The Queen v Crabbe [2004] NTSC 63

PARTIES:	THE QUEEN
	v
	CRABBE, Douglas John Edwin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	8322499
DELIVERED:	8 December 2004
HEARING DATES:	26 November 2004
JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW

Sentencing – murder– life imprisonment – Sentencing (Crime of Murder) Parole Reform Act 2003 - Part 5 Transitional Provisions – application by the Director of Public Prosecutions pursuant to s 19(4) – whether to fix a longer non-parole period.

STATUTES

Act of Parliament – interpretation – Sentencing (Crime of Murder) Parole Reform Act 2003 – s 19(4) – whether general sentencing principles can be included in objective or subjective factors affecting the relative seriousness of the offence – whether a longer non-parole period is "warranted" – whether discretion to fix a longer non-parole period is enlivened – whether non-parole period of 25 years represents the period of offence or offences in the middle range of objective seriousness.

Sentencing (Crime of Murder) Parole Reform Act 2003, s 18 & s 19; *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 21A

The Queen v Olbrich (1999) 199 CLR 270; *Crabbe v R* (1984) 56 ALR 733, at 748-749; *Power v The Queen* (1974) 131 CLR 623 at 627, 629; *The Queen v Robinson and Barrett* (1979) 22 SASR 367, at 269 – 270; *Bugmy v The Queen* (1990) 169 CLR 525 at 53; *Deakin v The Queen* (1984) 58 ALJR 367; *R v Leach* [2004] NTSC 60; *The Queen v Sewell & Walsh* (1981) 29 SASR 12; *The Queen v Crabbe* (1985) 156 CLR 464, at 469; considered.
R v Leach [2004] NTSC 60, distinguished in part.
R v Way [2004] NSWCCA 131, paras 85 – 88, 90, 91, 93, 94, 98, 99; *R v Proom* (2003) 85 SASR 120; applied

REPRESENTATION:

Counsel:

Appellant:	R Wild QC and M Fisher
Respondent:	S Cox QC

Solicitors:

Appellant:	DPP
Respondent:	NTLAC

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Crabbe [2004] NTSC 63
No. 8322499

BETWEEN:

THE QUEEN
Applicant

AND:

DOUGLAS JOHN EDWIN CRABBE
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 8 December 2004)

Introduction

[1] This is an application by the Director of Public Prosecutions ("the Director") pursuant to the provisions of the Sentencing (Crime of Murder) and Parole Reform Act 2003 ("the Act"). The respondent is serving sentences of life imprisonment for five crimes of murder. The Director seeks an order revoking the non-parole periods of 25 years fixed by the Act in respect of those sentences together with an order fixing non-parole periods longer than 25 years. The Director does not apply for an order refusing to fix a non-parole period.

History

[2] In the early hours of 18 August 1983 the respondent drove his 25 ton Mack Truck into a crowded bar of the Inland Hotel at Yulara. Five persons were killed and 16 were injured.

[3] The respondent was charged with five counts of murder. After a trial in March 1984 during which the respondent gave evidence, a jury convicted the respondent of all five counts. On appeal the convictions were set aside and a retrial was ordered. The second trial concluded on 7 October 1985 when a jury convicted the respondent of the five counts of murder.

[4] As required by the legislation in force in October 1985, the learned Sentencing Judge sentenced the respondent to imprisonment for life with respect to each of the five counts of murder. At that time the legislation did not permit the court to fix a non-parole period. Imprisonment for life meant imprisonment for the term of the respondent's natural life without any possibility of release other than by way of Executive clemency.

The New Scheme

[5] The Act came into operation on 11 February 2004. It brought about a substantial reform of the sentencing regime applicable to sentences of life imprisonment imposed for the crime of murder. The history of the laws relating to sentences for murder and the relevant provisions of the Act are set out in the reasons for judgment in *R v Leach* [2004] NTSC 60.

[6] The Act amended the Sentencing Act and introduced s 53A to that Act. Section 53A provides for the fixing of non-parole periods in respect of sentences of life imprisonment imposed for the crime of murder after the Act commenced. Upon conviction for a single crime of murder, s 53A(1)(a) provides that the court must fix at least the "standard" non-parole period of 20 years unless the circumstances identified in s 53A(3) apply. If those circumstances apply, and such circumstances include sentencing for two or more convictions for murder, the court is required to fix a non-parole period of at least 25 years. The "standard" non-parole period of 20 years is specified as representing the non-parole period "for an offence in the middle of the range of objective seriousness."

[7] Although s 53A(1)(a) directs the court to fix at least the "standard" non-parole period of 20 years, power is given to fix a non-parole period that is shorter than 20 years. The court may only fix a shorter period if satisfied that "exceptional circumstances" exist which "justify fixing a shorter period." Subsection (7) prescribes the circumstances that are capable of amounting to exceptional circumstances for these purposes and directs that the court "must not have regard to any other matters." By way of contrast, when the circumstances require the fixing of a non-parole period of at least 25 years, there is no provision authorising the court to impose a non-parole period that is less than 25 years.

[8] Section 53A(4) empowers the court to fix a non-parole period that is longer than either 20 or 25 years:

> "if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted."

[9] The court may also refuse to fix a non-parole period. Section 53A(5) provides that the court may refuse to fix a period:

> "if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole."

Transitional Provisions

[10] It is against the background of the previous legislation and the change in the sentencing regime that the transitional provisions applicable to the application before me must be considered. The relevant provisions for present purposes are as follows:

> "**PART 5 – TRANSITIONAL PROVISIONS**
>
> ***Division 1 – Prisoners currently serving life imprisonment for murder***
>
> 17. **Application of Division**
>
> This Division applies in relation to a prisoner who, at the commencement of this Act, is serving a sentence of imprisonment for life for the crime of murder.
>
> 18. **Sentence includes non-parole period**
>
> Subject to this Division –

(a) the prisoner's sentence is taken to include a non-parole period of 20 years; or

(b) if the prisoner is serving sentences for 2 or more convictions for murder – each of the prisoner's sentences is taken to include a non-parole period of 25 years,

commencing on the date on which the sentence commenced.

19. **DPP may apply for longer or no non-parole period**

(1) The Supreme Court may, on the application of the Director of Public Prosecutions –

(a) revoke the non-parole period fixed by section 18 in respect of the prisoner and do one of the following:

(i) fix a longer non-parole period in accordance with subsection (3) or (4);

(ii) refuse to fix a non-parole period in accordance with subsection (5); or

(b) dismiss the application.

(2) The Director of Public Prosecutions must make the application –

(a) not earlier than 12 months before the first 20 years of the prisoner's sentence is due to expire; or

(b) if, at the commencement of this Act, that period has expired – within 6 months after that commencement.

(3) Subject to subsections (4) and (5), the Supreme Court must fix a non-parole period of 25 years if any of the following circumstances apply in relation to the crime of murder for which the prisoner is imprisoned:

(a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) at the time the prisoner was convicted of the offence, the prisoner had one or more previous convictions for the crime of murder or manslaughter.

(4) The Supreme Court may fix a non-parole period that is longer than a non-parole period referred to in section 18 or subsection (3) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

(5) The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

20. **Appeals**

(1) For Part X of the Criminal Code, a decision of the Supreme Court under section 19(1)(a)(i) or (ii) fixing or refusing to fix a non-parole period is taken to be a sentence passed by the Court.

(2) The Director of Public Prosecutions may appeal to the Court of Criminal Appeal under Part X of the Criminal Code against a decision of the Supreme Court under section 19(1)(b) dismissing an application as if the decision were a sentence passed by the Court fixing a non-parole period of 20 or 25 years (as the case may be).

(3) On an appeal under subsection (2), the Court of Criminal Appeal may confirm the decision of the Supreme Court or substitute another decision that would have been available to the Supreme Court.

21. **Effect of decisions**

(1) The failure of the Supreme Court to comply with section 19(3), (4) or (5) when fixing or refusing to fix a non-parole period does not invalidate the prisoner's sentence.

(2) For section 5 of the *Parole of Prisoners Act*, a non-parole period fixed by or under this section is taken to be a non-parole period fixed in pursuance of the *Sentencing Act*."

[11] The effect of the transitional provisions is to direct that all sentences of life imprisonment for the crime of murder which were being served at the commencement of the Act are taken to include a non-parole period. Section 18(b) provides that if the prisoner was serving sentences of life imprisonment for two or more convictions for murder, each of those sentences is taken to include a non-parole period of 25 years. All other life sentences for murder are taken to include a non-parole period of 20 years (s 18(a)). The non-parole periods fixed by s 18 are taken to have commenced on the date on which the sentence of life imprisonment commenced.

