*Mather v The Queen* [2009] NTCCA 15

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| PARTIES: | MATHER, Phillip Geoffrey |
| | v |
| | THE QUEEN |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CA 6 of 2009 (20732049) |
| DELIVERED: | 12 November 2009 |
| HEARING DATES: | 26 October 2009 |
| JUDGMENT OF: | MARTIN (BR) CJ, SOUTHWOOD AND KELLY JJ |
| APPEAL FROM: | ANGEL J |

**CATCHWORDS:**

CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE

Manslaughter – plea of guilty – disputed facts – adverse findings of fact against the appellant – whether supported by evidence – whether sentence manifestly excessive – record of prior convictions – no remorse – poor prospects of rehabilitation – range of penalties for crime of manslaughter discussed.

Manslaughter – plea of guilty – whether plea warranted a significant reduction in the sentence – no indication by sentencing Judge of allowance given for guilty plea – no error in principle.

Appeal dismissed.

*R v Blacklidge* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Grove and Ireland JJ, 12 December 1995); *R v J O* [2009] NTCCA 4, applied.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | J Adams |
| Respondent: | P Usher |

*Solicitors:*

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| Appellant: | Northern Territory Legal Aid Commission |
| Respondent: | Director of Public Prosecutions |

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| Judgment category classification: | A |
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Mather v The Queen* [2009] NTCCA 15
No. CA 6 of 2009 (20732049)

BETWEEN:

**PHILLIP GEOFFREY MATHER**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: MARTIN (BR) CJ, SOUTHWOOD AND KELLY JJ

REASONS FOR JUDGMENT

(Delivered 12 November 2009)

**Martin (BR) CJ:**

**Introduction**

[1] The appellant appealed with leave against a sentence of 15 years imprisonment imposed following a plea of guilty to the crime of manslaughter. A non parole period of nine years was fixed.

[2] In addition to a complaint that the sentence was manifestly excessive, the appellant contended that the learned sentencing Judge erred in failing to give adequate weight to the plea of guilty and in making findings of fact adverse to the appellant.

[3] At the conclusion of submissions the Court dismissed the appeal. I now set out my reasons for agreeing with that decision.

**Background**

[4] The appellant was presented on an Indictment charging him with murder and the trial was listed to commence on Monday 9 March 2009. Four days earlier on Thursday 5 March 2009, the appellant first advised the Director of Public Prosecutions ("the Director") that the appellant was prepared to plead guilty to manslaughter in full satisfaction of the indictment. The Director agreed to accept the plea and an indictment charging the appellant with manslaughter was filed on 9 March 2009. The appellant pleaded guilty on that day and submissions concerning sentence occurred two days later on 11 March 2009.

**Factual Dispute**

[5] At the outset of submissions, the autopsy report and photographs were tendered. Crown facts were then read and, bearing in mind the dispute about the factual basis upon which the sentencing Judge imposed sentence, it is appropriate to set out those facts in full:

> "The deceased victim in this matter, James Arthur Francis O'Connell was born on 31 August 1982 at the Royal Darwin Hospital and was 24 years old at the time of his death.
>
> The prisoner, Phillip Geoffrey Mather was born at Darwin on 8 July 1974 and was 33 years old when he caused James O'Connell's death.

In a period of approximately five years leading up to August 2006 James O'Connell and Mr Mather had been close friends. James often visited Mr Mather at his premises situated at 30 Priest Circuit Gray. They shared similar interests, in particular fishing which was one of James' passions. James' other passion was his grey 1997 Mitsubishi Magna sedan registration NT 596882 which he regularly drove quite erratically. The Magna had previously been owned by his mother and he often slept in the vehicle at various locations about Darwin.

James' mother, Mrs Jean O'Connell, told police in the course of a missing person investigation (which will be referred to again shortly) that James had mental health problems which caused him to become 'hyped up' and on occasions 'aggressive'. He used cannabis to calm the more florid aspects of his condition. He did not usually drink alcohol as that made him sick. He had a tendency to 'fly off the handle' when he became stressed and to 'scream and swear' but he was not known to be physically violent. A reading of the Royal Darwin Hospital records confirms that James did suffer from a range of conditions that appear to have a psychiatric aetiology. His hospital records show that he suffered from kidney problems which required him to drink large amounts of water and that he also suffered asthma as a child.

In about August 2006 a conflict arose between the two men when James accused Mr Mather of stealing his esky. The esky concerned was a very large and quite expensive article, orange in colour with 160 litre capacity. The conflict escalated over the following months leading to a bitter fall out between the two men. The falling out resulted in several incidents taking place between the men. They included minor assaults, verbal threats and intimidation. Those incidents led up to the events of 22nd November 2006 the day on which the Crown asserts James met his death.

