



Supreme Court of Western Australia

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R -v- KRAKOUER & ANOR [2004] WASC 204 (1 September 2004)

Last Updated: 24 September 2004

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : R -v- KRAKOUER & ANOR [\[2004\] WASC 204](#)

CORAM : ROBERTS-SMITH J

HEARD : 1-4, 811, 1418, 2123 JUNE 2004

DELIVERED : 1 SEPTEMBER 2004

FILE NO/S : INS 181 of 2003

BETWEEN : THE QUEEN

AND

JEREMY TROY KRAKOUER

SCOTT SHELDON COLBUNG

Catchwords:

Criminal law - Sentence - Murder - Mandatory life imprisonment - Determination of period to be served before eligibility for parole

Legislation:

Nil

Result:

Minimum terms of 11 years and 8 years imprisonment respectively

Category: D

Representation:

Counsel:

Crown : Mr M Mischin

Accused (J T Krakouer) : Mr R M Utting

Accused (S S Colbung) : Mr A K R Prince

Solicitors:

Crown : State Director of Public Prosecutions

Accused (J T Krakouer) : Donna Webb & Associates

Accused (S S Colbung) : Haynes Robinson

Case(s) referred to in judgment(s):

Nil

Case(s) also cited:

Wood v R [\[2002\] WASCA 175](#)

1 **ROBERTS-SMITH J:** This is an awful and tragic case for everyone concerned.

2 Jeremy Krakouer and Scott Colbung, the two of you, together with Elwyn Colbung and Gary Krakouer, appeared in this Court on 1 June this year on an indictment charging you all with the wilful murder of Grant Clark on 9 March 2003. After a trial of some three weeks the jury found each of you not guilty of wilful murder but guilty of murder. They returned verdicts of not guilty of wilful murder, murder or manslaughter in respect of your co-accused Elwyn Colbung and Gary Krakouer.

3 I must give full effect to the verdicts of the jury. I am obliged to sentence you on the basis of such facts as are necessarily implicit in those verdicts, in particular that at the relevant time neither of you had an intent to cause Grant Clark's death but that each of you did have the intent to cause him grievous bodily harm.

4 Beyond that, to the extent that I sentence you on the basis of facts adverse to you, unless they are undisputed I can only do so if I am satisfied of them beyond reasonable doubt. On the other hand, if facts put to me in your favour are disputed, I need to be satisfied of them only on the balance of probabilities.

5 So far as Elwyn Colbung and Gary Krakouer are concerned, the jury verdicts mean that they have no criminal responsibility for the death of Grant Clark. That does not mean they played no role in what happened. It is clear that they did, but it was not such as to make them criminally responsible for Grant Clark's death.

6 The law is that an offender convicted of murder must be sentenced to imprisonment for life, so I must impose that sentence on each of you. What I am also required to do is to set a period from between seven and 14 years during which you would not be eligible for parole.

7 The minimum period which must be served before eligibility for parole is not itself a sentence of

imprisonment for a particular period. That is because it does not direct immediate release on the expiration of the minimum term but merely makes the offender eligible for consideration for parole once the minimum term has run. The decision whether or not to release the offender then or at any later time remains with the executive government of the day.

8 An order of eligibility for parole goes particularly to mitigation of the punishment of the offender and also to his or her rehabilitation through conditional freedom. I shall return to these and other relevant considerations once I have recounted the facts.

9 During the afternoon or evening of Saturday, 8 March 2003, a number of young people from Mount Barker met up at the Mount Barker hotel known as the Top Pub. They were relaxed and enjoying themselves. The evening was uneventful. One of the people there was Grant Clark who, in his late 20s, was probably somewhat older than the others.

10 The pub closed about 1 am. This group of about 15 to 20 people sat and stood around outside for a while talking and just continuing to quietly enjoy themselves. Grant Clark was playing his harmonica. There was some discussion about where they could go after that. Eventually it was decided they would go to Levi Cork's house. That was no more than a couple of kilometres from the pub and the group walked there. Some may have taken some alcohol with them but that is not clear.

11 At Levi Cork's house some people went inside to talk, have a drink and listen to music. Others stood around outside the house on the driveway or around the carport. It was all very informal, casual and relaxed and people were enjoying themselves. Sometime later the two of you, together with Elwyn Colbung, Gary Krakouer and Anthony Wallam, arrived at Levi Cork's house.

12 Earlier that evening there had been a family reunion at the **Noongar** Aboriginal Centre at Mount Barker. It was a large gathering to celebrate the return of a family member from the United Kingdom. People were drinking and the four of you had quite a lot to drink over the course of the evening until about 11 pm. It seems people were drinking beer, cask wine, whisky and bourbon.

13 The five of you and several other young people walked up to Kimberley Krakouer's place. You all sat around continuing to drink and talking. After probably a couple of hours, Gary Krakouer suggested you all go down to Mondurup Road. He said there was a party down there. From the evidence I am satisfied he thought that because he had earlier seen the other group either walking on their way or arriving there.