[12] The periods of 20 and 25 years fixed by s 18 of the Act correspond with the minimum periods that s 53A of the Sentencing Act directs be fixed in

respect of sentences imposed after the commencement of the Act. However, unlike the direction found in s 53A(2), there is no direction in the transitional provisions that the non-parole period of 20 years is a "standard" period which represents a period for an offence "in the middle range of objective seriousness".

[13] Section 19 of the Act provides that on application by the Director, the court may revoke the non-parole period fixed by s 18 and either fix a longer non-parole period or refuse to fix a non-parole period. There is no power to fix a non-parole period less than the period fixed by s 18.

[14] A prisoner serving a sentence of life imprisonment at the time that the Act commenced is not able to make any application in respect of a non-parole period fixed by s 18. Unlike the prisoner who is sentenced after the commencement of the Act, therefore, the prisoner already serving a sentence has no prospect of receiving a non-parole period of less than 20 years. The minimum period fixed by s 18 is 20 years and such a prisoner is unable to make any application in respect of that period.

[15] On an application by the Director in respect of a non-parole period of 20 years fixed by s 18 of the Act, if any of the circumstances set out in s 19(3) of the Act apply in relation to the crime of murder for which the prisoner was sentenced, the court must fix a non-parole period of at least 25 years. Those circumstances are identical to the circumstances now found in s 53A(3) of the Sentencing Act which, if they exist in respect of a crime of

murder for which sentence is imposed after the commencement of the Act, require the court to fix a non-parole period of at least 25 years.

[16] On an application by the Director, pursuant to s 19(4) of the Act the court may fix a non-parole period longer than the periods of 20 or 25 years:

> "if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted".

[17] This is the same test as that to be applied when determining whether to impose a longer non-parole period than 20 or 25 years in respect of sentences imposed after the commencement of the Act (s 53A(4)). The attention of the court is drawn to the "relative seriousness of the offence" as determined by reference to any "objective or subjective factors" affecting that relative seriousness. The court is required, therefore, to consider the objective circumstances of the offending together with any matters personal or subjective to the offender which affect the gravity of the offending. Having assessed those matters the court must determine whether, by reason of those matters, a longer non-parole period is "warranted".

[18] As to the power to refuse to fix a non-parole period on an application by the Director, pursuant to s 19(5) of the Act the Legislature has set for the court a different test to be applied from that by which the court decides whether to impose a longer non-parole period. Section 19(5) provides that the court may refuse to fix a period:

> "if satisfied the level of culpability in the commission of the crime is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole".

[19] The terms of s 19(5) are identical to s 53A(5) of the Sentencing Act which empowers a court to refuse to fix a non-parole period in respect of sentences of life imprisonment imposed after the commencement of the Act. These provisions focus on the "level of culpability in the commission of the crime". The court is directed to determine whether that level of culpability is "so extreme" that the specified community interests can only be met if the offender is imprisoned for life without the possibility of release on parole.

[20] The net effect of the transitional provisions is to create a degree of equality between those who were serving sentences before the commencement of the Act and those who are sentenced after that commencement. In substance, a minimum non-parole period of either 20 or 25 years is automatically applied to prisoners whether sentenced before or after the commencement of the Act unless the court orders otherwise. The tests for determining whether to fix a longer period or to refuse to fix a non-parole period are the same for each category of prisoner. A significant difference is that those sentenced after the commencement of the Act have the opportunity of attempting to persuade the sentencing court to fix a period shorter than the "standard" period of 20 years by establishing the existence of specified "exceptional circumstances". Those sentenced before the Act commenced are deprived of that opportunity.

Sentencing Principles

[21] Although the respondent has previously been sentenced, on an application by the Director pursuant to s 19 of the Act, essentially the court is required to undertake a sentencing exercise. Unless excluded by the Act, the well settled principles and the provisions of the Sentencing Act governing the exercise of the sentencing discretion apply. These include the principles enunciated by the High Court in *The Queen v Olbrich* (1999) 199 CLR 270. The Court may take into account facts adverse to the interests of the respondent only if those facts are agreed or have been proved beyond reasonable doubt. If the respondent seeks to establish facts in mitigation, the respondent bears the burden of establishing those facts on the balance of probabilities.

[22] Those sentencing principles must be applied when considering the objective or subjective factors affecting the relative seriousness of the offence as required by s 19(4) of the Act. Similarly, when addressing s 19(5), the usual principles will apply to the determination of the facts relevant to an assessment of the level of culpability of the respondent in the commission of the offence and to the determination of the underlying facts such as the likelihood of re-offending and the progress or otherwise towards rehabilitation.

Facts

[23] The crimes occurred in the early hours of 18 August 1983. The respondent was then aged 36 years. He had been a truck driver all his working life having been driving since the age of 14.

[24] On 17 August 1983 the respondent spent the day driving his 25 ton Mack Truck to various localities and unloading his trailers. That evening after a meal the respondent went to the Inland Hotel where he drank at the bar for an hour or so before the barman refused to serve him because he was causing trouble. The respondent walked behind the bar and confronted the barman. A scuffle followed during which the respondent was forcibly removed from behind the bar and restrained. The respondent and another man fell to the floor briefly before the respondent was let up. He dusted himself off and, at about 12.30pm left the bar.

[25] The respondent walked approximately 500 metres back to his truck. He then drove the truck and two attached trailers a small distance to the Uluru Motel. At the motel the respondent unhitched one of the trailers. That was an exercise that required a degree of skill and dexterity, although it must be recognised that the respondent was very experienced in the operation of the truck and the trailers.

[26] After unhitching a trailer, the respondent drove the truck and trailer back to the Inland Hotel. The affidavit of Mr Martin Fisher sworn in support of the Director's application summarises the events at the hotel as follows:

> "Crabbe then manoeuvred the 25 ton Semi and trailer, at speed, around a blind bend, through a car park, around a minibus, turned and drove it through the bessa brick wall into the crowded bar, crushing the people there. Leaving the engine running, he then got out of the truck, smiled down at one of his victims, stepped over some bodies and ran.
>
> This was at 1.10am. It had been 40 minutes between being thrown out and driving the truck into the bar. He was captured the next morning walking out of the bush 22 kilometres away."

[27] One of the witnesses described the impact of the truck with the wall as like a bomb going off.

[28] As to whether the respondent smiled down at one of his victims, counsel for the respondent noted that two other witnesses did not see the respondent smile. However, I am satisfied that the respondent did smile at a victim, Mr Hannigan, who was trapped under the truck.

[29] Mr Hannigan gave evidence that he was knocked down by the truck onto his backside. He finished up just behind the front right hand tyres of the truck covered with an amount of debris from the bar and a bessa block or two. Mr Hannigan said the light was on in the bar. At first he panicked because he thought the truck was going to reverse over his legs. In what he described as a "rather loud" voice, he called for help. He looked toward the cabin area where he noticed movement and again called for help. Mr Hannigan said the cabin door opened and the driver began to alight. He again called out. The respondent looked down on him and their eyes met. According to Mr Hannigan the respondent then smiled at him, stepped over

his head onto what was left of the bar and ran from the bar. The respondent did not display any difficulty in doing so.

[30] In cross-examination Mr Hannigan agreed he had a very brief glimpse of the driver. When it was suggested to him that he was mistaken about the appellant smiling, Mr Hannigan responded that he had no doubt at the time that the respondent smiled at him. Mr Hannigan's description in cross-examination when asked the time that elapsed between the cabin door opening and the person stepping over him was as follows:

> "Almost immediately. He opened up the door, swung it open. I called to him. He looked down at me, recognised me, smiled, stepped over me and was gone almost – in – in – in the one movement. There was no stopping."

[31] In re-examination Mr Hannigan said that as the respondent was beginning to dismount from the truck it appeared he was going to dismount in a normal fashion down towards Mr Hannigan. In an instant reaction he called out for help to make sure that the respondent was aware of him and it was then that the respondent looked straight down at him. He described the smile as a "very basic smile".

[32] There is no evidence to suggest that the respondent had any grievance with the patrons in the bar. It appears that he had consumed a substantial quantity of alcohol, but there was no suggestion that he was so drunk that he was incapable of forming a specific intent. The respondent did not display any difficulty in getting to his feet after the scuffle in the bar or in running

out of the bar. In addition, he was capable of driving his truck and two trailers to the motel, uncoupling one of the trailers, driving the truck and trailer back to the hotel and then manoeuvring the truck and trailer at speed immediately before driving into the wall of the hotel.

[33] The respondent gave evidence at the first trial. That evidence was read to the jury in the second trial. The respondent said he recalled being dragged from behind the bar and being choked until he was let up. He said he felt slightly embarrassed. He thought he realised he had made a fool of himself. He said the message had sunk in and he walked out. The respondent denied having any feelings other than embarrassment.

[34] In substance, although the respondent said he recalled a number of subsequent movements and the removal of the second trailer, he maintained that he had no memory of driving the truck into the wall of the hotel. He said that after the committal proceedings some recall returned, but not of driving into the wall. He had a memory of someone saying "Run. Run. The cops are coming" and of running himself. His next recollection was waking up draped over a bush in the scrub.