22 November 2006

At approximately 9:30 am on Wednesday 22nd November 2006 James attended at the Palmerston Shopping Centre with his mother Jean O'Connell. Mr Mather was also at the shopping centre with his mother Cecelia Payne. The parties met and a disturbance took place between James and Mather. The noise of the disturbance attracted the attention of Police Auxiliary Susan Wright. The men were trading terms of abuse directed at one another and their respective mothers. At one point Mather lunged at James who, being a short man of slight build, hid behind his mother to avoid being assaulted. Auxiliary Wright successfully diffused the situation and the parties separated.

At approximately 10.00am on the same day James O'Connell attended at the Palmerston Police Station where he spoke to Sergeant Abbas and made a complaint to police against Mather regarding the earlier incident at the shopping centre.

At about 1.00pm that afternoon James drove to the home of his friend Belinda Davis in Phinneaus Circuit Gray. They talked together for a period of time and then Davis asked James to drive her to the bottle shop in Palmerston to buy some cans of rum and coca cola. They also purchased a small amount of marijuana while they were away. They were gone for about 20 minutes. Shortly after their return Mr Mather attended at the premises. Mather had recognised James vehicle parked in the front of the residence. There was a minor altercation at the door relating to the events that had taken place earlier in the day before Davis intervened and calmed the situation. The three people then sat inside at the dining table and drank and consumed cannabis.

At about 2:20pm that afternoon James drove Davis in his vehicle to Mather's residence at 30 Priest Circuit Gray. Mather had earlier left Davis' residence and walked home. When they arrived at 30 Priest Circuit James wanted to smoke some more cannabis but Mather objected for the reason that his mother was present and he was due to receive a visit from officers of the Department of Family and Children's Services that afternoon in relation to his young son. Davis had to pick up her children from the Gray School and she had arranged for James to drive her there.

On the journey to the school James realised he had lost his wallet. Davis suggested that it could be at Mather's residence. The two then returned to Mather's. When asked about the wallet Mather told James he didn't believe James had a wallet when he arrived. James then said he must have left it at Colin Holden's. Davis and O'Connell then left and he dropped Davis off at Gray school. As Davis walked her children home from school she saw James driving his vehicle in the vicinity of Mather's residence.

At about 4.00pm on the same afternoon James arrived alone at Colin Holden's home at Old Bynoe Rd Darwin River. Mr Holden was an old school friend of James and he had often stayed over night at Holden's residence, usually sleeping in his car. He told Holden he was missing his wallet. Holden said he hadn't seen it. A discussion took place between the pair about money owed by Holden to James relating to a Ford Meteor vehicle. Then James asked Holden to return to Palmerston with him to help him retrieve his wallet which he still

thought he had left at Mather's house. James spent about 15 minutes at Old Bynoe Rd before leaving apparently to return to 30 Priest Circuit Gray. It is not known what took place between that time and when he was next seen in the vicinity of Elizabeth Valley Road in company with Mather later in the afternoon.

David Paul Brock and Vicki May White had moved into the house at 30 Priest Circuit in mid 2006. They were both employed. Brock had a job with a house moving business that operated out of a yard at Pinelands and White was employed by the Government in the city. Brock was a relative of Mather's and referred to him as Uncle Phil. They owned a small Daewoo vehicle. Their usual practice was for White to drop Brock off at his place of employment in the morning and pick him up from work on her way home from work at about 5.00pm. Brock had known James at school and he and White had met him on a number of occasions at Mather's house prior to them taking up residence there. They were aware of the animosity between the two men.

On 22nd November 2006 Brock and White went to work as usual. They returned to 30 Priest Circuit at approximately 5:30 pm. Shortly after their arrival they were told by Mather's mother that Mather had rung and that he wanted to be picked up from Elizabeth Valley Rd, Noonamah. Brock then rang Mather on his mobile telephone. Mather told him to come out to Elizabeth Valley and collect him. Brock intended to drive to Elizabeth Valley alone but White said she wanted to come for the ride. They left for Elizabeth Valley Rd shortly thereafter.

Brock and White knew the area well. They had lived there in the past and had relations that owned properties in Elizabeth Valley. They arrived at Elizabeth Valley Road at about 6.00pm and could not immediately find Mather so they drove to the family block at 60 Redcliff Road and ask [sic] some children if they have [sic] seen him. Mather had not been seen so they returned down Elizabeth Valley Rd towards the Stuart Highway. Brock then received a telephone call from Mather who directed Brock to the location of James' vehicle. In order to get to that location Brock and White left the bitumen road and drove down a dirt track finally stopping directly behind the Magna.