14 You all knew you were not invited to what you thought was a party at Levi Cork's house but you decided to go there anyway. I am satisfied all of you except Wallam, (who did not drink) were at least somewhat drunk. The five of you went to Levi Cork's. There were possibly around 20 people there. You were the only Aborigines. You knew and were known to most of the people there because you all lived in Mount Barker and had gone through the same schools together and played sport, especially football, either on the same teams or against each other.

15 Your group approached the house and stood and talked to some people on the driveway and near the front door. Although the five of you had arrived uninvited, there was no animosity and those who were there talked to you and some gave you drinks. At first things were friendly. There was conversation about football, cars and other ordinary things.

16 You, Scott Colbung, talked to Rachael Clarke for a few minutes. She could not later remember what you spoke about but she said you seemed nice and she thought it was a friendly conversation. After

speaking to you, she went back inside the house. Gordon Thomson and Josh Toovey talked to some of your group as well. Thomson gave you, Jeremy Krakouer, a couple of beers.

17 By that time a few other Aboriginal people had arrived as well. They included Samantha Krakouer and Lisa Colbung. At some stage arguments started. Elwyn Colbung and Gary Krakouer became aggressive. Elwyn in particular was "hyped up" and antagonistic towards the people at Cork's place. He accused Gordon Thomson of being a racist. Elwyn and Gary started arguing with Toovey, Thomson and Grant Clark.

18 At this stage, to your credit, the two of you were actually trying to make peace. You, Jeremy Krakouer, grabbed hold of Elwyn and told him to sit down and behave himself, telling him that these people were good. Elwyn did sit down but almost immediately jumped up and started arguing with Gordon Thomson again, accusing him and the others there of being racist. Nothing came of that particular incident, although the stage was almost set for the tragic events that were about to unfold.

19 You and the others had deliberately gatecrashed a casual gathering. You knew the people there from social, school and sporting contact in Mount Barker and were apparently generally on not unfriendly terms with them, but you were not invited and you knew it. Trouble brewed out of a potent mix of alcohol-fuelled aggression and racial resentment by Elwyn Colbung and Gary Krakouer.

20 I am satisfied Elwyn found a rubber mallet by the house. The house had only recently been built and brick paving was still being done. It is not particularly important where Elwyn got the mallet from except insofar as he did not take it to Levi Cork's place. At some stage he passed the mallet on to you, Scott Colbung.

21 The course of events is not entirely clear but there was a confrontation between Wallam and Grant Clark. They exchanged words. You, Jeremy Krakouer, intervened on Wallam's behalf. He then walked away while the two of you were arguing heatedly. That got to the point where you, Jeremy Krakouer, called Clark out onto the road. You were calling him out to fight. That fact was obvious to those who saw this part of what happened.

22 Grant Clark was reluctant to fight. He initially declined to do so. You continued swearing at each other. He told you to "fuck off". By this time Levi Cork had told everyone to leave because he wanted to go to bed. He had sent the people out of the house and shut the door. There were some people by the carport and driveway area and others had started to move off down the street.

23 Grant Clark eventually responded to your calls to fight, Jeremy Krakouer, and walked out on to Mondurup Road opposite the end of the driveway. There the two of you fought. You threw a few punches at each other and grappled and ended up wrestling each other to the ground, but Grant Clark got the better of you. You, Jeremy Krakouer, ended up on your back on the ground with Grant Clark sitting astride you, still fighting.

24 When they saw Grant Clark was winning the fight, Gary Krakouer and Elwyn Colbung ran in and mobbed Clark, hitting and kicking him and trying to drag him off you. Gary Krakouer hit him across the back with a thick stick which he had earlier had up his sleeve. Gordon Thomson joined in to pull Elwyn and Gary off Clark, telling them there was no need for that, it was a fair fight. They all moved back a little away from you, Jeremy Krakouer, and Grant Clark. Clark started to get up off the road.

25 The conflicting accounts of the witnesses do not enable any precise findings to be made about exactly what happened, but having regard to the evidence of Dr Margolius and the descriptions of how

Grant Clark subsequently fell it seems he was still in the process of getting up when you, Scott Colbung, ran in and struck him with the rubber mallet just below the point of the chin.

26 At the point of impact the blow was an upwards blow delivered with what must have been considerable force. You were trying to hit him in the face but instead connected just below his chin, propelling him not backwards, as he probably would have been if he had been already standing erect, but upwards and back, so that he staggered and stumbled around briefly before collapsing onto the road on his front, unconscious.

27 By their verdict, the jury has found that when you hit him you intended to cause him grievous bodily harm.

28 Unknown to anybody at the time, that was a killing blow and he was in fact dying from that moment.

29 The blow caused a laceration through to the chin bone, but far more importantly caused a diffuse axonal injury to the brain.

30 Within the skull the brain is connected to veins and other structures through which it sends and receives messages to and from the body. A significant impact to the head can cause some of these to be torn away or sheered off from the brain which in turn causes bleeding in the brain. Except in the most minor of cases this is a fatal injury. Medical science cannot fix it. The bleeding causes pressure inside the skull that presses upon the brain which has nowhere to go except a small opening at the base of the skull.

