1 A specific offence can involve a wide range of conduct. For a sentencing judge this requires considerable discernment as to where a particular case falls in the range of seriousness of the offence in question. It requires the judge to make findings of fact where the facts are not agreed; or even if the facts of an offence are agreed, there may remain a dispute as to the nature of the offender's role in, or responsibility for, the offence, or his or her moral culpability. To illustrate this point there are the following examples.

Break, enter and commit serious indictable offence

2 A commonly encountered offence is that of breaking and entering and committing a serious indictable offence: s 112(1) of the *Crimes Act 1900.* The manner in which the offender broke and entered the premises is often not as important as the nature of the premises (e.g. whether they are commercial or residential). The nature of the serious indictable offence is usually the key factor in the assessment of the objective seriousness of the offence.

3 A "serious indictable offence" is defined as one for which the prescribed maximum penalty is imprisonment for life or a term of 5 years of more: s 4 of the *Crimes Act*. Breaking and entering offences often involve the offence of stealing (s 117 of the *Crimes Act*) for which the maximum penalty is 5 years. But they can also involve more serious offences such as sexual assault or arson. Of course, if circumstances of aggravation are present (as defined in s 105A), such as the use of corporal violence, intentionally or recklessly inflicting actual bodily harm upon a person, or depriving a person of their liberty, then an aggravated form of the offence with a higher maximum penalty under s 112(2) or (3) may be prosecuted.

4 The sentencing judge would also be required to assess other features. For example, whether the offence was the product of professional

planning, organisation and execution; the amount of property damage that was caused; and, where theft is involved, the value of the property taken, either by reference to its monetary or sentimental value to the owner.

Sexual assault

5 Prior to amendments in 1981, the offence of "rape" was constituted by non-consensual penile/vaginal intercourse. All other forms of penetrative sex were prosecuted as indecent assault (or buggery): see, for example, ***Nelson v R*** [2007] NSWCCA 221 at [17]. Rape was replaced with the offence of sexual intercourse without consent (now in s 61I *Crimes Act*) and an extended definition of sexual intercourse (now in s 61H) substantially broadened the scope of the term. That broad definition is but one of the reasons that a wide range of conduct is encountered in relation to this offence.

6 Generally speaking, at a lower level of the spectrum of seriousness might be activity involving what was initially consensual digital penetration in the course of which the victim withdrew his or her consent but the offender continued with the intercourse for a short period. At the other end of the spectrum, one might find a victim who was subjected to significant degradation and humiliation for an extended period of time.

7 Whether the offender and victim were strangers, acquaintances or in a relationship might affect the seriousness of the offence, although not necessarily. Similarly, the nature and duration of the penetration might, but not necessarily, have a bearing. The degree of force used would usually be significant as well.

8 By way of example, a case lower down the scale was one where a 39-year-old masseuse with no previous convictions twice digitally penetrated the outer genitalia of a client. His 2-year sentence of imprisonment was

held on appeal to be not manifestly excessive: ***Jiang v R*** [2010] NSWCCA 277. On the other hand, a 46-year-old man who, in an "an opportunistic and exploitive series of acts" over a period of about an hour, had sexual intercourse in a bed at the Westmead Children's Hospital with a 16 year old girl who was being treated for anxiety, depression and severe social phobia received a 12 year sentence. He also failed on appeal to establish that it was excessive: ***Philopos v R*** [2008] NSWCCA 66.

Manslaughter

9 Manslaughter is an offence that is renowned for throwing up a wide range of circumstances that may have a bearing upon the assessment of objective seriousness.

10 One of the many reasons for this is that there are a number of ways in which a person may be liable for conviction for this offence. Murder is a homicide committed where the offender either intended to kill, or to inflict grievous bodily harm, or was reckless as to the probability of death resulting. It can also be committed if someone is killed in the course of the commission of an offence punishable by imprisonment for 25 years or more (e.g. armed robbery with wounding: s 98 *Crimes Act*). A homicide may be classified as manslaughter, rather than murder, in the following circumstances.

- Excessive self-defence: - the offender believed that it was necessary to do what he or she did but the response was not an objectively reasonable one in the circumstances: s 421 of the *Crimes Act*.

- Provocation: - the act causing the death was a result of a loss of self-control on the part of the offender that was induced by conduct of the deceased towards or affecting the offender and that conduct

of the deceased could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased: s 23 of the *Crimes Act*.

