SUPREME COURT OF QUEENSLAND

CITATION:	*R v Zarnke* [2019] QCA 141
PARTIES:	**R** **v** **ZARNKE, John Bernard** (applicant)
FILE NO/S:	CA No 241 of 2018 SC No 1152 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 20 August 2018 (North J)
DELIVERED ON:	26 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2019
JUDGES:	Fraser and Morrison and McMurdo JJA
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to 13 years imprisonment for manslaughter – where the applicant had a personality with a propensity towards violence, suffered from a severe and at times treatment-resistant schizophrenic illness, and had a long history of drug use – whether the sentencing judge erred by imposing a sentence beyond that which was appropriate, for the purpose of protecting the community – whether the sentence imposed was manifestly excessive in all of the circumstances *Penalties and Sentences Act* 1992 (Qld), s 9 *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39, cited *R v Beacham* (2006) 163 A Crim R 348; [2006] QCA 268, applied *R v Goodger* [2009] QCA 377, cited *R v Miguel* [1994] QCA 512, considered *R v Perini; Ex parte Attorney-General (Qld) (No 2)* (2011) 222 A Crim R 333; [2011] QCA 384, distinguished *R v Potter; Ex parte Attorney-General (Qld)* (2008) 183 A Crim R 497; [2008] QCA 91, distinguished *R v Pringle; Ex parte Attorney-General (Qld)* [2012]

QCA 223, distinguished
R v Yarwood (2011) 220 A Crim R 497; [2011] QCA 367, cited
Veen v The Queen (1979) 143 CLR 458; [1979] HCA 7, followed
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, followed

COUNSEL: J R Jones with N Edridge for the applicant (pro bono)
D I Balic for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant seeks leave to appeal against his sentence of 13 years imprisonment for manslaughter. The applicant was also sentenced to concurrent terms of two years imprisonment upon each of two counts of unlawfully using a motor vehicle and he was dealt with for various summary charges. The grounds of the proposed appeal are that the sentencing judge erred by imposing a sentence beyond that which is appropriate, for the purpose of protecting the community, and that the sentence is manifestly excessive.

[2] The applicant was 34 years old when he committed the manslaughter offence. He had a criminal history of offences committed between 1997 and 1999 and in 2006 and 2007. Most of the convictions were for minor street and drug offences and breaches of bail. In addition to one conviction in 1997 and one in 1998 were for assaulting police, in 1998 the applicant was convicted of possessing a regulated weapon, one of the three offences the applicant committed in 2007 was a breach of a domestic violence order, and the applicant had been sentenced to imprisonment once, for two years suspended after nine months, for a series of offences committed during 1998 (including unlawful use of motor vehicles and entering dwellings with intent to commit indictable offences).

[3] The applicant committed the manslaughter offence outside his aunt's house in Brisbane. His victim, Mr Bell, was a 27 year old man who had been a friend of the applicant and the applicant's aunt for about ten years. At night in February 2015 the applicant's aunt awoke to the applicant knocking on a window. She let the applicant in and made him coffee. Also in the house was the deceased and the 16 year old daughter of the applicant's aunt. The applicant repeatedly told his aunt and the deceased that people were out to get him and he was being poisoned. The applicant threatened to kill the deceased if the applicant found out that he was responsible for the applicant's former de facto partner leaving him. The applicant later left his aunt's house in a car and returned in half an hour on foot, at 2.30 am on 10 February 2015. He knocked on windows and his aunt let him in. In the presence of the deceased, the applicant shouted and swore at his aunt, accusing her of putting cyanide in his coffee and threatening to kill her. The deceased subsequently went outside to join a friend who was waiting in his car for the deceased to join him on a planned trip. The applicant then attacked the deceased with a knife. The deceased called to the applicant's aunt for help. A neighbour saw the applicant striking at the deceased, who was covering his face with his arms and pleading with the applicant to stop. After the deceased moved under the neighbour's car and the neighbour told the applicant to get away from his car, the applicant told the neighbour to move his

car. The deceased yelled out to the neighbour not to do so and that the applicant had a knife and was trying to kill him. The applicant crawled under the neighbour's car and reached for the deceased. The applicant's aunt pulled the applicant backwards away from the car and the deceased came out from under the car. His chest and stomach were then covered in blood and blood was pouring out of his body. The applicant's aunt helped the deceased up from the ground and encouraged him to run to her house but he staggered and fell onto the road. The applicant ran towards the deceased. The deceased was curled up on the ground with his hands and arm over his face and his knees up to his stomach. He yelled at the applicant that he had four little ones and the applicant's aunt also screamed at the applicant to stop. The applicant replied, "Fuck that I'm going to kill this little cunt". He kneeled over the deceased, raised the knife, struck it repeatedly into the upper body of the deceased, and said, "I told you I would get you, you little cunt". When an ambulance arrived soon afterwards the deceased was unconscious and attempts to revive him were unsuccessful.