31 As the pressure increases it compresses the brain which is forced against the bottom of the skull. As the bottom of the brain is pressed and squeezed into the small opening at the bottom of the skull those parts of the brain in that area are compressed. Those parts control respiration, or the ability of the body to breathe. When they are squeezed the body can no longer breathe and the person dies.

32 Scott Colbung, that was the process that started happening to Grant Clark when you hit him with the mallet. From that point no-one could have saved his life. His death was inevitable, but the process can take some time, and as he lay on the roadway that night you, and apparently everyone else, thought you had only knocked him unconscious.

33 At that stage you, Jeremy Krakouer, went to the side of the road by the intersection near the street light pole, picked up a white painted jarrah road marker post, which was approximately 119 centimetres long by 10 centimetres wide and five centimetres across, and headed back to where Grant Clark was lying unconscious on the road. It was a heavy post weighing approximately five and a half kilograms.

34 Mr Utting says you did not know Clark was unconscious. I do not accept that. I am quite satisfied it was obvious to you that he was unconscious and that at that stage he was certainly no threat to you whatsoever. You were enraged, abusive and violently aggressive, swinging the post around and threatening people with it. You went up to where Grant Clark was lying unconscious, and grasping the post with both hands at one end you raised it over your head and whacked the other end of it down on his head.

35 Despite Mr Utting's submission to me that you only struck him once, I am satisfied beyond reasonable doubt that you struck him twice. I appreciate only four witnesses, Josh Toovey, Scott Anderson, Adam Maninin and Trevor Scott, testified there were two blows, and there are reasons why

their evidence must be approached with considerable caution.

36 However, the medical evidence leads to that same conclusion and the fact that other witnesses speak of seeing only one blow does not cause me to doubt that conclusion. Probably nobody saw the whole thing. Most of the people there were affected by alcohol to some extent or other. The events occurred at night, early in the morning. They were unexpected and when they happened they did so quickly and were dramatic. People were shocked.

37 It is quite clear that most people saw only a part of the incident as it unfolded. The evidence of the witnesses who described two blows is supported by that of Dr Margolius.

38 I am satisfied one blow from the post caused the seven centimetre wound to the back of Grant Clark's head and under that a depressed fracture of the skull extending down to the brain. That blow alone would have caused death.

39 I am also satisfied a blow from the post caused the injury around the right ear and fractured the skull. That was done by a flat instrument while Clark was lying on the ground. The injury would not have been caused by him falling onto the ground because the ear was not bruised. The blow was almost parallel with that to the back of his head. That blow also caused bleeding over the right side of the brain producing the same result I have already described.

40 According to Dr Margolius a quantity of 50 grams of blood there would be life threatening. She found twice that amount, about 100 grams of blood. This also was a fatal injury by itself. I find those injuries were caused by you, Jeremy Krakouer, striking Grant Clark to the head twice with the post. The verdict of the jury means that, not surprisingly, when you hit Grant Clark you intended to cause him grievous bodily harm.

41 These were not the only serious injuries which had by then been inflicted on Clark. In particular there was a hinge fracture at the base of his skull involving the bottom and middle steps of the base of the skull and a fracture extending into the front bony step such that the bone over the top of the eyes was fractured like an eggshell. It is not possible to say precisely when or how the hinge fracture was caused, although it must have been either when Clark was struck by the mallet or when his head struck the ground.

42 Having struck Grant Clark twice on the head with the post, Jeremy Krakouer, you were still extremely aggressive. You threatened others with it. You said to Scott Anderson, "You want a go too?" and you said to Gordon Thomson, "Do you want some of this?" After that you threw the post on the ground and left the scene as did all the Aboriginal group except you, Scott Colbung.

43 Some of the people present had seen some of what happened. Some saw Grant Clark get hit either while rising to his feet or on the ground. Others just saw him lying on the road. Some of the girls began screaming and crying out. There was a general sense of shock and disbelief.

44 People were stunned and horrified. Some ran inside the house. Others quickly gathered around Grant Clark to help him. Some people tried to help Clark by putting him in a coma position and rendering first aid. Others rushed to call the police and an ambulance.

45 Samantha Krakouer had an altercation with some of the people gathered around Grant Clark. She was drunk and abusive. She and Gordon Thomson started abusing each other. You, Scott Colbung, told Thomson not to abuse your sister. He said you were pretty angry.

46 Despite that description I am prepared to accept you were in a highly emotional state which under the circumstances is not surprising.

47 Rebecca Khan, a regional project officer with the Department of Indigenous Affairs, lived across the street from Levi Cork. She came out with other members of her family and went to help. She and her family knew Clark well. He had been a good friend of her daughter's since primary school, played football with her son, was a family friend and had stayed at their house. She told Samantha Krakouer to leave. She told Levi Cork to get a blanket and she checked Grant Clark's pulse and airway. She told her son to call the police.

