What do we want? When do we want it?

Some issues about sentencing in the Children's Court

Children's Magistrate Paul Mulroney
Children's Legal Service Conference 11 October 2014

Sentencing advocacy can be deceptively simple. There are usually 3 things that an advocate needs to address:

- What happened?
- Why did it happen?
- What will stop it happening again?

Too often advocates get focussed on a problematic detail and neglect the bigger picture.

Before

What is the linguistic ability of the YP?

If a YP has language problems it will affect a number of areas related to sentencing:

- Likelihood of committing an offence
- Communication with a lawyer
- Taking part in a YJC
- Engaging in JJ supervision or counselling
- Engaging in education

Research from around the world (the UK, Scandinavia, the USA and Australia) in the last 10-15 years has identified young offenders as a group that is at high risk of undiagnosed (and often mis-labelled) language disorders. In research Assoc Prof Pamela Snow has led in Australia, with Professor Martine Powell (Deakin University), they have identified that:

> Between 46 and 52% of young male offenders have clinically significant (yet previously undiagnosed) language disorders; such deficits tend to "masquerade" as poor motivation, disengagement, rudeness, and inattentiveness.
>
> · These language disorders are pervasive, compromising expressive and receptive language skills across all domains –

vocabulary, narrative skills, ability to understand figurative (non-literal) language;
· Language disorders cannot simply be attributed to low IQ;
· There is a relationship between severity of offending (in particular convictions for violent offences) and the severity of language impairment;
· Young people who have been in out-of-home care via Child Protection orders face an elevated risk of language impairment (62%).

For further information - http://www.sentencetrouble.info

Agreed Facts

In *R v Crowley* [2004] NSWCCA 256 at [46], Smart AJ said:

> "Agreed facts should always be carefully checked by all parties and their legal representatives, and especially by counsel for an offender. This should not be perfunctory."

Facts that are tendered without objection are agreed. Too often advocates are unprepared to deal with the fact that a young person has given a different version of events to a JJ officer or a counsellor. A wise advocate should get signed instructions if there is even a slight doubt about whether the young person accepts the agreed facts.

Mental health diversions

One of the great advances in criminal law in recent decades has been the greater recognition of the impact of mental health on offending and especially the desirability of diversion of some people from the criminal justice system to the mental health system. The presence of Justice Health clinicians is an important part of that advance.

It is in the best interests of a young person to be diverted quickly. In many instances where the young person is already receiving treatment for a mental illness or a cognitive impairment a JH consultant will be able to prepare a suitable case plan very quickly. In many cases unnecessary anxiety for the young person and delayed treatment results from lack of thought about how the s32 application can be presented.

In too many cases the hopes of a young person are unfairly raised by the making of applications which have no merit. The case law makes it clear that whether an order is "more appropriate …. than otherwise in

accordance with law" is a key consideration. If a young person has had a number of previous offences dealt with pursuant to s32 or if there is a history of poor compliance with treatment it will rarely be more appropriate to deal with the young person under s32. The most obvious exceptions are where there has been a significant change in mental health status that is not explicable by failure to comply with treatment or where there is a change of diagnosis or treatment which means that previous treatment plans were ineffective despite the young person's compliance.

Double punishment

Police v BS [2011] CLN 3 - Mulroney CM

This especially arises in domestic violence cases. What is the behaviour relied upon for breach of the AVO? If the only ground for breach is an offence which requires nothing more to be proved than is required to establish the breach there can only be one charge. It is important to have regard to the facts upon which the prosecution relies.

Examples

1. If there are charges of breach AVO and AOABH, 2 charges are justified because each charge contains an element which is not in the other (existence of AVO, ABH).

2. If there are charges of breach AVO and common assault, 2 charges are not justified unless there is some other basis for the breach eg damage to property, an intimidation which is not part of the assault.

Withdrawal of plea

If there is real doubt about the integrity of a plea steps should be taken to have it withdrawn as soon as possible. In *Ming Yuk (Raymond) Wong v The Director of Public Prosecutions* [2005] NSWSC 129 the court set out a number of bases for withdrawal of a plea. Howie J referred to *R v Van* (2002) NSWCCA 148, which in turn cited Spigelman, CJ. in *Regina v. Houra* [2001] NSWCCA 61 at paras.32-33.

> • *Where the appellant 'did not appreciate the nature of the charge to which the plea was entered' (Regina v. Ferrer-Esis (1991) 55 A. Crim. R. 231 at 233).*
> • *Where the plea was not 'a free and voluntary confession' (Regina v. Chiron (1980) 1 NSWLR 218 at 220 D-E).*
> • *The 'plea was not really attributable to a genuine consciousness of guilt' (Regina v. Murphy [1965] VicRp 26; [1965] VR 187 at 191).*

• Where there was 'mistake or other circumstances affecting the integrity of the plea as an admission of guilt' (Regina v. Sagiv (1986) 22 A. Crim. R. 73 at 80).
• Where the 'plea was induced by threats or other impropriety when the appellant would not otherwise have pleaded guilty ... some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt' (Regina v. Concotta (NSWCCA, 1 November 1995, unreported)).
• The 'plea of guilty must either be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt' (Maxwell v. The Queen (supra) at 511).
• If 'the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt' (Regina v. Davies (NSWCCA, 16 December 1993, unreported)). See also Regina v. Ganderton (NSWCCA, 17 September 1998, unreported) and Regina v. Favero [1999] NSWCCA 320."

