SENTENCING SERIOUS OFFENDERS IN THE CHILDRENS COURT OF NSW[1]

A number of relevant sentencing considerations will be discussed in this paper. This paper is not an attempt to address all matters that may be taken into consideration when embarking on a sentencing exercise for serious offending by Young Persons. Rather, this is an attempt to provide an overview of issues that may be encountered. It is a little like attempting to discuss the history of the world in 1000 words or less.

The *Children (Criminal Proceedings) Act 1987*, (the Act), deals in different ways with three categories of offences:

i) serious indictable offences
ii) other indictable offences
iii) all other offences

Serious children's indictable offences are defined in section 3 of "the Act". Serious children's indictable offences include:

- homicide
- an offence punishable by life imprisonment or for 25 years
- aggravated sexual assault and assault with intent to have sexual intercourse or an attempt to commit either
- sexual assault by forced self-manipulation (ie penetration of the vagina or anus by an object) but only if the victim was under the age of 10 years
- firearms offences relating to the manufacture or sale of firearms if the offence is punishable by imprisonment for 20 years

Section 17 of "the Act" states that these offences can only be dealt with according to law and cannot be dealt with on sentence by the Children's Court.

Other indictable offences may be dealt with either "according to law" or by the Children's Court, pursuant to Part 3, Div 4 of the Act.

Section 18 of "the Act" refers to the definition of 'Other indictable offences'.

18 Other indictable offences

(1) A person to whom this Division applies shall, in relation to an indictable offence other than a serious children's indictable offence, be dealt with
  (a) according to law, or
  (b) in accordance with Division 4 of Part 3.

(1A) In determining whether a person is to be dealt with according to law or in accordance with Division 4 of Part 3, a court must have regard to the following matters:
  (a) the seriousness of the indictable offence concerned,

[1] Presented by Magistrate Joan Baptie at the Children's Court s16 Conference, 2 February 2011.

(b) the nature of the indictable offence concerned,
(c) the age and maturity of the person at the time of the offence and at the time of sentencing,
(d) the seriousness, nature and number of any prior offence committed by the person,
(e) such other matters as the court considers relevant.

(2) For the purpose of dealing with a person in accordance with Division 4 of Part 3, a court shall have and may exercise the functions of the Children's Court under that Division in the same way as if:
(a) the court were the Children's Court, and
(b) the offence were an offence to which that Division applies.

(3) If a court, in exercising the functions of the Children's Court under subsection (2), makes an order under section 33 that provides for a person to enter into a good behaviour bond or that releases a person on probation, the court may, on referral from the Children's Court under section 40 (1A), deal with the order in the same way as the Children's Court may deal with it under section 40.

Section 18 of "the Act" is contained in Part 2 Division 4 of "the Act". Section 16 of "the Act" makes it quite clear that Division 4, which includes section 18, is applicable to "a court other than the Children's Court." Section 18 only becomes relevant to considerations made by the Children's Court pursuant to section 31 (5), discussed below.

In this paper, the focus relates to sentencing young offenders for serious criminal offending rather than consideration of matters relating to hearing committal matters.. In relation to sentencing for serious offences, the Court must also consider section 31 subsection 5 of "the Act" when determining whether to deal with a sentence in the Children's Court or in accordance with law.

Section 31 states:

(1) If a person is charged before the Children's Court with an offence (whether indictable or otherwise) other than a serious children's indictable offence, the proceedings for the offence shall be dealt with summarily.....

(5) Notwithstanding subsection (1):
(a) if a person is charged before the Children's Court with an indictable offence, and
(b) if, at any stage of the proceedings, the person pleads guilty to the charge, and
(c) if the Children's Court states that it is of the opinion that , having regard to all the evidence before it (including any background report of a kind referred to in section 25), the charge may not properly be disposed of in a summary manner,

the proceedings for the offence shall not be dealt with summarily but shall be dealt with in accordance with Division 5 of Part 2 of Chapter 3 of the Criminal Procedure Act 1986 as if the offence were a serious children's indictable offence in respect of which the person had pleaded guilty as referred to in that section.

