CURRENT ISSUES IN SENTENCING IN THE LOCAL COURT

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1. INTRODUCTION.

The Local Court in New South Wales deal with the vast majority of criminal matters in our criminal justice system. Everything from parking and littering through to extremely serious offences involving a high degree of criminality.

It is therefore not surprising that consistent with the development of the law in relation to sentencing generally that the Local Court, over the last 10 years, has come to spend a great deal more time on sentencing.

The common law and relevant legislation that forms the body of law now seeks to deal with sentencing in all jurisdictions and it applies just as equally in the Local Court.

However the time limitations and the greater range of offending dealt with in the Local Court means, from a practical point of view, that whilst the law of sentencing applies in the Local Court, it has to be applied and executed in a more efficient and practical way.

We should not however lose sight of what should be the approach in sentencing.

The duty of any Court is probably no better summarised than recently when Derryn Hinch was sentenced in Melbourne to home detention. There the Melbourne Magistrates Court noted;

"…… [the] judicial discretion in the sentencing process and that each case has its unique factors requiring a balancing process which results in tailoring sentences to the distinct facts of the offence and the individual circumstances of the accused. A 'one size fits all' approach, without judicial discretion, will result in courts being transformed into vehicles for injustice."

The purpose of this paper is not to seek to attempt to provide you with a dissertation on the law of sentencing. Rather it is to provide you with information that may be of assistance in dealing with some of the more important and common issues that now arise in the Local Court in sentence matters.

2. DISPUTES ON FACTS WHEN PLEADING GUILTY.

An agreed statement of facts, signed by all parties and tendered almost as the ten commandments are now most common in the District Court. However, in the Local Court we still rely of the usually Police informant prepared facts sheet.

These facts sheets can vary from lengthy and involved explanations of every aspect of a particular matter through to a couple of summarised paragraphs.

More recently however, my experience is that prosecutors are more prepared to be fairly reasonable on the contents of facts sheets so as to be able to avoid the need for hearings, lengthy or otherwise, on disputed facts. The black texta is also still used but in some places not as often or not at all.

My starting point with facts sheets is to ensure that they provide the Court with an accurate summary of the case against your client. They may, in some cases, include material that is either disputed or irrelevant. That does not mean that the document has to be rewritten in its entirety or you have to embark on a full hearing on the facts.

In many cases hearings on disputed facts can be avoided by commonsense prevailing. If the facts sheet contains such material then it is sometimes just as easy to ask the Court to ignore certain parts or not give it any weight. This is especially so if it is not central to the facts that form the basis of the charge/s against your client and will not be of any consequence in the type of sentence to be imposed.

If every word of every facts sheet in the Local Court had to be agreed and if not, required the calling of evidence there would be little time left to do anything else. However it is important to ensure that any substantial dispute or dispute that may affect the resulting sentence is dealt with in the proper way.

Remember that a plea of guilty admits guilt but only to those facts that constitute the essential elements of the offence and facts that are adverse to your client must be proved beyond reasonable doubt

and facts favourable to your client must be proved on the balance of probabilities.

Last year the CCA in *Korgbara –v- R [2010]NSWCCA176* had the opportunity to deal with a purported statement of agreed facts and in deciding that the sentencing process had miscarried said;

"[T]he entitlement of an offender to contest the facts on which he or she is to be sentenced…is of fundamental importance to the administration of justice and must always be a paramount consideration in the sentencing process."

3. REVERSING A PLEA OF GUILTY

Now more commonly known as a Section 207 application (being a reference to the Criminal Procedure Act 1986) the Court has the power to order that a plea be reversed.

Any application needs to be prior to sentence being imposed and the onus rests on the applicant. It is not uncommon to see such applications and the prosecutor usually comes armed with *Wong –v- DPP [2005] NSWSC 129*, which is recognised as providing a good summary of the law for such applications in the Local Court. *R-v-Wilkinson (No 4) [2009] NSWSC323* provides a similar summary but in the context a plea of guilty to murder in the Supreme Court.

Howie J in *Wong* provides a summary on how the Local Court should approach such applications and stressed the need for the Court to have evidence as to the circumstances in which the accused came to plead guilty and recognised that evidence from a lawyer who acted for the defendant at the time the plea was entered "might" need to be placed before the Court. I would suggest that if this is to occur

then such evidence could be called by either the applicant or the prosecutor on the application. It does not necessarily, as is sometimes suggested by Police prosecutors, have to be called by the applicant.