49 To the cases cited should be added reference to *Regina v. Iral* [1999] NSWCCA 368 in which the failure of the appellant to appreciate the nature of the charge and difficulties with an interpreter lead to the appeal being upheld; *Regina v. Wilkes* [2001] NSWCCA 97 where the advice of trial counsel to enter the plea was held to be imprudent and inappropriate thus occasioning a miscarriage of justice; *Regina v. McLean* [2001] NSWCCA 58 in which senior counsel's inappropriate advice on the applicant's ability to challenge a relevant matter of fact occasioned a miscarriage of justice; *Regina v. KCH* [2001] NSWCCA 273 involving improper pressure by counsel and *Regina v. Becheru* (CCA, unreported 6 April 2001) and *Regina v. Toro-Martinez* [2000] NSWCCA 216; (2000) 114 A. Crim. R. 533.
16 The authorities referred to in the above passage show that the issue is one of the integrity of the plea of guilty and the question to be determined is whether a miscarriage of justice would arise if the court acted upon the plea of guilty to convict and sentence the defendant***. I simply do not comprehend how a court can resolve that issue or determine that question without evidence from the person who entered the plea of guilty. It may well be the case that evidence from the legal representatives who acted for the defendant at the time the plea was entered might need to be placed before the court.***

Be very careful about getting detailed instructions if a client wishes to withdraw a plea or make a s.4 application.

Get an affidavit from your client and, if possible, an affidavit from the lawyer who represented the YP at the time of entry of the plea.

During

The responsibility of the advocate

Lord Reid said in *Rondel v Worsley* (1969) 1 AC 191, [I967] 1 3 All E.R. 993 [1967] 3 WLR 1666 that

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case.
>
> But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.

Closed court

All people other than those with an 'interest' in the matter, or those described by the section, are to be excluded from the court unless the court directs otherwise [s10 CCPA]. Normally parents and other family will be allowed. Even here there will be occasions where a parent might be disruptive, or where intra-family conflict or shame results in the YP asking for a parent to be excluded.

AE v R [2010] NSWCCA 203, pars 37-40, contains a helpful consideration of this issue, although no reference was made to the Beijing Rules, which give weight to the YP's privacy.

> 39 Any intrusion on the open administration of justice is capable of leading to an erosion of public confidence in the integrity of the system. Accordingly, exceptions to the principle warrant close scrutiny. Where a child is a party to criminal proceedings, Parliament has determined that the principle of open justice should be compromised in the manner noted above, subject to the court exercising its discretion to direct otherwise. There is no need for special circumstances to be shown: it is sufficient that the court exercises its discretion in the circumstances of the particular case, bearing in mind the underlying purpose of s 10.

In sentence proceedings that may involve discussions of abuse, mental health or other sensitive issues, children can feel uncomfortable or intimidated by police and media presence, especially if they know these people. This will be even more of an issue in regional centres where it is more likely that the young person will know others at court.

Is there such a thing as an "adult like offence"?

There is also a body of cases which reinforce the importance of treating young people differently from adults by emphasising rehabilitation. In recent times there has also been a greater recognition that "adult like" behaviour does not dilute this requirement. In *BP v R* [2010] NSWCCA 159, (2010) 201 A Crim R 379 Hodgson JA and Rothman J cast some doubt on the "adult like offence" formulation.

Delay

For delay to be relevant in sentencing it must be lengthy and unexplained. What is lengthy for a young person may be a shorter time than for an adult. The cases also recognise that delay operates in favour of an accused person in many instances as it gives them a chance to rehabilitate.

In *R v Blanco* [1999] NSWCCA 121 Wood CJ at CL said

> 16 The reason why delay is to be taken into account when sentencing an offender relates first to the fact of the uncertain suspense in which a person may be left; secondly to any demonstrated progress of the offender towards rehabilitation during the intervening period; and thirdly, to the fact that a sentence for a stale crime does call for a measure of understanding and flexibility of approach: See, in addition to Todd and Mill, the decisions in Harrison (1990) 48 A Crim R 197 at 198-199 and King (Court of Criminal Appeal NSW, 24 February 1998).