[4] The applicant ran from the scene with the knife. He made his way on foot to a hospital more than 11 kilometres away, where he got into the driver's seat of a car which the owner had vacated to assist her elderly mother out of the passenger's seat. The applicant drove the car away from the hospital. (After he was found by police and he supplied some information to them, police found the car secreted in bushland and they found the keys in a different place.) The applicant then took another person's car from a residence. Shortly afterwards two residents of a different house noticed the car parked at an intersection. The applicant approached those residents, on two separate occasions about half an hour apart, and asked whether he could have a smoke. The residents told him to go away. Police were called and apprehended the applicant. He was seated in the driver's seat of a car. The applicant did not comply with a direction by police to get onto the ground and he kicked the legs of a police officer, causing him to lose balance. Upon being restrained, the applicant aggressively asked what it was about. When told that he was wanted for questioning for murder the applicant said that it was not murder but self-defence and that the deceased had been trying to "formaldehyde poison" him. The applicant subsequently told detectives that "I gutted the piece of shit because he fucking poisoned me. Or I think that's what happened. It's hard to tell with all the voices in your fucking head from being poisoned so often … I killed the fucking scum cunt. He deserved it." The applicant declined an opportunity to participate in a record of interview.

[5] Upon an autopsy of the deceased it was found that he had sustained 16 wounds. Death was caused by three stab wounds to the chest which caused significant blood loss, collapse of the lungs and heart muscle damage. One of those wounds required a moderate degree of force and the other two may have been inflicted with a mild degree of force. The remaining wounds were superficial injuries which did not contribute to death. They included five stab wounds in the head and neck area. Cuts to each hand were defensive injuries. The sentencing judge described the applicant's attack as "frenzied and remorseless". The applicant had fled the scene. The deceased was known to the applicant, he had not harmed the applicant, offered any provocation or insult or attacked the applicant. The deceased was much loved by his family and had died a frightening and violent death at the applicant's hands.

[6] Findings about the applicant made in the Mental Health Court on 11 July 2017 and the expert evidence given in that court were before the sentencing judge. The

expert evidence included evidence of psychiatrists that the applicant suffered from a mental illness which included persecutory delusions, that illness was treated by drugs but there was a risk that the applicant would relapse in a community setting.

[7] The sentencing judge referred to findings of the Mental Health Court:

> "The advice of Dr Redden to the court was that, on 10 February 2015, the psychiatrist thought the evidence showed very clearly that Mr Zarnke was psychotic but also under the influence of methylamphetamine so that a finding of unsoundness of mind was precluded. She recommended that I accept the evidence of all the psychiatrists that Mr Zarnke was nonetheless suffering from an abnormality of mind which substantially impaired his capacity to control his actions at the time of the killing. The psychiatrist thought that Mr Zarnke understood what he was doing at the time of the killing despite Dr Butler's evidence to the contrary … I think that Mr Zarnke did understand what he was doing at all material times.
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> …Mr Zarnke was deprived of the capacity to know he ought not do the acts comprising this offence and deprived of the capacity to control himself; however, because the evidence is that he was intoxicated with cannabis and methylamphetamine at the time, he is not entitled to a defence of unsoundness of mind pursuant to s 27 of the *Criminal Code* … Mr Zarnke's schizophrenia was an abnormality of mind which substantially impaired his capacity to know that he ought not kill Mr Bell. … Mr Zarnke was of diminished responsibility at the time he killed Mr Bell and may be tried for manslaughter only, not murder, in relation to this killing."

[8] The evidence was that the applicant had "a severe and treatment-resistant illness". Dr Redden's advice was that there were also anti-social aspects of the applicant's personality. Early in the applicant's life he had engaged in abnormal and violent behaviours: for example, when the applicant was seven years old he chased his mother down the street with a butcher's knife, and when he was 14 years old he attacked his brother with a knife. As an adult, the applicant had engaged in controlling and abusive behaviour towards a partner. The advising psychiatrist was concerned that the applicant's drug-taking behaviour had been minimised in his accounts to the psychiatrists and the applicant was dishonest in saying that he did not remember Mr Bell. The applicant had also illegally obtained tobacco in prison which, the sentencing judge remarked, "raised concerns as to how compliant you would be if and when released from custody in staying away from drugs."

[9] The sentencing judge summarised the effect of the evidence and findings in the Mental Health Court as being that the applicant has a personality with a propensity towards violence, he had also suffered from a schizophrenic illness that had been at times resistant to treatment and could result in him suffering in a particularly psychotic way, and the applicant's condition could become florid or exacerbated if he took or consumed illegal drugs such as amphetamine.

The first ground: the sentencing judge erred by imposing a sentence beyond that which is appropriate, for the purpose of protecting the community

[10] The first ground of the proposed appeal invokes the statement by Jacobs J in *Veen v The Queen*[1] that "the protection of the public does not alone justify an increase in the length of sentence" and the following statements by Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v The Queen [No 2]*:[2]

> "It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.
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> … consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality."

The applicant argued that, contrary to those pronouncements, the sentencing judge engaged in "preventative detention".

