SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2022 0168

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

BRANDON SILIVAAI — Respondent

JUDGES:	KYROU, T FORREST and KENNEDY JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	24 January 2023
DATE OF JUDGMENT:	17 February 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 19
JUDGMENT APPEALED FROM:	DPP v Silivaai (County Court, Judge Blair, 26 October 2022)

CRIMINAL LAW – Sentence – Crown appeal – Causing injury recklessly – Related summary charge of assaulting emergency worker on duty and related summary charge of resisting emergency worker on duty – Respondent sentenced to 7 days' imprisonment on causing injury recklessly charge and 6 months aggregate community correction order (with 50 hours unpaid community work) on 2 related summary charges – Whether error of law in finding substantial and compelling circumstances that are exceptional and rare under s 10A(2)(e) of *Sentencing Act 1991* – Not open to judge to find substantial and compelling circumstances that are exceptional and rare – Ground of appeal established.

CRIMINAL LAW – Sentence – Crown appeal – Residual discretion to dismiss appeal notwithstanding finding of error – Whether Court should exercise residual discretion – Respondent completed 7 days' imprisonment and part of community correction order – Residual discretion exercised – Appeal dismissed.

WORDS AND PHRASES – 'substantial and compelling' – 'exceptional and rare' – *Sentencing Act 1991* s 10A(2)(e).

Sentencing Act 1991 ss 10A(2)(e), 10AA(4) referred to.

DPP v Hudgson [2016] VSCA 254; *DPP v Lombardo* [2022] VSCA 204; *Bugmy v The Queen* (2013) 249 CLR 571; *R v Verdins* (2007) 16 VR 269; *DPP v Bowen* (2021) 65 VR 385 referred to.

Counsel

Appellant:	Mr BF Kissane KC with Mr L McAuliffe
Respondent:	Mr J Gullaci SC with Mr J O'Connor

Solicitors

Appellant:	Ms A Hogan, Solicitor for Public Prosecutions
Respondent:	Marco Man & Associates

KYROU JA
T FORREST JA
KENNEDY JA:

1 On 16 June 2022, the respondent pleaded guilty in the County Court to one charge of causing injury recklessly, one summary charge of assaulting an emergency worker on duty and one summary charge of resisting an emergency worker on duty. On 26 October 2022, a judge of that Court sentenced the respondent as follows:

Charge	Offence	Max Penalty	Sentence	Cumulation
1	Cause injury recklessly (*Crimes Act 1958*, s 18)	5 years	7 days	N/A
Related Summary Offences				
5	Assault emergency worker on duty (*Summary Offences Act 1966*, s 51(2))	6 months	Aggregate, community correction order (CCO) of 12 months (with 50 hours of unpaid community work)	N/A
6	Resist emergency worker on duty (*Summary Offences Act 1966*, s 51(2))	6 months		N/A
Total Effective Sentence:		7 days' imprisonment and a CCO of 12 months		
Non-Parole Period:		N/A		
Pre-sentence Detention		N/A		
Section 6AAA Statement:		Total effective sentence of 6 months' imprisonment and a CCO of 12 months (with the same terms and conditions)		

2 The appellant has appealed against the sentence on a single ground expressed as follows:

> The learned sentencing judge erred at law in finding that there were substantial and compelling circumstances that are exceptional and rare under s 10A(2)(e) of the *Sentencing Act 1991* (Vic) that justified a finding under s 10AA(4) of the *Sentencing Act 1991* (Vic) that a special reason existed so as not to impose a term of imprisonment of not less than 6 months in relation to Charge 1 …

3 The substance of the appellant's contentions is that the sentence on charge 1 (7 days' imprisonment) was not open to her Honour given the effect of ss 10A(2)(e) and 10AA(4) of the *Sentencing Act 1991* ('Act'). The appellant contends that the effect of these provisions in the particular circumstances of this case was to compel the judge to impose a prison sentence on charge 1 of not less than 6 months.

Background

4 The background to the relevant offending can be stated shortly. At about 1.30 am on 21 November 2021, two police officers (Constables Miller and Jones) attended the scene of an altercation in Malvern Road, Prahran. They observed a young man behaving erratically and becoming aggressive towards police. This young man was the respondent's 17 year old brother.

5 A number of other police officers were present, including Senior Constable Stone who was assisting in controlling a small crowd which had developed around the altercation. The respondent approached the altercation and was told by Senior Constable Stone to move away. He ignored the instruction, forcefully pushed the arm of another officer (Constable Hale) and pushed heavily into the back of Constable Binns (summary charge 5: assault emergency worker on duty).

