Legalwise Criminal Law conference 19 March 2021 opening speech by Judge P.E. Smith[1]

Introduction

When I was asked to speak at this conference I was told that I could speak on any legal topic.

I initially thought about speaking as to Military Law but I immediately recalled what Georges Clemenceau said about Military Law- Military Law is to law like Military Music is to music.

So I thought I would actually speak as to the topics to be discussed in the first session from the court's point of view.

I think they are excellent topics to be discussed as they are very relevant to present issues before the court.

Judge only trials

Obviously enough the COVID pandemic caused mayhem in the courts when it first hit in about March 2020.

Jury trials stopped for about three months. They recommenced on a limited basis in June 2020 using two court rooms per trial. We were about to go back to normal court rooms in January 2021 and then the three day lockdown occurred. Now we are pretty close to normal. However we need to remain flexible in case there are more restrictions.

At least at the start there was an increase in Judge Only trials.

I thought the statistics were interesting.

- Between March 2020 and November 2020 there were a total of 159 judge only applications
- 126 were granted, 8 refused, 13 adjourned and 7 withdrawn.
- 106 actually were listed and 68 proceeded to trial
- 40 were not guilty verdicts and 27 guilty
- 28 pleaded guilty

[1] Judge Administrator, District Court of Queensland.

- 10 were discontinued

I don't have the statistics with me but the acquittal rate for jury trials is about 50%.

So one can see that the far greater majority of Judge Only trials were granted and the acquittal rate was about 59%.

It seems to me the following things emerge from these statistics.

First the decision of Burns J in *R v Pentland*[2] changed the landscape insofar as no jury applications were concerned.

His Honour granted a no jury application in a murder case. His Honour noted that a key consideration was that no-one at that time could say when jury trials were to resume. I note that that decision was given on 1 April 2020.

The COVID issue certainly led to many successful judge applications on the basis of *Pentland*.

Second, it seems to me that the applications were brought in cases where there was a good chance of winning.

Third (and this follows from the last point) the acquittal rate was higher in no jury trials than in jury trials.

Despite the resumption of jury trials there still is much uncertainty surrounding COVID. If there are further outbreaks then we could go back to another lock down.

So COVID issues are still relevant to no jury applications.

Obviously your material should address why your case is one which should be tried by judge only. You need to carefully consider and address the relevant features in section 615 of the Criminal Code.

Particular issues to be considered are issues of delay and whether the accused is in custody.

I would like to thank practitioners who considered and indeed brought Judge Only applications in 2020. It certainly resolved a number of matters which otherwise could not have been resolved because of the pandemic.

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[2] [2020] QSC 78.

Family Violence

The main issue I wanted to talk about was sentencing in cases involving family violence.

I think it is fair to say that sentences have increased in this area in recent times.

Cases like *R v HBZ*[3], *R v MDB*[4] and *R v MCW*[5] show that reasonably significant sentences are given in choking/strangulation cases.

There are a couple of reasons for this.

First there have been a number of domestic killings and I think this has brought the issue to the forefront of people's minds. In particular was the Batty case in 2014 and in more recent times was the death of Hannah Clarke and her children in 2020. Indeed the number of reported incidents of domestic violence has increased in recent times e.g. it was 58,000 in 2011-2012 and 66,000 in 2013-2014 and in 2014-2015 it was 71,775.

Secondly, the 2015 Now Not Ever report was delivered to the Queensland government which made a number of key recommendations to deal with domestic violence including the offence of choking. Indeed Mullins JA in *HBZ* at [72]:

> *"As emphasised in both MCW and MDB, s 315A of the Code was enacted to deter a type of offending that was viewed as a precursor to offending with much greater consequences for the victims, including death. That the offending may be committed over a very short period of time will frequently be a characteristic of this offence. The deterrent aspect of sentencing for this offence is not just directed at the offender being sentenced, but more generally, in an attempt to eliminate the dangerous conduct of one domestic partner choking, suffocating, or strangling the other that can easily result in fatal or lasting consequences."*

It is crucial that practitioners be familiar with the statutory provisions relating to domestic violence sentencing.

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[3] [2020] QCA 73; (2020) 282 A Crim R 419.
[4] [2018] QCA 283.
[5] [2018] QCA 241; [2019] 2 Qd R 344.