48 She saw you, Scott Colbung, standing at Grant Clark's feet. She heard you tell Levi Cork you did not do anything and him tell you that you should think about who you hang around with. She says you got upset and said words to the effect, "The black fellows stick together" and that you swore at Cork and called him "a white c...". I accept that you remained in the vicinity and that you were expressing concern and anxiety about Grant Clark, asking how he was, but your situation quickly became untenable because Clark's friends were blaming you for what had happened and so you left.

49 The police and ambulance later arrived. Grant Clark was taken first to Mount Barker Hospital where he was stabilised and then to Albany Regional Hospital and flown by Royal Flying Doctor Service to Royal **Perth** Hospital. Despite the best efforts of all the medical personnel and doctors his brain injuries were irreversible and nothing could be done for him. He was pronounced dead at 20 past 2 in the morning of 9 March 2003 without ever having regained consciousness from the moment he fell to the ground after being hit by the mallet.

50 In the meantime, while people were waiting for the police and ambulance you, Scott Colbung, went and stood by the Khan house. When Michael Khan came out from telephoning the police he saw you there. You asked him for a cigarette. He went back inside and got one for you. When he gave it to you, you handed him the rubber mallet. You later told police in your video record of interview that you told him that you had hit Clark. He asked you what you hit him with and you showed him the mallet. You gave it to him and he threw it in the rubbish bin.

51 After Grant Clark had been taken away by ambulance Rebecca Khan had gone back inside her house. She had coffee and a cigarette and took them out to her back porch. She could hear people still talking on the roadway so she went to the fence to look over. She saw a figure standing by the fence on the same side. She thought it was a friend who was staying with her at the time, Glenda Williams, but it was you, Scott Colbung.

52 She became very angry and upset with you. She told you that you and the others should not have gone to the party uninvited when there was, she said, "obvious racism" in Mount Barker. She testified that you said Grant Clark was a racist and you referred to him in extremely abusive and racist terms. She said she told you Clark was not a racist because she knew he was not. He had a lot of **Noongar** friends and that in any event that did not give you the right to bash him.

53 You told her that you had punched Clark on the chin and someone else had hit him with the road marker post. At that stage Rebecca Khan went back inside her house. She found you, Jeremy Krakouer and Anthony Wallam sitting in her lounge room. She told the two of you that Clark was going to die and the police would be talking to you about murder and she told you to go. Neither of you said anything. You, Jeremy Krakouer, just put your head in your hands and the two of you then apparently left.

54 Mr Utting submitted to me that this was some evidence of remorse on your part as was what you

said to the police in your video record of interview on 8 March 2003 about being shocked when you were told Clark had been seriously injured and was in hospital. I do not accept that. Your reaction at Rebecca Khan's place I take to be no more than a dawning realisation of the seriousness of your own situation as a result of what you had done. Nor do I see any sign of remorse in your interview with the police.

55 Jeremy Krakouer you were arrested by police around 5 pm on Saturday, 8 March and taken to Albany police station. You were interviewed by police about 8 pm. You admitted you were at Cork's place and said you had an argument and a few hits with someone, that he wrestled you to the ground and that was all you could remember. You denied hitting him with a post.

56 You said you had had quite a bit to drink before you got there, beer and spirits, and Gordon Thomson had given you two beers at the house. You said it was Clark who challenged you to a fight but you started to walk up the road towards home when he bullrushed you and tackled you to the ground. You said you tried to wrestle him off and you thought someone grabbed him off you and you just got up and walked back up the road. As you were walking away you saw Clark lying on the road but you didn't know what happened to him. None of that was true.

57 Scott Colbung, you were interviewed by police in the early morning of 8 March as a witness. You told them that whilst you and the others were at Kimberley Krakouer's Gary Krakouer had said there was a party on somewhere down on Mondurup Street and so you had all gone down to Levi Cork's place. You said everything was all right until Jeremy Krakouer and Grant Clark started arguing and then went on to the road and started fighting.

58 You told the police that Gary and Elwyn had come up behind Clark and punched him and then Grant Clark and Jeremy Krakouer fell over and wrestled on the ground before getting up and continuing to fight. You told them that about 30 seconds later you saw Clark lying on the road and while he was lying there Jeremy Krakouer hit him on the head with the post. You said Clark was unconscious. The other four left and you stayed for a little while until people started to blame you, so you left. You said absolutely nothing to police at this stage about your role in the incident.

59 About 8 o'clock that morning police went to your home with a search warrant and to speak to you further but you were not there. You had gone to the beach with Catherine Hollingworth. She knew nothing about the events of the previous night. She noticed you were a bit on edge. Over the course of the afternoon you gradually told her a little. You said that Jeremy put a guy in hospital and initially denied having any involvement yourself.

60 You told her the guy was Clarkie. Later still you told her that you had hit Clarkie once. You did not say with what. She said you had to go to the police station and tell them. You agreed to go. She drove you down to the Mount Barker police station and waited outside a short time while you went in. You got to the police station about 2.40 pm and subsequently took part in a video record of interview with police. At first, as to what you had done, you said only that you had punched Clark a couple of times and that after the others had left you found a rubber mallet so you picked it up and threw it in the bin at (your) auntie's house.

