SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2013 0196

JOHN O'CONNOR

v

THE QUEEN

JUDGES:	MAXWELL P, WEINBERG and PRIEST JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	19 May 2014
DATE OF JUDGMENT:	19 May 2014
MEDIUM NEUTRAL CITATION:	[2014] VSCA 108
JUDGMENT APPEALED FROM:	[2014] VCC 1259 (Judge Tinney)

CRIMINAL LAW – Appeal – Sentence – Aggravated burglary, recklessly cause serious injury – Impairment of mental functioning – Low IQ – Heavy drug use – Drug-affected at time of offending – Psychologist's report concluded *Verdins* principles applicable – Defence counsel disavowed reliance on *Verdins* – Whether miscarriage of justice – Whether *Verdins* principles can be invoked for first time on appeal – Applicability of *Verdins* to be determined by sentencing judges, not psychologists – Need for cogent expert evidence of relevant impairment of functioning – *Verdins* explained – *Romero v The Queen* (2011) 32 VR 486 applied – Appeal dismissed.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr R F Edney	Doogue O'Brien George
For the Crown	Ms A Hassan	Mr C Hyland, Solicitor for Public Prosecutions

MAXWELL P:

1 I invite Weinberg JA to deliver the first judgment.

WEINBERG JA:

2 The appellant, John O'Connor, pleaded guilty in the County Court, at Melbourne, to the following offences, and was sentenced as set out in the table below:

Charge on Indictment	**Offence**	**Maximum**	**Sentence**	**Cumulation**
1	Aggravated Burglary [*Crimes Act 1958* (Vic) s 77(1)]	25 y [*Crimes Act 1958* (Vic) s 77(2)]	42 m	Base
2	Recklessly cause injury [*Crimes Act 1958* (Vic) s 18]	5 y [*Crimes Act 1958* (Vic) s 18]	10 m	5 m
3	Criminal Damage [*Crimes Act 1958* (Vic) s 197(1)]	10 y [*Crimes Act 1958* (Vic) s 197(1)]	3 m	N/A
4	Recklessly cause injury	5 y	15 m	7 m
Total Effective Sentence:		4 y 6 m		
Non-Parole Period:		2 y 8 m		
Pre-sentence Detention Declared:		124 days		
6AAA Statement:		7 y with a non-parole period of 5 y 6 m		

3 On 28 February 2014, the appellant was granted leave to appeal on one of two grounds upon which he initially relied. That ground is in the following terms:

> The sentencing discretion miscarried because of the failure of the sentencing judge to apply the principles enunciated in *R v Verdins*.

4 The appellant was refused leave on ground 2 which contended that the individual sentences and orders for cumulation were manifestly excessive. He has not sought to renew this ground of appeal.

Circumstances surrounding the offending

5 The Registrar's neutral summary records the circumstances of the offending in the following terms:

> - In the early hours of 24 January 2013 a group of people were at a house in Widford Street, Glenroy. Those people were [GH] (then aged 46), her niece [AA] (then aged 28), [AA's] daughter, [T] (aged 5), [GH's] son [CW] (aged 17), [ST] (aged 17), [BW], [BNW] and [JK].
>
> - [AA] is the former partner of the appellant. [T] is their child.
>
> - While the group were sitting in the kitchen [AA] received text messages of a sexual nature from the appellant. [AA] telephoned the appellant and told him to leave her alone. While speaking to the appellant she went outside and put her daughter in the car ready to leave the house. [BNW] followed her outside.
>
> - During the conversation [AA] told the appellant that she was not going to have sex with him. She then saw the appellant in Widford Street, approximately 100 metres away. [AA] told [BNW] to go inside.
>
> - The appellant yelled at [AA] and [AA] moved toward the front door of the house. The appellant walked into the house and slammed the door closed as he did so (charge 1 — aggravated burglary).
>
> - [GH] told the appellant to leave. The appellant ignored her and approached [BNW] who was standing at [GH's] bedroom door. The appellant said to him 'you're a cunt' and punched [BNW] in the face (charge 2 — recklessly cause injury).
>
> - [GH] shoved the appellant and demanded that he leave the house. The appellant then punched [GH] in the face. [GH] punched the appellant back and more shoving followed. The appellant then left the house through the front door.
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> - Once outside the appellant saw a Holden Commodore car parked in the front yard belonging to [JK]. The appellant asked 'who's [sic] fucking car is this?' and kicked the left hand rear panel causing a large dent (charge 3 — criminal damage).
>
> - [GH] again demanded that the appellant leave the house. He walked towards her and [GH] shoved him. The appellant then walked towards the front fence and removed the metal lid from the post box and threw it at [GH]. It hit her on her right arm causing a large cut (charge 4 — recklessly cause injury). The appellant then left.