A recent case of *Fuimaono–v-DPP [2011] NSWSC472* demonstrates the importance of ensuring that you have access to all the material that the Court has available to it on such an application. This includes the fact sheet and the ERISP.

An older case of *DPP–v-Arab & Anor [2009] NSWCA75* demonstrates on ensuring that all parties and the Court are clear as to the application being made and the basis on which it is made. This case involved a Section 207 application that eventually was dealt with as a Section4 application and an annulment of the conviction but in circumstances where clearly the plea was being sought to be reversed.

4. BREACH OF BONDS

Sections 98 and 99 of the Crimes (Sentencing Procedure) Act 1999 deal with proceedings for breach of bonds and consequences of revocation of bonds.

Whilst the granting of a section 9, 10 or 12 bond in the Local Court can sometimes be relatively straight forward the breach of a bond by a client can be far more serious and the consequences harsh.

It is now obvious that all Courts, including the Local Court, will act to ensure that a breach of bond is dealt with or at least considered. In other words, if your client is on Section 9, 10 or 12 bond and commits a further offence then you should expect the Court to call

your client up for breach. From a practical point of view this involves the papers that relate to the bond matter being obtained and placed before the Court that is dealing with the offence/s that create the breach. Even if you are going to ask the Court not to take any action in relation to the breach you should still expect the papers relating to the original offence to be obtained and placed before the Court.

It is also now generally understood that if the breach is going to involve the revocation of the bond and resentencing or, in the case of a section 12 bond, the implementation of the suspended sentence then this needs to be done before the Court proceeds to deal with the fresh offence i.e. the matter creating the breach. This stems from *R-v-Cooke; Cooke-v-R [2007] NSWCCA184* and reaffirmed in *DPP-V-Nouata&Ors [2009] NSWSC72.*

These two cases were summarised and applied by Chief Magistrate Henson in *Police-v-Larkins [2009] NSWLC12* where a breach of a Section 12 bond occurred 8 hours before its expiration. The Court emphasised that the subjective circumstances of an offender at the time of the breach are not relevant to the determination that a Court has to make under section 98(3) when dealing with a section 12 bond but was mindful that there may be *"extenuating circumstances of sufficient importance to explain the behaviour giving rise to the breach (so as) the court can exercise its discretion to take no action on the breach".*

The Chief Magistrate stressed the mandatory provisions of section 98(3) and proceeded to revoke the suspended sentence and sentence the offender. However it should always be remembered that Section 99(2) allows a Court to consider intensive correction orders and home detention after having revoked a section 12 bond.

Section 98(3) only applies to section12 bonds and it still remains open to convince a court not to take any action for breach of a

section 9 or 10 bond. However the principle remains the same – if the Court decides to revoke the bond they must resentence (in the case of section 9) or convict and sentence (in the case of section 10) before dealing with the offender for the breach.

The need for this to occur was highlighted in *R-v-Nicholson [2010] NSWCCA80* (though in relation to a section 12 bond) and the CCA stressed the need for breaches to be dealt with.

Section 98(1) allows a Court of superior jurisdiction, with the offender's consent, to call up an offender for breaching a bond. In other words the District Court can deal with a breach of a bond from the Local Court but not vice versa. Under Section 98(2) a court can decide to take no action or the conditions of a section 9 and/or a section 10 bond can be varied or added to. Section 98(3) as outlined above deals with a breach of a section 12 bond.

5. SECTION 10 OF THE CRIMES (SENTENCING PROCEDURE) ACT 1999.

Section 10 (as its predecessor section 556A was) can be and is the source of much debate when it comes to sentencing in the Local Court. A quick glance at statistics will show the extent of its use in the Local Court. Its use, misuse, overuse and non use causes debate amongst lawyers, defendants,the media and the like.

I would suggest that Section 10 is a valuable part of the armoury available to lawyers in the Local Court sentencing process. But I am a big believer in only seeking its use when appropriate. I know some practitioners take the "if you don't ask you don't get" view of section 10 but I do not feel that this is appropriate. Section 10 is there for a reason and in the proper case should be, and is, used. It is not there to be bowled up in every 2nd plea and it should be obvious to

competent and/or experienced practitioners when it is appropriate to seek its application.