[11] The applicant referred the Court to a statement by the sentencing judge in the course of argument at the sentence hearing that the decision in *R v Pringle; Ex parte Attorney-General (Qld)*[3] not to disturb a sentence of nine years imprisonment could be distinguished upon the ground that in *Pringle* there was no clear evidence that the offender was a continuing danger to the community. However the sentencing judge's reasons for the sentence were comprehensively stated in sentencing remarks made after the conclusion of the arguments. The statement in the course of argument should not be taken to represent a concluded view. It is irrelevant to the disposition of this application.

[12] The applicant also relied upon a passage in the sentencing remarks. After summarising the effect of the evidence and findings in the Mental Health Court the sentencing judge stated:

> "You have been, one way or the other, in custody either in an institution being treated or, more recently, in prison now for some 1286 days, somewhat short of four years. You have been closely monitored and closely treated. I'm told that your current drug regime requires you to take many tablets morning and night. Your counsel has said that your instructions to him are that, as a result of your response to the more recent drug treatments, that your mental health has stabilised – they're my words – that you are deeply remorseful for what you did, that you now express statements consistent with insight into what you did, the wrongfulness of it, and acknowledge your guilt. I note your counsel's description of the killing as brutal and callous.

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1 (1979) 143 CLR 458 at 478.
2 (1988) 164 CLR 465 at 473, 477.
3 [2012] QCA 223.

> The evidence before me and the findings in light of the evidence from the Mental Health Court, which are consistent with the evidence, is that **I'm persuaded that you remain a considerable risk to the community of violent conduct if and when you are discharged from custody**. I acknowledge that your criminal history does not contain a long history of violent conduct. There is a history of minor offending and a significant repeated history of drug offending many years ago, but that is consistent with the history that I outlined earlier consistent with your counsel's submissions. What has emerged is that you now suffer from a schizophrenic illness which can be resistant to treatment, that you have had a long history of drug use, in the months – or 10 months before this killing, you became heavily addicted to methylamphetamine. And so the risk remains that your illness may become florid, if you were to take drugs, or that you become drug noncompliant.
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> It is those factors and circumstances, combined with the severity and ferocity of the attack upon Mr Bell, that lead me to conclude that, in balancing the competing considerations that apply, including acknowledging the circumstance that, to some extent, your state of diminished responsibility reduces your moral culpability, the need to protect the community is a significant and very real concern when sentencing you."

[13] The sentencing judge then acknowledged that the applicant had entered an early plea of guilty to the ex officio indictment and the sentence hearing occurred reasonably quickly after the conclusion of the proceedings in the Mental Health Court. After observing that this suggested "that there may be some substance to your counsel's submission that you're showing a benefit in the recent past of the drug regime that has been finally worked out for you", the sentencing judge concluded:

> "Nevertheless, in the circumstances, balancing the factors that I have mentioned and the considerations that I find are applicable, I have concluded that the appropriate sentence for the manslaughter is one of 13 years' imprisonment."

[14] The applicant argued that in circumstances in which, so the applicant submitted, sentences imposed for the same offence in previous cases indicated that the applicant's sentence should fall within the range to 10 to 12 years imprisonment, the remark emphasised in [12] of these reasons revealed that an additional imprisonment of one year was added to the appropriate sentence by way of preventative detention.

[15] The sentencing judge did not adopt such a "two step" sentencing process.[4] The sentence was instead determined by the sentencing judge taking into account in one process all of the relevant factors, including the protection of the community. That clearly appears from the sentencing judge's remarks as a whole, and in particular by the reference to "balancing the competing considerations that apply … the need to protect the community is a significant and very real concern" and the conclusion

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[4] Compare *R v Beacham* (2006) 163 A Crim R 348 at 358 [38] (Jerrard JA) and *R v Nunn* [2019] QCA 100 at [13] – [15].

that "in the circumstances, balancing the factors that I have mentioned and the considerations that I find are applicable" the appropriate sentence was 13 years' imprisonment. That was the correct sentencing methodology.

[16] The passage from *Veen v The Queen [No 2]* in [10] of these reasons makes it clear that the protection of society may be taken into account as a material factor in determining the appropriate sentence, and their Honours also endorsed[5] the conclusion of all justices other than Murphy J in *Veen v The Queen* that "in a case where a verdict of manslaughter is returned on the ground of diminished responsibility, the risk that the offender's mental abnormality may lead him to kill again is a material factor in determining the sentence to be imposed." In Queensland the purposes of sentencing are specified in legislation which is consistent in this respect with the exposition of the common law in *Veen v The Queen [No 2]*.[6] Section 9(1) of the *Penalties and Sentences Act* 1992 (Qld) provides that the only purposes for which sentences may be imposed on an offender are punishment that is just in all of the circumstances, the provision of conditions in the court's order to help the offender to be rehabilitated, deterrence of the offender or others from committing the same or a similar offence, denunciation, and (s 9(1)(e)) "to protect the Queensland community from the offender".

