

## **SENTENCING FOR STANDARD NON-PAROLE PERIOD OFFENCES IN NEW SOUTH WALES <sup>1</sup>**

### **History of the Standard Non-Parole Period scheme**

#### *(a) Introduction of the SNPP scheme*

The NSW standard non-parole period scheme was introduced by the enactment of the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW), which inserted Part 4, Div 1A (ss 54A–54D) into the *Crimes (Sentencing Procedure) Act 1999* (NSW). The Division was to apply to serious indictable offences listed in the Table to Div 1A. The Amending Act commenced on 1 February 2003.

The initial form of s 54A(2) of the Amending Act stated:

“The standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division”.

The initial form of s 54B(2) stated:

“When determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.”

In the Second Reading Speech of the Amending Act on 23 October 2002, then Attorney-General Bob Debus stated that the scheme was not mandatory sentencing, and intended to preserve judicial discretion (at p 5813):

“The scheme being introduced by the Government today provides further guidance and structure to judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process. By preserving judicial discretion we ensure that the criminal justice system is able to recognise and assess the facts of an individual case.”

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b) *Interpretation of the SNPP Scheme: R v Way (2004) 60 NSWLR 183*

In *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 183, the Court of Criminal Appeal was asked to consider the proper approach to sentencing under the scheme. The Court adopted a two-staged approach. The Court held that s 54B(2) was drafted in mandatory terms, which required the sentencing judge to impose the SNPP unless there were reasons why the SNPP was not appropriate. The Court held that this enquiry was first to be answered by reference to the objective seriousness of the offence so as to determine whether the offence fell within an abstract “middle of the range of objective seriousness”. If the offence did not fall within the midrange, then it was not an offence to which the SNPP applied. Secondly, if it was within the midrange the judge was required to consider the aggravating and mitigating factors in s 21A, which may have also necessitated a departure from the SNPP.

The Court also held that for the purposes of determining what would constitute an abstract “middle of the range offence”, the term “objective seriousness” was not to be narrowly confined. Rather, the Court held (at 186-7) that an analysis of objective seriousness could take into account the physical acts of the offender and their consequences, as well as circumstances personal to an offender that are causally connected to the commission of the offence. The Court instanced intellectual disability, mental state and illness, robbery to feed a drug addiction, duress and provocation as circumstances of the offence rather than of the offender.

c) *Interpretation of the SNPP Scheme: Muldrock v The Queen (2011) 244 CLR 120*

Numerous NSW cases applied the two-staged approach to sentencing in *Way*. But in *Muldrock*, the High Court held that that approach to sentencing under s 54B was incorrect.

The High Court repudiated the NSW Court of Criminal Appeal’s interpretation of s 54B(2). It held that it is wrong to characterise s 54B(2) in mandatory terms requiring a two-staged process. Rather, the Court held that the SNPP was relevant whether or not the offence fell within an abstract midrange of seriousness; a court is obliged to take into account all factors relevant to the sentence and make a value judgment as to what is the appropriate sentence. The Court held that to determine the appropriate sentence a court must consider two legislative guideposts: the maximum penalty and the standard non-parole period. While the SNPP requires the court to give “meaningful content” to the SNPP’s specification as the non-parole period for an offence in the midrange of objective seriousness, there is no need to categorise the objective seriousness of the offending.

The High Court considered whether personal circumstances referred to in *Way* could be taken into account when determining the objective seriousness of the offence. The Court held that meaningful content cannot be given to the concept that the SNPP is the standard period for an offence in the midrange of objective seriousness by taking into account characteristics of the offender. The Court at [27] held that it must be determined “without reference to matters personal to a particular offender” but “wholly by reference to the nature of the offending”.

This is reflected in s 5A(3)(a) and (b) of the *Sentencing Act 1991* (Vic).

In NSW this aspect of the holding in *Muldrock* has raised the question whether the High Court had limited the range of factors relevant to objective seriousness so as to exclude those factors instanced in *Way*, such as duress, provocation, and mental illness. The High Court did not further elucidate which matters were to be regarded as “personal to a particular offender” and which were matters relevant to the “nature of the offending”. When discussing the facts of the case at hand, however, it referred (at [54]) to the offender being mentally retarded as substantially lessening “the offender's moral culpability”.

The decision in *Muldrock* made it clear that numerous cases decided after *Way* had been wrongly decided. This led to various successful appeals and also legislative amendment.

#### d) *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013*

The 2013 Amending Act was intended to clarify the SNPP scheme in light of *Muldrock* and a subsequent report prepared by the NSW Law Reform Commission. Specifically, the Act intended to clarify two unresolved issues raised by the High Court: first, the extent to which the personal factors of an offender may be taken into account in assessing the objective seriousness of a standard non-parole period offence; and second, whether a sentencing court is required or permitted to classify a standard non-parole period offence by reference to its position in a range of objective seriousness.

