Episode 19: Summary

Episode name: Sentencing Considerations
Guest(s): Michael Vo and Matthew McAuliffe

What area(s) of law does this episode consider?

Criminal law – sentencing

Evidence law

Why is this topic relevant?

As many as 85% of criminal charges brought in the District Court of NSW result in a plea of guilty. Further, the law relating to sentencing – both in terms of the sentencing options available to a court, and the evidence which the court may take into account in determining the appropriate sentence to impose – is constantly changing.

What legislation is considered in this episode?

Crimes (Sentencing Procedure) Act 1999 (NSW)

Section 4 of the *Evidence Act 1995* (NSW)

What cases are considered in this episode?

Barbaro v the Queen (2014) 253 CLR 58: in this case, the High Court considered whether it is the duty of the prosecution to make submissions about the available range of sentences. The prosecution's role is: *"… to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases*". In other words, the court will have all the information which is necessary to decide what sentence should be passed without any need for the prosecution to proffer a view as to an appropriate range of sentences. This is now known as the *Barbaro* principle.

CMB v Attorney-General (NSW) (2015) 89 ALJR 407: the Barbaro principle was considered in this decision; Chief Justice French and Justice Gageler said: "*The Crown (by whomever it is represented) has a duty to assist a sentencing court to avoid appealable error. That duty would be hollow were it not to remain rare that an appellate court would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error".*

The Queen v Olbrich (1999) 199 CLR 270: In this case the High Court considered the burden of proof insofar as it applies to sentencing proceedings. The majority said at [25]: … *if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence it will be for the prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it. Similarly, it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it.*

The Queen v Olbrich stands for the proposition that the Court may not take into account any fact adverse to the interests of the offender unless that Crown has proved that fact beyond reasonable doubt; but facts which may be taken into account in the offender's favour need only be proven on the balance of probabilities.

Parker v DPP (1992) 28 NSWLR 282: where a judge is contemplating an increased sentence in a severity appeal, the judge must alert the offender so that they can withdraw their appeal. The practical effect of this decision is to virtually guarantee that an offender cannot receive a more severe sentence as a result of their own severity appeal than the one imposed at first instance.

What are the main points?

- The Early Appropriate Guilty Pleas Reforms commenced in April 2018, designed to facilitate and encourage appropriate guilty pleas earlier in the criminal justice process. The reforms have five elements.
    - Firstly, the investigating agency – usually the NSW Police – has to provide a simplified brief of evidence – in other words, one that isn't necessarily in admissible form - to the Office of the Director of Public Prosecutions (ODPP).
    - Secondly, the ODPP reviews that simplified brief of evidence and confirms which charges will proceed to trial and which will be withdrawn.
    - Thirdly, the prosecution and defence must hold a case conference to discuss the case and whether there are any charges to which the defendant would be prepared to plead guilty (this is the process that Matthew and Michael discuss in their interview).
    - Fourthly, the bill removes the discretion on Local Court magistrates to discharge in respect of these serious indictable matters – a discretion that, before the reforms, was only exercised in 1 percent of cases. That gatekeeping role is now left up to prosecutorial discretion.
    - Finally, the reforms prescribe caps on the utilitarian discounts that can be applied for guilty pleas at different stages of the criminal justice process. At the earliest stage, a 25% discount on sentencing can be applied – but at the latest stage, the maximum discount is only 5%.
- An ICO is an Intensive Correction Order which is a type of custodial sentence of up to two years, which is served in the community instead of in full-time custody. An ICO can include a whole range of conditions, such as home detention, electronic monitoring, curfews, or community service.
- The Crown is not permitted to suggest a sentencing range.
- Research shows that people experiencing mental disorders are over-represented in the criminal justice system. Reports from psychologists and psychiatrists can be useful in bringing these subjective sentencing considerations to the notice of the sentencing judge.

What are the practical takeaways?

- Magistrates in the Local Courts are managing enormous caseloads. As at December 2019, there were 139 magistrates responsible for dealing with 350,000 criminal matters. For that reason, uninspired, pro-forma references are unlikely to leave an impression.
- Section 3A of the *Crimes (Sentencing Procedure) Act 1999* sets out the seven purposes of sentencing, of which rehabilitation is one.

- Whilst you should aim for the best possible outcome for your client, it is important for counsel for the offender to suggest an appropriate and reasonable sentence so as not to lose credibility with the court, and to avoid appealable error.

- Psychological reports can be beneficial not only for clients with mental illnesses but also for clients with no previous criminal record where something may have occurred leading up to the event.

Show notes

The Queen v Dookheea [2017] HCA 36

Mental Illness Among New South Wales Prisoners, August 2003, NSW Corrections Health Services

Public Defender's resource page

Judicial Commission website link to various sentencing statistics