion about what would happen. Thomas said he was going to go back to the unit to give the deceased a touch-up when she was at work. Syrch replied to the effect, 'Okay, just as long as it does not come back on me'. She understood that Thomas may have been seeking some form of approval from her. She described this conversation to police as serious.

She said she had a fair idea of what was going to happen, that Haritos was to receive a bashing, but that she did not know how or when. She gave Thomas the key to the MacKillop Street unit as well as a remote control to open the gate to the unit complex. Burns was not present during any of these conversations and he did not take part in any preliminary statements between Thomas and Syrch.

Syrch then left the shed and went to work. Syrch saw no weapons at any stage nor was the use of weapons discussed. By her plea, Syrch acknowledges she was a party to the common purpose of assaulting the deceased and that she foresaw the death of the deceased as a possible consequence of Thomas' assault upon the deceased.

Thomas then took from Burns' bedroom a black metal baseball bat and I now tender, your Honour, the baseball bat.

HIS HONOUR: It's by consent, I take it, and I will take it everything from here on is by consent unless I hear otherwise. That will be exhibit P2.

EXHIBIT P2 Baseball bat.

MR KARCZEWSKI: The bat which belonged to Burns, was engraved with the words 'Happy 21st Stud from all the crew 2002'. He also took with him a boning knife. Burns was not present when Thomas made these preparations. Thomas had earlier contacted Burns on his telephone and asked him to return to the shed to help him with the job. When Burns arrived back at the shed, Thomas asked him to give him a hand in giving Marshall a touch-up.

He told Burns that the deceased had assaulted Syrch and that he intended to teach the deceased a lesson. He asked Burns to go with him to act as backup. Burns told police he understood that to mean they were going to beat him up. Burns agreed. Thomas and Burns then left the shed and drove to Syrch's unit. Burns told police he took with him a scythe-shaped metal implement which he described as a brewery spanner. … And that was to threaten the deceased. As Burns got in the car with the brewery spanner, Thomas told him, 'We won't be using that'. Burns then put it under the seat in the car. Thomas told Burns: 'I've got your back'. Burns replied: 'Okay'. Burns did not know Thomas had the knife with him. Burns did not take the brewery spanner with him to the unit. It remained in Thomas' vehicle.

Syrch was not aware that Thomas would seek the assistance of Burns. Thomas and Burns parked inside the unit complex. As they got out of the car, Thomas passed Burns the baseball bat and asked Burns to carry it for him. Burns secreted the bat up his shirt and in his shorts. Burns was not aware that Thomas was armed. Thomas opened the door with the keys supplied by Syrch. They entered the unit. Thomas took the bar from Burns.

Thomas then entered the bedroom where the deceased was asleep on a bed. He was followed by Burns. Thomas woke the deceased up and said: 'Oy, Marshall. You're not untouchable now'. Holding the bat in two hands, Thomas then hit the deceased about the head with the baseball bat a number of times. The blows were delivered with considerable force.

Thomas then handed the bat to Burns and told him to hit the deceased if he tried to get up. At that point the deceased sat up a bit. Burns took a swing at the deceased with the bat. He told police he might have hit the bed-head. A subsequent examination of the bed-head disclosed the presence of a black dented mark on it.

…

Burns hesitated before he delivered one hard blow to the deceased's head. After Burns hit the deceased, the deceased continued to move about on the bed. Thomas then produced the knife he had secreted on his person and which he had not disclosed to Burns and went over to the bed where the deceased was and stabbed the deceased once in the right side of the chest in the lung. It was when Burns produced the knife – sorry – when Thomas produced the knife that Burns realised the matter was going to go a lot further than anticipated. They left the bedroom shortly afterwards. Thomas noticed the deceased was still moving and he re-entered the bedroom and stabbed the deceased again in the left side of the chest in the heart. Thomas then held the deceased's hand until he died. Thomas confirmed that Haritos was dead by checking his pulse. The stabbing caused Burns to go into shock and he subsequently told police that this affected his recollection of events and subsequent conversations.

By his plea of guilty to manslaughter, Burns acknowledged that he acted in concert with Thomas in the assault of the deceased and that he foresaw the death of the deceased as a possible consequence of the joint assault. Further, by accepting that plea, the Crown concedes that Burns was not a party to the use of the knife. Jeramiah Burns acknowledges by his plea of guilty that he is guilty of manslaughter, as he engaged in an assault upon the deceased in the company of Thomas, but that at no time did he personally intend to cause death or grievous harm to the deceased. The prosecution accepts that Burns did not take part in the stabbing of the deceased and that the use of the knife by Thomas was entirely unexpected by Burns.

Whilst it is not possible for the Crown to say with precision what injuries were the immediate cause of the deceased's death, the supervening stabbing appears more likely to be so.

Thomas and Burns then left the unit and drove back to the shed in Thomas' work vehicle. Thomas decided the best thing to do was to get rid of the body and the evidence. Thomas left Burns at the shed and returned to collect him later that night. In the meantime, Thomas went to 15 Muckaninnie Court, Palmerston where he collected two suitcases. When he returned to the shed, he collected some orange plastic sheeting and wrapped in it some knives from the kitchen and a tomahawk. One of the visitors at the shed asked Thomas what the plastic was for. He said words to the effect that he was going to get a quarter of a cow. Although Burns was at the shed, he did not take

part in those preparations and was not present during that conversation.

After picking Burns up again, the two men returned to the unit. Thomas spread out the plastic sheeting and both men pulled the deceased's body onto the plastic. They then dragged the deceased into the bathroom where Thomas dismembered the body, removing his arms, legs and head from the torso. Burns did not take part in that process which had the effect of making him ill. In the meantime, Burns set about cleaning the bedroom of blood and collecting the bloodstained bedding from the bed. The bedding was placed in the garbags bags which Burns located in the kitchen. Thomas then placed the deceased's body parts in the garbags bags which they packed into two suitcases. Thomas and Burns then carried the suitcases downstairs and put into the back of the deceased's vehicle, the Holden Rodeo utility which was parked in the unit complex carpark.