61 You said you had been drinking whisky and Coke, and by the time you got to Cork's house you felt a bit drunk. A bit later you admitted you punched Grant Clark when he got up off the ground. At first you repeatedly denied hitting him with the mallet but after further questioning you admitted you had done so and swung it at him hitting him in the face. You said it was rubber and you "didn't think it would hardly do anything".

62 I do not accept that and it is clear the jury did not because they found you intended to cause Clark grievous bodily harm when you hit him.

63 Mr Mischin, the State prosecutor, submits to me that the circumstances of this case raise serious issues of deterrence both specific and general. I agree. What happened here calls for sentences which will operate to impress upon each of you and other people that death or serious injury are all too frequently the result of alcohol-fuelled aggression and that those who commit offences in that way will suffer serious punishment.

64 What the two of you did that night not only tragically resulted in the death of Grant Clark but has forever changed your lives and those of his family as well as those of your own families. I have before me a victim impact statement from Grant Clark's parents dated 21 May 2004. I do not propose to read it all but I will recount something of which it contains. They begin:

"It is hard to know what to put in a victim impact statement. How do we begin to describe what it means to have lost our only son? Even though he was nearly 30 years old, he worked on the farm and so we saw him every day except on weekends, which is probably the opposite of how it is with most adult children.

He was no angel and liked having a drink, perhaps more than we really approved of but he never harmed anybody. In fact he was always ready to lend a helping hand, which is why we did not hesitate to donate his organs for transplantation.

When we were first notified of Grant's admission to hospital we thought it was nothing serious, something requiring a few stitches maybe, but when we arrived at the hospital we realised it was more serious and that he was going to be flown to **Perth**. When we saw him we could see for ourselves that he was in a very bad way, and when we arrived in **Perth** after him we were told straightaway that there was nothing that could be done to save him, although some tests needed to be done by two doctors before life support could be withdrawn.

What was supposed to be a short drive to Albany Regional Hospital turned into a five-hour ordeal, seeing Grant lie there, returning to the farm to throw together a few things and then driving to **Perth**, not knowing what to expect at the other end, dreading the worst and being met by a heartbroken daughter and then having to tell my parents.

Because we had been in the middle of shifting from our farm, because there were all sorts of official requirements with the police and others about Grant's death, we were caught up in seeing to practical things. In some ways this may have made it possible for us to keep functioning but in another way this was not a good thing."

65 They go on to say:

"We were overwhelmed by the hundreds of people who attended Grant's funeral. Many of them were from the various footie clubs he belonged to over the years. Some came from as far away as Tambellup. This was a reflection of what a social person Grant was, and also how much he loved sport. A number of Aboriginal people asked if they were welcome to attend. We are aware that many local **Noongar** people were shocked by the manner of Grant's death and some families have moved away from the town as a result.

Our new house is large and without Grant to share it, it felt even more empty. His birthday

was only a few weeks after he died. This was very hard for us. His mother says that what sticks in her mind is the way he died. She says, 'I find that a terrible thing. I don't know if I will ever get the image of him on life support out of my mind'.

I know what-ifs don't get you anywhere but I do wish that there had been something to prevent me from running him into town that Friday night. I didn't want him to go. I watched him go through the hotel doors. That's the last time I saw him conscious."

66 They say that they cannot help, in different ways, thinking there might have been something they could have done to prevent it, even though logic tells them otherwise. They go on to mention the comfort they gained from their religious faith and the support of those in their Church.

67 I also have a victim impact statement from Grant Clark's sister and she recounts emotions, naturally, much the same. She says:

"You could always rely on Grant for a smile and a laugh. He is what his friends call a free spirit, not always a perfect angel but someone who you were glad to know and be around. In his usual way he always tried to get the best out of everyone and was not known to be someone who got into fights. He was one of those people who had an uncanny way of being able to charm himself out of a sticky spot."

68 It is apparent from what else she recounts in her victim impact statement that his death has had a profound effect upon her life and will have a continuing effect of that kind. She concludes with the observation:

"I never thought I would be a victim of crime. It's a difficult thing to admit, like there is something wrong with me. Even when I rang victim support they asked me who the victim was. I said my brother but I now realise I am, my family is and his friends are."

69 Jeremy Krakouer, in relation to your personal circumstances and background I have received a certain amount of documentation, to all of which I have given careful consideration. There is in particular a pre-sentence report dated 27 July 2004. I've already indicated to Mr Utting, who appears on your behalf, that although you have a minor criminal record, in my view none of the offences listed there have any bearing upon an offence of the seriousness of the kind for which I now have to sentence you.

70 You were born in **Perth** and raised in Mount Barker. You are one of five children born to your mother. You've had a stable family background with both your mother and father employed at TAFE and CDEP respectively. You left school after completing the third term of year 10. Your literacy and numeracy skills are described as rudimentary. You report that your main attributes at school were your sporting ability and particularly football.