First, s 9(2A) and (3) of the *Penalties and Sentences Act* are relevant. Those sections provide as follows:

> "9(2A) However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence—
> (a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or
> (b) That resulted in physical harm to another person.
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> (3) In sentencing an offender to whom subsection (2A) applies,
> the court must have regard primarily to the following—
> (a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;
> (b) the need to protect any members of the community from that risk;
> (c) the personal circumstances of any victim of the offence;
> (d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;
> (e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;
> (f) any disregard by the offender for the interests of public Safety;
> (g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;
> (h) the antecedents, age and character of the offender;
> (i) any remorse or lack of remorse of the offender;
> (j) any medical, psychiatric, prison or other relevant report in relation to the offender;
> (k) anything else about the safety of members of the community that the sentencing court considers relevant.

As can be seen where an offence of violence has occurred the principle that a sentence of imprisonment is one of last resort is not applicable.

Second, is section 9 (10A) of the Penalties and Sentences Act which provides that in determining the appropriate sentence for a domestic violence offence the court must treat the fact that it is a domestic violence offence as an aggravating factor unless the court considers it is not reasonable because of the circumstances of the case.

In most cases an offender charged with choking will receive an actual prison sentence.

Sexual Assault Laws

The main issue I wanted to talk to you about was the issue of joinder of complainants in sexual offence cases.

In Queensland I think it is fair to say we have had diverging views from the Court of Appeal on this issue.

As at 2017 we thought that the law was settled in Queensland by the case of *R v Watson*[6]. In that case Watson the appellant was a teacher in Grade 5 and sexually abused a number of students. Whilst the offending was different the court at [20] found this was a case where a teacher preyed upon his own pupils and this was "remarkable" for innocent people. He took advantage of his position as a teacher of 10 year olds. The charges were joinable.

But then the 2018 decision of *Nibigira*[7] was handed down. In that case the appellant was convicted of 21 offences involving four different complainants. They were members of a church youth choir and he drove the complainants to and from choir practice and abused them in his vehicle or at home during choir practice. Despite these *modus operandi* the Court of Appeal held that there should not have been joinder because the offending was different.

It is hard to reconcile *Watson* and *Nibigira*.

The Court of Appeal has had that difficulty as one can see from later cases.

In 2019 there was the case of *Davidson*[8]. In that case the appellant was convicted of 18 counts of sexual assault. He was a masseur and sexually assaulted his patients. The majority (Gotterson and McMurdo JJA) held that joinder was appropriate. Boddice J dissented holding that the offending was different.

Also in 2019 was *McNeish*[9] where the President and Henry J held that joinder was permitted. McMurdo JA dissented. In that matter the appellant had been convicted of 22 sexual offences involving three complainants. The majority held at [60] that the

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[6] [2017] QCA
[7] [2018] QCA 115.
[8] [2019] QCA 120.
[9] [2019] QCA 191; (2019) 2 QR 355.

significant probative value of the evidence would be that it is objectively improbable that three pre-pubescent sisters would falsely allege the appellant repeatedly engaged in sexual activity with them in similar surrounding circumstances. The majority noted that the similarities included that the appellant lived next door; the complainants were of a similar age; and were all easily accessible and under a degree of control.5

Finally in 2020 there was *WBN*[10] where the majority (Fraser and McMurdo JJA) held there should not have been joinder but Philippides JA dissented holding that joinder was permitted. In that case the appellant was convicted of 11 counts against seven children. The offending occurred at the appellant's family home. Three of the complainants were relations of the appellant. The majority held that e.g. counts 8 and 11 were so remote from each other separate trials should have been granted.[11]

Of interest in 2021 the High Court dismissed an appeal by *Davidson*.

So I think it is fairly arguable that the approach in *Watson* is the correct one and the one more likely to be adopted by the Court of Appeal in the future but it may depend on which judges constitute the court.

In any event, practitioners should be aware of these issues when preparing for a trial in these matters.