Pursuant to section 31 of "the Act", the Prosecution may invite the Court to exercise its discretion to determine that the sentencing of a Young Person should be "according to law" and refer the matter to the District Court.
The Court may also be of the view that it should independently exercise its discretion and refer the matter to the District Court.

Unlike section 18, section 31 (5) does not define "the matters" that should be taken into account; but rather refers to "all the evidence before it".

It is uncontroversial that the relevant considerations contained in Section 18 (1A), (see above), can also guide and inform the Children's Court assessment pursuant to section 31(5).

In R v WKR (1993) 32 NSWLR 447, his Honour, Chief Justice at Common Law Hunt stated

> "If the offence were a grave or serious one (albeit not one falling within the definition of a serious indictable offence), and if the offender standing for sentence were of such an age and maturity that he did not deserve the benefit of the special provisions in Pt 3, Div 4 when being punished for such a grave or serious offence, the judge would be more likely to determine that he should be dealt with according to law rather than in accordance with Pt 3, Div 4."

Later, his Honour Justice Sully stated

> "These 'principles' strengthen me in the view to which I would have been inclined to come without such instruction, namely, that the threshold discretion which arises under s 18 (1) of the Criminal Proceedings Act is to be exercised upon the basis of a fair and objective view of the true level of culpability – or, as I would prefer to say, of personal responsibility, - of the offender.
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> If, in a particular case, a crime has been committed and it is a crime which is, in its nature and incidents, an adult crime rather than a crime which can be conceptualised sensibly as deriving from the offender's 'state of dependency and immaturity…' then that factor is, in my opinion, strong warrant for the exercise of the relevant discretion in favour of dealing with the offender according to law. The graver the crime the greater the warrant".
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> In order to fix a fair and objective view of the true level of personal responsibility of a particular offender, it will be appropriate to consider, as well, whether the nature and incidents of the crime, and the personal circumstances otherwise of the offender, are such that the offender should be allowed to shelter behind the accident of age so as to have the quite extraordinary advantages, in terms of penalty, that flow from the application of Div 4 of Pt 3 of the Criminal Proceedings Act."

The Children's Court has a limit on its jurisdiction of 2 years for a single offence and three years maximum for 2 or more offences. Serious driving matters are often considered in this context. For example an offence of Dangerous driving occasioning death carries a maximum sentence at law of 10 years, clearly well below 25 years. The Court of Criminal Appeal, however, has consistently indicated that a control order is almost inevitable if speed or drugs and/or alcohol are involved, despite the fact that the offender was a juvenile.

Any Court embarking upon the sentence of a young person must have regard to the principles expressed in section 6 of the Act.

Section 6 states:

A person or body that has functions under this Act is to exercise those functions having regard to the following principles:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater that that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparations for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

The sentencing discretion will not prove fatal if the Court fails to expressly refer to section 6 when providing reasons for sentence. However it is regarded as best practice.
See R v AD [2005] NSWCCA 208. At paragraph 27, his Honour Justice Howie stated that
"There is no reference to the section or its terms in the sentencing remarks but such a failure does not itself amount to an error of law: R v MHH [2001] NSWCCA 161.

GENERAL SENTENCING REQUIREMENTS

Sentencing Young Persons for serious offences does not require a departure from the standard sentencing procedures that you are all too familiar with in your collective experience.
These include, generally, and not exhaustively, the following;

- Aggravating and mitigating matters pursuant to section 21A
- Discounts associated with plea of guilt
- *De Simoni* principle
- Assistance to authorities

- Totality of sentencing
- Concurrency and accumulation
- Delay
- Parity
- Victim Impact Statements
- 'Doan's case

Section 3A of the Crimes (Sentencing Procedure) Act 1999, cites the purposes of sentencing. These are the well established principles of retribution, general and personal deterrence, rehabilitation, accountability, denunciation and recognition of the harm occasioned to the victim of crime and the community.