First, the Act amended s 54A(2) so as to provide:

“For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the Table to this Division that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.”

This provision is mirrored in s 5A(1)(b) of the *Sentencing Act*.

The Act also reformulated the approach to sentencing in s 54B(2) thus:

“The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.”

This provision is mirrored in s 5B(2)(a) and (3)(a) of the *Sentencing Act*.

### **“Objective factors affecting the relative seriousness of the offence”**

*Ayshow v R* [2011] NSWCCA 240, *MDZ v R* [2011] NSWCCA 243 and *Yang v R* [2012] NSWCCA 49

In one of the first cases to consider *Muldrock*, Johnson J said in *Ayshow v R* at [39]:

"To the extent that a question arises whether the Applicant's mental state at the time of the offence may bear upon objective seriousness (*Muldrock* at 1162–1163 [27], 1163 [29]), it remains a relevant factor on sentence in an assessment of moral culpability. Accordingly, if there is evidence to support a finding that an offender's moral culpability is reduced by a relevant mental condition, the offender is entitled to have it called in aid on sentence."

In *MDZ v R*, Hall J concluded (at [67]) that in light of *Muldrock* the mental condition of the offender at the time of the offence could be taken into account in the assessment of the objective seriousness of the offence.

Doubt was expressed in *Yang v R* about the correctness of these decisions on the basis that *Muldrock* appeared to overturn the holding in *Way* that such personal circumstances could be relevant to an assessment of objective seriousness. In the end, however, it was unnecessary to resolve the issue.

*Badans v R* [2012] NSWCCA 97

The Court of Criminal Appeal (Meagher JA, and Hoeben and Rothman JJ) in *Badans* took the view at [53] that *Muldrock* had established that the specification of the SNPP as the non-parole period for an offence in the midrange of objective seriousness required the court not to have regard to matters personal to a particular offender or class of offenders. The Court held that *Muldrock* had even gone so far as to exclude from the assessment of objective seriousness matters personal to the offender that were causally related to the commission of the offence.

*Williams v R* [2012] NSWCCA 172

In *Williams*, Price J confronted the issue of whether provocation was a matter personal to the offender that could not be taken into account in the assessment of objective seriousness. He concluded at [42]:

“The objective seriousness of an offence is to be determined wholly by reference to the ‘nature of the offending’. I do not think that the nature of the offending is to be confined to the ingredients of the crime, but may be taken to mean the fundamental qualities of the offence. In my view, where provocation is established such that it is a mitigating factor under s 21A(3)(c) *Crimes (Sentencing Procedure) Act*, it is a fundamental quality of the offending which may reduce its objective seriousness. It seems to me, that in those circumstances, there cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account.”

*McLaren v R* [2012] NSWCCA 284

In *McLaren*, the appellant contended that the trial judge had erred by having regard to the offender’s state of mind when assessing the objective seriousness of the offence. McCallum J at [28]-[29] held:

“The decision in *Muldrock* does not, however, derogate from the requirement on a sentencing judge to form an assessment as to the moral culpability of the offending in question, which remains an important task in the sentencing process. That this assessment is also sometimes referred to as the ‘objective seriousness’ of the offence perhaps contributes to the misconception. I do not understand the High Court to have suggested in *Muldrock* that a sentencing judge cannot have regard to an offender’s mental state when undertaking that task (as an aspect of his or her instinctive synthesis of all of the factors relevant to sentencing).”

*Subramaniam v R* [2013] NSWCCA 159

In *Subramaniam*, Latham J (Emmett JA and Simpson J agreeing) held that there was a distinction between attributes personal to the offender (which her Honour held to belong to an assessment of moral culpability) and “objective features of the offences” such as the acts and fault element constituting the offences. In so doing, Latham J acknowledged the decision of Price J in *Williams v R* on the issue of provocation but held that the mental state of the offender ought not be considered in an assessment of the objective seriousness of the offence.

*Elturk v R* [2014] NSWCCA 61 and *Cowan v R* [2015] NSWCCA 118

The appellant in *Elturk* had pleaded guilty to stealing a knife and wounding with intent to cause grievous bodily harm. There was evidence that he was mentally ill but he disavowed reliance upon that as a defence and pleaded guilty. The Crown applied to the District Court to have his pleas set aside because of the availability of the defence but the application was rejected. As a consequence of all of this, in sentencing the judge did not take into account the mental illness when determining the objective seriousness of the offence; confining its relevance to his subjective circumstances.

The Court of Criminal Appeal (per Beazley P) considered the decision of McCallum J in *McLaren* that an offender's mental state ought to be considered when assessing moral culpability. Her Honour found McCallum J's "analysis is, respectfully, not only correct, but aptly captures the relevance of moral culpability in the sentencing process." It was concluded that the sentencing judge had erred in determining that the appellant had waived his right to have his mental illness considered as a causal factor in the commission of the crime.

