

APPELLATE ADVOCACY SESSION

17 March 2013

SENTENCING SCENARIO

The evidence

A, B and C meet at the local pizza parlour in an inner Sydney suburb on a Sunday night. It is their regular haunt. They decide to purchase drugs from D, who is their regular supplier, and from whom they have previously purchased drugs 'on credit'. They arrive at D's place at 7pm and find him in an agitated state. He says that he does not have any drugs and that his own supplier, E, is hassling him to repay a debt of \$1000 which D owes him. As it happens, A, B and C in turn owe D the sum of \$1000. D tells them that they must repay their debt to him by 10pm that evening. He tells them that if they do not, then E and his mates (who are known by A, B and C to be very large menacing Pacific Islanders with a reputation for violence) would track them down and "give them a hiding". He also informs them that E has just been released from gaol for "beating senseless" two young men who had failed to repay their drug debts. D goes on to tell them that he is terrified of E and his mates who had earlier that day turned up at his place and viciously assaulted him in front of his wife and their two young children.

A, B and C leave D's premises and go for a drive to discuss their predicament. B and C (who are brothers) live at home with their parents. They ring family and friends in an endeavour to raise the money from them but without success. A, who turned 18 a fortnight ago, has no family to approach, having been thrown out of home when he was aged 13 by his violent stepfather. Ever since then he has been homeless and, for the most part, has lived on the streets.

As time marches on, the trio become increasingly desperate. In due course, they hatch a plan to rob the pizza parlour. They decide to do so because they know, from personal experience, that the premises close at 9pm at which time only the owner is in attendance. They are also aware that when he closes up the premises, his practice is to take with him the entire weekend's takings. A, B and C then drive back to the pizza parlour in the car which B and C's parents have lent them for the evening. As they had discussed, C who is the youngest of the group having just turned 16, remains in the car and acts "as a lookout". A and B enter the premises just as the owner is locking up. When the owner turns around to confront them, B produces a knife from inside his jacket pocket. He jabs it in the direction of

the owner and demands, on several occasions, that he hand over all the money from the till. The owner obliges and A, who is unarmed, grabs the money from him.

Although A and B pulled their jumpers down over their faces in an attempt to disguise themselves, the owner of the premises instantly recognises them as the young men who had been in there earlier. He is able to do so because they are still wearing the same clothes as they had been earlier and because he recognises B's voice as he is issuing the demands. Furthermore, he sees their faces as they run from the shop and jump into the car in which he sees C seated. After the group make their escape, the owner rings the police. They respond immediately and within minutes they arrest the 3 offenders.

C immediately confessed to police that he had been in the car, well knowing that the robbery was to take place. He pleaded guilty in the Children's Court to aiding and abetting the robbery and was placed on a bond to be of good behaviour for a period of 12 months. He had no previous convictions and tendered on his behalf were a series of very favourable reports detailing his significant progress at school and his positive response to drug counselling.

B told Police that the weapon was a penknife which he always carried with him. He said that he only remembered having it with him at the time at which he and A actually entered the premises. B, who was unemployed at the time having dropped out of school, had prior convictions for malicious damage to property, assaulting a police officer and assaulting a stranger on a train. Moreover, at the time he committed the present offence, he was on a bond for three offences of break, enter and steal. He had not previously received a custodial sentence. Following discussions with the prosecutor, he pleaded guilty to an offence of robbery and was also dealt with in the Children's Court as he was 17 years and 10 months at the time. Police told the court that he had made full and frank admissions about his involvement in the offence at the first available opportunity. Moreover, they said that he had outlined A's involvement in the offence and had signed an undertaking to give evidence for the Crown in the proceedings against A. A control order for a period of 18 months was imposed upon B but it was fully suspended. B was informed that, but for his co-operation with the authorities, his sentence would not have been suspended.

A also admitted his role to police. He also told them that he had seen B in possession of the knife earlier in the evening when he had used it to cut up fruit. He also volunteered the information that although they had not specifically discussed the use of the knife as a weapon, he thought that it was highly likely that B would produce it in order to threaten the

owner of the pizza parlour. Based upon that material, A was charged with armed robbery. His solicitor sought unsuccessfully in the Local Court to have the charge reduced to one of robbery simpliciter. A was then committed for trial. Counsel was briefed and advised A to change his plea to guilty when he appeared in the District Court. A had a record which contained entries for 12 prior offences including offences of shoplifting, possession of stolen goods, receiving and possession of drugs. None of those offences had attracted a custodial sentence but he was subjected to a control order for a period of 6 months in a juvenile detention centre in respect of an offence of stealing from the person. At the time of the present offence, he was on bail for a further offence of shoplifting (for which he subsequently received a fine).

A's mother gave evidence at the sentence hearing. She said that when she had visited her son in gaol she was astonished to see the transformation in his appearance from his normal drug-addled state. She said that it was the best he had looked in years. She said that he had proudly showed her certificates which he had obtained for a course he had completed in agriculture at the local TAFE. She said that her son planned to seek employment in that field upon his release from custody. She further told the court that her son had told her how much he regretted his actions and how desperate he had been on the night of the offence in question. She said that he had told her that he often thought of how traumatised the pizza parlour owner must have been when confronted by the knife. She said that he had asked her to write a letter of apology to the victim on his behalf because he felt that he lacked the necessary literary skills to do so himself.

The sentencing remarks

In his sentencing remarks, Judge X described the offence as being a particularly serious offence of its type. He said that A, being the oldest, was clearly the ringleader and had obviously cajoled the other two into committing the offence. His Honour concluded that the offence had been planned and had been committed "in company". His Honour found that it was an "aggravating factor" that the offence had "all the hallmarks of being premeditated". He also regarded his prior record as an "aggravating factor". His Honour observed that although there was no victim impact statement, it could readily be inferred that the victim had been so terrified by the incident, that "it was unlikely that he would ever fully recover from it". His Honour said that the offender's age was all but irrelevant because this type of offence was typically committed by young men. Indeed he said that he intended to heed the message which the Premier had reportedly expressed the previous day when appearing on 'talkback' radio. The Premier had said "the community is sick to death of young hooligans

who continue to rob innocent hardworking citizens of their hard earned cash. It is time for the courts to do their job by getting tough on these ratbags by imposing hefty sentences on them.” His Honour said those considerations were more important than all the Judicial Commission statistics and the authorities to which he had been referred.

His Honour rejected a submission that he should have “some regard to the sentences imposed on B and C.” His Honour said that those sentences were “completely irrelevant” to his task when sentencing A because they had been dealt with in the Children’s Court which has “an entirely different sentencing regime”. His Honour said that he placed almost no weight on what A’s mother had said. He described her evidence as being “precisely what one would expect any mother to say in order to get her son out of trouble and that it was a shame that she had not taken more interest in what he had been doing on the night of the robbery.”

His Honour allowed a discount of 5% for the “utilitarian value” of the plea of guilty and said that the discount was not greater because it was inevitable that A would have been convicted had he gone to trial. His Honour rejected a submission that A had reasonable prospects of rehabilitation. In fact His Honour said he thought that they were bleak in view of his record and because he “had decided not to give evidence before me.” His Honour declined to find “special circumstances” and imposed a non-parole period of 6 years with the total term being one of 8 years imprisonment.

The brief

You are briefed to appear on behalf of A in his challenge to the severity of the sentence imposed upon him by Judge X. In approaching your task, you are to assume that you have been provided with all the factual material you will need.