As recently as this week I saw a District Court judge (in dealing with a severity appeal) ask a lawyer what part of section 10 he was relying upon in seeking its implementation. The words of the section should not be forgotten and it is incumbent on practitioners to be able to point to that part of the section being relied upon if asked.

It is a section that has also been examined on a number of occasions recently by the Supreme Court.

In an older decision from 2008 called *Matheson -v- DPP [2008] NSWSC550* the Supreme Court had the opportunity to reject any suggestion that section 10 was not available after a plea of not guilty. It followed a conviction having been entered against the defendant for using an unregistered vehicle. The Supreme Court came to the conclusion that the Local Court had excluded consideration of section 10 solely because the defendant had defended the matter and that there was "no discount available".

Johnson J said at Para 65

"There is no statutory or common law principle which excludes an order under s.10 in circumstances where a defended hearing has taken place. In many cases, of which this case may be an example, the defended hearing may disclose extenuating circumstances in which the offence was committed to which the court should have regard in determining whether to apply the section:s.10(3)(c)."

More recently, in *Hoffenberg-v-The District Court of New South Wales [2010] NSWCA142;* the Court of Appeal had cause to examine the words used in section 10. Mr Hoffenberg had been convicted and released on a section 9 bond in the Local Court for damaging property. His severity appeal to the District Court was heard and dismissed by the Chief Judge Blanch J. It should be noted that in

the Local Court the defendant had had two other charges dealt with under section 10.

The Court of Appeal held that Blanch CJ had approached the sentencing task properly and had given proper consideration to those matters the Court is required to take into account. In dismissing his appeal to the Court of Appeal McClellan CJ at CL said that Blanch CJ

"…….took the view, as he was entitled to do, that a deliberate act of vandalism placed the nature of the offence beyond the trivial and may, depending on all the circumstances, deny an offender the benefit of an order pursuant to s 10."

In *Morse(Office of State Revenue)-v-Chan and Anor[2010]NSWSC1290(26 November 2010)* the Supreme Court had occasion to analyse in some detail the relationship between section 10 and section 21A of the Crimes (Sentencing Procedure) Act 1999 and also the relationship between section 10 and section 32 of the Mental Health (Forensic Provisions) Act 1990. I will leave the detail of the judgment in relation to section 21A for you to read for yourselves as it is very much involved in what were questions of law and what were questions of fact.

In relation to section 32 Schmidt J said at Para 91

" *The conclusion that an order under s32…….was not available did not preclude the exercise of a discretion under s 10. In determining whether the discretion should be exercised, his Honour considered the factors specified in s 10(3)."*

The Supreme Court, in examining the details, both objective and subjective, of the particular facts of the case, went on to find that it could not be said that the s 10 bond that was imposed was manifestly inadequate.

I think the case highlights the use to which section 10 can be put and that in the proper case it is a proper exercise of the sentencing discretion. The Court conceded that whilst lenient it did not involve manifest inadequacy.

6. INTENSIVE CORRECTION ORDERS.

It is now 10 months since the previous Government replaced Periodic Detention with Intensive Correction Orders.

Sections 64 through to 73A of the Crimes (Sentencing Procedure) Act 1999 now govern ICO's.

Under section 66 ICO's are not available for certain sexual offences and under section 67 it is necessary for a Court to ensure that an offender is suitable and *"that it is appropriate in all of the circumstances that the sentence be served by way of intensive correction in the community".*

A Court is firstly required to consider all alternatives to full time imprisonment and if they come to the view that no other penalty other than full time imprisonment is appropriate and that the period is "likely" to be less than 2 years then they can refer a matter for assessment. (Section 69(2)).

An offender must be assessed as suitable and must sign an undertaking to participate. Following the assessment the matter returns to court and after determining that an ICO is appropriate can proceed to make an order that the period of imprisonment is to be served by way of an ICO.

If an offender is assessed as unsuitable then the Court can still consider home detention, for which a separate assessment can then

be conducted. It is also possible for a Court to suspend any sentence under section 12 if an offender is assessed as unsuitable.

An ICO has mandatory conditions that are attached and additional conditions can be included provided they are necessary or desirable for reducing the likelihood of reoffending.

It is necessary for all ICO's to be less than 2 years or a combination of less than 2 years if cumulative.

Breaches are dealt with by the Commissioner and the Parole Authority.