[35] The respondent told the jury that he did not consider his ejection from the bar was a possible reason for driving the truck into the wall of the hotel. He said he did not believe he was capable of doing something like that. The respondent said he did not accept in his own mind that he was the driver. He did not think that alcohol played any role.

[36] Asked if he knew that if he drove the truck against the wall while there were people in the bar it would be likely to kill some of those people, the respondent replied: "It would be highly likely".

[37] As a consequence of the evidence given by the respondent, the trial Judge allowed the prosecutor to cross-examine about two previous incidents in which the respondent had been involved. The decision to allow the cross-examination was the subject of an appeal to the Full Federal Court in *Crabbe v R* (1984) 56 ALR 733. In the course of his judgment, Muirhead J observed that the respondent gave evidence-in-chief "designed no doubt to portray [the respondent] as a hard working man of stability". His Honour pointed out there was little if any cross-examination on the question of intoxication and that the defence "did not endeavour to portray a drunken man whose capacity to reason or control his vehicle was reduced". His Honour's judgment continued (748):

> "His [the appellant's] evidence, relating to his feelings after he had been manhandled and ejected from the bar was quite clear. He told the jury his only feeling was one of embarrassment; an acceptance that he was in the wrong. Any sense of hostility was by implication denied; again a picture of a man who realised he had been in the wrong and who accepted the consequences of his conduct in good spirit. It was against this background that the appellant gave evidence on three occasions in remarkably similar terms. It was not one "off the cuff" remark. On each occasion the answer went further than acceptance of a suggestion or denial of a counter suggestion as to previous behaviour under stress whilst drinking.
>
> (1) "I don't consider myself capable of doing something like that" (p 352).

(2) "I still don't believe that I'd be capable of doing something like that" (p 354).

(3) "I don't feel I'd be capable of doing such a thing … it's completely against me you know" (p 357).

These answers were given towards the end of his testimony, in an apparently considered fashion. The repetition of the questions was unusual; it may have been designed to emphasise to the jury that the accused was a mild type of fellow, careful of property. It seems to me that the appellant, bearing in mind what he had said earlier as to his years of experience on Territory roads, thus endeavoured to convey to the jury that he was a man without violence, a man who did not bear a grudge after a bar-altercation, a man too careful of vehicles he has driven to deliberately damage them."

[38] On the basis that the respondent had given evidence of good character, he was cross-examined about prior incidents.

[39] In February 1983 the respondent was at Threeways near Tennant Creek. He had been drinking alcohol at the roadhouse. The respondent denied he was affected by alcohol, but said he was short of sleep.

[40] According to the respondent, three youths in a car were giving a young bowser attendant a hard time by language and spinning the wheels backwards and forwards on the driveway. The respondent told them they were a bunch of hoons and they started on him with language. They asked what he was going to do about it. Provoked in that way the respondent went over to the car and grabbed a youth through the window.

[41] The respondent admitted assaulting a person who was inside the car and that he tried to get that person out of the car. He agreed that the person was

saying he did not want to fight him. The respondent said he tried to open the door and admitted bringing the door back past its limit of travel. The victim said "don't dent the car. It cost me $1800" or something like that and ran away. The respondent admitted chasing the youth and taking his boots off for that purpose because he could not catch the youth.

[42] During the incident the respondent said "I'll [obscenity] dent the car all right". The respondent got onto the bonnet of the car and jumped on it. He did the same to the roof of the car. His explanation for doing these acts was to entice the victim back.

[43] The respondent admitted telling the police that he was provoked by obscenities and general words. He described the victim and others as a "pack of scumbags". The respondent pleaded guilty to wilful and malicious damage to the vehicle.

[44] The second incident occurred on 24 March 1983, three months before the respondent committed the crimes under consideration. The respondent was at the Curtin Springs store where a country and western night was occurring. While drinking in the bar he got into an argument with other patrons. The bar manager approached him and asked him to calm down. The proprietor intervened. A scuffle occurred inside the hotel and others intervened trying to restrain the respondent.

[45] The scuffle moved outside. A police officer joined in and the respondent was held down on the ground. He agreed he was held in much the same manner as he was held down at the Inland Motel three months later.

[46] At Curtin Springs while he was being held down the respondent was told to calm down. Eventually he stopped struggling and was let up. He was told that if he behaved himself he could re-enter the bar. After he re-entered the bar another argument occurred. As a consequence a second scuffle involving the respondent, the proprietor of the roadhouse and a police officer occurred.

[47] The respondent agreed that on both occasions he had struggled violently. He agreed he would have used abusive language during the course of the events.

[48] After the scuffles the respondent was told by the proprietor that he was barred from the pub. The respondent agreed that he was angry, not about the scuffles or being barred, but about the people involved. He said he became angry on the second occasion. He had moved to a corner where he was sitting quietly drinking, but he was provoked by one of the people who was in the first argument. The respondent said he became very angry. He agreed it was a similar type of provocation to the provocation that occurred at Threeways.

[49] The respondent said he was very slow to be provoked at any time, even when he was drinking. He said he usually became happier when drinking,

but when it was put to him that sometimes he became more aggressive with drinking, the respondent replied:

> "I have become more aggressive when I've been drinking, yes."

[50] It is unnecessary to canvass the evidence in further detail. It was open to the jury to reject the respondent's evidence that he had no memory of driving the truck into the wall of the hotel. Even if the jury was of the view that it was reasonably possible that the respondent had no memory of the events, it was open to the jury to convict the respondent.

[51] As a consequence of the way in which the Crown presented its case and the directions to the jury, there were two states of mind that were sufficient for convictions of murder. First, that the Crown had proved the respondent intentionally drove the truck into the wall with an intention to cause death or grievous bodily harm to persons in the bar. Alternatively, the jury could have convicted on the basis that although not satisfied that the respondent possessed such specific intention, the jury was satisfied that when the respondent drove the truck into the wall he knew that his act of driving the truck into the wall would probably cause death or grievous bodily harm. The jury was told that such a state of mind was sufficient for murder even if that knowledge was accompanied only by indifference as to whether or not death or grievous bodily harm might be caused.

[52] I am not satisfied that the jury convicted on the basis that the respondent intended to kill or cause grievous bodily harm. Nor does the material satisfy

me of the existence of such a specific intent. It is more likely that the jury convicted on the basis that the respondent knew it was probable that his actions would cause death or grievous bodily harm. For the purposes of assessing the relative seriousness of the respondent's crimes, I proceed on that basis.

[53] As to the respondent's attitude to the probability that he would cause death or grievous harm, and as to his attitude immediately following the entry of the truck into the bar, I have referred to the evidence of Mr Hannigan. I am unable to discern any basis for rejecting that evidence.

[54] I am satisfied that when the respondent drove his truck into the wall with the knowledge that it would probably kill or cause grievous bodily harm, he was utterly indifferent to whether death or grievous bodily harm ensued. I am satisfied that when he climbed out of the truck, Mr Hannigan called for help and the respondent heard that call. He looked at Mr Hannigan, smiled, stepped over him and over the rubble within the bar. As the respondent exited from the truck and the bar, he was utterly indifferent to the harm he had caused.

[55] Consideration must be given to the respondent's consumption of alcohol. It appears that he had consumed a quantity of alcohol. I am satisfied, however, that the respondent was not significantly affected by alcohol. He was able to scuffle and move about without displaying any obvious signs of intoxication. He was capable of driving the truck and of uncoupling a

trailer. He proved to be capable of manoeuvring the truck and trailer at speed.

[56] Although the respondent was not significantly affected by alcohol, nevertheless the effects of alcohol played a role in the commission of the offence. The respondent had previously demonstrated a tendency to be argumentative when affected by alcohol. He had also demonstrated a tendency to react with physical aggression in the face of provocation. On this appeal, through counsel the respondent said that he now recognises that he was "an immature fool". Counsel submitted that the respondent now recognises that he possessed a reactive personality. He never walked away from a confrontation. Counsel suggested that sleep deprivation over a number of years was relevant in this context.

[57] In the context of the respondent's mental state, I have had the assistance of a helpful report from a psychologist who examined the respondent in October 2004. Details of the respondent's background are provided. There is nothing in that background of particular relevance to the facts of the respondent's criminal conduct. It is not the type of background that would ordinarily attract mitigation of penalty.

[58] The respondent was not suffering from any mental illness, psychological illness or psychological symptoms suggestive of psychosis. It was the view of the psychologist that it is highly likely that the respondent has never been psychotic. The psychologist reported that as at October 2004 the respondent

had a good degree of intelligence and insight. There is nothing related to the respondent's mental state or psychological condition capable of affecting the gravity of the respondent's criminal conduct.