I should also mention that in the *Criminal Code (Child Sexual Offences Reform) and other Legislation Amendment Bill 2019 (Qld)* the government proposed that section 632 of the Criminal Code would be amended to provide a new joinder test as follows:

> **132A Admissibility of propensity evidence and relationship evidence**
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> (1) This section applies in relation to a criminal proceeding.
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> (2) Propensity evidence, or relationship evidence, about the defendant is admissible in evidence in the proceeding if the court considers—
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> (a) the evidence will, by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and

[10] [2020] QCA 203.

[11] They were 9 years apart. Count 8 involved digital rape on a sleeping girl and count 11 was an attempt by the appellant to kiss another girl which she avoided.

(b) having regard to the probative value of the evidence compared to the degree of risk of an unfair trial, a fair-minded person would consider that the public interest in admitting all relevant evidence of guilt outweighs the risk of an unfair trial.

3) In considering the probative value of evidence under subsection (2), the court may not have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion. (4) The weight of evidence admitted under this section is a question for the jury, if any. (5) In this section— propensity evidence, about a defendant, includes the evidence of 2 or more witnesses of events involving the defendant, if the similarities in the evidence of the witnesses make it improbable the witnesses are lying.

For some reason this section was dropped off the amendments to the Evidence Act which went through on 14 September 2020.[12]

Bear in mind the important amendment which did go through and that is section 132 BA of the Evidence Act. This provides:

Section 132 BA Delay in prosecuting the offence

(1) This section applies in relation to a criminal proceeding in which there is a jury.

(2) The judge may, on the judge's own initiative or on the application of a party to the proceeding, give the jury a direction under this section if the judge is satisfied the defendant has suffered a significant forensic disadvantage because of the effects of delay in prosecuting an offence the subject of the proceeding.

(3) For *subsection (2)* , a significant forensic disadvantage is not established by the mere fact of delay in prosecuting the offence.

(4) In giving the direction, the judge—
(a) must inform the jury of—
(i) the nature of the disadvantage; and

(ii) the need to take the disadvantage into account when considering the evidence; but

(b) must not warn or in any way suggest to the jury that—
(i) it would be dangerous or unsafe to convict the defendant; or

(ii) the complainant's evidence should be scrutinised with great care.

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[12] Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020

(5) However, the judge need not give the direction if there are good reasons for not doing so.

(6) The judge must not, other than under this section, give the jury a direction about the disadvantages suffered by the defendant because of the effects of delay in prosecuting the offence.

(7) In this section—

"delay" , in prosecuting an offence, includes delay in reporting the offence.

Mental impairment of offenders

Finally I wanted to briefly talk about the mental impairment of offenders.

The statistics show that a large percentage of defendants before the criminal courts have mental health impairment to some degree. In 2003 it was found that 13.5% of male prisoners and 20% of female prisoners had prior psychiatric admissions.[13]

In a 2015 Australian government report[14] 49% of prisoners reported having been told by a Medical Practitioner that they had a mental health disorder and 28% were on medication for such disorders.

The figure is probably higher bearing in mind undiagnosed conditions.

So it is crucial that consideration is given to obtaining a psychiatric/psychological reports before sentencing.

The report should detail any connection between the offending and the mental health condition and the effect a custodial sentence may have on such a condition.[15]

It is also important to bear in mind that mental health conditions caused or contributed to be the taking of illegal drugs are not irrelevant. In *R v Bowley*[16] Lyons J noted at [46] that the fact a person was intoxicated by drugs and suffering a psychosis at the time of the offence does not mean that the mental state should be excluded from consideration in sentencing as a mitigating factor.

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[13] Identification of Mental Health Issues in the Criminal justice System, Australian Institute of Criminology 2007.
[14] The Health of Australia's prisoners 2015 Australian Institute Health and Welfare.
[15] *R v Verdins* [2007] VSCA 102; (2007) 16 VR 269. Applied in Queensland in *R v Yarwood* [2011] QCA 367; (2011) 220 A Crim R 497 and *R v Goodger* [2009] QCA 377.
[16] [2016] QCA 254; (2016) 262 A Crim R 93.

I should indicate that recently we have had a lot of sentences adjourned because counsel and solicitors have realised at the last minute that a report is needed. This should be avoided and I ask that practitioners give consideration to this issue at an early time.

Conclusion

Thank you for giving me the opportunity to speak at your conference and I hope that the sessions are productive ones for you in your practice.