Section 21A of the Crimes (Sentencing Procedure) Act 1999 requires all sentencing Courts, in determining an appropriate sentence, to take into account all aggravating and mitigating circumstances known to the Court, in addition to any other objective or subjective factor "that affects the relative seriousness of the offence".

Section 21A (2) (a) to (o) sets out a number of aggravating features. Section 21A (3) (a) to (m) similarly sets out a number of mitigating features. It is clear that neither list is an exhaustive list of those features.

The limitations placed on the use of the section have been discussed at length by the Court of Criminal Appeal. For example, in R v Wickham [2004] NSWCCA 193, the Court clearly indicated that "the (sentencing court) is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence." The policy behind this direction is to prevent a court from double counting an aggravating feature of an offence.

For example, the fact that an offender was "in company" for an offence of Robbery in Company cannot act as an aggravating factor alone. However, the nature and extent of the behaviour and company may be taken into account in determining the seriousness of the offending. See R v Way (2004) 60 NSWLR 168.
Care should be taken in determining what are the legal elements of the offence that are being determined. In R v Chisari [2006] NSWCCA 19, the Court of Criminal Appeal found that the sentencing Judge had erred in refusing to take into account the fact that a weapon had been used during the commission of a charge of maliciously inflicting grievous bodily harm. The error was that such an offence could be committed without the use of a weapon.

The fact that an accused has a prior criminal record is not necessarily an aggravating feature. In R v Shankley [2003] NSWCCA 253 it was considered to be relevant, "not to increase the objective seriousness of the offence committed but rather that retribution, deterrence and protection of society may indicate a more severe sentence is warranted." The prior record does not aggravate the offence but is an aggravating factor in determining the appropriate sentence.

A mitigating factor is the accused's assistance to authorities.....

Section 22 of the Crimes (Sentencing Procedure) Act 1999 also applies when sentencing Young Persons. This section addresses the issue of a plea of guilty.

The guideline judgment of R v Thomson and Houlton (2000) 49 NSWLR 383 is still relevant although it has been reviewed.
In R v Borkowski [2009] NSWCCA 102, the relevant principles were revisited and summarised.
Care should be taken in terms of double counting if there is a plea of guilty and assistance to authorities.

Standard non-parole periods clearly do not apply if the offender was "under the age of 18 years at the time the offence was committed".
See section 54D(3) of the Crimes (Sentencing Procedure) Act 1999. A table of offences is annexed to section 54D.
See also MJ v R, CPD v R [210] NSWCCA 52. Also R v JW [2010] NSWCCA 49.

Standard non-parole periods replace guideline judgments where applicable.

Clearly guideline judgments do apply to sentencing Young Persons.
See R v SDM [2001] NSWCCA 158. Wood CJ at CL stated at paragraph 46,

> "The pre-Henry authorities that are directed to sentencing of young offenders are readily adaptable to the application of guideline judgments. The principles have been so frequently stated that little is to be gained from further exposition: youth is a factor that may operate to reduce the emphasis to be placed on considerations of general deterrence and retribution; but that principle itself is counterbalanced where the offence is one more commonly expected of an adult offender: Pham and Ly; R v Hearne [1999] NSWCCA 605, and the cases there cited; R v Hearne [2001] NSWCCA 37, and the cases there cited.
> Armed robbery is classically an offence of the kind in which the leniency otherwise attracted by youth may be diminished. The applicant could therefore gain little comfort from his youth in this sentencing process."

