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Précis Paper

A consideration of WC v R [2016] NSWCCA 173

Simon Healey and Will Tuckey discuss the recent case, WC v R [2016] NSWCCA 173

Discussion Includes

- What happens when there is a delay between the end of the offending and sentencing being handed down?
- How courts deal with offending across interstate lines, including application of the totality principle.
- What is the importance of steps towards rehabilitation and rehabilitation in the sentencing process?
- Use of the word "opportunistic" in regard to sentencing

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A consideration of WC v R [2016] NSWCCA 173

1. In this edition of BenchTV, Simon Healey and Will Tuckey discuss the case of WC v R [2016] NSWCCA 173 (Hoeben CJ at CL, Campbell J, Natalie Adams J). Mr Healey acted for the appellant, "WC" in the CCA proceedings, who was successful in reducing the non-parole period of WC's prison sentence.

Background

2. "WC" commenced sexual assault offences against his daughter in 1999 when she was 12 years old, and his offending against her continued until 2006.
3. Between the years of 1999 and 2005 WC and his daughter lived in NSW. In 2005 they moved to Queensland. WC's daughter was 17 years old at the time of their move.
4. WC was charged in 2007 in Queensland in regard to offences committed against his daughter since 2005 in Queensland. As WC's daughter had attained the age of 16 years by the time that they moved to Queensland, WC was charged with incest rather than child sexual assault offences.
5. WC was sentenced in Queensland in regard to 3 offences in November 2009 to a term of 4 years' imprisonment, with non-parole period of 16 months.
6. For various reasons WC was never granted parole in Queensland and accordingly served the whole of his sentence there.
7. While WC was in prison in Queensland. WC's daughter made a formal complaint to NSW Police in regard to WC's previous offending against her in NSW, ie for the period from 1999 to 2005. NSW Police decided to charge WC with a number of offences.
8. Subsequent to serving the full period of 4 years imprisonment in Queensland in November 2013 WC was released into the custody of NSW Police and was extradited to NSW to face the child sexual offences and incest offences under the Crimes Act 1900 (NSW) relating to the period from 1999 until 2005.
9. WC pleaded guilty to all of the NSW charges in September 2014. Sentencing was handed down by NSW District Court in February 2015. In regard to WC's offending in NSW Conlon DCJ sentenced WC to 19 years' imprisonment with a 13 year non-parole period (*R v WC District Court of NSW (unreported) 16 February 2015, Conlon DCJ)*
10. WC appealed to the NSW Court of Criminal Appeal (NSWCCA) in regard to the sentence awarded by the NSW District Court.

District Court decision: grounds for appeal

11. In sentencing WC, in the NSW District Court (NSWDC), Conlon DCJ noted that he was taking into taken account WC's Queensland custodial sentence period, and partially backdated WC's sentencing period by 2 years.
12. Mr. Healey observed in discussion with Mr Tuckey that as a result of the sentence handed down by Conlon DCJ, effectively the "net practical sentence" for all of WC's offending was 21 years with a 15 year non-parole period.
13. Mr Healey also observed that there a number of issues for consideration in regard to the sentencing of WC. These included the totality principle, delays and rehabilitation. Mr Healey indicated that while these issues were raised in the NSW District Court proceedings, they were dealt with in such a way that provided grounds for appeal before the NSWCC.
14. Mr Healey noted that the evidence before the NSW District Court included that WC had undertaken two courses in Queensland regard to his offending. The completion of the first programme did not seem to make a significant impact on WC and it was advised that he complete a more advanced programme. WC completed this, and the assessment was that some measure of rehabilitation had been achieved. It was reported in regard to the completion the second programme that WC had some recognition of his grossly inappropriate behaviour and the abusive nature of his relationship with his daughter ("the victim).
15. Mr Healey said that this measure of rehabilitation should have been considered by the NSW District Court but was not taken into account in regard to sentencing.

<u>No parole granted to WC in respect of his Queensland convictions</u>

16. In respect of his convictions in Queensland, a non-parole period of 16 months had been given to WC. However, WC served the whole of the 4 year term there.
17. In regard to WC's offending in NSW Conlon DCJ sentenced WC to 19 years' imprisonment with a 13 year non-parole period.
18. In reviewing his situation, Justice Campbell of the NSW Court of Criminal Appeal (NSWCCA) noted that WC had applied for parole in Queensland in September 2010. This had been refused by the parole board on the basis that WC had failed to complete rehabilitation programmes, had demonstrated limited insight into the nature of offending and his release was considered to represent an unacceptable risk. Justice Campbell noted at the time that his application for bail was rejected, the only offending known to the board were the Queensland offences. (See *WC v R [2016] NSWCCA 173 at para [19]).*
19. Justice Campbell noted that WC lodged a second application for parole in March 2012. This time the parole board in its April 2012 report referred to the arrest warrant in respect of 24 further charges of sexual offending against the victim. In NSW A recommendation against granting parole was made for largely the same reasons as previously. WC had not yet completed the rehabilitation programmes, and it appears that the parole board decided to

postpone a final decision until they had received a completion report in regard to the advanced course.

