Judicial Commission of New South Wales

JIRS Updates related to COVID-19

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This Newsletter contains a summary of legislation, case law and other material published on the Judicial Information Research System (JIRS) addressing changes to the administration of criminal justice as a result of the COVID-19 pandemic. Updates will be published as needed.

RECENT LEGISLATION

N/A

RECENT CASES

8/05/2020

Crown Appeal — Crimes Act 1900, s 66A(1) — child sexual assault — Crimes (Sentencing Procedure) Act, ss 17B, 17C, 17D, 89 — judge erred by imposing CCO without first obtaining a sentence assessment report — proposed work condition not available — sentence manifestly inadequate — residual discretion exercised — offender aged 76 vulnerable to COVID-19 due to existing health issues — RC v R; R v RC [2020] NSWCCA 76

***Editor's note**: This recent law deals only with the Crown sentence appeal.*

The respondent was convicted of one count of sexual intercourse with a child under 10 (Crimes Act 1900, s 66A) and sentenced to an 18 month community correction order (CCO). RC was the 6-year-old complainant's grandfather.

The judge imposed a CCO and indicated it would be subject to a work service condition after receiving a sentence assessment report (referred to as SARs), and made orders to that effect. The Court later received a report that noted that, although the respondent was assessed as suitable to undertake community service work, no agency was available to offer work to a convicted child sex offender.

The Crown appealed on the basis the sentence was manifestly inadequate.

The Court (Wilson J; R A Hulme J agreeing; Hamill J agreeing with additional observations) concluded the sentence was manifestly inadequate but dismissed the appeal.

The sentencing exercise miscarried because a CCO, intended to have a work component, was imposed without first ordering an assessment report: [222].

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Division 4B of Part 2 of the Crimes (Sentencing Procedure) Act makes an assessment report mandatory before imposing some community based sentencing orders. The purpose of an assessment report is made clear by s 17B(2), which provides that the report "is to assist a sentencing court to determine the appropriate sentence options and conditions to impose on the offender during sentencing proceedings." Section 17D(4) provides, for good reason, that "the sentencing court must not impose a community service work condition on an intensive correction order or community correction order unless it has obtained an assessment report relating to the imposition of such a condition in relation to the offender". The importance of obtaining a report before imposing a community based order is reinforced by s 89(4): [223]–[225].

Had a report been obtained before imposing sentence in accordance with s 17C, the judge's consideration of "appropriate sentence options" would have been informed. There are practical reasons why it is important for sentencing courts to comply with s 17D(4) and s 89(4), as illustrated by this matter, where sentence was passed without any evidence about the respondent's suitability for a work condition, and the availability of work to him. This procedural irregularity resulted in a sentence lower than the sentence his Honour clearly intended to impose: [226]–[228].

For an offence of sexual intercourse with a child under 10, the principles identified in EG v R [2015] NSWCCA 21 at [42], together with the applicable maximum penalty and SNPP, suggest it could only be in the most extraordinary and unusual circumstances that a sentence of full-time imprisonment would not be imposed upon an offender. There were no extraordinary or unusual circumstances in this case: [233]–[234]. It should be understood that sentences of anything less than full-time imprisonment must be exceedingly rare for offences against s 66A, and could only be available where there are wholly exceptional circumstances: [247].

Nothing in either the facts of the offending conduct, or in the respondent's subjective case, justified the sentence imposed: [235].

Effect of COVID-19 and exercise of the residual discretion

The respondent is particularly vulnerable to COVID-19 infection and mortality due to his respiratory issues, systemic hypertension, kidney disease, and his advanced age. In a closed custodial setting there can be additional challenges in managing the risk of infection: [218]. The respondent's age and respiratory condition, particularly in the present days of a pandemic, would justify a finding of special circumstances pursuant to s 44(2) of the Crimes (Sentencing Procedure) Act, to permit a departure from the ordinary statutory ratio: [251].

Being mindful of the present medical emergency, in these unusual circumstances, the respondent should not be re-sentenced, despite the clear inadequacy of the sentence imposed at first instance: [255].

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23/04/2020

Procedure — COVID-19 pandemic — Federal Court civil trial — adjournment application refused — virtual trial would cause some adverse impact on conduct, length and expense of trial — not unfair or unjust for trial to proceed — trial should continue to extent possible within existing public order regulations — *Capic v Ford Motor Company of Australia Limited* [2020] FCA 486

A class action in relation to allegedly defective gear boxes was listed for hearing in the Federal Court in June 2020. The Respondent sought a six month adjournment due to the COVID-19 pandemic and the limits of technology.

Section 37M of the *Federal Court of Australia Act* 1976 provides the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

Restrictions in light of the COVID-19 pandemic meant a virtual trial, with practitioners working from home, was the only viable solution. The issue was whether a virtual trial was appropriate in light of s 37M and fair to the parties.