In the matter of the Attorney General's Application (No1) under s26 of the Criminal Appeal Act; R v Ponfield et al [1999] 48 NSWLR 327, the Court of Criminal Appeal was 'slow' to enunciate a guideline judgment in relation to Break, Enter and Steal offences largely because of the disparate types of offending caught by the provisions relating to breaking and entering. At paragraph 48 of the judgment delivered by his Honour Justice Grove, he stated that

> "A court should regard the seriousness of offence contrary to s112(1) of the Crimes Act as enhanced and reflect that enhanced seriousness in the quantum of sentence if any of the following factors are present. Necessarily, if more than one such factor is present there is accumulative effect upon seriousness and the need for appropriate reflection.
> (i) The offence is committed whilst the offender is at conditional liberty on bail or on parole.
> (ii) The offence is the result of professional planning, organization and execution.
> (iii) The offender has a prior record particularly for like offences.
> (iv) The offence is committed at premises of the elderly, sick or the disabled.
> (v) The offence is accompanied by vandalism and by any other significant damage to property.

(vi) The multiplicity of offence.....In sentencing on multiple counts regard must be had to the criminality involved in each: Pearce v R (1998) 72 ALJR 1416.
(vii) The offence is committed in a series of repeat incursions into the same premises.
(viii) The value of the stolen property to the victim, whether that value is measured in terms of money or in terms of sentimental value.
(ix) The offence was committed at a time when, absent specific knowledge on the part of the offender (a defined circumstance of aggravation – Crimes Act s105A (1) (f), it was likely that the premises would be occupied, particularly at night.
(x) That actual trauma was suffered by the victim (other than as a result of corporal violence, infliction of actual bodily harm or deprivation of liberty – defined circumstances of aggravation: Crimes Act s105A (1)(c), (d) and (e).
(xi) That force was used or threatened (other than by means of an offensive weapon, or instrument – a defined circumstance of aggravation.
It will of course be requisite for a sentencing court to give appropriate weight to matter in mitigation as manifest in the particular case. These will include evidence of genuine regret and remorse and any rehabilitative steps taken by the offender. Whilst addiction to drugs and alcohol is a relevant circumstance for the Court to consider it is not of itself a mitigating factor."

In section 54D, a standard non-parole period is provided for in relation to section 112(2) and 112 (3) of the Crimes Act. This clearly does not apply to sentencing Young Persons.

In relation to robbery offences, clearly the guideline judgment applies to Young Persons. In section 54D, only section 98 offences are constrained by a standard non-parole period. Section 98 offences carry a maximum penalty of 25 years imprisonment and are therefore Serious Children's Indictable offences and must be dealt with at law in any event.

Driving offences do not attract a standard non-parole period and therefore the guideline judgment enunciated in R v Whyte (2002) 55 NSWLR 252 still applies.

In relation to Assault Police matters, the Court of Criminal Appeal declined to provide a guideline judgment in Attorney General's Application under s37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002 [2002] NSWCCA 515.

ISSUES OF PARTICULAR RELEVANCE TO YOUNG PERSONS

- AGE
- REHABILITATION
- DRUG HISTORY
- MENTAL HEALTH
- STANDARD NON-PAROLE / GUIDELINE JUDGMENTS
- PARITY
- DELAY
- SPECIAL CIRCUMSTANCES
- CSO/ SUSPENDED SENTENCES AS ALTERNATIVES TO CONTROL ORDERS

AGE AND REHABILITATION OF YOUNG OFFENDERS

The Court of Criminal Appeal has repeatedly indicated that when sentencing Young Persons that

> "in the case of a youthful offender.....considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation." Yeldham J Wilcox's case (unreported, Supreme Court, NSW, 15 August 1979).