6 The respondent then threw punches at various police officers, one of which connected with Senior Constable Stone dislodging his glasses and face mask. Unsurprisingly, Senior Constable Stone then attempted to restrain the respondent who, in the struggle, put a finger in Senior Constable Stone's mouth and then in his eye. It was described in the summary of prosecution opening for plea as a 'gouge' which caused 'immediate pressure on his right eye' (charge 1: recklessly causing injury). A number of other police officers attempted to restrain the respondent who at times used phrases such as 'that's my fucking brother', 'let's go you pussies' and 'your mum's a pussy'. Constable Hale wrapped his arms around the respondent's legs and made contact with the asphalt road surface as the respondent continued to struggle (summary charge 6: resisting emergency worker on duty).

7 Senior Constable Stone attended hospital and his right eye was assessed. In all, he sustained abrasions to his right elbow, pain, superficial abrasions to his right lower eye lid, mild peri-orbital soft tissue swelling and a small mucosal blister to his mouth.

Statutory framework

8 The offence of recklessly causing injury when committed against an emergency worker on duty is a 'category 1 offence',[1] with the consequence that the court must make a custodial order under div 2 of pt 3 of the Act.[2]

9 The penalty for this offence when it is committed against an emergency worker on duty is further overlaid by statute. Section 10AA(4) of the Act relevantly provides as follows:

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1 Section 3(1) of the Act (definition of 'category 1 offence').
2 Section 5(2G) of the Act.

> In sentencing an offender (whether on appeal or otherwise) for an offence against section 18 of the *Crimes Act 1958* committed against an emergency worker on duty … a court must impose a term of imprisonment of not less than 6 months unless the court finds under section 10A that a special reason exists.

10 The Act defines what will qualify as a special reason and specifies what the court may and may not take into account in deciding whether a special reason exists. Section 10A relevantly provides as follows:

> (2) For the purposes of section ... 10AA ... a court may make a finding that a special reason exists if—
>
> ...
>
> (e) there are substantial and compelling circumstances that are exceptional and rare and that justify doing so.
>
> …
>
> (2B) In determining whether there are substantial and compelling circumstances under subsection (2)(e), the court—
>
> (a) must regard general deterrence and denunciation of the offender's conduct as having greater importance than the other purposes set out in section 5(1); and
>
> (b) must give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence; and
>
> (c) must not have regard to—
>
> (i) the offender's previous good character (other than an absence of previous convictions or findings of guilt); or
>
> (ii) an early guilty plea; or
>
> (iii) prospects of rehabilitation; or
>
> (iv) parity with other sentences.
>
> (3) In determining whether there are substantial and compelling circumstances under subsection (2)(e), the court must have regard to—
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> ...
>
> (ab) the Parliament's intention that a sentence of imprisonment of not less than 6 months should ordinarily be imposed for an offence covered by section 10AA(4); and
>
> ...
>
> (b) whether the cumulative impact of the circumstances of the case would justify a departure from that sentence …

(4) If a court makes a finding under subsection (2), it must—

(a) state in writing the special reason; and

(b) cause that reason to be entered in the records of the court.

(5) The failure of a court to comply with subsection (4) does not invalidate any order made by it.

11 The statutory language thus prescribes two 'key steps' in the inquiry under consideration. First, the court must identify whether there are 'substantial and compelling circumstances.' These will be circumstances that are 'weighty and forceful or powerful.'[3] In *Lombardo*,[4] this Court said '[t]he issue is whether the circumstances are substantial and compelling so as to justify not imposing a custodial sentence. That is the criterion by which the substance and compulsive force of the circumstances are to be assessed.'

12 The second step in the process, assuming the circumstances have been assessed as 'substantial and compelling', asks whether the circumstances are also 'exceptional and rare.' This second step imposes a single composite test, as there is obviously great overlap between the words 'rare' and 'exceptional.'[5] A separate test asking first whether something is exceptional and then whether it is rare would be redundant. Instead, the two words operate together and each influences the meaning of the overall phrase.[6]

13 In *Lombardo*, the Court said that the expression 'exceptional and rare' requires circumstances that are wholly outside 'run of the mill' factors typical of the relevant offending.[7] The Court noted that this interpretation is consistent with case law, such as *Hudgson*.[8]

The judge's reasons

14 The judge noted that the victim of the offending the subject of charge 1 was an emergency worker on duty,[9] and that the maximum penalty that applied to that charge was 5 years. Her Honour stated that she was satisfied 'to the requisite degree' that the respondent knew or was reckless as to whether the victim was an emergency worker.