A non-parole period is not set by the Court so as to ensure the offender is subject to the conditions of the order for the full term of the sentence. This ensures that for the full period of the term there is a strong focus on rehabilitation.

Conditions include 24 hour monitoring and community work of 32 hours per month.

Like periodic detention ICO's have different levels or stages.

Corrective Services assured the recent Legal Aid Criminal Law Conference that resources meant that ICO's would be available across all parts of the state by October 2011 (i.e. within 12 months of their introduction). This is seen as one of the advantages over periodic detention which was not really available west of the Great Dividing Range.

Provision is also made in the legislation for there to be a review of ICO's by the Sentencing Council after five years and for the report to be tabled in Parliament. I would expect something from BOSCAR even earlier.

ICO's appear to have been taken up across all jurisdictions. Some recent figures show that in May 2011 there were a total of 288 people on ICO's in NSW. (256 male and 30 female).

In *R-V-Bateson [2011] NSWSC643* Buddin J, in dealing with a person for insider trading, had the opportunity to consider ICO's as a sentencing option. After examining suspended sentences and their "inbuilt leniency" the Court went on to examine ICO's, including their history and their implementation. Buddin J noted with community service work of 32 hours per month as a standard condition an offender doing an ICO for 2 years would be obliged to perform a minimum of 768 hours of community service.

He then went on to examine some Victorian authorities, where ICO's have been available for longer than in NSW. The cases, gathered at Para 71 to 75 of the judgment, refer to such expressions as;

"an intensive correction order is not a light sentence. It is intended to be….burdensome."

"an [ICO] must be regarded as a significantly punitive disposition."

"an [ICO] seeks to meet the objects of sentencing….It will be an appropriate adjunct to your rehabilitation and a constant reminder to you to never again involve yourself in criminal conduct"

Buddin J then went on to recognise that ICO's have a strong degree of leniency built into them as was recognised in NSW in *R-v-Hallocoglu (1992)29NSWLR67 at 73* as it related to periodic detention. The Court then imposed a 2 year ICO (together with a $70,000 fine).

7. FORUM SENTENCING

Part 7 of the Criminal Procedure Regulation 2010 provides for forum sentencing as a declared intervention program under the Act and after a trial it is now slowly being rolled out in Local Courts across NSW.

In addition the Chief Magistrate has issued Practice Note No 2 of 2011 (dated 7 March 2011) and at Para 1.3 it provides;

"1.3 The programme provides for the referral of offenders who have pleaded guilty of offences and for whom there is a likelihood of a custodial sentence, to be referred to a Forum. At the Forum the offender and the victim or victims of the offence, the police and others affected by the offence are brought together with a Forum facilitator to discuss what happened, how people were affected by the offence and develop an Intervention Plan for the offender."

Regulation 55(2) lists "excluded offences" including domestic violence offences, serious traffic and drug matters and some offences under the Summary Offences Act 1988 (offensive conduct, custody of knives and offensive implements).

You should also be aware that Regulation 63, which deals with eligibility, does not allow persons with certain previous convictions to be referred for inclusion in a Forum. The offences that would act as a bar include personal violence matters, certain drug offences and serious firearms offences.

The initial referral is for a suitability assessment (2 week adjournment) and if the offender is assessed as suitable then the Court will consider making a Forum Participation Order which then involves an 8 week adjournment. Following then the holding of the Forum, the Court will be asked to consider an Intervention Plan. Having made an Intervention Plan Order the Court can then adjourn

the matter for sentence and provide the offender with the opportunity of completing the Intervention Plan (section 11 adjournment) or proceed to deal with the offender pursuant to section 9, 10 or 12 where the completion of the Intervention Plan can be a condition of the bond.

If the former is adopted then the offender is subsequently sentenced and the Court can take the successful completion of the Plan into account.

If the latter course is adopted then the Court is to be advised whether the Intervention Plan is satisfactorily completed. If it has not then action can be taken for breach of the bond.

This sentencing option is another addition to our armoury. Practitioners should be familiar with the eligibility (or non-eligibility) and what offences allow such a Forum to be considered.

Regulation 63, in dealing with eligibility, talks about the Court considering the facts, the antecedents and any other information available, in determining *"that it is likely that the person will be required to serve a sentence of imprisonment"*. Sentence of imprisonment is defined to include periodic detention, intensive correction or home detention.

