New South Wales
Supreme Court

CITATION: **Regina v Heatley [2006] NSWSC 1199**

HEARING DATE(S): 23/10/06, 25/10/06, 26/10/06, 27/10/06, 30/10/06, 1/11/06, 2/11/06, 3/11/06, 6/11/06

JUDGMENT DATE: 21 November 2006

JUDGMENT OF: Whealy J at 1

DECISION: For the offence of robbery with a dangerous weapon, I sentence you to a fixed term of imprisonment for 4 years. The sentence is to be backdated to commence on 27 March 2004 and is to expire on 26 March 2008. For the offence of manslaughter, I sentence you to a term of imprisonment comprising a non-parole period of 8 years and a balance of term of 6 years. The sentence is to commence on 27 March 2008 and the non-parole period expires on 26 March 2016, the date on which you will be eligible to be released on parole. The balance of the term will expire on 26 March 2022. For the 7 recommendations made - see judgment.

Criminal practice and procedure - manslaughter by reason of substantial impairment of mind - robbery with a dangerous weapon - difficulties of reconciling sentencing principles in mental illness matters - systemic failure by Corrective Services Department - gaol violence and death in custody - special circumstances in mental illness matters.

LEGISLATION CITED: Crimes (Sentencing Procedure) Act 1999

CASES CITED: R v Ellis (1986) 6 NSWLR 603 at 604
R v Thomson & Houlton (2000) 49 NSWLR 383
Regina v Carlson (unreported NSWSC 16 October 1995
R v Engert (1996) A Crim R 67 at 68
R Hemsley [2004] NSWCCA 228 at (33-36) per Sperling J
R v Wicks [2005] NSWCCA 213 at (24-26) and (33-34)

R v Pham [2005] NSWCCA 314 at (27-35)
R v Hughes [2005] NSWCCA 117 at (24-29)
R v Israel [2002] NSWCCA 255 at (23) per Spigelman CJ
Veen v The Queen (No 2) (1988) 164 CLR 465
Hill (1981) 3 A Crim R 397 at 402
E v McDonald (NSWCCA 12 December 1995)
R v Woodland [2001] NSWSC 416 per Wood CJ at CL
R v McGuire (NSWCCA unreported 30 August 1995)
R v Troja (NSWCCA unreported 15 July 1991)
R v Bloomfield (1998) 44 NSWLR 734 at 738-739
R v Montgomery [2004] 151 A Crim R 376 at [5] per Spigelman CJ
R v Trevenna [2004] 149 A Crim R 5005 at [98-100]

PARTIES: Regina v Michael Alan Heatley

FILE NUMBER(S): **SC** 2005/113

COUNSEL: Ms M. Cunneen - Crown
Mr W.Terracini SC; Mr G. Newton - Offender

SOLICITORS: Office of DDP - Crown
Ross Hill & Associates - Offender

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION
CRIMINAL LIST

WHEALY J

TUESDAY 21 November 2006

2005/113 - REGINA v Michael Alan HEATLEY

SENTENCE

1 **HIS HONOUR:** On 27 March 2004, Michael Heatley (whom I shall refer to as the offender) beat and kicked to death a fellow inmate Craig Anthony Behr (the deceased). The attack occurred in a cell at Long Bay Prison Hospital.

2 The prisoner pleaded guilty to manslaughter on the basis of substantial impairment. The psychiatric evidence disclosed an underlying chronic psychotic disorder, which, on the balance of probabilities, impaired the offender's ability to control his urge to kill the deceased at the time of the offence. The Crown accepted the plea to the alternative charge of manslaughter in full satisfaction of the indictment for murder.

3 Manslaughter carries a maximum penalty of 25 years imprisonment.

4 The offender pleaded guilty, as well, to a charge of robbery with a dangerous weapon. This charge related to events, quite unconnected to the killing of the deceased. These events occurred on 15 March 2002. The offender, armed with a shortened firearm, held up employees at the

Commonwealth Bank of Australia and escaped with $18,705.00, the property of the bank.

5 This offence also carries a maximum penalty of 25 years imprisonment.

6 It will be convenient first to deal with the detail of the circumstances relating to the bank robbery. There are agreed facts and they are as follows.

Agreed Facts of Robbery

7 About 9.30am on Friday the 15th of March 2002 the Commonwealth Bank of Australia, located on the corner of Liverpool and Castlereagh Streets, Sydney, opened for trading. Approximately 8 people were standing outside the building waiting for the bank to open. In that group was the offender.

8 When the doors were unlocked and opened by a staff member of the bank, the offender pushed past another customer and walked towards the middle of the counter area of the bank. He approached a bank employee, Nina Vukasinovic, whilst holding a shortened firearm and said "I *want all your money now*". The offender turned and faced the waiting customers and said to get back. The offender shouted "*This is a fucking robbery*". Vukasinovic ran from the teller area towards the back of the bank.

9 The offender said "*Hurry up*" a number of times. Another employee of the bank, Concettino Auditore, walked over to where the offender was standing in an attempt to see what the offender wanted. At this stage Auditore was unaware of the situation. A clear dividing screen separated the two. As Auditore got closer to the offender, Auditore entered the teller slot in front of the offender and picked up a plastic bag that the offender had placed on the counter area of the bank. Auditore saw the offender holding and pointing a shortened sawn off firearm at him. The offender told Auditore to take the bag and said "*Hurry up and get me some money*".

10 Auditore started to take money from the tellers' drawer and place it in the plastic bag that the offender had placed on the counter. While doing this Auditore heard the offender say "*Hurry up you have 30 seconds and don't fuck me around*". While Auditore filled the bag the offender instructed the other customers to get along a sidewall while pointing the firearm in their direction. He then stated that if anyone did anything stupid, he would fire the gun.

11 Once Auditore had finished removing the money from the drawer, the offender demanded more money from underneath the counter. This was money that was on hand and was contained in the 'Under Counter Unit' or UCU, a lockable cabinet that contains a substantial amount of currency. Auditore attempted to open the UCU belonging to the teller slot he was standing in, however it failed to open.

12 Auditore walked over to his allocated teller slot and attempted to open that UCU, at which point the offender said "*You've got 10 seconds*" while pointing the firearm at Auditore.

13 Auditore requested someone to help him load money into the plastic bag. Another Bank employee, James Rachelle, loaded money in the bag and during this process the accused said: "*Hurry up, you've got 20 seconds, if you don't fucken move, I'll jump the counter and turn this place into a hostage situation, I am not kidding*". Rachelle and Auditore finished loading money into the plastic bag. The offender reached through the screen and took the plastic bag full on money and said "*Thank you*".

14 The offender left the bank and walked west along Liverpool Street. Numerous Police attended the surrounding area, but failed to locate the accused.

15 During the robbery the Banks' security alarm had been activated together with a number of security cameras. These photographs captured a number of images. These images clearly depict the offender in

possession of a shortened firearm and holding a plastic bag during the robbery.

16 A detailed check of money stolen from the Commonwealth Bank totalled, as I have said, $18,705 in Australian currency.

17 On Wednesday 16 July 2003 Detective Inspector Jacob of the State Crime Command Homicide Squad met with the offender and during that conversation the offender disclosed to Detective Inspector Jacob that he was responsible for the robbery at the Commonwealth Bank on the 15 March 2002.

18 On Wednesday 21 January 2004 the offender was formally interviewed by Robbery and Serious Crime Squad Detectives. During that interview the offender made full admissions to the robbery at the Commonwealth Bank. The offender also adopted the conversation he had with Detective Inspector Jacob on the 16 July 2003. The offender stated that he used the money to live. He stated that he went on a trip to Victoria and Queensland and purchased clothing. He added that the money lasted about 9 days and he did not use it to purchase drugs or alcohol.

19 During the commission of the offence a number of bank employees and members of the public suffered from shock and consequently have been traumatised by that fact that a firearm was pointed at them.