The Court (Perram J) refused the adjournment, ordering the parties to confer about the conduct of the virtual trial including the platforms to be used at the hearing and how documents should be exchanged.

Although not every case can be heard in a virtual fashion, it is imperative the Court endeavours to facilitate the continuation of the economy and essential services of government while complying with health and public order regulations: [3]–[5], [7]. Ordinarily such an unsatisfactory mode of a trial would not be imposed on a party against its will. But these are not ordinary circumstances and to adjourn the trial because of the pandemic may be to adjourn it for an indeterminate period because there is no guarantee the situation will be better in six months' time. The parties must try their best to make the trial work and if it becomes unworkable then it can be adjourned: [23]–[25].

The difficulties which may be encountered if the trial proceeds virtually include [8]:

1. Technological limitations. Where all participants are at home there are going to be some with excellent internet connections and some without. Intermittent internet connections while tiresome, are not insurmountable: [10]. Also, there is the possibility of putting together superior technology solutions because the case is two months out from trial: [11].
2. Physical separation of legal teams. The ability for junior counsel to assist senior counsel while in their own homes is degraded. One solution is for counsel to use an instant messaging platform. Whilst this is a poor situation in which to run a trial, it does not mean the trial will be unfair or unjust: [13].
3. Expert witnesses. Conferring with witnesses before the trial will be slower, more tedious and more expensive but will not be unfair or unjust: [14].

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4. Lay witnesses and in particular cross-examination. Many authorities underscore the unsatisfactory nature of cross-examination by video-link. However, those statements were not made in the present climate, nor were they made with the benefit of seeing cross-examination on platforms such as Microsoft Teams, Zoom or Webex. However, difficulties can arise when dealing with objections, by the reduction in the chemistry which may develop between counsel and the witness and the reduction in the proceedings' formality: [19].
5. Document management. With the use of digital court books, a virtual courtroom does not impact on this aspect of the hearing. The problem of witness and cross-examination bundles is soluble with services such as Dropbox. While not ideal, it will not result in an unfair or unjust trial: [20].
6. Future issues including practitioners or witnesses becoming sick or practitioners with children at home. When these problems arise, they may be addressed by being sensitive to them and making allowances. Although challenging, they are not insurmountable: [21].
7. Trial Length and Expense. Conducting a trial in a virtual environment will prolong the hearing and increase its expense: [22]. However, the exhortations to speed, thrift and efficiency in s 37M are subject to the rider that this be achieved so far 'as possible': [2].

Editor's Note: In R v Macdonald; R v E. Obeid; R v M. Obeid (No 11) [2020] NSWSC 382 a criminal trial against three co-accused was adjourned when systematic technical difficulties compromised the right to a fair trial.

21/04/2020

Sentence appeals — fresh evidence — power of CCA to take judicial notice of presumed effect of COVID-19 when determining if sentence manifestly excessive — no error established — no power or principle permits Court to allow sentence appeal when otherwise no error — limitations on power to receive fresh evidence discussed — *Borg v R; Gray v R* [2020] NSWCCA 67

Editor's note: This Recent Law item only deals with Ms Borg's appeal and only to the extent that it concerns the COVID-19 pandemic.

The applicant was convicted after trial of supplying a commercial quantity of methylamphetamine pursuant to s 25(2) of the *Drug Misuse and Trafficking Act* 1985.

She was sentenced to 4 years, 6 months imprisonment with a non-parole period of 2 years, 8 months.

The applicant appealed her sentence on grounds including that it was manifestly excessive. At the hearing of the sentence appeal, she sought to make further submissions that the COVID-19 virus and its presumed effect on her if she remained incarcerated were relevant

to both re-sentence and the question of manifest excess. No evidence was sought to be adduced on this point and it was argued the Court could take judicial notice of the extent of the virus.

The Court (Adamson J; Johnson J agreeing; McCallum JA agreeing with additional observations) dismissed the appeal.

The sentence was not manifestly excessive. It was open to the judge to impose a sentence of that length, which was neither unreasonable nor plainly unjust: [44].

There are several difficulties with the approach taken by the applicant regarding COVID-19, the most fundamental of which is whether the Court has power to allow an appeal against a sentence which was not, at the time it was imposed, manifestly excessive: [45].

While the Court of Criminal Appeal has the flexibility to receive new evidence where it is necessary to do so in the interests of justice, there are limits to the circumstances in which this can occur: [46]; *Betts v The Queen* (2016) 258 CLR 420. Otherwise the general principle is that the review of a sentence in the light of subsequent events is the proper province of the Executive and not the Court: [46]. No power or principle was identified which would enable intervention in these circumstances. The submission that "the pandemic does not accord with principle" does not assist: [47].

The additional submissions on COVID-19 will not be considered since, no error having been established in the sentence imposed, there is no entitlement to re-sentence the applicant: [48].

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