71 When questioned as to what your main interests or hobbies were it took some time for you to divulge that football was your main interest and that you were a team player for one of the Mount Barker football clubs. You made the observation that your victim also played for the same team. You are single with no dependants. The community corrections officer says you were raised by your parents in a stable and supportive household. Although reserved, you appear to be articulate and you display an ability to plan for the future, without stating precisely what your plans are.

72 It says that your only comment as to the reason for your current situation was "If only I hadn't drunk so much that night."

73 There is a psychological report dated 23 July 2004. In relation to your family background I'm told in that report that you described it as being generally happy and stable, although early in your life your father drank alcohol to excess and subjected the family to domestic violence. He ceased drinking approximately 14 years ago after a health scare and the family unit has been stable since that time.

74 Your mother has said that you went through normal developmental stages and proved to be a healthy normal child. You experienced no problems at school and she described you as a good boy who helped her out at home and caused no trouble. You have a young son to an ex-girlfriend in Mount Barker and you used to see the child several times a week when you could visit freely but since you have been in custody you have not seen your son at all frequently because of course you are reliant upon his mother to bring the child to prison to visit you.

75 The report goes on to say that according both to you and your mother growing up in Mount Barker was not easy for children in your family, because of the ongoing fighting which exists between several Aboriginal families. There was apparently considerable violence and at times during your life you've been assaulted and chased with weapons by groups of Aboriginal youths. You said how you had observed relatives sustain serious injuries during these altercations during which you had been exposed to significant levels of violence.

76 Both your parents are supportive and visit you regularly. You have expressed distress and remorse to the psychologist at being convicted for the offence and you present as depressed, although you do not appear hopeless and you were able to discuss plans for your future.

77 You tried alcohol when you were young but after an unpleasant experience did not commence drinking it regularly until you reached 17 years of age. From that time drinking alcohol with your mates formed a large part of your social activities. You said that until the time of the offence you would drink approximately twice a week to the stage of intoxication in the company of friends. You said that your mother and father disapproved of this behaviour and had urged you to look after yourself but you did say you were not worried at that stage about the extent of your alcohol use.

78 In the part of the report under the heading "Discussion" the psychologist refers to what I have just mentioned about your account and that of your mother concerning exposure to violence outside the home due to long-term feuds between various Aboriginal families in Mount Barker. The psychologist then makes the comment that growing up in such an environment is likely to desensitise a person to violence and promote fighting as a way to resolve difficulties. In addition, people who grow up in violent environments can tend to perceive threat when there is none or their reactions to threat can be excessive to the situation, and certainly that is possible in your case.

79 A conclusion which the psychologist expresses is that it appears your offending behaviour in this case resulted from your acceptance of violence as a way of dealing with conflict combined with your state of intoxication. The psychologist says that when first meeting you, you had no recollection that I had requested a psychological assessment, but she goes on to say that you showed little curiosity and unquestioningly complied with the process that you would have found arduous. She then observes that this behaviour is not atypical for people who are unable to stand up for themselves without using aggression and/or violence.

80 Unfortunately this suggests that in many situations you could be taken advantage of or abused without you defending yourself. Subsequently that could result in a possible build up of frustration and anger that would likely then be released with aggression in alternate situations, and she says it is therefore important that you be provided with the opportunity to learn how to defend yourself and meet

your needs with assertive behaviour rather than aggressive behaviour.

81 She concludes that you have said you will abstain from drinking alcohol when released, and as that is something your father has achieved for the last 14 years, you are likely to receive substantial support from your parents. In addition, you would benefit from referral to prison based substance use programs which could be supported by community based substance use counselling upon your release.

82 With regard to your desensitisation to violence, you could be referred to the violent offender treatment program which would assist you develop insight and pro-social strategies for dealing with conflict and life problems in general. I accept those observations and recommendations.

83 I have had handed up to me today by Mr Utting two letters. The first is a letter from Pastor Geoffrey Narkle in which he makes some observation as to your early schooling years and the involvement of your family in the community in the Mount Barker district. He makes the quite correct observation, in my experience, that the influences of drugs and alcohol have destroyed many young lives and will continue to do so. I take account of what Pastor Narkle has written.

84 There is, as I said, a letter from Rebecca Khan in your support. She writes that she has known your family for the last 40 years and that your father and mother were both removed from their parents at a young age and placed in Aboriginal missions but to their credit, she says, they have both been able to reconnect with their immediate and extended families and through determination and perseverance have been role models and spokespeople for **Noongar** people.

85 She recounts how that has been done and describes the active support that they have given to you and your siblings. She says that your parents have been actively involved in advocating for **Noongar** people to government and non-government agencies for the past 20 years and that their efforts have made a difference to the level of government services in Mount Barker and until recently, to race relations in the town.

86 She says you come from a loving and supportive family who were devastated by the events of the past 17 months. She asks that I consider the impact on your family. I accept the information which Rebecca Khan gives, and I think the background of your parents and family, as described by her, adds again to the tragic dimensions of the events of that night.

87 I have also read and taken into account a letter from Joan and Lester Yorkshire who write, amongst other things, that neither you nor Scott Colbung went out that night with any intention of harming anyone. I accept that.