[17] Section 9(2) of that Act lists matters to which a sentencing judge must have regard, but s 9(2A) provides that the principles in s 9(2)(a) (that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable) do not apply in a sentence for an offence involving violence. In such a case s 9(3) requires the sentencing court to have regard "primarily" to a list of matters which, congruently with the sentencing purpose in s 9(1)(e), include:

> "(a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;
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> (b) the need to protect any members of the community from that risk;
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> …
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> (j) any medical, psychiatric, prison or other relevant report in relation to the offender;
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> (k) anything else about the safety of members of the community that the sentencing court considers relevant."

[18] There is no substance in the first ground of the proposed appeal.

The second ground: the sentence is manifestly excessive

[19] In support of the ground that the sentence is manifestly excessive the applicant referred to the plea of guilty, the applicant's mental illness, the absence of a previous violent criminal history, his remorse and apology, his family support, that he was addicted to drugs from a young age, his consumption of methylamphetamine and the decline in his mental health in the period leading up to the offence, and evidence of the applicant's rehabilitation in prison and his behaviour as a model

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5 (1988) 164 CLR 465 at 474.

6 See *Muldrock v The Queen* (2011) 244 CLR 120 at 129 [20].

prisoner. The respondent emphasised the seriousness of the offence and its impact upon the deceased's family together with the relevance for the sentence of the applicant's mental health history.

[20] Both parties referred to eight sentencing decisions. It is not necessary to discuss the three first instance sentences.[7] A sentence of eight years imprisonment with parole eligibility after three years that was held not to be manifestly inadequate in *R v Potter; Ex parte Attorney-General (Qld)*[8] was referrable to facts which were very far removed from the facts of the present case. In *R v Perini; Ex parte Attorney-General (Qld) (No 2)*[9] the majority decision that a sentence of 13 years imprisonment for manslaughter imposed at first instance should be set aside and replaced by a sentence of 18 years imprisonment was explained by many aggravating circumstances. They include the even greater significance in that case of the need to protect the community, the higher degree of premeditation and cruelty in that offender's killing, his degrading acts over an extended period, his "revolting mistreatment afterwards", and the circumstance that his plea of guilty did not indicate remorse, rehabilitation, or even cooperation with the administration of justice.[10] *Perini* is also not a comparable case.

[21] A sentence of nine years imprisonment for a broadly similar manslaughter offence was held not to be manifestly inadequate in *R v Pringle; Ex parte Attorney-General (Qld)*.[11] That decision does not imply that a more severe sentence would have been manifestly excessive. Its usefulness as a guide to the appropriate sentence in this case is also limited by the circumstance that the appeal was determined upon the basis that the offender's recovery from the condition which led to his diminished responsibility for the killing was "by no means certain"[12] whereas the sentencing judge in this case found that the applicant in fact remained a considerable risk of violent conduct, that offender had no relevant criminal history, and the sentencing judge was entitled to regard the applicant's offence as even more brutal than the very serious offence in *Pringle*.

[22] *R v Beacham* is of some assistance as a "yardstick" sentence. The Court resentenced that offender on appeal to 12 years imprisonment. He pleaded guilty to manslaughter and other offences. He bashed and kicked the deceased. He also injected the deceased with a drug and, amongst other things, tied his hands and feet tightly together and left him face down on the floor. The deceased died as a result of asphyxiation, to which the trauma to his head and possibly the injection of the drug were contributing causes. The offender was found not to have intended to kill the deceased but to teach him a lesson. He was of diminished responsibility as a result of a mental illness which substantially impaired his capacity to know he ought not to do the act, but for which he would have been guilty of murder under s 302(1)(b) of the *Criminal Code* 1899 (Qld). McMurdo P found error and considered the sentence of 12 years imprisonment appropriate upon the basis that the material before the sentencing judge did not support his Honour's conclusion that the

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7 *R v Wilson* (unreported, North J, Indictment No 23 of 2009, 13 October 2011), *R v Murray* (unreported, Flanagan J, Indictment No 448 of 2015, 22 October 2015), and *R v Greenfield* (unreported, A Lyons SJA, Indictment No 224 of 2018, 16 February 2018).

8 (2008) 183 A Crim R 497.

9 (2011) 222 A Crim R 333.

10 (2011) 222 A Crim R 333 at 357 [63], 360 [78], 362 [87] and [88].

11 [2012] QCA 223.

12 [2012] QCA 223 at [39].

offender presented "a particular future threat to the protection of the community".[13] Jerrard JA considered the sentence of 12 years imprisonment appropriate upon the basis that the offender "does not show a significantly greater risk to the community on his eventual release… than the risk posed by other long-term prisoners with similar histories of deprivation, abuse and self-abuse", the danger for the community coming from the risk that he would not take medication prescribed for him and from the offender's consumption of unprescribed drugs.[14] The sentence of 12 years imprisonment imposed on appeal in *Beacham* makes it difficult to accept the applicant's contention that a sentence of 13 years imprisonment is manifestly excessive in this case, in which the need for protection of the community has been found to be significant.

