COURT: SUPREME COURT OF TASMANIA (COURT OF CRIMINAL APPEAL)

CITATION: *Groenewege v Tasmania* [2013] TASCCA 7

PARTIES:	GROENEWEGE, Adam Robert v TASMANIA (STATE OF)
FILE NO:	837/2012
DELIVERED ON:	26 July 2013
DELIVERED AT:	Hobart
HEARING DATE:	18 February 2013
JUDGMENT OF:	Tennent, Porter and Wood JJ

CATCHWORDS:

Criminal Law – Appeal and new trial – Appeal against sentence – Grounds for interference – Sentence manifestly excessive or inadequate – Global sentence of 4½ years' imprisonment with a non-parole period of 2 years 9 months for arson and assault – Assaulted estranged wife and intentionally burnt down former matrimonial home – Wife and four young children left homeless – Weight to be attributed to appellant's psychiatric condition – Head sentence not manifestly excessive but minimum non-parole period ought to have been ordered.

R v Tsiaras [1996] 1 VR 398; *R v Verdins* [2007] VSCA 102, applied.

Aust Dig Criminal Law [3521]

REPRESENTATION:

Counsel:

Appellant:	E Hughes and F Cangelosi
Respondent:	J Hartnett and A Shand

Solicitors:

Appellant:	Rae & Partners Lawyers
Respondent:	Director of Public Prosecutions

Judgment Number:	[2013] TASCCA 7
Number of paragraphs:	62

Serial No 7/2013
File No 837/2012

ADAM ROBERT GROENEWEGE v STATE OF TASMANIA

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL
TENNENT J
PORTER J
WOOD J
26 July 2013

Orders of the Court

1 Appeal allowed to the extent it relates to the order under s17(2)(b) of the *Sentencing Act*.

2 Set aside that order and in lieu, order that the appellant not be eligible for parole until he has served one half of the sentence.

Serial No 7/2013
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REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL
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1 I have had the opportunity of reading in draft form the reasons of Porter J. I agree with those reasons and the outcome he proposes.

File No 837/2012

ADAM ROBERT GROENEWEGE v STATE OF TASMANIA

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL
PORTER J
26 July 2013

Introduction

2 This is an appeal against sentence. The appellant pleaded guilty before a magistrate to a charge of arson and was committed to the Supreme Court for sentence. When the matter came before Blow J (as he then was), his Honour agreed, pursuant to s385A of the *Criminal Code*, to deal with a summary charge of common assault under the *Police Offences Act* 1935, to which the appellant then pleaded guilty. The arson charge concerned the almost total destruction of a dwelling house which was the home of the appellant and his wife and four children (boys) aged between 7 years and 3 years. The complainant in the assault matter was the appellant's wife, Kristen Groenewege; the particulars of the charge were that the appellant placed his hands around her throat and applied pressure.

3 On 14 September 2012, by way of a global sentence, the appellant was sentenced to four years and six months' imprisonment to take effect from 18 July 2012. It was ordered that the appellant not be eligible for parole until he had served two years and nine months of that sentence.

4 There are two grounds of appeal which are:

> "1 THAT his Honour erred by imposing a sentence that was manifestly excessive in all the circumstances.
>
> 2 THAT his Honour erred by imposing a sentence that placed too much weight on the principle of general deterrence given the Applicant's mental health condition."

The facts

5 The sentencing judge was told the following. The appellant and his wife married in February 2006. They purchased 34 James Street, Ulverstone, in 2009. It was in both their names and was subject to a mortgage. They had four children together who were aged between 7 and 3 at the relevant time. Over the years the appellant's relationship with his wife deteriorated. As at 18 July 2012 they were "separated", but still living at 34 James Street, Ulverstone. There were a number of contributing factors towards the deterioration of the relationship. The appellant suffered from depression and over the period of the relationship his behaviour became more and more unpredictable. Their relationship became marked with controlling behaviour and mistrust on the part of the appellant. The appellant had significant financial problems following the failure of his business. This led to a drinking and gambling problem.

6 In the months leading up to the commission of the crime the appellant was verbally abusive and intimidating towards Mrs Groenewege. As a consequence Mrs Groenewege told the appellant that their relationship was over and that they needed to separate. The appellant did not accept this and refused to leave the property, but slept in a shed. Mrs Groenewege was too frightened to tell him to leave due to his unpredictable behaviour.

7 Over this period he made a number of threats towards his wife including that he would burn the house down. On 18 July 2012 Mrs Groenewege told the appellant that she and their four children were leaving the following weekend to find alternative accommodation. She told him that she had to sort matters out with Centrelink before she did. The appellant demanded that he attend the appointment with her. Later the same day she was at home. The appellant asked her to go into the

shed. She did so. He asked her for a hug and Mrs Groenewege refused. She explained that they were no longer together and returned to the house to get ready to go to her appointment.

8 One of their children was home sick from school. The appellant came in and said, "Your mummy is in a shitty mood, I've done nothing wrong." Mrs Groenewege got into the car to leave. The appellant also got in. They argued and the appellant got out of the car. Mrs Groenewege left and went to Centrelink. As it turned out Mrs Groenewege's appointment had been moved. While she was still there the appellant continually called and texted her. Mrs Groenewege answered one of the calls and told him to stop calling. The appellant told her that she was lying and that she had to return home and talk to him.

9 Mrs Groenewege took their son to her parents' house and returned home. She parked at the front on the street and went in. She found the appellant sitting in the shed crying. He said to her, "See what you do to me and see how you make me feel." The appellant approached Mrs Groenewege cornering her and pushed her to the chest with a moderate degree of force causing her to stumble backwards. The appellant then grabbed her around the throat and squeezed for about four seconds.

10 The pressure was not hard but it was sufficient to cause her to become very fearful. The appellant put his hands up to her and said, "Do you want me to hit you?" She responded, "No." He repeated this before shoving her. He asked her for the keys to the car so that he could go to see the children. By this stage Mrs Groenewege was terrified. She described the appellant as very angry. She suggested that they go together to get the children, her intention being to drive to the police station with him. He walked with her to their car. She tried to walk behind but he would not allow it.

