

Sentencing since *Muldrock*

The impact of the High Court's decision on sentencing for standard non-parole offences in NSW

Introduction

The High Court handed down its unanimous decision in *Muldrock v R* (2011) 244 CLR 120 on 5 October 2011. The decision was unexpected and overturned 7 years of sentencing law on the meaning and application of standard non-parole periods (SNPPs) in NSW. The High Court ruled that *Way* had been wrongly decided and set out in seemingly clear and simple terms the manner in which SNPPs were to operate.

Nearly 18 months later, courts and lawyers are still coming to grips with some aspects of how sentencing for offences with an SNPP is to be undertaken and whether *Muldrock* has affected sentencing law more generally.

This paper seeks to set out which aspects of the law in this area appear settled, which remain to be clarified, and what the future may hold. It is intended as a practical guide to assist practitioners in understanding sentencing for offences for which a SNPP is specified. It is beyond the scope of this paper to explore the interesting area of appeals or reviews, in the light of *Muldrock*, of cases decided before that decision.

The paper is divided into three sections:

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3. What degree of specificity is required or permitted in making a finding about objective seriousness in a particular case?
4. Can "matters personal to a particular offender" be taken into account in assessing the objective seriousness of an offence subject to a SNPP
5. What are "matters personal to a particular offender" and what factors have been found to be relevant to an assessment of objective seriousness?
6. In practical terms, does it matter whether a particular factor relevant to the determination of a sentence is said to be relevant to the objective seriousness of the offence or a purely subjective factor?

C: What the future may hold

A: The settled principles:

1. The general principles in sentencing for SNPP offences

In *Biddle* [2011] NSWSC 1262, Garling J at [23] set out a concise and useful summary of the general principles applicable to sentencing for offences for which a SNPP is specified:

- (a)The effect of the s 54B(2), despite its apparently mandatory terms, is to preserve the full scope of judicial discretion to impose a non-parole period longer or shorter than a standard non-parole period: *Muldrone* at [25];
- (b)When read with s 21A, s 54B requires an approach to sentencing which is consistent with the judgment of McHugh J in *Markarian v The Queen* (2005) 228 CLR 357 at [51]: *Muldrone* at [26];
- (c)In considering all factors relevant to sentencing the Court must keep in mind the two legislative guideposts: the maximum sentence and the standard non-parole period: *Muldrone* at [27];
- (d)In giving content in a specific case to the statutory phrase "... *an offence in the middle of the range of objective seriousness ...*", the assessment is made without reference to matters personal to an offender or class of offenders, and is made by reference wholly to the nature of the offending: *Muldrone* at [27];
- (e)The standard non-parole period is not the starting point in sentencing for a mid-range offence after conviction: *Muldrone* at [31], nor does it have determinative significance in sentencing an offender: *Muldrone* at [32].

A number of judges of the Supreme Court, when sentencing at first instance, have adopted a form of words to the following effect, or very similar, which encapsulates the general requirements of sentencing for an offence involving a SNPP¹:

[7] In determining the appropriate sentence, I am not required to assess whether or not, having regard to the standard non-parole period, the offence is within the middle range of objective seriousness. Similarly, I am not required to commence by asking whether there are reasons for not imposing the standard non-parole period (see *Muldrone* (2011) 244 CLR 120 at [25]). The relevant statutory provisions, particularly ss 21A, 54B(2) and 54B(3) of the *Sentencing Act* require an approach to sentencing in which all of the relevant factors are identified and, having regard to all such factors, a determination reached as to the appropriate sentence (see *Muldrone* at [26], citing *Markarian* (2005) 228 CLR 357 at [51]).

As will be seen, aspects of how some of these principles are to be applied remain unclear.

¹*Dawson* [2012] NSWSC 1497 per Bellew J at [7].See also *Shamoun* [2012] NSWSC 716 per Bellew J at [67]; *Dannevig* [2012] NSWSC 1013 per Hall J at [1]; *Huon* [2012] NSWSC 1092 per Hall J at [5]; *Purtill* [2012] NSWSC 1475 per Harrison J at [2]

2. Reduced significance of SNPP

Following *Muldrick*, judges in a number of cases have made it clear that the significance of the SNPP in setting a sentence is reduced. This has been expressed in a number of ways. For example, in *Koloamatangi* [2011] NSWCCA 288 Basten JA, with whom Adams and Johnson JJ agreed, stated that “*Muldrick* weakens the link between the standard non-parole period and the sentence imposed in a particular case” (at [18]), referred to the “diminished role accorded the standard non parole period” (at [19]) and stated (at [21]) that:

“the standard non-parole period cannot have “determinative significance” - see *Muldrick* at [32] - nor even, as the Court also noted, much weight at all in circumstances such as those which arose in *Muldrick* itself”

It has been held to be reflective of error when a judge considered his or her sentencing discretion was “tethered to” the SNPP - *Williams* [2012] NSWCCA 172 per Price J at [33] (Allsop P and SG Campbell J agreeing).²

3. Sentencing as for other offences but with an additional guidepost

One of the most helpful observations in seeking to understand the general impact of *Muldrick*, is that of Latham J in *Murrell* [2012] NSWCCA 90 (McClellan CJ at CL and Harrison J agreeing) at [33-34]:³

[33] ... there is no difference in approach to the sentencing exercise as between standard non parole period offences and other offences, save that the standard non parole period for Part 4, Division 1A *Crimes (Sentencing Procedure) Act 1999* offences operates as a factor additional to other factors under s 21A of the same Act and additional to the maximum penalty for the offence: *Muldrick* at [26], 1162; *Koloamatangi* [2011] NSWCCA 288 at [10] to[13].

[34] That approach consists of:-

a complex but unitary (or integrated) process requiring consideration of all relevant factors in quantifying the sentence to be imposed. It is an evaluative assessment “based on indeterminate standards and human judgment”: *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [72] (McHugh J).

The difficulty, it will be seen, is in determining *how* to take into account the SNPP as an additional factor or guidepost since there is a necessity that “content be given to its specification as “the non-parole period for an offence in the middle of the range of objective seriousness”” (*Muldrick* at [27]).

²see also *PK* [2012] NSWCCA 263 per McCallum J at [52], Macfarlan JA and Price J agreeing and *DS* [2012] NSWCCA 159 per Beazley JA at [137], Harrison and McCallum JJ agreeing

³ See also *Foster* [2011] NSWCCA 285 at [31] per Adams J, who had made a similar observation

4. Likely increase in penalties where a SNPP has been specified

In *Muldrick* (at [31]) the High Court foreshadowed the possibility that non-parole periods for some SNPP offences might increase as a result of the introduction of the standard non-parole period:

[31]... It appears that for most, if not all, Div 1A offences, the standard non-parole period exceeds the mean non-parole period for the offence recorded in the statistics kept by the Judicial Commission of New South Wales in the period before the enactment of Div 1A[footnote omitted]. As the Court of Criminal Appeal correctly pointed out in *Way*, it is necessary to treat this circumstance with care. It may be, as the Court of Criminal Appeal observed in *Way*, that for some Div 1A offences there will be a move upwards in the length of the non-parole period as a result of the introduction of the standard non-parole period.

The court went on to explain the reason for the likely increase:

[31] ... This is the likely outcome of adding the court's awareness of the standard non-parole period to the various considerations bearing on the determination of the appropriate sentence. It is not because the standard non-parole period is the starting point in sentencing for a midrange offence after conviction.

[footnotes omitted]

Following *Muldrick*, this has been found to be so in at least one case in relation to the offence of cultivating not less than a commercial quantity of cannabis plants. In *Beveridge* [2011] NSWCCA 249 James J (at [27-28], with whom Bathurst CJ and Hoeben J agreed) considered an earlier, pre-*Muldrick*, decision by RS Hulme J in *Green and Quinn* [2010] NSWCCA 313 about that same offence, and said:

[27] In *Muldrick* the High Court recognised that the introduction of a standard non-parole period for an offence might have the effect of increasing non-parole periods ...

