

Sentencing of Juveniles

Some Notes on Sentencing

By Ian Nash, Public Defender

- The respect of (and knowledge about) the judicial officer who will be imposing the sentence is invaluable.
- Remember your duty to assist the court. Identify the key points or disputes both factual, legal and regarding appropriate disposition – get to the point (Can you agree with the prosecutor what the appropriate outcome should be? Happily appearing for the ALS or as a public defender in a sentencing hearing is not a public relations exercise - with the client or solicitor (although, on occasion, clients they do appreciate you speaking up for them))
- Are you asking for what is fair? Or, if you are appearing in the District Court for a 1st instance sentence, will it withstand a Crown appeal?
- What is unique about your particular case? What will interest the bench (in a good way)? I have found that creating an interest in the matter works. Of course this is often impossible when you're before particular judicial officers.
- If you're asking for something unusual – be prepared / have something to back up what you say (comparative cases or JIRS statistics).
- Negotiating the facts is an important aspect of any plea. It is the time you have most pull with the prosecutor. It is important, as far as you can, to have your client agree with the facts. Don't be afraid of the occasional factual dispute on sentence.
- Remember that facts taken into account as adverse to the offender must be proved beyond reasonable doubt and facts taken into account as favouring the offender must be proved on the balance of probabilities: *Olbrich v The Queen* (1999) 199 CLR 270.

Some legislative provisions and principles that apply to the sentencing of children

Section 28 of the *Children (Criminal Proceedings) Act 1987 (CCPA)* incorporates, subject to Part 2 of the *CCPA* and the rules of the Children's Court, "any Act or other law relating to the functions of the Local Court or Magistrates or to criminal proceedings before them" as applying to the Children's Court as well as any criminal proceedings before the Children's Court. Therefore, for example, relevant provisions in the *Criminal Procedure Act* and the *Crimes (Sentencing Procedure Act (CSPA))* apply to sentencing proceedings in the Children's Court.

The incorporation of "any Act or other law" presumably includes such things as a magistrate's powers under s.32 of the *Mental Health (Forensic Provisions) Act*.

Section 3A *CSPA* sets out the purposes of sentencing:

- "The purposes for which a court may impose a sentence on an offender are as follows:
- (a) To ensure that the offender is adequately punished for the offence,
 - (b) To prevent crime by deterring the offender and other persons from committing similar offences,
 - (c) To protect the community from the offender,
 - (d) To promote the rehabilitation of the offender,
 - (e) To make the offender accountable for his or her actions,
 - (f) To denounce the conduct of the offender,
 - (g) To recognise the harm done to the victim of the crime and the community."

The Legislature has, however, made special provision for the sentencing of children. Section 6 of the *CCPA* provides principles relating to the exercise of criminal jurisdiction with respect to children:

“A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:

- (a) That children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
- (b) That children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
- (c) That it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
- (d) That it is desirable, wherever possible, to allow a child to reside in his or her own home,
- (e) That the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.”

It was noted by Hulme J in *DM* [2005] NSW CCA 181 that the Court of Criminal Appeal in *Hearne* (2001) 124 A Crim R 451, pointed out that the principle underpinning the practice of imposing lesser sentences on youthful offenders than those imposed on adults who commit similar crimes lies in the recognition of the immaturity of youth.

The legislative framework provides avenues for diverting some juvenile offenders away from the criminal justice system: e.g. *Young Offenders Act*. It also provides for specific sentences: see generally Part 3 of the *CCPA* and, specifically s.33 of that Act.