Commentary

20 It will be seen immediately that this was a bad robbery. The criminality involved was at a significant level. The offence involved the threatened use of violence and the actual use of a dangerous weapon, namely a shortened 22-calibre rifle. There were aggravating features: the victims, as bank tellers going about their daily tasks, were in a vulnerable position. The offence involved more than one victim and was, to a degree, a planned offence. As the agreed facts indicate, a number of bank employees and members of the public suffered from shock as a

consequence of the frightening experience they encountered on the day of the robbery.

21 The offender has a reasonably extensive criminal history although the only matters that are particularly relevant for this offence relate to earlier charges he faced in January 2001 and November 2002. On 29 January 2001, the offender, facing a charge of robbery with a dangerous weapon, was found not guilty at trial by reason of mental illness by Shillington DCJ. The offender was referred to the Mental Health Review Tribunal. On 12 November 2002, the offender, again charged with robbery with a dangerous weapon, was, once again found not guilty at trial by reason of mental illness. The Judge in this trial was Tupman DCJ. It is the fact, of course, that these findings are not, strictly speaking, part of the offender's criminal record. They do however, have a limited relevance.

22 I should, at the outset, make it clear that while I have regard to the offender's criminal antecedents, I do not do so to impose punishment upon the offender in relation to any of those earlier matters. I take them into account, but only for the limited purpose of noting that the instant offence is not an uncharacteristic aberration. Rather it shows in this area, an attitude of continuing disobedience of the law. The mental illness findings, on the two occasions in the District Court, have some impact, however, on the present sentencing process. I shall of course, have more to say about the offender's mental status when I come to consider the manslaughter charge. As will become apparent, the offender has suffered from an underlying chronic psychotic disorder for many years and, although this did not appear to impact on the commission of the Commonwealth Bank robbery on 15 March 2002, there is a possibility that the offender's persistent mental condition was, in general terms, operative at the time.

23 The offender is entitled to a mitigation of the penalty to be imposed for the robbery by reason of the fact that on 30 October 2006, he pleaded guilty to the charge. It is relevant to note that the offender first made voluntary admissions as to his involvement in relation to the offence on 16 July

2003. This was during a conversation with Detective Inspector Jacob. During his evidence in the present proceedings, the offender expressed remorse for the distress he had caused the victims of the robbery and other persons in the vicinity at the time.

24 In relation to the plea, there is no doubt that the offender is entitled to a discount for the utilitarian value of his plea of guilty. The history of the matter is this: the trial was to be heard in the District Court but, by arrangement with the Chief Justice, the present indictment was presented in the Supreme Court so that the manslaughter plea and the robbery could be dealt with at the one time. Although the offender had admitted his involvement in the robbery at a much earlier point of time, the plea was not in fact entered until last month. For this reason, a discount for the plea at the lower end of the range (10-25%) is appropriate. The fact however, that the offender had made a voluntary disclosure of his involvement in this serious offence entitles him to "a significant added element of leniency" in accordance with the principles set out in **R v Ellis** (1986) 6 NSWLR 603 at 604. It seems that the police would not have discovered the offender's involvement in the crime, had it not been for his voluntary admissions.

25 A combination of the plea and the assistance to the authorities, in the way I have indicated, does entitle the offender, overall, to a reasonably significant discount in relation to the sentence to be imposed. It needs to be borne in mind, however, that the ultimate discount should not be unreasonably disproportionate to the nature and circumstances of the offence.

26 I shall return to a consideration of the appropriate penalty to be imposed and its place in the structure of the overall sentence to be imposed when I have dealt with the details surrounding the manslaughter plea. I turn to consider that matter now.

The death of Craig Behr

27 The following are the agreed facts on sentence:

28 About 10.30am on Saturday 27 March 2004 the deceased, was moved to cell 20 of Long Bay Prison Hospital to be in the company of another inmate. The deceased was placed in cell 20 with the offender.

29 The deceased and the offender had previously shared a cell together with no problems.

30 About 11.45am the lunchtime 'lockdown' occurred and all inmates were returned to their cells. The deceased was locked into cell 20 with the offender. There were no other inmates in the cell.

31 The adjoining cell, containing inmate Johannes Schmidt, was separated by an interconnecting door. There is a space under this door, which allowed Schmidt to see into cell 20 containing the offender and the deceased.

32 About 12.15pm a number of inmates heard screaming coming from cell 20. Schmidt heard what he believed sounded like a body hitting the floor of the cell and the sound of a bed banging. Schmidt attempted to raise the alarm on the Emergency Cell Call System at about 12.15pm. At about 12.21pm Schmidt attempted to raise the alarm for a second time. There was no response to either call.

33 At about 12.28pm Schmidt heard what he believed to be the sound of a body being moved.

34 At 12.35pm Corrective Services Officers Keith Smith and Brian Corlis received a call regarding an emergency in cell 20. Smith and Corlis immediately attended cell 20 and opened the door. The Officers observed the offender standing in front of the deceased.

35 The offender said "Get me out, get me out. I've got to get out of here."

36 The offender attempted to push past the two officers. The officers saw the deceased lying on the floor of the cell with blood and vomit around his head.

37 The offender was removed from cell 20 and placed in an adjoining cell. The Officers attempted to revive the deceased but were unsuccessful.

38 Police were contacted and attended the Long Bay Prison Hospital a short time later.

39 The offender had blood on his hands, legs, clothing and shoes.

The offender was conveyed to Maroubra Police Station where he was interviewed but declined to say anything. After the interview the offender was returned to the dock where he said to Detective Sergeant Davies "*Sorry about the interview but I didn't want to say anything in front of him.*" When asked who he meant the offender said "*The guard.*"

40 He then said: -

> "I didn't want to kill him man, I didn't even know him. I'm not schizo but I do have a mental problem. I'm homicidal, I've told them that for days. Then they tell me this morning that they're putting this guy with me and I begged them not to but they said they were going to. I told them I'll kill him but they just said 'you're full of shit'. So about 11.30 they put us together and by 12.30 he's dead. I didn't want to do it, I know he's got a mum and dad and his mum is probably crying now. I know what it's like to lose someone, I lost my dad."

41 The offender was asked what the deceased had done to provoke him and he replied "*Nothing.*" He was then asked how he had killed the deceased and the offender responded "*I kicked him to death.*"

42 On Sunday 28 March 2004 Dr Paul Botterill performed a post mortem on the deceased. Dr Botterill found that the deceased could have died from a blow to the head or from asphyxiation caused by vomit in his airways.

43 On Thursday 1 April 2004 the offender was interviewed at Maroubra Police Station. He stated that after he and the deceased had lunch he punched and kicked the deceased and then stood at the back of the cell. The offender said that he saw the deceased lying on the floor with blood and vomit on his face. He said that he activated the emergency alarm so that he could get out of the cell.

44 During the interview the offender adopted the conversation with Detective Sergeant Davies in the dock at Maroubra Police Station on the 27 March 2004.

Commentary

45 Apart from the agreed facts, there are four additional areas where factual findings and assessments need to be made. First, it is necessary to resolve and clarify, so far as it is possible, the precise nature of the offender's mental state at the time of the death of the deceased. Secondly, it is necessary to assess the current and future dangerousness of the offender, that is, his potential to pose a threat to society in terms of possible harm to others, whether in custody or at large in the community. Third, there is a need to resolve the suggestion in the offender's evidence that he was subject to a sexual threat or advance by the deceased immediately prior to the killing. Finally, it will be necessary to make some general findings and recommendations concerning the apparent systemic failure of the Corrective Services Department in relation to the circumstances surrounding the death of the deceased.

The offender's mental state

46 Dr Stephen Allnutt has provided a comprehensive and thorough report dated 26 October 2006. This contains a complete analysis of all of the clinical and psychiatric documentation relevant to the offender. It covers a period between approximately 1996 and the present time. It is a highly complex and, in some respects, confusing history. Fortunately, I am spared from the need to detail this history because of the general agreement between Dr Allnutt and Dr Bruce Westmore who has examined the offender from the perspective of the defence side.

