Sentencing Juvenile Sex Offenders

A paper delivered at the 8th International Criminal Law Conference Melbourne, 2 – 6 October 2002

The sentencing of sex offenders attracts intense sometimes prurient public interest. When the wrongdoers are persons of high office[1] or from a religious background[2], the interest becomes overwhelming. Similarly, when the offender is a child, somehow the public sensibility is even more outraged; such is the contradiction between youthful innocence and calculated and predatory sexual abuse of another. The saturation coverage of a series of youthful gang rape offenders recently in New South Wales[3] demonstrates the public horror at such offending by the young. In Queensland a case of a 16 year old male convicted of the rape and torture of a handicapped wheelchair bound woman, directly embroiled a senior prosecutor (who argued for a non-custodial sentence) in a litigation with the Director of Public Prosecutions[4], who subsequently successfully argued for the imposition of a substantial detention period[5].

As in other States, the *Juvenile Justice Act* 1992 (Qld) (the Act), which governs the sentencing of juvenile offenders[6], sets out principles which clearly regard detention as a sentence of last resort[7]. One of the major justifications for the

---

[1] *R v D'Arcy* [2001] QCA 325
[2] *R v. Durham* [2000] QCA 88
[3] *R v. C* (New South Wales District Court)
[4] *Vasta v. Clare* [2002] QSC 259
[5] *R v. E; ex parte A-G (Qld)* [2002] QCA 417
[6] In Queensland a child is a person who has not turned 17 years: s.5 *Juvenile Justice Act* 1992 ("the Act")
[7] Section 4 of the Act sets out general principles of juvenile justice including:

> (c) a child -
>
> (i) should be detained in custody for an offence (whether on arrest or sentence) only as a last resort.

imposition of custodial sentences for adult sex offenders is deterrence, both general and personal[8]; however deterrence is not mentioned in s.4. The principle is applicable however as a result of many decisions of the Queensland Court of Appeal interpreting these provisions[9].

The abhorrence and disgust generated by violent sexual crime committed by young offenders is not of recent origin. On September 9, 1886 a 16 year old girl was raped by a number of young males in Moore Park in Sydney. Clearly, in the 19th Century, the principle of justice delayed is justice denied was paramount, as on November 29th in the same year nine young men were convicted of rape and sentenced to death. Five were later reprieved, but on January 8, 1887, four were hanged, of whom two were aged seventeen and two nineteen[10].

In the Sixth Annual Report (1998-1999) of the Childrens Court of Queensland, as the then President of the Court I reported on a disturbing trend in the statistics dealing with juvenile sex offenders (p19):

> "The statistical tables record a significant increase in the number of sexual offences (including rape) involving juveniles from 119 to 248. These figures may be misleading as a number of these offences were disposed of in a Magistrates Court by way of dismissal, and therefore do not constitute the commission of a proved offence.

---

[8] *R v. Pham* (unreported judgment of the Court of Appeal, No. 435 of 1995, 6.2.96); *R v. H* (1993) 66 A Crim R 505

[9] See for example, *R v. W; ex parte Attorney-General* [2001] Qd R 460, and *R v. A; ex parte Attorney-General* [2001] QCA 542, a case in which a 12 month detention order suspended for an offence by a 16 year old Aboriginal male of raping his grandmother, was increased to 4 years. The similarity in approach to young adult sex offenders (despite s.4) is demonstrated in the judgment of the Chief Justice (with whom McMurdo P and Williams JA agreed). His Honour said (at p8): "The sentence imposed ignored, first, the need to signal the community's strong denunciation of crimes of violence involving in this case the violation of a woman's body, none other than the offender's grandmother; second, the need to impose a penalty appropriately deterring the commission of this sort of crime in whatever community the offender be situated; and third, the primacy of the need to protect the personal security of other people, especially women asleep in the sanctity of their homes."

[10] This case is discussed in "Rape, Pack Rape and Other Violent Sexual Offences Especially Committed by Juveniles": N. Wallace QC, The Australian Journal of Forensic Sciences, September 1975 at p2.