Brock and White got out of their vehicle to find that James and Mather had been smoking cannabis. They were invited to join them for some 'cones'. They used a home made 'bong' to smoke the

cannabis. The atmosphere seemed convivial enough until, without warning, Mather approached O'Connell and punched him with great force to the face several times using a clenched fist. James then fell to the ground on his back. Mather then proceeded to stand over O'Connell and while he held James' head cupped in one hand repeatedly and forcefully punched him to the side of the head with the other. After he had punched him on numerous occasions Mather, who did not have any footwear on, used the heel of his foot to stomp on O'Connell's head and upper body several times. He then returned to punching O'Connell's head. Throughout the sustained assault O'Connell was saying 'Don't Phil, please don't'. At this point Brock observed James eyes rolling back in his head.

Mather then went to the Magna vehicle and obtained a fishing knife described by Brock as a 'filleting knife' and went to put the knife to James throat. At that point Brock intervened and told Mather he was not going to put up with that 'shit'. Mather then proceeded to punch James to the head with a fist holding the knife. The knife was not used on the deceased.

Mather then went to the Magna and retrieved a blanket which he placed over O'Connell and continued to punch him to the side of the head. Brock then intervened telling Mather to stop. Mather then told Brock to help him lift James into the Magna. Together they carried O'Connell to the vehicle and placed him in the front passenger area with his legs over the front seat and his head in the passenger footwell. Mather told Brock he wanted to take the car further down the track because he wanted to burn it.

The Magna was then driven by Brock about 500 metres down the dirt track away from Elizabeth Valley Rd and into the scrub. Mather drove the Daewoo with White as the passenger. Once they had come to a point well out of sight of anyone on Elizabeth Valley Rd, they stopped the vehicles. Mather got out of the Daewoo and went to the passenger side of the Magna where he opened the door and began punching O'Connell as he lay in the vehicle. Again Brock intervened and told Mather if he continued Brock would leave him there with O'Connell.

Mather then closed the passenger door of the vehicle and returned to the driver's side. At that point White had left the Daewoo and approached the Magna where she was able to observe James face. James had his eyes open and appeared to her to be conscious. He did not speak and did not attempt to move from the vehicle. Brock had

also seen that O'Connell appeared conscious and became concerned to get Mather away from the Magna as soon as possible so that James could get out of the vehicle and away from Mather.

At the drivers side of the Magna Mather removed a cigarette lighter from his pocket. He bent down through the open door of the vehicle and held the lighter under the front driver's seat of the Magna until it was alight. While Mather engaged in that act Brock and White returned to the Daewoo and took the opportunity to leave the area immediately. The track allowed little area to turn their car around in and as they were driving off Mather ran to the Daewoo and got into the rear passenger seat. It is clear from what evidence is available on autopsy that James left the vehicle before the fire in the vehicle took hold.

Brock drove back to Elizabeth Valley Rd and then to a friend's home where he, White and Mather stayed for about an hour during which time they consumed more cannabis and alcohol. They then returned to 30 Priest Circuit Gray.

Over the ensuing days the events of 22nd November were not discussed with Mather by White and Brock.

On 29 November 2006 the deceased's mother Mrs Jean O'Connell made a missing person report to police regarding James. She had not seen or heard of him since 22nd November. Police immediately commenced inquiries. They discovered his bank account had not been accessed. They spoke to various persons who may have known of his whereabouts including Mr Mather and Mr Brock. Mr Mather told Constable Geoffrey Brotherton on the same day that he had not seen James O'Connell for two weeks. Various other enquiries [sic] were made but none led to any explanations as to where James might be found.

In the meantime, on Monday 27 November 2006, Mr Anthony Hillier who owns a block at Lot 19 Elizabeth Valley Rd situated about 1.5 km from the turnoff from [the] Stuart Highway into Elizabeth Valley Rd, decided to clear trees that [had] been cut on the track along the Elizabeth River as a firebreak. He noticed some car tracks that led deep into his block. He followed the tracks and came upon a burnt out vehicle about 400 to 500 metres from Elizabeth Valley Road. The vehicle was situated on the track so he moved it off the track using the bucket of the front end loader. He then removed the

rear number plate of the vehicle and placed it in his tool box. He intended to report his find to police. Mr Hillier had some personal business interstate and it was not until 12 December 2006 that he contacted the Palmerston Police Station and provided the vehicle registration number to police. The registration number was immediately identified as that belonging to James O'Connell's Mitsubishi Magna.

At about 1.30 pm on 12 December, Constables Teague and Sullivan attended at the area described by Mr Hillier. Having carried out a preliminary search with a view to setting up a crime scene they noticed a strong smell coming from the vicinity of the creek. When they looked over the banks of the creek they saw a body in a mummified state. The location of the body was about 15 metres from the burnt out vehicle. The body was later identified as that of James O'Connell.

Forensic Pathologist Dr Terence Sinton who had attended the scene on 12 December and observed the body in situ performed an autopsy on the body that afternoon commencing at 5.00pm at the Royal Darwin Hospital. Because of the advanced state of decomposition of the body he was unable to secure any evidence that supported any particular mode or manner of death. He concluded that the cause of death was 'undetermined'. At that time he could not rule out death as a consequence of environmental exposure, heat stroke or dehydration, snakebite or covert naturally occurring organic disease.

