R V WANGANEEN

Supreme Court of South Australia (Gray J)
30 July 2010
[2010] SASC 237

Criminal Law Nunga Court – Sentencing of Aboriginal defendants – discretion of the court under s 9C of the *Criminal Law Sentencing Act 1988* (SA) to convene a sentencing conference – sentencing conference process – purpose of sentencing conference – use of information raised in a sentencing conference

Facts:

This case sets out the purpose and process of convening a sentencing conference that may be used by the court when sentencing Aboriginal defendants. In this case, the Supreme Court was asked to consider the application of an Aboriginal defendant, Dwayne Lee Wanganeen, to continue with sentencing by sentencing conference under s 9C of the *Criminal Law (Sentencing) Act 1988* (SA) (*'Sentencing Act'*). On the 2nd of November 2009, Dwayne Lee Wanganeen pleaded guilty to the aggravated offence of causing serious harm with intent to cause serious harm contrary to s 23(1) of the *Criminal Law Consolidation Act 1935* (SA). Section 9C of the *Sentencing Act* provided that before sentencing an Aboriginal defendant the court may, with the defendant's consent and assistance of an Aboriginal Justice Officer, convene a sentencing conference known as Nunga Courts, and take into consideration the views expressed.

The first issue for the Supreme Court to decide was whether sentencing of the Aboriginal defendant should continue by sentencing conference, and if so, what the purpose of a sentencing conference was. The second issue was how the sentencing conference should proceed, and how s 9C operated in relation to other sentencing principles. The final issue for the court to determine was how the information raised in the sentencing conference should be used.

Held, granting the application for sentencing to proceed by sentencing conference, conducted pursuant to s 9C of the *Criminal Law (Sentencing Act) 1988* (SA):

1. Where the defendant is Aboriginal, the court has discretion to convene a sentencing conference, with the defendant's consent, and take into consideration the views expressed at the conference. Under section 9C(2)(a)-(e) of the *Sentencing Act* the conference must comprise of the defendant, parents or guardians if the defendant is a child, legal representative (if any), the prosecutor, the victim if they choose to attend and a support person, and the victim's parent or guardian if they are a child. Under section 9C(3)(a)-(e), other people may also attend, if the court thinks they may contribute usefully: [4].

2. The conference is to be convened with the assistance of an Aboriginal justice officer, whose duties include providing advice on Aboriginal society and culture, and assisting Aboriginal persons to understand court procedures and sentencing options. Those in attendance of this sentencing conference include an Aboriginal elder, an Aboriginal justice officer, the defendant's mother, aunt and cousin, but not the victim: [4].

3. It is not appropriate to set out in any strict manner the way a sentencing conference should be conducted. The conference may proceed by seating participants in a 'roundtable' arrangement, with an introduction by the Judge or Aboriginal justice officer outlining the purpose and informal nature of the conference, and an introduction of individuals

present and their role. Then a number of readings could follow, such as a reading of the charges and plea, agreed facts and details of the offender's background, a victim impact statement, and a reading of the basis of the prosecution's charge. Participants could then be invited in turn to speak, one person at a time. The Judge and counsel could also question when appropriate: [4], [25].

4. The sentencing conference is a way of informing the court, the defendant, and their community, about matters relevant to sentencing in a more comprehensive and understandable way than possible using standard sentencing procedures. Section 9C is a formal recognition of the cultural differences that should be accommodated when sentencing Aboriginal offenders: [4], [7].

5. The significant over-representation of Aboriginal people in Australian prisons has been an issue of concern for many years and was particularly highlighted in the 1991 report of the Royal Commission into Aboriginal Deaths in Custody. For this reason, the approach taken in sentencing Aboriginal offenders is of significance: [7]–[9]; *Neal v The Queen* [1982] HCA 55, cited.

6. A sentencing conference gives the defendant an opportunity to speak directly to the court while also allowing contribution to sentencing by the victim. This may provide restorative justice and enable the court to better understand cultural and societal influences. The involvement of an Aboriginal Elder, family members and the community may further assist the defendant in desisting from offending through elements of shaming and by realising the impact on their family and community: [20]–[21]; *Harradine v R* (1992) 61 A Crim R 20, cited.

7. Section 9C does not specify the formality required by the sentencing conference. However it is apparent that the purpose of section 9C was to provide a statutory basis for sentencing techniques used by the Nunga Court, which utilised a less formal approach in order to reduce cultural alienation of Aboriginal offenders and promote attendance and participation. This approach proved successful. Therefore, it is appropriate that sentencing conferences proceed on a less formal basis, more by way of dialogue than a traditional approach: [13]–[15], [22].

8. The use of information arising from the sentencing conference is within the discretion of the court. However, use is limited to parameters outlined by s 10 of the *Sentencing Act*, which lists factors to be considered in sentencing. The conference information may provide the context in which to consider these factors: [4], [10]–[12].

9. Although courts are mindful of matters relevant to sentencing which relate to Aboriginality, the same sentencing principles apply to all offenders. However, the conference is significant as it allows the sentencing process to occur in a manner more suited to the cultural needs of Aboriginal offenders: [29], [19]; *R v Tjami* (2000) 77 SASR 514; *Neal v The Queen* [1982] HCA 55, cited.

10. It is not mandatory for the defence to provide written submissions outlining how they seek to use information from the conference. How that information is sought to be used will generally be clear from final sentencing submissions, and is ultimately matter for the discretion of the court: [30].

11. Prior to the enactment of s 9C, general sentencing powers of the Nunga Court provided a broad framework to convene an Indigenous sentencing court. Section 9C has not introduced any limitation on how information arising from the sentencing conference is to be utilised or the discretion of the court to evaluate that information: [31]; *Police v Carter* (2002) 81 SASR 330, cited.