[28] Applying what was said by the High Court in *Muldrick*, I would agree with RS Hulme J's conclusion that the introduction of the standard non-parole period of ten years for the present offence indicates that Parliament intended that sentences for the offence should increase.

Presently the decision of *Beveridge* would appear to be limited to that particular offence but it is likely that such an intention would be found for any offences where it could be shown that the SNPP was set at a level significantly above what had been the mean or median non-parole period prior to the introduction of the particular SNPP.

5. Non-custodial sentences and very short non-parole periods

There is nothing to prevent, in an appropriate case, the imposition of a non parole period which is very short in comparison with the SNPP. (See *Muldrock* at [4].)

Nor has there ever been a proscription against the imposition of a non-custodial sentence for a SNPP offence. Since the introduction of SNPPs, section 54C of the *Crimes (Sentencing Procedure) Act 1999* has provided as follows:

54C Court to give reasons if non-custodial sentence imposed

- (1) If the court imposes a non-custodial sentence for an offence set out in the Table to this Division, the court must make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account.
- (2) The failure of a court to comply with this section does not invalidate the sentence.
- (3) In this section:

non-custodial sentence means a sentence referred to in Division 3 of Part 2 or a fine.

(For ease of reference, "a sentence referred to in Division 3 of Part 2" means any one of the following: community service order, s9 good behaviour bond, s10 dismissal or conditional discharge, s10A conviction, s11 remand or s12 suspended sentence).

In accordance with the pre-*Muldrock* understanding of the nature of SNPPs, in *Thawer* [2009] NSWCCA 158 Howie J (with whom Giles JA and Latham J agreed) interpreted s54C as requiring a court to

"explain why it is that, *despite the fact* that the offence falls within the provisions dealing with the standard non-parole period, a sentence without a non-parole period is being imposed"

(at [39]; emphasis added).

While not quite raising a presumption against the imposition of a non-custodial sentence, this decision appeared to raise a relatively high hurdle. Following *Muldrock*, and the lesser significance of SNPPs in the sentencing exercise, it might have been expected that the hurdle may be lowered somewhat. In the recent post-*Muldrock* case of *Dungay* [2012] NSWCCA 197 this appears to have happened. McCallum J, with whom Macfarlan JA and Grove AJ agreed, observed (at [31-33]):

[31] ... the decision in *Thawer* needs to be approached with some care. ...

[32] Those remarks [by Howie J] must now be viewed in the light of the decision in *Muldrock* [2011] HCA 39. In that decision, the High Court explained at [28] that the existence of a standard non-parole period for an offence does not require or permit the court to engage in a two-stage approach to sentencing, "commencing with an assessment of whether the offence falls within the middle range of objective seriousness in comparison with an

hypothesised offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period".

[33] In my view, it follows from the High Court's rejection of the two-stage approach that a judge will not fail to comply with s 54C simply by omitting to explain why it is that a sentence without a non-parole period is being imposed "despite the fact" that the offence carries a standard non-parole period. The significance of that statutory fact has been diluted since the decision in *Thawer*.

6. SNPPs and relative seriousness: *De Simoni*

Another aspect of the law of sentencing and SNPPs which also appears to be settled, following *Muldock*, relates to the principles in *The Queen v De Simoni* [1981] HCA 31; 147 CLR 383.

In *Cassidy* [2012] NSWCCA 68 it was held that, for the purposes of the *De Simoni* principles, where two offences have the same maximum penalty, but only one has a SNPP, the one with the SNPP is to be considered more serious. The case involved the fire-bombing of a house. The applicant had been sentenced for the offence of intentionally destroying property with intent to endanger life, contrary to s198 of the *Crimes Act* 1900. That offence carried a maximum penalty of 25 years imprisonment but had no SNPP. The sentencing judge was found to have breached the principles in *De Simoni* by taking into account the applicant's intention that the "the people inside the house would not get out alive". That the court's reasoning stemmed, at least in part, from *Muldock* is apparent from the judgment of Blanch J at [25-26] (with whom Basten JA and Beech-Jones J agreed):

[25] The court [in *Muldock*] further went on to say at [27] that in imposing the sentence the sentencing court will be "... mindful of two legislative guideposts: the maximum sentence and the standard non-parole period." The High Court observed at [31]:

It may be, as the Court of Criminal Appeal observed in *Way*, that for some Div 1A offences there will be a move upwards in the length of the non-parole period as a result of the introduction of the standard non-parole period. This is the likely outcome of adding the court's awareness of the standard non-parole period to the various considerations bearing on the determination of the appropriate sentence.

[26] In those circumstances in my view the offences under ss 27 to 30 which require an intent to kill and which have standard non-parole periods, are "more serious" within the meaning of that term in *De Simoni*.

It is suggested that the same reasoning would apply where two offences have the same maximum penalty but different SNPPs.

7. Juveniles, offences dealt with summarily and SNPPs

Before turning to the issues which flow from difficulties in the interpretation of *Muldrick* itself, there is one additional question about SNPPs which seems to be settled.

Section 54D provides that:

- (1) This Division does not apply to the sentencing of an offender:
 - (a) to imprisonment for life or for any other indeterminate period, or
 - (b) to detention under the *Mental Health (Forensic Provisions) Act 1990*.
- (2) This Division does not apply if the offence for which the offender is sentenced is dealt with summarily.
- (3) This Division does not apply to the sentencing of an offender in respect of an offence if the offender was under the age of 18 years at the time the offence was committed.

In relation to the sentencing of offenders who were juveniles at the time of offending it was held, pre-*Muldrick*, in *BP* [2010] NSWCCA 159; (2010) 201 A Crim R 379, that it was erroneous for a sentencing judge even to take into account the SNPP "as a guide". The "appropriate course is to place entirely to one side the standard non-parole period"⁴.

In *AE* [2010] NSWCCA 203, another pre-*Muldrick* decision involving a juvenile offender which was handed down a few months after *BP*, Basten JA, with whom Hall and Latham JJ agreed, made no reference to *BP*. He stated (at [23]) that:

his Honour's reference to the use of a standard non-parole period as a guideline or guidepost, giving an indication of the range of sentencing options, *while not erroneous*, is troubling. ... To use the standard non-parole period as a reference point in a case to which, by force of the statute, it has no application, is to risk misuse.

(emphasis added)

Basten JA went on to find that the sentencing judge had used the SNPP "as a factor indicating Parliament's intention as to the seriousness of such an offence, thereby justifying a higher sentence than might otherwise have been thought appropriate" (at [26]) and then held:

Given that the standard non-parole period was inapplicable, as a matter of law, and that the reason was the age of the offender, in my view that approach was erroneous in principle.

Following *Muldrick*, where the High Court made clear that the SNPP is a guidepost, akin to the maximum penalty, indicating the seriousness of an offence, it is likely that any reference to a SNPP where one is not applicable would be erroneous.

⁴ per Johnson J at [39], Hodgson JA and Rothman J agreeing on this issue

Since *Muldrock*, *BP* has been followed and/or cited with approval in a number of cases⁵. To the extent that there is any practical difference between the approaches in *BP* and *AE*, it is suggested that *BP* is likely to be correct since if the SNPP provisions are inapplicable, it is difficult to see how the SNPP could be taken into account in any way without error.

It is suggested that the same reasoning would apply to matters being dealt with summarily.

One interesting question, yet to be explored or resolved, arises from consideration of this issue with the previous one (see A.6 above). If a court cannot take into account the SNPP when dealing with a juvenile (or a matter being dealt with summarily), can it nevertheless use the existence of a SNPP for the purposes of the *De Simoni* principles?