In the following months the police carried out extensive enquiries [sic] into James' death. They further interviewed Mr Mather and Mr Brock. Both denied any knowledge of the circumstances that may have led to the death. As a result of a lack of evidence that a crime had been committed a brief was compiled for the Coroner. James' family made application to the Coroners Office for a second autopsy to be carried out. That was performed on 7th February 2007 by Forensic Pathologist Dr Nigel Buxton. While Dr Buxton made some observations additional to those of Dr Sinton no evidence of the cause of death was identified by him.

In evidence given at the committal proceedings on 2nd July 2008 Dr Sinton told the court that death may well have resulted from various forms of intracranial haemorrhage, principally subdural and sub arachnoid haemorrhage, arising from forceful blows to the head that had not resulted in a fracture of any bones of the skull. He also gave evidence that heavy blows to the abdomen may also cause death

without producing any skeletal damage. In either case he told the court that a person suffering from that sort of injury may be able to move about for some period of time before the injuries led to death. Such an ability to move could well explain why James O'Connell's body was found some distance away from the burnt out motor vehicle. As the vehicle had been totally destroyed by fire no evidence of any forensic value remained to link any possible perpetrators to its destruction or the death. No evidence was found upon either autopsy that the body had suffered any burn injury.

The investigation into James death had come to a standstill until in September of 2007 Ms Brenda White, the mother of Vicki White provided information to police regarding a conversation that had taken place between she and Mr Brock earlier that year. The conversation appeared to contain briefly outlined circumstances explaining how James had met his death. The homicide investigation was rekindled. Brock and White were interviewed and subsequently provided new information to police. Brock and White agreed to assist police in their investigation. To that end they engaged in re-enactments at the scene and Brock engaged Mather in a pretext telephone call which later led to a conversation between he and Mather being covertly recorded. Certain incriminating remarks were made by Mather in that conversation.

On Tuesday 27th November 2007 Philip Mather was arrested in connection with James O'Connell's death. He engaged in an electronically recorded interview conducted by police but maintained his denial that he had played any part in bringing about the death.

The Crown was first advised that Mr Mather was prepared to enter a plea of guilty to causing James O'Connell's death on 5 March 2009. The Crown accepts the plea on the grounds that Mather, in subjecting James O'Connell to a substantial assault to the head and body over a period of time, foresaw that his actions could possibly result in death and that he did cause the death.

A full committal was conducted over two periods 4, 5 and 6 March 2008 and 30 June 2008 to 2 July 2008 inclusive."

[6] After the facts were read, the Judge asked counsel for the appellant if those facts were admitted. Counsel indicated that they were admitted in part only.

In subsequent submissions, counsel identified the areas of dispute in the following terms:

> "There was on my instructions, your Honour, an explosion on the part of Mr Mather in relation to Mr O'Connell. There is no issue taken with the Crown facts in terms of the description of this explosion in which Mr O'Connell was merely standing there and there had been no previous violence at that stage. Mather walked up to him and then commenced to assault him. No doubt about it.
>
> What we take issue with in terms of the Crown facts are these matters, your Honour. Firstly, the extent of the violence perpetrated on the deceased. We say with the greatest of respect, the Crown witnesses, Vicki White and David Brock, are perjurers on any view. The Crown would have to accept that because they've got sworn statements to the effect that they don't know how it is that the deceased had disappeared. But more significantly, that they have exaggerated the matters to their own advantage."

[7] Subsequently counsel for the appellant informed the Judge that the appellant also denied using a knife in any way and denied that the deceased was in the vehicle when the appellant set fire to it.

[8] In view of the dispute, contrary to the submissions of counsel for the appellant that neither Brock nor White were needed to give evidence, the trial Judge indicated that they should be called. Counsel for the Director indicated an intention to call both Brock and White and a statutory declaration by Brock was tendered.

[9] The following day counsel for the Director informed the Judge that he had available two witnesses who were eyewitnesses. However, at the conclusion of lengthy evidence by Brock, counsel advised the Judge that he did not intend to call any further evidence and counsel for the appellant informed

the Judge that the appellant would not be giving evidence. Counsel for the appellant did not request that White be called for cross-examination.

[10] Following further submissions, the proceedings were adjourned to 17 March 2009 when the sentencing Judge delivered his remarks and imposed sentence. In essence his Honour accepted the evidence of Brock as to the extent of the violence perpetrated against the deceased, the use of the knife and the presence of the deceased in the vehicle when the appellant set fire to the driver's seat.