Thomas then drove the deceased's vehicle to bushland at the back of Howard Springs off Girraween Road. Burns followed driving Thomas' work vehicle. Once there, Thomas and Burns took the suitcases off the vehicle and covered them with foliage. The deceased's vehicle was then driven by Thomas to another nearby location and set alight by him. Both men then drove back into the city in Thomas' vehicle.

In a second and subsequent trip that night, Thomas and Burns collected the mattress and sheets, the deceased's clothing and material used to clean the unit and loaded them in Thomas' work vehicle. Thomas then drove Burns back to the shed, dropped him off and then continued on alone to an area of bush near the Elizabeth River Bridge near Palmerston where the various items, including the soiled clothing worn by both men that night, were dumped and set alight.

Both men had got blood on their bodies and clothing. Thomas asked Burns for his clothing and Burns did so. Later Thomas burnt their clothing. The men also showered. When Thomas returned to the shed later that night, Syrch was there. She asked Thomas what was going on, what had happened. He replied, 'It's fixed'. She said, 'What do you mean'. He replied, 'He's gone'. Syrch asked Thomas where Haritos was. He replied, 'In the bush at the back of Howard Springs. The car has been burnt and the body has been buried'. She

asked him, ‘What am I supposed to do now?’ Thomas replied, ‘Get on with your life. The problem’s gone’.

She asked him what she should do if she was questioned by the police. He told her she had to be strong and to say she knew nothing. He told her not to go home for a week. He told her that the mattress was gone. He suggested that she should probably call Marshall’s father. She did so the following day. She asked Mr Haritos Senior if he had seen Marshall. He replied that he thought his son was with her. She replied, ‘That’s bad then’. They agreed to let each other know if they saw Marshall.

The family of the deceased made extensive inquiries as to Marshall’s whereabouts without success. Several members of the Haritos family spoke to Syrch regarding her knowledge of his whereabouts. On 30 July 2004, Syrch told the deceased’s sister, Tiffany, that she and the deceased had had a fight after she told the deceased that she was moving to Cairns. She said she last saw the deceased in the morning when she went to work.

On Sunday, 1 August, the deceased’s mother had a lengthy conversation with Syrch at Lake Alexander. Syrch told her that she had not seen or heard from the deceased, that she had no idea where he was and that she was worried about him. She said she was no longer going to Cairns as she had been offered a promotion at work.

Members of the deceased’s family made a missing person report to police on 1 August 2004. On Saturday 31 July 2004, Thomas and Burns, at Thomas’ request, attended at Le Cornu furniture store in Snell Street, Stuart Park and purchased a replacement mattress for the bed. Some days later, the mattress was taken to the unit by Thomas and another person. Burns told police he had no recollection of taking part in that activity.

At about this time, Thomas also attended at Spotlight department store and purchased a doona and pillows which he then gave to Syrch. On or about Saturday 31 July 2004, Thomas asked Burns if he could assist in further disposing of the deceased’s body. Burns refused. Thomas stated that was okay because at least he would not know where the deceased’s was.

Thomas returned to where he had secreted the body, selected a burial site, dug a hole about one and a half metres deep and buried the body

parts, except for the head. He buried the head separately in a nearby termite mound. … He then drove to another site where he burnt the suitcases and the clothes he was wearing. Thomas later told Burns that 'they'll never find him'.

A day or so after Thomas had burnt the suitcases, he returned to the site to get rid of any charring. The baseball bat was not disposed of immediately. Thomas initially secreted it under a log in bushland near the Elizabeth River Bridge near Palmerston. He later retrieved it and took it to Muckaninnie Court where it was seen by several witnesses who noticed that the bat had a dent in it which previously had not been there.

Later still, Thomas hit the bat under a log in bushland off the Arnhem Highway near Humpty Doo. Thomas says he melted down the knife he had used, using an oxyacetylene torch. Burns did not take part in any of those activities.

Syrch travelled to Queensland on 7 September 2004. In the meantime she stayed with friends for several days and then resumed residence at the unit. Before she left, she spoke to Thomas over the phone. She asked him what she should do if she got spoken to. He replied, 'Tell them you do not know anything. Don't stress. They have nothing on us'.

During the course of their combined investigations, the Northern Territory Police and Queensland Police spoke with Diane Syrch on numerous occasions. Syrch was spoken to by Northern Territory Police on 9 August. She told members Gavin and Henrys that she last saw the deceased asleep on the morning of 28 July 2004, that she had no idea where he might be and that she could not assist police with suggestions as to where he might be.

She reported this conversation to Thomas when they next spoke. He told her to keep to her story and to remain strong. Syrch reiterated her lack of knowledge to member Gavin on 16 August and to member Milner on 10 September 2004 when further inquiries were made of her. Syrch made witness statements to Queensland detectives on 29 September, 6 and 7 October 2004. She was formally interviewed by Queensland detectives on 8 October 2004 and by Northern Territory detectives on 13 October.

The early statements did not disclose Syrch's involvement in the offence. In the first statement, she said she did not know where Marshall was. In each successive statement, she disclosed more information than she had previously. In her second and third statements, she disclosed her conversations with Thomas before and after the killing. As a result of this information, on 7 October 2004 Northern Territory Police conducted an aerial search of bushland near Girraween Road and located the burnt-out remains of the deceased's vehicle.

Ultimately in the interview on 13 October 2004, Syrch admitted to her participation in the offence. She told police she was angry and hurt. Syrch wanted to be left alone and she wanted the deceased out of her unit. She wanted to end the relationship. At the conclusion of this interview, Syrch was arrested for the offence of murder and appeared before a Queensland Justice who ordered her returned to the Northern Territory.

Thomas flew out of the Territory to Sydney on 29 September 2004 together with his then girlfriend, Cally Harris, a geologist whom he had met at the Granites Camp on the Tanami on 10 August 2004. The plan was that he would spend a few days with her at her stepfather's residence. Harris was aware from previous conversation with Thomas of the earlier relationship Thomas had had with Syrch, of the unsatisfactory nature of the subsequent relation between Haritos and Syrch and of the fact that Haritos had gone missing.