[59] Prior to the commission of the crimes, the respondent had committed a number of offences of a relatively minor nature. The prior offending was not such as to have any relevance to an assessment of the gravity of the respondent's criminal conduct.

[60] As mentioned, the respondent was aged 36 at the time he committed the crime. There is no issue of youth or immaturity relevant to an assessment of the gravity of the criminal conduct.

[61] Finally as to the facts, the extent of the harm caused by the respondent's crimes is reflected by the death of five persons and injuries to 16 others, four of whom were injured seriously. In addition, the court is now in a position to gain an appreciation of the harm caused to the indirect victims through the deaths of the five persons. The victim impact statements provided on this appeal graphically demonstrate the severity of the ongoing and wide ranging impact of the respondent's crimes.

21 Years of Incarceration

[62] The respondent has been in prison for approximately 21 years. He is now deeply remorseful and acutely aware of the ongoing impact of his crimes.

[63] The respondent is highly regarded by Correctional Services officers with whom he has had contact over the last 21 years. From his early days in custody the respondent has maintained a strong work ethic and has been consistently described as placid, well behaved and courteous. The respondent has undertaken numerous courses of study and physical skills. He has acquired skills in mechanics, welding, electrical refrigeration, automotive air-conditioning, computers, first aid and woodwork. He has taken every opportunity to work within a Community Support Program conducted by Correctional Services. This has included working outside the confines of the prison. The respondent's right to engage in that type of activity was earnt through his exemplary conduct and industry. The President of an Association for which the respondent worked during the Program has spoken highly of the respondent's dedication and care for the work he performed. In an enlightened reference, the President concluded:

> "I and the Committee feel the work he [the respondent] is doing and the contact that he has with club members and the public will greatly aid in his reintegration into the civilian population in the not too distant future. I and a lot of clubs throughout the Darwin region support the Community Support Program and we hope that it continues not only for our benefit but also for those who work in it."

[64] In short, the respondent has been a model prisoner. He has achieved this not just by staying out of trouble. He has made every conceivable positive effort to rehabilitate himself and to prove that he is no longer a risk to the community. The totality of the material before me inspires confidence that

the respondent, who is now aged 57 years, can in due course be safely released into the community.

Relative Seriousness of the Offence

[65] As I have said, in determining whether to fix a non-parole period longer than the 20 or 25 years automatically fixed by s 18(b) of the Act, the court is required by s 19(4) to determine whether it is satisfied that "because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted." In determining that question, for the reasons discussed in *Leach*, in my opinion evidence is admissible of matters occurring or emerging since the imposition of sentence if relevant to the seriousness of the offence. This brings into focus the question as to what factors the Legislature intended be encompassed within the description "factors affecting the relative seriousness of the offence".

[66] In the case of this particular respondent, one of the critical questions is whether the respondent's subsequent rehabilitation can properly be regarded as a factor affecting the relative seriousness of his crimes.

[67] The starting point is to consider the ordinary and natural meaning of the words of the provisions in the context in which they appear. There is nothing ambiguous about that meaning. The court is required to consider factors "affecting" the relative seriousness of the offence. The Oxford English Dictionary (1989) defines "affect" as meaning:

> "To make a material impression on; to act upon, influence, move, touch, or have an effect on."

[68] The New Oxford Dictionary of English (1988) defines "affect" as meaning "have an effect on; make a difference to." The following note appears:

> "Affect is primarily a verb meaning "make a difference to"".

[69] Ordinarily, only those circumstances which are causally connected or have a nexus with the commission or the offence would fit the description of factors which make a difference to the seriousness of the offence. As a matter of the ordinary use of language, it does not appear that the rehabilitation of an offender over many years subsequent to an offence can be regarded as a factor capable of making a difference to the seriousness of the crime.

[70] It hardly needs to be said that, subject to legislative requirements and exceptions, the established principles of sentencing dictate that factors such as an offender's plea of guilty, remorse and rehabilitation are important factors in the determination of both a head sentence and a non-parole period. Allowing for differing weight to be given to various factors depending upon whether a head sentence or a non-parole period is being determined, the factors to be taken into account in fixing the non-parole period will be the same as those factors relevant to the fixing of a head sentence: *Power v The Queen* (1974) 131 CLR 623 at 627; *R v Robinson and Barrett* (1979) 22 SASR 367 per King CJ at 269 and 270; *Bugmy v The Queen* (1990) 169 CLR

525 per Mason CJ and McHugh J at 531. In the context of the statutory regime applicable to the fixing of non-parole periods in respect of sentences of life imprisonment imposed for the crime of murder, therefore, a clear legislative direction is required before the court will find that the Legislature intended to exclude such factors thereby overriding the application of established principles of sentencing.

[71] In considering the statutory context in which the transitional provisions must be interpreted, it must be borne in mind that prior to the commencement of the new regime brought about by the Act, there was no power to fix a non-parole period in respect of a sentence of life imprisonment imposed for the crime of murder. Subject to Executive clemency, that sentence meant imprisonment for the term of the offender's natural life without the possibility of release on parole. The new sentencing regime introduced in February 2004 brought about a dramatic change to that situation. It would not be surprising to find that the Legislature accompanied that change with guidance for the court in respect of the fixing of non-parole periods for sentences of life imprisonment imposed for the crime of murder. However, the Legislature has not restricted itself to the provision of guidelines. It has gone much further by prescribing minimum non-parole periods.

[72] Section 5 of the Sentencing Act identifies both the purposes for which sentences may be imposed and the matters to which the court shall have regard in the sentencing process. Those purposes and matters are entirely

consistent with the well established principles of sentencing. Those provisions do not exclude other established principles of sentencing to the extent that those principles are not inconsistent with the provisions of the Sentencing Act.

[73] As a consequence of the Legislative provisions of the new regime, however, to a large extent s 5 of the Sentencing Act and the ordinary principles of sentencing have been displaced in respect of the fixing of a non-parole period for the crime of murder. Depending on the circumstances, s 53A of the Sentencing Act directs the court to impose at least the minimum periods of either 20 or 25 years. If the circumstances require that the court fix a period of at least 25 years, the court does not possess a discretion to impose a period less than 25 years. To that extent s 5 and the well established principles of sentencing are excluded.

[74] In respect of the minimum of 20 years fixed for a single crime of murder, s 53A(6) enables the court to fix a non-parole period shorter than 20 years "if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period". However, the discretion of the court is significantly limited because s 53A(7) defines what is capable of amounting to "exceptional circumstances" and directs that the court must not have regard to any other matters. Subsections (7)-(9) are relevant for these purposes and are in the following terms:

> "(7) For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period under subsection (6), the

sentencing court must be satisfied of the following matters and must not have regard to any other matters:

(a) the offender is –

(i) otherwise a person of good character; and

(ii) unlikely to re-offend;

(b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender.

(8) In considering whether the offender is unlikely to re-offend, the matters the sentencing court may have regard to include the following:

(a) whether the offender has a significant record of previous convictions;

(b) any expressions of remorse by the offender;

(c) any other matters referred to in section 5(2) that are relevant.

(9) The sentencing court must give reasons for fixing, or refusing to fix, a non-parole period and must identify in those reasons each of the factors it took into account in making that decision."

[75] This brief overview is sufficient to demonstrate that in fixing minimum non-parole periods in connection with sentences of life imprisonment for the crime of murder imposed after the commencement of the Act, subject to a very limited exception the Legislature has excluded the operation of both s 5 and the ordinary principles of sentencing. Regardless of where the crime of murder sits in the scale of seriousness, and regardless of any other factors

normally relevant to the imposition of sentence and the fixing of a non-parole period, a minimum of either 20 or 25 years must be fixed. It is in this context that the power contained in s 53A(4) to fix a longer non-parole period and the identical power contained in s 19(4) of the Act applying to the respondent must be construed.

[76] Two relevant powers exist. The court may either refuse to fix a period or fix a longer period. As mentioned, in determining whether to refuse to fix a non-parole period, the court is required to focus on the "level of culpability in the commission of the crime". The court is also directed to an assessment of the community interest in retribution, punishment, protection and deterrence. The community interest in those features may change over the years of incarceration and must be determined as at the date of the application. Matters such as the offender's progress by way of rehabilitation, plea of guilty and remorse will all be relevant to an assessment of those features of the community interest.

[77] In directing the attention of the court to those aspects of the community interest, in substance the Legislature has brought into consideration all of the factors normally relevant to the imposition of sentence and the fixing of a non-parole period; that is, those factors relevant by reason of s 5 of the Sentencing Act and the well established principles of sentencing.

