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A SHORT SENTENCE

PUBLIC OPINION AND CRIMINAL SENTENCING

A public lecture delivered at QUT on 31 August 2005

by Judge J.M. Robertson, District Court of Queensland

Abstract: *The media reports only a very small proportion of sentencing outcomes and focuses almost exclusively on "soft" sentences. This creates a public perception that the Courts are generally too soft on criminals, which in turn has the potential to reduce public confidence in the Courts. The author is a District Court Judge and editor of the Queensland Sentencing Manual, a practical guide to principles and practices in sentencing law. By reference to a number of actual cases which have had substantial media coverage and which have then been appealed by the Attorney-General(Qld), and analysis of the published crime statistics, the author argues that this perception is incorrect and, insofar as this diminishes public confidence in the courts, is not in the public interest.*

At a recent talk, the Queensland Integrity Commissioner Gary Crooke QC observed that:

** **"Perception is reality"**

Gary Crook QC , Machivelli or Descartes

He may have been quoting the other two but he did not say, hence the hesitant attribution.

In a very entertaining speech to the Bi-ennial Conference of District and County Court Judges held in Melbourne in July 2005, one of Australia's leading commentators on the law of sentencing Professor Arie Freiburg, referred to a "survey" conducted by the Melbourne Herald Sun of 3000 readers in which they had been asked (in effect) the question *"Do you think the Courts sentence too lightly"*. The response was over 90% in the affirmative.

** **90% of surveyed readers think Courts are too soft on criminals:**

(Herald Sun "survey")

Whatever the reality, these results overwhelmingly establish that the perception in the mind of the public is to this effect. This perception is not confined to our State as this report in the Sunday Mail of the 15th May,2005 informs us by reference to the situation in Britain which says that "Outrage over perceived lenient sentencing amounts to nothing less than a **subversion of justice**". Strong words indeed!

** Sunday Mail article 15th May

If perception is reality, as I think it is in this world of information overload; then the reality is that public opinion is very definitely to the effect that Judges do sentence too lightly. I don't expect anyone to suggest that media reports about sentencing do not have a significant effect on the creation of this perception. Indeed, the media is our major source of information about what happens in courts. Accepting as I do that public confidence in the judiciary is essential to the independence of what is the third

arm of government; then if Judges are “weakly merciful” in sentencing offenders; then there is the real potential for public confidence in the judiciary to diminish.

One of the practical (and indeed legal) reasons said to justify severe punishment is the need to deter others of a like mind. It is called the principle or theory of general deterrence. So, as the theory goes, if a young, poorly educated, drug using male from a severely compromised and dysfunctional social background reads (or hears) about tough sentences being handed out for say armed robbery, he will be deterred from committing the offence. It is not the time to debate this theory. From the point of view of the judges, we are bound to apply it because it is part of the law. It need only be said that the theory of general deterrence is controversial amongst theoretical and academic thinkers such as Arie Freiburg, and there is a strong suggestion in the research that it is the fear of detection not punishment that is much more likely to deter people who came from backgrounds which predispose them towards criminal conduct.

If, contrary to the perception, the Courts are too severe on offenders or some offenders, or that very severe sentences are handed out for particular types of crimes e.g. sexual offending against children, violence in public places leading to serious harm, and, if in fact, potential wrong doers do read the papers and watch the TV and current affairs programmes and listen to 2UE; then could it be said that the constant refrain that the Courts are too soft actually encourages rather than deters potential offenders.

The Chief Justice of NSW, Spiegelman J expressed this argument in a recent speech to the Law Society of NSW in this way:

** **"For deterrence to work potential offenders must have an understanding of the legal consequences of criminal conduct. If, as I believe is the case, media reporting gives excessive emphasis to light sentences, and gives the impression that such sentencing is typical when it is not, then deterrence will not work."**

I don't think it can be disputed that the media do have a major influence in moulding public opinion on this issue, and I am sure that it is accepted that the media can only report a small percentage of sentences imposed. To demonstrate my point, I intend to focus on just a few cases from my area of work at the Sunshine Coast. The Coast has one daily tabloid the "Sunshine Coast Daily". It is, I am sure, typical of many regional communities around Australia. It reports Court activities (mainly sentencing) on a daily basis. A typical sentence day in the Maroochydore District Court might involve from 10-20 matters every three or so weeks; sometimes attracting up to 4 reports in the paper under the individual reporter's by-line. Because there are between 3 and 4 Magistrates Courts operating daily; the reporters (or reporter) are required to move from court to court. As far as I am aware, there is no formal protocol, whereby the media can be told in advance of a potential public interest case. The reporter thus has to rely on informal sources to enable him or her to be present in Court for a particular case. Queensland is the only State in which the higher courts do not have a specialist media liaison officer, part of whose function is to inform the

media of the cases that come up on a daily basis thus enabling journalists to make informed decisions about the courts they attend.