15 The circumstances of the offending were then summarised. It is unnecessary to repeat these.

16 The respondent's background was then set out by her Honour:

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3 *Farmer v The Queen* [2020] VSCA 140, [47]-[50] (Maxwell P, Kaye and Niall JJA); *DPP v Hudgson* [2016] VSCA 254, [112] (Weinberg, Whelan and Priest JJA) (*'Hudgson'*); *DPP v Lombardo* [2022] VSCA 204, [66] (McLeish, Niall and Kennedy JJA) (*'Lombardo'*).

4 [2022] VSCA 204, [66].

5 Ibid [66]-[67].

6 Ibid [67] (McLeish, Niall and Kennedy JJA).

7 Ibid [58], [63], [70].

8 [2016] VSCA 254.

9 As defined by subss 10AA(8) and (9) of the Act.

(a) The respondent was 21 years old at the time of offending and 22 at the time of sentence.

(b) He has no prior or subsequent criminal history.

(c) He is the oldest of three brothers in the family.

(d) In his early childhood, he witnessed significant physical abuse inflicted by his father upon his mother.

(e) One episode of this nature led to the lengthy imprisonment of his father.

(f) As a child, he blamed himself for his father's imprisonment and the imprisonment had a significant distressing impact upon him (the respondent). He was required to provide a VARE statement as to the events he had witnessed.

(g) He completed VCE, although his exams were unscored as he was focussed on sporting activities.

(h) He has worked productively since leaving school and remains employed casually as a labourer with a scaffolding company.

(i) He lives with his partner Jade and his one year old daughter Jaydee. He is the main breadwinner. Testimonies were tendered that spoke highly of his parenting and character more generally.

(j) Subsequent to the offending, he has moderated his drinking habits.

(k) A psychological report, ordered from Forensicare, was provided to the Court. The report concluded that the respondent does not suffer from PTSD, but he has had two periods of lowered mood, the last of which occurred some five years before the offending.

17 The judge assessed the gravity of the offending at the lower end of the spectrum for offending of this kind because: it was of a short duration, unplanned, spontaneous and reactive; it was not committed in company; and no weapon was involved. The respondent had received false information on the basis of which he believed his brother to be in trouble, and came to his brother's assistance, when in fact his brother did not need assistance. Further, the injury sustained by the victim was not particularly serious or significant.

18 The judge accepted that the respondent's childhood involved significant deprivation and that the *Bugmy*[10] principles were engaged. Accordingly, her Honour's assessment of the respondent's moral culpability was 'somewhat reduced', as was the need for general deterrence although it remained a relevant sentencing factor. Protection of the community was not considered to be 'a prominent sentencing consideration.'

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10 *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37.

19 The judge made the following observations about the mitigating circumstances upon which the respondent was able to rely:

(a) The respondent is a youthful offender, which is a primary sentencing consideration. His youth and the circumstances at the time of offending reduced his moral culpability and the weight to be placed on general deterrence. He reacted spontaneously in the context of excessive alcohol consumption and was motivated by a desire to protect his brother.

(b) The respondent indicated an intention to plead guilty at a very early stage and did so at the committal mention. There is a significant utilitarian benefit, and the value of the plea is enhanced by being entered during the COVID-19 pandemic.

(c) The respondent is remorseful.

(d) The respondent's anxiety as to the welfare of his partner and child should he be imprisoned, would add to the burden of imprisonment.

(e) It was likely that the respondent was at 'increased risk of a future depressive episode' and that a stressful prison term 'may precipitate a reduction in mood' and place him at risk of depression. The judge further stated that '[t]o this extent I accept that limb 5 of *Verdins* applies in your case.'

20 Her Honour then turned to the legislative scheme. It was summarised correctly. Her Honour understood that it was incumbent upon her to sentence the respondent to not less than 6 months' imprisonment unless he could bring himself within the relevant exception. Her Honour then said:

> 47 Given the circumstances of your case, pursuant to sub-s 10A(2)(e), I find that there are a combination of substantial and compelling factors in your case that are exceptional and rare and the cumulative impact of which would justify a departure from s 10A(4). I have already canvassed these matters, but, in summary, they include:
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> – your offending is at the lower end of the scale of seriousness for this type of offence;
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> – your low moral culpability;
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> – your childhood experiences of exposure to violence and alcohol abuse that enliven the *Bugmy* principles;
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> – your youth, for the reasons indicated;
>
> – your genuine and profound remorse;
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> – the expectation that you would experience onerous conditions in custody by virtue of your worry for your family;
>
> – the risk of the onset of a further depressive episode;
>
> – your valuable plea of guilty entered during a time when the

court is crippled by the backlog of cases caused by the COVID-19 pandemic;

- your lack of prior convictions; and

- the finding that you are a low risk of reoffending.