**Ground 1 – Manifestly Excessive**

[11] The appellant contended that even on the version accepted by the sentencing Judge, the sentence of 15 years was so far outside the range of sentences imposed for manslaughter as demonstrated by previous sentences imposed since 1990, as to be "clearly and obviously excessive and so disproportionate to the objective circumstances as to indicate an error of principle". Particular reference was made to the absence of the aggravating feature of use of a weapon, the relatively short duration of the infliction of violence and the fact that at the age of 30 the appellant had only one prior conviction for assault as an adult in 1994.

[12] As to the critical events of the crime, the sentencing Judge found that the appellant bore "considerable animosity" towards the deceased and "deeply resented" the verbal abuse that the deceased had previously levelled at the appellant's mother. His Honour found that the appellant "wished to settle

things once and for all" with the deceased and "induced" the deceased to attend at the remote location where the crime occurred "for the purpose of assaulting him". The essential findings as to the critical events appear from the following passage of his Honour's sentencing remarks:

> "I am satisfied that without warning you approached O'Connell and punched him forcefully to the face a number of times using a clenched fist. Your assault was such that O'Connell fell onto the ground on his back and you continued to punch him thereafter in the face and head area. I also accept Brock's account that with unshod feet you used the heel of your foot to stomp on O'Connell's head and upper body several times. In the course of this assault O'Connell, who was defenceless on the ground, was saying 'Don't, Phil. Please don't.'
>
> You then went to O'Connell's Magna vehicle and obtained a fishing knife, described by Brock as a filleting knife, and held it in the vicinity of O'Connell's throat. Brock intervened and thereafter, while holding the knife, you punched O'Connell to the head again. The knife was not used on O'Connell. You retrieved a blanket from the Magna vehicle and placed it over O'Connell and continued to punch him to the side of the head. Brock intervened telling you to stop.
>
> You and Brock then carried O'Connell to the vehicle and placed him in the front passenger area with his legs over the front seat and his head in the passenger foot well. Brock drove the Magna with O'Connell in it about 500 metres further down the dirt track away from the Elizabeth Valley Road into the scrub. You followed, driving the blue Daewoo with White as passenger.
>
> Once at a point well out of sight of anyone on Elizabeth Valley Road, the vehicles were parked. You then went to the passenger side of the Magna where you opened the door and began punching O'Connell again as he lay in the vehicle. Once again Brock intervened and told you that if you continued he, Brock, would leave you with O'Connell. At that stage Brock observed O'Connell who appeared to be conscious.
>
> Brock and White decided to leave and turned to the Daewoo for that purpose. At the driver's side of the Magna you set fire to the front

> driver's seat, it would appear, with a cigarette lighter though Brock's view of precisely how you set fire to the car was obstructed. The track allowed little area to turn a car around and as Brock and White started driving off you ran to the Daewoo and got into the rear passenger seat.
>
> From what evidence is available on an autopsy, it is clear that O'Connell left the Magna vehicle before the fire in the vehicle took hold."

[13] On the basis of those findings of fact, the sentencing Judge accurately described the appellant's conduct as a "premeditated attack carried out in circumstances containing no mitigating elements". His Honour correctly categorised the conduct as an "unprovoked, savage and sustained" attack in which the appellant assaulted the victim "into a state of helplessness and abandoned him in a burning car". As his Honour said, on the basis of those findings it was a "serious case of involuntary manslaughter."

[14] In addition to the immediate circumstances of the crime, the sentencing Judge observed that there was "nothing significant" in the appellant's background which warranted leniency. His Honour noted that the appellant had a history of mental and anger problems. As far back as 1990 a Juvenile Justice officer recorded:

> "Mather has a history of assaults and it has become obvious that he finds it easier to solve his problems by resorting to violence rather than thinking of other options."

[15] In January 2002 a health practitioner with whom the appellant consulted recorded advice from the appellant that he was experiencing aggressive responses to external pressures and that the appellant had said, "I'm a

walking time bomb". Further notes about problems with anger management were made in 2005.

[16] The appellant has a lengthy record of prior offending dating back to his first appearance in the Juvenile Court in August 1988 for the offence of assault. In April 1990 the appellant was convicted of assault causing bodily harm and a further conviction for assault was recorded in June 1990. The appellant's next and final conviction for assault occurred in December 1994 when the assault was accompanied by a circumstance of aggravation and a sentence of 12 months imprisonment was imposed. That sentence was suspended after service of six months. In addition to the offences of assault, the appellant has also committed many offences against the traffic laws and numerous offences of dishonesty. He has repeatedly failed to comply with court orders.

[17] The sentencing Judge also referred to the appellant's "callous disregard for those affected" by the crime. His Honour said the appellant "took a calculated course of conduct to avoid detection". He found that the appellant did not possess "true remorse" and that his prospects of rehabilitation were "poor". Further, his Honour was of the view that the appellant's plea of guilty was motivated "largely by a desire to avoid a trial on a count of murder" and that the plea was "substantially self-serving".