6 The appellant was arrested several hours later at a house in Glenroy, and subsequently interviewed by police. The matter was listed for a contested committal

hearing on 6 June 2013. However, it resolved on that day without any witnesses having to be called. An earlier offer to plead guilty made in April 2013 had been rejected by the prosecution.

The plea hearing

7 It was submitted on behalf of the appellant that the offending in question was the culmination of his very troubled life. His parents separated before he was born, and his mother and grandmother cared for him and his sister thereafter. He had little contact with his father, who had problems of his own with drugs.

8 The appellant's mother became involved in two lengthy relationships with other men while the appellant was growing up. Her first partner was an alcoholic and was abusive towards her. Her second partner had little time for the appellant.

9 The appellant disliked school and was often truant. He was isolated and did not make friends. When he was in Grade 4, his mother sent him to live with an uncle and aunt. His uncle mistreated him, subjecting him to severe beatings. He returned to live with his mother during Grade 6. He eventually left school without completing Year 7.

10 Thereafter, the appellant became involved with various delinquent youth gangs. He was a heavy drug user and did not have regular employment. When he was 18 he was convicted of an aggravated burglary. It seems that he and his friends had come to believe that a particular individual was a paedophile. The group went to the person's house and bashed him. The appellant stole a television set while he was there.

11 Thereafter, from about the age of 20, the appellant managed to find full time employment as a labourer. He commenced a relationship with AA when he was 24, and she was 19. Their relationship was marked by drug use and violence. The appellant began using amphetamines, and later, 'ice', as a mechanism for coping.

12 As a result of his use of 'ice', the appellant lost his job in March 2012. Soon

after, in September 2012, his relationship with AA came to an end.

13 On the night of the offending, the appellant had arranged to see AA and their daughter, T. He had earlier indicated that he did not approve of the company that AA was keeping, and believed that someone in the house on the evening in question was a paedophile. He was heavily affected by 'ice' on the night itself.

14 The appellant relied upon a lengthy report, dated 11 September 2013, which had been prepared, on his behalf, by Mr Bob Ives, a forensic psychologist. Mr Ives has practised in the area of legal and forensic psychology since 1996. He says in his report that, over the years, he has completed more than 2100 reports for various courts and tribunals.

15 On 31 July 2013, Mr Ives interviewed the appellant for about two hours in the Port Phillip Prison. On 5 September 2013, he saw him again, for about an hour, at the Melbourne Remand Centre. He administered a series of tests to the appellant, and had him complete two separate personality questionnaires.

16 Mr Ives set out in his report a most detailed summary of the appellant's background and history. It should be noted, however, that he took no steps to verify the appellant's account.

17 Having summarised the appellant's background, Mr Ives set out some conclusions. He found that the appellant had an overall IQ of 75 which he characterised as being in the bottom five per cent of those of the appellant's age. He described the appellant's IQ as 'low'. With regard to his cognitive function, Mr Ives found that the appellant had poor memory, and little ability to perceive spatial relationships. He ranked either low, or very low, on matters of language and attention. He was classified as being in the bottom one per cent of overall neuro-psychological functioning.

18 Mr Ives stated that the appellant suffered from low self-esteem. He regarded him as confused and socially isolated, partly through a history of substance abuse.

He described him as withdrawn, isolated and estranged from those around him. He considered the appellant's judgment to be poor, and found him to be inclined to be impulsive, and bad tempered. He noted that the appellant was tense and pessimistic about his future, with a sense of worthlessness, and a tendency towards recurrent thoughts of suicide.

19 It must be said that much of Mr Ives' 26-page report was repetitious. Parts of it were tendentious. The sentencing judge observed that everything Mr Ives had said could have been written in five pages or less.

20 On the positive side, so far as the appellant was concerned, Mr Ives concluded that he appeared to want to make changes in his life, and was motivated to receive treatment. However, the combination of problems that the appellant was reporting led Mr Ives to conclude that treatment would be 'quite challenging'. He added that the treatment process was likely to be arduous, with many reversals along the way.