11 Mrs Groenewege got into the driver's side and locked the doors before the appellant was able to get in. She started the car, attempted to drive off and at the same time tried to call the police on her mobile phone. The appellant grabbed onto the roof racks of the vehicle and began to punch the driver's side window. This caused Mrs Groenewege to stop, and her mobile phone fell under the pedal. The appellant kept punching the window before jumping on the bonnet and the windscreen, which began to shatter.

12 Mrs Groenewege jumped out of the car and ran to a nearby school. The appellant approached her and took her phone from her so she could not call anyone. Mrs Groenewege obtained assistance from school staff. She was distressed and had the staff take her to her children. The appellant left in the vehicle and returned to their home. He went into the shed, got a bottle of methylated spirits and went directly to the main dwelling. He went to the main bedroom and poured the methylated spirits onto the bed, floors and walls. He set fire to the bed. The fire took hold. The appellant left knowing that the bed was on fire.

13 The house was damaged beyond repair. Neighbours attempted to enter and put the fire out. The fire brigade attended and the fire was brought under control. The appellant left and travelled to Mrs Groenewege's parents' house looking for her. She was not there. The appellant rang Mrs Groenewege's step-father and sang the words, "Burn mother fucker, burn," to him. The appellant returned to James Street, drove past the home and observed smoke and neighbours out looking at the fire, but continued on. He drove directly to a women's shelter where he located his son with his grandparents. Police were called. The appellant was arrested and taken to the Devonport Police Station.

14 At the station he participated in an interview under caution during which he confirmed that his marriage was in trouble. He had been verbally abusive to his wife but this was the first occasion of physical violence. He admitted sending a previous message to her which said he would burn the house down. He outlined that the relationship was breaking down as a result of many matters, including drinking, gambling, his infidelity and financial pressures.

15 He outlined the events leading up to him setting fire to the bed including the matters outlined above. He said that he was upset when his wife returned without their son. He said that when he held her by the throat she was understandably extremely frightened and had started to cry. He had made

her walk with him to the car so she could not call anyone. He said it was his way of controlling her. He had taken the phone off her at the high school for the same reason.

16 He said that he had set the fire, "Because if I couldn't have it, no one could." He was upset that his wife had recently taken over the mortgage payments and was referring to it as her house. He said he had renovated the house. He claimed that he thought his neighbour, a fire-fighter, would come in and put the fire out, although he accepted that he did nothing to raise the neighbour's attention to the existence of the fire and simply left the house after he lit it.

17 He said he did not think of the risk to the lives of those who may attempt to put the fire out. He said that he felt extremely ashamed for what he had done. He felt that his wife was taking his children away. He already did not see a child from a previous relationship. After he set the fire he drove past and saw the fire and did not stop to help. He agreed that he felt a sense of satisfaction with what he had done, and agreed that this was in accordance with him ringing, and singing to his wife's step-father. He said that he had left after the fire to find his children as he wanted to say goodbye. He knew that he would not be allowed to see them after what he had done.

18 The sentencing judge was told that the appellant had a conviction in 2000 for engaging in disorderly conduct, but otherwise only had a history of traffic matters. Counsel for the Crown also told the sentencing judge that the property was insured in joint names, but that liability for a claim by Mrs Groenewege had been denied by solicitors acting for the insurer. The denial was said to be on the basis that the loss was caused by a deliberate act of the co-insured. His Honour was not told of the value of the house or of the contents destroyed.

Victim impact

19 The sentencing judge was given a victim impact statement made by Kristen Groenewege. The relevant points are as follows:

- Mrs Groenewege and the family lost all of their possessions, there being very little in the house that was salvageable. This was contributed to by the fact that asbestos in the ceiling was disturbed, and things which survived may well have been contaminated. The only clothing which they were left with was what they were wearing at the time.
- All of the appellant's clothing and possessions had been put in an outside shed, and were later collected by his parents.
- Mrs Groenewege lost all of her personal possessions which included a computer. Stored on that computer were all of the photographs of the children. Additionally she lost all of the children's school reports and art work and the special baby clothes that she had kept, the Christmas decorations and mother's day gifts which the children had made.
- The children lost all of their toys, and were sometimes inconsolable as a result.
- After the fire, the family stayed at a women's shelter which was an extremely stressful experience, with the five sleeping in one room. Living space was shared with strangers and there was little privacy. Some toys were provided to the children by the Salvation Army but were lost to other children. The appellant's children were bullied and Mrs Groenewege felt powerless to intervene.
- Mrs Groenewege and the children were then in short-term crisis accommodation. She was not allowed to disclose their location and not allowed visitors. She felt isolated and lonely, with limited phone and internet access. They had some clothing and toys but little else to call their own.
- Mrs Groenewege had been enrolled in a Bachelor of Education degree course but had to defer her studies due to limited time and computer access. She had not resumed her studies at the time of making the statement, and said she was unable to make any plans.

- The children now have behavioural problems, which include showing disrespect for her and bedwetting from the younger three children. She finds it very difficult to cope with the four children in her circumstances.
- She is financially destitute and will most likely find herself bankrupt. This will impact on her ability to obtain private rental accommodation and replace her motor vehicle which was unreliable.
- Her previous good relationship with the appellant's side of the family has been lost. The behaviour of members of that family has caused her hurt and stress.
- She is generally frightened and anxious.

Matters put to the sentencing judge for the appellant

20 The basis for the plea in mitigation on behalf of the appellant was a report from a psychiatrist, Dr Lester Walton, dated 30 August 2012. Then counsel for the appellant told the sentencing judge that the report outlined the appellant's background, and provided "information in respect of the factors that were impacting on him at the time that he committed this crime". To a large extent, counsel's submissions highlighted various aspects of the report, particularly those which are contained in an "Opinion" section. Because of that, and the significance the report has in this appeal, I will need to examine it in some detail.