> Commentators should therefore be very careful about over reacting to those apparent trends.
>
> However, in 1999, I have sentenced three juveniles for serious violent rape; and the problem of juvenile sex offending must be confronted. C was sentenced by me for the violent rape and grievous bodily harm of a five year old child after a trial in the district Court with a jury. His appeal against conviction was dismissed. C was just 14 at the time of the offence; with a substantial criminal history for property offences. H pleaded guilty to the rape of a 12 year old child who he abducted and attacked whilst she was on her way home from school, in the middle of the day. He also pleaded guilty to sexual assaults on two older girls in the same area. He had no previous convictions and was 16 at the time of the commission of the offences. K pleaded guilty to the violent rape of two adult women in their homes. He was 16. He has appealed against sentence. In all cases the victims were strangers to the juvenile offenders. The offences were serious and disturbing and characterised by extreme violence.
>
> Unlike South Australia and Victoria, Queensland does not have a sex offenders treatment program specifically developed to deal with juvenile offenders. The extensive literature on the issue of sex offender treatment programs, suggests that early intervention is an important factor in achieving successful outcomes. The South Australian Mary Street programme has received strong support from the Courts and other stake holders. 35% of referrals come from the Court or Police or the conferencing co-ordinator. The majority of referrals are from the relevant Families Department. The programme does not have a presence in the juvenile detention centres. The Victorian programme is the subject of a paper delivered at the Australian Institute of Criminology “Children and Crime” conference in Brisbane in June 1999. This programme has been positively evaluated, and it is highly regarded by the Childrens Court Magistrates. The programme is available for young people in detention centres. I would urge the Government to consider the development of a programme specifically designed to treat juvenile sex offenders in detention centres and in the community.”

The sentence in *K* was not disturbed on appeal[11].

The Government responded and in the 2000-2001 Budget committed annual recurrent funding to establish and maintain a specialised assessment and treatment programme for young sexual offenders. In its 2001 Annual Report the Griffith Adolescent Forensic Assessment and Treatment Centre reported a total of

[11] *R v. K* [1999] QCA 043.

26 referrals to the end of December 2001. Seven of these referrals involved reports for Court purposes, and a number of the other young offenders were in various forms of treatment including counselling. The vast majority were from an Anglo-Australian background (17) and 20 were in the 15-17 year old group. Many of these young offenders come from highly compromised backgrounds, often including domestic violence and physical and sexual abuse at the hands of family members or close friends of family. Stable father figures were rare and education was always severely compromised.

Surprisingly, recent research by the manager of the Griffith Centre suggests that sexual recidivism rates as adults for juvenile sex offenders is surprisingly low – about 10%, whereas non-sexual recidivism is quite high – about 61%[12]. The Griffith Centre is designed as a therapeutic community, and the staff prefer to treat young offenders in the community rather than in a custodial setting. The Centre Manager has recommended that if a detention order is inevitable, it is preferable (if possible) to couple the detention order with probation to ensure that the young person continues to be obliged to attend treatment after release from the detention centre, or completion of an immediate release order or fixed release order. The Court of Appeal in *R v. E*, imposed a 4 year detention order but found special circumstances[13] and ordered that the juvenile offender be released on a fixed release order, to include treatment conditions, after serving 50% of the sentence. Only a few weeks after E was initially sentenced by a District Court

[12] "Recidivism Among Juvenile Sex Offenders in New South Wales": Ian Nisbet M.A. – paper presented at the Second Biennial International Conference of the Australian and New Zealand Association for the Treatment of Sexual Abusers: Sydney 4-6 April 2002.
[13] s.188 of the Act

Judge (not a Childrens Court Judge)[14], another District Court Judge sentenced a 16 year old female offender who was convicted of the sexual assault and torture of an epileptic adult male. As in the case of E, older adult co-offenders were involved and the offender had no previous convictions. In this case, however, the result was quite different and the young offender was sentenced to two years detention, immediately suspended on a three month immediate release order.

I mention this case to demonstrate that perhaps we should be at least thinking about more constructive ways of dealing with these young offenders. The apparent inconsistency in the resolution of these two cases does not leave me with any sense that the aims of juvenile justice have been achieved. The formation of the Griffith programme at least provides us now in Queensland with other options, rather than those primarily focussed on punishment and denunciation. In the United States "there has been a virtual explosion of treatment programs throughout the U.S. for youthful sex offenders since the early 1980s"[15]. However, as Professor Katner points out in this useful article, there is a distinct lack of empirical data as to the effectiveness (e.g. in reducing sexual offence recidivism), of juvenile sexual offender treatment programmes, such that until such research is available, no-one can say positively that the programmes work. He strongly recommends that defence attorneys nevertheless learn more about the programmes in their respective jurisdictions and strongly encourage their clients to engage in treatment, as one of a number of "aids" designed to achieve the best outcome for the client.

---

[14] In Queensland, a juvenile has a right to elect to be dealt with by a District Court Judge or a Childrens Court Judge. In the *Juvenile Justice Amendment Act* 2002 (to be proclaimed), this right of election is abolished.

