CASE NOTES

O'Connor v Ryan

Supreme Court No.JA65/2001

Judgment of Mildren J delivered 11 December 2001

CRIMINAL LAW – SENTENCING

The appellant pleaded not guilty in the Alice Springs Court of Summary Jurisdiction to a charge of aggravated assault. He was convicted and sentenced to imprisonment for one month.

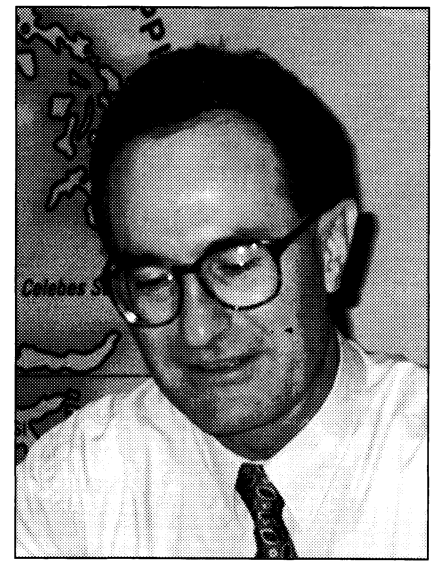
The Magistrate ordered that this sentence be suspended upon the rising of the court, conditionally upon the appellant being of good behaviour fot two years and paying a fine of $500 within six months.

The appellant personally conducted his appeal against conviction and sentence.

HELD

- Appeal against conviction dismissed.
- Appeal against sentence allowed (in part); order to pay fine quashed.
- The *Sentencing Act* (s.7) does not permit the imposition of a fine *as a condition of an order for suspending a sentence of imprisonment.*

Mildren J noted that the Magistrate had intended to dispose of the matter by way of fine only, until his attention was directed by the prosecutor to the appellant's conviction and fine in 1979 for aggravated assault.



Mark Hunter

Section 78B of the *Sentencing Act* therefore required the imposition of a term of actual imprisonment for a subsequent "violent offence".

His Honour observed that the Magistrate's order of actual imprisonment (to the rising of the court) ranked as a more severe penalty than the $500 fine originally intended by him.

In these circumstances, the imposition of the former made the latter unjustifiable. Mildren J identified this as a further sentencing error.

APPEARANCES

Appellant - in person

Respondent - McMaster/DPP

JUSTICE BELL from page 9

"In a further statement issued on 18 December 2001 the Attorney-General outlined further details of the proposed increase in the powers to be given to ASIO. The power to detain a person will allow for a period of up to forty-eight hours. The detained person may be held incommunicado without legal representation. This power is to be the subject of safeguards which were identified as including; that ASIO be required to give a copy of the warrant issued by a federal magistrate or a senior legal member of the Administrative Appeals Tribunal to the Inspector-General of Intelligence and Security together with a statement containing details of the detention."

Justice Bell said the proposed increase in the powers available to ASIO involves a significant alteration to common law rights and immunities and that the Law Council of Australia has urged that the legislation should be the subject of the close scrutiny of a Parliamentary Committee.

"The Council urges the need for the Government to demonstrate that the proposed new measures are reasonably necessary to assist in the defence of Australia against terrorism," she stated.

"It is apparent that at both the Federal and State levels of government it is necessary for security agencies and police to collate and exchange information on those who might reasonably be thought to pose a risk of politically motivated violence. Equally, history demonstrates that agencies charged with this function have in the past exceeded their charter.

"It is to be hoped that the President of the Law Council's call for a constructive debate on the government's proposed counter-terrorism legislation will be heeded."

WHO WANTS TO BE A DPP? (from page 12)

After all, if not to the bench or another position in the gift of the government, where is a DPP likely to go at the end of a fixed term and before retirement? (A few have, in fact, returned to the Bar.)

The Opposition proposal of this year comes in the wake of my having declined to institute a Crown appeal against sentence by the Supreme Court in a manslaughter (not murder) of a young girl.

The most controversial decisions made by the DPP seem to be decisions not to appeal against allegedly inadequate sentences; but let us keep them in perspective.

These are cases in which a court has heard all the facts of a matter and delivered remarks on sentence that are available to be (but are seldom) read by anyone expressing a view. I do not impose sentences and I do not have the power to change them.

The only course open to me is to institute an appeal to a higher court and the law and guidelines governing the commencement of such expensive action are clear. It is not an easy row for the Crown to hoe.

It would be an easy course to ignore those rules and to institute appeals just to end the public hysteria and personal criticism and to please the political agitators of the day; but life as DPP was not meant to be easy, whether I make the decision or it is made by one of the Deputy Directors pursuant to delegation. It is not personal and commentators should not make it so, although some do.

There was a particularly torrid example of this last month following the manslaughter sentence when an apprentice shock-jock on one radio station, apparently filling in during the silly season, decided to make me his project for the week.

The less said about that rubbish, the better; but I really don't enjoy much the consequential death threats (fielded by my secretary, it should be noted, who doesn't enjoy them much, either), the calls to resign, to buy a razor, the criticism of my lopsided face.

I don't like being used as a tool with which to attack the government of the day.

During last month's fracas a sample of members of the public, spurred on by some of the (to borrow Chief Justice Spigelman's phrase) "electronic lynch mob of talkback radio", claimed amongst other things:

- I should be sacked and Michael Costa appointed in my place
- I am not popular with the people [but being popular is nowhere in my duty statement – and popular with which "people"?]
- I am setting myself up as a director of public policy [no, merely commenting, where appropriate, on aspects of the administration of criminal justice]
- I am usurping the role of the courts by deciding what evidence will be used in court [we rely upon all available relevant and admissible evidence and are subject to court rulings]
- I have sympathy with the wrongdoers, not the victims, and make excuses for crime [but we attempt to respect and protect the rights of all involved in the criminal justice process, work extensively with victims and prosecute, not excuse, crime]
- I should be sacked because I don't listen to the people [I do – but "listening to the people" is only one aspect of the process of gauging the general public interest: which is a different concept from what happens to be of interest to the public]
- I am accountable to no-one [not so]
- I am arrogant and flying in the face of public opinion [but decisions cannot be made in accordance with the demands of those who shout loudest and longest and perhaps a certain measure of detachment is needed to survive the onslaught].

There has been no suggestion in all of this that I am not discharging my office competently. If that were to be suggested, then I am sure that the proposition could be explored in the defamation jurisdiction.

The provision of reasons for decisions is a vexed question, in this and other jurisdictions. In one sense it would be the easier course to give full explanations to anyone who asked (although the resource implications would be immense). But there are privacy considerations involved.

presumption of innocence

Respect must be paid to the presumption of innocence. There are often sensitive personal considerations behind the final decision not to proceed with a prosecution, for example.

The workings of the appeal process cannot be explained shortly to non-lawyers. There is no statutory obligation to provide detailed reasons to the public and judgment must be exercised in each case.

The better course, it seems to me, is to keep trying to put factual, general information before the public about the way in which the criminal justice process works, so that people are better able to make their own assessments of situations and are less vulnerable to the unhelpful hysteria whipped up in the heat of the moment.

This means writing, talking to groups and to journalists, going on radio and on TV. There is always the risk of selective reporting, misrepresentation and personal attack, but that is a price that must be paid.

The Opposition has never, in seven years, approached me or (to my knowledge) my senior officers for information about the Office or my functions. One wonders how they can be so sure that change is required and that their proposals are for the best.

I am grateful to the NSW Bar Association and its officers for their support on matters of principle and for the opportunity to place these matters on the public record. I am proud to be a member.