21 The appellant's background and personal circumstances as appear from the report, are as follows:

- The appellant is 33. His psychiatric history dates back to when he was around 12 years old, at which time he was sexually abused by a male peer. This included fondling of his genitals and attempted anal penetration. The appellant's view was that he had suffered relatively little from this until he was "flooded with memories" in early 2012. The appellant became convinced that his 6-year old disabled son had been sexually abused by a carer.
- In November 1988 the appellant was involved as a victim in an armed robbery, apparently when in a takeaway food restaurant. When threatened with a rifle he helped a female shop assistant put money in bags. As a result, the appellant is troubled by intrusive memories and flashbacks, as well as troublesome anxiety, especially in crowded situations. He had some counselling without much benefit, and resorted to self-medication by way of heavy alcohol consumption.
- According to the appellant, about a year later, and whilst he was heavily intoxicated, he was effectively raped by a female, with the result that she became pregnant and gave birth to a daughter. The appellant has had no contact with the child. According to Dr Walton, the situation seems to have aggravated his anxiety and depression, and caused intense feelings of guilt.
- About a week before his marriage the appellant attempted to commit suicide by way of "a staged motor vehicle accident". The result was that he suffered serious injuries to his thoracic spine. He obtained great benefit from surgery but suffers residual back pain.
- There are four sons of the marriage. The second born suffers from a congenital syndrome characterised by physical impairment and delayed mental development.
- From about six months before the fire, the appellant was established on antidepressant and anti-anxiety medications by his general practitioner, but they do not seem to have been of any great benefit.
- As far as his employment history is concerned, the appellant completed year 12 and, without formal apprenticeship, learned joinery skills, which work he has done over the years. He has also intermittently managed takeaway food restaurants. More recently the appellant had established his own joinery business, a step with which his wife disagreed because of financial implications. As it turned out, he had to close the business by the end of June 2011 as he was nearly insolvent.

After that he worked as a foreman in a joinery factory but describes himself as "extremely resentful of his situation".

22 I think it is necessary to set out the entirety of the opinion section contained the report:

"**Opinion**

1 Adam Groenewege is suffering from a chronic mixed anxiety/depressive disorder and a chronic post-traumatic stress disorder. While there are these separately identifiable diagnoses, in reality there is the one psychiatric syndrome only from his perspective. There have been multiple contributions to this man's end-state psychiatric disorder which include: his being sexually abused as a child, his being taken advantage of while intoxicated such that he impregnated his cousin resulting in the birth of a daughter about which he is deeply ashamed, his belief that his own disabled son had been sexually abused, chronic pain as a consequence of his suicide attempt, financial strain associated with his work and his deteriorating marriage. These stressors impacted on a underlying vulnerable personality.

There was a pattern of parallel alcohol abuse.

Mr Groenewege struggled as a student. He had some learning difficulties but he is not intellectually disabled in a global sense.

2 Mr Groenewege does not seek to excuse his misconduct in any way and he freely acknowledges that vengeful feelings were at the centre of his motivation towards destroying his own home in order that his wife may not take possession of it after the breakdown of their marriage. However, objectively Mr Groenewege's reasoning processes likely were adversely affected by his diagnosable psychiatric conditions, especially so with his resorting to excessive alcohol consumption. The probability is that depression rendered him in a nihilistic and self-destructive frame of mind such that he did not give proper consideration to the consequences of his action. It is not the case that he was deprived of moral capacity to a point where he has a formal defence of mental impairment but, in my opinion, the destructive fire setting was not simply an expression of anger.

3 There have been what I would describe as intermittent preliminary attempts at psychiatric treatment. It does seem that Mr Groenewege was deriving some benefit from the anti-anxiety and antidepressant medications he had been prescribed, especially given that his mood disturbance seems to have become worse since he ceased those medications recently. They should be reinstated promptly. However, what has greater priority in the longer term is that Mr Groenewege needs to apply himself to extended psychological counselling to address the multiple areas of past psychological trauma and persisting psychological conflict. I imagine that that type of in depth counselling is unlikely to be available in a prison context. I doubt that Mr Groenewege requires formal alcohol rehabilitation as the probability is that if his mood disturbance is brought under control then there would simply be no drive towards alcohol abuse.

4 Mr Groenewege does impress as appropriately remorseful now.

5 As I understand it Mr Groenewege will be presented as a cleanskin but I imagine that given the seriousness of his offending he may be at risk of an immediate term of imprisonment. All I would state from my area of expertise is that I do see this man's out of character misconduct as not simply criminal in nature as there are relevant psychiatric factors which, perhaps, might be seen as mitigating culpability to some extent. While it is hardly unique, because of his persisting mood disturbance Mr Groenewege is experiencing imprisonment as rather more onerous than some other prisoners. Simply on an actuarial basis, because of an absence of a past history of similar offending, the prognosis specifically in to recidivism is favourable. To the extent that this man's mental disorder may have contributed to the offending then that is a potentially reversible situation with treatment. It is also the case that Mr Groenewege is not motivated out of any psychopathological desire to set fires generally, he not being a fire fetishist nor a

> pyromaniac. His misconduct arose out of a particular set of family circumstances which are likely to resolve. Thus, from a clinical perspective, actual imprisonment would not be required to be achieve [sic] sufficient deterrence. Mood disorders and post-traumatic stress disorders are reasonably common conditions in the community and the ameliorating affect [sic] upon general deterrence likely would not be given great weight in this case."

23 In her plea, counsel for the appellant made a number of points along with some observations about the report. These included the following:

- the report seemed to suggest a history of an inability to cope very well when particular stressors exist, and there was no doubt that before the commission of this crime there had been a pattern of drinking, exacerbated by the breakdown of the relationship;
- at the time of the commission of the crime, the appellant felt overborne;
- his prior history suggests no history of violent conduct, or conduct of this nature, and the commission of the crimes is perhaps reflective of the state he was in at the time;
- the appellant did not seek to excuse his misconduct in any way, and freely acknowledged that vengeful feelings were at the centre of his motivation towards destroying his own home;
- in Dr Walton's view, it is objectively likely that the appellant's reasoning processes were adversely affected by his psychiatric conditions, the probability being that depression rendered him in a nihilistic and self-destructive frame of mind, such that he did not give proper consideration to the consequences of his actions;
- the appellant has expressed and continues to feel significant remorse, there being full acknowledgement of the devastation to his family and the existence of a real barrier to an ongoing positive relationship with his children, and;
- the appellant was taken into custody on the day of the crimes, and given the realisation of his actions, he did not apply for bail. A plea of guilty was entered at the earliest available opportunity.