A similar conclusion was reached by the Court in *Cowan v R* at [60]-[63], where Bellew J said that taking into account and applying the principles relevant to sentencing a mentally ill offender formed part of the assessment of objective seriousness.

*Biddle v R* [2017] NSWCCA 128

In *Biddle*, two members of the Court in *Badans* (referred to above) appear to have departed from their statements of principle in that decision. In *Biddle* the appellant had been found guilty of murder and was sentenced to a lengthy period of imprisonment. The appellant contended that the trial judge had failed to properly take into account the appellant's mental impairment and intellectual functioning.

Hoeben CJ at CL held (Rothman and Price JJ agreeing) that the proposition that an offender's mental state should be taken into account when assessing objective seriousness is problematic. However, in light of the authorities since *Muldrock* his Honour held (at [68]) that the case law has followed the approach that an offender's mental condition, which must impact on moral culpability, is a matter to be properly taken into account.

*Yun v R* [2017] NSWCCA 317

The appellant in *Yun v R* was found guilty and sentenced for the offence of murder, a SNPP offence. He was re-sentenced following a successful appeal in 2008. In a further appeal it was contended that the Court had erred by resentencing in accordance with

Way, including by taking into account matters which were personal to the appellant when assessing the objective seriousness of the offending.

Latham and Bellew JJ, Campbell J agreeing, considered the High Court's distinction between "matters personal to a particular offender" on the one hand and matters affecting "the nature of the offending". The latter was said to be sufficiently broad to include the *mens rea* of the offender; it was "an integral part of the offender's conduct that constitutes the offence". On this basis, Latham and Bellew JJ held that it is incorrect to describe duress and provocation as personal characteristics of the offender which the court cannot take into account; the offender's mental condition is a critical factor affecting the objective seriousness of the offence.

Latham and Bellew JJ noted the divergence of authority between *Badans* and *McLaren* and concluded that in light of the authorities, it is now clear that the Court has determined that an offender's mental condition at the time of the commission of the offence is a critical component of "moral culpability" which in turn affects the assessment of objective seriousness. The Court dismissed the appeal.

### **Describing the relative level of objective seriousness by reference to "middle of the range"**

Before *Muldrock*, NSW courts took the view that sentencing for SNPP offences required the judge to specify where on a spectrum of objective seriousness the offence fell. In *R v McEvoy* [2010] NSWCCA 110, Simpson J (as her Honour then was) referred to a number of cases in which there had been discussion as to the degree of specificity necessary. She concluded (at [86]): "It would, in my view, be sufficient for a sentencing judge to indicate that a particular offence was significantly above or below mid-range, slightly above or below mid-range, or at the top or bottom of the range."

Before turning to some specific post-*Muldrock* cases it is worth noting the approach of the NSW Court of Criminal Appeal concerning the need for there to be an assessment of the objective seriousness of offences in all sentencing exercises. The approach is encapsulated in what was written by Simpson J in *R v Campbell* [2014] NSWCCA 102 at [27]:

"In my opinion, the assessment of objective seriousness is, and has always been, a critical component of the sentencing process: *R v Geddes* (1936) 36 SR (NSW) 554; *R v Dodd* (1991) 57 A Crim R 349; *Markarian v The Queen* [2005] HCA 25; 228 CLR 357; *Khoury v R* [2011] NSWCCA 118; 209 A Crim R 509 at [71]-[72]. These cases were all decided before judgment was given in *Muldrock v The Queen* [2011] HCA 39; 240 CLR 120. There is nothing in that judgment that cuts across the principle stated. *Muldrock*

exposed error in this Court in over emphasising the assessment of objective gravity in offences to which Pt 4 Div 1A of the Sentencing Procedure Act applies, of notional offences in the mid-range of objective seriousness. It does not preclude proper attention being paid to the objective seriousness of the particular offence under consideration: see, for example, *R v Koloamatangi* [2011] NSWCCA 288 per Basten JA.”

*R v Koloamatangi* [2011] NSWCCA 288

The offender Koloamatangi was convicted of several SNPP offences relating to a number of armed robberies. He was sentenced to a lengthy period of imprisonment in the District Court.

On appeal, the Court was required to consider the effect of *Muldrock* on the sentencing judge’s obligation to assess the objective seriousness of an SNPP offence. Basten JA considered whether the sentencing judge was required, permitted, or prohibited from classifying the particular offence by reference to a low, middle, or high range of objective seriousness pursuant to s 54A. Basten JA noted what the High Court had said in *Muldrock* at [25] and [29]: the judge is not obliged to classify the objective seriousness on a scale, but is required to place the offence in its statutory context. His Honour referred to his remarks in *R v Carlton* [2008] NSWCCA 244 at [90], where he held:

“The statutory language [in s 54A] does not require the determination of a low range, a middle range and a high range of seriousness: it envisages a single range and an offence in the middle of the range. ... As a practical matter, it must be accepted that the middle of a range of seriousness is not a precise point, nor is there any paradigm by which it can be identified.”