[78] The Legislature has chosen, however, to employ a different test when the court is considering whether to impose a non-parole period longer than the

minimum. In directing the attention of the court solely to "objective or subjective factors affecting the relative seriousness of the offence", the Legislature has pointedly omitted reference to the community interest in matters such as retribution, punishment, protection and deterrence. Is the court to infer, therefore, that the Legislature intended that the court should disregard the usual sentencing considerations such as retribution, punishment, protection of the community and general deterrence? Does it follow that the Legislature intended that the court should ignore the rehabilitation of an offender that has occurred over many years in custody because, although rehabilitation is directly relevant to questions such as protection of the community and personal deterrence, it does not affect the relative seriousness of the offence committed many years previously?

[79] The New South Wales Court of Criminal Appeal had occasion to consider the meaning of a legislative direction to take into account objective or subjective factors that affect the relative seriousness of an offence in an appeal against sentence, including a non-parole period, in *R v Way* [2004] NSWCCA 131. The relevant provisions of the Crimes (Sentencing Procedure) Act 1999 (NSW) ("the NSW legislation") with which the Court was concerned applied to offences committed on or after 1 February 2003. Those provisions give directions concerning the fixing of "standard" non-parole periods unless the Court determined there were reasons for setting a longer or shorter non-parole period. As is the situation with respect to the minimum non-parole period of 20 years in the Northern Territory, the NSW

legislation states that the "standard" non-parole period "represents the non-parole period for an offence in the middle of the range of objective seriousness" for specified offences.

[80] The New South Wales provisions contain detailed guidance for the court that does not appear in the Northern Territory legislation. The New South Wales legislation states that the reasons for which the court may set a longer or shorter period than the standard non-parole period are those referred to in s 21A of that legislation. Section 21A directs that the court is to take into account the "aggravating" and "mitigating" factors listed in s 21A together with:

> "(c) any other objective or subjective factor that affects the relative seriousness of the offence."

[81] The aggravating and mitigating factors to which the court is directed by the New South Wales legislation are the types of factors usually found in sentencing legislation and which are taken into account when sentencing in accordance with the well established sentencing principles. The mitigating factors specified in s 21A include matters such as prospects of rehabilitation, remorse, plea of guilty and degree of pre-trial disclosure by an offender as provided by the legislation. These are factors that settled sentencing principles treat as relevant in mitigation of penalty. Such factors do not necessarily have a nexus with the commission of the offence. Notwithstanding the absence of such a nexus, however, it is a reasonable interpretation of the New South Wales legislation that by listing the factors

to be taken into account as aggravating and mitigating, and by giving a direction that in addition to those factors the court was required to take into account "any other objective or subjective factor that affects the relative seriousness of the offence", the legislation was indicating that it regarded all of the factors listed under the headings of "aggravating" and "mitigating" as factors that affect the relative seriousness of the offence.

[82] The court observed that by providing guidance in the form of specified aggravating and mitigating factors, the Legislature did not intend to overrule or disturb the well established body of principles.

[83] After discussing the "abstract" offence in the middle of the range of objective seriousness and the assessment of whether an offence falls within that range, the court turned to the construction of the words "objective seriousness" as those words appear in the direction that the standard non-parole period represents the non-parole period "for an offence in the middle of the range of objective seriousness for offences …".

[84] In that context, the court made the following observations:

> "85 The multiplicity of purposes of sentencing set out in s 3A of the Act, quoted above, do not suggest a narrow perspective as to the range of facts and matters that are to be regarded as "objective" facts and matters which may affect the judgment involved in assessing "seriousness". It is too narrow a perspective to confine attention to the physical acts of the offender and their effects, as those acts or effects could be observed by a bystander. The inquiry which we consider to have been intended is one that would take into account the actus reus, the consequences of the conduct, and those factors that might properly have been said to have impinged on the mens rea

of the offender (see for example Fox and Freiberg, *Sentencing*, 2nd Edition at paras 3.506 to 3.510).

86 Some of the relevant circumstances which can be said "objectively" to affect the "seriousness" of the offence will be personal to the offender at the time of the offence *but become relevant because of their causal connection with its commission*. This would extend to matters of motivation (for example duress, provocation, robbery to feed a drug addiction), mental state (for example, intention is more serious than recklessness), and mental illness, or intellectual disability, *where that is causally related to the commission of the offence*, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected: *Channon v The Queen* (1978) 20 ALR 1 and *R v Engert* (1995) 84 A Crim R 67. Such matters can be classified as circumstances of the offence and not merely circumstances of the offender that might go to the appropriate level of punishment. Other matters which may be said to explain or influence the conduct of the offender or otherwise impinge on her or his moral culpability, for example, youth or prior sexual abuse, are more accurately described as circumstances of the offender and not the offence.

87 Questions of degree and remoteness arise which will need to be developed in the case law. There are potential areas of overlap. For example, impaired mental or intellectual functioning can go to either, or both, the seriousness of the offence and punishment, so far as deterrence is concerned.

88 In an assessment of the objective seriousness of the subject offence it seems to us that attention must accordingly be given to the factors mentioned above. Some of these relevant factors will be elements of the offence itself. Others will fall within the list of aggravating and mitigating factors referred to in s 21A (2) and (3) of the Act, so far as they relate to purely objective considerations." (my emphasis)

[85] In the context of the New South Wales legislation, the court regarded matters personal to an offender at the time of the offence as objectively affecting the seriousness of the offence if they were "causally related" to the offence. This view was confirmed shortly after the passages I have cited

when the court noted that there has always been a need to compare an offence in the abstract with an individual offence when assessing the relative seriousness of the individual offence. The court said:

> "90 In that comparison, it is necessary to reflect the distinction between circumstances which go to the seriousness of the offence considered in a general way, and matters that are more appropriately directed to the objectives of punishment.
>
> 91. If that distinction is respected then the spectrum of offences, and the identification of those which fall in the mid range of seriousness can be confined to matters which are directly or causally related to its commission."

[86] After referring to the observations in *Veen v The Queen [No 2]* (1998) 164 CLR 465 that an antecedent criminal history illuminates the moral culpability of the offender or shows dangerous propensity or shows a need for both personal and general deterrence, the court expressed the view that such factors "are more relevant to the measure of punishment for the individual offender, than they are to a consideration of where the offence before the court falls within the spectrum of conduct which may constitute the offence in the abstract". The judgment continued:

> "93 The existence of this dichotomy between matters relevant to the offence and to the offender, or put another way, between matters to be taken into account as relevant to an assessment of the objective seriousness of an offence, and matters going to the punishment of the offender for its commission, has not always been fully recognised, or at least expressly reflected, in the reasons which are given for sentence.
>
> 94 That is illustrated by reference to the terms in which the authorities have spoken of the factor last mentioned, namely re-

> offending while on conditional liberty, and of the factor that the offender has a prior record for similar offences."

[87] Having discussed differing approaches to an antecedent criminal history which in some cases had been treated as demonstrating an increased animus and culpability for an offence and in others as more related to the aspect of punishment, the court observed that it has not previously been necessary to draw a distinction between factors affecting objective seriousness and those which do not have a nexus with the commission of the offence:

> "98 Prior to enactment of legislation of the kind which is seen in Division 1A of Part 4 it was probably not necessary for any strict line to be drawn between matters which related to the offence, and to the offender, respectively, since the focus was placed upon the question of setting a sentence that reflected the overall criminal culpability involved.
>
> 99 The position has now changed in relation to sentencing in respect of offences for which standard non-parole periods have been set, in so far as there needs to be an examination of the level of objective *seriousness* involved in the offence, in which considerations that do not have a nexus with its commission are to be placed to one side."

[88] The observations to which I have referred were made in the context of a requirement to assess the objective seriousness of an offence in order to compare the objective seriousness of the particular crime with an abstract offence in the middle of the range of objective seriousness for that type of crime. The court then observed that in addition to the specified aggravating and mitigating factors, the legislation specifically required the court to take into account "any other objective or subjective factor that affects the

relative seriousness of the offence". The court also noted that s 21A specifically states:

> "The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law".

[89] In that context, the court concluded that the provisions in their entirely indicated that the factors listed in s 21A were not intended to operate as an exhaustive or exclusive code. In the view of the court, the provisions demonstrated a Legislative intention "that existing statutory and common law factors may still property be taken into account in determining a sentence even though they are not listed in s 21A(2) or (3)." The court went on to say that such factors could include hardship to a family where it qualifies as exceptional or the fact that serving a sentence will be unduly onerous by reason of illness or by the reason of the fact that it will be served in strict protection.

[90] In the light of that analysis, the court concluded that the sentencing Judge must ask and answer the question: "Are there reasons for not imposing the standard non-parole period?" The court determined that the question would be answered by considering:

> "(i) the objective seriousness of the offence, considered in the light of the facts, which relate directly to its commission, including those which may explain why it was committed, so as to determine whether it answers the description of one that falls into the mid range of seriousness for an offence of the relevant kind;

(ii) the circumstances of aggravation, and of mitigation, which are present in the subject case, or which apply to the particular offender, as listed in s 21A(2) and (3), and as incorporated by the general provisions in s 21A(1)(c) and by the concluding sentence to s 21A(1)."