In R v LNT [2005] NSWCCA 307, his Honour Justice Rothman summarised the relevant case law as follows:

> "The principles expressed in R v MA are of long standing and, depending upon the age and any other disability of the offender in question, have been applied with varying effect in a number of judgments. Reference should be made to, inter alia, R v Pham and Ly (1991) 55 ACrim R 129; R v WKR (1993) 32 NSWLR 447; R v Bus (CCA, unreported, 3 November 1995); R v AEM [2002] NSWCCA 58; R v AD [2005]NSWCCA 258. The principles espoused in those cases were recently summarised in this Court in R v AN [2005] NSWCCA 239. In that last mentioned case, Howie J (with whom James J and I agreed) said:
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> > The full passage from Bus....is as follows
> > ....it is obvious that the relevance of the principles stated in s6 to which individual case depends to a very large extent upon the age of

the particular offender and the nature of the particular offence committed. An offender almost 18 years of age cannot expect to be treated according to law substantially differently to an offender just over 18 years of age. In both cases, the youth of the offender remains very relevant. Rehabilitation plays a more important role and general deterrence a lesser role. But that principle is subject to the qualification that, where a youth conducts himself in a way an adult might conduct himself and commits a crime of considerable gravity, the function of the Courts to protect the community requires deterrence and retribution to remain significant elements in sentencing him....

....One of the most frequently cited decisions stating this approach is R v Pham and LY.... Where the relevant offender was aged 17 years and 8 months. In that case Lee J said at [135]
It is true that courts must refrain from sending young persons to prison unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate, In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes....

In R V WKR... Sully J stated:

If in a particular case, a crime has been committed and it is a crime which is, in its nature and incidents, an adult crime rather than a crime which can be conceptualised sensibly as deriving from the offender's ....state of dependency and immaturity....then that factor is, in my opinion, a strong warrant for the exercise of the relevant discretion in favour of dealing with the offender according to law. The graver the crime the greater the warrant.....
In order to fix a fair and objective view of the true level of personal responsibility of a particular offender, it will be appropriate to consider, as well, whether the nature and incidents of the crime, and the personal circumstances otherwise of the offender, are such that the offender should be allowed to shelter behind the accident of age so as to have the quite extraordinary advantages, in terms of penalty, that flow from the application of Division 4 of Part 3 of the Act.

In KT v R [2008] NSWCCA 51, at paragraph 23 his Honour McClellan CJ at CL stated that:

"The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age. The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence. Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult. Although accepted to be of less significance than when

sentencing adults, considerations of general deterrence and retribution cannot be completely ignored when sentencing young offenders. There remains a significant public interest in deterring antisocial conduct.....
The emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders, may be moderated when the young person has conducted him of herself in the way an adult might conduct him or herself and has committed a crime of violence or considerable gravity....In determining whether a young offender has engaged in 'adult behaviour' the court will look to various matters including the use of weapons, planning or pre-meditation, the existence of an extensive criminal history and the nature and circumstances of the offence. Where some or all of these factors are present the need for rehabilitation of the offender may be diminished by the need to protect society.
The weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity. A 'child-offender' of almost eighteen years of age cannot expect to be treated substantially differently from an offender who is just over eighteen years of age. However, the younger the offender, the greater the weight to be afforded to the element of youth."

The Court of Criminal Appeal appears to allow a much greater consideration to the aspect of age and rehabilitation if the offender has limited exposure to the criminal justice system.

In MJ v R, CPD v R [2010] NSWCCA 52, his Honour Justice Rothman stated at paragraph 71:

> "Chronological age of a young offender is not solely the determining factor in deciding how much weight should be attributed to general deterrence, as distinct from the other factors, in assessing an appropriate sentence. Regard must be had to the mental state and circumstances of the offender at the time of the offending....Likewise, the violence of the offence, of itself, does not necessarily establish that the juvenile is acting 'as an adult'. In sentencing, juveniles (including minors), who act as an adult would, the function of the courts requires deterrence and retribution and they remain, or become, more significant elements in sentencing the youth....The test, in those circumstances, is whether the youth has conducted himself or herself in a way that an adult would, and that requires an assessment of the maturity and conduct, not only the degree of violence and the gravity of the offence."