⁵ See eg *AM* [2012] NSWCCA 203; *BT* [2012] NSWCCA 128

B: What remains to be clarified:

1. May, or should, courts make *some* finding about objective seriousness?

It is tolerably clear from the body of post-*Muldrick* cases that *Muldrick* does not, in relation to an SNPP offence, prevent a sentencing judge from making *some* assessment of the objective seriousness of an offence in coming to an appropriate sentence.

The issue was discussed at an early stage by Basten JA in *Koloamatangi* [2011] NSWCCA 288, where he observed (at [18]) that the High Court did not "suggest that a conventional assessment of the objective offending, according to a scale of seriousness, was to be eschewed."

Johnson J, in a dissenting judgement on the outcome of a Crown appeal in *Ehrlich* [2012] NSWCCA 38 at [86-87], analysed the issue further. In *Zreika* [2012] NSWCCA 44 at [45-46], with the concurrence of McClellan CJ at CL, he repeated that analysis:

[45] The High Court did not suggest that a conventional assessment of objective offending, according to a scale of seriousness, was to be avoided: *Koloamatangi* at [18]-[19].

[46] The process of instinctive synthesis to be undertaken by a sentencing court involves the sentencing judge identifying all the factors that are relevant to the sentence and then making a value judgment as to is the appropriate sentence in all the circumstances of the case: *Markarian* at [51]; *Muldrick* at [26]. Assessment of the objective gravity of an offence has traditionally been an essential element of the sentencing process: *Dodd* (1991) 57 A Crim R 349 at 354; *Khoury* [2011] NSWCCA 118 at [71]. It is an essential element of the process of instinctive synthesis, a purpose of which is the imposition of a proportionate sentence, which adequately punishes an offender: s.3A(a) *Crimes (Sentencing Procedure) Act 1999*.

In one of the most recent judgements on the topic, *Stewart* [2012] NSWCCA 183, Button J (with whom McClellan CJ at CL and Price J agreed) observed as follows:

[41] Since the decision of the High Court in *Muldrick*, the exercise of assessing the objective seriousness of the offence plays a lesser role in sentencing for standard non-parole period offences.

He went on to say:

However, I accept that it remains desirable for a sentencing judge, having reviewed the objective features of the matter in the remarks on sentence to the degree necessary, to make some assessment of the objective seriousness of the offence. In that regard, I respectfully agree with what Johnson J said in the passage extracted from *Ehrlich*.

The passage from Johnson J in *Ehrlich* to which Button J was referring was that which was repeated in *Zreika* and which is set out above. In that context, it seems clear that *some* assessment of the objective seriousness of an offence is permitted and desirable.

While it appears that it is permitted and desirable for a sentencing judge to make *some* finding of objective seriousness, it is yet to be determined whether it is a requirement. No case to date has cavilled with the broad proposition from *Zreika* (above) that "assessment of the objective gravity of an offence has traditionally been an essential element of the sentencing process". If that is correct, it is difficult to see how a judge could leave out this essential element altogether without error.

Perhaps consistently with this proposition, error was found in a post-*Muldrick* case, *GWM* [2012] NSWCCA 240 (per Johnson J, McClellan CJ at CL and Bellew J agreeing) when a judge made no attempt to assess the objective gravity of the offence beyond a "recital of the facts, accompanied by a passing reference to the "dreadful" nature of the offence" (at [63]).

There remain two other significant issues about the determination of objective seriousness which are yet to be settled. In *Stewart* (at [34]), Button J concisely identified them:

The first is whether features personal to an offender may be taken into account in assessing the objective seriousness of an offence that is subject to a standard non-parole period. The second is the degree of specificity with which a sentencing court should determine the objective seriousness of an offence that is subject to a standard non-parole period.

Before turning to those issues, it is important to bear in mind a more fundamental question which seems to have been touched upon in only a few cases.

2. What did the High Court in *Muldrick* mean by "objective seriousness"?

The question is essentially whether the "objective seriousness" referred to at [27] of *Muldrick* is some limited statutory concept or the general common law concept. The latter is often referred to as objective seriousness, objective gravity or objective criminality and is fundamental to the principle of proportionality.⁶

At this point it is helpful to review exactly what was said in *Muldrick*. Firstly, the High Court summarised the approach to SNPPs in *Way*, which it held to be erroneous, as follows:

[22] The Court of Criminal Appeal in *Way* took as its starting point that s 54B(2) is expressed in "mandatory terms". In order to give "sensible meaning" to sentencing for Div 1A offences the Court said that s 54B(2) is to be construed so as to include, as a reason for departing from the standard non-parole period, that the offence is outside the middle range of objective seriousness for such offences. This required the Court to determine what would constitute an abstract offence in the middle of the range of objective seriousness. In performing this task, the Court considered that the expression "objective seriousness" was not to be narrowly confined. Rather, it was to be understood as taking into account the physical acts of the offender and their consequences, together with circumstances personal to the offender that are causally connected to the commission of the offence. The Court instanced duress, provocation, robbery to feed a drug addiction, mental state (intention

⁶ See *McNaughton* [2006] NSWCCA 242

being more serious than recklessness), and mental illness or intellectual disability (where the latter are related to the commission of the offence) as such circumstances. These were to be distinguished from those more accurately described as circumstances of the offender and not of the offence.

(footnotes omitted)

Having held that *Way* was wrongly decided, in explaining the correct approach, the High Court then went on to say:

[27] Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness"[footnote omitted]. Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.

[31] ... The standard non-parole period represents the non-parole period for an hypothetical offence in the middle of the range of objective seriousness without regard to the range of factors, both aggravating and mitigating, that bear relevantly on sentencing in an individual case.

These passages are open to a number of possible interpretations. Firstly, at a minimum, it would seem that the High Court is saying that, in hypothesising "an offence in the middle range of objective seriousness", no regard is to be had to any personal characteristics of any hypothetical offender, but only to the nature of the hypothetical offending.

(The somewhat vexed question of which category particular factors fall into, including what is to be made of personal factors causally related to the offending, will be discussed later in the paper.)

Secondly, in order to use the SNPP as a guidepost, logically there may be a need to compare the case at hand, at least in a very broad sense, with the "hypothetical offence in the middle of the range of objective seriousness". The High Court might also therefore be seen as implying, in those passages, that any assessment of the objective seriousness of the particular offence before the court, *solely for the purposes of that comparison*, should be limited to the narrower range of factors. This interpretation may be seen as involving a particular statutory definition of "objective seriousness".

Thirdly, the High Court could be seen as indicating that any assessment of "objective seriousness", whether for the purposes of using the SNPP as a guidepost, or more generally as part of arriving at a sentence by instinctive synthesis, ought to be limited to the narrower range of factors. This interpretation involves the common law concept of objective seriousness.

Until very recently, there have been no clear attempts to articulate which of these possible interpretations of the High Court's meaning is to be preferred.

At a very early stage Basten JA (Adams and Johnson JJ agreeing) in *Koloamatangi* [2011] NSWCCA 288 at [18-19] discussed the general effect of *Muldrick* on the approach to SNPP offences:

[18] Perhaps because this Court in *Way* took the view that, where applicable and absent reason for departure, the standard non-parole period should be applied, it permitted a broad range of factors to be considered in determining the "objective seriousness" of the offence: at [84]-[86]. *Muldrick* weakens the link between the standard non-parole period and the sentence imposed in a particular case and limits the range of such factors: at [27].

[19] ... to treat the standard non-parole period as a guidepost requires that the phrase "the middle of the range of objective seriousness" must be given content: see [27]. Further, the Court recognised the need for a sentencing judge to maintain "awareness" of the standard non-parole period as an additional consideration bearing on the appropriate sentence: at [31]. That exercise must include reference to the statutory context for its consideration. Nor did the Court suggest that a conventional assessment of the objective offending, according to a scale of seriousness, was to be eschewed. The diminished role accorded the standard non-parole period is, in effect, a function of the fact that it involves an hypothetical offence, ascertained by reference to a limited range of considerations. ...