Admissibility of disputed material in JJRs and other reports

Stanton v Dawson (1987) 31 A Crim R 104

> It would appear that Mr Dickens had been provided with a copy of the Probation and Parole Report and had shown it to his client in that case for the purpose of obtaining instructions. When that was conveyed to the learned magistrate he said: "Well you should not have done that Mr Dickens. To be perfectly frank with you the information contained in the Probation and Parole Service reports is for the benefit of the court and the court only. They have nothing to do with the Defendant ... the pre-sentence report comes to the court because the courts ask for them and they're for the

information of the court, and it is only a matter of courtesy that they are made available to Defendant's solicitors, and the information contained in them is certainly not for the information of Defendants. Now I make that perfectly clear and I don't want that ever to happen again, Mr Dickens." - when Mr Dickens put to the learned magistrate:

> "Your Worship my submission to you would be in respect of that that if there is material going to the court that your Worship is taking into account as the basis for sentencing him, then some of that material of a hearsay nature, then it's only proper for the person to be aware of the material that your Worship is using as a basis for sentencing him." The reply was made: "I have said what I have said Mr Dickens."

It would seem to me that once the attention of the learned magistrate is drawn to the absence of any support for the view that he appears to have held on the matter and in particular to the case of R v O'Neill [1979] 2 NSWLR 582, that it is unlikely that any further problem will arise. Should it do so, it will be necessary for this Court to be approached again upon the basis of what has taken place in this case.

O'Neill's case makes it clear that the court is to consider only material that has been agreed upon or proved. At p 588 Moffitt J said: "I think three elemental matters can be stated."

The first is not material for present purposes. "The second, beyond that, any facts relied on by the Crown, and in particular, any that aggravate the offence must be established by the Crown by some acceptable procedure. Third, any dispute as to matters beyond the essential ingredients of the offence admitted by the plea must be resolved by ordinary legal principle, including resolving relevant doubt in favour of the accused."

Later, on the same page, he said: "In summary, at least, they provide authority for the following propositions, which I think should be accepted. Where there are depositions and these are tendered before the judge and admitted, he is entitled to determine the nature of the offence by reference to the depositions. Where the accused disputes the facts, the appropriate course is for the accused to give evidence on oath and for the Crown to call before the judge any contrary evidence, except so far as he properly has before him admissions of the accused or evidence given on some other occasion, e.g. committal depositions sufficient to enable him to resolve the disputed facts. Where the Crown relies on matters which are disputed, and are not the subject of evidence given on oath before the judge or of depositions on oath admitted before a

judge, they should not be brought to account, unless the subject of further evidence on oath."

From that and other cases it is abundantly clear that an accused person cannot be sentenced upon the basis of material that is not known to him, and indeed it is difficult to see how material can be known to the accused's legal advisers which they are not under a duty to convey to him.

Cumulative sentences

Sentencing for multiple offences often involves a tension between dealing with each separate act of criminality and reflecting the overall criminality of the behaviour. In *MPB v R* [2013] NSWCCA 213 Garling J observed that

> 133 There is no general rule of law that determines whether a sentence must be concurrent in whole or in part, or else consecutive: *Cahyadi v R* [2007] NSWCCA 1; (2007) 168 A Crim R 41 at [47] per Howie J. The overarching principle was expressed by Howie J in *R v Jarrold* [2010] NSWCCA 69 at [56], where his Honour said that the question to be asked is whether the sentence for one offence encompasses the criminality of all of the offences.
>
> 134 Recently, in *Franklin v R* [2013] NSWCCA 122, Hoeben CJ at CL said:
>
> "There is no rule that sentences for offences committed on the same day, or as part of the same criminal enterprise should be served concurrently. A sentence should not be 'concurrent' simply because of the similarity of the conduct or because it may be seen as part of the one course of criminal conduct: *R v Jarrold*, Howie J at [56]). The question to be asked is whether the criminality of the offence can be encompassed in the criminality of the other offence (*Cahyadi v R*). If not, the sentence should be at least partially cumulative, otherwise there is a risk that the sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the offences can be regarded as part of a single episode of criminality (*Cahyadi v R* at [27])."

For further information see *R v XX* (2009) 195 A Crim R 38 at [52], where Hall J derived 11 propositions from the case law.

I am not aware of any case which suggests that young people should be dealt with differently from adults with regard to cumulation. Care should be exercised to ensure that the cumulated sentences take account of the principles regarding sentencing of young people.

Discounts for pleas and delayed pleas

R v Robert Borkowski [2009] NSWCCA 102 (2009) 195 A Crim R 1

32 It should not be necessary to do so, but, because there appears to be discrepancies in the application of the discount for the utilitarian value of the plea, it is apposite to set out in point form the principles laid down by this Court and to be applied by sentencing courts. Of course these are principles of general application and are subject to the scheme set out in *Criminal Case Conferencing Trial Act* 2008 and regulations made under that Act:

> 1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].
>
> 2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].
>
> 3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.
>
> 4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.
>
> 5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186.
>
> 6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291
>
> 7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
>
> 8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.

9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* [2004] NSWCCA 448.

10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129

11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.

12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

The last of these principles is derived from the present judgment and is included for completeness.