[18] In support of the contention that the sentence of 15 years imprisonment is manifestly excessive, counsel for the appellant provided to the Court a

schedule of sentences for manslaughter imposed between April 1990 and June 2009. Counsel submitted that the range of sentences imposed in that period demonstrates the manifest excess of the sentence under consideration. In that period of 19 years the longest sentence was 15 years imposed in May 2002 for a crime described by the sentencing Judge as the "worst case of manslaughter that has come to my attention in 15 years on this Bench". However, a reduction of 25 percent had been allowed for full co-operation with authorities and an early plea which means that the starting point was a sentence of 20 years.

[19] It is common ground that there is no tariff or standard range of penalties for the crime of manslaughter because of the infinite variety of circumstances and wide range of criminality involved in such crimes. At the heart of the offence, however, is an unlawful killing for which the legislature has prescribed a maximum penalty of imprisonment for life. In *R v Blacklidge*,[1] Gleeson CJ said:

> "It has long been recognised that the circumstances which may give rise to a conviction for manslaughter are so various, and the range of degrees of culpability is so wide, that it is not possible to point to any established sentencing tariff which can be applied to such cases. Of all crimes, manslaughter throws up the greatest variety of circumstances affecting culpability.
>
> At the same time, the courts have repeatedly stressed that what is involved in every case of manslaughter is the felonious taking of a human life. That is the starting point for a consideration of the

[1] (Unreported, New South Wales Court of Appeal, Gleeson CJ, Grove and Ireland JJ, 12 December 1995).

> appropriate penalty, and a key element in the assessment of the gravity of the objective circumstances of the case."

[20] As this Court observed in *The Queen v J O*,[2] notwithstanding the absence of a tariff "there is a range of appropriate sentences that can be said to comprise the sentencing 'standard'" for the particular crime under consideration. The judgment continued:

> "A sentencing standard is not a fixed range or tariff. The role of a sentencing standard was explained in the joint judgment of Martin (BR) CJ and Riley J in *Daniels v The Queen*:[3]
>
> > 'The role of sentencing standards must be properly understood. They do not amount to a fixed tariff, departure from which will inevitably found a good ground of appeal. We respectfully agree with the observations of Cox J in *R v King* (1988) 48 SASR 555 as to the proper role of sentencing standards (at 557):
> >
> > > "… In a word, this case is about sentencing standards, but it is important, I think, to bear in mind that when a standard is created, either by the cumulative force of individual sentences or by a deliberate act of policy on the part of the Full Court, there is nothing rigid about it. Such standards are general guides to those who have to sentence in the future, with certain tolerances built into or implied by the range to cater for particular cases. The terms of approximation in which such standards are usually expressed – 'about' and 'of the order of' and 'suggest' and so on – are not merely conventional. … It follows that a particular sentence will not necessarily represent a departure from the standard because it is outside the usual or nominal range; before one could make that judgment it would be necessary to look at all of the circumstances of the case. Those circumstances will include, but of course not be confined to, the questions whether or not the offences charged are multiple or single and whether the defendant is a first

[2] [2009] NTCCA 4 at [87].
[3] (2007) 20 NTLR 147 at [29].

> offender with respect to the particular crime charged. That is not to undermine the established standard but simply to acknowledge that no two cases, not even two 'standard' cases, are the same. …"'"

[21] On the facts found by the sentencing Judge, the appellant committed a particularly brutal crime. It was a premeditated crime. The appellant lured the deceased to a remote location for the purposes of inflicting serious violence upon the deceased and burning the deceased's car. In that remote location, the appellant carried out his intention with savage ferocity in a sustained attack which culminated in the appellant leaving the deceased in a vehicle to which he set fire. Subsequently the appellant engaged in a course of deception designed to avoid detection. The appellant possessed foresight that his actions could result in death. The objective circumstances of the crime do not possess any feature of mitigation and the personal circumstances of the appellant similarly do not attract leniency.

[22] As I mentioned, in the one previous case of manslaughter in which a sentence of 15 years imprisonment was imposed, the starting point adopted by the sentencing Judge was 20 years. A review of the cases in the schedule demonstrates that a starting point of the order of 13 – 15 years is not unusual. For the reasons discussed later in respect of ground 2, it appears likely that the sentencing Judge allowed only a small reduction to reflect the utilitarian value of the plea. If that reduction was in the range of five to ten percent, his Honour's starting point before allowance for the plea was in the range of approximately 15 years and nine months to 16 years and nine

months. Such a starting point is at the top end of the usual range disclosed by a schedule of previous sentences and the ultimate sentence of 15 years is undoubtedly a severe sentence at the very top of the proper range of the sentencing discretion for the crime under consideration. However, in my view, bearing in mind the gravity of the appellant's criminal conduct and the absence of mitigating circumstances, a sentence of 15 years is not outside that proper range of the sentencing discretion.