While observing that *Muldrick* limits the range of factors to be taken into account in determining "objective seriousness", Basten JA did not make clear whether he considered the term to have a limited statutory definition or a broader meaning.

In *Zreika* [2012] NSWCCA 44, Johnson J, with whom McClellan CJ at CL said:

[47] The judgment of the High Court in *Muldrick* has left somewhat opaque the meaning of the term "objective seriousness": *Koloamatangi* at [19]-[21]. Nevertheless, as subsequent decisions of this Court have stated, it remains part of a sentencing Judge's function to consider the objective gravity of the subject crime and the moral culpability of the offender: *Ayshow* at [39] ...

Once again, it is unclear whether Johnson J was intending to indicate that the objective seriousness referred to by the High Court in *Muldrick* at [27] has a statutory definition different from the common law meaning. The apparently deliberate choice of the phrase "objective gravity" instead of "objective seriousness" is perhaps consistent with such an intention. "Objective gravity" and "moral culpability" are referred to as two separate concepts.

In *GN* [2012] NSWCCA 96 Basten JA, with whom Blanch J agreed, also distinguished between objective seriousness and moral culpability:

[12] ... Usually, the "objective seriousness" of the offence is equated with the level of moral culpability of the offender. However, although the circumstances of the offence may justify the description of being "in the middle of the range of objective seriousness" for such an offence, in the language of s 54A(2) of the *Sentencing Procedure Act*, where the personal characteristics of the offender reduce the level of moral culpability, that description does not identify the level of moral culpability: see *Muldrift* at [54].

Again, however, there is no specific indication of whether the "objective seriousness" being referred to was a limited statutory one.

Button J in *Stewart*[2012] NSWCCA 183 at [35-37] (McClellan CJ at CL and Price J agreeing) appears to have interpreted *Muldrift* as referring to the common law concept of objective seriousness, since he considered that the approach to the assessment of objective seriousness is no different from before the introduction of SNPPs. (See the discussion of *Stewart* below at B.4)

More recently in *McLaren* [2012] NSWCCA 284, a decision handed down on 4 December 2012, McCallum J (with whom McClellan CJ at CL and Bellew J agreed) seems to have interpreted the High Court in *Muldrift* as attributing "objective seriousness" a particular statutory meaning:

[27] The appellant contends that his Honour's conclusion may now be seen to have entailed error in that the decision in *Muldrift* renders impermissible any consideration of the applicant's state of mind in assessing the objective seriousness of the offence at hand.

[28] In my view, that submission misconceives the effect of the decision in *Muldrift*. The phrase "objective seriousness" in *Muldrift* at [27] where it appears in the underlined sentence in the extract above^[7] refers specifically to the definition in s 54A(2) of the Act as to what a "standard non-parole period" denotes. That is the "concept" referred to in the previous sentence of that paragraph. The point there made by the High Court, as I would understand it, is that there is no sense in attempting to place the offence at hand (with all its features, including matters personal to the offender where relevant to an assessment of the nature of the offending) at a point along a purely hypothetical range which, of its nature, is ignorant of those matters.

[29] The decision in *Muldrift* 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 *Muldrift* 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).

⁷ The sentence underlined was, at [25] of *McLaren*: "The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders."

McCallum J seems to be distinguishing between the statutory concept of "the non parole period for an offence in the middle of the range of objective seriousness" and the broader concept of objective seriousness, which she refers to as "moral culpability". Unlike Basten JA in *GN* and, arguably, Johnson J in *Zreika*, McCallum J appears to equate objective seriousness with the concept of moral culpability.

Most recently, on 8 February 2013 in *Kaewklom (No. 3)* [2013] NSWSC 59, Johnson J at first instance in sentencing an offender explicitly referred to two separate concepts of "objective seriousness":

[98] Each offence carries a standard non-parole period so that the principles in *Muldrock* [2011] HCA 39; 244 CLR 120 should be kept in mind on sentence. The standard non-parole period is a guidepost to be taken into account, together with the maximum penalty as part of the instinctive synthesis process. The standard non-parole period refers to *the statutory concept of objective seriousness*.

[99] Both the Crown and Ms Manuell SC submitted that the murder offence fell within the mid-range of objective seriousness.

[100] With respect to the s.35(2) offence, the Crown submitted that the offence fell within the mid-range of objective seriousness and no contrary submission was advanced for the Offender.

[101] I accept the submissions of counsel concerning *the statutory concept of objective seriousness*.

[102] Counsel addressed matters bearing upon *the broader common law concept of the objective gravity* of the Offender's crimes.

(emphasis added)

At this stage, it is not clear whether or not Johnson J's interpretation will become more broadly adopted. One difficulty with this approach, from a practical point of view, is that it is likely to make sentencing for SNPP offences more complicated. A judge may be required to make two separate and often different assessments of the objective seriousness of an offence.

In *Kaewklom* itself, it can be seen from the passage above that Johnson J made a determination, in accordance with submissions from both parties, that in relation to the "statutory concept of objective seriousness" the offence "fell within the mid-range of objective seriousness". Johnson J then went on to discuss the "matters bearing upon the broader common law concept of the objective gravity of the Offender's crimes". Interestingly, however, he did not make a specific determination of what he found it to be.

3. What degree of specificity is required or permitted in making a finding about objective seriousness in a particular case?

Having considered at A.1 above the question of whether *some* finding about objective seriousness is permitted, the next question is the degree of specificity permitted or required and, in particular, whether the finding ought to be made by reference to the middle range of objective seriousness.

The uncertainty in this area stems from the following passages from *Muldrick* (at [25, 28-29], emphasis added):

[25] ... The court is not required when sentencing for a Div 1A offence to commence by asking whether there are reasons for not imposing the standard non-parole period *nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness.*

...

[28] Nothing in the amendments introduced by the Amending Act requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with *an assessment of whether the offence falls within the middle range of objective seriousness* by comparison with an hypothesised offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period.

[29] A central purpose of Div 1A is to require sentencing judges to state fully the reasons for arriving at the sentence imposed. The reference in s 54B(4) to "mak[ing] a record of its reasons for increasing or reducing the standard non-parole period" is not to be understood as suggesting either the need to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, *or the need to classify the objective seriousness of the offending.* It does require the judge 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 discussed at above, this has not been interpreted as meaning that courts must not undertake some assessment of the objective seriousness of an offence nor attempt to express that assessment by reference to some sort of scale of seriousness.

In *Koloamatangi*, one of the earliest cases in the NSWCCA following *Muldrick*, Basten JA (with whom Adams and Johnson JJ agreed), first identified the issue (at [19]):

[19] What remains in doubt, however, is whether the sentencing court is required or permitted to classify, or prohibited from classifying, the particular offence by reference to a low, middle or high range of objective seriousness. The statements at [25] and [29] indicate that the sentencing judge is not required to undertake such an assessment or classification. The statement at [28] indicates that it would be wrong to

adopt a two-stage approach which commenced with such an assessment and then sought reasons for departure. On the other hand, to treat the standard non-parole period as a guidepost requires that the phrase "the middle of the range of objective seriousness" must be given content: see [27].

In *Beveridge* [2011] NSWCCA 249 James J (with whom Bathurst CJ and Hoeben J agreed) seemed to indicate that there was no requirement to have any degree of specificity (at [18]):

[18] ... There is no suggestion in *Muldrock* that a sentencing judge is required to specify with precision the degree to which the objective seriousness of a particular offence departs from the objective seriousness of a notional mid-range offence.

Much more recently Button J, with whom McClellan CJ at CL and Price J agreed, in *Stewart* [2012] NSWCCA 183 (at [40]), did not find it necessary to

"delve more deeply into the question of the degree to which it is necessary for a sentencing court to determine the objective seriousness of the offence in order to permit the sentencing judge to treat the standard non-parole period as an effective guidepost."