47 The history, however, is illuminating because it focuses initially on the offender's mental condition between 1999 and 2002. It was during this period he was, on two occasions, found not guilty at trial by reason of mental illness. Paranoid behaviour, on the part of the offender, was reported, by his family as early as 1995. It appears that he had a troubled childhood and was brought up by his grandparents. He had, in fact, been born in Wollongong but was brought up in Sydney until he turned nine. He then moved to Tasmania. He manifested juvenile delinquent behaviour in his teens and was in trouble with police from about the age of 15. He was made a ward of the state in February 1992 when he was before the Devonport Children's Court in relation to an assault charge. As an adult, he came before the Devonport Court of Petty Sessions on a number of occasions in 1994, 1998 and 1999. He had an early history of substance abuse, and a diagnosis of possible ADHD, in childhood had been made. It seems that he excessively used both cannabis and dexamphetamine over a number of years and that the ingestion of these drugs may have been a significant factor in the onset of his later mental illness.

48 Early clinical examinations during 1999 and 2000 suggested that the offender was suffering acutely from paranoid schizophrenia, although later clinical assessment suggested this was not necessarily the situation. A

brief extract from the clinical history during this early period will give the flavour of the situation, without descending into too much detail: -

> "In a report dated 10 March 2000, Dr Wilcox noted that she at the time was caring for the defendant at Long Bay Hospital; her assessment was for the purpose of providing a report on his mental state at the time that robbery offences had occurred in December 1999. She noted that he came from a difficult childhood; his father was in custody throughout his childhood; his father was shot dead in 1994 and his uncle was serving a life sentence for his father's death; his learning was affected due to numerous moves; he had limited support in childhood; he described himself as a loner; throughout his teens he smoked marijuana regularly; he had used alcohol as self medication to quieten voices; he reported several years of paranoia; he believed that people were following him and trying to kill him...in Tasmania he was sniffing his father's ashes; he believed he was being taken over by his father's spirit; he said he imagined the voices were there to determine his daily activities and he would ask the voice whether he should do something; he had heard his father's voice telling him he had to commit the crimes while out one night...Dr Wilcox concluded that the offender suffered from paranoid schizophrenia."

49 The history records that on 16 May 2001 he was assessed for transfer to Kenmore Hospital, pending a determination by the Mental Health Review Tribunal. The offender went AWOL from Kenmore at the end of January 2002. During this time, he discontinued any medication, abused amphetamines, and lived and slept "rough". He committed the Commonwealth Bank robbery on 15 March 2002, and at least one other serious offence at about the same time.

50 The offender was back in custody by the end of March 2002. He was admitted to D Ward, the acute psychiatric section of the prison. He was placed on anti-psychotic medicine and again diagnosed with schizophrenia, although, later in the year, this diagnosis was doubted. Generally, throughout this time he was, as he has been for a considerable period, a forensic patient. On occasions, he was assessed as exhibiting psychotic symptoms, but on other occasions there was no evidence of psychotic symptoms. The anti-psychotic medication fluctuated with the

offender increasing his complaints that the medication was affecting him adversely. It was apparent, at least to some of the clinicians who reviewed him, that he had fabricated or elaborated symptoms at some stage in the past. But it was generally believed that some type of psychotic disorder, or at least a serious personality disorder, was present.

51 The history records that, a few days prior to the death of the deceased he was interviewed by Ms Matsuo, a psychologist. She formed the view that the accused's risk of harm to others was high; and that he should be placed in a cell "one out". Ms Matsuo gave evidence during the sentence hearing and said that at times during this interview, he appeared to be extremely serious in relation to his homicidal urges. But at other times was quite "flippant" or "glib" in relation to the subject. Overall, the history records, Ms Matsuo was very concerned about the manifestation of these homicidal urges. He had asked her that he be kept away from other prisoners. He also told her that he had previously got away with pleading "not guilty" by reason of mental illness and that he had feigned symptoms of psychosis. The medical notes indicate that the offender had ceased taking Flupenthixal in December 2003 as this had been causing him to experience movement disorders. In April 2004, he was commenced on Olanzapine, which, for a time, appeared to help his mental condition.

52 By May 2004, Dr Wilcox now concluded that his psychotic symptoms had occurred in the context of an extreme Anti-social Personality Disorder with some borderline traits and illicit substance abuse, chiefly cannabis and amphetamines. But she now felt that he had never demonstrated a comprehensive picture of schizophrenia. On 31 May 2004, the offender told the Registrar that he did not want to be a forensic patient; and that the truth now was that he did not have schizophrenia. He had always "made up" the symptoms and he now wanted to come off his medication to prove that he was not medically ill. He also wanted to be moved out of D Ward. In August 2004, the offender told Dr Wilcox that if he had been on medication he would not have "committed the offence" in which he killed the deceased. This was because he said the medication kept him calmer

and caused his judgment to be better. He also said the reason why he committed the alleged offence was because he believed the victim was a sexual offender and he detested inmates who had committed paedophilia or crimes against the elderly. It appears that, throughout the remainder of the year, at times the offender demanded medication and insisted that it was helpful to him. At other times, he was abusive and threatened staff. He suggested that the medication was causing significant problems to him. Throughout the whole time, there were however intermittent outbursts of aggression and paranoid behaviour.

53 Dr Westmore reported in December 2004 as to the condition of the offender. It was his recommendation that there should be a trial of discontinuation of the medication as it appeared possible that it was having a significant adverse affect on the offender's mental condition.

54 On 14 March 2005, Dr Wilcox noted the offender had given yet another version of events surrounding the death of the deceased. He claimed that he had been smoking cannabis about the time of the alleged offence; he was feeling paranoid. Immediately prior to the offence, however, he was feeling really good and he just snapped and assaulted the victim before buzzing for the prison officer. He did not feel remorse but recognised that "you are not allowed to do those things, not allowed to break the law". He told her "It is not my fault, I have a mental illness, I believed that people were trying to give me AIDS".

55 Dr Allnutt completed one of his earlier reports in March 2005 after an interview with the offender. Mr Heatley told him that he had, in the past, suffered a psychotic disorder; but did not believe that he was manifesting symptoms of a mental illness at the time that he was interviewed by Dr Allnut. During the middle of 2005, the offender's behaviour became more reclusive and aggressive. He was complaining about a conspiracy of doctors working together to torture him and make him go up to "the top gaol". In early November 2005, Dr Nielsen formed a tentative view that the offender was unfit to stand trial and that he had an acute exacerbation

of his schizophrenia. On the other hand, in a report of 21 November 2005, Dr Allnutt concluded that the accused had a tendency to report mental illness symptoms in an exaggerated form, or to report their evidence for secondary gain. Dr Allnutt considered that this did not necessarily exclude the existence of an underlying psychiatric disorder such as schizophrenia. At the time, however, Dr Allnutt agreed that the offender should be regarded as unfit to stand trial.

56 By the middle of 2006, the general view of those doctors who had interviewed the offender in that period of time was that he was by now fit to stand trial. Dr Westmore interviewed the offender during the sentencing hearing in October 2006 and concluded once more that the offender remained fit for trial.

57 On 4 October 2006, Dr Allnutt had an interview with the offender. For the first time, on this occasion, the offender introduced the notion that he had been the subject of a sexual advance made to him by the deceased on the day of the killing. He also told Dr Allnutt that, on the Sunday prior to the offence, he had smoked cannabis. This had led him to believe that the person in his cell was going to beat him to death while he was asleep. He said that, on the following day, he felt terrible; he felt awful but he never thought about his cellmate. Dr Allnutt returned to Long Bay Hospital on 11 October 2006 and re-interviewed the offender. At the outset, Dr Allnutt was told by the offender that he had been lying to clinicians and also to Dr Allnutt. He said that Justice Health and the Department of Corrective Services were condoning "a shameful situation", that being the "Craig Behr tragedy". He said that what they were doing was preventing anyone from doing anything about it. All they had done, he said, was "to lock him in segregation , they didn't want to release him".