21 Mr Ives, having yet again set out the appellant's personal circumstances, and having repeated the results of the tests he had administered, went on to proffer a somewhat gratuitous opinion as to whether the appellant fell within a number of the criteria set out in *R v Verdins*.[1] Indeed, he even volunteered the opinion, by reference to *Verdins,* that the appellant's offending was 'casually' [sic] linked to his various personality difficulties.

22 Even counsel, who appeared on behalf of the appellant on the plea, recognised, as did the sentencing judge, that Mr Ives ought not to have ventured into that territory. Questions of that kind are matters for submission, and ultimate determination, by a sentencing judge. They do not fall within the province of a forensic psychologist.

23 Notwithstanding the tender of Mr Ives' report, counsel for the appellant did not suggest that the principles in *Verdins* had been engaged. Indeed, he specifically

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1 (2007) 16 VR 269 ('*Verdins*').

eschewed any such reliance on the report. He did, however, submit that the appellant's moral culpability should be treated as having been reduced by virtue of his various 'disorders', and submitted that his 'condition' would mean that he would find imprisonment more burdensome.

24 Counsel also relied upon Mr Ives' comment that the appellant had some prospects of rehabilitation. At the same time, he acknowledged that the offending had been both confronting and violent, and that general and specific deterrence were relevant sentencing considerations.

25 The Crown limited its submission to putting forward a range of between 20 and 30 months as the total effective sentence, with a non-parole period of between 15 and 24 months. As will be seen, the sentencing judge rejected that range, as he was entitled to do.

Sentencing remarks

26 His Honour began by addressing the serious nature of the offending in question. He noted that the appellant had entered a residential property as a trespasser, with intent to assault those within. He had done just that, delivering a punch to the head of a 17-year-old boy who had done nothing whatever to provoke any such attack.

27 The appellant had followed up by assaulting the boy's 46-year-old mother, delivering a severe blow to her face, and subsequently hurling at her a piece of a metal lid from a letter box, that he had broken off, causing a cut to her arm. The appellant then kicked the panel of a car parked outside, resulting in criminal damage.

28 The sentencing judge observed that GH's victim impact statement indicated that the appellant's actions had had a significant, and continuing impact on her. She bore a permanent scar on her arm as a result of the assault with the letter box lid. More importantly, she said that she no longer felt safe or secure in her home, having

been attacked by an individual who she said appeared as a 'man possessed'.

29 The sentencing judge referred to various mitigating factors. These included the guilty plea, which had been entered at an early stage. He also referred to the fact that the appellant was affected by drugs on the night in question, though he was certainly aware of the effect that 'ice' sometimes had upon him. The appellant had also acted out of a misguided concern for his daughter, and the company that AA was keeping. He noted the appellant's disadvantaged background. He accepted that the offending was impulsive and unpremeditated.

30 With regard to Mr Ives' report, the judge observed that even the appellant's counsel had described it as unduly lengthy, and 'wordy'. His Honour agreed with that assessment, as do I.

31 The sentencing judge then went on to say this:

> Though the author of the report makes a number of conclusions as to the application of the principles from a case that you heard us discuss of *R v Verdins*, your counsel very directly and explicitly indicated that he was not relying on any of those conclusions at all. Correctly so in my view. Mr Ives, for whatever reason, went far beyond his charter and his conclusions in that respect were not supportable and your counsel correctly disavowed any reliance on that case.

32 This passage from his Honour's sentencing remarks accurately reflects what counsel had said of Mr Ives' report, during the course of the plea:

> There is a conclusion that heads down the *Verdins* path, but which I do not adopt and do not put to you in the way that Mr Ives has put it.

33 Notwithstanding the sentencing judge's comment as to Mr Ives having 'gone far beyond his charter' and having stated conclusions, in that regard, that were 'unsupportable', his Honour went on to say that the report was still of 'great use'. It provided the essential context of the offending, which was the appellant's drug addiction. He added:

> So whilst it is conceded that the case of *Verdins* has no role to play, that of course is not the end of the matter as far as the focus that I bring to bear on your background and your deficits and skills and abilities.

34 Shortly thereafter, his Honour returned to the use that could legitimately be made of the report. He said:

> Your culpability is reduced by virtue of your past personal history and background. The report also is of use as it indicates to me that you at least appear to have an interest in making changes in your life, with an acknowledgement of some important problems that exist and a perception of your need for help and a positive attitude towards pursuing some treatment in the years to come. It is clear from the report that it is a long road ahead for you but it must surely be a positive that you are not 'point blank' resistant to change as is sometimes the position.

