Onus in a Crown appeal

Belinda Baker reports on *CMB v Attorney General (NSW)* (2015) 317 ALR 308.*

The High Court's decision in *CMB v Attorney General (NSW)* (2015) 317 ALR 308; [2015] HCA 9 concerns an appeal lodged by the attorney general in respect of sentences imposed for sexual offences committed by CMB upon his daughter when she was aged between 11 and 12 years. The decision clarifies that the onus in negating the residual discretion rests with the Crown. The judgment also discusses the proper approach to dealing with assistance to authorities in a Crown appeal.

Procedural history

In 2011, CMB's daughter made a report to police that CMB had sexually assaulted her on a number of occasions when she was between 10 and 13 years of age. CMB was charged and pleaded guilty to those offences. Following his guilty plea, CMB was referred to a Pre-trial Diversion of Offenders Program.[1] The enabling legislation of the diversion program required CMB to enter into an undertaking to comply with the program. It further provided that upon the undertaking being given, CMB would be convicted, but would not be sentenced or otherwise dealt with in relation to the offence provided he complied with the undertaking and other statutory requirements.[2]

In the course of the diversion program, CMB disclosed that he had committed a number of additional sexual offences against his daughter. CMB subsequently attended a police interview and made voluntary admissions in respect of the additional offences. CMB was charged by police in respect of the additional offences. However, prior to the additional charges being laid, the regulation that enabled the diversionary program was repealed. This meant that there was no opportunity for the additional charges to be considered for referral to the diversion program. Accordingly, CMB was required to be dealt with 'at law' in respect of the new charges.

When the proceedings came before the District Court, the representative of the director of public prosecutions ('DPP') submitted that, in view of the repeal of the regulation, it would be 'unfair' and 'against the spirit of the program' for CMB to be sentenced to a term of imprisonment. The DPP representative also inadvertently misled the court as to the operation of the regulation prior to its repeal. With the agreement of the DPP, the District Court sentenced CMB to two three-year good behaviour bonds and one two-year good behaviour bond.

When the DPP declined to appeal the sentence, the attorney general appealed the sentence pursuant to s 5D of the *Criminal Appeal Act 1912* (NSW).

The Court of Criminal Appeal ('CCA') upheld the attorney general's appeal, finding that the sentencing judge had erroneously taken into account how CMB's disclosures of the additional offences would have been dealt with had the regulation not been repealed, and that the sentences imposed were manifestly inadequate.[3]

As the CCA was satisfied of error, it was required to determine whether or not to exercise its 'residual discretion' to dismiss the attorney general's appeal, notwithstanding its finding of error. As to the exercise of this residual discretion, the court stated:

> We are ultimately not satisfied that there is any basis upon which, or reason why, this Court should exercise its residual discretion not to intervene. We take the law to be that 'the onus lies upon the respondent to establish that the discretion ought to be exercised in his favour'.'[4]

The CCA acknowledged that there were a number of matters in CMB's favour that were relevant to the exercise of the residual discretion, but held that the respondent had not discharged his onus. The CCA allowed the attorney general's appeal, set aside the good behaviour bonds and imposed sentences amounting to an aggregate term of imprisonment of five years and six months, with a non-parole period of three years.

CMB was granted leave to appeal to the High Court on two grounds – first, that the CCA erred in imposing an onus on him to establish that the residual discretion ought to be exercised in his favour, and secondly, that the CCA erred in its consideration of the assistance that he had given to authorities.

High Court decision

The High Court allowed CMB's appeal on both grounds.

In respect of the first ground of appeal, the High Court unanimously held that the CCA had erred in finding that there was an onus on the CMB to negate the exercise of the residual discretion. In so holding, all members of the court affirmed the statement of Heydon J in *R v Hernando*[5] that:

> [I]f this Court is to accede to the Crown's desire that the respondent be sentenced more heavily, it must surmount two hurdles. The first is to locate an appellable error in the sentencing judge's discretionary decision. The second is to negate any reason why the residual discretion of the Court of Criminal Appeal not to interfere should be exercised.[6]

In respect of the respondent's second ground of appeal, a majority of the court (Kiefel, Bell and Keane JJ; French CJ and Gageler JJ dissenting) held that the CCA had erred by misapplying s 23(3) of the *Crimes (Sentencing Procedure) Act*

1999 (*CSP Act*) and the principle in *R v Ellis*[7] when assessing whether the sentence imposed by the District Court was manifestly inadequate.