[23] Attention having been drawn to the range of sentences imposed for the crime of manslaughter over the last 19 years, in my opinion it is appropriate to observe that considerable leniency has been afforded to many offenders over that period and to warn that as a general rule future offenders cannot expect to receive the same degree of leniency. Crimes of violence are far too prevalent and in recent years penalties for crimes of violence have increased in recognition of both that prevalence and the growing community concern about these types of crimes. The general increase in penalties with respect to crimes of violence has not necessarily been reflected in sentences imposed for the crime of manslaughter, but those who commit this crime should understand that in the future crimes of manslaughter are likely to be met with longer sentences of imprisonment than have regularly been imposed in the past.

**Ground 2 – Plea of guilty**

[24] The appellant contended that the plea of guilty warranted a significant reduction in the sentence because of its utilitarian value. In particular, counsel referred to the "real difficulties" that the Crown would otherwise have experienced in establishing the cause of death. In this way the plea not only possessed utilitarian value, but it facilitated the interests of justice.

[25] The sentencing Judge did not ignore the existence of the plea. His Honour acknowledged that the plea saved society "the cost and expense of a lengthy trial". However, his Honour did not indicate what, if any, allowance had been made by reason of the plea.

[26] While this Court has previously said that the preferable course is to indicate the amount of reduction allowed in recognition of the plea, failure to do so is not an error of principle. The sentencing Judge having acknowledged the practical value of the plea, it cannot reasonably be argued that his Honour did not allow some reduction by reason of that plea. In itself, this ground cannot be made out but as I have said, it is appropriate to take into account a reduction for the plea in determining whether the sentence of 15 years is manifestly excessive.

**Ground 3 – Evidence of Brock**

[27] Ground 3 was a complaint that the sentencing Judge erred in accepting the evidence of the witness Brock as to particular aspects of the events at the location where the fatal attack occurred. In particular, the appellant

disputed Brock's evidence concerning the use of the knife, the degree of violence used and the presence of the deceased in the vehicle at the time that the appellant set fire to it.

[28] First, counsel referred to Brock's admitted perjury in making a false statutory declaration during the course of police enquiries in which he denied any knowledge of the whereabouts of the deceased. In addition, at the time he gave evidence, Brock was an indemnified witness.

[29] The sentencing Judge was well aware of the difficulties attending the evidence of Brock. In his sentencing remarks, after reminding himself that the onus was on the Crown to prove Brock's account beyond reasonable doubt, his Honour specifically stated that he took into account that Brock was "a proven perjurer who has made a false statutory declaration in the course of the police inquiries denying any knowledge of what happened to O'Connell" and that "Brock was an indemnified witness having at one stage been arrested for the murder of O'Connell". No error in the approach of the sentencing Judge can be discerned.

[30] Secondly, counsel emphasised that an eye witness to the events, Ms White, had not been called by the prosecution. The failure to call White occurred in the context of counsel for the Director indicating that both Brock and White were available to give evidence, but stating at the conclusion of Brock's evidence that he did not intend to call White. In these circumstances counsel for the appellant urged this Court that his Honour

should have drawn the conclusion that White's evidence would not have supported the evidence of Brock.

[31] Again, the sentencing Judge was alert to the absence of White. His Honour specifically took into account that White was not called as a witness.

[32] In addition, by reason of the circumstances attending the sentencing proceedings, in my view the absence of White was not significant. The appellant was in possession of statements by both Brock and White implicating the appellant in the attack upon the deceased. During submissions, counsel for the appellant used a particular passage from White's statement. In cross-examination of Brock, although Brock was asked whether the appellant used his knee, a question obviously based upon the statement by White that the appellant used his knee, counsel for the appellant did not seek to put to Brock any part of White's version by way of contradiction of the evidence of Brock. At the outset, counsel for the appellant suggested it was unnecessary to call either Brock or White because he expected that they would "swear up" to their statements. At the conclusion of Brock's evidence, when counsel for the Director indicated he did not intend to call further evidence, counsel for the appellant did not request that White be called for cross-examination. Nor was any complaint made about the absence of White and it was not suggested to the sentencing Judge that his Honour should draw a conclusion adverse to Brock's evidence by reason of the absence of White. Counsel for the appellant apparently

made a forensic choice not to complain about the absence of White or to seek that she be called for cross-examination.

[33] As to the particular areas in dispute, counsel for the appellant pointed out that a knife was not found and there was no evidence from the post-mortem examination that the knife had been used. Counsel also suggested that the evidence of Brock concerning the appellant punching the deceased while holding the knife was a description of a "very unusual" action.

[34] In my view, there is no substance in these points. According to the evidence of Brock, on two occasions the appellant demonstrated an intention to cut the deceased's throat and was dissuaded from doing so by Brock. According to Brock, the knife was not used on the body of the deceased and it was after Brock dissuaded the appellant from cutting the deceased's throat that the appellant struck the deceased while holding the knife in his fist.