35 Having said all this, his Honour recounted the appellant's criminal history. He noted that it was not particularly lengthy but did contain some relevant past offending. Of particular significance was the prior conviction in the County Court for aggravated burglary. There was also a prior appearance in the Magistrates' Court for having recklessly caused injury to AA (as well as a subsequent conviction for having inflicted yet another injury upon AA) for which the appellant had received a suspended sentence.

36 The sentencing judge was not persuaded that the appellant had shown any remorse for his offending. That conclusion was fortified by the foul language, and violent expressions he had used in referring to his victims when interviewed by police.

37 His Honour was prepared to find that the appellant had some prospects of rehabilitation, though these were guarded. He said that he took into account current sentencing practices, and referred to relevant Sentencing Advisory Council Snapshots in that regard.

38 His Honour also referred to two decisions of this Court. The first was *Director of Public Prosecutions v El Hajje*,[2] which, he noted, contained a table of decisions setting out sentencing outcomes for this sort of offending. The second was *Hogarth v The Queen*,[3] which commented upon the seriousness of 'confrontational aggravated

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2 [2009] VSCA 160.

3 [2012] VSCA 302.

burglary', and also contained a table of relevant sentencing decisions.

39 The sentencing judge accepted that the aggravated burglary was clearly not at the highest end of seriousness for offending of this kind. Nor, however, was it at the lowest end of such seriousness. The fact that the appellant had previously committed an offence of a similar nature, albeit when he was much younger, but seemed to have learned little from that experience, was a matter of particular concern.

40 His Honour concluded his sentencing remarks by making the following general comments:

> Sentencing is a quite complicated task. There are a variety of matters which the court must be taken [sic] into account. As I said to you a moment ago, I must take into account the maximum penalty. I must pay regard to current sentencing practices and to the impact of your crime as well as a host of other matters. Whilst your prospects of rehabilitation are of course a relevant purpose they are not the only matter that I have to consider. Far from it. They must take, to a degree at least, a backseat given the nature of the offending and your past history. Still though they are relevant. You must also be punished for your crimes, justly and proportionately and I must denounce your conduct. The community must be afforded some protection as well and that is a consideration which must be given some weight given your past conviction for the very same offence. You must be deterred. You must be dissuaded from ever committing such a crime again. That is also a significant sentencing purpose as you appear before me on your second instance of aggravated burglary. This court must also seek to deter others who are minded to commit this type of serious offence. That purpose referred to as general deterrence is a highly relevant purpose of sentencing here. The message must be sent loud and clear that this style of home invasion will be dealt with by a substantial immediate term of imprisonment.
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> I do not accept for one moment the adequacy or the appropriateness of the range of sentence provided to me. That it could be suggested that a **head sentence** of 20 months might be achieved in a case as this is in my view fanciful and plainly wrong. Indeed when one looks at the sentencing materials that I have referred to when dealing with current sentencing practice, it would clearly not be open to even impose such a sentence on the single aggravated burglary charge standing alone and of course that offence does not stand on its own. Yours was a confrontational aggravated burglary committed at night. An inherently serious offence by a mature offender with an intent to assault people in their own home. You then moved on to an unprovoked physical attack upon a youth and a woman, in their own home. You have relevant criminal history. I am frankly bemused and bewildered by the range that has been extended. I note that it seemingly contemplates the possibility of a 20 month head sentence with a non-parole period of 15 months. Well such a sentence as that would not even comply with the

> barest legal requirements as to a minimum 6 month gap between head sentence and non-parole period as commanded by s.11(3) of the *Sentencing Act 1991*. It is also a curious aspect that the lower reaches of the range of head sentence (20 months) is actually exceeded by the upper range of non–parole period provided by way of range (24 months). I simply do not accept the submissions as to range and was not assisted by them at all.[4]

The appellant's submissions

41 The appellant, despite having, on the plea, disavowed any reliance on the principles in *Verdins*, submitted that the sentencing judge's failure to take those principles into account meant that the sentencing discretion had miscarried. He relied upon the fact that Mr Ives' opinions, as set out in his report, had been unchallenged and, he submitted, clearly raised questions about the appellant's mental state at the time he committed the relevant offences, and thereafter.

42 While the appellant acknowledged that authorities such as *Romero v The Queen*[5] and *Tran v The Queen*[6] presented serious obstacles to success on this ground, he nonetheless submitted that the *Verdins* point was unassailable, and should be upheld.