Victorian Statistical Information (from that State's Courts Media Liaison Officer) suggests that less than one percent of all sentences are reported by the media. I am sure the Queensland position would be similar.

Another important factor to keep in mind in considering these cases is that Queensland is unique, in that it is the only State where the decision to appeal against the inadequacy of sentence is vested in the Attorney-General. In all other States and the Commonwealth, it is the independent D.P.P. who decides whether or not to lodge an appeal. I make no criticisms of the present Attorney or previous Attorneys in making the observation that in Queensland the political nerve is much more exposed when there is a suggestion in the media that a particular sentence is too soft.

Case A involves a sentence imposed by a Judge in the Maroochydore District Court upon 2 young males who pleaded guilty to a number of offences including armed robbery in company. The offenders were aged 16 and 22 at the time of the offences; and, by the time of the hearing over a year later, significant rehabilitation had occurred. The Judge imposed a combination of sentences which included a wholly suspended 4 year jail term so no actual time had to be served, apart from a few days in custody while the judge considered his decision. The response of the Sunshine Coast Daily was immediate:

** The banner headline of April 7

** The banner headline of April 8

In this case, the Attorney did lodge an appeal. Judgment was delivered by the Court of Appeal on 24 June 2005, and the full citation is *R v Dullroy and Yates; ex parte A-G (Qld)* [2005] QCA 219. The Court by majority (2:1) dismissed the Attorney's appeal. As far as I can tell, there was no report in the paper of the Court of Appeal decision. Certainly there was no attempt to inform the public of the reasons for dismissing the appeal.

Cases B & C involved internet child abuse issues. The first was a case in Maroochydore in which the accused pleaded guilty to possessing child abuse material which comprised over 8000 pornographic images of children saved in a number of files on his computer. The maximum term for this crime is 2 years, and has not been changed over many years. The second defendant was a Noosa businessman who was caught in the Taskforce Argus crackdown on persons using the internet to meet children for sexual favours. Again, the "Daily" reacted with considerable effect:

** The headline from March 8

** The headline from March 9

** The headline of March 10.

As it turned out, the Attorney did appeal in Case C but not in Case B. The appeal judgement was delivered ex tempore i.e. at the conclusion of the hearing on the 10th May 2005, and the AG's appeal was unanimously dismissed. The case can be viewed on the Qld Courts Homepage as *R v Burdon; ex parte A-G (Qld)* [2005] QCA 147.

Again, there was no attempt to analyse the reasons for the Court's decision and no attempt to inform the public of these reasons. Given the absence of a Court Liaison Officer it could well be that the paper simply did not know when the appeal judgments were being handed down although this information appears every day in the Courier Mail law list. These cases as typical.

My proposition is that the overwhelming focus of media reporting of sentencing is on the allegedly "soft sentences", and that it is very rare for there to be any report of sentences that are said to be too severe. The only exception that I can point to in recent history is the Schapelle Corby case; where universally the Indonesian Courts have been criticised for being too severe on the accused, although I recall at least some reports on the sentencing of a well known female politician in Queensland some years ago suggested that the sentence imposed on her was too harsh.

The second string to my bow involves a quick look at the published statistics of the Queensland Court of Appeal for the 2002-2005 period. My proposition is that if read fairly, these figures do not support the perception that the courts are too "soft" on criminals.

The relevant tables are set out in my paper which will be available on-line for those who are interested in statistics. The figures are taken from the official statistics of the Court of Appeal. I will focus on the 2003-2004 figures because they can be compared with the general crime statistics published in the Queensland Government Criminal Justice Bulletin for that year (it is the most recent).

2001-2002

	Lodged	Won	Lost
Attorneys Appeals	26	15	11
Commonwealth DPP	3	3	-
Prisoners Appeals	179	56	123

2002-2003

	Lodged	Won	Lost
Attorneys Appeals	44	32	12
Commonwealth DPP	1	1	-
Prisoners Appeals	205	61	144

2003-2004

	Lodged	Won	Lost
Attorneys Appeals	24	9	15
Commonwealth DPP	3	2	1
Prisoners Appeals	174	58	116

2004-2005

	Lodged	Won	Lost
Attorneys Appeals	28	16	12
Commonwealth DPP	6	6	-
Prisoners Appeals	182	70	112

These figures indicate that in numerical terms, the number of successful prisoner appeals (that is against severity of sentence) greatly exceeds the number of successful Attorney appeals. Expressed in percentage terms, not surprisingly the Attorney has more success than do convicted persons.