[23] A sentence of 12 years imprisonment was not disturbed on appeal in *R v Miguel*.[15] The offence in that case was of similar seriousness to the applicant's offence and the application was considered on the footing that the offender's capacity to form a rational intention to kill and to control his actions at the time of killing was substantially impaired. It is significant that the sentence was imposed after a trial, but there was no suggestion that the offender had a criminal record or that the need to protect the community from the offender was a relevant consideration. The applicant's sentence is therefore not discordant with the sentence in *Miguel*.

[24] In that case McPherson JA pointed out that manslaughter sentences in cases of diminished responsibility "vary greatly from terms of imprisonment as high as 20 years down to terms of only one year or even less." The sentence imposed will depend upon the particular facts and circumstances of each case and discretionary decisions by sentencing judges concerning the relative weight to be attributed to competing sentencing considerations. Such guidance as may be derived from comparable sentences in the present case suggests that the sentence imposed upon the applicant is not manifestly excessive.

[25] It must always be borne in mind that the maximum penalty for manslaughter is life imprisonment. In light of the factors properly taken into account by the sentencing judge, the applicant's sentence was not outside the sentencing discretion.

Specific error?

[26] A different question was raised during the hearing of the application. At the sentence hearing the applicant's counsel submitted that, after the applicant's medication had been adjusted over a period of quite some time (whilst he was in prison), the applicant was in a mentally stable state. The applicant's counsel immediately added: that "provided that he remains medication-compliant … the future risk to the community is perhaps a moderate one … [a]lthough there is some concern that is raised in some of the reports about the potential for spontaneous …"; whilst the applicant was imprisoned he was required to take the medication; the applicant's ability to remain stable was "linked entirely with his willingness to remain medication – compliant"; and that was fundamentally important. Counsel for the respondent did not contradict the submission that after the applicant's medication had been adjusted he was in a mentally stable state in prison.

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13 (2006) 163 A Crim R 348 at 350 – 351 [12].
14 (2006) 163 A Crim R 348 at 357 – 358 [37].
15 [1994] QCA 512.

[27] During the hearing of the application in this Court the respondent's counsel was referred to the sentencing judge's remark "that there may be some substance to your counsel's submission that you're showing a benefit in the recent past of the drug regime that has been finally worked out for you" and was asked whether the sentencing judge had accepted the submission by the applicant's counsel that the applicant was in a mentally stable state. The respondent's counsel replied that it was implicit in the sentencing remarks that the sentencing judge had accepted the submission. Counsel for the applicant did not submit to the contrary.

[28] I would accept the submission for the respondent. The sentencing remarks should not be parsed and analysed as though they were in a reserved judgment. I have referred to remarks by the sentencing judge concerning the risk that the applicant would relapse outside the prison setting.[16] In the context of the submissions made by the applicant's counsel, the expert and other evidence accepted by the sentencing judge, and the sentencing remarks as a whole, the tentative and qualified character of the sentencing judge's reference to the applicant showing a "benefit" from the drug regime should not be understood as a rejection of the uncontentious submission that the applicant's mental health had stabilised in prison as a result of his compliance with the drug regime. As I would construe it, the terms of the remark merely reflected the sentencing judge's findings about the continuing risk to the community posed by the applicant arising both from the risk of a relapse in the applicant's currently stable mental health in prison (in which, as the sentencing judge remarked, the applicant had been "closely monitored and closely treated") if he were instead outside the prison setting and from the anti-social aspects of the applicant's personality. Upon that view, the sentencing judge's remark does not evidence a specific error in the exercise of the sentencing discretion. The applicant did not contend that there was any such error.

Proposed Order

[29] I would dismiss the application.

[30] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.

[31] **McMURDO JA:** The facts and circumstances of the applicant's offending, including the findings made by the Mental Health Court, are set out in the judgment of Fraser JA and need not be repeated here.

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[16] For example: report of Dr Phillips, 25 January 2016, p 15 (the applicant "attributed the improvement in his mental state to commencement of Clozapine"), p 23 ("the recency of the improvement of mental state with Clozapine; the risk of relapse to illicit substance abuse; and his history of non-adherence with treatment"); report of Dr Butler, 30 October 2015, p 11 ("if the applicant was not prescribed antipsychotic medication" there would be "the re-emergence of persecutory delusions" and "a high risk of his behaving aggressively"; "there would be a chance of his relapsing in a community setting even on his current treatment regime"), p 18 ("it is imperative that he remains abstinent" and "it is imperative that he receives regular review and ongoing appropriate medication … even …. a mild degree of psychosis would increase the risk of potentially dangerous phenomena being reactivated in an environment where there is the potential for confrontation"); Mental Health Court decision at [116] (referring to Dr Dodemaide's opinion that the applicant required medication for the rest of his life to treat his mental illness, and "the very real negative connection between Mr Zarnke's almost lifelong use of intoxicating substances and his poor mental state") and at [117], (referring to opinions to similar effect by Dr Phillips in her report of 4 August 2016 and by Dr Wilson in her report of 16 February 2016).