43 It is difficult to accept that submission upon a closer consideration of those authorities. In *Romero*, Redlich JA (with whom Buchanan and Mandie JJA agreed) said the following:

> In sentencing appeals, this court is reviewing the exercise of a discretionary judgment. It is not a rehearing of the plea in mitigation. It is not the occasion for the revision and reformulation of the case presented below. Given the nature of its supervisory role, this court will not lightly entertain arguments that could have been, but were not advanced on the plea. It will have an even *greater reluctance* to entertain arguments that seek to *resile from concessions* made below or are a *contradiction* of the submissions previously made. The revivification of arguments abandoned or eschewed on the plea is highly undesirable and should not be countenanced, save where fresh evidence is adduced, or in the exceptional circumstance where it can be shown that there was most compelling material available on the plea that was not used or understood and which demonstrates that there has been a miscarriage of

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4 Emphasis in original.

5 (2011) 32 VR 486 ('*Romero*').

6 (2012) 35 VR 484 ('*Tran*').

justice arising from the plea and sentence.[7]

44 The Court in *Tran* took a similar view in finding that, while

> [a] clear basis for a submission based on *Verdins* … had thus been established by the expert evidence … [it] [wa]s not appropriate to speculate as to why the argument was not advanced. It was for defence counsel to decide whether that evidentiary basis was, or was not, to be relied on to support a submission on the basis of *Verdins* ...[8]

45 The appellant submitted that the sentencing judge had misunderstood the purport of Mr Ives' opinion when he characterised the comments regarding *Verdins* as clearly beyond his expertise. He submitted that Mr Ives had not attempted to tell his Honour that *Verdins* should be applied, but had merely identified 'five factors' which, from a psychological perspective, may have had a detrimental effect upon the appellant's psychological state. According to this submission, all Mr Ives was doing was setting out his opinion of the appellant's psychological state by reference to what he understood *Verdins* to have meant.

46 Counsel who appeared on the plea plainly did not view this particular passage from Mr Ives' report in that light. Otherwise, he would, in all likelihood, have sought to invoke *Verdins,* by way of mitigation.

47 The Crown submitted that Mr Ives' views, having been considered by the sentencing judge on the basis that they did not give rise to *Verdins* mitigation, should not now be treated any differently by this Court. The Crown argued that counsel on the plea made a deliberate and considered forensic choice to place only limited reliance upon Mr Ives' report. The sentencing judge did exactly what counsel asked him to do. He did not disregard the contents of the report in their entirety, but used the report in exactly the way that counsel submitted he should.

48 The Crown drew attention to the appellant's counsel's submission, on the plea, as to how Mr Ives' report should be used:

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7 Ibid 489–90 [11] (emphasis added).

8 (2012) 35 VR 484, 492 [26].

> The reality is that I don't urge you to apply the Verdins principles in the way that Mr Ives suggests that you should. Mr Ives looks at the totality of my client's life and says 'Well here you go'. The reality is, of course your Honour that Verdins principles apply to mental impairment. What Mr Ives is talking about is the whole of gamut of psycho and social factors that operate in my client's life.

49 The Crown submitted that even counsel for the appellant recognised that Mr Ives had gone far beyond any legitimate expression of opinion when he disavowed any reliance on his report as the basis for a *Verdins* discount. For one thing, nothing in Mr Ives' report justified his 'conclusion' that there was a real and substantial causal connection between the appellant's mental condition, and his offending. That is, of course, assuming that one puts to one side the fact that the appellant was under the influence of 'ice' at the time, a matter that could not, of itself, give rise to a *Verdins* discount.

50 As I have indicated, the sentencing judge said that he would have regard to some aspects of Mr Ives' report notwithstanding counsel's concession that it could not form the basis of a *Verdins* discount. Counsel expressly acquiesced in that course, effectively re-endorsing the concession previously made. He said:

> Whilst Mr Ives says you should do things in a certain way I say you should deal with it in the way your Honour has pointed out and what I say though, is that the amount to which a sentence should be mitigated is exactly the same whichever one you use, but to be fair, in my submission, you should go down the path that your Honour has just gone down in relation to background and the like.

51 The Crown submitted that it would be quite wrong, in the absence of exceptional circumstances, to permit the appellant to present an entirely different case before this Court to that which he chose to present on the plea.