In BP v R [2010] NSWCCA 159, his Honour Justice Hodgson JA considered the sentencing of BP who was a repeat juvenile sex offender (see BP v R, SW v R [2006] NSWCCA 172). At paragraph 76 he commented:

> "What does the evidence reveal in the present case? The applicant was nearly 17 years' old at the time of the offence. The background report and presentence report do not assert that immaturity on the Applicant's part played any part in the commission of the offence. Parts of the Court's 2006 judgment on the doli incapax issue shed light upon the Applicant's understanding and maturity in 2003, in ways which do not assist the Applicant on sentence for

the 2008 offence.....The victim was used effectively as a sex object, perhaps reflecting the Applicant's approach to past sexual activity within his peer group. Whatever had been the Applicant's past experience, however, he had received intensive sex-offender counselling and, by March 2008, he well understood the proper boundaries of lawful sexual activity, and the consequences of crossing those boundaries and engaging in forcible and non-consensual sexual intercourse with a woman.
Was the Applicant's immaturity a significant contributory factor to the commission of the 2008 offence? In the circumstances of this offender and this offence, I do not consider that the relevant nexus exists. In any event, to the extent to which the Applicant's youth and immaturity may operate in his favour on sentence, they are very largely neutralised by the clear warnings flowing form his prior conviction for similar offences and the subsequent counselling and reinforcement provided to him concerning the limits of the law in the area of sexual activity."

In R v MA [2004] NSWCCA 92, his Honour Justice Dunford stated at paragraph 27:

> "Deterrence, retribution and protection of the community are not to take precedence to the exclusion of rehabilitation, but neither is rehabilitation to take precedence over deterrence, retribution and punishment, All must be balanced in the overall synthesising of the sentence."

In TM v R [2008] NSWCCA158, Justice Hall, cited with approval the remarks made by Justice Adams in MS2 & Ors v R [2005] NSWCCA 397 as follows:

> "the point may be put simply: children do not have adult value judgments, adult experience, adult appreciation of consequences – especially catastrophic consequences – or adult understanding of criminal culpability. That, of course, is not to say that, depending on age and background, they cannot be intentionally wicked and know very well that what they do or intend to do is very seriously wrong and even criminal...."

And later at paragraph 52:

> "The correct approach requires the sentencing judge to assess whether immaturity, having regard in particular to an offender's age, was a significant factor in the commission of an offence, If those questions are answered in the affirmative, then it may be fairly said that the criminality involved is less than it would be in the case of an adult of more mature years in accordance with the principles stated in R v Hearne.

In R vAQ [2003] NSWCCA 43, the sentencing Judge in the District Court had proceeded on the uncontested basis that the juvenile offender was 16 years of age at the time of the commission of the offences. It subsequently transpired that the young person was in fact 14 years of age at the time of the commission of the offences. His Honour Justice Shaw commented at paragraph 75 that:

> "Considerations of the offender's age affect the sentencing discretion in a number of ways including:
> - the assessment of the appropriate penalty when making findings of fact about the relationship between the offender and his co-offenders;
> - when making findings of fact about the culpability of the offender;

- when coming to an assessment of the objective gravity of the offences;
- when coming to an appreciation of the subjective background of the offender;
- when considering the prospects for rehabilitation;
- when considering the totality of the offenders criminality;
- when fixing an appropriate term of detention;
- when considering whether there are 'special circumstances' as a matter of fact or law;
- when fixing the minimum period of detention that is required;
- when assessing whether an order should be made that the offender be kept in a detention centre.

A misconception as to the offender's age therefore had the potential to greatly affect the manner in which the sentencing discretion was undertaken. The notional idea that the criminality of an offender can be classified as 'childish' or somehow 'adult' is, at times, a difficult concept. In some cases, there must be allowance for a consideration that the seriousness of the offence is, in some respects, a result of the offender's immaturity and, accordingly, lack of social identity and loyalty. There are some cases in which age is not only a relevant consideration but rather the only consideration. This is reflected in the doctrine of doli incapax, set by statute at 10 years of age. In the years between 10 and 18 (at which any offender must be classified as adult, disregarding any intellectual disability) it is difficult for any person called upon to sentence a child to distinguish culpability from immaturity. The appropriate person in this regard is the sentencing judge."