48 Despite my finding that special reasons exist in your case, by virtue of s 5(2GA) of the *Sentencing Act* I must still impose an immediate term of imprisonment, however, the length of such sentence is now discretionary.

49 I must also consider the other relevant mitigatory matters and sentencing principles that apply in your case. It is my view that you are a person of previous good character. Despite your disrupted and difficult childhood and your young age you have completed secondary education, played representative basketball and, importantly, worked in paid employment for several years, thus being a contributing member to our society. You have had the significant responsibility of paying private rental and providing for your young family. Testimonials tendered on your behalf at the plea support this finding.

21 The judge found that the respondent's prospects of rehabilitation were good, and considered that general deterrence (albeit somewhat moderated), denunciation and just punishment were relevant to the sentencing mix. Her Honour considered specific deterrence to have 'little or no role' to play and that community protection could best be achieved by rehabilitation. Her Honour said that she applied the sentencing principles of totality, parsimony and proportionality.

22 The respondent was then sentenced as set out at [1] above. The two summary charges attracted a 12 month CCO with an unpaid community work component of 50 hours. Those remain partly served as at the date of the hearing of this appeal.

This appeal

23 The short point we are asked to determine is whether, given the circumstances of the offending and the statutory scheme, the judge was required to imprison the respondent for a term of not less than 6 months. The respondent pleaded guilty to an offence against s 18 of the *Crimes Act*, which was committed against an emergency worker on duty. As we have observed, the judge was required by s 10AA(4) of the Act to sentence the respondent to not less than 6 months' imprisonment unless there was a 'special reason' for not doing so. A special reason would exist if there are 'substantial and compelling circumstances' that are 'exceptional and rare and that justify' the minimum term not being applied.

24 The appellant contended that the judge made a specific error in finding that the exception in s 10A(2)(e) of the Act applied. The surrounding circumstances were said to be neither 'substantial and compelling' nor 'exceptional and rare'. The appellant further argued that the respondent's childhood deprivation fell far short of engaging *Bugmy* principles, and that her Honour's finding of 'low moral culpability' was not open on the evidence.

25 The appellant further argued that *Verdins* limb 5[11] was not urged upon the judge during the plea and that there was no evidentiary basis for the judge's conclusion that it was engaged. The submission proceeded that in stating 'you are a low risk of reoffending' the judge was effectively saying that the respondent's prospects of rehabilitation were relevant to the 'substantial and compelling' question. This reasoning is prohibited by s 10A(2B)(c)(iii) of the Act.

26 Senior counsel for the respondent adopted the 10 factors set out by the judge in her reasons for sentence, and submitted that in combination they were capable of satisfying both the 'substantial and compelling' and 'exceptional and rare' tests, even if there were some minor errors in her Honour's reasoning. In particular, senior counsel relied upon the following:

(a) Low moral culpability.

(b) Low objective gravity.

(c) Youth.

(d) The surrounding circumstances of the offending.

(e) Genuine and profound remorse.

(f) The plea of guilty and its high value.

(g) Lack of prior and subsequent convictions.

27 Senior counsel for the respondent went on to contend that the judge was entitled to conclude that *Bugmy* had application because the respondent, as a child, was exposed to significant violence. It was accepted on behalf of the respondent that, even if the judge made an error incorporating *Verdins* limb 5 into her 10 factors (it not being urged upon her on the plea), it does not appear as if she gave it much weight.

Analysis

28 The mandatory sentencing provisions introduced by the Victorian Parliament have set the sentencing bar very high indeed. The respondent in our view has not cleared that bar. It will be recalled that the judge cited 10 factors which she considered in combination were substantial and compelling and exceptional and rare (see [20] above). Accepting for the moment that all these factors were able to be considered by the judge, and established by the evidence, in our view they still fall well short of satisfying the 'special reason' exception in s 10AA(4) of the Act. This Court has said in recent times that these mandatory sentencing provisions create a requirement that is

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[11] The '*Verdins* principles' are six means by which an impaired mental function can be relevant to sentencing, as described in *R v Verdins* (2007) 16 VR 269, 276 [32] (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102. Principle 5 is as follows:
[5] 'The existence of the [mental] condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.'

'almost impossible' to satisfy,[12] and in considering whether special circumstances exist a court is prohibited from taking into account an offender's previous good character, prospects of rehabilitation and early plea of guilty — all factors that ordinarily, and in this case, would operate powerfully to mitigate sentence.