When one compares these figures with figures extrapolated from the Bulletin, one can confidently say that very few of the total number of sentences are challenged by the Attorney on the grounds of inadequacy. Nine in ten criminal appearances which progress through the higher courts are finalised in the District Court, and focussing on the 2003-2004 year, the actual figures lead to the conclusion that:

** **The Attorney appeals in less than 1% of sentences imposed and succeeds in only .25%, while prisoners appeal in 7% of cases and succeed in just over 2%.**

My proposition is that if you base your analysis of sentencing trends on the facts rather than perception, it leads to a conclusion that maybe the Courts are getting it basically right, and if one looks at these figures superficially we are perhaps marginally too severe. That is, if we accept that the Court of Appeal is the highest court in the State and sets the range of penalties for particular offences.

I do not suggest for a moment that Judges do not make mistakes. We do. In our democracy, Judges' mistakes in the exercise of their judicial role are made on the public record for all to see. Equally, the appeal process is transparent so, if anyone is interested, they can listen to all the proceedings and make up their own mind. The

judgments of the Court of Appeal are all available to anyone with an internet connection as are many of the sentences imposed at first instance. Sometimes judges are criticised by the Court of Appeal for imposing sentences that are "weakly merciful" and too low, and these are increased but, as can be seen, only on rare occasions.

What the facts suggest however is that it is only in a very small percentage of cases that sentences are found to be too low, or "manifestly inadequate" to use the appropriate terminology, and by focussing almost exclusively on these few cases, the media is creating the public perception that this is what happens generally when it clearly does not. If this is reducing public confidence in the courts then the question has to be asked is this in the public interest?

I do not expect there to be any change in the way in which the media report the sentencing process. Indeed Chief Justice Spiegelman has observed that there is as much point in criticising the media about this issue as there is in complaining about the weather.

The Courts have an important role to play in engaging with the public and explaining the judicial method. I recall that when I was the President of the Childrens Court of Queensland, part of my statutory role was to engage with groups with an interest in juvenile offending such as Parents and Citizens Groups. Often, on these occasions, I would be met with the proposition that "you Judges are just too soft on juvenile criminals". I would always meet that concern with a story. I would explain that in Court we as Judges are bound to hear both sides of the story. We don't have the

luxury of simply being able to focus on the details of the crime and its effects on the victims. Every fair minded person would expect that if they had to face court, their side of the story would be told.

These stories are what we hear every day in Court. Last year I was called upon to sentence a 42 year old woman who pleaded guilty to dangerous driving causing the death of a 2 year old child when she had a blood alcohol limit of .20%, i.e. 5 times the upper legal limit. Armed with only those facts, most members of the community would expect severe punishment. But when is added to those facts that the child was her own and that she had only started to drink as a result of severe post-natal depression which had not been adequately treated; I think you can see that the task becomes much more difficult. It is this class of offences that very often leads to calls for mandatory sentencing as a solution, frequently in the context of a court door interview with distressed and grieving relatives and friends.

It is easy to call for mandatory sentencing when one focuses on the very bad cases, and the very small number of cases where Judges do get it wrong and sentence below the appropriate range. But mandatory sentencing itself always leads to manifest injustice because its premise is that each case is the same, which is not true, as the example I have just given demonstrates.

In Queensland we have tried it twice. The first was in the 1970's when the Government responded to the shocking road toll by legislating to make it mandatory that a person who drove whilst disqualified by order of a Court had to serve at least 6 months in jail. Apart from having no impact at all on the road toll, within 12 months,

a nursing sister, a 70 year old pensioner and others were in jail and the public outcry over the terrible injustice at an individual level lead to the restoration of a judicial discretion. The second was in 1986, when as a demonstration of a "get tough on drug traffickers"policy the last Joh Government introduced mandatory life imprisonment for drug traffickers. Not only did this have no discernible effect on the drug trade, within a few short years the jails were bulging with lifers who had trafficked primarily to feed a drug habit and for very little commercial gain. Once again, the law had to be changed and all those people had to be re-sentenced.

In concluding, let me say that sentencing of offenders is a complex and sometimes emotionally taxing task. There is no doubt that public opinion, influenced as it is by perception gained from the media emphasis on the "soft" sentences, is that the Courts are too weak with offenders. I hope my observations may cause at least some in the community to think about that perception.