NB: A review of both the *CCPA* and *YOA* is currently being undertaken. The review appears to be general in nature but will cover the possibility of transferring to the Children’s Court traffic offences committed by children as well as amalgamating the *CCPA* and the *YOA*. See: *Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987 - Consultation Paper* by Dept of Attorney General and Justice October 2011. Paper and submissions available:

www.lpcldr.lawlink.nsw.gov.au/lpcldr/lpcldr_consultation/lpcldr_discussion.html

Some other procedural provisions:

- Serious children’s indictable offences must be dealt with “at law”, meaning on indictment in either the District or Supreme Court although the committal proceedings are conducted in the Children’s Court (see ss.17 and 28 *CCPA*);
- s.31(5) *CCPA* allows a Children’s Court magistrate to commit a child for sentence to the District court in respect of any indictable offence if of the opinion that “the charge may not properly be disposed of in a summary matter”;
- s.18 *CCPA* allows a court to which a child has been committed for sentence pursuant to s.31(5) to deal with the juvenile pursuant to Division 4 of Part 3 of the *CCPA* in any even (i.e. in accordance with the sentencing provisions in the *CCPA*);
- s54D(3) of the *CSPA* provides that standard non-parole periods do not apply to children.

A comprehensive summary of sentencing principles peculiar to children and young adults was set out in *AI v R, R v SB and AI* [2011] NSWCCA 95 by Hodgson JA in (with whom Adams and Hall JJ agreed (unequivocally)). In his judgment Hodgson JA first quoted extensively from the judgment of McClellan CJ at CL (as he then was) in *KT v R* [2008] NSWCCA 51, (2008) 182 A Crim R 571 and then from his own judgment in *BP v R* [2010] NSWCCA 159. I have summarised the principles below and annexed to this paper an extract containing all the relevant paragraphs of Hodgson JA’s judgment in *AI v R, R v SB and AI*.

- considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence;
- rather, emphasis should be placed on considerations of rehabilitation;
- the cognitive, emotional and/or psychological immaturity of a child can contribute to their breach of the law. Allowance will be made for an offender’s youth and not just their biological age. Where immaturity is a significant factor in the offending conduct, the criminality involved will be less than if the same offence was committed by an adult (I understand this to be a measure of the objective seriousness of the offence);

- deterrence, retribution and the protective aspects of punishment cannot be entirely ignored, particularly when sentencing young offenders for anti-social and/or violent conduct;
- the emphasis on rehabilitation over deterrence and retribution will be moderated in circumstances where the offending conduct establishes that the juvenile has committed a serious offence and in doing so conducted him or herself in a manner consistent with an adult rather than a child

Ian Nash
Public Defender
March 2013

Extract from *AI v R, R v SB and AI* [2011] NSWCCA 95 (per Hodgson JA, Adams and Hall JJ agreeing):

"67. Principles concerning the relevance of the youth of an offender to sentencing have been stated as follows by McClellan CJ at Common Law in *KT v R* [2008] NSWCCA 51; (2008) 182 A Crim R 571 at [22] - [26]:

[22] The principles relevant to the sentencing of children have been discussed on many occasions. Both considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence. In recognition of the capacity for young people to reform and mould their character to conform to society's norms, considerable emphasis is placed on the need to provide an opportunity for rehabilitation. These principles were considered in *R v GDP* (1991) 53 A Crim R 112 at 115-116 (NSWCCA), *R v E (a child)* (1993) 66 A Crim R 14 at 28 (WACCA) and *R v Adamson* (2002) 132 A Crim R 511; [2002] NSWCCA 349 at [30].

[23] The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age. (*R v Hearne* (2001) 124 A Crim R 451; [2001] NSWCCA 37 at [25]). The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence (*Hearne* at [24]). Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult. (*Hearne* at [25]; *MS2 v The Queen* (2005) 158 A Crim R 93; [2005] NSWCCA 397 at [61]).

[24] Although accepted to be of less significance than when sentencing adults, considerations of general deterrence and retribution cannot be completely ignored when sentencing young offenders. There remains a significant public interest in deterring antisocial conduct. In *R v Pham & Ly* (1991) 55 A Crim R 128 Lee CJ at CL said (at 135):

"It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes, particularly crimes involving physical violence to persons in their own homes. It is appropriate to refer to the decision of *Williscroft* [1975] VicRp 27; (1975) VR 292 at 299, where the majority of the Full Court of Victoria expressed the view that, notwithstanding the enlightened approach that is now made to sentencing compared to earlier days, the concept of punishment ie coercive action is fundamental to correctional treatment in our society."