[32] For the reasons that follow, I would grant leave to appeal, allow the appeal and substitute a sentence of 10 years' imprisonment.

[33] The applicant was sentenced upon the basis that he killed with diminished responsibility, because he lacked the capacity to control his actions and to know that he ought not to do what he did. In cases of this kind, considerations of deterrence and denunciation are less significant because of the offender's limited moral culpability: *Muldrock v The Queen*,[17] *R v Goodger*,[18] *R v Yarwood*,[19] and *R v Pringle; Ex parte Attorney-General (Qld)*.[20]

[34] A purpose for which a sentence may be imposed is to protect the community from the offender.[21] In that way, the risk that this offender would re-offend was one of the matters to which the Court was to have regard.[22] It was necessary for the judge to consider, as far as it was possible to do so, the relative likelihood of the applicant re-offending upon his ultimate release. Such an assessment is necessarily speculative, requiring as it does the judge to predict the prisoner's mental state many years into the future, and the prisoner's preparedness to manage his mental health, by taking prescribed medication and avoiding the use of dangerous drugs at that time.

[35] Once the applicant becomes eligible for parole, it will be the task of the parole authority to consider the applicant's mental health, and other relative circumstances.[23] Inevitably, the parole authority will be better placed to assess whether there is an unacceptable risk to the community arising from the imminent release of the applicant, than a sentencing judge, having to predict the far future. In *R v Potter; Ex parte Attorney-General (Qld)*,[24] Mackenzie AJA (with whom Keane JA agreed) made these observations about cases of this kind:

> "[I]t is not uncommon for sentencing judges to recognise, in cases where a condition that led to a finding of diminished responsibility is likely to be an enduring one, that release from custody will depend on the course of the illness and of rehabilitation while the offender is in custody. Often, the cases show that allowances are made for mitigating factors in fixing the head sentence rather than in fixing an early date for release on parole."

[36] The risk of re-offending is not irrelevant in the assessment of the head sentence. But that risk is better managed by the parole authority than by the sentencing judge in cases such as the present where, under any appropriate sentence, the offender will have to serve many years in prison. For the reason given by Mackenzie AJA, especially where a declaration of a serious violent offence must or will be made, the mitigating circumstances must be reflected in the term which is imposed. This was a prolonged and horrific attack upon the deceased, but, as I will discuss, there were several substantial mitigating circumstances, and the facts of this case were not as serious as some which might be thought to be relevant yardsticks.

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17 (2011) 244 CLR 120 at 139 [54]; [2011] HCA 39 at [54].
18 [2009] QCA 377 at [21].
19 (2011) 220 A Crim R 497 at 506-507 [22]-[26]; [2011] QCA 367 at [22]-[26].
20 [2012] QCA 223 at [33].
21 *Penalties and Sentences Act* 1992 (Qld) ("PSA") s 9(1)(e).
22 PSA s 9(3)(k).
23 Ministerial Guidelines to Parole Board Queensland (dated 3 July 2017) s 2.1(g), having force under s 242E of the *Corrective Services Act* 2006 (Qld).
24 (2008) 183 A Crim R 497 at 509 [46]; [2008] QCA 91 at [46].

[37] Undoubtedly, on the evidence before the sentencing judge, there was a risk that the applicant would re-offend. The extent of that risk, insofar as it could be assessed, was affected by the applicant's mental health at the time that he was sentenced. The Court had no medical evidence of his mental state more recent than that which was before the Mental Health Court, such that the reports had been written at least two years earlier. But the Court had the unchallenged statements by the applicant's counsel that the applicant was in a mentally stable state, was well behaved in prison and consistently used his prescribed medication with good effect. As I read the reasons of the sentencing judge, those facts, as alleged by the applicant's counsel, and accepted by the prosecution, were not entirely accepted by his Honour. The sentencing judge said:

> "Your counsel has said that your instructions to him are that, as a result of your response to the more recent drug treatments, that your mental health has stabilised … that you are deeply remorseful for what you did, that you now express statements consistent with insight into what you did, the wrongfulness of it, and acknowledge your guilt. …
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> I should acknowledge that this is an early plea. You have pleaded guilty today to the ex officio indictment, and that this day has come about reasonably quickly following the conclusion of the proceedings in the Mental Health Court, which resulted in the findings that I've referred to. That suggests that there may be some substance to your counsel's submission that you are showing a benefit in the recent past of the drug regime that has been finally worked out for you."

If, as the respondent submits, the judge did accept those facts that the applicant's counsel had put forward about his client's mental health and remorse, clearly they were mitigating factors, as was the applicant's early plea of guilty. There was no reason for the judge not to accept them. Upon my consideration of the comparable sentences, it is difficult to see how those mitigating factors influenced this sentence.