Always helpful in any sentencing process are the legislative objectives. Regulation 61 lists them and they include;

*to reduce re-offending,

*increase confidence of the community in the justice process

*increase satisfaction of victims with the justice process

*increase an offender's awareness of the consequences of their offences for their victims and the community.

8. SUPPLY OF DRUGS.

The Local Court still deals with its fair share of drug supply matters. Whilst not the large amounts that attract lengthy sentences in the District Court it is not uncommon for the Local Court to deal with drug supply matters involving in excess of the trafficable amount that still involve a fair degree of planning and profit.

Whilst the sentencing statistics show the Local Court use the whole range of sentencing options available to them in dealing with drug supply matters it is always good to remind ourselves of some of the broader principles, especially for those matters that would be seen as being further towards the top of the spectrum for these type of matters, in the Local Court.

It is trite law but it is well established that drug dealing to a substantial degree will, in the absence of exceptional circumstances, require a sentence of full time imprisonment; *R-v-Gu[2006]NSWCCA104;R-v-Gipp[2006]NSWCCA115;R-v-Clark(NSWCCA 15/3/90);R-v-Bardon(NSWCCA 14/7/92);R-v-Burns[2007]NSWCCA228*.

The principle has recently been affirmed in *Scott-v-R[2010]NSWCCA103* when the CCA was called upon to resentence an offender when the District Court did not, in imposing fulltime custody, first turn its attention to whether the offender was involved in drug dealing to a substantial degree.

In *Zahrooni-v-R;DPP-v-Zahrooni[2010]NSWCCA252* the CCA held that whilst the sentencing judge did not make an express finding as to whether the offender was involved to a substantial degree it was appropriate that the Court look at *"…the extent of involvement in supply. Where the supply is on a single, isolated occasion, the circumstances might(or might not) permit a non-custodial sentence"(Para 29).*

The finding of exceptional circumstances has been considered recently in *Santos-v-R[2010]NSWCCA127* where the CCA looked at whether the offender's subjective circumstances were exceptional. They held that they were not and added that rehabilitation by itself is not an exceptional circumstance.

In *R-v-Pickett[2010]NSWCCA273* the Crown appealed the alleged inadequacy of a suspended sentence for a continuing supply matter where the sentencing judge had found exceptional circumstances. The voluntary cessation of involvement, his age and evidence of real and established rehabilitation and willingness to make a positive contribution to a charitable program was sufficient, to both the sentencing judge and the CCA, to constitute exceptional circumstances. The Crown appeal was dismissed.

The importance of rehabilitation and ceasing involvement can be vital. In the Local Court the existence of the MERIT program can be of huge assistance.

Indirectly relevant to matters involving drugs and rehabilitation it should be pointed out that in *BJT-V-R[2011]NSWCCA12* the CCA has again recognised that time spent in a full time residential rehabilitation facility can be taken into account as time served for which credit can be given when sentencing an offender to full time imprisonment.

9. SENTENCING FOR SPECIFIC OFFENCES

As a final matter for consideration I wanted to point you in the direction of recent cases that relate to certain specific offences.

They all provide an excellent summary of the law to be applied for those particular offences;

(a) *DPP-v-Matthew Freeman[2011]NSWLC8* being a decision of Magistrate O'Brien relating to sentencing for using fabricated false evidence to mislead a judicial tribunal and perjury.

(b) *R-v-Robert Richard Cutler[2010]NSWDC236* being a decision of Cogswell DCJ relating to firearm offences.

(c) *Minehan-v-R[2010]NSWCCA140* being a decision of the *CCA* relating to child pornography.

(d) *DPP-v-Victoria Bhandari[2011]NSWLC7* being a decision of Chief Magistrate Henson in relation to negligent driving occasioning death.

10. CONCLUSION

The material collated in this paper I hope assists you in tackling some of the more common issues that we as practitioners confront in the Local Court.

It could be argued that sentencing law and practice has become too involved and/or complicated, even in the Local Court. I would suggest that it is more about getting the balance right. The balance between the reasonable time needed to do justice to your client and your

case and recognising some of the practical constraints that come with being in what is the busiest court in Australia.

If we can ensure the balance is achieved then we will be discharging our obligations to the Court and to our client.

As legal practitioners we will have done our job.

Brett Thomas

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