She had overheard Thomas have conversations with other people regarding the deceased which puzzled her. While in Sydney, Thomas made a number of comments to Harris which made her frightened. On 30 September 2004 as they were driving in the city, Harris told Thomas that she wanted to know the truth about Marshall Haritos. He told her that Marshall was dead and that he and Thomas had cut him up into six pieces. She became more frightened and avoided any further conversation about the matter.

After they returned to Darwin on 3 October 2004 – I beg your pardon – they both returned to Darwin on 3 October 2004. On 5 October, Harris flew out to the Tanami. They spoke to each other over the phone several times after that, but not about the disappearance of Marshall Haritos. She heard through a mutual friend that Thomas had been arrested by police on 10 October. She made a statement to police on 14 October 2004.

Thomas was interviewed twice by Northern Territory Police at Pine Creek on Sunday 10 October 2004. He was working there at the time. He made no admissions to police. In both interviews, he said he did not know where Marshall was. He said that Syrch had complained to him from time to time about the manner in which the deceased treated her. Thomas said he first heard that Marshall was missing from Syrch who rang him to tell him she hadn't seen Marshall for three or four days. He denied having anything to do with the death of Marshall Haritos.

At the end of the second interview Thomas was arrested for the murder of Marshall Haritos. Thomas appeared in court on 30 October 2004 and was remanded in custody.

On Saturday 16 October 2004, Thomas informed prison authorities that he wished to speak with police. Detectives Ordelman and Cummins attended the Darwin Correctional Centre. In the conversation that followed, Thomas said that he wished to show detectives the location of a number of items, including that of the deceased's body and that he wanted to speak to the deceased's father. Arrangements were made for Thomas to be handed into police custody.

Later that afternoon, Thomas accompanied police and directed them to an area of bush off Girraween Road. The search for the body and head of the deceased was unsuccessful. Thomas then directed police to a location off the Arnhem Highway where police located the baseball bat used in the killing. The bat was hidden under a fallen tree. A subsequent examination of the bat revealed that an attempt had been made to grind off the engraved words. The engraved words however remained visible under close examination.

Thomas then directed police to a location near the Elizabeth River bridge at Palmerston where police located the remains of a burnt mattress. He then showed police a further location nearby where he said the shorts of the deceased could be located. He kicked the top off a termite mound revealing the shorts. He told police that when he returned to the site a week or so after the killing to clean up any remnants, he saw that the deceased's shorts hadn't burnt so he secreted them in the ant hill.

Thomas accompanied police back to the Darwin Police Station where he took part in an electronically-recorded interview where he

admitted his part in the killing of the deceased. He agreed to continue to assist police to locate the remains of the deceased. The following day Thomas returned with police to the same area of bush off Girraween Road to continue searching for the remains of the deceased.

That morning police officers involved in the search in fact found the body and head of the deceased in two separate locations. The areas where the remains were found was no more than 100 metres from the area where the search had concentrated the previous day.

Burns was spoken to by police on Sunday 10 August 2004. After initially denying any knowledge of the offence, he made admissions and was arrested for the offence of murder. On Monday 11 October 2004, he directed and accompanied police officers to the site where the burnt-out remains of the Holden Rodeo utility were found and assisted police in their search for the body and other evidence. Those efforts were unsuccessful. Burns continued to assist police by agreeing to engage in a further detailed record of interview on Tuesday 12 October 2004.

A post-mortem examination of the remains was conducted on 18 October 2004 by Dr Woodford with the assistance of forensic scientist Daymon Steptoe who reconstructed the skull. Dr Woodford, a specialist in forensic medicine and pathology, noted that there were extensive comminute fractures to the skull bowl, face and facial bones as well as fractures to both clavicles. Dr Woodford identified 14 fractures to the face and skull and they are more comprehensively described in the doctor's report which in the facts I note were attached. I don't propose tendering that, your Honour. I think the entries like to speak for themselves.

Several incised injuries were identified, leaving aside injuries associated with the disarticulation. There were two such injuries of note. Firstly, on the fifth right rib there were two adjacent shallow fine vertically orientated linear scores, each two millimetres in greatest dimension. Dr Woodford opined that these injuries could represent evidence of sharp force penetrating injury to the right side of the chest.

Secondly, the wound to the ninth thoracic vertebrae measured five millimetres in length and was approximately three millimetres in depth. Dr Woodford opined that this injury was consistent with a

stab injury. Dr Woodford expressed the opinion that (inaudible) as a result of such penetrating chest wound, would include intercostal vessels, lung and large thoracic veins.

Dr Woodford expressed the opinion that the multiple skull fractures resulted from blunt force trauma to the head with a minimum of three blows, three distinct blows having to be delivered to result in the fracture pattern seen. These blows appear to have been delivered over the vertex, right side of the head extending from the right mastoid temporal region to the right side of the mandible and the left side of the head in the region of the left mastoid temporal region.

The calculation of the number of actual number of blows delivered is complicated by the fact that some may have been delivered over a previously injured area, some may not have caused fracturing and some may have been relatively glancing in nature. The deceased was alive at the time of the infliction of some or all of these blows, the possible effects would include impairment of conscious state, inter-cranial haemorrhage and brain parenchymal injury.

…

Diane Syrch has been in custody since the date of her arrest in Noosa, Queensland on 13 October 2004. Jeramiah Burns has been in custody since the date of his apprehension near the Arnhem Highway turn-off on 10 October 2004 and their sentences should be backdated accordingly."