20. WC commenced a 12 session rehabilitation program in September 2012. The board then informed him that completion of the more advanced course was also necessary. WC had already commenced this course in July 2012, and he completed it in April 2013. He then served the short remainder of his sentence without a grant of parole, and was extradited to NSW in November 2013, when the prison term in Queensland expired.

Discussion of issues

21. One issue raised by the Crown before the NSWDC was that the programmes that WC had competed were only in response to WC's criminal behaviour in Queensland. The crown argued that these courses did not have regard to WC's criminal behaviour in NSW, and so these rehabilitation programs were of limited weight as they were not directed towards WC''s previous offending in NSW.
22. In discussing this case with Mr Tuckey, Mr Healey stated that the fundamental issue of appeal before the NSWCCA was that the sentencing judge in the District Court had been well aware the principles in R v Todd [1982] 2 NSWLR 517 and Mill v The Queen [1988] HCA 70; 166 CLR 59 but did not consider WC's rehabilitation that had been achieved in the Queensland jail was relevant because that rehabilitation had been related to the 2006 incest offending.
23. Mr Healey observed that WC had some difficulty during his detention in Queensland, acknowledging his prior criminal behaviour in NSW for a fear that he may incriminate himself in regard to the pending charges in NSW.
24. However, as Justice Campbell in the NSWCCA observed: "[WC] had not yet entered pleas in relation to the NSW offending at the time of participating in the [rehabilitation programmes in Queensland] and on his account, did not yet know the exact extent of the charges he would face. There are several references to this in the [rehabilitation programme] report, which are worth outlining when considering this allegation of a want of truthfulness in his account of [WC's] offending." (See WC v R [2016] NSWCCA 173, Campbell J at para [23]).
25. Justice Campbell also noted that according to the programme report, WC did did "not appear to attempt to hide or not acknowledge his [NSW] offending, indeed, he mention[ed] it at least on three different occasions" and he was finally informed that "he did not need to discuss" it. (See WC v R [2016] NSWCCA 173, Campbell J at para [27]).

Application of the totality principle to cross-border offending

26. Mr Healey explained in his discussion with Mr Tuckey, that the "totality principle:" involves the concept that an offender's total time served in prison should match the totality of the offender's offending.

27. Justice Campbell of the NSWCCA noted that the application of the totality principle in regard to cross-border sentencing formed the basis of the appeal. He noted that "[t]wo grounds are relied on by reference to [the totality principle]. First, the applicant argues that the sentencing judge erred when considering [his] rehabilitation … specifically by assigning little or no weight to rehabilitative programs undertaken interstate, and otherwise incorrectly addressing the question of rehabilitation." (WC v R [2016] NSWCCA 173 at para [2].

28. The NSW District Court Judge (NSWDCJ) in handing down sentence had discussed *R v Todd* [1982] 2 NSWLR 517 ("Todd") and *Mill v The Queen* [1988] HCA 70; 166 CLR 59 ("Mill"), which deal with the application of the totality principle "where the offender commits a number of offences within *a short space of time* in more than one state" (*Mill* at 63).

29. The NSWDCJ stated that on a consideration of the Mill and Todd he thought it appropriate to backdate the sentences to best reflect the principle of totality. He also noted that it was accepted that the court is entitled to have regard to the extent to which the offender has rehabilitated himself in consequence of the period of imprisonment served interstate when determining the appropriate sentence. However, the NSWDCJ considered that WC had done no rehabilitation programme in respect of his NSW offending. (See WC v R [2016] NSWCCA 173 at para [42-43]).

30. Justice Campbell indicated that although the NSWDCJ had referred to the relevant two cases, (and backdated WC's sentence) he did not take from them the principles which should have been considered more thoroughly. Instead the NSWDCJ had distinguished WC's case from Todd and Mill on the grounds that it in those two cases, the cross-border offending, occurred over *a short period of time*, or in the course of one criminal enterprise. The NSWDCJ saw WC's offending as part of a continuing course of conduct over a seven year period.