58 It was at this point in the interview that the offender repeated, in effect, remarks he had made to Danielle Matsuo, namely that he had "uncontrollable impulses of aggression" and that he felt "as though he was likely to attack someone". He denied that this was related in anyway to his

not having contact with his son or his girlfriend. He said that he had simply killed the victim but he couldn't remember what had happened exactly. Dr Allnutt immediately pointed out that the offender had given a version of sexual advances having been made to him only a few days earlier. Dr Allnutt asked him why he was lying. The offender said "I don't know, you tell me". On this occasion, the offender said "I attacked him, he didn't do anything to warrant the attack". The offender specifically denied there had been a sexual advance. He said "I just decided to kill him".

59 This relatively brief analysis of a very long and complicated history given by Dr Allnutt leads me directly to the doctor's final opinion. In his evidence (as appears in his written report) Dr Allnutt made three points. First, in the present matter, little reliance can be placed upon the offender's own reporting of his symptoms and conditions. In that sense, he is quite unreliable. Secondly, an objective analysis of the plethora of information contained throughout the history of clinical reports and notes, although difficult to analyse conclusively, tends to demonstrate that the offender does have, in all probability, an underlying chronic psychotic disorder. The problem is not whether he has such a disorder; but rather when does he experience symptoms of the disorder? That, in Dr Allnutt's opinion, is anyone's guess. For example, the offender might experience symptoms and not report them because he has a secondary goal in mind; at other times he might not experience symptoms but feel that it is in his interests to report them as such; and at other times he may be telling the truth.

60 Thirdly, there exists undoubted evidence of potential full psychiatric symptoms at the time of the killing. The better view, according to Dr Allnutt, is that there was a psychotic process, underlying his feelings, of a homicidal nature. This chronic psychotic disorder is compounded by a manifest personality disorder, which is driven by elements of paranoia, egocentricity and anti-social irritability and aggression. In addition, the offender lacked real insight into his own problems and does not collaborate well with his doctors and nurses. For the same reason, he is

not as reliable as a historian of his symptoms and does not accept treatment adequately at all times.

61 As I have said earlier, there is no real disagreement between this opinion of Dr Allnutt and that of Dr Bruce Westmore in this regard. Dr Westmore has seen the offender on a number of occasions and has provided approximately 12 reports, over many years, in relation to him. Dr Westmore's view is that the offender suffers from a chronic mental health problem and that, on the balance of probabilities, he was mentally ill at the time the killing occurred. Both doctors agreed that the nub of the substantial impairment affecting the offender at the relevant time was an impairment of his ability to control his urges and actions on the occasion he took the life of his fellow inmate. Both accepted that he had some ability to understand the nature and quality of his actions and, in particular, that they were wrong. This was particularly evidenced by the fact that he had been concerned to report the homicidal urges to Ms Matsuo several days before the killing occurred and by his request to be kept away from others.

62 It is perhaps unnecessary for me to state, but it should be recorded, that this analysis of the psychiatric evidence amply justified and explained the decision of the Director of Public Prosecutions to accept the offender's plea of manslaughter in full satisfaction of the indictment on the charge of murder. The offender is plainly a very disturbed young man, one whose personality and psychiatric problems are of the most complex kind. None of the psychiatrists have found it easy to diagnose, in absolute terms the full range of his psychiatric problems. All agree that the predominant flavour or theme of his presentation, and his thought content, is that of a paranoid and persecuted man. Dr Allnutt was prepared to concede that the offender is an unusual patient and, perhaps, a unique patient. Nobody seems to know precisely what is wrong with him; nobody seems to know when he is telling the truth or when he is not; and nobody seems to know exactly what to do with him in relation to his treatment and the possibility of future recovery. Against that background, it must be said, that a significant

tragic factor in this case, tragic for the deceased, his family, and, for that matter, the offender himself, is that the Corrective Services Department permitted the deceased to be placed in the cell of a man who was in the implacable grip of an urge to kill someone. I shall return to this subject a little later.

Future dangerousness

63 Dr Allnutt had a firm view that, based on the risk factors manifested by the offender, the only reasonable conclusion at this stage is he should be regarded as falling into a group of offenders with mental illness who have high risk of future aggression. This conclusion is compounded by his repeated failure to collaborate with doctors and nurses; and his failure, on occasions, to accept the need for treatment and medication. Dr Allnutt was, however, prepared to qualify this statement to the extent that this was his prediction "at least in the short to medium term". He felt that one could not predict any further into the future because there was the possibility, once the court case is over that the offender will accept treatment, will collaborate with his psychiatrists and engage in a proper rehabilitation program. If all that were to happen, the risk he poses to others might be then attenuated. In the short to medium term, however, he should remain within the status of a forensic patient.

64 Dr Westmore was, in some senses, a little more optimistic. He thought that this year the offender had improved in relation to his mental condition. He did however say that, if one were to "scratch the surface", the offender became "quite agitated" and manifested persecutory thoughts. But he was able to say that he did see a degree of improvement during the current year. As to future risk, Dr Westmore thought that the offender's behavioural potential was "really unknown". He will require frequent psychiatric review and his future can only be determined on a day-by-day, week-by-week basis. He agreed entirely with Dr Allnutt that, in the short to medium term, the offender is at high risk of aggression towards other

people. Therein, of course, lies his dangerousness, a factor which plainly makes the present sentencing exercise a difficult and challenging one.

65 Both psychiatrists were critical of the conditions in which the offender is held. Of course, the reality of psychiatric hospital incarceration is one thing; and the views of psychiatrists as to optimum, or even a better range of conditions is quite another. The reality of government resources and community needs probably means that there is, comparatively speaking, little in the way of spare funds to go towards prison improvements, particularly in the psychiatric area. But it must be said that segregation in a small cell without facilities, or at least very limited facilities; and with little or no recreation, all continuing over many months and years, is hardly a recipe for rehabilitation, reform and improvement in mental health. The offender can be extremely unpleasant towards people and I have no doubt he has been unpleasant, aggressive and offensive on occasions to clinicians and prison officers during the last 30 months. This is hardly helped by the fact that he has little insight into his own behaviour and tends to blame others for the situation in which he finds himself.

66 Were, however, this offender simply to disappear into the grim maw of the hospital psychiatric prison system with little hope of rescue, with little hope of proper treatment and reform, simply because he is a difficult person, this would be a very sad condemnation of our prison system. For this reason, I propose to make some recommendations at the end of this sentencing process as to the future treatment and placement of the offender.

The Offender's version of the events in the cell

67 I am unable to accept the offender's assertions that he was the subject of a sexual advance, and perhaps a sexual assault, by the deceased on the day of the killing. There are a number of reasons. First, this version of events appears to have been publicly stated for the first time by the

offender during his meeting with Dr Allnutt on 4 October 2006. The offender, however, then withdrew the version entirely during his next meeting with Dr Allnutt on 11 October 2006. On 27 October 2006, when the deceased's mother read to the Court her Victim Impact Statement, the offender interrupted the reading in a violent and aggressive manner. During his outburst, he asserted once more that there had been a sexual advance made to him by the deceased. On 30 October 2006, the offender apologised for his outburst but, it is to be noted, he did not withdraw the allegation of a sexual advance.

68 Secondly, Dr Westmore interviewed the offender on a number of occasions in 2004 and 2005. During a number of these meetings, Dr Westmore pressed the offender to explain what had happened in his cell on the day the deceased has died. During one of those interviews, on 27 July 2005, Dr Westmore thought that the offender was much less agitated and much less paranoid than he had been when Dr Westmore had interviewed him in June 2005. Dr Westmore asked the offender exactly why he had attacked the other prisoner. The offender replied: -

> "I get this feeling inside me, it get's inside me. It happens in gaol. I just can't be around people and if I am around people, it can only be a small number. I can't go into a small area of space with other people it get's me inside the chest. I get anxious and paranoid".