In *Martin* [2013] NSWCCA 24, a decision published as recently as the 7th of this month, Beech-Jones J, with whom Bathurst CJ and Fullerton J agreed, said:⁸

[38] Prior to the High Court's decision in *Muldrock* [2011] HCA 39; 244 CLR 120, it was customary when imposing sentences for offences carrying a standard non-parole period to make some assessment as to where the particular offence stood in comparison with "the middle of the range of objective seriousness" as referred to in s 54A(2) of the Sentencing Act. Following the decision in *Muldrock* it is unclear whether such a classification is required, permitted, or prohibited (see *Koloamatangi* [2011] NSWCCA 288 at [19] per Basten JA).

Statements such as these indicate that the issue is unresolved and seem to imply that there is little guidance to be found. However a consideration of discussions of the issue in post-*Muldrock* cases and, in particular, of what was actually decided in a number of those cases may provide some indication of the approach to be taken.

There have been very many cases in which the issue has been canvassed. At one end of the spectrum is *Butler* [2012] NSWCCA 54 where Beazley JA (with whom Harrison and McCallum JJ agreed) said (at [25]):

[25] ... The offences were objectively serious but an assessment as to precisely where they lie in the hypothetical range is not required: see *Muldrock* [2011] HCA 39 at [25].

Much more recently in a similar vein, in *PK* [2012] NSWCCA 263, McCallum J (with whom Macfarlan JA and Price J agreed) said (at [25-26]):

⁸ Note: *Martin* did not involve a SNPP offence – see [39]

[25] ...For present purposes, it is enough to observe that, following *Muldrick*, whilst an assessment of the objective seriousness of the offending remains an essential aspect of the sentencing task, *the sentencing court need not, and arguably should not, attempt to quantify the distance between the actual offence before the court and a putative offence in the middle of the range*: see *Muldrick* at [29]. ...

[26] What has been emphasised in decisions since *Muldrick* is that it remains important to assess the objective criminality of the offending, which has always been an essential aspect of the sentencing process. In that context, the view has been expressed that there is no vice in doing so according to a scale of seriousness: *Zreika* [2012] NSWCCA 44 at [45] per Johnson J (citing *Koloamatangi* [2011] NSWCCA 288 at [18]-[19] per Basten JA); McClellan CJ at CL agreeing at [1]; Rothman J not addressing that point (see [128] to [130]). However, as I read *Muldrick*, *the usefulness of comparing the particular offence before the court with the hypothetical mid-point offence has been doubted*.

(emphasis added)

While this would seem to amount to a rejection of the practice of making a specific finding referable to the mid-range, upon a careful reading of the whole case it is not quite so clear. Later in the judgement, McCallum J found as follows (at [38]):

I am satisfied that it was open to the judge to make the finding he did, assessing the objective seriousness of the offending as being slightly above the midpoint of the range.

In *Ehrlich* [2012] NSWCCA 38 Adams J (with whom Basten JA agreed), appeared to criticise specific characterisation of an offence:

[23] ... her Honour ... decided it was necessary to "assess where the offence lies in terms of objective seriousness because it is an offence to which a standard parole period applies" and went on to conclude that the offence "lies in the middle of the range in terms of objective seriousness but very much towards the bottom of the middle of that range." This approach has been disapproved by the High Court of Australia in *Muldrick*.

On the other hand Johnson J, who was in dissent on the Crown appeal in that case, seems to have had no difficulty with the specificity of the characterisation:

[87] As this Court observed in *Koloamatangi* [2011] NSWCCA 288 at [18]-[19], the High Court did not suggest in *Muldrick* that a conventional assessment of objective offending, according to a scale of seriousness, was to be avoided. The sentencing Judge in the present case concluded that the Respondent's offence lay in the middle of the range of objective seriousness "but very much towards the bottom of the middle of that range".

At the other end of the spectrum from *Butler* and *PK* above is *Aitchison* [2012] NSWCCA 82 where Blanch J (with whom Basten JA and Hall J agreed) said (at [11]):

[11] The decision of the High Court in *Muldrick* (*supra*) does not mean that a sentencing judge should not assess the seriousness of the offence in the way judges have always done that - *Zreika* [2012] NSWCCA 44, *Koloamatangi* [2011] NSWCCA 288, *Ayshow* [2011] NSWCCA 240. In a case where there is a standard non-parole period that includes by reference to a notional case where the seriousness of the offence is mid-range.

(emphasis added)

In *Williams* [2012] NSWCCA 172 Price J (with whom Allsop P and SG Campbell J agreed), effectively held that there is nothing wrong with coming to a specific finding of objective seriousness relative to the mid-range, so long as it is part of a process of instinctive synthesis rather than of a two-step reasoning process (at [34-36]):

[34] The sentencing judge did, however, characterise the murder as being "just above the mid-range." In *Koloamatangi* [2011] NSWCCA 288, Basten JA (with whom Adams and Johnson JJ agreed), when discussing *Muldrick* observed at [19]:

"What remains in doubt, however, is whether the sentencing judge is required or permitted to classify, or prohibited from classifying, the particular offence by reference to a low, middle or high range of objective seriousness."

[35] It is clear that there is no need to "classify" the offending or assess whether it falls in the middle range of objective seriousness. It may also be accepted that a sentencing judge is to continue to assess the objective seriousness of the offence: *Muldrick* at [27]; *Koloamatangi* at [19]. ...

[36] It seems to me that her Honour's classification of the murder as being "just above the mid-range" does not expose error of the kind identified in *Muldrick*. My conclusion would be different if a consideration of all of the sentencing remarks revealed a two-stage approach or that the standard non-parole period had determinative significance in the sentence.

There are numerous other cases where there was found to be no error in the sentencing judge making a relatively specific finding of seriousness, many explicitly referable to the mid-range. Including the cases discussed above, the following types of findings have been held not to involve error:

- "slightly above the midpoint of the range"⁹
- "just above the mid-range."¹⁰
- "more than slightly below the middle of the range of objective seriousness"¹¹
- "'slightly below' the middle of the range of objective seriousness"¹²
- "moderately below the mid-range of objective gravity"¹³
- "towards a lower end of the middle of the range of objective seriousness"¹⁴

⁹ *PK* [2012] NSWCCA 263, McCallum J (with whom Macfarlan JA and Price J agreed) at [38]

¹⁰ *Williams* [2012] NSWCCA 172 Price J (with whom Allsop P and SG Campbell J agreed) at [36]

¹¹ *Aldous* [2012] NSWCCA 153 Davies J (with whom Latham J agreed) at [33-36]

¹² *Madden* [2011] NSWCCA 254 per Simpson J (with whom Whealy JA and Hislop J agreed) at [17], [35-36]

¹³ *RR* [2011] NSWCCA 235 per Johnson J (James J agreeing) at [133]

¹⁴ *Aoun* [2011] NSWCCA 284 per Johnson J (Basten JA and Adams J agreeing) at [66]

Similarly, in resentencing an appellant Johnson J in *Sheen* [2011] NSW CCA 259 (Hall and Price JJ agreeing) said (at [173]):

[173] To the extent that an opinion concerning the objective seriousness of the Appellant's crime should be expressed to allow the standard non-parole period to have some practical utility as a "*legislative guidepost*", I consider that this offence lay within the middle of the range of objective seriousness.

The cases above indicate that making a relatively specific finding of objective seriousness in comparison with the mid-range is probably *permitted*. It is far less apparent what degree of specificity is *required*. For example, in *Yuksel; Sirtlan* [2012] NSWCCA 84 Beech-Jones J (Whealy JA and Blanch J agreeing) held (at [25]):

[25] I do not consider that there was any error on his Honour's part in concluding that the offences were objectively serious, but were "towards the lower end of the scale of seriousness" or in not making any further findings as to the relative seriousness of the offences.