29 Shortly stated, we consider there was an insufficient evidentiary basis to enliven the general *Bugmy* principles, nor was there any real basis for the judge to conclude that *Verdins* limb 5 was engaged, particularly as the psychological report stated that the respondent was not suffering from any mental health problems at the time of sentence, had not suffered from any for some years and 'may also be able to adjust relatively well to the structure of the prison environment'. Further, it does not appear from her Honour's reasons that, in determining whether there existed substantial and compelling reasons under s 10A(2)(e) of the Act, her Honour gave any consideration to the requirements of s 10A(2B)(a) and (b). These subsections required the judge in carrying out this determination to:

(a) regard general deterrence and denunciation of the offender's conduct as having greater importance than other sentencing purposes;[13] and

(b) give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence.

(c) Many of the factors said, on the plea, to demonstrate substantial and compelling circumstances were either:

(d) unsupported by evidence (*Verdins* limb 5, *Bugmy* principles); or

(e) statutorily prohibited from consideration (early guilty plea, prospects of rehabilitation).

30 By force of statute, the respondent was left with:

(a) his low moral culpability and the relatively low objective gravity of the offending;

(b) his youth;

(c) his remorse;

(d) the additional custodial burden of family hardship;

(e) his lack of prior and subsequent convictions as a generally positive consideration, but without the usual concomitant finding of good or better prospects of rehabilitation;[14] and

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12 *DPP v Bowen* (2021) 65 VR 385, 388 [11] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA); [2021] VSCA 355.

13 As set out in s 5(1) of the Act.

14 See s 10A(2B)(c)(iii) of the Act.

(f) arguably, some remnants of mitigation arising from the guilty plea. It is unnecessary to resolve whether the prohibition upon taking judicial account of 'an early guilty plea' in s 10A(2B)(c)(ii) means that other aspects of the plea (as evidencing remorse, its residual utilitarian value and the like) survive this curiously worded phrase.

31 What is left of the respondent's mitigatory material is of the type that is often mustered in support of a decent young man who has acted out of character in a moment of drunken idiocy. We doubt that, in total, these facts can be correctly characterised as substantial and compelling and, looked at overall, these factors could never be considered exceptional and rare.

32 For these reasons, the ground of appeal has been established. Had her Honour complied with her statutory obligations, this young man with no prior or subsequent convictions, for an act of drunken idiocy that occupied just a few seconds and in which no one was seriously injured, would have been sent to an adult prison for a minimum of six months.

Residual discretion

33 As the Director has succeeded in establishing the ground of appeal, subject to the application of the residual discretion to refuse relief in a Crown appeal, the respondent would be resentenced to a term of imprisonment of not less than six months.

34 In argument, senior counsel for the Director accepted that it was open to this Court to invoke the aforementioned residual discretion. He was no doubt cognisant that this was relatively low range offending by a young man of otherwise good character, who had already served a short period of imprisonment and part of his CCO.[15] As senior counsel for the Director said:

> Of course, as in *Lombardo*, this offender has youth on his side, and that would be relevant to [the residual discretion] … and … he's done a number of hours of his community corrections order.

35 A little later in discussion, after the Bench observed that in a Crown appeal an onus rests with the Crown to persuade the Court not to exercise the residual discretion,[16] senior counsel for the Director, very fairly, said:

> Well, the position, the factors I've outlined all point towards the residual discretion being exercised if we get to that point …

36 We have got to that point.

37 In the recent similar case of *Lombardo*, the Court enumerated a non-exhaustive list of factors that may inform the residual discretion to decline to interfere with a sentence, even where sentencing error is established. Those factors include whether:

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15 Apparently, no community work has been available for the respondent. Corrections Victoria have sent him a knitting kit so that he can perform some of the 50 hours of unpaid community work by knitting.

16 *Lombardo* [2022] VSCA 204, [109] (McLeish, Niall and Kennedy JJA).

(a) the offender given a non-custodial sentence has complied with its terms for a significant period;

(b) the offender given a 'lenient disposition' has made productive use of that disposition, including by finding 'employment and stability in their personal life';

(c) the offending falls short of 'criminality of the highest order';

(d) there has been a delay between the imposition of sentence and the Crown appeal; and

(e) the sentence first imposed is of a type which enhances the prospects of the offender's rehabilitation, particularly where the offender is young.[17]

38 The respondent can call in aid factors (a), (b), (c) and (e). It also ought be observed that the primary purpose of Crown appeals against sentence is to clarify the law and lay down principles for the governance and guidance of sentencing courts in future cases.

39 The residual discretion not to interfere with the sentence imposed ought be exercised in this case. Accordingly, the appeal will be dismissed.

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[17] *Lombardo* [2022] VSCA 204, [108] (McLeish, Niall and Kennedy JJA) (citations omitted).