[38] In *R v Potter; Ex parte Attorney-General (Qld)*,[25] the applicant killed her five year old daughter, by sticking masking tape around the child's mouth while she was lying down on a bed and then putting a pillow over the child's face, which the applicant held in place with her hands and knees for an estimated 20 minutes until the child was dead. The Mental Health Court had found that she had the defence of diminished responsibility under s 304A of the *Criminal Code*, by a substantial impairment of her capacity to know that she ought not to do the act which resulted in the death of her daughter. Mackenzie AJA said that the case fell into "a category where there is no discernible need to protect the public from repetition of similar conduct" where "a finding of diminished responsibility reduces the moral culpability of the offender and is therefore a mitigating factor in sentencing."[26] After an extensive discussion of then comparable cases, Mackenzie AJA concluded that there was no error in the imposition of a sentence of eight years' imprisonment, with a date of eligibility for parole after three years. The main distinguishing feature between that case and the present one is that here the judge identified a substantial risk of re-offending.

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25 (2008) 183 A Crim R 497 at 501-502 [14]; [2008] QCA 91 at [14].

26 (2008) 183 A Crim R 497 at 501 [12]; [2008] QCA 91 at [12].

[39] In *R v Pringle; Ex parte Attorney-General (Qld)*,[27] the respondent pleaded guilty to the unlawful killing of his partner and was sentenced to nine years' imprisonment, without a declaration, under s 161B of the PSA, that he had been convicted of a serious violent offence. He had what was described as a minor criminal history and none for violence. The Mental Health Court found that he was of diminished responsibility at the time of the killing, suffering under a delusional disorder in which he saw his attack on his partner as "a desperate measure of self-defence."[28] The mitigating circumstances in that case were described as "the timely plea of guilty, remorse, the nature of his diminished responsibility and, although a recovery was by no means certain, his slow but steady positive response to medication and treatment."[29] To my mind, the same description could be given of the present applicant's case, upon the basis of the unchallenged facts put to the sentencing judge. There is a difference from the present case, in that the offender there had not been totally deprived of his capacity to control his actions and to understand that he ought not to do that which killed his partner. That might indicate that the present applicant's risk of re-offending was greater; on the other hand, the applicant's total loss of those capacities made his culpability relatively lower. The sentence in that case was not disturbed on appeal.

[40] In *R v Beacham*,[30] the applicant pleaded guilty to the unlawful killing of a man by what was described as "a planned and violent vigilante-style attack". The applicant, together with a co-offender, went to the victim's house for the purpose of assaulting and robbing him. At the house, the applicant punched the victim, knocking him to the ground, before injecting him with temazepam, causing the victim to lose consciousness. The victim's hands and feet were then tied together, after which the applicant kicked him in the head and throat area seven or eight times, and pushed an item into the victim's anus. The victim was left in that position, where he was found some 15 hours later, dead. The cause of death was considered to be asphyxiation. The Mental Health Court concluded that he was of diminished responsibility and, consequently, he was charged with manslaughter. His original sentence of 13 years' imprisonment was reduced by this Court to 12 years. One psychiatrist who gave evidence in the Mental Health Court described the offender as having "an ongoing psychotic disorder", which should be fully *assessed* "near the time of his release", and said that if his symptoms were to persist, beyond his date of release, "he would have the potential to be of significant risk to others."[31] Another psychiatrist considered that his symptoms supported a diagnosis of schizophrenia, but only the passage of time would clarify that diagnosis.[32] It is sufficiently clear that the offender in that case had ongoing mental health problems, giving rise to a risk of re-offending, at least without appropriate management and treatment. Jerrard JA referred to the possibility that the prisoner could be released into the community, although subsequently detained as an involuntary patient in a mental health service. Describing that possibility, Jerrard JA said:[33]

> "The disadvantaged and deprived life he has experienced, with fractured relationships, prison sentences, and significant drug abuse,

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27 [2012] QCA 223.
28 [2012] QCA 223 at [18].
29 [2012] QCA 223 at [39].
30 (2006) 163 A Crim R 348 at 351 [13]; (2006) QCA 268 at [13].
31 (2006) 163 A Crim R 348 at 350 [10]; [2006] QCA 268 at [10].
32 (2006) 163 A Crim R 348 at 350 [11]; [2006] QCA 268 at [11].
33 (2006) 163 A Crim R 348 at 357-358 [37]; [2006] QCA 268 at [37].

> is similar to that of many people who are sent by courts to prison. Those deprivations, disadvantages and other experiences predictably damage mental health. I accept Mr Durward's submission that Mr Beacham does not show a significantly greater risk to the community on his eventual release, after serving all or the greater part of a lengthy prison sentence, than the risk posed by other long-term prisoners with similar histories of deprivation, abuse, and self-abuse. The danger for the community will come from his not taking medication prescribed for him, and his consumption of unprescribed drugs."