Conduct subsequent to the crime

[5] Although the sentencing Judge did not entirely ignore the conduct of the respondents following the commission of the crime, nevertheless the Crown submitted that in the following observations error is demonstrated in the highlighted passage:

"*Although not directly relevant to the offending with which I am dealing*, the manner in which the body was disposed of is disturbing. It was dismembered and hidden in the bush. The effect of disposing of the body in this way was to suggest that the deceased had left

> Darwin or was in hiding. It was a cruel deception of the family of the deceased who suspected but could not know that he had met with foul play. Ms Syrch perpetuated that deception by her subsequent lies to the family and the authorities. The family has been left with the lasting image of the body of the deceased in that regrettable condition.
>
> *The prisoners are not to be punished for this conduct as it would constitute a separate and serious crime and none of the prisoners has been charged with a relevant offence*. This conduct is relevant to the state of mind of Mr Thomas immediately after the murder. It is relevant to an assessment of his prospects for rehabilitation, the benefit he is to receive for his later cooperation with the Police and his remorse. The conduct after the death is also relevant in the assessment of mitigatory factors relevant to Ms Syrch and Mr Burns" (my emphasis).

[6] Later in his reasons as to Syrch, the sentencing Judge again referred to the significance of her conduct after the commission of the crime:

> "After the events, Ms Syrch was callously deceitful in her dealings with member of the family. I accept that she acted in that way because she was fearful for her own situation and, to some extent, was concerned by what she knew Mr Thomas could do. However Mr Lawrence correctly described her conduct at that point as 'treacherous'. That conduct is relevant to an assessment of her claimed remorse, her acceptance of responsibility for her conduct and her prospects for rehabilitation. It throws light upon her character."

[7] As to Burns, subsequently the sentencing Judge again noted that Burns had been part of the clean-up process.

[8] The appellant submitted that the conduct of the respondents after the killing of the deceased amounted to an aggravating circumstance because it reflected adversely on the objective seriousness of their offending and on their culpability in the commission of the crime to which each pleaded guilty. Notwithstanding that such conduct could have been the subject of a

separate charge, the Crown contended that as a matter of degree and fairness it was not appropriate for separate charges to be laid and such conduct should have been appropriately taken into account as part of the surrounding circumstances attending each crime.

Principles

[9] Numerous authorities have grappled with the application of broad principles governing a determination as to whether circumstances which amount to a crime other than the crime for which an offender has been convicted can be taken into account as part of the circumstances surrounding the commission of the crime for which sentence is to be imposed. Many of the authorities are discussed by the Queensland Court of Appeal in *R v D* [1996] 1 Qd R 363.

[10] In *The Queen v De Simoni* (1981) 147 CLR 383 the High Court was concerned with sentencing for the crime of robbery in the course of which the offender wounded the victim. Pursuant to the provisions of the Western Australian Criminal Code, the wounding was a specified circumstance of aggravation which increased the maximum penalty from 14 years to imprisonment for life. Notwithstanding s 582 of the Criminal Code (WA) which provided that if "any circumstance of aggravation is intended to be relied upon, it must be charged in the indictment", the wounding was not charged as a separate circumstance of aggravation.

[11] In a judgment with which Mason and Murphy JJ agreed, Gibbs CJ stated the relevant principle in the following terms (389):

> "At first sight it may seem unlikely that the framers of the Code intended that an offender should be sentenced on the fictitious basis that no circumstance of aggravation existed when it is found by the trial judge that such a circumstance did exist, particularly when such a finding is based upon an unchallenged statement of facts made by the prosecutor after the offender has pleaded guilty. However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. Section 582 reflects this principle. The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."

[12] Section 305(4) of the Northern Territory Criminal Code is in the same terms as s 582 of the Western Australian Criminal Code and provides that if it is intended to rely upon a circumstance of aggravation "it shall be charged in the indictment". "Circumstance of aggravation" is defined in s 1 as meaning "any circumstance by reason of which an offender is liable to a greater punishment than that to which he would be liable if the offence were committed without the existence of that circumstance".

[13] Read literally, s 305(4) of the Criminal Code (NT) could be viewed as requiring any circumstance which aggravates the commission of an offence to be charged in the indictment. However, read in the context of the Criminal Code in its entirety, the requirement to charge a circumstance of aggravation is a reference to those circumstances identified in a number of

sections of the Code which, if they accompany the commission of the primary offence, result in an increased maximum penalty. For example, s 188 provides for a maximum penalty of one year for the offence of common assault, but if the common assault is accompanied by any of the circumstances identified in s 188(2), the maximum penalty increases to five years imprisonment.

[14] In the matter under consideration, there is no question of taking into account aggravating circumstances which would have warranted a conviction for a more serious offence or an offence carrying a greater maximum penalty. The Code does not specify any circumstances which are capable of aggravating the offence of manslaughter. There is a single maximum penalty of life imprisonment.

[15] The conduct of Burns in dismembering the body amounted to an offence of misconduct with regard to a corpse contrary to s 140 of the Code. The maximum penalty for that crime is two years. The conduct of Syrch in making false statements concerning her knowledge of the deceased and his whereabouts was capable of amounting to the offence of accessory after the fact to murder contrary to s 13 of the Code which carries a maximum penalty of 14 years imprisonment (s 294). Whether that conduct amounted to the accessory offence depends on the purpose for which Syrch made the false statements.

[16] It is necessary to identify the principle applicable to the sentencing exercise when the primary offence is accompanied by a circumstance of aggravation that could have been charged as a separate offence. I respectfully agree with the following observations of King CJ, with whom Zelling and Bollen JJ agreed, in *R v Austin* (1985) 121 LSJS 181 at 183:

> "It is true that in imposing sentence for a crime, a judge should take into account not only the conduct which actually constitutes the crime, but also such of the surrounding circumstances as are directly related to that crime and are properly to be regarded as circumstances of aggravation or circumstances of mitigation.
>
> Just what surrounding circumstances are properly to be taken into account in a particular case is a matter of degree. The courts have to be particularly cautious when the circumstances relied upon themselves may constitute crimes. Often the circumstances amount to crimes of a similar character to that charged and can more readily be taken into account as circumstances of aggravation. Likewise where the criminality of the aggravating circumstances is clearly subsidiary to as well as related to the criminality involved in the conduct constituting the crime charged. Special care, however, is required when the circumstances relied upon as circumstances of aggravation themselves constitute crimes or may constitute crimes of a different character or crimes against different victims.
>
> If a person is to be punished for conduct which is said to be criminal, generally speaking justice requires that he be charged with it and have the opportunity of defending himself. If he is not charged with it, generally speaking it should not be relied upon as a circumstance of aggravation of some other crime. This, of course, is not a hard and fast rule; everything must depend upon the particular circumstances and, as I have said, it is very much a matter of degree."