In summary, an impression may be gleaned from comments in some of the cases that the issue of whether, in making a finding of objective seriousness, any degree of specificity (including by reference to the middle range) is "required, permitted or prohibited" remains wide open. However an analysis of the actual decisions in post-*Muldrock* cases in the NSWCCA seems to reveal a moderately clear trend. In the recent sentencing decision of *Iskander* [2012] 1324, Davies J summarised the position succinctly:

[44] ... I note what was said in *Muldrock* [2011] HCA 39 at [17], [20], [25] - [27] and [29] concerning the way the standard non-parole period is to be dealt with. What remains unclear from *Muldrock* is whether any assessment should be made of where in the range of objective seriousness the offence lies: *Koloamatangi* [2011] NSWCCA 288 at [19]. In cases decided by the Court of Criminal Appeal since *Muldrock* the preponderant view appears to be that it is not an error to do so and may be helpful: *Beveridge* [2011] NSWCCA 249 at [10]-[18]; *Madden* [2011] NSWCCA 254 at [36].

4. Can “matters personal to a particular offender” be taken into account in assessing the objective seriousness of an offence the subject of a SNPP?

The answer to this question also remains elusive. There are two schools of thought: one which will be referred to as the narrower view – whereby matters personal to the offender may not be taken into account even if they are causally related to the offending. What will be referred to as the broader view permits causally related matters to be taken into account.

In March 2012, in the decision of *Yang* [2012] NSWCCA 49, RA Hulme J (with whom Macfarlan J and RS Hulme J agreed), set out the question and reviewed a number of cases:

[28] ... the High Court of Australia in *Muldrock* at [27] appears to have rejected the notion propounded in *Way* at [86] that matters personal to an offender, including a mental illness, can be said to affect the objective seriousness of an offence. I have said, “appears to have rejected”, because it has not been universally accepted.

[29] In *MDZ* [2011] NSWCCA 243, Hall J (Tobias AJA and Johnson J agreeing) stated:

[67] In my opinion, in light of the High Court’s judgment in *Muldrock* (above), it is open to conclude that the mental condition of the applicant at the time of the offence may bear upon the objective seriousness of the offences: *Muldrock* (above) at [27] and [29]. Certainly, in the present case, the sentencing judge, on the evidence, was required to expressly determine the moral culpability of the applicant in assessing the seriousness of the offences and in determining the appropriate sentences to be imposed in relation to them. In this case, the evidence required a finding that the applicant’s moral culpability was reduced by his mental health issues.

[30] In *Ayshow* [2011] NSWCCA 240 the point was referred to but not decided. Johnson J (Bathurst CJ and James J agreeing) said (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.

[31] There are first instance decisions that reflect different approaches. In *Biddle* [2011] NSWSC 1262 at [88], Garling J, with reference to *Muldrock*, specifically excluded from an assessment of the objective seriousness of the offence the offender’s mental health (an impaired capacity of the offender to control himself due to brain damage).

[32] The point is not entirely clear, with respect, in the approach taken by Harrison J in *Fahda* [2012] NSWSC 114. His Honour said:

[50] The objective seriousness of the offence is to be determined without reference to the personal attributes of the offender, but "wholly by reference to the nature of the offending": *Muldock* at [27]. However, such factors remain particularly relevant to any determination of the appropriate sentence to be imposed.

[33] Earlier, however, his Honour said:

[38] I accept that the offender suffered from post-traumatic stress disorder that was caused and evident prior to the commission of the offence and that this was associated with hyper-vigilance, paranoia, auditory hallucinations, depression and inverted sleep patterns. I also find that the offender was substantially impaired by an abnormality of mind arising from an underlying condition in the form of post-traumatic stress disorder or an anxiety disorder and a probable psychotic illness. I have taken all of this into account in mitigation of the objective criminality of the offence.

[34] In *Tran* [2011] NSWSC 1480 at [13], Rothman J took into account in an assessment of objective seriousness, "circumstances personal to the offender that are causally connected to the commission of the offence such as his state of mind". The "state of mind" he was speaking of does not appear to have been any mental condition. The case concerned a murder committed at a meeting between parties involved in an illicit drug transaction. The offender engaged another man (the actual killer) to provide protection because he was in fear of the deceased's notoriety for violence and it would appear that it was this that his Honour had in mind.

[35] In *Cotterill* [2012] NSWSC 89, McCallum J (at [30]) said that the assessment of the objective seriousness of the offence may include consideration of circumstances personal to the offender that are causally connected to the commission of the offence. Her Honour added that she did not understand *Muldock* to hold otherwise. It was concluded (at [45]) that the seriousness of the offence was mitigated by the offender's impaired control due to several psychiatric disorders.

[36] Finally, I note that in *Koloamatangi* [2011] NSWCCA 288 at [18], Basten JA said that *Muldock* limits the range of factors to be considered in determining the objective seriousness of the offence.

In *Yang* [2012] NSWCCA 49, it was found unnecessary to decide the issue. There have been a number of other cases since then where the issue has been discussed. As can be seen, the views and approaches to this topic remain divergent.

In *Badans* [2012] NSWCCA 97 Meagher JA, with whom Hoeben and Rothman JJ agreed, stated unambiguously:

[53] When taking into account the standard non-parole period it is necessary to note that it represents the non-parole period for an offence in the middle of the range of objective seriousness assessed without reference to matters personal to a particular offender or class

of offenders and therefore determined "wholly by reference to the nature of the offending": *Muldock* at [27], [31]. Such an assessment would not take account of circumstances personal to the offender even if they were causally related to the commission of the offence: cf *Way* at [86], [88], [99]; *Muldock* at [22].

(emphasis added)

[NB: This approach would seem to be consistent with a view of the term "objective seriousness" having a statutory definition as discussed at B.2 above.]

In *Taha* [2012] NSWSC 903 Latham J, when sentencing at first instance, opined at [19-20] that the issue of whether any "link between the offender's cognitive abilities and his offending ... may bear upon the assessment of the objective seriousness of an offence is yet to be resolved" and found it unnecessary to do so.

In *Stewart* [2012] NSWCCA 183 Button J, with whom McClellan CJ at CL and Price J agreed, noted (at [34]) that the question had been the first of two important subjects of debate in the Court of Criminal Appeal. Without indicating that the debate had been resolved, Button J appears to have proceeded on the basis that the narrow approach was correct:

[35] As for the first area of debate, in *Muldock*, the High Court stated at [27]:

"Section 54B(2) and (3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending." (footnotes omitted)

[36] In *R v Muldock; Muldock v R* [2012] NSWCCA 108 at [8], Allsop P (with whom Hoeben JA and Beech-Jones J agreed, Beech-Jones J delivering a separate judgment), determined the objective seriousness of the offence subject to re-sentence "*without reference to matters personal to a particular offender or class of offenders.*"

[37] In accordance with that recent decision of this Court, I proceed on the basis that features personal to the offender should not be taken into account in assessing the objective seriousness of an offence. That approach accords with sentencing practice before the statutory system of standard non-parole periods began in 2003. Furthermore, so long as sentencing is founded on instinctive synthesis, whereby all relevant objective and subjective features will be accorded appropriate weight, that approach disadvantages neither the Crown nor an offender.

The implication of equating the narrower approach with sentencing practice before the introduction of SNPPs would seem to be that this narrower approach to the assessment of objective seriousness applies more generally to all offences and not just those subject to an SNPP.

Most recently, in *Karen Dawson* [2012] NSWSC 1497, Bellew J in sentencing at first instance, adopted the broader approach and took into account a depressive illness as "relevant in the assessment of objective criminality" (at [37]).