The judge's comments on passing sentence

24 After the hearing, the sentencing judge adjourned the matter for about a week. When later called on, counsel for the Crown, as had been foreshadowed, sought to make submissions in relation to the psychiatric report. Counsel submitted that much of the material relating to the appellant's background was "self-report only with no independent verification", the material therefore being of limited weight. Secondly, counsel submitted that Dr Walton's statement that from a clinical perspective, actual imprisonment would not be required to achieve sufficient deterrence, was not reconcilable with the acceptance by the appellant that the crime was motivated by vengeful feelings.

25 Counsel argued that the sentence imposed needed to have a significant effect of personal deterrence, but that personal deterrence was in any event only one of the relevant sentencing factors. Counsel who then appeared for the appellant (different counsel from the one who had made the plea) did not disagree, accepting that Dr Walton's opinion as to that point was of limited value.

26 His Honour then said:

> "Yes, thank you. Well, look, what – I've prepared written sentencing comments and I don't think I'll change them. What I proposed to do was to take what was said about remorse and psychiatric history and mental state at face value, but I wasn't going to say anything about the degree of need for personal deterrence, and I was – and I propose to make the point that whilst the psychiatric matters are relevant there's a need for general deterrence, a need to impose a sentence that might deter other individual, or should deter other individuals from crimes like this one – crimes like this arson, so I don't think its appropriate to – well, I certainly don't think it's appropriate to give the Crown an opportunity to cross-examine the psychiatrist, I

think I – I note what's been said and I don't think it makes any difference to the sentence that I'm going to impose or the comments that I'm going to make that are of relevance to that sentence, so I'll proceed."

27 After setting out the facts, his Honour said:

"Mr and Mrs Groenewege were the joint owners of the house. It was mortgaged to a bank. It was insured. Mrs Groenewege made an insurance claim, but the insurance company denied liability, asserting that it was not liable because the damage was deliberately caused by a co-owner.

Mr and Mrs Groenewege have four children, all boys. At the time of the fire, the eldest was 7 years old and the youngest was 3. One of the boys has a serious disability. Mrs Groenewege and the four boys lost all their possessions in the fire, except for the car and the clothes they were wearing. There is a loan debt owing in respect of the car. The amount owing exceeds the value of car. The house has gone but the mortgage debt has survived. Mrs Groenewege is at risk of going bankrupt. Sometimes in this sort of situation the innocent co-owner is entitled to claim on the insurance policy: *Holmes v GRE Insurance Ltd* [1988] Tas R 147. However it may well be that the wording of the relevant insurance policy expressly excludes cover in respect of fire damage deliberately caused by one co-owner.

The fire left Mrs Groenewege and the four young children homeless. Initially they had to live in a women's shelter. They subsequently moved to short-term crisis accommodation. Mrs Groenewege has been unable to rent privately owned accommodation because her credit rating has been destroyed. She and the children are waiting for public housing. She does not know when or where a residence will become available.

Mrs Groenewege works part-time. She was enrolled in a university degree course, but has had to defer her studies as a result of the disruption caused by the fire. Amongst other things, the fire deprived her of access to a computer.

Had the fire not occurred, life for Mrs Groenewege as a single mother, working part-time and looking after four young children, would have been very difficult. Children the age of these children are often emotionally disturbed by the separation of their parents. By starting a fire that deprived Mrs Groenewege and the children of their home and all their possessions, Mr Groenewege has made his wife's situation immensely worse in all sorts of ways. And, at least to some extent, that was deliberate. The burning down of the house was an act of vengeance, motivated by the thought that, if he could not keep the house, he would make sure that his wife did not get it either.

But there were five victims of this crime. From Mrs Groenewege's victim impact statement, it seems that the fire and the consequential temporary arrangements have had a substantial emotional impact on all of the young children. The children of course lost all their toys in the fire. They have been upset about the loss of such things as special teddy bears. The Salvation Army provided some new toys, but some of those were stolen by other children in the shelter where they have been accommodated. The children have shown various signs of emotional disturbance, some of which have been difficult for their mother to deal with, including bedwetting and irritability. They have suffered a calamity which children would not often suffer except in war zones and natural disasters, and they now only have one parent available to help them. The children's difficulties have of course added to Mrs Groenewege's burdens. Not surprisingly, she has been suffering from a range of psychological symptoms.

The burning down of a house always creates some degree of risk for those who attempt to put out the fire – in this case neighbours and Fire Service personnel. Quite apart from the dangers presented by the fire itself, there was a danger in this case associated with the presence of asbestos that had been used in the construction of the house. Quite apart from the risk of asbestos inhalation at the time of the fire, the

presence of asbestos has meant that it has not been possible for anyone to search in the ruins for family mementos or other items that might be salvaged.

Mr Groenewege is 33 years old. He was fined 12 years ago for engaging in disorderly conduct. Otherwise he has no significant prior convictions. He had not been violent to his wife before the day in question. His counsel provided me with a report about him from a Melbourne psychiatrist. It seems that Mr Groenewege has psychiatric symptoms that commenced during his adolescence. He was sexually assaulted by another boy when he was about 12. When he was 20, he was in a McDonald's restaurant when a female staff member was robbed at gunpoint in front of him. He seems to have had symptoms of post-traumatic stress disorder ever since then. About a year after that robbery he fathered a child in a situation that, rightly or wrongly, left him with intense feelings of guilt. He attempted suicide shortly before his marriage. The psychiatrist believes he is suffering from a chronic mixed anxiety/depressive disorder and a chronic post-traumatic stress disorder. There were a number of stressors in Mr Groenewege's life in the time leading up to the day in question, including financial pressures following the failure of a joinery business that he had been operating, and problems resulting from his drinking and gambling. He had commenced seeing a psychologist, and had arranged a second appointment for the day after the fire. He had been taking antidepressant and anti-anxiety medications for some six months prior to the fire.