- Substantial impairment by abnormality of mind: - the offender's capacity to understand events, or to judge whether their actions were right or wrong, or to control themselves, was substantially impaired by an abnormality of mind arising from an underlying condition, where the impairment was so substantial as to warrant reduction of the offender's liability from murder to manslaughter: s 23A of the *Crimes Act*.

- Unlawful and dangerous act: - the act causing death was one that was unlawful and dangerous: *Lane v R* [2013] NSWCCA 317 at [54]-[57]. "Unlawful" needs no explanation. The mostly commonly encountered unlawful act is an assault. "Dangerous" means that a reasonable person in the position of the offender would have realised that the act of the offender exposed the victim to an appreciable risk of serious injury: *Wilson v The Queen* (1992) 174 CLR 313 at 333.

- Criminal negligence: - the act or omission which caused the death was done consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable person would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merits criminal punishment: *Lane v R* at [58]-[62].

11 In each of the first three of those scenarios (which are what are sometimes referred to as "voluntary manslaughter"), the offender had the mental state that would otherwise warrant conviction for murder (i.e. an intent to kill or

inflict grievous bodily harm, or reckless indifference to the probability of death occurring). In the last two ("involuntary manslaughter"), sentencing must proceed with an acceptance that such a mental state is absent. It would be a serious error to impose a sentence for manslaughter committed by way of an unlawful and dangerous act or by criminal negligence by taking into account that the offender intended to kill or to inflict grievous bodily harm. That would be to sentence the offender for murder when the offence in question is the less serious one of manslaughter: see *R v De Simoni* (1981) 147 CLR 383

12 Street CJ said in *R v Hill* (1981) 3 A Crim R 397 at 402:

> "It has been said that manslaughter, perhaps beyond any other crime is protean. The circumstances leading to the felonious taking of human life being regarded as manslaughter rather than murder can vary infinitely, and it is not always easy to determine in any given case what should be done in the matter of sentence".

13 Legislative recognition of the wide range of conduct that may be encountered in the offence of manslaughter is reflected in the penalty provision. Up until 1989, the maximum penalty was imprisonment for life but when "truth in sentencing" amendments were introduced it was reduced to imprisonment for 25 years. However, at least since 1883, there also has been the provision (currently in s 24 of the *Crimes Act*) for a judge to discharge a jury, thereby effectively acquitting the accused, if the judge is of the opinion that "having regard to all the circumstances, a nominal punishment would be sufficient". Generally, see *R v Lavender* (2005) 222 CLR 67 at 76-77 [21]-[22].

14 The following examples provide some insight into the breadth of conduct and criminal culpability that can be encountered in manslaughter cases.

15 In ***R v Jukes*** [2006] NSWSC 1065, a 2 year suspended sentence was imposed upon a young woman who had pleaded guilty to having killed her

mother's partner by stabbing him when he was in a drunken rage. The woman said she was in fear for her mother's safety but when she tried to intervene he pushed her up against a refrigerator. She grabbed the nearest thing available, a knife. He was approaching her as she grabbed the knife and it entered his chest. The woman was mortified by what had happened and ran next door to ring triple 0.

16 The sentencing judge found that this was a case of manslaughter by way of unlawful and dangerous act, namely the taking up of a knife in the course of a domestic argument. Partially pushing forward with the knife was not deliberate but instinctive and it occurred as a result of the deceased moving towards her. It was found that she did not intend to stab the deceased, let alone inflict grievous bodily harm or kill him. The judge accepted that there was an element of provocation and self-defence.

17 The woman was 20 years old and was described as having had "a most unfortunate background". Her parents had separated when she was aged two and she had since only seen her father once. She was sexually assaulted when she was aged nine and was bashed and again sexually assaulted at age 14. She had her first baby when aged 16 and by the time of sentencing had 5 children who were dependent upon her. Her youngest child, aged 8 months, had a medical condition that meant he required special assistance from her.

18 Mitigating factors included that the offender was of good character; she had no previous convictions; she had good prospects of rehabilitation and was unlikely to re-offend. The Crown conceded that a non-custodial sentence might be appropriate.

19 In ***R v Sutton; R v Sutton*** [2007] NSWSC 295, good behaviour bonds were imposed upon a couple aged in their 60s who killed their 29 year old son. He had been born profoundly disabled. He suffered from Trisomy 13

Syndrome, a condition involving various disabilities. The condition is incurable and only a small proportion of babies survive longer than a year. He had a cleft lip and palate and no eyes. He was deaf in one ear and had only 30 or 40 per cent hearing in the other. He was profoundly mentally retarded and only achieved a mental age of three or four.