[17] The view expressed by King CJ was not challenged by counsel and has subsequently been cited with approval in a number of authorities including *R v Teremoana* (1990) 54 SASR 30. In particular, Cox J cited the remarks to

which I have referred and gave examples at each end of the spectrum or circumstances (38):

> "However, it is certainly not a universal rule that the judge, when sentencing for the offence specifically charged in the information, may never have regard to relevant actions of the defendant that, strictly speaking, constituted separate offences. If they were offences of lesser gravity than the offence of which the defendant has been convicted, then it will be a matter of degree and fairness whether they may properly be taken into account as a part of the circumstances surrounding the offence charged. If a burglar is disturbed in the course of ransacking a house, and seriously assaults the victim, the assault should be separately charged and not regarded as a mere matter of aggravation of the burglary. *R v Parsell* (1980) 28 SASR 369. On the other hand, relatively minor indecencies that are directly associated with an act of rape, though serious enough in themselves, are often not separately charged but are nevertheless taken into account by the sentencing judge as circumstances of aggravation. In *R v Sharp* [1983] 36 SASR 215 the defendant was convicted of misprision of felony. He helped to remove the body of a murder victim from the house where the murder had been committed and to bury it in a lonely spot many kilometres away. It was held that the defendant could not be sentenced on the footing that he was an accessory after the fact to murder – a more serious offence than the passive crime of misprision – but it was not suggested that his participation in the removal and burial was not a relevant circumstance of aggravation, and I do not think that the position would have been any different had it transpired, say, that burying a person on a roadside was contrary to some health regulation. As the Chief Justice said in *R v Austin*, it is a matter of degree."

[18] In *R v Garforth*, unreported New South Wales Court of Criminal Appeal 23 May 1994, the Court was concerned with sentence imposed for the crime of murder which had been preceded by an abduction of the deceased and a sexual assault upon her. The applicant abducted the deceased on her way home from school and took her in the boot of his car to a remote rural area where he bound her hands behind her back and tied her ankles together with

wire. After sexually assaulting the deceased, the applicant threw her into a dam where she drowned. On appeal it was argued that the sentencing Judge erred in taking into account as aggravating circumstances those acts preceding the murder which could have been the subject of separate charges. In rejecting that proposition, the Court said:

> "It is often the case that a criminal escapade involves a multiplicity of unlawful acts. The offender is frequently charged with the most serious of the offences involved. In the present case, for example, it would be absurd to charge the applicant with indecent exposure, although he undoubtedly committed that offence.
>
> Sometimes the aggravating features of homicide are themselves separate offences (such as abduction) and sometimes they are not. It would be paradoxical if the only circumstances that could be taken into account in sentencing for homicide are those which are not serious enough to be separate crimes, those that are serious enough to be separate crimes being disregarded.
>
> Mr Sides QC, in mounting this argument, conceded that in a case such as the present it might well have been appropriate to impose cumulative sentences for the abduction and the sexual assault. There are many cases in which such an approach might lead to the imposition of a sentence greatly in excess of the offender's life expectancy. This occurs not infrequently in other jurisdictions but has never found favour in this country. However, in this case it was at least impliedly contended by Mr Sides that a sentence resulting from such an accumulation could not have yielded a result as unfavourable to the applicant as the result under appeal.
>
> No authority was advanced in favour of this argument. It is not within the principles enunciated in *The Queen v De Simoni* (1980) 147 CLR 383. Indeed Mr Sides conceded that he was seeking that this Court enunciate this as a new matter of principle in relation to all cases where the consequences of a finding that the circumstances fell within the worst type of case would result in a sentence of life imprisonment.

We reject the submission. *In our view it would be an affront to common sense to say that the abduction and the sexual assault of this victim must be disregarded in evaluating the seriousness of the homicide.* His Honour was right to take these matters into account in deciding whether this case attracted the maximum penalty" (my emphasis).

[19] In *D*, after a review of the authorities the Queensland Court of Appeal summarised the principles in the following way (403):

"Sentencing judges ought experience little difficulty in practice if there is unqualified adherence to the fundamental principles which emerge from the decisions of the High Court in *De Simoni* and subsequent cases. We will try to summarise those principles in a manner which should be adequate for most purposes.

1. Subject to the qualifications which follow:

   (a) a sentencing judge should take account of all the circumstances of the offence of which the person to be sentenced has been convicted, either on a plea of guilty or after a trial, whether those circumstances increase or decrease the culpability of the offender;

   (b) common sense and fairness determine what acts, omissions and matters constitute the offence and the attendant circumstances for sentencing purposes (cp. *Merriman* at 593, *R v T* at 455); and

   (c) an act, omission, matter or circumstance within (b) which might itself technically constitute a separate offence is not, for that reason, necessarily excluded from consideration.

2. An act, omission, matter or circumstance which it would be permissible otherwise to take into account may not be taken into account if the circumstances would then establish:

(a) a separate offence which consisted of, or included, conduct which did not form part of the offence of which the person to be sentenced has been convicted;

(b) a more serious offence than the offence of which the person to be sentenced has been convicted; or

(c) a "circumstance of aggravation" (Code, s 1) of which the person to be sentenced has not been convicted; ie, a circumstance which increases the maximum penalty to which that person is exposed.

3. An act, omission, matter or circumstance which may not be taken into account may not be considered for any purpose, either to increase the penalty or deny leniency; and this restriction is not to be circumvented by reference to considerations which are immaterial unless used to increase penalty or deny leniency, eg, "context" or the "relationship" between the victim and offender, or to establish, for example, the offender's "past conduct", "character", "reputation", or that the offence was not an "isolated incident", etc."