His Honour held that what the High Court had said in *Muldrock* was not at odds with these remarks and that the Court had not prohibited the conventional assessment of the objective offending according to a scale of seriousness (at [19]).

*Badans v R* [2012] NSWCCA 97

The appellant in *Badans* argued on an appeal against a sentence for a sexual assault offence that the sentencing judge had erred on a number of grounds. The Crown also appealed, relevantly, on the ground that the judge had fallen into *Muldrock* error by not placing the offence on a scale of objective seriousness.

Meagher JA rejected the Crown’s ground of appeal that the trial judge was required to assess and classify the objective seriousness of the offence relative to the “mid-range of objective seriousness of the offence”. Meagher JA at [55] held that *Muldrock* had repudiated this approach to sentencing.



Although it is likely that the conclusion reached by the Court in *Badans* as to the factors used to inform an assessment of objective seriousness (as above) has been overturned in *Yun v R* (see above), the judgment was not otherwise affected.

*Aldous v R* [2012] NSWCCA 153

The appellant in *Aldous* was convicted of wounding with intent to cause grievous bodily harm, an offence to which a SNPP applies. In sentencing the offender, the judge mentioned that the particular offence fell “slightly below the middle of the range” of objective seriousness. The judge therefore held that the SNPP did not apply but was still to be used as a legislative guidepost. The appellant contended that the sentencing judge fell into *Muldrock* error by expressing the sentencing reasons in a two-staged process: “The consequence of this finding is that the standard non-parole period of 7 years does not apply”.

The Court dismissed the appeal. Davies J, with whom Allsop P and Latham J agreed, held that although the judge had spoken in terms suggesting the sentencing process turned on whether the offence fell within a midrange to which a SNPP applied, the reasons as a whole showed that the judge had correctly referred to the SNPP as a guidepost. Davies J also held that, as in *Koloamatangi*, it was not incorrect to classify the offence on a scale of objective seriousness since *Muldrock*.

*Kertai v R* [2013] NSWCCA 252

The appellant was sentenced for having sexual intercourse with a child under 10. He appealed his sentence, arguing that the sentencing judge had fallen into *Muldrock* error by expressing a finding that the objective seriousness of the offence was “slightly below mid-range”. Mr Kertai argued that the degree of specificity in the judge’s reasoning was contrary to an instinctive synthesis approach in *Markarian*.

Hoeben CJ at CL disagreed. His Honour held that it is no error to express a finding of objective seriousness on a scale and that the sentencing judge had not engaged in a two-staged process. Rather, the judge had identified all factors relevant to sentence, evaluated their significance, and determined the appropriate sentence accordingly.

*Sharma v R* [2017] NSWCCA 85

The offender in *Sharma* was convicted of a number of assault and sexual assault offences to which a SNPP applied. The sentencing judge said that the offences were “serious offences of their type”. Unlike in *Kertai* and *Aldous*, the offender in *Sharma* argued on appeal that since *Muldrock* the judge was required to do more than simply state that the offences were “serious offences of this type”.

R A Hulme J, with Beazley P and Walton J agreeing, held that there is no requirement for a sentencing judge to rank the objective seriousness of the offences on a scale with reference to a middle range. Rather, a judge is required to “identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed” as per Muldrock at [29].

*Yeung v R* [2018] NSWCCA 52

The appellant in *Yeung* was convicted of a serious drug supply offence which carries a SNPP of 10 years. The appellant was also convicted alongside four co-offenders. In the sentencing judge’s remarks, the judge dealt with each offender’s level of seniority in the drug supply syndicate, ostensibly for the purposes of ranking the seriousness of their offending. The appellant contended that the judge had erred by failing to classify where on the scale of objective seriousness the appellant’s offending had fallen. Both parties made submissions which classified the seriousness vis-à-vis the “middle of the range” of objective seriousness.

McCallum J, with whom Hoeben CJ at CL and Simpson JA agreed, held that the decision in *Muldrock* and various other CCA authorities (such as *Lawson v R*; *Badans v R*; *Khoury v R*) mean that a sentencing judge is not required to articulate a determination placing the offence on a hypothetical scale. Her Honour held that a failure to label the objective seriousness of the offence will ordinarily not constitute an error; what is required is that the judge makes an assessment of objective seriousness. Her Honour concluded that although the sentencing judge did not attach a specific label to the offending, it is clear that his Honour undertook an evaluative assessment of the relevant factors affecting the objective seriousness of the offence.