[91] I have considered the decision in *Way* at some length because it contains a very helpful analysis of the appropriate approach, in the context of the New South Wales legislation, to the determination of the objective seriousness of an offence where the legislation has directed that a standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for the offence under consideration. In that context, and in the context of provisions specifically directing the court to take into account specified aggravating and mitigating factors and "any other objective or subjective factor that affects the relative seriousness of the offence", the court determined that the legislation preserved the "well established body of principles that have been developed by the courts over a long period of time."

[92] The court also determined that in assessing the objective seriousness of an offence, regard could be had to matters personal to an offender if such matters had a causal connection with the commission of the crime. For that purpose, other matters personal to an offender such as moral culpability which were not directly or causally related to the commission of the crime, but were more appropriately directed to the objectives of punishment, must be put aside. In determining a sentence, however, the court was not confined to factors causally connected to the commission of the crime and

was entitled to take into account all those factors regarded as relevant in accordance with the well established common law principles of sentencing.

[93] The issue for consideration is whether the same approach is permitted under the Northern Territory legislation. As mentioned, when considering whether to fix a non-parole period longer than 20 years in respect of a sentence of life imprisonment for murder imposed after the commencement of the Act, the court is given guidance in the same terms as the New South Wales legislation that the standard non-parole period of 20 years "represents the non-parole period for an offence in the middle of the range of objective seriousness" for offences of that type. In determining where an offence stands in the range of objective seriousness, there is no impediment to applying the reasoning in *Way*. I find that reasoning persuasive.

[94] A more difficult question is whether the reasoning in *Way* can be applied in determining which objective or subjective factors can properly be regarded as affecting the relative seriousness of the offence when deciding whether a longer non-parole period is warranted.

[95] The decision in *Way* that all factors relevant to the imposition of sentence in accordance with the well established body of sentencing principles can be taken into account was a decision reached in the context of the particular New South Wales provisions. As I have said, there are significant differences between the two sets of legislation. The New South Wales provisions relate to sentences and non-parole periods generally whereas the

Northern Territory legislation under consideration is limited to non-parole periods for sentences of life imprisonment imposed for the crime of murder.

[96] In contrast to the Northern Territory provisions, the New South Wales legislation specifically includes for consideration most factors relevant to sentence at common law including factors that do not have a causal connection to the offence. It is in the context of the specific inclusion of those matters that the New South Wales legislation also directs the court to have regard to any other objective or subjective factor that affects the relative seriousness of the offence.

[97] It is apparent, therefore, that the context in which the relevant provisions of the Act are to be interpreted is quite different from the New South Wales legislation. In addition, as mentioned, in the Sentencing Act and the transitional provisions the Legislature has chosen to direct the court in different terms depending upon whether the court is considering whether to refuse to fix a non-parole period or to fix a longer period. In the former situation the terms of the legislation effectively embody the principles found in s 5 of the Sentencing Act and the common law. In the latter situation which relates to the application under consideration, the Legislature chose not to give the same direction.

[98] As to why different tests have been imposed by the Act, in *Leach* I pointed out that the court would only consider not fixing a non-parole period in respect of those cases properly characterised as in the worst category of

cases of murder. It is not necessary, therefore, for the court to be directed to any question of the relative seriousness of the offending. In respect of the worst type of crimes, the Legislature was concerned to direct the court to the moral blameworthiness of the offender and to whether that blameworthiness was so extreme that the specified community interests could only be met by imprisonment for life without the possibility of release on parole.

[99] In cases where the court is considering whether to fix a longer non-parole period, the court will not be concerned only with those crimes falling within the worst category. The crimes involved will cover the whole spectrum of crimes from the lowest end of the scale of seriousness through to crimes fitting within the worst category. In these circumstances, the Legislature had directed the court to consider the "relative seriousness of the offence". In this way, the court is required to determine where the offending sits in the scale of seriousness. It is only when the court has determined where the offence sits in that scale that, in the context of fixed minimum non-parole periods, the court is able to determine whether a longer non-parole period is warranted.

[100] The Legislature cannot have intended that the court should take a narrow view of factors which affect the relative seriousness of the crime. Ordinarily, when a court is fixing a non-parole period the court is required to determine the minimum period that "justice requires that [the offender] must serve having regard to all the circumstances of [the] offence": *Power v*

The Queen at 629; *Deakin v The Queen* (1984) 58 ALJR 367; *Bugmy*. As was stated in *Power*, that determination is made according to accepted principles of sentencing. In the context of the fixed statutory minimum, when determining whether to fix a longer non-parole period, in substance the court is engaged in the same process.

[101] Adopting a broad interpretation which I consider will achieve the purposes of the legislation, in my opinion the objective and subjective factors to which the court shall have regard are not limited to those that, literally speaking, have a direct causal connection with the commission of the offence. Factors such as immediate remorse, immediate cooperation with authorities and an early plea of guilty, while not directly linked in a causative way to the commission of the crime, are so closely connected with the offender's culpability as to amount to factors affecting the relative seriousness of the offence for the purposes of s 53A of the Sentencing Act and s 19(4) of the Act. To this extent, following detailed submissions and analysis of the decision in *Way*, I have been persuaded that my general observation in *Leach* that an offender's plea of guilty and cooperation with the authorities do not affect the relative seriousness of the crime was incorrect ([64]). Such factors may affect the relative seriousness. It is a question of degree and timing.

[102] Having reached that view, the question remains whether the broad interpretation I have adopted can reasonably encompass prospects of rehabilitation or the rehabilitation of an offender that has taken place over

many years subsequent to the commission of the crimes. It is here that I have reached the view that the line must be drawn adverse to the respondent.

[103] To find that the Legislature intended that the court, in assessing the relative seriousness of the offence, should take into account prospects of rehabilitation or rehabilitation that has occurred over many years subsequent to the commission of an offence is to distort the ordinary and natural meaning of the words "affecting the relative seriousness of the offence". Prospects of rehabilitation or subsequent progress towards rehabilitation cannot reasonably be regarded as factors affecting the relative seriousness of the offence.

Warranted – Discretion

[104] The threshold question for the court in considering the question of a longer non-parole period is whether the court is satisfied that a longer non-parole period is warranted. That question is answered by reference to any objective or subjective factors affecting the relative seriousness of the offence. Unless the court is satisfied by reason of those factors that a longer non-parole period is warranted, the court is not empowered to fix a longer non-parole period. In other words, the discretion to fix a longer non-parole period is not enlivened unless the court is satisfied that a longer period is warranted.

[105] Sections 53A(4) of the Sentence Act and 19(4) of the Act provide that if the court is satisfied that a longer non-parole period is warranted, the court

"may" fix a longer non-parole period. The Legislature has not directed the court to fix a longer non-parole period if satisfied that a longer period is warranted. A discretion is conferred upon the court to do so.

[106] Significantly, once the discretion to fix a longer non-parole period is enlivened, neither the Sentencing Act nor the Act purports to restrict the exercise of that discretion. Nor do the provisions of those Acts provide any guidance for the court in the exercise of that discretion. Subject to the context in which the discretion is granted to the court, and subject to the well recognised principles of sentencing, the discretion is unfettered.

[107] In these circumstances the question arises as to whether there is anything in the Sentencing Act or the Act or in the context of the new sentencing regime which evinces an intention on the part of the Legislature to fetter the discretion exercised by the court in determining whether to fix a longer non-parole period. In particular, is there any basis for inferring an intention that the court should ignore prospects of rehabilitation or rehabilitation that has occurred over many years subsequent to the commission of the offence?

[108] On one view, it might be said that the history of the treatment of persons convicted of murder and the purposes of the new regime points in the direction of ignoring questions of rehabilitation. Previously, regardless of any objective or personal circumstances or issues of rehabilitation, the community regarded the gravity of a crime of murder as requiring that the offender remain in prison for the term of the offenders' natural life. The

new regime has sought to ameliorate that situation to a strictly limited extent. The view of the community, reflected in the terms of the new regime, is that regardless of any factors of mitigation, issues of scale of seriousness or questions or rehabilitation, the crime of murder requires the punishment of a long period of incarceration. It could be said that consistently with that view, the court should be guided only by the gravity of the crime when determining whether a period longer should be fixed. On this view the court is concerned only with determination of the minimum period that justice requires the offender serve by reason of the gravity of the criminal conduct. Questions of rehabilitation are left to the Parole Board in deciding whether to release an offender on parole.

[109] The alternative view is that clear direction is required before a court will infer an intention on the part of the Legislature to exclude from the court's consideration those matters which s 5 and the well established principles of sentencing otherwise require the court to consider in a sentencing exercise. Generally when sentencing, and in particular when fixing non-parole periods, the court is vitally concerned with prospects of rehabilitation. Where a delay has occurred between the offence and sentencing, progress that has been made towards rehabilitation is usually an important consideration. Rehabilitation is generally regarded as particularly important when considering the question of a non-parole period.