69 During the same interview he reiterated that he had told the psychologist, Ms Matsuo, that he wanted to be "one out". He repeated that he had told her he couldn't be around other people, that he felt he was homicidal and that he didn't want to be near anyone.

70 During an earlier meeting on 4 May 2005, the offender had told Dr Westmore that he did not believe he was psychotic at the time of the killing. He did not think he was paranoid. He said the only problem he had was his aggression and his anger. On this occasion, he told Dr

Westmore he had not argued with the victim nor had the man upset him in any way. He said: -

> "I've never killed anyone before but that feeling, it wouldn't go, it was like uncontrollable rage".

71 I consider that it is of some significance that the offender, who obviously trusted Dr Westmore, spoke openly, or at least apparently openly, to him about the killing on these occasions. There was no suggestion of any sexual advance as the basis for the offender's violent physical actions towards the deceased.

72 Thirdly, as the agreed facts indicate, the offender specifically told Detective Sergeant Davies, on the day of the killing, that the deceased had done nothing to provoke him. Fourthly, although the offender gave evidence before me and repeated that he had been the subject of the sexual advance by the deceased on the day in question, I did not accept his evidence as reliable.

73 During the course of a difficult, courageous but effective cross-examination, the Crown Prosecutor pointed out to the offender that, had he been the subject of a sexual advance in his cell, he would have been able to repel such an approach easily without resort to physical violence. This point was, I consider, not lost on the offender himself during the time he gave his evidence.

74 Finally, and most significantly, it must be accepted that the offender is not a reliable historian of events in any sense of the word. I am unable to place any reliance upon the version he gave because he has given so many versions and they are by no means consistent one with the other. This is not to say that the offender does not, at least at the moment, truly believe that he may have been approached sexually. Nor is it to say that he may not have persuaded himself over the years that this was a justification for his own actions. My position, as the tribunal of fact, is that I

can place little reliance upon the accuracy or reliability of the evidence given before me by the offender.

75 In the same way, the offender said that he did not intend to kill the deceased. I am unable to accept this evidence essentially for the same reasons. It seems to me that the offender well knew the nature of the homicidal urges he was experiencing. It was for that very reason that he asked to be placed "one out". True it is that his mental illness impaired his ability to control those homicidal urges. But I think he recognised their nature and understood the wrongfulness he felt compelled to carry out. I am satisfied beyond reasonable doubt that, at the time he attacked the deceased, although he was suffering from a substantial impairment of mind that impacted upon his ability to control himself, he did intend, by punching and kicking the deceased, to bring an end to his life. And, of course, that is what he precisely achieved.

The placement of the deceased in the offender's cell – systemic failure by the Department of Corrective Services

76 The next matter I need to address in these remarks on sentence relates to the fact that prison officers placed the deceased in a cell with the offender in circumstances where that action was likely to be, and indeed proved to be, extremely dangerous for the deceased. A great deal of time was taken up, during the sentence hearing, in the cross-examination of Corrective Services Officers, and other persons, relating to the ascertainment of the real circumstances that led to the deceased's placement in the cell on 27 March 2004.

77 Although a considerable amount of time was devoted to the cross-examination of these witnesses, I have come to the conclusion that I should not express any final opinion as to who was precisely responsible for the failure that resulted in a situation where the deceased was left at the mercy of the offender, while he was in such a dangerous homicidal mood. The reasons for my decision to refrain from such a determination

are these: first, I do not think it is appropriate that the sentencing court make findings of this nature. This is because the Court is not equipped to conduct an appropriate and thorough investigation into all of the surrounding circumstances. Indeed, although I have heard the cross-examination of a number of witnesses, sentencing procedures are, by their nature, not conducive to the elucidation of all necessary material to enable a proper finding to be made. In this regard, the Crown Prosecutor, quite properly in my view, did not seek to examine-in-chief the Corrective Services Officers called at the request of the defence but simply made them available for cross-examination, after the tender of their statements. It was not the role of the experienced Crown Prosecutor to do so; and she correctly did not allow herself to be diverted from her proper task in the sentencing process.

78 Secondly, I consider that the discovery of the truth of the matter, and the placement of blame, is best elucidated either by an independent inquiry or by the resumption of the Inquest which I understand commenced on 25 February 2005 but terminated on that day. (It did so, as I understand it as a consequence of the pending criminal proceedings). A Coronial Inquiry would be far better placed to investigate this matter than a Court whose principal task is to punish the offender. Thirdly, I do not consider that the circumstances that led to the unfortunate placement of Mr Behr in the offender's cell on 27 March 2004 are, strictly speaking, relevant to my task as the sentencing judge. Those circumstances, of course, are part of the narrative history of the events leading up to the death of the deceased and they are relevant in that general sense. They are, however, not especially significant in relation to the difficult task of sentencing the present offender for the crime of manslaughter.

79 In making these remarks, I do not wish to appear insensitive to the situation of the deceased's family. Nor do I wish to appear insensitive to the public interest involved in the broader community's concern in connection with the future prevention of similar events in the prison system. Each of these matters of private and public interest are legitimate

concerns. They are important concerns. But, as I hope it will be understood, they are likely to be a distraction from the task I have to perform, that is to impose an appropriate sentence upon the offender, having regard to the complex variety of established principles of sentencing practice.

80 Although I do not propose to make any definitive or determinative findings in relation to who was precisely at fault in the placement of Mr Behr in the offender's cell, I would like to make some brief comments about this aspect of the matter. The first relates to the evidence itself. Without descending into detail, it may be said there are two broad strands of evidence relating to the circumstances of Mr Behr's placement in Cell 20 on 27 March 2004. The first strand commences with the plainly truthful and reliable evidence of Danielle Matsuo, the forensic psychologist who interviewed the offender on 24 March 2004. After she had completed her interview, she spoke to Officer Too and told him that Mr Heatley was not a risk to himself, but was a risk to others. She also prepared a report for Assistant Superintendent Martin; it was Mr Martin who had asked Ms Matsuo to interview the offender. The report prepared by Ms Matsuo (Exhibit 2) makes it quite clear that she had formed the view that "Mr Heatley's risk of harm to others is currently assessed as high". Her report concluded that, if the offender were placed "two out" or was made to mix with other inmates in the yard, it was highly likely he would hurt someone. He had stated that "he had been experiencing homicidal urges for the past 18 months". Ms Matsuo recommended, primarily for the staff and other inmates, that the offender be managed in the ICMU.

81 The next morning Ms Matsuo spoke to Mr Martin. She understood that he would shortly be given her report. A little time later, Mr Martin said he read the report. Later that day there was a meeting at the clinic. This was attended by the mental health nurse, Colman Driscoll, where Mr Heatley's position was discussed. At that time, Mr Heatley was classified as "green dot". This meant that he had to be "two out", that is, he must have a cellmate. Mr Martin said that it was agreed that the "green dot" status

should be altered; and that Mr Heatley should be classified as "normal cell placement" but "one out". He was to remain locked in his cell until he was moved from the centre. Mr Martin then wrote on the bottom of Ms Matsuo's report "Noted RIT terminated, "two out" terminated; to be locked in landing cell "one out" until moved from centre".

82 According to Mr Martin, the paper work was then completed and he took the documentation with him to 13 Wing. He spoke to Officer Too and told him that Mr Heatley's RIT had been terminated; that his "two out" cell placement had been terminated and that he was to be kept locked in, "one out" on the middle landing until he could be moved from the centre. According to Mr Martin, Officer Too was instructed to let other officers know about the changed situation. Mr Martin said he placed the new paper work, together with the relevant notification, in the Case Manager's tray for filing into Mr Heatley's case file. The documents were clipped together and Ms Matsuo's report (with the notations on it) was placed on top. Mr Martin said he assumed these documents were placed into the Heatley case file but he himself had no further conversations with anyone else on the subject. He was not at the prison on the day when Mr Behr met his death.