Mr Groenewege's psychiatric problems were clearly not so serious as to prevent him from understanding what he was doing, nor that what he was doing was wrong, nor how enormously wrong it was to destroy the home of his wife and children and all their possessions. His mental state on the day of the fire is a factor that I must take into account for sentencing purposes. However I also have to bear in mind the need to impose a sentence that is heavy enough to deter other individuals who might be tempted to commit crimes like this when their marriages break down.

Mr Groenewege co-operated with the police after his arrest. He made full admissions to them. He told the police, within hours after the fire, that he was extremely ashamed of what he had done. He certainly was not remorseful when he spoke to his wife's stepfather on the telephone, but I accept that he has been fully and appropriately remorseful ever since he was arrested. He pleaded guilty in the Magistrates Court at an early stage. He did not apply for bail, but he may well have known that he had no realistic chance of being granted bail.

The burning of the house was a terrible crime because of the very disturbing effect on the four young children, who seem to have been the unintended victims of their father's conduct, and because of the long-term devastating consequences for the intended victim, Mrs Groenewege. Parliament has indicated that the courts should respond sternly in cases of family violence. In this case, although the main crime involved violence towards property, the consequences were extreme. The only appropriate penalty is a substantial prison sentence. I will backdate it to the day Mr Groenewege was arrested. I think that he might benefit from a long period on parole, and will therefore fix a non-parole period that allows for that."

The appeal – ground 2

28 I think it is preferable to deal firstly with the ground of appeal which alleges a specific error, rather than deal firstly with the question of whether the sentence is manifestly excessive. The appellant complains that the sentencing judge "gave inappropriate weight to the need to impose a sentence that might meet the end of general deterrence". The appellant focuses on his Honour's expression of the need to impose a sentence that might or should deter other individuals from committing like crimes. That comment appears in the passage which I have set out in par[26] above. The basis of the appellant's complaint is that because of the appellant's mental condition, the factor of general deterrence should have been given little, if any, weight.

29 It is well established that psychiatric illness or impaired mental functioning is relevant to the sentencing process in a number of ways. The appellant relies on all, but principally the third, of the

propositions formulated by Charles and Callaway JJA and Vincent AJA in their Honours' joint judgment in *R v Tsiaras* [1996] 1 VR 398 at 400. Their Honours said:

> "Serious psychiatric illness not amounting to insanity is relevant to sentencing in at least five ways. First, it may reduce the moral culpability of the offence, as distinct from the prisoner's legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective. Second, the prisoner's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served. Third, a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence. The illness may have supervened since that time. Fourth, specific deterrence may be more difficult to achieve and is often not worth pursuing as such. Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health."

30 The appellant correctly submits that a condition does not need to be characterised as a "serious psychiatric condition" in order to attract the operation of the principles: *R v Verdins* [2007] VSCA 102 per Maxwell P, Buchanan and Vincent JJA at [5]. Further, a court is not concerned with how a particular condition is to be classified or defined in terms of diagnosis or a label to be applied: "What matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time" *Verdins* at [8]; see also *R v Sebalij* [2006] VSCA 106 per Maxwell P at [21].

31 The question as to whether general deterrence should be moderated or eliminated as a sentencing consideration, "depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition of the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both": *Verdins* at [32], adopted in this State in *Startup v Tas* [2010] TASCCA 5 at [6]; *R v Yaldiz* [1997] 2 VR 376 per Winneke ACJ (Hampel AJA agreeing) at 383. However it is always necessary to consider how the particular condition affected the mental functioning of the offender at the time of the offence, and how it might affect the person in the future.

32 Further, the question must always be whether, in the particular case, it has been shown that the offender's moral culpability or the significance of general specific deterrence is reduced because of the condition: *Romero v R* [2011] 32 VR 486, per Redlich JA (Buchanan and Mandie JJA agreeing) at 490 [13]. The onus is on an accused: *R v Skura* [2004] VSCA 53 at [8]; *Verdins* at [11]. As to the nature of the overall exercise, in *Thompson v R* (2005) 157 A Crim R 385, Steytler P (McLure JA agreeing) said at 396 [55] (omitting references):

> "As to general deterrence, this is a factor which should often be given little weight in the case of an offender suffering from a mental disorder, such an offender not being an appropriate medium for making an example to others. In an extreme case, considerations of general deterrence might be totally outweighed by other factors. *However, in every case, the relevant factors must be balanced in a manner no different from that which is involved in every sentencing exercise*." [Emphasis added]

33 The appellant argues that what is contained in Dr Walton's report "was sufficient for it to have been apparent to the learned sentencing judge that it was inappropriate for general deterrence to have played as prominent a role in the sentencing of the [appellant] as it did". It is argued that the report established two separate and diagnosable mental conditions which would have put him in the nihilistic frame of mind described by Dr Walton which both produced a motivating feeling of vengeance and adversely affected the appellant's ability to properly consider the consequences of his actions.

34 As to the sentencing judge's approach, the appellant argues that his Honour said that he would take what was said about the psychiatric history and mental state at face value, but then although expressly noting the relevant matters contained in the report, and acknowledging that the appellant's mental state on the day was a factor that he must take into account, failed to consider what that mental state actually meant in exercising the sentencing discretion. That is, the sentencing judge failed to

give sufficient weight to the material about the appellant's mental condition; and giving it appropriate weight would, and ought to, have led to the elimination or moderation of the factor of general deterrence.

35 For the sake of convenience I will repeat the conclusions of the sentencing judge as to this aspect:

> "His mental state on the day of the fire is a factor that I must take into account for sentencing purposes, however I also have to bear in mind the need to impose a sentence that is heavy enough to deter other individuals who might be tempted to commit crimes like this when their marriages break down."

