Criminal law developments

The High Court has recently been considering cases involving two of the most common sub-groups of the prison population – the so-called 'dogs' (or informers) and 'rock spiders' (inmates serving sentences for sexual assaults involving minors).

It has long been the experience of counsel involved in criminal law that both of these categories of offenders are at risk of being targeted by vigilante groups of fellow prisoners with extremely violent results.

In *York v The Queen* (2005) 79 ALJR 1919 the High Court dealt with the case of an offender who had provided extensive assistance to the police and if imprisoned was clearly at risk of being killed. This led the sentencing Judge to impose on the offender a term of imprisonment for her own offence but the entire period of the sentence of imprisonment was suspended.

The Queensland Court of Appeal allowed a Crown appeal and ordered a term of actual imprisonment on the basis that the appellant's problems in prison were not relevant in determining sentence.

The High Court disagreed. It found that there was no reason to interfere with the sentencing Judge's sentence given the unusual circumstances of this case. It appears from the evidence on sentence that if the appellant had been given a full-time custodial sentence it would in all likelihood have been served in a prison without a protective custody section. McHugh J referred in terms to the need for protective custody for informers and sex offenders because of the generally accepted view that their safety in prison is often at risk. His Honour when considering the relevance of this to the sentencing process said:

> That means that a sentencing judge must endeavour not only to protect society from the risk of a convicted criminal re-offending but also to protect the convicted criminal from the risk of other prisoners re-offending while in jail.

Callinan and Heydon JJ in a joint judgment said:

> If the responsible authorities chose not to, or are unable to respond to the risks proved in a case, courts can and will be left with the impression, as the sentencing judge was here, that those authorities are indifferent to, or insufficiently concerned for the physical safety of incarcerated persons. The imposition of a sentence of a shorter duration, because of the risks to the appellant's safety, than would otherwise be imposed, can do nothing to meet or reduce those risks except the period of exposure to them. The unusually strong and uncontradicted evidence in this case made it a special one.

The case of *New South Wales v Bujdoso* (2005) 80 ALJR 236 illustrates what happens when a high risk prisoner is not protected properly in the prison system.

Mr Bujdoso's involvement with the courts began when he pleaded guilty to a number of counts of sexual assaults on males under the age of 18. He was sentenced to a term of imprisonment and during the course of that sentence was admitted to a prison work release program which involved him leaving the prison each day to attend to his job. Because of various problems with security at the institution he was attacked one evening in his cell by a number of men wearing balaclavas and wielding iron bars. As a result of the attack he suffered serious injuries including a fractured skull.

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The attack led to civil proceedings being taken on behalf of Mr Bujdoso. Evidence at the hearing of that claim revealed a long list of problems associated with his incarceration. He complained to authorities that he was repeatedly accused of being a 'rock spider' and he made various requests to be housed in parts of the prison system that might appear to offer him some safety. The judgment refers to a number of internal reports from prison officers that confirm the presence of weapons such as knuckle dusters in the gaol. There was also what can only be described as a fair amount of 'buck passing' between the prison staff regarding Bujdoso's safety (see for example paragraphs [12] and [13]).

In the High Court the state was found to have breached its duty of care to Mr Bujdoso even though there was evidence that there some difficulties within the prison system successfully preventing assaults of this type. The state argued that the general approach taken to classification and protection of prisons at the particular institution involved had led to a general view that inmates required little supervision and there had not been any earlier history of assaults.

The High Court referred to the duty of care owed by prison management in these terms:

> It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and at which they generally lawfully conduct themselves (*Modbury Triangle v Anzil* (2000) 205 CLR 254; 75 ALJR 164). In a prison, the prison authority is charged with the custody and care of persons involuntarily held there. Violence is, to a lesser or a greater degree, often on the cards. No one except the authority can protect a target from the violence of other inmates.

It remains to be seen whether the judgment has led to a re-appraisal of inmates' security in the New South Wales prison system.

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