83 Mr Martin informed Ms Matsuo on 25 March 2004 that he had Mr Heatley locked in a "one out" cell in 13 Wing.

84 Correctional Officer David Ulph gave evidence before me. He was a relatively inexperienced Corrective Services Officer at the time. It was his evidence, however, that a couple days prior to his going on annual leave, he was instructed by Officer Too to take Mr Heatley and his gear up to the middle landing; he was to make sure that Mr Heatley was "one out" and that he was to stay locked in until the Area Manager had seen him. Mr Ulph said he carried out these instructions. He also said a cell card was placed on the outside of Cell 20 identifying that it was Mr Heatley inside the cell. He himself placed a notification on the whiteboard on the middle landing that Mr Heatley was to be "one out". He said he distinctively

remembered putting "a big asterisk" on the whiteboard and notification to this effect. Mr Ulph also said that he entered the instruction into the landing log, and later produced a copy of it (the log, I might add, is rather ambiguous but it is capable of giving the meaning that Mr Ulph described). He also claimed to have placed a notification of the instruction on a plastic sticker in the muster book.

85 In short, Mr Ulph said that he did everything that he could possibly do with the information he had been given to make sure these instructions were drawn to the attention of other officers. He simply could not explain how it happened that a second person was placed in the cell on the relevant day. He was on leave on that day.

86 The second broad strand of evidence derives from the evidence of Assistant Superintendent Plumb and Prison Officer Keith Smith. The former, at the relevant time, was a senior correctional officer. Both officers are still currently employed with Corrective Services. Both these men were on duty on 27 March 2004. It was, in fact, the decision of Mr Plumb that Mr Behr should be placed in the cell with the offender. Officer Smith said that he and Officer Plumb went down to the Area Manager's office to find out why the offender was locked in. They could find no reason why the deceased should not be moved in to the offender's cell. Each denied that the Matsuo document and the notation by Mr Martin (Exhibit 2) were on the Heatley file. They could not recall seeing the instructions on the landing whiteboard nor in the Area Manager's log or diary. There was nothing about the Heatley situation mentioned at the morning briefing on 27 March when Mr Smith started work. There was nothing on the cell door, nor was there anything in the muster book to indicate that the offender was to be kept "one out". Mr Walsh, the Area Manager at the time, was not in the prison or, at least, not in the vicinity at the time, or during the morning, prior to the attack on the deceased. Mr Plumb, in particular, insisted that any notifications he saw indicated that the offender was normal cell placement and there were no instructions that he should be kept "one out".

87 The logical connection between these two broad strands of evidence was Officer Too. His evidence however, was entirely unsatisfactory. It was impossible to know precisely what it was he was saying. At one time, he seemed to be agreeing that there were instructions that the offender was to be kept "one out"; and other times, he appeared to insist the offender was in a normal cell placement situation with no restriction on a second inmate being introduced into his cell.

88 In addition to the complexities of the above situation, there was a second major area of concern. This related to the apparent lengthy delay in answering the call for assistance to Cell 20. The agreed facts indicated that the offender himself buzzed through and that, relatively shortly after, Corrective Services Officers attended Cell 20. There was however a statement tendered before the Court from the inmate in the next cell. This was a man named Schmidt. According to his statement, he had, during a period of about 20 minutes, attempted to buzz through to the gate to get somebody to attend. This was because he had become aware that there had been some type of violent assault in the cell next to him. His statement indicated that one of his calls, at least, had been disconnected without being answered. The position was further complicated by the fact that an inmate named Xuereb had, over many hours, been abusing the "knock-up" system by constantly ringing the buzzer and infuriating officers at the gate where the calls were taken. This had been going on, as I say, over many hours prior to the attack on the deceased.

89 Mr Schmidt was unavailable to give oral evidence at the sentence hearing as he now lives overseas. I could not therefore, form any concluded view about the validity of this second major area of complaint. It is a potentially important area of complaint, however, particularly having regard to the fact that the post-mortem examination on the deceased indicated that he may well have choked to death on food debris, as he had apparently vomited after the physical assault upon him. Clearly, in such a context, a lengthy

delay in attending to assist the stricken man could have a tragic consequence for him, as is indeed it may well have done.

90 I have said enough in this brief summary of the facts and evidence placed before me to indicate that I am satisfied that the placement of Mr Behr in the offender's cell occurred as a consequence of both systemic and individual failures on the part of some prison officers to adhere to proper practices and procedures. Had those practices and procedures been followed, the prisoner would have remained "one out" and Mr Behr would not have died. It is clear to me that there is a significant likelihood that one group or other of the witnesses who gave evidence before me has not told the truth or is deliberately holding back information. Where the real and ultimate responsibility lies, I shall not, for the reasons I have earlier given, determine.

91 The entire situation, however, calls for an urgent need to resume the Inquest or to conduct a separate Inquiry. I would recommend this be done and that both the deceased's family and the offender be entitled to be represented at such a further Inquiry. The reason for that is obvious. There has been an internal Inquiry, as I understand it, by the Department of Corrective Services but that has been, as such Inquiries often are, inconclusive. It is not surprising that is the situation. Such Inquiries are, by their nature, on occasions quite unsatisfactory and inconclusive. An independent and free ranging Inquiry is called for to answer the questions that the family of the deceased and the public legitimately ask to be answered; to explain why it was that a fellow inmate was placed in the offender's cell in circumstances where he had made it only too plain that he was in the grip of homicidal urges. The overall protection of the community and the need for the efficient operation of the prison system call out for, and demand, such an independent inquiry. I would hope that this recommendation falls upon receptive ears, even though its consequences may be unpleasant for some individuals, and perhaps for the Department of Corrective Services itself, at least in the short term.

The sentence to be imposed

92 What sentences are to be imposed for each of the offences? Let me first consider the robbery of the bank with a dangerous weapon.

93 The agreed facts demonstrate that this was a serious robbery which involved a high degree of criminality. The language and the actions of the offender were particularly violent and his threats would have terrified the bank tellers and members of the public in the vicinity. It appears the money taken from the Commonwealth Bank was never recovered.

94 The offender is entitled to a discount for the utilitarian value of his plea. I do not, however, regard it as a plea at the earliest opportunity. A discount at the low end of the 10 to 25% range is appropriate (**R v Thomson & Houlton** (2000) 49 NSWLR 383). As I understand the timing of the plea the robbery offence was listed for hearing in the District Court to be heard as a contested trial towards the end of November 2006. While it is true the offender first disclosed the offence in July 2003 and formally admitted it during an interview in January 2004, the plea was not entered until 30 October 2006. It is fair to assume that, between mid-2003 and October 2006, the offender and his legal representatives had not finally made up their minds as to whether the robbery charge would be resisted on the basis of a claim for mental illness. The defence was entitled to take that stance, particularly having regard to the unusual history of both matters. Nevertheless, the chronology and sequence of events disentitles the offender from a discount other than at the low end of the range I have identified.

95 On the other hand, as I have said, the offender is clearly entitled to a reasonably generous discount arising from the fact that he voluntarily disclosed the commission of the offence to the authorities in circumstances where it may well be that his involvement would not have been discovered (**R v Ellis**).

96 In all the circumstances, I propose to allow a discount of 25% to recognise the plea and the relevant disclosure made to the authorities.

97 There were, of course, a number of aggravating factors in relation to this offence and I have earlier identified those. I repeat that I do not take the record of previous convictions into account other than to note that the offender does not come before the Court as a first offender. The acquittals in relation to the earlier robberies, predicated as they were on a mental illness defence, mean that those robberies can be noted only in a limited way, and for the limited purpose, of establishing that, in the present context, Mr Heatley is not in truth, in this area, a first offender; and that he has resorted to bank robbery on other occasions when his financial situation required it. His previous criminal history and his involvement, particularly in armed robberies, is also relevant, to a limited degree, on the issue as to whether he may be considered to pose a danger to the community upon release, although his violence and aggression in the present bank robbery pale into insignificance in comparison to the level of violence shown in the manslaughter offence which I shall shortly discuss.