[110] As I observed in *Leach*, there are powerful reasons why the Legislature would intend a court to receive all relevant information capable of bearing

upon the assessments required of the court, including facts that have emerged during the period of incarceration. The decisions required of the court affect the liberty of prisoners. The court is empowered to increase the very lengthy minimum periods fixed by the transitional provisions. The nature of the orders to be imposed and their impact upon the lives of prisoners dictate that in the absence of the clearest words to the contrary, the provisions should be interpreted as supporting a Legislative intention that the court should have available to it all relevant and up to date information concerning the prisoner.

[111] The other factor which indicates a Legislative intention that in exercising the discretion whether to fix a longer non-parole period the court should have regard to all matters ordinarily relevant to the fixing of a non-parole period, including questions of rehabilitation, is the timing of applications by the Director as required by s 19(2) of the Act. On that aspect I adhere to the following views expressed in *Leach* ([69] – [70]):

> [69] In considering this issue, regard must also be had to the timing of applications by the Director as required by s 19(2) of the Act. If a period of 20 or 25 years fixed by s 18 expired before the commencement of the Act, s 19(2)(b) requires the Director to make the application within six months of the commencement of the Act. In other circumstances, s 19(2)(a) provides that the Director must make the application not earlier than twelve months before the first 20 years of the prisoner's sentence is due to expire. In substance, therefore, the Legislature has specifically precluded the Director from making an application before a prisoner has served at least 19 years.

> [70] In my opinion, the obvious reason for imposing the requirement that an application by the Director be delayed for such a long time is to enable the court to be put in the best position possible to make the assessments required of it. Numerous authorities have emphasised the difficulties facing sentencing Judges required to impose lengthy sentences of imprisonment and lengthy non-parole periods when endeavouring to predict the likely response of an offender to imprisonment. For example, in *Bugmy v The Queen* (1990) 169 CLR 525, in a joint judgment, Dawson, Toohey and Gaudron JJ observed that a minimum term of 18 years and 6 months was of such a length as to render impossible accurate forecasts as to the risk of offending and the protection of the community (537). Experience has demonstrated that on occasions persons convicted of horrific crimes and who appear to be incapable of rehabilitation have, over a period of many years, responded favourably to incarceration. By precluding a Director's application for such a long period the Legislature has endeavoured to minimise the difficulties associated with future predictions as to human behaviour in response to lengthy periods of imprisonment.

[112] In my opinion, neither the terms of the legislation nor the context of the new statutory regime imply that in determining whether to exercise the discretion to fix a longer non-parole period the court is not to take into account prospects of rehabilitation or rehabilitation that has occurred subsequent to the crime. There is nothing to indicate a Legislative intention that the principles embodied in the Sentencing Act and the well established common law principles of sentencing should not apply. Quite the contrary. The Legislature has chosen not to fetter the discretion and to ensure that the timing of an application by the Director pursuant to the transitional provisions will enable the court to receive the benefit of information as to an offender's progress or otherwise by way of rehabilitation over many years in custody.

Range of Objective Seriousness

[113] The Director submitted that as s 53A of the Sentencing Act states that the standard non-parole period of 20 years represents the non-parole period for an offence in the middle of the range of objective seriousness for offences of murder, the periods of 20 and 25 years automatically fixed by s 18 of the Act should also be regarded by the court as periods appropriate to an offence in the middle of the range of objective seriousness. In this way the court is given a guideline or starting point from which to determine the relative seriousness of the offence under consideration.

[114] It seems to me there is considerable force in that submission in respect of the period of 20 years automatically fixed by s 18 in respect of a sentence of life imprisonment imposed before the commencement of the Act. As mentioned, it is apparent that the transitional provisions endeavour to create a degree of equality between prisoners serving sentences before the commencement of the Act and those sentenced after the Act commenced. Notwithstanding the absence of the direction in the transitional provisions that the period of 20 years represents the period for an offence in the middle of the range of objective seriousness, in my view it is reasonable to infer that the Legislature intended the court proceed on that basis when determining whether to fix a longer non-parole period pursuant to the transitional provisions.

[115] In my opinion the same reasoning cannot be applied when considering whether the Legislature intended that the non-parole period of 25 years be

regarded as representing the period appropriate for an offence or offences in the middle of the range of objective seriousness for offences of the type attracting the minimum of 25 years. The Legislature chose not to give such a direction in either the Sentencing Act or the transitional provisions. If it was intended that the court should regard the 25 years as representing the period for an offence or offences in the middle of the range of objective seriousness, given the direction with respect to the standard non-parole period of 20 years it is somewhat surprising that the Legislature omitted to give a similar direction.

[116] The standard non-parole period of 20 years applies regardless of the circumstances of the crime and circumstances of the offender. Without a direction that 20 years represents the period for an offence in the middle of the range of objective seriousness, the court would be deprived of any reference point by which to determine the relative seriousness of the offence when considering whether to impose a shorter or longer non–parole period.

[117] The difficulty in giving a similar direction with respect to those crimes requiring a minimum of 25 years is that the circumstances which require the fixing of a minimum period of 25 years will almost inevitably elevate the objective seriousness beyond the middle of the range. The legislature has determined that those factors which require the increased minimum period are aggravating factors which justify a significant increase in the minimum non–parole period of five years. Any increase of that magnitude is inconsistent with the view that the offence requiring the minimum of 25

years represents an offence in the middle of the range of objective seriousness.

[118] In addition, the minimum of 25 years must be imposed if the offender is being sentenced for two or more crimes of murder or if the offender has previously been convicted of unlawful homicide. These criteria do not sit well with an attempt to apply a presumption with respect to all crimes requiring the minimum of 25 years.

[119] In my opinion, bearing in mind that the minimum of 20 years represents a period appropriate for a single crime of murder in the middle of the range of objective seriousness, it is appropriate to regard 25 years as appropriate for an offence otherwise in the middle of the range of objective seriousness, but accompanied by any one of the aggravating features specified in s 53A(3) of the Sentencing Act and s 19(3) of the Act. If more than one of the features specified in those sections is present, the objective seriousness of the crime is increased. It is not appropriate to regard the addition of each feature as requiring the addition of another five years to the non-parole period, but each feature represents a circumstance of aggravation.

[120] Those remarks relate to a single crime of murder accompanied by one or more of the particular features which require the fixing of at least 25 years as the non-parole period. In the case of two or more crimes of murder, that reasoning cannot apply. At best the court will be required to bear in mind that the Legislature has determined that for a single crime of murder in the

middle of the range of objective seriousness, 20 years is the minimum period. In addition, for a single crime in the middle of the range of objective seriousness accompanied by one of the specified aggravating features, the minimum is 25 years.

Findings

[121] I am satisfied that at the time the respondent left the bar after the scuffle or soon after leaving the bar, the respondent formed an intention to drive his truck through the wall of the hotel. At that time the respondent knew that if he drove his truck at speed into the wall, the size and the momentum of the truck would inevitably mean that it would break through the wall and into the bar.

[122] The respondent also knew that a significant number of people were in the bar. He knew that if he drove his truck through the wall, it was highly likely that persons in the bar would be killed or seriously injured.

[123] The respondent's intention to drive the truck through the wall of the bar was formed at a time when he was affected by alcohol, but not significantly affected. Alcohol was a contributing factor to the respondent's conduct. As the consequence of the effects of alcohol, the respondent's inhibitions were lowered and his anger at being ejected from the bar prevailed to the point where his violent reaction ensued. An aggressive and physical response in such circumstances perceived by the respondent as provocation was not an uncommon reaction when the respondent was affected by alcohol. When the

respondent perceived that he was being provoked, he tended to become argumentative and physically aggressive.

[124] I emphasize that this is not a case in which the moral culpability of the respondent was reduced by reason of his intoxication. The respondent was not a person of impeccable character who, totally out of character, committed a minor offence while significantly affected by alcohol.

[125] Intoxication is, unfortunately, often an explanation for the commission of a crime. Rarely, however, is it a mitigating factor: *R v Sewell & Walsh* (1981) 29 SASR 12. In some circumstances, it may be an aggravating factor. In *Sewell* reference was made to violent crimes committed by intoxicated persons being more frightening to the average person.

[126] The respondent's intoxication provides part of the explanation for his conduct. I regard it as neither an aggravating nor a mitigating factor.

[127] In arriving at this view I have not overlooked the fact that the respondent was addicted to alcohol. In my view, however, in the circumstances of the respondent's criminal conduct, the fact of his addiction cannot be treated as a mitigating factor. There is no proper basis for the view that alcoholism reduces the respondent's moral culpability in the commission of the crimes. This approach is consistent with the approach to the relevance of addiction to other drugs, particularly in the context of serious crimes: *R v Proom* (2003) 85 SASR 120.