20 His parents were devoted to him and made many sacrifices. When he became an adult he lived in group homes and came under the influence of other residents who exhibited violent behaviours. Regular home stays became even more difficult. The strain eventually took its toll upon the parents with both developing depressive disorders.

21 At the age of 29 their son was found to have a diseased left mastoid process (a bony structure in the skull adjacent to the ear). It would require surgery that would leave him completely deaf for three months and risked permanent further reduction of his limited sense of hearing. He would probably have lost his ability to speak and might have lost his sense of taste. The sentencing judge described the plight of his parents in this way: *"They could not contemplate standing by and letting the disease do its work, yet the alternative was to take away from Matthew, in a way he could not understand, all that he enjoyed"*.

22 One night Mrs Sutton gave her son his medication including a sedative that rendered him unconscious. Then Mr Sutton took his life in a way that has never been revealed. Both of them were thereafter wracked by guilt but were not prepared to admit what they had done until the time of a coronial inquest some four years later when they decided to confess. They were charged with murder but the DPP agreed to accept pleas of guilty to manslaughter when there was unanimous psychiatric opinion that they were both suffering from a substantial impairment by an abnormality of mind.

23 The sentencing judge found that the offenders were subject to many stressors as well as the abnormality of mind described by the psychiatrists. They were faced with a problem not of their own making and made the decision that the only thing they could do was to protect their son from a future life without sensation by bringing his life to an end. They breached their trust as parents because they loved him and could not bear to contemplate his suffering any more.

24 The judge considered all of the purposes of sentencing. Deterrence and protection of the community were irrelevant in the unique circumstances of the case. Recognising the harm they had caused and making them accountable for their actions was achieved by the public process of the prosecution itself. As to punishment, the judge said, *"Nothing that the Court can do by way of sentence can add to the offenders' suffering"*.

25 A case at the other end of the spectrum is ***Clare v R*** [2008] NSWCCA 30; 181 A Crim R 450.

26 A man who was babysitting a three year old boy and his sister rang triple 0 just after midnight reporting that the boy was vomiting, had choked, was unconscious and was not breathing. He said that the boy had not responded to CPR or to what he described as a "little bit of an electric shock" that he had administered. An ambulance arrived seven minutes later and found that the boy's body was cool to the touch. He was taken to hospital where death was declared. A post-mortem examination detected recent tears to the anus and bruising to the lining of the rectum.

27 Clare pleaded guilty to having sexual intercourse with a child under the age of 10 but not guilty to murder. A jury acquitted him of murder but found him guilty of manslaughter. He was sentenced to the maximum penalty of 25 years for the manslaughter (with a concurrent 14 years for the sexual assault, but cumulative upon the non-parole period of 12 years

1 month for having sexually assaulted the boy's sister the previous day. So, the total sentence was one of 37 years 1 month with a non-parole component of 30 years 10 months).

28 The manslaughter offence was constituted by an unlawful and dangerous act, namely by having anal intercourse with the deceased. By the time he had applied electrical wires to him in an attempt to revive him he was already dead. Being acquitted of murder, it was necessary to accept that he did not have an intention to kill the boy, or to inflict grievous bodily harm upon him, but the sentencing judge found that there was an intention to "gratify a depraved sexual urge". He regarded the case as falling into the worst category of manslaughter

29 Clare was aged 31 at the time of the offences. He became a ward of the State at the age of about five. He had low average or borderline levels of cognitive ability, putting him in the bottom 4th percentile of others his age. He had a history of having been sexually abused by his father from the ages of about three to five. He acknowledged himself to be a paedophile. He had a criminal history comprising convictions for sexual offences and had served time in gaol.

30 On appeal it was found that there was no error in the accumulation of the sentences and a contention that the manslaughter sentence was manifestly excessive was also rejected. However, error by way of oversight was found in providing for less than the usual one quarter of the aggregate term by way of parole period. The total term remained but the non-parole period was reduced from 18 years 9 months to 15 years 9 months. The aggregate term of the sentences remained at 37 years 1 month with the non-parole component becoming 27 years 10 months.

Conclusion

31 Aside from all of the variable subjective features of an offender; all of the aggravating and mitigating features that are relevant, both objectively and subjectively; and all of the range of sentencing purposes and principles that a judge is required to take into account; the very facts of an offence itself can be so widely varied. There is no single correct outcome in the assimilation of all of these matters in the determination of a sentence that is just: for society, the victim, and the offender.

R A HULME J

20 March 2014