98 The nature of the robbery offence, and the aggravating matters, tend to indicate that a sentence should be imposed that has a substantial component of general deterrence. On the other hand, it is impossible to put to one side altogether the history of the offender's mental illness. This matter must diminish or at least reduce, the suitability of the offender as a vehicle for general deterrence. There is a need, however, to insist upon a sentence which reflects an element of personal deterrence in the area of armed robbery.

99 The offender has expressed remorse for the offence and, if he can be accepted, has suggested that he now appreciates that the presentation of a dangerous weapon to other people in connection with a robbery or threatened robbery is an action that legitimately causes considerable fear and distress to the people involved.

100 The sentence to be imposed should reflect, in general terms, the purposes for which a Court may impose a sentence as set out in s 3A of the **Crimes (Sentencing Procedure) Act 1999**. It should also reflect and take into account the aggravating and mitigating factors mentioned in s 21A of the legislation.

101 The method of structuring sentences has been altered by the legislature for offences committed during and after February 2003. The consequence is that, in the general run of things, an offence such as the present would need to be structured by the setting of a total term and then for the establishment of a non-parole period within that term. For offences committed after February 2003, the legislature has reverted to earlier sentencing practice in requiring the Court to first impose a non-parole period and then set the balance of the term of the sentence. As I say, this change in sentencing structure does not apply to the present matter as the offence was committed prior to February 2003.

102 I have decided that, because the offender comes for sentence in relation to the more serious charge of manslaughter as well, and because questions of accumulation will and do inevitably arise, a fixed term of imprisonment should be imposed for the present offence. I propose to impose, after discount, a sentence of four years fixed term of imprisonment for this offence and to backdate it to 27 March 2004. The term is intended to be the equivalent of the appropriate non-parole period that would have been applicable if other than a fixed term had been imposed.

103 Strictly speaking, this back dating process is brought about by the situation, as is agreed between the parties, that the offender, although remaining a forensic patient at the time, might notionally be regarded as having been held in custody in relation to the manslaughter charge from that day onwards. By contrast, although the offender was formally interviewed in relation to the robbery in January 2004, it does not appear

that the offender was held in custody (or even in notional custody) as from that date in connection with the robbery offence.

104 From a practical point of view, it is, in my opinion, a more satisfactory method of structuring the sentence by placing the fixed term sentence below or beneath the sentence for manslaughter and then later to consider questions of accumulation or concurrence. In addition, the manslaughter sentence is for a more serious crime and will involve the selection of a non-parole period and a balance of term. It is for those reasons that I will first impose the fixed term sentence and backdate it to the agreed date for commencement of the overall sentence, namely 27 March 2004.

105 I turn now to consider the sentence to be imposed for the manslaughter offence. The principal difference between the parties in relation to this offence focused upon the level of criminality involved in the killing. The Crown submitted that the level was high. In this regard, the Crown submitted that, although sentences for manslaughter vary widely, there is authority to suggest that cases in which the partial offence of substantial impairment have been invoked warrant higher sentences than other categories. References were made to the comment by Hunt CJ at CL in **Regina v Carlson** (unreported NSWSC 16 October 1995): -

> "There are...identifiable patterns of sentencing for different categories of manslaughter. Where an offence involves an intention to kill or to inflict grievous bodily harm, the range remains wide, but its upper limit is a high one – more so for diminished responsibility cases than for provocation cases. In an diminished responsibility category, the sentences fall at the upper end of range".

106 I am not satisfied, however, that the observations of Hunt CJ at CL carry with them the meaning attributed to them by the Crown. Rather, I think his Honour was discussing patterns of sentencing for different categories of manslaughter. The decision, however, is not accompanied by the sentencing statistics that his Honour had in mind and is therefore of limited value. In any event, I do not think it can be said that one type of

manslaughter warrants a higher sentence than another in any useful general manner. Each case must depend upon its own circumstances.

107 Secondly, the Crown argued that the offender's capacity to understand events, and his ability to judge whether his actions were right or wrong were not impaired by his mental illness. The Crown submitted that the impairment impinged upon his capacity to control his homicidal urges. For that reason, it was submitted that the impairment, although substantial, was not as serious, for the purposes of gauging the level of culpability, as other types of impairment.

108 In general terms, I accept this submission. It is necessary to add that the substantial impairment suffered by the offender has already been taken into account in relation to reducing the offence from murder to manslaughter. It is not inappropriate, however, to have regard to the nature of that impairment when assessing the criminality of the manslaughter offence itself. It is necessary to take special care not to "double count" the impact of the substantial impairment. But, as I have said, it is not inappropriate in a particular case, to examine the mental illness or disorder for the further purpose I have mentioned.

109 Mr Terracini SC, who appeared with Mr Newton for the offender, argued that the manslaughter fell in the mid range. He submitted that there was nothing remarkable about the circumstances of the killing. Indeed, the report by Dr Botterill (Exhibit "F") had stated: -

> "Although less severe than most lethal head injuries, it is most likely that the head injury has resulted in impaired consciousness, vomiting and inhalation of food debris, in turn leading to brain hypoxia and death".

110 The points made by Mr Terracini were first, that the injuries noted on the body of the deceased were not of the most severe kind. Secondly, it was possible that death occurred as a result of hypoxia, consequent upon the beating.

111 The parties were in agreement as to the legal principles that are applicable to the difficult sentencing exercise that often arises in a situation where mental illness is involved. Those principles are well expressed by Gleeson CJ in **R v Engert** (1996) 84 A Crim R 67 at p 68. His Honour said: -

> "The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment. Those purposes were said by the High Court in Veen v The Queen (No 2) (1988) 164 CLR 465 at 476 as follows: 'protection of society, deterrence of the offender and others who might be tempted to offender, retribution and reform'... In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration.
>
> For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time increase the importance of the deterrence of the offender".

112 There are three ways in which mental illness may be relevant in sentencing so as to moderate the sentence otherwise to be imposed. First, where mental illness contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced. Secondly, mental illness may render the offender an inappropriate vehicle for general deterrence and moderate that consideration which would otherwise be of significance. Thirdly, a custodial sentence may weigh more heavily on a mentally ill person.

R v Hemsley [2004] NSWCCA 228 at (33-36) per Sperling J; **R v Wicks** [2005] NSWCCA 213 at (24-26) and (33-34); **R v Pham** [2005] NSWCCA 314 at (27-35) and **R v Hughes** [2005] NSWCCA 117 at (24-29). See also **R v Israel** [2002] NSWCCA 255 at (23) per Spigelman CJ.

113 On the other hand, there is a countervailing consideration, namely the need in cases involving mental illness, to evaluate the danger which the

offender presents to the community. This entails consideration of the need for special deterrence. As the majority said in **Veen (No 2)** at 476: -

> "A mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter."

114 As Gleeson CJ said in **R v Engert** at 68: -

> "In the case of a particular offender, an aspect of the case which might mean the deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. ...In a particular case, a feature which lessens what might otherwise be the importance of general deterrence might, at the same time, increase the importance of deterrence of the offender."

115 These principles have particular significance in the case of the present offender. There can be no doubt that an assessment of the level of criminal culpability in the crime here requires a recognition that the offender, as a consequence of his psychotic disorder, and his personality difficulties, found it difficult to control his homicidal urges when they were upon him. The recognition of this aspect requires the moderation of the level of criminal culpability in the present case. That moderation is, however, offset to a degree by the fact that the offender recognised the wrongfulness of his actions and, indeed, recognised the dangerousness of the urge to kill.

116 At the same time, the very condition that diminished the offender's capacity for self control plainly increases the need for protection of the public, including those persons with whom the offender is likely to come into contact during his time in custody or perhaps, upon release.