[41] Significantly, in re-sentencing Mr Beacham, Jerrard JA was mindful of the applicant's poor history towards improving his mental state between the offence and being sentenced:[34]

> "Had Mr Beacham's delusional beliefs responded to the medication he took for a relatively short period in custody, and if he had both taken medication as prescribed and remained free of the psychosis for at least two years prior to being sentenced, then his diminished responsibility when he offended would have justified a very substantial reduction in the otherwise appropriate sentence … That reduction would reflect both his diminished responsibility and the considerable lessening in the risk he would pose on release."

[42] In *R v Miguel*,[35] the applicant had killed his de facto wife, in the presence and sight of their two young children, stabbing her with a sharpened hunting knife. A sentence of 12 years was not disturbed on appeal. He carried out what McPherson JA described as "a careful plan to attack her", by driving to the house where she and the children lived, parking his car out of sight, cutting the telephone wires so that she could not call the police or for other assistance, and waiting under the house for her. He was tried for the offence of murder, but was found guilty of manslaughter only, apparently upon the basis that, according to the then law, the jury was left with a reasonable doubt as to his ability to control his actions. McPherson JA said:

> "The learned Judge, in sentencing the applicant to a term of imprisonment of 12 years, was evidently persuaded that the offence was one that fell not far short of murder. He said that the applicant was fortunate that the jury had taken the view of the facts that they did. It is impossible not to agree with that sentiment, and to add that the sentences in cases of diminished responsibility – as I see this case to be – vary greatly from the terms of imprisonment as high as 20 years down to terms of only one year or even less.
>
> The case discloses circumstances that are, to my mind, quite horrifying. The offence was that of killing another human being in a cold-blooded and calculated way. The victim was defenceless and, as it happens, blameless, and she was stalked, one might say, in a way that was intended to ensure that she could summon no assistance. The killing took place, as I said, in front of the children."

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34 (2006) 163 A Crim R 348 at 358 [39]; [2006] QCA 268 at [39].

35 [1994] QCA 512.

[43] It is to be noted that *Miguel* pre-dated the provisions for serious violent offences, carrying minimum non-parole periods of 80 per cent of the sentence. The case is of limited assistance in the present matter. It appeared that the offender had not, at least, completely lost his capacity to control his actions or to understand that he should not act as he did, so that the moral culpability of his conduct was greater than in the present case. And although the head sentence was only a year less than in the present case, the sentence in the present matter was heavier for the non-parole period of 80 per cent of the present term. It appears that the Court in *Miguel* was affected by the perception that the offence did not fall "far short of murder".

[44] Of the cases cited by the parties to the present application, only one resulted in a heavier sentence than 13 years, which was *R v Perini; Ex parte Attorney-General (Qld) (No 2)*.[36] In that case, by majority, this Court allowed an appeal by the Attorney-General, increasing a sentence of 13 years to 18 years for the unlawful killing of a 76 year old woman. The offender was then aged 36 years. He and the victim were neighbours. On the night in question, he gained access to her unit through an unlocked door, armed with a knife and a man's tie. He placed the tie around her throat, attempted to strangle her and then stuffed a pair of socks in her mouth when she began to scream. He then stabbed her in the neck, leaving the knife embedded there. After he had killed her, he attempted intercourse with her corpse but was unable to obtain an erection. He returned to his own unit and, after a while, then went back to the deceased's unit where he digitally penetrated the corpse. The Mental Health Court found that he was suffering from a personality disorder with schizoid or autistic traits, with dependent and dissocial features, combined with a functional impairment and a severe adjustment disorder with anxiety symptoms. He thereby had a substantial impairment to his capacity to know that he ought not to kill the deceased. The circumstances of that offending involved a considerable degree of premeditation, as well as the shocking conduct of the offender after the deceased was killed. The majority considered that the offender's disabilities were "untreatable" such that it was an aggravating circumstance as he did not have a mental illness which might respond to medication.[37] It was said that his plea of guilty "was not indicative of any remorse, or desire for rehabilitation, or even cooperation within the administration of justice."[38] On those findings, and the facts and circumstances of the offences which were committed in *Perini*, it is not at all comparable to the present case.

[45] My review of these decisions leads me to the conclusion that the term of 13 years imposed in this case was beyond the range of sentences which was appropriate. On the uncontested facts which were put to the sentencing judge, this applicant was genuinely remorseful, and had spent the years between the offence and being sentenced doing everything which he could towards improving his mental health and promoting his rehabilitation. Those mitigating factors, including of course his early plea of guilty, had to be recognised. His risk of re-offending was an aggravating feature, but a lack of moral culpability in his case, from his being unable to control his actions and to know that he ought not to do what he did, was a factor which weighed in favour of a substantially lower head sentence. In my conclusion the sentence was manifestly excessive.

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36 (2011) 222 A Crim R 333; [2011] QCA 384.
37 (2011) 222 A Crim R 333 at 360 [78]; [2011] QCA 384 at [78].
38 (2011) 222 A Crim R 333 at 362 [87]; [2011] QCA 384 at [87].

[46] I would re-sentence the applicant to a term of 10 years' imprisonment, from which it would follow a declaration that he had committed a serious violent offence.