52 In addition, the Crown submitted that even if the appellant's IQ of 75 could, of itself, engage *Verdins* (as to which there would be serious doubt), there was nothing to suggest that his behaviour was brought about by any significant intellectual disability. Rather, he presented as someone who generally lacked self-control, and when combined with the use of 'ice', behaved in an extraordinarily violent and thuggish manner. Such behaviour did not fall within *Verdins.*

53 The Crown also pointed to the fact that the appellant was well aware of what he had done. It drew attention to what he told the police in his record of interview in that regard.

54 Finally, the Crown submitted that the sentencing judge had obviously given some weight to the opinions expressed by Mr Ives, particularly with regard to the appellant's dysfunctional and abusive childhood. This had been treated as reducing the appellant's moral culpability for his offending. His background must also have been taken into account in fixing what was, on any view, a moderate non-parole period for offending of this gravity.

Conclusion

55 In my opinion, this appeal should be dismissed. As the judge who granted leave to appeal on the *Verdins* ground correctly found, both the total effective sentence and the non-parole period were within range for offences as serious as these.

56 Aggravated burglary carries a maximum of 25 years' imprisonment. It could hardly be said that a sentence of three years and six months for a serious example of that offence, imposed upon an offender with prior convictions for violence (including one for aggravated burglary) was wholly outside the range for such offending, or in any way excessive. Indeed, it could be said that the individual sentences imposed on these charges, and the orders for cumulation made, were moderate.

57 That being so, it would be highly unlikely that this Court would conclude that a different (and lesser) sentence should be passed, even if specific error of the kind now alleged were shown.

58 However, in my view, the appellant's case falls at the first hurdle. No error of the kind alleged as the basis for this ground has been established. The sentencing judge would have been well entitled to accord even less weight to Mr Ives' report

than he did. It was, in many ways, an unhelpful document. It went far beyond the bounds of a legitimate expression of psychological opinion. It contained a number of unsubstantiated conclusions on matters that fell clearly outside any psychologist's expertise, with no factual basis shown for the particular opinions expressed in the relevant passages.

59 I agree entirely with the learned sentencing judge that Mr Ives' report did not justify a *Verdins* discount. Moreover, I do not think that this Court should lightly entertain an appeal conducted on a basis that is completely inconsistent with the way in which the case was conducted below. This case is certainly not one of those rare instances where it can be shown that there was 'compelling material available on the plea that was not used or understood which demonstrates that there has been a miscarriage of justice'.[9]

60 Counsel who appeared for the appellant on the plea, sensibly recognised the limitations inherent in Mr Ives' report, and elected to make the best that he could of that report. He extracted every conceivable benefit, for the appellant, that he legitimately could. Any sentence significantly lower than that imposed by the sentencing judge would be almost derisory. I note his Honour's observations regarding the range proffered by the Crown below. I should say that I agree with those observations.

61 For these reasons I would dismiss the appeal.

MAXWELL P:

62 I agree. I too would dismiss the appeal, for the reasons which his Honour has given. Because the issues raised here concerning *Verdins* are of more general application, and given the frequency with which *Verdins* is cited, I would add these additional comments.

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9 *Romero v The Queen* (2011) 32 VR 486.

63 What *Verdins* did — as was first done in *R v Tsiaras*,[10] the seminal decision in this area — was identify sentencing considerations. *Verdins* identified six sentencing considerations which might or might not be made relevant in a particular case, depending on the expert evidence before the sentencing court about the impairment of mental functioning of the person to be sentenced. Whether one more of those considerations applies is, however, a matter for the court. It is no concern of the expert witness.

64 *Verdins* made clear that the application of the sentencing considerations identified in *Tsiaras* was never intended to be confined to 'serious mental illness'. Those considerations were capable of application to any impairment of mental functioning. It has been mistakenly thought in some quarters that *Verdins* thus 'opened the floodgates', making permissible a whole range of new arguments. In fact, the reverse is true, and this needs to be emphasised. The Court in *Verdins* was at pains to point out that no argument of this kind should be advanced unless it had a proper evidentiary foundation.

65 None of the *Verdins* sentencing considerations can apply unless there is specific evidence from an expert about:

(a) the nature of the impairment of the offender's mental functioning;

(b) how the impairment affected, or was likely to have affected, the offender at the time of the offending; and/or

(c) how the impairment was affecting the offender at the time of sentence, or was likely to affect him/her in the future.