[25] The emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders, may be moderated when the young person has conducted him or herself in the way an adult might conduct him or herself and has committed a crime of violence or considerable gravity (*R v Bus*, unreported, NSWCCA, 3 November 1995, Hunt CJ at CL; *R v Tran* [1999] NSWCCA 109 at [9]- [10]; *R v TJP* [1999] NSWCCA 408 at [23]; *R v LC* [2001] NSWCCA 175 at [48]; *R v AEM Snr, KEM and MM* [2002] NSWCCA 58 at [96]-[98]; *R v Adamson* [2002] NSWCCA 349; (2002) 132 A Crim R 511 at [31]; *R v Voss* [2003] NSWCCA 182 at [16]). In determining whether a young offender has engaged in "adult behaviour" (*Voss* at [14]), the court will look to various matters including the use of weapons, planning or pre-meditation, the existence of an extensive criminal history and the nature and circumstances of the offence (*Adamson* at [31]-[32]). Where some or all of these factors are present the need for rehabilitation of the offender may be diminished by the need to protect society.

[26] The weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity (*R v Hoang* [2003] NSWCCA 380 at [45]). A 'child-offender' of almost eighteen years of age cannot expect to be treated substantially differently from an offender who is just over eighteen years of age (*R v Bus*, unreported, NSWCCA, 3 November 1995; *R v Voss* [2003] NSWCCA 182 at [15]). However, the younger the offender, the greater the weight to be afforded to the element of youth (*Hearne* at [27]).

68. I accept those principles, but I also adhere to additional comments that I made in *BP v R* [2010]

[NSWCCA 159](#) at [4] - [6]:

[4] First, statements that, in relation to young offenders, principles of retribution may be of less significance and considerations of rehabilitation may be of more significance, may tend to obscure the point that even in relation to retribution the youth of an offender may be a mitigating circumstance. In my understanding, considerations of retribution direct attention to what the offender deserves; and in my opinion, where emotional immaturity or a young person's less-than-fully-developed capacity to control impulsive behaviour contributes to the offending, this may be seen as mitigating culpability and thus as reducing what is suggested by considerations of retribution: see *TM v R* [\[2008\] NSWCCA 158](#) at [\[33\]](#)- [\[36\]](#).

[5] Second, while I agree with the statements in *KT* at [26] that the weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity, and that a "child offender" of almost 18 years cannot expect to be treated substantially differently from an offender who is just over 18 years of age, it does not follow that the age of maturity is 18 (albeit that for certain purposes the law does draw a line there: [Children \(Criminal Proceedings\) Act 1987](#)). In my understanding, emotional maturity and impulse control develop progressively during adolescence and early adulthood, and may not be fully developed until the early to mid twenties: see *R v Slade* [\[2005\] 2 NZLR 526](#) at [43], quoted by Kirby J in *R v Elliott* [\[2006\] NSWCCA 305](#); [\(2006\) 68 NSWLR 1](#) at 27 [\[127\]](#). As shown by *R v Hearne* [\[2001\] NSWCCA 37](#); [\(2001\) 124 A Crim R 451](#), youth may be a material factor in sentencing even a 19 year old for a most serious crime.

[6] Third, I do not think courts should be over-ready to discount the relevance of an offender's youth on the basis that the offender has engaged in adult behaviour or acted as an adult. In the present case, the offence is a very serious one; but it did not involve significant planning or reflection, or any other indicia of mature decision-making. The applicant was 16 years old, and in my opinion the circumstances of the offence suggest rather that emotional immaturity and less-than-fully-developed capacity to control impulses were likely to be contributing factors."