[20] In *D*, while recognising that an act which might technically amount to a separate offence is not, for that reason alone, necessarily excluded as a circumstance attending the crime, the court expressed the view that it is not permissible to take into account a circumstance amounting to a separate offence if that circumstance involved "conduct which did not form part of the offence" for which sentence is to be imposed. On that approach, the difficult question to be determined is whether the conduct formed "part of the offence". In addition, this approach has the potential to undermine the flexibility which is inherent in the observations of King CJ in *Austin* to which I have referred.

[21] In *Director of Public Prosecutions v England* [1999] 2 VR 258, Brooking JA, with whom Batt and Chernov JJ.A. agreed, reviewed a number of authorities in the context a crime of murder which was followed by an act of sexual intercourse with the corpse, theft of property and setting fire to the premises of the deceased. The sentencing Judge expressly sentenced on the basis that the sexual intercourse and burning of the body could not be taken into account as aggravating circumstances of the crime and could only be used in considering whether the offender had established that he was remorseful. Brooking JA referred to authorities in which mutilation of the body has been treated as a circumstance of aggravation of the crime of murder. His Honour cited with apparent approval the remarks of King CJ in *Austin* to which I have referred. After reviewing a number of authorities, Brooking JA specifically rejected the approach taken previously by a sentencing Judge who had determined that conduct after commission of the crime of murder could not be regarded as a circumstance of aggravation. The conduct in question involved disposing of a firearm and dumping and burning the body in a mineshaft a significant distance from the place of the murder.

[22] Having emphatically rejected an approach that the circumstances of the offence for sentencing purposes "are neatly marked out by two lines, one at the technical beginning and the other at the technical end of the crime", Brooking JA concluded his review of the authorities with the following observations [35]:

> "What should be regarded as the circumstances of an offence is best left to the good sense of sentencing judges, without any attempt to lay down principles or rules, which are all too common in the criminal law nowadays and which are particularly to be avoided in a matter of this kind. I have no doubt that in this case the judge was wrong in failing to characterise as a circumstance of the crime the facts that the murderer had capped the homicide with a sexual assault upon the body from which life had just departed and then burnt what he had just defiled. Cases may arise in which, for example, the murderer, who has allowed the victim's body to lie concealed for a long time, then dismembers it with a view to disposing of it by some different means; and it may be argued that, having regard to all relevant matters, the dismemberment should not be regarded as so connected with the crime as to be viewed as one of its surrounding circumstances. When such a case arises, it can be left to the good sense of the sentencing judge. As was said in the South Australian decisions mentioned earlier, what is a surrounding circumstance may be a question of degree."

[23] Specifically in connection with dismemberment of a victim's body, the New South Wales Court of Criminal Appeal cited *England* with approval in *R v Knight* [2006] NSWCCA 292. The applicant had been convicted of a particularly gruesome murder. After killing the victim, the applicant defiled the body by skinning and dismembering it. Parts of the body were removed and the applicant cooked the deceased's head. In the course of an appeal against sentence the applicant submitted that the mutilation of the deceased's body following his death was not relevant to the objective seriousness of the crime. In rejecting that submission, McClellan CJ at CL, with whom Latham J agreed, said [28]:

> "As this Court said in *R v Yeo* [2003] NSWSC 315 at [36] the offender's treatment of the deceased's body can be taken into account in assessing the seriousness of the offence (see also *R v Garforth*, unreported, NSWCCA, 23 May 1994; *DPP v England* … ."

[24] Adams J made the following observations [64]:

> "I have already expressed my view about the culpability involved in the murder committed by the applicant. Although at first I was minded to think that too much had been made of her subsequent dealings with Mr Price's body, I have concluded, on reflection, that so extreme was this conduct and so closely linked in time and place was it with the killing that it must be regarded as an integral part of the killing itself. It demonstrates the extraordinary extent of the applicant's brutality and, perhaps of greater significance, her lack of what we might recognise as humane feelings, which were, I think, completely buried in an unreasoning and irrational hatred for her victim."

Application of principles

[25] The conduct of Burns in assisting Thomas in cleaning up and disposing of the body was closely and directly connected with the killing and subsidiary to it. It was conduct admitted by the respondent as part of the agreed facts. Fairness and the practical administration of criminal justice dictate that such conduct be regarded as part of the surrounding circumstances of the crime of manslaughter and as a circumstance of aggravation attending the commission of the crime.

[26] The conduct of Syrch in misleading the police and the deceased's family occurred over a period of approximately nine weeks following the killing of the deceased. The conduct was directly related to the crime and was undertaken for the subsidiary purpose of avoiding apprehension. The conduct comprised statements that were repeated in substantially the same form for the same purpose. It was the course of conduct beginning immediately after the crime.

[27] In my opinion, fairness and the practical administration of justice again dictate that such a course of conduct should not be the subject of a separate charge and, for the purposes of sentence, should be considered as part of the surrounding circumstances attending the commission of the crime. A primary motivation of the respondent Syrch was to avoid her own apprehension. Even if Syrch committed the crime of accessory after the fact to the murder by Thomas, in my view given that the facts were not in dispute and that the course of conduct began immediately after the commission of the crime, it would have been inappropriate to charge Syrch with being an accessory after the fact. The appropriate course was to treat her conduct as an aggravating circumstance attending the commission of the crime of manslaughter.

[28] It was the duty of the sentencing Judge to take into account all relevant circumstances surrounding the commission of the crimes. This duty applies to circumstances that both aggravate and mitigate the seriousness of the offending. It follows from these reasons that, in my opinion, the sentencing process was attended by error. His Honour erred in approaching sentence on the basis that the manner of disposal of the body was "not directly relevant to the offending" and that the respondents were "not to be punished" for their conduct after the commission of the crime because that conduct "would constitute a separate and serious crime" with which the respondents had not been charged. His Honour erred in restricting the use of the conduct to the assessment of remorse and prospects of rehabilitation. The conduct should

have been taken into account as part of the surrounding circumstances of each crime bearing upon the objective seriousness of the crimes committed by the respondents and upon their moral culpability.

Burns

[29] Error having been demonstrated, it does not necessarily follow on a Crown appeal that the appeal should be allowed. As I have said, acknowledging the restrictions that apply to Crown appeals, the Director of Public Prosecutions properly conceded that, notwithstanding the error, this Court could take the view that the sentence imposed upon Burns was within the proper range of the sentencing discretion and decline to interfere.