66 For that reason, the Court in *Verdins* explained, sentencing courts are not concerned with diagnostic labels:

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[10] [1996] 1 VR 398 ('*Tsiaras*').

> The sentencing court should not have to concern itself with how a particular condition is to be classified. Difficulties of definition and classification in this field are notorious. There may be differences of expert opinion and diagnosis in relation to the offender. It may be that no specific condition can be identified. 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.
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> …
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> Where a diagnostic label is applied to an offender, as usually occurs in reports from psychiatrists and psychologists, this should be treated as the beginning, not the end, of the inquiry. As we have sought to emphasise, the sentencing court needs to direct its attention to how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances – that is, at the time of the offending or in the lead-up to it – or is likely to affect him/her in the future.[11]

67 A recent article by Dr Dion Gee and Professor James Ogloff in *Psychiatry, Psychology and Law* helpfully spelt out what was expected of forensic experts in order to meet the rigorous requirements set down in *Verdins*:

> [T]he challenge is for forensic assessors after the fact to provide the evidence and insight required by the courts into the nature, extent and effect of an offender's impaired mental functioning. … [S]uch opinion evidence requires considerable forensic expertise; especially given the problem that many mental health professionals believe, wrongly, that all mental illnesses satisfy the *Verdins* standard.[12]

68 The present case concerns intellectual impairment rather than mental illness. Such impairment can, of course, render one or more of the *Verdins* sentencing considerations applicable but, as always, that will depend on what the evidence shows about the particular offender. In *DPP v Patterson*,[13] the offender's intellectual disability was said to warrant a reduction in his moral culpability for the offences committed. The Court said:

> As explained in *Verdins*, impaired mental functioning may reduce the offender's moral culpability in any number of ways, including if it has the effect of impairing the offender's ability to exercise appropriate judgment, or to make calm and rational choices, or if it makes the offender disinhibited or if

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11 *Verdins* [8], [13] (citations omitted).

12 Dion G Gee and James R P Ogloff, 'Sentencing Offenders with Impaired Mental Functioning: *R v Verdins, Buckley and Vo* [2007] at the Clinical Coalface' (2014) 21 *Psychiatry, Psychology and Law* 46, 50.

13 [2009] VSCA 222.

> it obscures the offender's intent to commit the offence. Whether, and to what extent, moral culpability is reduced must depend on all the circumstances of the case. The Court will need to assess the expert evidence to determine whether the mental impairment is shown to have caused or contributed to the offending and, if so, whether the offender is to be adjudged less blameworthy as a result.[14]

69 In the present case, as Weinberg JA has set out, defence counsel made a considered forensic decision that an argument directed at those sentencing considerations was not supportable on the evidence from the expert. If I might say, respectfully, that seems to me to be a proper course for counsel to take. Counsel has a responsibility to decide whether the evidence in a forensic report is sufficient to meet the rigorous standards set out in *Verdins*, that is to say, whether it is reasonably arguable that one or other of the sentencing considerations is enlivened. If not, it is counsel's obligation not to advance the argument.

70 In the circumstances, counsel's decision here was perfectly explicable. As Priest JA pointed out in argument, the purported conclusions in the expert's report directed at *Verdins 1* — the sentencing consideration concerned with moral culpability — were essentially assertions. What was lacking was precisely the kind of evidence which, as *Verdins* made clear, is essential before a conclusion like that could be reached.

71 This offending was not shown to have been relevantly connected, causally or otherwise, with the appellant's intellectual impairment. On the plea, defence counsel explained that the offending was referable to particular sources of distress concerning the appellant's work and personal life, in particular his relationship break-down, the loss of his job and loss of contact with his daughter. Quite understandably, those matters caused him great distress, to which he responded by taking 'ice'. He was under the influence of 'ice' when he committed the offences.

72 It was that concatenation of factors, so defence counsel told the judge, which had led to this conduct. Accordingly, there was no proper basis for saying that there

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[14] Ibid [46] (citations omitted).

was a 'realistic connection' between the impairment of mental functioning and the offending in question.[15]

PRIEST JA:

73 For the reasons advanced by Weinberg JA, I agree that the appeal should be dismissed. I also express my respectful agreement with what has fallen from the learned President.

MAXWELL P:

74 The order of the Court is appeal dismissed.

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15 *R v Vuadreu* [2009] VSCA 262, [37]; *Charles v R* (2011) 34 VR 41, 70 [162]; *Johnston v R* [2013] VSCA 362, [14].