[15] A Defense Perspective of Treatment Programmes for Juvenile Sex Offenders": David R. Katner, Criminal Law Bulletin 2001, p371 at 372

Despite my reports, and the availability of leaflets and printed information about the Griffith Service, my experience is that, outside the specialist youth legal aid and advice centres, there is a distinct lack of knowledge about its programme.

The therapeutic approach of such a programme sits comfortably with concepts of restorative justice now enshrined in the Act[16]. What is more problematical, is the application of community conferencing orders (to be known under the *Juvenile Justice Amendment Act* 2002 as youth justice conferences) to sexual offending by young people. In my various reports as President of the Childrens Court of Queensland, and in many papers and speeches[17] I have championed restorative justice as a powerful tool for use in the complex task of sentencing juvenile offenders. Certainly, as I reported in by Eighth Annual Report[18], community conferences ordered by the Court have contributed to a just and appropriate resolution in cases involving such serious offences as arson and armed robbery. I have yet to encounter a case of juvenile sexual offending in which resort to restorative justice seemed appropriate, but that may be because only the very serious sexual offences come before the Childrens Court of Queensland. There is more and more evidence of the healing effect of face to face meetings between victim and offender, even involving the most serious crime in the criminal calendar[19]; and there is no reason why similar effects could not be achieved in cases involving sexual abuse.

---

[16] Part 5 Division 1A of the Act

[17] For example, see "Restorative Justice – A quite revolution in criminal justice", paper delivered at the Children's Legal Issues Forum, 4.10.2001

[18] Eighth Annual Report, Childrens Court of Queensland (2000-2001) at p4

[19] The documentary "Facing the Demons" is a graphic and powerful example, as was the conference recorded on ABC's "Australian Story" involving the people involved in the tragic case of *R v. Button*.

Nonetheless, in the most difficult of all tasks facing a Judge, the sentencing of offenders, the sentencing of youthful offenders for serious sexual crimes and other crimes of violence, stands out as one of the most challenging. The complexity of the task is elegantly captured in a recent judgment of Jerrard JA in which His Honour said this (after referring to *R v. W*):

> "The judgment reminds of the need for consideration of matters of general deterrence when sentencing juveniles, and I consider it is consistent with the observations of Gleeson CJ when then sitting on the Court of Criminal Appeal, New South Wales in *CST* (unreported judgment of 12 October 1989), when His Honour accepted a submission that:
>
> > "In sentencing young people … the consideration of general deterrence is not as important as it would be in the case of sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed".
>
> In *GDP* [(1991) 53 A Crim R 112] the New South Wales Court of Criminal Appeal advised both that considerations of general deterrence should not be ignored completely when sentencing young offenders, and that rehabilitation be the primary aim (said there in relation to an offender who was then 16 when being sentenced).
>
> The analysis of the relationship of rehabilitation of an individual juvenile offender and protection of the community was put slightly differently by the West Australian Court of Criminal Appeal in *C (a child)* (1995) 83 A Crim R 561 in that matter Pidgeon J wrote (at 564) that:
>
> > "In a Childrens' Court, deterrence plays a different role. The prime factor is rehabilitation, which would temper deterrence to a degree. As the principles are completely different, I do not consider the correct answer can be reached by commencing with an adult tariff and then discounting it."
>
> Much the same view was expressed by Wallwork J, who cited in his judgment earlier observations of the WA Court of Criminal Appeal in *B (a child)* (1995) 82 A Crim R 234 at 244 where that court wrote:
>
> > "It is fallacious to regard the rehabilitation of an individual offender as a consideration separate and apart from, and somehow inimical to the protection of the public. The two things are intrinsically connected. The criminal justice system aims to rehabilitate

> offenders (particularly young offenders), because rehabilitation removes the danger to the public from one of its (previously) errant members."

What I think those citations demonstrate is that courts sentencing juvenile offenders are instructed by both the statutory commands in the *Juvenile Justice Act*, and the shared wisdom of other experienced judges, to have as a principal object the rehabilitation if possible of the juvenile offender while the offender is still a juvenile. Nevertheless, courts are not to overlook the fact that the protection of members of the community from the infliction of harm can be achieved not only by the means of rehabilitation of the individual causing that harm in the past, but also by sentences having a generally deterrent effect in the community."[20]

J.M. Robertson DCJ
(Resident Judge, District Court of Queensland,
and Childrens Court Judge, formerly President of
the Childrens Court of Queensland)

6.10.2002

[20] *R v. E* (*supra*) at pp8-9