[30] There is no tariff or standard range of penalties applicable to the crime of manslaughter. Every crime of manslaughter is serious, but the crime is committed in an infinite variety of circumstances and involves a wide range of criminality. Each case must be judged according to its individual circumstances.

[31] The criminal conduct of Burns was undoubtedly very serious. He entered the unit armed with a baseball bat and willingly engaged in the violent attack upon the defenceless deceased. Burns was to be sentenced on the basis that he foresaw the death of the deceased as a possible consequence of the attack, but it must also be remembered that he was unaware that Thomas was carrying a knife and he was not party to the use of the knife. In addition, the Judge was required to sentence on the basis that Burns did not

intend to cause death or grievous harm. Had he possessed such an intention, he would have been guilty of murder. The penalty must reflect the fact that the deceased died and the criminality of Burns' conduct includes his conduct in subsequently assisting Thomas in cleaning up and disposing of the body.

[32] Weighed against the objective seriousness of the crime committed by Burns are circumstances personal to him which attract a degree of mitigation. Necessarily, as the crime was so serious, the personal circumstances cannot attract the same weight that would be given if Burns had committed a much less serious crime.

[33] The sentencing Judge described Mr Burns as having a minor criminal history which did not involve violence and was of no consequence in the sentencing exercise. There is no challenge by the Crown to that approach. The sentencing Judge accepted the evidence of witnesses and references that Burns' conduct was out of character. His Honour accepted that Burns had been a hard worker in full employment since leaving school and that he will have work available from a previous employer who was so impressed with Burns that he will offer him work when he is released from prison. Burns is truly remorseful for his conduct and has accepted responsibility for his actions. He has been a model prisoner and intends to use his time in prison to further educate himself.

[34] Before making allowance for the plea of guilty and co-operation with the authorities, the sentencing Judge regarded a period of 13 years as an

appropriate sentence. His Honour allowed a reduction of a little over 23% for the plea and co-operation with the authorities thereby reaching the sentence of 10 years. There is no suggestion that the allowance for the plea of guilty and co-operation was anything other than appropriate.

[35] In my opinion, although the Judge erred in failing to take into account as an aggravating circumstance the involvement of Burns in assisting Thomas after the deceased had been killed, nevertheless the starting point of 13 years, and hence the ultimate sentence of 10 years, were well within the proper range of the sentencing discretion.

[36] It is not to be automatically assumed that if the sentencing Judge had taken into account the conduct of Burns in assisting Thomas, his Honour would have imposed a longer sentence. Even taking that conduct into account, the sentence of 10 years imposed by the Judge was well within the proper range of the sentencing discretion. Careful regard must be had to the specific conduct of Burns and his motivation before a determination can be made as to the extent to which that conduct aggravates the seriousness of the offending and whether it is of significance in the exercise of the sentencing discretion.

[37] The sentencing Judge accepted that after being a willing participant in the initial attack upon the deceased, Burns became less keen when the knife was produced and the deceased was stabbed. He then started to feel shock and, during the clean up process, felt physically ill. Burns declined to be part of

the dismembering. He told the psychiatrist that he felt like he was not there and it was like he was trying to block it out. From the perspective of Burns, the dismembering had an air of unreality. The psychiatrist expressed the view that the incident was psychologically traumatising and diagnosed the feelings of unreality as demonstrative of "dissociation of mental functioning". To put it colloquially, Burns suffered a "nervous shock reaction".

[38] In these circumstances, although the conduct of Burns in assisting in the clean up and disposal of the body is an aggravating circumstance, it is not demonstrative of the type of callousness that subsequent dealings with a body might otherwise indicate. For example, in the case of *Knight* to which I have referred, the conduct of the offender in skinning and dismembering the body and cooking the deceased's head demonstrated, in the view of Adams J, the "extraordinary extent" of the offender's brutality and her lack of "humane feelings".

[39] If this Court allowed the appeal and re-sentenced Burns, the Court would be required to give effect to the element of double jeopardy involved in Crown appeals and in requiring Burns to face the prospect of being sentenced twice for the same criminal behaviour. As I explained in *R v Riley* [2006] NTCCA 10 at [22]:

> "This principle usually results in a lesser sentence being imposed by the Appellate Court when re-sentencing than would have been imposed when sentencing at first instance. In compliance with the

principle, Appellate Courts often impose new sentences which sit at the lower end of the range of appropriate sentences".

[40] In view of the Crown attitude to which I have referred, and bearing in mind the restraint in sentencing that would be required should this Court re-sentence Burns, in my opinion this Court would not impose a longer sentence than 10 years imprisonment. In these circumstances, having corrected the point of principle for which the Crown appeal was brought, the appeal against sentence imposed upon Burns should be dismissed.

Syrch

[41] In contrast to the Crown position with respect to the sentence imposed upon Burns, as to Syrch the Crown contended that not only was the sentence attended by error, independently of error the sentence of four years and six months was manifestly inadequate. The Crown submitted that the conduct of Syrch in making false statements to the family of the deceased was a cruel deception and amounted to a significant aggravation of the objective seriousness of the crime committed by Syrch.

[42] The essence of the criminal conduct by Syrch was her approval that Thomas give the deceased a bashing coupled with her physical assistance by providing Thomas with a key and a remote control to open the gate. This conduct was accompanied by foresight that the death of the deceased was a possible consequence of an assault by Thomas upon him.

[43] The deceased was killed and Syrch must be punished for her involvement in that killing. However, it must be recognised that the offending by Syrch, while undoubtedly very serious, was much lower in the scale of seriousness than the offending by Burns. Syrch was not present and was not actively involved in the physical violence. She was not involved in the clean up or the disposal of the body. Syrch was not aware that Thomas would seek the assistance of Burns and had no knowledge of how the bashing would be carried out. The use of weapons was not discussed or contemplated by Syrch.