36 The sentencing judge was required to determine the nature and severity of the symptoms of the mental conditions suffered by the appellant and their effect upon his mental capacity. Those matters were apparent from the terms of the report which his Honour said he accepted "at face value". The question is correctly framed as one of the weight to be given to that material. Again, for the sake of convenience, I will repeat parts of the last paragraph of the opinion section of Dr Walton's report:

> "… I do see this man's out of character misconduct as not simply criminal in nature as there are relevant psychiatric factors which, perhaps, might be seen as mitigating culpability to some extent.
>
> …
>
> Mood disorders and post-traumatic stress disorders are reasonably common conditions in the community and the ameliorating effect upon general deterrence likely would not be given great weight in this case."

37 Given that statement, and given the absence of any other psychiatric opinion, it would have undoubtedly been very difficult, if not impossible, for the sentencing judge to have been satisfied that the appellant was not an appropriate vehicle by which to convey a message to the general community about the seriousness and likely consequences of this type of offending. The sentencing judge seems to have accepted that some weight should be given to the appellant's mental condition but not such that significantly reduced the need for the sentence to satisfy the need for general deterrence. In my view, the appellant has not shown that on the material before him, the sentencing judge made an error as suggested.

Ground 1 – manifest excessiveness

38 This ground is directed to the head sentence as well as to the order made under s17(2)(b) of the *Sentencing Act* 1997, setting the period for which the appellant is not eligible for parole.

39 First, the submissions for the appellant highlight the mitigating factors which are said to exist. They are:

- the appellant's remorse demonstrated by his refusal to apply for bail, his statements to Dr Walton and the early plea of guilty.
- the appellant's history of psychiatric illness and the diagnoses of chronic mixed anxiety-depressive disorder and chronic post-traumatic stress disorder.
- that he had seen a psychologist and had commenced counselling at the time of the crimes.
- that there was little likelihood of a repetition of the type of offending, given the particular circumstances.
- the lack of relevant or other serious offending, the appellant otherwise being of good industrious character.

40 Secondly, the appellant's argument is that the sentence is considerably outside the established range of sentences for arson so as to demonstrate error. Mr Hughes referred to Professor Warner's text *Sentencing in Tasmania*, 2nd ed, 2002, at par12.404. That shows that sentences in the total period

from 1978 to 2000 ranged from two months to four years with a median of 12 months. Professor Warner says, "Clearly, 4 years' imprisonment is regarded as the top end of the range for arson, reserved for very bad cases where the case put in mitigation was not strong so that such a grave penalty was clearly deserved: *Brown* Serial Number 16/1985 …".

41 As to the range of sentences for arson, Mr Hughes noted the more recent case of *Capell* 30 November 2011, in which Blow J (as he then was) imposed a sentence of six years and six months' imprisonment on a man found guilty by a jury of arson and a consequential crime of wounding, a bystander having been injured by flying glass when the fire caused an explosion. The accused had set fire to business premises in a revenge attack, with the fire spreading to adjacent shops. The target business was completely destroyed and substantial damage was caused to four other premises.

42 In that case it was asserted that Mr Capell had caused loss and damage totalling about $1.9 million. Mr Hughes submits that *Capell* stands outside of the range rather than, as the respondent submits, extending it. Mr Hughes says that this is so because of the particular circumstances of the case, including the amount of damage done, and the presence of the wounding crime. In his comments on passing sentence in *Capell*, Blow J said:

> "In recent decades, except in cases involving fatalities, it seems no one has been sentenced to more than four years' imprisonment for arson in Tasmania. However there does not appear to have been an arson case involving nearly as much damage as this one, and I think this case warrants a larger sentence because of the amount of damage and harm Mr Capell has caused."

43 I think that because of the presence of the crime of wounding, it must be accepted that caution needs to be exercised in assessing what impact on the range of sentences for a single count of arson, the sentence *Capell* has had. It is one isolated sentence but it may have some significance as establishing the upper limit of sentences for arson to date.

44 Mr Hughes noted that the penalty for assault under the *Police Offences Act* was a fine not exceeding 20 penalty units or 12 months' imprisonment. He said that the assault when put alongside the arson would not mean that the sentence imposed on the appellant should be assessed other than by reference to the range for arson. He submits that the assault was brief, desisted from quickly with no physical harm being caused. Ms Hartnett, for the respondent, accepted that the assault would not add to an appropriate term for the arson, but submitted that it was relevant as constituting a course of conduct, and as showing the appellant's attitude to his wife. Mr Hughes also noted that the value of what was destroyed was not given, so there could be no real understanding of a relevant factor.

45 Mr Hughes acknowledged that establishing a proper range in relation to the crime of arson was a difficult exercise because the crime can be committed by way of a specific intention or recklessness, and because motives and damage caused may vary considerably. There is no doubt that arson is a crime which does not readily lend itself to standardisation and the establishment of a range. It is trite that consideration of sentences imposed in other specific cases is of limited value. At the risk of adopting the discredited "comparable sentence approach" my search of the Court's sentencing database from 1989 to date reveals 19 sentences relating to cases in which the motivation of the offender was vengeance or revenge. All but three of them involved personal relationships. Two cases arose from employment or business issues.

46 The range of head sentences is between six months and 3½ years, with the average being nearly 18 months. The median is 18 months. In only one case was the execution of any part of the term suspended. In some cases it is not clear whether the intention was to cause some damage or complete destruction, and in some cases it is clear precisely what damage was in fact caused. Obviously, I have excluded *Capell* from this analysis, but the exercise which I have undertaken might assist in providing a better understanding of the pattern of relevant sentences.

47 The one sentence of 3½ years' imprisonment was imposed by Cox CJ in *King*, 23 February 1999. The accused pleaded guilty to one count of receiving stolen property, two counts of aggravated

burglary, one count of stealing, and one count of arson. All charges related to the incitement by the accused of two youths to burgle the home of a man with whom she had been having an affair, and to burn the house down. The accused was upset and embittered. The damage caused was in excess of $185,000. The accused's conduct was described as "wicked in the extreme".

48 As to the submission that the subject sentence is manifestly excessive based on a comparison of the established range, it is worth setting out a passage from the judgment of Underwood CJ (Evans J agreeing) in *Oliver v Tasmania* [2006] TASSC 95. Ms Oliver was sentenced to three years' imprisonment for two charges each of aggravated burglary and unlawfully injuring property, and one charge of arson. There were two separate incidents some 14 months apart, the victim on each occasion being the accused's former partner. The vengeful arson attack caused damage to a house in excess of $50,000, with lost contents having an estimated value of between $15,000 and $20,000.

