Sentencing

Wakefield v R [2010] NSWCCA 12; *Bourke v R* [2010] NSWCCA 22

These two recent decisions of the New South Wales Court of Criminal Appeal provide useful guidance on the operational effect of the sentencing principle laid down by the High Court in *The Queen v De Simoni* (1981) 147 CLR 383 that an offender must only be sentenced for the offence he or she has been charged with and convicted of.

In *Wakefield* [2010] NSWCCA 12 the appellant was sentenced on nine counts of fraud by an officer of a company (Nestle), with a further eighteen counts being taken into account on a Form 1. The scheme involved the appellant misusing his position to redirect to himself company funds allocated to gifts, discounts, rebates and prizes to retailers of the company's products. The earliest offence occurred on 1 December 2000 and the latest on 19 March 2004. However, the sentencing judge stated in his remarks on sentence that the offences occurred between 4 September 2000 and 28 May 2004.

It was argued, on behalf of the appellant, that in stating in his remarks that the offences occurred between 4 September 2000 and 28 May 2004 the sentencing judge 'by stating a period that must have incorporated offences not brought against the applicant … fell into error by taking into account erroneous material in aggravation of the applicant's offending'. In rejecting this argument, Grove J, with whom Simpson and R A Hulme JJ agreed, held that the remarks made it sufficiently clear that the *De Simoni* principle had been complied with. Grove J stated (at [14]):

> The dates mentioned by his Honour had obvious relevance to the applicant's holding the position which enabled him to perpetrate the frauds. There was no indication that the applicant was being punished for uncharged offences either during the five months calculated by counsel or any other time. To the contrary his Honour was careful to avoid so doing. Inter alia he said:
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> > The offences occurred at least between the period of 4 September 2000 and 28 May 2004, which is a lengthy period. Although the offender is not to be sentenced for matters other than those which he has been charged with, it is of note that on the agreed facts it appears that the offender has otherwise benefited in the past from funds transferred improperly from the company by others who were later concerned in these matters. But, as I say, Mr Wakefield is only to be sentenced in relation to those matters that are brought against him. Of course the only matters bought (sic) against him are those where he was the person responsible for improperly authorising the actual payment.'

The issue in *Bourke* was more complex. In that case the appellant pleaded guilty to an offence of 'malicious wounding', that is, wounding a person with intent to inflict grievous bodily harm, contrary to s 33(1)(a) of the *Crimes Act 1900*. The offence occurred when the applicant approached the victim armed with a pole and an axe. The applicant swung the axe at the victim, who fell to the ground. The applicant then struck the victim three times with the axe and the pole causing lacerations and fractures to the victim.

… the Court of Criminal Appeal held that the sentencing judge was both entitled to and obliged to take into account the full extent of the injuries, and this did not contravene the De Simoni *principle.*

These injuries were clearly capable of comprising grievous bodily harm. However, it was argued that because the applicant was charged with 'malicious wounding' injuries which amounted to grievous bodily harm had to be disregarded when considering the objective severity of the offence. To do otherwise would result in the applicant being sentenced for a more serious offence or for circumstances of aggravation which had not been pleaded.

In rejecting this argument the Court of Criminal Appeal held that the sentencing judge was both entitled to and obliged to take into account the full extent of the injuries, and this did not contravene the *De Simoni* principle. McClellan CJ at CL, with whom Price and R A Hulme JJ agreed, set out the reasons for this as follows (at [54]):

> It must be remembered that the intent to which the applicant pleaded guilty was the intention to do grievous bodily harm. It is apparent that his Honour had that in mind, but also recognised that the injuries inflicted on the victim included both wounds, and, if considered alone, injuries in the nature of grievous bodily harm. To my mind in the circumstances of this case his Honour was both entitled and, if he was to determine the appropriate sentence, obliged to have regard to the full extent of those injuries. The consequence is not that the applicant has been sentenced for a more serious offence than that for which he was charged or for an aggravated form of the present offence. Furthermore because the infliction of wounds or grievous bodily harm is an element of the offence, the sentencing judge was careful to identify the fact that he was not taking the injuries into account as an additional aggravating factor under s 21A(2)(g) of the *Crime Sentencing Procedure Act* 1999 (NSW).

In separate judgments both McClellan CJ at CL and R A Hulme J distinguished the present facts from those in *McCullough v R*

[2009] NSWCCA 94 because that case involved the sentencing judge erroneously taking into account an injury that was entirely separate and distinct from the wound that was the subject of the charge.

McClellan CJ at CL succinctly described the principle in *De Simoni*, as developed in recent New South Wales Court of Criminal Appeal decisions, as follows (at [50]):

> an offender must not be sentenced for an offence with which he or she has not been charged and convicted. If by reason of the facts of a particular case an offender could have been found guilty of an offence carrying a greater maximum penalty than that for which they have been charged, the facts which would constitute a finding of the more serious offence cannot be relied upon when sentencing the offender. If those facts would have made the offender liable for the penalty for the aggravated form of an offence they must be put to one side when sentencing for the offence for which that person has been convicted.

By Chris O'Donnell

Double jeopardy: *R v JW* [2010] NSWCCA 49 and *R v Carroll, Carroll v R* [2010] NSWCCA

Two recent decisions by the New South Wales Court of Criminal Appeal have clarified the interpretation of a recent amendment abolishing the concept of double jeopardy previously applicable to a Crown appeal against sentence.

The matter was seen as so important that both *R v JW* [2010] NSWCCA 49 and *R v Carroll, Carroll v R* [2010] NSWCCA were heard by a bench of five judges with the chief justice presiding.

JW dealt with the effect of the amendment in detail. In 2009, Section 68A(1) was added to the *Crimes (Appeal and Review) Act 2001* in these terms:

> An appeal court must not:
>
> dismiss a prosecution appeal against sentence, or
>
> impose a less severe sentence on any such appeal than the court would otherwise consider appropriate,
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> because of any element of double jeopardy involved in the respondent being sentenced again.'

After considering the case law on the 'double jeopardy' concept and the submissions in the appeal, the court in brief summary was of the view [par 141] that the expression 'double jeopardy' in section 68A refers to the circumstance that an offender is, subject to the finding of error on the part of the sentencing judge, liable to be sentenced twice. The section also removes from the court's consideration the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject. Further, the section prevents the court, on the basis of such distress and anxiety, exercising its discretion not to intervene or reducing the sentence it otherwise believes to be appropriate.

JW also found that section 68 prevents the court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case.

Both cases will repay careful reading to see the many considerations that still remain relevant in the resentencing process. Carroll in particular is instructive in showing the effect its appellate history had on the ultimate sentence imposed.

Keith Chapple SC

Verbatim

Lehman Brothers Holdings Inc v City of Swan & Ors [2009] HCATrans 323 (11 December 2009)

Gummow J: Mr Hutley, you may be right about all of this.

Mr Hutley: I hear that. I know what is coming next, your Honour.

Gummow J: Is there not a question of some public importance?

Mr Hutley: Your Honour, what we say is this. There was an interesting question before the Full Court. We say that the Full Court has exposed in conventional fashion in great detail the reasoning and argument. We say that once that is exposed, that the argument available leads to such perverse results, or potentially perverse results, that it is not one where there would be sufficient prospects that your Honours, or a majority of your Honours, would come to the conclusion that the appeal would be successful. I can put it no higher than that, your Honour.

French CJ: You are allowing for the possibility of outriders.

Mr Hutley: Your Honour, I would not presume unanimity.