Section 23(1) of the CSP Act relevantly provides that a court may impose a 'lesser penalty than it would otherwise impose on an offender', having regard to the degree to which the offender has assisted law enforcement authorities in the investigation of the offence concerned. Section 23(3) of the CSP Act provides that a lesser penalty imposed under s 23 'must not be unreasonably disproportionate to the nature and circumstances of the offence'. The decision in *Ellis* is to similar effect.[8]

Justices Kiefel, Bell and Keane emphasised that the 'mandate' of s 23(3) is that a lesser penalty imposed with respect to an offender's assistance to authorities must not be 'unreasonably disproportionate' to the nature and circumstances of the offence. Their Honours observed that the term 'unreasonably' has been 'given a wide operation', and that it was a question 'about which reasonable minds might differ'.[9] Their Honours continued:

> In determining whether the sentences imposed by [the sentencing judge] were manifestly inadequate, the issue for the Court of Criminal Appeal was not whether it regarded non-custodial sentences as unreasonably disproportionate to the nature and circumstances of the offences but whether, in the exercise of the discretion that the law reposed in [the sentencing judge], it was open to his Honour upon his unchallenged findings to determine that they were not.[10]

The High Court remitted the proceedings to the CCA for determination according to law. On 25 June 2015, the CCA determined the remitted proceedings: *Attorney General for New South Wales v CMB* [2015] NSWCCA 166. The CCA found that the District Court had erroneously taken into account how CMB's disclosures would have been dealt with if the regulation had not been repealed (at [48]). However, having regard, in particular to CMB's time in custody whilst the High Court decision was pending and other subjective circumstances (including health issues), the court determined not to interfere with the sentences imposed in the exercise of its residual discretion.

Endnotes

*The author appeared as junior counsel for the attorney general in the High Court.

1. *Pre-Trial Diversion of Offenders Act 1985* (NSW).
2. *Pre-Trial Diversion of Offenders Act 1985,* ss 24 and 30.
3. *R v CMB* [2014] NSWCCA 5.
4. *R v CMB* [2014] NSWCCA 5 at [110] (internal reference omitted).
5. [2002] NSWCCA 489; (2002) 136 A Crim R 451 at 458 [12].
6. [2015] HCA 9 at [34], per French CJ and Gageler J; at [66], per Kiefel, Bell and Keane JJ.
7. (1986) 6 NSWLR 603.
8. *R v Ellis* (1986) 6 NSWLR 603 at 604.
9. [2015] HCA 9 at [78].
10. [2015] HCA 9 at [78].

Cruel and unusual punishment

Caroline Dobraszczyk reports on *Glossip v Gross*, 576 U.S. ___ (2015); 135 S.Ct. 2726 a decision by the Supreme Court of the United States on what constitutes cruel and unusual punishment.

On the same day that two Australians were executed in Indonesia, a very important case was being argued in the Supreme Court of the US. *Glossip v Gross* deals with a fundamental issue relevant to US death penalty cases, i.e. whether a very specific three-drug protocol, which is to be used in Oklahoma in the execution of numerous prisoners on death row, would constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Essentially, the Eighth Amendment prohibits the federal government from imposing excessive bail, excessive fines or cruel and unusual punishments, including torture. The US Supreme Court has ruled that the cruel and unusual punishment clause also applies to the states. The phrase originated from the English Bill of Rights of 1689.[1]

In *Blaze v Rees* 553 US 35 (2008) the Supreme Court held that Kentucky's three drug execution protocol was constitutional, based on the uncontested fact that 'proper administration of the first drug', which is a 'fast acting barbiturate' that created 'a deep coma-like unconsciousness', will mean that the prisoner will not experience the known pain and suffering from the administration of the second and third drugs, pancuronium bromide and potassium chloride – at 44. In *Blaze*, the plurality stated that a stay of execution would not be granted