88 They also say that the two of you were deeply remorseful. I am prepared to accept that in your case that is now so and that is a positive sign, but it has taken you some time to get to that point.

89 I come, I think, to this position in your case, Jeremy Krakouer: first, there was no premeditation. This was a spontaneous act as a result of a situation which got out of control. It was fuelled by alcohol. That to some extent explains why what happened did happen but it is no excuse and no mitigation.

90 While you did not start the argument with Grant Clark, it was you who persisted in it, and you who provoked the fight. When I say you did not start it, I am not suggesting he did. The fight was started by Wallam; that is to say, the argument was started by you intervening in the argument between Wallam and Clark, and it was you who persisted in it and who provoked the fight.

91 The situation, however, developed in the first place because the group of which you were a member went to Cork's place uninvited. I am not prepared to accept on the evidence that you went there looking for trouble as the prosecution says but as Rebecca Khan clearly recognises, and I'm sure you all did, your presence there in the circumstances became provocative. It was Elwyn and Gary who started behaving aggressively and initiated the racial abuse aspect. You started to fight with Grant Clark who had first tried to avoid fighting you. When he was unconscious on the ground he was clearly no further threat or danger to you but you were enraged and wildly aggressive.

92 Not only did you attack him whilst he was lying helpless on the ground; you deliberately went to the side of the road and got the long solid post and you delivered two forceful blows to his head which was resting on the roadway. You swung the post in a two-handed grip from over your head down onto his skull intending to cause him life-threatening or permanent injuries. You have demonstrated absolutely no remorse at any time until after your conviction.

93 As I have said, I am required to fix a time between seven and 14 years before which you will not be eligible to be considered for parole. 14 years is not to be reserved for the worst possible case of murder but rather that category of murder cases which are the worst of the sort. The law recognises that there may be a range of circumstances which fall within the worst category of cases. On the objective facts of your offence I think it is in that category.

94 There are other factors which particularly bear upon the issue of eligibility for parole. The first is the fact that you were barely 18 years old when you committed this offence. Combined with that is the fact that although you have a short criminal record, there is nothing which is of any relevance to this offence and you must have some prospect of rehabilitation. I have regard to the need to afford you that opportunity through conditional freedom after a period of imprisonment which would reflect the seriousness and culpability of what you actually did which caused Grant Clark's death.

95 I am mindful of those considerations in particular and your personal background going to mitigation of punishment. I have especially have regard to and take into account your family circumstances and situation as explained by Rebecca Khan. I have come to the conclusion that a non-parole period of 11 years would be appropriate to the circumstances of your offence and your own circumstances and antecedents. Although, for reasons I shall explain in a moment, the issue of parity of sentence does not arise here as between two offenders being sentenced for their roles in the same offence, in fixing your non-parole period I have taken into account the general consideration that you and Scott Colbung are both being sentenced for a death essentially arising out of the same incident. You have been in custody since 8 March 2003 and I will backdate your sentence to that date.

96 Scott Colbung, in addition to what Mr Prince has said to me on your behalf, I have received and taken into account a pre-sentence report dated 22 July 2004 together with letters from your father Mr Quinton Colbung, from Lester and Joan Yorkshire, to which I have already referred, from your older brothers, Norman, Aaron, Gerard and Reg, your older sister Barbara, Mrs Winsome Kickett and a character reference from Mr Dennis Ireland, a teacher at Mount Barker High School. You have a minor criminal record which is quite insignificant in the context of your present situation.

97 You are now 19 years old. In summary, and referring to the pre-sentence report, your background is as follows. You were born and raised in Mount Barker. You have four brothers and one sister and you are the fourth eldest. Your mother passed away in 2000 after a long battle with cancer. With the exception of your eldest brother, who lives and works in Mount Newman, your siblings have continued to live with your father in Mount Barker who has been living at the same address for nine years. You say you've enjoyed a comfortable upbringing in a close-knit, supportive and loving family and your father is a non-drinker, as was your mother.

98 Your father and four siblings live in Mount Barker and are all employed on the local Commonwealth Development Education Program in conjunction with various TAFE programs. You are single with no dependants. Before you were remanded in custody in relation to this matter you did have a girlfriend who you had been seeing for nearly 12 months. That relationship ceased after your arrest.

99 You attended school in Mount Barker until midway through year 12, and you were, by all accounts, an average student both academically and in terms of behaviour and attitude. You have no literacy or numeracy problems. You are articulate and of at least average intelligence. After leaving school you obtained an apprenticeship with the Shire of Mount Barker as a diesel mechanic. After a few months, however, you left that and you explained to the author of the pre-sentence report that at the time you were having difficulties coming to terms with your mother's death and "you went off the rails a bit".

100 According to you, you began drinking alcohol and smoking cannabis at about 15 years of age. Your drinking was done in the context of socialising with your family and peers and you say it is not generally problematic. That is supported by your father who says that whilst you do get drunk, you were not obnoxious or aggressive.