49 At [12] Underwood CJ noted the submission that in the previous five years the subject sentence was the longest imposed but it could not be said to have been the most serious case of arson amongst those matters; this indicating undefined error in the exercise of the sentencing discretion. His Honour referred to the submission as a "tariff submission". His Honour continued:

> 13 The starting point for any 'tariff submission' is the oft-quoted statement of Mason J (as he then was) in *Lowe v R* (1984) 154 CLR 606 at 610 - 611 commencing:
>
> > 'Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice.'
>
> 14 Although *Lowe* concerned disparity between sentences imposed on co-offenders, the above statement has been said to have general application. See *Inkson v R* (1995) 6 Tas R 1 at 22; *Breed v Pryce* (1985) 36 NTR 23.
>
> 15 As Hunt CJ at CL said in *R v Ellis* (1993) 68 A Crim R 449 at 460, the obligation of a sentencing judge is to give:
>
> > '... full weight to the collective wisdom of other sentencing judges in interpreting and carrying into effect the policy of the legislature; that collective wisdom is manifested in the general pattern of sentences currently being passed in cases which can be recognised judicially as relevant to the case in hand: *Oliver* (1980) 7 A Crim R 174 at 177, quoted in *Visconti* [1982] 2 NSWLR 104 at 107.'
>
> 16 However, as his Honour said at 461, the general principle expressed by Mason J in *Lowe* does not mean that the approach to be taken with respect to co-offenders is necessarily the approach to be taken when reviewing a sentence imposed on a single offender. His Honour said:
>
> > 'What must be looked at is whether the challenged sentence is within the range appropriate to the objective gravity of the particular offence and to the subjective circumstances of the particular offender, and not whether it is more severe or more lenient than some other sentence which merely forms part of that range. There is nothing in *Lowe* to suggest otherwise.'
>
> 17 Although Kirby P was in dissent in *R v Hayes* (1987) 29 A Crim R 452, the following statement at 465 is valid and has general application:
>
> > 'It would be a serious mistake to assume that the sentencing of persons for offences, such as those involving the respondent, could be reduced to a simplistic formula derived from little more than the quantity of plants found in the prisoner's unlawful cultivation. Courts search for consistency. However, that goal would be bought at too high a price if cases were to be reduced to an equation between loss of liberty and the number of Indian hemp plants found. As the cases and the practice of the courts show, the sentencing process is

> much more complicated. There is a danger, in the short presentation of facts, that a busy court, seeking consistency, will seek refuge in levels of punishment imposed in apparently similar cases, attaching undue weight to the only objective features which run through all cases involving cultivation of prohibited plants - namely the variety of the plant and the quantity of the cultivation found.'

18 Although the sentencing judge, and this Court, must depend in part upon knowledge of sentences for the same or similar offences (*R v Williscroft* [1975] VR 292 at 301) a 'tariff submission' is unlikely to succeed if it simply refers to the number of sentences imposed during any given period, the term of imprisonment in each case and one or two objective factors such as the value of the property destroyed. Such an approach reduces the sentencing discretion to a mechanical calculation. See *Pavlic v R* (1995) 83 A Crim R 13. The view expressed by Wright J in *Dowie v R* [1989] Tas R 167 at 185 is apposite to this appeal:

> 'For my part I have considerable difficulty with the notion that to enable sentencing consistency, which is of course one of the primary aims of a sentencing judge, (see *Lowe v The Queen* (1984) 154 CLR 606 at pp610-611 per Mason J), the parameters apparently indicated by sentences actually imposed in previous cases for similar crimes, constitute some sort of a framework within which the impending sentence must fit or be seen to be manifestly inadequate or excessive, as the case may be. I subscribe to the view enunciated by Adam and Crockett JJ in *R v Williscroft & Ors* [1975] VR 292 at p299, where they accepted that it is the seriousness of the criminal conduct, rather than the category of crime of which the offender has been convicted, which is of paramount importance.'

19 With respect to the 'tariff submission' made in this appeal, the first observation to make is that the appellant was not sentenced for the crime of arson alone. She was also sentenced for the crimes of aggravated burglary and unlawful damage to property committed 14 months before the crime of arson. She was also sentenced for aggravated burglary and unlawful destruction of the windows of the complainant's car committed in connection with the crime of arson. The second observation is that arson may be committed by reckless conduct or intentional conduct, the latter being more serious than the former. The third observation is that the crimes of arson and unlawful destruction of property are often committed by persons suffering from some kind of mental illness or in the heat of the moment while tempers are aroused. The fourth observation is that any comparison with other sentences must take into account, in addition to the value of property destroyed, the age and antecedents of the offender, whether there was remorse or not, and so on."

50 Further, even accepting that a range can be established, in the sense of the general pattern of sentences relevant to the particular case, it does not necessarily follow that a sentence which lies outside that range, must be set aside. The existence of a range does not mean that every sentence must fall within it, and the range is one factor to be taken into account: *Inkson v R* (1996) 6 Tas R 1 per Underwood J (as he then was) at 15; *Devine v R* (1993) 2 Tas R 458 at 469. That a sentence is significantly higher than the range would generally however, give rise to increased appellate scrutiny.

51 The head sentence was undoubtedly a very heavy one. To the extent that a sentence for the crime of arson is capable of being assessed from that head sentence, it would seem to outside the apparent range. However, in my view imprisonment for 4½ years is not so disproportionate to the gravity of the appellant's offending as a whole, as to demonstrate error. The nature of the particular crimes and the aggravating factors were such that notwithstanding some mitigatory matters, a very lengthy term of imprisonment was called for, and the sentence cannot be properly characterised as plainly unreasonable or unjust. The following features of the case lead me to this view.