DRUG HISTORY AND INTOXICATION OF YOUNG OFFENDERS

It has been long held that "the consumption of alcohol or drugs is not an excuse for this behaviour, nor should it be an excuse for this kind of behaviour."

His Honour Justice Wood stated in R v Henry (1999) 46 NSWLR 346 at paragraph 273, that the occurrence of a drug addiction at "a very young age" may be recognised as an exception to the general rule.

This consideration has been cited with approval in R v Todorovic [2008] NSWCCA 49 and in SS v R and JC v R [2009] NSWCCA 114.

In BP v R [2010] NSWCCA 159, his Honour Justice Hodgson JA considered the issue of intoxication, his Honour noted that:

> "Although the issue is excluded in this way at trial, the intoxication of an offender may be relevant on sentence....Certainly, there is nothing in the Crimes Act 1900 or the Crimes (Sentencing Procedure) Act 1999, not any common law principle, which would exclude intoxication being taken into account on sentence in assessing the moral culpability of a s 611 offender. Of course, how it may be taken into account will depend upon the circumstances of the case and the impact of intoxication upon the offender's degree of deliberation and whether it contributes to an offender acting out of

character……Alcohol is not a licence to commit crime….Ms Rigg did not contend that the victim's intoxication reduced the objective gravity of the offence. She acknowledged that, in some circumstances, the intoxication of a sexual assault victim may be a reason for finding the offence more serious than would be the case in the absence of such vulnerability."

MENTAL HEALTH OF YOUNG OFFENDERS

In R v AN [2005] NSWCCA 239, the young person presented with a "severe mental impairment". At the time of the commission of the offences (detain for advantage and aggravated sexual assault on 8 August 2000) the young person was 13 years and 9 months of age.

The young person was found unfit to be tried. Subsequently, the Mental Health Review Tribunal determined that the young person would not become fit within a period of 12 months and directed a special hearing be conducted. The sole issue at that hearing before a Judge sitting alone related to whether the presumption of doli incapax had been rebutted. That issue depended upon an assessment of the young person's mental condition at the time of the offending.
In November 2001, when he was 15 years of age a number of psychometric tests were conducted to assess his level of cognitive functioning and his intellectual disability. "The difference between his chronological age and test age differed depending upon the type of test administered but it ranged between 6 year 8 months below his chronological age on one series of tests to 7 years 4 months on another……Dr Hayes reported upon the applicant again in January 2004, by this time the applicant was aged 17 years and 2 months. She expressed the opinion that the applicant's interpersonal relationships were at a level equivalent to that of a 5 year and 8 months child. His personal, domestic and community skills were at a level between 9 years and 11 years and, in terms of his receptive and expressive language, the applicant functioned at the age of 7 years."

The trial Judge was satisfied that the presumption had been rebutted and imposed two limiting terms. The Court of Criminal Appeal considered whether the sentencing Judge had considered general deterrence as it applied to a child; as well as to sentencing for mental disability.

At paragraph 22, his Honour Justice Howie commented:

> "But it was not only the age of the applicant and the principles that applied in sentencing a child that needed to be taken into account in the difficult task that confronted his Honour. The evidence was that the applicant was suffering from a mild to moderate intellectual disability. It was because of his mental abnormality that he was found to be unfit to be tried. The applicant had an intellectual age far below his chronological age. Therefore the applicant's criminal responsibility was not only diminished by the vulnerability and immaturity arising from his youth but also by the mental deficiencies from which he suffered and that resulted in a reduced understanding of the criminality of his conduct and its consequences to the victim and himself."