101 The content of the pre-sentence report is expanded upon somewhat by the letter from your father. He says:

"Whilst growing up, Scott has been a very happy child and has been much loved by all his family. He has been very respectful to me and his mother, who is now deceased. He has always respected rules that we have in our household and is always willing to cooperate with other family members."

102 You have five brothers and one sister. He says that throughout the years you have been a good child to raise. You have excelled at school, taking much interest in gaining an education so that you could be successful later on in life. Your father says you attended Mount Barker High School and obtained a good grade. You did a school-based learning program and did your hours with the Mount Barker Shire learning mechanics, as that was your interest. He said you received high praise for the effort you put into that work from your teachers and also from the Shire.

103 During 1997 your mother became ill and you started to find it hard to cope when she was diagnosed with terminal cancer. At that time you were only 13 years old. You had a very close bond with your mother and this was devastating news for you and had an effect on the way you reacted. The result was you had to sit and watch as your mother got sicker and sicker with her cancer, knowing but not accepting, that it was eventually to take her life. She passed away in May 2000 when you were 15.

104 Your father says her death devastated you and your life began to change. You became withdrawn and very angry as you could not accept that your mother had passed away. You at times became suicidal as you could not deal with your grief. Even though that was happening in your life at the time, your father says he is pleased that you did not get involved in criminal activity until this unfortunate incident for which you are very remorseful.

105 The family continue to visit you on a regular basis and your father says he has seen the remorse that you have and which you have expressed. Your father writes that as a single father he has tried very hard since his wife's death to raise his family to have respectful values and morals but this has been very hard on him as he and his wife were married for 25 years. The impact this incident has had on the family has been extremely hard to deal with and they all know they are going to suffer as a result. He writes:

"Since the incident I have spoken to my family at length about violence and the devastating effect it can have on families and the community in general."

106 What has been put before me by members of your immediate family in the letters to which I have referred essentially reflects what your father wrote.

107 This is not a case in which two co-offenders must take equal responsibility for one act or event. The question of parity or equivalence of sentences between you and Jeremy Krakouer does not quite apply here in that way. Indeed, given the different circumstances of the offence committed by each of you it would be wrong and unjust to impose the same minimum period of imprisonment to be served before eligibility for parole.

108 Each of you committed a separate fatal assault on Grant Clark. In a sense the prosecution case was never that you were both jointly responsible for what each of you did. The prosecution case throughout was that each of you was criminally responsible for causing the death of Grant Clark by your own individual actions. Each of you separately at different stages did something which caused his death.

109 In sentencing you, Scott Colbung, I must do so on the basis that you caused his death by hitting him with the mallet. What Jeremy Krakouer did after that was a separate event for which he alone is responsible, although together you caused the same result. You were not defending Jeremy Krakouer. When you came running in with mallet Clark was already off him and in the process of standing up. You attacked an unarmed man with a weapon which you had, for a short time at least, in your possession to use as a weapon.

110 You struck a blow at his face with considerable force. Although you did not intend to kill him, you were trying to cause him very serious injury, not just render him unconscious, although that is what you thought you had done. You struck one blow and only one blow. I am prepared to accept that after you had seen Clark struck by Jeremy Krakouer and he and the others run off, you began to realise the enormity of what the two of you had done. You were concerned for Clark and that is why you stayed to see if he was all right.

111 I do not accept that Grant Clark abused you or any of your group in the racist terms you described to Rebecca Khan. What you said at the scene and to her was your attempt to somehow justify to yourself what you had done. It stands very much to your credit that you voluntarily went to the police station and that although initially denying your role, you eventually admitted hitting Clark with the mallet, although you still tried to minimise your role.

112 I accept that when you told police at the end of the video record of interview that you were sorry you had hit Clark and that it had happened at all and that whatever punishment you were to get you would accept because you knew you were in the wrong was a genuine expression of remorse. Furthermore, it was made before you knew he had died.

113 At the time you were just 18 years old and had no relevant criminal record. Any crime of murder is a serious crime but being required by the law to categorise your offence somewhere in the range of seriousness, I do not think your offence falls within the worst category, yet nor is it within that of the least serious.

114 Your behaviour at the scene and immediately afterwards by voluntarily going to the police station, and your expressions of remorse virtually from that time, combined with your personal background and antecedents, and of course your age, all suggest a very good prospect of rehabilitation and that you

should be afforded that by an order that you be eligible for parole as soon as reasonably possible once you have served a period of imprisonment which does nonetheless bear appropriate proportionality to the circumstances and seriousness of what you actually did in causing Grant Clark's death.

115 My conclusion is that in your case I should fix a non-parole period of eight years' imprisonment. You have been in custody since 9 March 2003 and your sentence will be backdated to that date.

116 Jeremy Krakouer, I sentence you to imprisonment for life. I make an order that you be eligible to be considered for parole after having served 11 years. I order your sentence be backdated to 8 March 2003. Scott Colbung, I sentence you to imprisonment for life. I order that you be eligible to be considered for parole after having served eight years. I order your sentence be backdated to 9 March 2003.