52 The appellant intentionally set fire to the house and intentionally caused its entire destruction. His motive for doing so was to exact some sort of vengeance on his estranged wife intending to

destroy his wife's interest in the building and its availability as a home. He told police that he set the fire "because if I couldn't have it, no one could". He also caused the destruction of the home of his four young children, one of whom suffers from a significant disability. He caused the total destruction of the belongings of the whole of his family.

53 This was obsessive and possessive conduct, involving some violence, committed in the aftermath of a broken relationship. It is the type of conduct which simply cannot be tolerated. Ms Hartnett submitted that the arson crime could be also regarded as a crime of family violence, in addition to the crime of assault. As such the course of conduct involved a breach of trust: *Parker v R* 57/1994 (AustLII [1994] TASSC 94) per Underwood J at 11. It is unnecessary to decide whether the label of family violence can be correctly applied to the crime of arson in these circumstances. The notions underlying the concept of a breach of trust are effectively the same. To intentionally deprive a spouse of his or her home in such a way amounts to very hurtful subjugation, and exploits a position of vulnerability.

54 The appellant's remorse was not immediately apparent. Even leaving aside the arrogant, gloating and abusive phone call to Mrs Groenewege's stepfather which was made while the house was burning, at the same time as the appellant told police shortly after that he felt extremely ashamed, he acknowledged a sense of satisfaction with what he had done.

55 It is true that neither the sentencing judge nor this Court has any idea of the value of the house and the contents which were destroyed, but the more pertinent issue is the intention with which the crime of arson was committed. "While the extent of the damage is relevant, it is the intention which characterises the seriousness of the offence": *R v S (A Child)* (1992) 68 A Crim R 121 per Malcolm CJ (Seaman and Ipp JJ agreeing) at 132. I have already noted that it was the appellant's intention not only to just set fire to the house, but to destroy it. Whilst unquantified, the extent of the destruction was great, and the impact on the appellant's estranged wife and children was profound.

56 I turn to the order in relation to parole eligibility. The question is whether the period for which an appellant is not eligible for parole makes the sentence manifestly excessive; "sentence" in this context, being used in a broader sense. Under the *Sentencing Act* 1997 s17, there is no parole eligibility unless it ordered that the offender is not eligible for parole before the expiration of a specified period. That period must be not less than one half of the head sentence. A non-parole period should be the minimum period that the sentencing judge determines that justice requires the prisoner must serve in prison, having regard to all the circumstances. The fixing of a parole eligibility period gives a sentencing judge the opportunity, when appropriate, to mitigate a penalty of imprisonment in favour of the rehabilitation of a prisoner through conditional freedom once the prisoner has served the minimum period the judge determines: *Power v R* (1974) 131 CLR 623 at 629; *Carr v R* (2002) 11 Tas R 362 at 389 [96]; *Richman v Tasmania* [2011] TASCCA 18 at [47].

57 Obviously, whether a non-parole period is appropriate has to be assessed not only on the basis of the whole of the circumstances of the case, but in the light of the length of the head sentence. There are several recent instances in which this Court has taken the view that although the particular head sentence was not shown to be manifestly excessive, the non-parole period made the sentence a manifestly excessive one. In *Johnstone v Tasmania* [2011] TASCCA 9, the non-parole period was set at 2½ years (a little over 70%) of a 3½ year term. The court concluded that having regard to mitigating circumstances, particularly the appellant's age, his general good character and lack of prior convictions, and attitude to offending after it was detected, the minimum period required to be served was out of proportion to moral culpability. The sentence was varied by a reduction of the non-parole period to 21 months.

58 Similarly in *Pickrell v Tasmania* [2011] TASCCA 13, factors of mature age with no record of offending and an extreme unlikelihood of re-offending, were said to justify the reduction of a 2½ year non-parole period of a four year term (62.5%), to two years. In *Richman v Tasmania* (above), a non-parole period of 15 months of a two year term (62.5%) ,was reduced to one half on the basis of "many

mitigatory matters that the appellant can claim in aid coupled with my view that [the] head sentence was at the upper end of the applicable range … .": Evans J at [48].

59 Of course, there is no presumptive starting point for parole eligibility, but those cases provide an indication of the types of matters which may justify the benefit of the total available opportunity for parole. Without wishing to be prescriptive, apart from the nature of the offending itself ,one factor which would justify a requirement to serve a greater proportion of the head sentence than one half, is a bad criminal record: *Enniss v Tasmania* [2012] TASCCA 10 at [21]; *Wahl v Tasmania* [2012] TASCCA 5. Other, perhaps associated, factors would be the protection of the community as a whole: *Mabb v Tasmania* [2008] TASSC 22 at [27], and a poor previous parole history.

60 In my view, to require the appellant to serve two years and nine months of the very lengthy term imposed before being eligible for release on parole, makes the whole sentence manifestly excessive. Although in percentage terms, the non-parole period amounts to a little over 60 per cent, it is, as I have noted, the length of the period in the context of the head sentence which is important. Of course, whether the appellant is released on parole at any time is a matter for the Parole Board, but in this case, I think it unjust not to afford the opportunity for the maximum parole period. In addition to the relative severity of the head sentence, the factors which lead me to this view primarily are:

- the relative previous good character of the appellant;
- his mental condition which probably led to him being in a nihilistic and self-destructive frame of mind, and not readily able to give proper consideration to the consequences of his action;
- that the appellant had sought medical assistance shortly before the crimes, had agreed to take medication for his condition, and had commenced a program of what was intended to be ongoing counselling;
- that the appellant has been assessed as now appropriately remorseful, and seems to have a realisation of the enormity of his conduct, and;
- Dr Walton's view that the type of in depth psychological counselling required to address the appellant's problems is unlikely to be available in the prison context.

Outcome

61 Accordingly, I would allow the appeal to the extent that it relates to the order under s17(2)(b) of the *Sentencing Act*. I would set aside that order and in lieu, order that the appellant not be eligible for parole until he has served one half of the sentence.

ADAM ROBERT GROENEWEGE v STATE OF TASMANIA

REASONS FOR JUDGMENT **COURT OF CRIMINAL APPEAL**
WOOD J
26 July 2013

62 I agree with the reasons for judgment of Porter J and the orders he proposes.