117 It needs, however, to be carefully kept in mind that the principle of proportionality must be applied. The sentence to be imposed should not

increase or extend beyond that is which is proportionate to the crime (**Veen No 2**) at 472, 473).

118 In the present case there is agreement between the medical experts. This points to the fact that the offender must, at least for the short to medium term, be regarded as dangerous to others. Neither expert was prepared to predict any further into the future. There was general agreement between them, however, that with frequent psychiatric review and treatment, there remains the possibility that the offender's condition will improve and that his present dangerousness will be reduced.

119 My assessment of the criminal culpability involved in the present offence is that it was of a reasonably high order. It is true that no weapons were used in the attack. It is true that the injuries sustained by the deceased were not as lethal as in other beatings. It is easy to imagine a more horrific manslaughter than the present one. But nevertheless, the assault on the deceased was clearly a violent and brutal one. He was quickly rendered unconscious after receiving a number of blows and kicks. The offender was, and is, capable of a level of high aggression. It would have been a terrifying experience for the deceased to be set upon in this manner. There was nowhere for him to escape and nowhere for him to hide. There was no real opportunity to get help. The offender knew what he was doing was wrong. The psychotic condition impaired his ability to control his urges, but it did not substantially impair his understanding that what he was doing was very wrong indeed.

120 The other matter at issue in relation to the manslaughter charge is the value of the offender's plea. The background to this is somewhat complicated. I do not propose to detail the background. It is sufficient to note that, on a number of occasions, the offender pleaded guilty to the charge of murder but afterwards was given leave to withdraw the plea. For example, on 22 September 2006, I gave leave to the offender to withdraw a plea of guilty which had been entered before Barr J on 7 July 2006. A similar situation arose in 2005.

121 The bottom line, if I may be exercised for using that inelegant expression, is that the offender did not plead guilty to manslaughter until 26 October 2006. I infer that it was shortly prior to that day that agreement was reached between the medical experts and instructions obtained from the Director of Public Prosecutions to accept the manslaughter plea.

122 It is clear that the plea entitled the offender to a discount for its utilitarian value (**R v Thomson & Houlton**). While it is true that the offender has never denied causing the death of the deceased, and while it is true that he has pleaded guilty to murder on several occasions but later been permitted to withdraw the plea, the plain fact of the matter is that the plea of manslaughter was negotiated and then given at the outset of the trial for the murder charge against the offender. In those circumstances, the plea can only qualify for a discount at the lower end of the range. In my view, the discount should be no greater than 10%.

123 I regret to say that I can, at this stage detect very little remorse or contrition on the part of the offender in relation to the killing of Craig Behr. At this stage, the offender has little insight into his actions and, once again, he is not a reliable reporter of his own thought patterns. For example, he stated, during his evidence, that he was not a violent person. In addition, he rather suggested the blame for the killing of the deceased lay with the deceased himself or with the prison authorities who permitted the deceased to be placed in the cell. An absence of remorse cannot be used in any way to punish the offender. That is particularly the case in the present matter where his mental illness and his difficult personality conspired to rob him, to some degree, of an ability to have meaningful insight into his own actions. The absence of remorse, however, means that the offender is not entitled to any discount on that basis.

124 Before coming to the actual sentence to be imposed, I should here recall that Mrs Behr read a Victim Impact Statement to the Court during the sentencing hearing. This was a sad and moving document. The Court

extends to Mrs Behr and her family its sympathy and trusts that the opportunity to make those grieving statements will bring some degree of consolation to the family in respect of the death of their loved one. In accordance with established principles, I do not propose to take those matters into account in increasing the sentence to be imposed upon the offender.

The sentence to be imposed

125 What sentence then should be imposed on the offender for the manslaughter?

126 A principle of general of importance is the recognition that the offence of manslaughter is a particularly serious one, since it involves the taking of a human life, the protection of which is the primary objective of the criminal justice system (**Hill** (1981) 3 A Crim R 397 at 402; **R v McDonald** (NSWCCA 12 December 1995); **R v Woodland** [2001] NSWSC 416 per Wood CJ at CL).

127 I have taken into account the pattern of statistics referred to by counsel during addresses. I have also had regard to the very thorough chart of the manslaughter cases, dealing with substantial impairment, prepared by Mr Terracini. While I have had regard to this material, it is necessary to bear in mind that, in the case of manslaughter especially, neither a consideration of statistical information nor an examination of results in other decided cases illuminates, in any decisive manner the decision to be reached in a particular case. Sentences for manslaughter vary greatly because of variations in the circumstances of the individual instances of the offence (**R v McGuire** (NSWCCA unreported 30 August 1995); **R v Troja** (NSWCCA unreported 15 July 1991); **R v Bloomfield** (1998) 44 NSWLR 34 at 738-739; **R v Woodland** at 416; **R v Montgomery** [2004] 151 A Crim R 376 at [5] per Spigelman CJ; **R v Trevenna** [2004] 149 A Crim R 505 at [98-101].

128 A sentence that appropriately reflects the application of the conflicting and differing principles I have earlier identified, and which recognises the seriousness of the taking of a human life is, after discount for plea, a term of imprisonment for 14 years. In my opinion, the sentences for the two offences should be cumulative, one upon the other. The offences were completely unconnected and represent entirely separate bouts of criminal conduct.

129 The offender, however, is entitled to the recognition of special circumstances. There are two reasons for this. The first is the cumulative structure of the two sentences. The second relates to his mental illness. In my opinion, the offender should be encouraged to co-operate with his clinicians and medical specialists. He should be encouraged to be frank and truthful in his dealings with them, and to take medication and other treatment, if prescribed. A principal reason for the finding of special circumstances is the need for the offender to be encouraged to realise that his co-operation, in the process of medical rehabilitation, may yield him the prospect of earlier conditional release than would otherwise have been the case.

130 For the manslaughter offence, I propose to impose a non-parole period of eight years with a balance of term for a further period of six years. The sentence is to commence at the end of the fixed four-year term to be imposed for the robbery. I should stress that, whether the offender will in fact be released to parole in March 2016, will very much depend on two things: first, his own behaviour and conduct, including his efforts to genuinely co-operate with doctors and clinical staff. Secondly, his own mental state at the relevant time and, in particular, whether he has been shown to be able to control his dangerous and aggressive instincts. Those matters will fall to be decided by the medical staff and the parole authorities.

131 I recommend that the following steps should be taken in connection with the offender's status.

1. He should remain for the time being as a forensic patient.

2. His status, as a segregated patient, should be carefully and frequently monitored. In the short term, regular risk assessments should be undertaken, preferably on a daily basis, and the results should be clearly communicated to staff.

3. He should agree to undertake weekly-supervised urine drug screening to ensure he has abstained from substance use. Later, these may be altered to monthly tests.

4. He should be treated, but only if thought necessary, with anti-psychotic medication.

5. Subject to prison protocol and procedures, and to issues of resources and availability, the offender should be provided with at least a minimum of recreational and personal facilities, including physical recreation and reading materials.

6. He should receive, throughout his time in custody, intensive psycho-education with regard to his offending, substance abuse and mental illness.

7. Subject to improvement in his mental condition and behavioural traits, he should, in the medium term, be considered for removal to a secure hospital with a therapeutic model, such as Morisset hospital.

132 Michael Alan Heatley, for the offence of robbery with a dangerous weapon, I sentence you to a fixed term of imprisonment for four years. The sentence is to be backdated to commence on 27 March 2004 and is to expire on 26 March 2008.

133 For the offence of manslaughter, I sentence you to a term of imprisonment comprising a non-parole period of eight years and a balance of term of six years. This sentence is to commence on 27 March 2008 and the non-parole period is to expire on 26 March 2016. That date is the date on which you will be eligible to be released on parole. The balance of the term will expire on 26 March 2022.

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I CERTIFY THAT THIS AND THE 39 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT SUMMING UP HEREIN OF THE HONOURABLE JUSTICE ANTHONY WHEALY

Beverley Dalley
Associate

Date 21 November 2006