[35] In respect of the extent of the violence used, counsel emphasised the evidence of Dr Sinton that he would commonly expect to find fractures to the skull if forceful punches had repeatedly been delivered to the temple, skull and face. The absence of such fractures was a legitimate matter to be taken into account, but it did not exclude the violence described by Brock. The sentencing Judge was well aware of this issue. In his sentencing remarks, his Honour said:

> "At the committal hearing on 2 July 2008 Dr Sinton said that the autopsy findings did not exclude trauma as a cause of death. He said blows to the head do not necessarily have to cause skull fractures

that may well result in various forms of intra-cranial haemorrhage, principally sub-dural or sub-arachnoid haemorrhage. He also expressed the view that blows to the abdomen which contained a large number of soft tissues, which are very vascular and are known to bleed quite catastrophically if damaged without evidence of any skeletal association, could also lead to death. Soft tissue damage to the throat could also lead to death.

Dr Sinton in cross-examination said that forceful punches to the temple area would commonly cause fracturing or breakage in the bones there. He said one would expect to find fractures there. There was no sign of damage to the skull that could be associated with trauma. Dr Sinton was asked:

> 'If there were to be blows to that area forceful enough to cause the sub-dural haemorrhage that's referred to, would you expect to see usually damage to the skull?---One would expect to see it but not surprised if there were no skull injuries. It's not an uncommon finding. There is no correlation between the two.'
>
> 'And around the chest area would you normally expect to find, if there had been heavy stomping on the chest area, there'd be some sign of fracture to the rib cage or any of that area there?---Yes. One would expect to find that but again not exclusively.'"

[36] The final point made by counsel centred on the absence of any burn marks on the body of the deceased and the fact that the body was found 15 metres from the burnt out vehicle.

[37] First, Brock gave evidence that at the time the deceased was left in the vehicle he was conscious and aware of what was happening. Secondly, it was an agreed fact that Dr Sinton gave evidence that a person suffering from an intra-cranial haemorrhage or from blows to the abdomen causing internal bleeding might be able to move around for some period before death. The Crown facts state that "[s]uch an ability to move could well explain why

James O'Connell's body was found some distance away from the burnt out motor vehicle". That statement was not disputed by the appellant.

[38] In my view, it was open to the sentencing Judge to accept the essential features of Brock's evidence. While Brock had lied to police and was an indemnified witness, prior to being indemnified Brock had made a statement under caution in which he implicated the appellant and gave a version consistent with his evidence. Having read the evidence, I can well understand why the sentencing Judge was satisfied that with respect to the matters in issue Brock had given truthful and reliable evidence. He withstood a lengthy and searching cross-examination.

**Ground 4 – Luring**

[39] Ground 4 was a complaint that the sentencing Judge erred in finding that the appellant had lured the deceased to the location where the attack occurred for the purpose of assaulting him. Counsel argued there was no basis in the evidence for drawing such a conclusion beyond reasonable doubt.

[40] First, there was ample evidence of a motive. Disagreements had occurred and, notwithstanding evidence that the appellant and deceased were seen smoking cannabis together, the evidence was capable of supporting a conclusion that there was ongoing animosity between them.

[41] Secondly, while the circumstances in which the appellant and the deceased came to be in a remote locality smoking cannabis when Brock and White arrived are unknown, it is apparent that they travelled to the locality in the

deceased's car. There was also evidence that the deceased was particularly fond of the car. From the remote locality, the appellant requested that Brock drive to the locality and bring "keys" with him. The reference to "keys" was understood by Brock as a reference to bolt cutters. However, nothing was said in that conversation or subsequently about an intended use of "keys".

[42] Although the appellant had requested that Brock attend at the remote locality, White decided she would accompany Brock. When they arrived, the appellant and the deceased were smoking cannabis and the situation appeared to be amicable. After a few minutes, however, without any provocation on the part of the deceased, the appellant attacked the deceased and, ultimately, set fire to the deceased's car. The appellant, Brock and White then left in Brock's car. At no time did the appellant make any reference to keys or bolt cutters. Nor did he explain why he wanted Brock to attend at the remote locality.

[43] In these circumstances, in my opinion it was open to the trial Judge to conclude beyond reasonable doubt that there was no reason why the appellant would have attended with the deceased at such a remote locality other than for the purpose of assaulting the deceased and burning his car. It was open to the trial Judge to exclude the possibility that the appellant wanted Brock to attend for the purpose of some criminal enterprise and to conclude beyond reasonable doubt that he chose Brock as a source of a vehicle in which to leave the locality after he had burnt the deceased's vehicle.

[44] For these reasons I was of the view that the appeal should be dismissed.

**Southwood J:**

[45] I agree with the reasons of Martin CJ.

**Kelly J:**

[46] I agree with the reasons of Martin CJ in their entirety.

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