The Court then referred to the well established principle that "where an offender suffers from a significant mental disability, less weight may be given to general deterrence; see for example R v Letteri (NSWCCA, unreported, 18 March 1992), R v Engert (1995) 84 A Crim R 67 and R v Israil (2002) NSWCCA 225. In R v Henry (1999) 46 NSWLR 346 Wood CJ at CL summarised the principle, its operation and rational as follows:

> "The reason for this approach lies in the circumstance that the community will readily understand that the offender who suffers from a mental disorder or abnormality is less in control of his or her cognitive facilities or emotional restraints, and in some instances lacks the ability to make reasoned or ordered judgments. Almost invariably there is a limited appreciation of the wrongfulness of the act, or of its moral culpability, which although falling short of avoiding criminal responsibility does justify special consideration upon sentencing. Moreover, such a condition is inherent and its presence does not depend upon any element of choice."

His Honour Justice Howie then elucidated the differing tests at paragraph 46:

> "The considerations that apply in determining the significance to be given to general deterrence when sentencing a child are not the same as those which apply when sentencing a person who suffers from a mental abnormality. In the former the issue is one of weighing the need for general deterrence as against the need to promote the rehabilitation of the child. In the latter case the issue is whether the offender is a suitable subject for general deterrence and, if so, to what degree having regard to the severity of the mental abnormality and its connection with the offence committed. I do not believe that the weight to be given to general deterrence in dealing with a child suffering from a mental disability can be determined simply on the basis of applying only the relevant considerations applicable to a child or only the relevant considerations applicable to a person suffering from a mental disability."

Justice Howie concluded that:

> "In my opinion, by reason of the age of the applicant and his mental deficiencies, general deterrence had no role to play in determining the limiting terms to be imposed upon the applicant..."

Other considerations relating to mental health were considered in YS v R [2010] NSWCCA 98. In that case the young person was 16 years of age at the time of the commission of the offences, being a number of sexual assaults perpetrated on the same victim in circumstances of aggravation, being deprivation of liberty.
The young person was first diagnosed with a mental illness at the age of 18, "at which time he was reportedly suffering a psychotic disorder with catatonic features. His symptoms included auditory hallucination and he displayed psychomotor retardation. He presented on other occasions with similar psychotic symptoms and has been admitted to hospitals under the Mental Health Act 2007. The psychiatrists noted that the applicant was very difficult to interview."

Clearly, in this case the young person's mental health issues were not obviously present at the time of the commission of the offences. The Court of Criminal Appeal

however was of the view that nonetheless the pat played by mental illness also "affects the conditions under which incarceration will occur."

PARITY

The issues relating to parity are well established. See Lowe v The Queen [1984] HCA 46. Also, "Like co-offenders should be treated alike, with any disparity being based on a rational basis: Postiglione v R [1997] HCA 26.

Clearly parity applies as between young offenders. See AE v R [2010] NSWCCA 203.

Care should be taken if sentencing different co-offenders for lesser offences which carry a different maximum penalty arising from a joint enterprise.
At paragraph 30, his Honour Justice Basten noted that:

> "It is undesirable, but sometimes unavoidable, that person involved in a common criminal enterprise are sentenced at different times or by different judges. Disparity in outcome may give the appearance of disparity in approach in circumstances where the basic principle of equal justice requires consistency in punishment...However, equal justice also requires that differences in culpability be reflected in different measures of punishment. Accordingly, where circumstances differ, disparity in outcome will be an appropriate, or even necessary, result. It will reflect the fair administration of justice, rather than the contrary.
> Further, the personal circumstances of a group of offenders will tend to vary, as will the degree of responsibility for the criminal acts. Nor is there any scientific approach to the assessment of such matters..."

See SS vR, JC v R [2009] NSWCCA 114, in relation to other considerations such as disparate ages and rehabilitation, seriousness of offending, duress, special circumstances and accumulation of sentences and the non-parole period.