[128] I have also had regard to the reports of the psychologist and Dr Wake, the Director of the Northern Territory Prison Medical Services. The respondent told the psychologist that he could not provide a basis for his motivation and said that he "had no distinct or dedicated animus" to any of the victims. The psychologist did not proffer any explanation as to the respondent's motivation.

[129] Dr Wake has known the respondent since 1993. In his opinion the respondent is of above average intelligence. Dr Wake "ventured" the view that, "in one moment of madness", the respondent committed the crimes. It appears that Dr Wake regards alcohol and anger as the "offending precipitants".

[130] Speaking colloquially, it might be said with some justification that anyone who deliberately drives a 25 ton truck through a wall into a crowded bar was acting in a "moment of madness". However, in my view, that expression is not appropriate to the respondent's offending.

[131] The respondent's crimes, while committed on impulse, were not in the category of a spontaneous reaction to a stressful set of circumstances. There was a significant element of premeditation. Having been ejected from the hotel, the respondent not only walked to his truck and drove it to the motel, he uncoupled one of the two trailers before driving back to the hotel. I am satisfied the respondent uncoupled the trailer because, for some unexplained reason, in planning to drive the truck through the wall of the hotel the

respondent thought it would be in his best interests to remove the second trailer. It might be that the respondent had in mind backing away from the hotel after he had driven the truck through the wall. Such a manoeuvre would not be possible if a second trailer was attached. However, the reason is not of particular significance. The conduct in driving to the motel and removing the trailer is primarily relevant because it demonstrates a significant degree of premeditation and planning.

[132] As mentioned, this was not a spontaneous and instant reaction to stressful circumstances. In that context one of the serious features of the respondent's crimes is that his actions were directed towards people who had given him no cause for animosity towards them. They were entirely innocent.

[133] The means by which the respondent committed the crimes is also relevant. It is difficult to imagine a more lethal weapon than a 25 ton Mack truck. It was a weapon against which there was no defence. It was a weapon capable in one action of destroying the lives of many people.

[134] In considering the relative seriousness of the respondent's criminal conduct, it is not appropriate to attempt to isolate the individual crimes of murder and to consider the relative seriousness of each individual crime. In the particular circumstances of the respondent's offending, it is the totality of his conduct to which regard must be had. In its totality, the respondent's criminal conduct must be regarded as falling within the worse category of

crimes of murder. Whatever might be said about the circumstances, in one action with a lethal weapon that would inevitably kill and injure a significant number of innocent victims, the respondent murdered five persons. The severe and widespread harm caused by the crimes continues today, over 20 years later.

[135] As mentioned earlier in these reasons, I am satisfied that when the respondent left the mayhem in the bar behind him he was utterly indifferent to the harm he had caused. It is difficult, if not impossible, to identify when the respondent came to accept responsibility and to experience true remorse. In his affidavit in response to the Director's application, the respondent stated that after extensive self analysis he now understands the circumstances which led to his irresponsible behaviour and the devastating effects of that behaviour. He said gaining an insight and understanding has been a long, difficult and confronting exercise. The respondent now accepts full responsibility for his actions.

[136] The respondent maintained his plea of not guilty in his trial of October 1985. The conduct of that trial was not based solely on putting the Crown to proof. I am satisfied that at the time of his second trial in 1985, a little over two years after the crimes were committed, the respondent had not accepted responsibility. There is nothing in the material before me to suggest that by the time of his second trial the respondent was truly remorseful. I make that observation in the light of the respondent's evidence at the first trial which conveys the distinct impression of a person not being entirely truthful about

his state of memory and of a person somewhat indifferent to the harm he had caused. It might be that the respondent could not bring himself to accept that he would have committed such terrible crimes and, in the process of justifying that position, an incorrect impression had been conveyed. At the least, however, on the basis of the material before me I am unable to find that the respondent was experiencing true remorse at any time prior to his second trial. In these circumstances, I do not regard remorse subsequently experienced as a factor affecting the relative seriousness of the offence.

Conclusion

[137] I am required to assess the relative seriousness of the respondent's criminal conduct. The respondent is not a serial killer who murdered five people on different occasions in premeditated and planned attacks. The respondent did not possess a specific intention to kill. Sentencing courts have always regarded a murder committed with a specific intention to kill as more aggravated than a murder committed with a reckless state of mind. However, much will depend upon the circumstances and the words of the High Court in a joint judgment in *The Queen v Crabbe* (1985) 156 CLR 464 should be borne in mind (469):

> "the conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm. … If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the

> likely result, for the word "probable" means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm."

[138] Those remarks were addressed to the mental state required for the crime of murder in the context of a Crown application for special leave to appeal from a decision of the full court of the Federal Court quashing the respondent's convictions on the first trial. The Court was not concerned with assessing the relative seriousness of a particular crime. Notwithstanding that distinction, the observations of the Court represent a recognition of the underlying culpability of a person who does an act knowing that death or grievous bodily harm is a probable consequence.

[139] In the circumstances of the respondent's crimes, as the respondent admitted in evidence, it was highly likely that a number of persons would be killed or injured seriously when he drove his truck through the wall. The respondent's knowledge and callous indifference to the consequences of his act mean that the difference between a specific intention to kill and the respondent's state of mind is not of great significance for present purposes.

[140] Although the respondent did not commit the crimes by multiple premeditated acts, nevertheless he committed the crimes with a lethal weapon in circumstances that would inevitably result in multiple deaths and injuries. The inescapable fact is that the respondent murdered five innocent and defenceless persons. There are no circumstances that significantly mitigate the objective seriousness of the crimes. Similarly, there are no

subjective circumstances which mitigate the seriousness of the criminal conduct.

[141] The community has determined that the starting point for the commission of two crimes of murder is a non–parole period of at least 25 years. This minimum applies regardless of where the individual crimes sit in the scale of seriousness. It applies regardless of the personal circumstances of the offender. While it is inappropriate to engage in a mathematical calculation based on 20 years for one crime of murder and an additional five years for each additional murder, and while the legislation plainly contemplates the possibility that the minimum non-parole period of 25 years could be fixed in respect of more than two crimes of murder, it is relevant to bear in mind that the absolute minimum period that can be fixed for two crimes of murder is 25 years.

[142] By reason of the factors affecting the relative seriousness of the respondent's crimes to which I have referred, I am satisfied that a longer non-parole period is warranted. The discretion having been enlivened, I must determine whether to exercise that discretion.

[143] I have had regard to all of the material relating to the circumstances of the crime and personal to the respondent. As I have said, in connection with the commission of the crime, there is little to mitigate the gravity of the respondent's criminal conduct. The respondent's personal circumstances do

not attract mitigation. Nor is the respondent entitled to the benefit of youth, a plea of guilty or immediate remorse.

[144] Of particular importance to the exercise of the discretion is the respondent's subsequent rehabilitation. As mentioned, the respondent has made every conceivable possible effort to rehabilitate himself and has done so successfully. It is impossible to predict with absolute certainty that if released the respondent will not offend again. There is always an element of risk that a person who has been convicted of serious crimes will offend again when released. Through the terms of the legislation, however, the community has recognised that notwithstanding a degree of risk, in appropriate circumstances a person convicted of serious crimes of murder should receive a non-parole period thereby providing the offender with an opportunity to seek release on parole.

[145] It must be emphasised that the fixing of a non-parole period does not mean that at the expiration of the period the respondent will be entitled to release on parole. He will not be entitled to an automatic release. At the expiration of the non-parole period the respondent will be able to apply for release on parole. Whether he will be released on parole is a matter for determination by the Parole Board.

[146] With the advantage of knowledge of the prisoner's response to imprisonment over the last 21 years, I must determine the minimum period that justice requires that the respondent must serve having regard to all the

circumstances of the offence. That determination must be made in the context of the new Legislative scheme. That scheme provides for an absolute minimum non-parole period of 25 yeas for two crimes of murder. In my view the community expectation and intention reflected in the scheme is that ordinarily an offender being sentenced in respect of five crimes of murder could not expect to receive the minimum non-parole period of 25 years. I do not exclude the possibility that compelling objective and/or subjective factors might justify the imposition of the minimum period of 25 years.

[147] While the respondent's subsequent remorse and remarkable efforts to achieve his rehabilitation are particularly significant factors, I have reached the view that they do not justify the imposition of the absolute minimum of 25 years. If it had not been for those factors, the period I would have fixed would have been significantly longer.

[148] The non-parole periods of 25 years in respect of each of the five sentences of life imprisonment are revoked. I fix a single non-parole period of 30 years commencing on 18 August 1983. The respondent will be eligible for parole in August 2013 when he will be 66 years of age.