[44] This brief overview of the essential features of the crime committed by Syrch and the different role played by Burns is sufficient to demonstrate that the offending by Syrch was considerably less serious than the criminal conduct of Burns. The sentencing Judge was required to recognise the difference in criminality and to reflect that difference in the sentences of imprisonment imposed upon Burns and Syrch. The disparity in the sentences was justified.

[45] As with Burns, it is not to be automatically assumed that if the sentencing Judge had taken into account the conduct of Syrch in deceiving the family and the police his Honour would have imposed a longer sentence. Careful regard must be had to the nature of the deception and the motivations of Syrch.

[46] The sentencing Judge found that Syrch was "callously deceitful" in her dealings with members of the family of the deceased. As to motivation for that deceit, his Honour said:

> "I accept that she acted in that way because she was fearful for her own situation and, to some extent, was concerned by what she knew Mr Thomas could do."

[47] At the time of the offending, Syrch was only 18 years of age. She had not previously been in trouble with the law. What started out as a bashing had turned into possible implication in a killing. Syrch was ill equipped to cope with the enormity of the situation and sought to distance herself by denying any knowledge of the whereabouts of the deceased. The conduct was undoubtedly deceitful and was described by her counsel as "treacherous", but in the circumstances it was far removed from the type of conduct that is demonstrative of a high level of moral culpability in the crime. While that conduct is a relevant aggravating circumstance, it was not such as to have a significant impact upon penalty.

[48] Against the background of the objective seriousness of the criminal offending by Syrch, regard must be had to her personal circumstances including her young age and her lack of prior offending against the law. Everyone who knew Syrch appreciated that she had become involved in the use of drugs, but were of the view that she was otherwise a person of good character.

[49] The background of the relationship between the deceased and Syrch was also of relevance. That relationship commenced in 2003 when Syrch was aged 17 and the deceased 26. The sentencing Judge noted that the deceased's use of drugs made him "jealous and evil-tempered". The relationship had a history of arguments and physical assaults as well as reconciliation. As mentioned, about a week and a half before Syrch agreed to Thomas giving the deceased a bashing, the deceased had damaged her car and smashed her phone. On the morning of the attack, a further argument had occurred during which the deceased pushed Syrch and threw eggs at her vehicle. Syrch was angry and upset.

[50] Syrch's youth and the background of her relationship with the deceased explained why Syrch was prepared to become involved in approving of Thomas assaulting the deceased and in assisting him by the provision of the key and remote control. The offending was very serious because Syrch facilitated an opportunity for Thomas to give the deceased a bashing while, at the same time, foreseeing the possibility that the deceased would be killed. And the deceased was killed. However, the foresight by Syrch was not of the same clarity as the foresight by Burns and her conduct was significantly influenced by the previous behaviour of the deceased within their relationship. Finally, although Syrch engaged in deception after she became aware of the killing, prior to sentence she had become extremely remorseful and had accepted responsibility for her actions. The sentencing

Judge correctly regarded Syrch as possessing positive prospects for rehabilitation.

[51] Prior to making allowance for Syrch's plea of guilty and co-operation with the authorities, the sentencing Judge regarded a period of six years as the appropriate sentence. His Honour made an allowance of 25% for the plea of guilty and co-operation thereby arriving at the sentence of four years and six months. There is no suggestion that his Honour was in error in making that allowance. The critical question is whether the starting point of six years and, therefore, the ultimate sentence of four years and six months, was manifestly inadequate.

[52] It must be recognised that sentencing for the crime of manslaughter is not an easy task. The crime is committed in an infinite variety of circumstances. In the matter under consideration, a life was taken in violent circumstances, but careful attention must be given to the role of the individual offender and that offender's personal circumstances. It is not appropriate to approach sentencing by endeavouring to assess the value of the deceased's life in terms of years of imprisonment for those involved in the killing. One cannot help but feel great sympathy for the family and friends of the deceased whose lives have been devastated by the killing of the deceased and the conduct of the offenders. It is perfectly understandable that those victims might approach the question of sentence on the basis of asking what the life of the deceased is worth in years of imprisonment for persons involved in the killing. But neither the sentencing Judge nor this Court is

permitted to adopt such an approach. The Judge was required to sentence in accordance with settled sentencing principles and to arrive at sentences that were proportionate to the gravity of the offending and properly took into account matters personal to each offender. This Court is required to review the sentences on the same basis.

[53] Having regard to the individual circumstances of the offending by Syrch, including her conduct after the killing in deceiving the family of the deceased and the police, and after making appropriate allowance for the personal circumstances of Syrch, including her young age, I have reached the view that the sentence of four years and six months is towards the lower end of the appropriate range of sentences. There is a range of appropriate sentences within which a particular sentence can properly imposed and as the sentence is within that range the difficult question is whether, error having been demonstrated, it is appropriate for this Court to interfere and re-sentence Syrch.

[54] My mind has vacillated. Those who are minded to encourage and facilitate physical violence being perpetrated against others must recognise that when such encouragement and facilitation is accompanied by foresight of the possibility of death and death occurs, significant sentences of imprisonment will almost inevitably be imposed. On the other hand, great care must be taken to assess properly the individual role of the offender in the death and to give appropriate weight to matters of mitigation such as youth and prospects of rehabilitation. It is not an easy task to strike the right balance.

[55] After anxious consideration of all these matters, I have reached the view that this Court should not interfere and re-sentence Syrch. As I have said, in my view the sentence is towards the lower end of the appropriate scale, but it is not manifestly inadequate. By reason of the principle of double jeopardy and the restraint required of a court re-sentencing following a successful Crown appeal to which I have earlier referred, if this Court re-sentenced Syrch it would be required to impose a sentence at the lower end of the appropriate range of sentences. In other words, if this Court re-sentenced Syrch the sentence would be the same as or close in length to the sentence imposed by the sentencing Judge. In these circumstances, bearing in mind the principles relating to Crown appeals and the exceptional nature of that remedy, in my opinion the appeal against the sentence imposed on Syrch should be dismissed.

Southwood J:

[56] I agree.

Martin AJ:

[57] I agree.