On any view, matters personal to an offender which have *no* causal connection with an offence may not be taken into account. What remains to be resolved are:

- a) whether or not such factors which are causally connected with the offending may be taken into account; and
- b) Whether any apparent narrowing of the meaning of objective seriousness applies beyond SNPP offences.

The approach in the NSWCCA at this point, given *Badans*, *Muldrock* (re-sentence) and *Stewart*, appears to be perhaps tending towards the narrower view. Of particular importance, therefore, is the question of what constitutes a "matter personal to an offender".

5. What are "matters personal to a particular offender" and what factors have been found to be relevant to an assessment of objective seriousness?

There does not appear, in the cases, to have been an attempt to articulate a clear definition of the distinction between "matters personal to an offender" and matters relating to "the nature of the offending". As Button J observed in *Stewart* [2012] NSWCCA 183:

[38] It may be that, with regard to some features, the dividing line between classification of them as objective or subjective cannot be sharply drawn ...

The following is an attempt to identify from post-*Muldrock* cases the matters, or kinds of matters, which have clearly been regarded as in one or other category and what matters remain in doubt.

Some factors are obviously personal to an offender, some are obviously not and others could be seen as being near the "dividing line". Those near the line generally relate to the state of mind of the offender (eg intent, motive) or to something, such as planning, which is not immediately connected with the offence.

In many of the cases where a particular factor was taken into account in relation to objective seriousness, there was no indication of whether it was taken into account as something inherently part of "the nature of the offending" or as "matter personal to the offender" causally related to the offending. The fact that the previous question of whether or not causally related

personal matters may be taken into account remains unresolved makes it difficult find a meaningful answer to this one.

Factors which are clearly purely subjective and irrelevant to the nature of the offending

Firstly, any factor which has no possible causal link with the offending would fit into this category (see *Muldruck* at [19]). Such factors include:

- a. That the sentence may be served under conditions of segregation¹⁵;
- b. That imprisonment will be particularly burdensome because of the offender's physical condition¹⁶;
- c. A plea of guilty¹⁷;
- d. Criminal history (or lack of)¹⁸;

It is suggested that any factor, such as being subject to conditional liberty,¹⁹ which was considered irrelevant to objective seriousness even under the previous approach in *Way* would clearly remain irrelevant. To that extent, some of the cases decided under the pre-*Muldruck* understanding of SNPPs may remain of assistance.

Factors which have been considered to be part of the nature of the offending

Clearly matters directly involving the physical commission, and circumstances, of the offence, such as the level of violence, being in company, using weapons, the extent of injuries, the age and vulnerability of the victim and so on, form part of the nature of the offending.²⁰ Somewhat less straightforward are matters relating to the mental state or motive of the offender and matters such as planning and premeditation.

At this stage, one such factor – provocation - has been found to be directly relevant to the nature of the offending. In *Williams* [2012] NSWCCA 172 Price J (with whom Allsop P and SG Campbell J agreed), said at [42]:

[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

¹⁵ *Muldruck* at [19]

¹⁶ *Muldruck* at [19]

¹⁷ *Yuksel; Sirtlan* [2012] NSWCCA 84 at [25]

¹⁸ *Yuksel; Sirtlan* [2012] NSWCCA 84 at [25]; See also *McNaughton* [2006] NSWCCA 242 at [24]

¹⁹ See *Way* at [92]; *Hillier v DPP* [2009] NSWCCA 312

²⁰ See eg *PK* [2012] NSWCCA 263 at [27-36]; *Essex v R* [2013] NSWCCA 11 at [44-45]; *Iskandar* [2012] NSWSC 1324 per Davies J at [45-46]

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.

This passage was cited in passing without criticism by Button J (McClellan CJ at CL and Price J agreeing) in *Stewart* [2012] NSWCCA 183 at [38] as an example of an exercise in classification illustrating that the "dividing line ... cannot be sharply drawn".²¹

In a number of other cases, provocation has been taken into account in assessing objective seriousness without specification of whether it was a subjective matter causally linked to the offending or a "fundamental quality of the offending".²²

Factors which have been held to be personal matters possibly causally connected to offending

The following factors have been held to be subjective factors which might be causally connected to the particular offending:

- a. Mental illness and developmental disability;²³
- b. A need for drugs²⁴;
- c. Being affected by drugs or alcohol²⁵;

In the case of mental illness and developmental disability, there is no suggestion in any of the cases that these are not "personal matters". However, as discussed in the previous section, there is a divergence of opinion about whether or not they may be taken into account in determining objective seriousness when causally connected with the offending.²⁶

In relation to the latter two factors, they were considered in cases where the narrower approach was taken so they were not taken into account in assessing objective seriousness.

To this list might be added the somewhat unusual case of *Tran* [2011] NSWSC 1480, discussed by RS Hulme J in the extract from *Yang* [2012] NSWCCA 49 cited above (see B.4). In that case Rothman J identified the offender's mental state as a circumstance "personal to the offender" and took it into account as "causally connected to the commission of the offence". As RS Hulme J points out, it would seem that the state of mind referred to was the offender's "fear of the

²¹ See also *Willmott* [2012] NSWSC 824 per Price J at [9] where he largely re-iterated what he said in *Williams*

²² *Fahda* [2012] NSWSC 114 per Harrison J at [30]; *Willmott* [2012] NSWSC 824 per Price J at [9];

Dawson [2012] NSWSC 1497 per Bellew J at [36]; see also *Purtill* [2012] NSWSC 1475 per Harrison J at [30-34; 60-67]. It would appear that there are currently no decisions of the Court of Criminal Appeal or the Supreme Court where a contrary view has been expressed

²³ See the cases discussed in *Yang* [2012] NSWCCA 49 and those following *Yang*, set out above at B.4.

²⁴ *Holohan* [2012] NSWCCA 105 at [67]

²⁵ *Stewart* [2012] NSWCCA 183 at [27] – given that these factors were categorised under the heading "subjective features"

²⁶ See footnote 23 above

deceased's notoriety for violence" in a context where the offender "engaged another man (the actual killer) to provide protection" in relation to a drug deal.²⁷

Other factors relevant to objective seriousness where the basis is unclear

A number of other factors have been found to be relevant to the assessment of the objective seriousness of the offence. The court in these cases did not explicitly specify whether or not the matter was considered intrinsically part of the nature of the offending or whether they were taken into account as personal matters causally related to the offending.

The factors identified so far are:

- a. The nature of intent (eg to kill or cause GBH)²⁸ or recklessness²⁹;
- b. Planning or premeditation³⁰;
- c. Grooming of child victims³¹;
- d. Committing an offence for sexual gratification³² or to act out a sexual fantasy³³;
- e. Isolated offence³⁴;

To this list might possibly be added financial gain³⁵, but it is not clear whether or not that factor was taken into account as part of the assessment of the objective seriousness of the offence or more generally.

²⁷ See *Yang* [2012] NSWCCA 49 at [34]

²⁸ *Amos* [2012] NSWSC 1021 per Hall J at [57]; *Huon* [2012] NSWSC 1092 per Hall J at [97-98]; *Iskandar* [2012] NSWSC 1324 per Davies J at [45-46]; *Purtill* [2012] NSWSC 1475 per Harrison J at [30-34]

²⁹ *PK* [2012] NSWCCA 263 at [27-36]

³⁰ *PK* [2012] NSWCCA 263 at [27-36]; *Yuksel; Sirtlan* [2012] NSWCCA 84 at [25] – by necessary implication: *Purtill* [2012] NSWSC 1475 per Harrison J at [30-34]

Note: in *Amos* [2012] NSWSC 1021 Hall J at [59-60] appeared to question, but not disavow, the relevance of premeditation after *Muldrock*. When citing a pre-*Muldrock* authority for the relevance of premeditation to objective seriousness he said (at [60]): "That case was decided before the High Court's decision in *Muldrock* (supra) so that statement as to the objective seriousness and absence of premeditation must be considered with that in mind."

³¹ *Essex* [2013] NSWCCA 11 at [46];

³² *Essex* [2013] NSWCCA 11 at [49];

³³ *PK* [2012] NSWCCA 263 at [27-36]

³⁴ *PK* [2012] NSWCCA 263 at [27-36]

³⁵ *Amos* [2012] NSWSC 1021 per Hall J at [63], [68]

6. In practical terms, does it matter whether a particular factor relevant to the determination of a sentence is said to be relevant to the objective seriousness of the offence or a purely subjective factor?

The short answer to this question, according to some the cases, appears to be "no".

In *Yang* [2012] NSWCCA 49 RA Hulme J, with whom Macfarlan J and RS Hulme agreed, found that it was not necessary to decide whether or not mental illness can be taken into account in determining the objective seriousness of an offence. He then went on to say:

[38] That is not to say that an assessment of the applicant's moral culpability was irrelevant. If her moral culpability was reduced for the reasons advanced under this ground, it would have been necessary for the judge to assess its significance, along with all other relevant factors, in making a judgment as to the appropriate sentence to impose: *Markarian* [2005] HCA 25; (2006) 228 CLR 357 at 351 [51].

Latham J, sentencing at first instance, observed in *Taha* [2012] NSWSC 903:

[19] ... the offender's case on sentence consisted of evidence from his mother and psychological evidence that sought to draw some link between the offender's cognitive abilities and his offending.

[20] Before turning to that evidence, I should observe that the question whether such matters may bear upon the assessment of the objective seriousness of an offence is yet to be resolved: *Muldrock* [2001] HCA 39; *Zreika* [2012] NSWCCA 44. It is not necessary that I resolve that controversy. The offender's cognitive function is part of his subjective circumstances. It may reduce his moral culpability for the offence, it may reduce the role of general and/or specific deterrence in the sentencing exercise and it may render his term of imprisonment more onerous. Whether it does any or all of those things depends upon the nature and severity of the alleged condition. The point is that, provided that it is factored into the sentencing exercise, it allows for the imposition of a sentence that is commensurate with both objective and subjective circumstances.

In *Williams* [2012] NSWCCA 172 Price J, with whom Allsop P and SG Campbell J agreed, after coming to his conclusion that provocation was not a "matter personal to the offender" (see above), went on to say:

[43] Notwithstanding this discussion, I am far from certain that, after *Muldrock*, whether proven provocation is taken into account in assessing the objective seriousness of the offence or as a matter personal to a particular offender, that there will be any practical impact upon the ultimate sentence.

Finally, in *Stewart* [2012] NSWCCA 183 Button J, with whom McClellan CJ at CL and Price J agreed, stated:

[37] In accordance with that recent decision of this Court, I proceed on the basis that features personal to the offender should not be taken into account in assessing the objective seriousness of an offence. That approach accords with sentencing practice before the statutory system of standard non-parole periods began in 2003. Furthermore, so long as sentencing is founded on instinctive synthesis, whereby all relevant objective and subjective features will be accorded appropriate weight, *that approach disadvantages neither the Crown nor an offender.*

(emphasis added)

These appear to be different ways of saying the same thing. Whether a factor is taken into account in assessing the objective seriousness of the offence or only in the mix of factors relevant to determination of the ultimate sentence may make little difference to the actual sentence imposed.

As a matter of logic, in most cases this would seem to be so. If, for example, an offender's mental illness or intellectual disability has a causative link with offending this will almost inevitably reduce his or her moral culpability and the ultimate sentence will be reduced. The significance of any standard non parole period is likely to be greatly diminished and the need for punishment, retribution, denunciation, general deterrence and specific deterrence will also be likely to be reduced. (See *Muldock* at [32], [53-54]).

If the narrower approach to the taking into account of personal matters is adopted (see B.4 above), but only in relation to a statutory definition of objective seriousness in relation to SNPP matters (see B.2 above), then this would seem unlikely to make any difference to particular sentences. This is because the guidepost is just another factor in the mix in the process of instinctive synthesis.

However it may be that if, as Button J seems to imply in *Stewart* [2012] NSWCCA 183, the narrower approach applies to the common law concept of objective seriousness, then whether or not a matter is taken into account in determining the objective seriousness of an offence may make a difference to the ultimate sentence. That is because the objective seriousness of an offence sets both the upper and lower boundaries of a proportionate sentence - *McNaughton* [2006] NSWCCA 242 per Spigelman CJ at [15], [24].

Having said that, in *McNaughton* Spigelman CJ (at [29]) agreed with an earlier observation by McClellan CJ at CL, concerning differing views about whether criminal history can be relevant to objective seriousness. McClellan CJ at CL had said that the different approaches were unlikely to be of practical significance when determining an actual sentence.

C: ***What the future may hold***

Since the High Court's decision in *Muldrock*, there have been about 90 cases in the Court of Criminal Appeal and over 30 in the Supreme Court at first instance in which *Muldrock* has been discussed or applied.

At the time of writing, a decision of a 5 judge bench of the Court of Criminal Appeal in *Achurch*, reserved since 4 December 2012, is yet to be handed down. It is anticipated that decision might provide some further guidance. However, there is a prospect that it will be limited to the issue of whether or not s 43 of the *Crimes (Sentencing Procedure) Act 1999* may be used to correct "*Muldrock* errors" in pre-*Muldrock* cases.

Since well before *Muldrock*, the SNPP scheme has been under review. On 30 March 2009 the Sentencing Council was asked to review the SNPP regime. On 23 September 2011, about two weeks before the *Muldrock* decision, the Law Reform Commission (LRC) was asked to conduct a review of the *Crimes (Sentencing Procedure) Act 1999* with a particular focus on SNPPs. The Sentencing Council and LRC were encouraged to collaborate and the Council published its "Background Report on Standard Non-parole Periods" in November 2011. The Council raised questions and considered a number of issues but, in the light of the anticipated report by the LRC, made no recommendations.

In May 2012 the LRC published Report 134 entitled "Sentencing: Interim report on standard minimum non-parole periods". The LRC considered 6 options for the reform of the SNPP scheme, ranging from abolition and/or replacement of the scheme to a "wait and see" approach involving monitoring and analysis of how the application of *Muldrock* would be "worked out by the CCA".

The option it recommended was "Option 2". This option involved the "wait and see" approach but with interim legislative clarification of some aspects of the interpretation of *Muldrock*. The principal purpose of the suggested interim amendment would be to clarify that "matters personal to an offender which are causally connected with, or materially contributed to the commission of the offence" would be taken into account in determining the objective seriousness of an offence. (Report 134, [2.67-69])

At this stage there is no indication of which, if any, of the LRC's recommendations are being favourably considered by government or whether there is any likelihood of legislative reform of the SNPP scheme.

Conclusion

Pending definitive clarification by the Court Criminal Appeal, or legislative reform, or both, the operation of some aspects of the SNPP scheme remain to be resolved.

What is apparent is that the SNPP scheme is likely to continue to contribute increases in sentences compared with before its introduction, although to a much lesser extent than under *Way*.

In most cases, *Muldrock* is likely to be seen to have freed judges from what could be viewed as a somewhat restrictive and formulaic previous understanding of how the SNPPs worked. Despite the lack of clarity in a number of important aspects of the concept of objective seriousness, it may be

that, so long as judges take relevant matters into account in a process of instinctive synthesis, the differences in approach will make no practical difference to the actual sentences imposed.

Where this is the case, prospective appellants may run up against s6(3) of the *Criminal Appeal Act* 1912 in that it may be difficult to persuade the Court of Criminal Appeal that some lesser sentence is warranted in law.

If that proves to be so, the answers to the unresolved questions about *Muldrock* may be a long time coming.

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12 March 2013

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