31. Justice Campbell of the NSWCCA indicated that Street CJ in Todd (at page 519) had emphasised that fairness required weight to be given to the progress of rehabilitation and '....the circumstance that he [the offender] has been left in a state of uncertain suspense as to what would happen to him when in due course he comes up for sentence on the subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach...' (See *WC v R [2016] NSWCCA 173 at para [43-44].)*

32. Justice Campbell of the NSWCCA also observed that Chief Justice Street in Todd had said these considerations play "a dominant role" in sentencing, at times requiring "what might otherwise be a quite undue degree of leniency being extending to the prisoner." Justice Campbell also observed that the Chief Justice Street's reasoning was quoted with apparent approval by a unanimous High Court in *Mill* (at page 64; 65-66). (See *WC v R [2016] NSWCCA 173 at para [43-44].)*

Submissions at the NSWCCA

33. Justice Campbell observed: "Mr S Healy of counsel for [WC] argued that the learned [NSWDCJ] erred in principle in his application of *Todd* and *Mill*. His Honour failed to appreciate that there are three factors tending towards a degree of leniency in the application of the *Todd* principle and that fairness to the offender required weight to be given to: one, the *progress* of his rehabilitation during the earlier sentence; two, the circumstance that he has been left in a state of uncertain suspense as to what will happen when he comes up for sentence again; and three, the fact that sentencing for a stale crime "calls for a considerable measure of understanding and flexibility of approach" :*Todd* at p 519-20 per Street CJ at CL; see p 521-2 per Moffat P; *Mill* at p 65-6. It was an error in principle to regard the relevance of rehabilitation to be restricted to the offending for which sentence was then being passed. This error was compounded, so the argument ran, by his Honour's failure to address the issue of rehabilitation at all."). (See *WC v R [2016] NSWCCA 173 at para [47].)*

34. Justice Campbell of the NSWCCA accepted Mr Healey's submissions in respect of Mill and Todd. He stated: "[t]he principle expounded in *Todd* and approved by the High Court in *Mill* relates to 'an offender [who] comes to be sentenced many years after the commission of an offence because during the intervening period he has been serving a sentence imposed in another State in respect of an offence of the same nature and committed about the same time'." (See *WC v R [2016] NSWCCA 173 at para [51].)*

35. Justice Campbell noted that the NSWDCJ had questioned the application of the principle from Todd to WC's situation because WC's conduct was a continuing course of conduct over a 7 year period. Justice Campbell noted, even so, the NSWDCJ purported to apply the principle from Todd by referring to the need to 'reflect the principle of totality' and to his power to backdate the sentence under s 47(2) *Crimes (Sentencing Procedure) Act.*" (*WC v R [2016] NSWCCA 173 at para [51])*

36. However, Justice Campbell was of the view that the principle from Todd's case did apply to WC's circumstances. Justice Campbell stated: "I have no doubt that the principle applies notwithstanding the offending was not confined to a short period of time. The High Court's [Mill] reference to 'an offence of the same nature and committed at about the same time' should not be construed like the words of a statute. But, doubtless, the consideration that the offending was a continuing course of conduct over many years was highly relevant to the assessment of the objective seriousness of the offending." (*WC v R [2016] NSWCCA 173 at para [51])*

37. Justice Campbell noted that Street CJ's exposition (in Todd) of the principle in *Todd* identified three discreet circumstances which engage the principle in a given case. These are:

- the progress of the offender's rehabilitation during the term of his earlier sentence,
- that he has been left in a state of uncertain suspense about the outcome when sentenced again; and
- "that 'sentencing for a stale crime, long after the committing of the offences calls, for a considerable measure of understanding and flexibility of approach…'. These

factors are relevant because of 'considerations of fairness to [the offender])' (at 519). These matters will frequently play a dominant role when the offender comes up for sentence again. Leniency may be the effect of the application of the principle." (*WC v R [2016] NSWCCA 173 Campbell J at para [52].)*

Rehabilitation: for the offence or of the offender?

38. Justice Campbell raised the issue of whether for the purpose of the application of the principle from Todd and Mill, it is necessary for an offender to show that he has in fact undergone programs directed to his New South Wales offending rather than his offending behaviour generally.
39. Justice Campbell stated: "[t]he absence of true remorse in this case limits the weight that can be given to the offender's progress toward, and prospects of, rehabilitation in this case. But it does not nullify the consideration. Judgments are not statutes, but there is no reason to suppose that Street CJ did not choose his words carefully. The evidence in this case proved that the offender had made *some* progress toward rehabilitation even if he remains a long way short of having been rehabilitated." (WC *v R [2016] NSWCCA 173 Campbell J at para [61])*
40. Justice Campbell noted that the NSWDCJ had required specific deterrence and had given no weight at all to the progress WC had made by completing the relevant rehabilitation programmes in Queensland. Justice Campbell considered this to be an error "because the question was one of rehabilitation of the *offender*, not for the *offence*. And the emphasis was upon *progress* not *cure*." (WC *v R [2016] NSWCCA 173 Campbell J at para [62])*

<u>Openness in regard to past offending?</u>

41. Mr Healey noted that the NSWCCA also took issue In regard to the sentencing judge's apparent criticism of WC for not discussing the full extent of his offending for the purpose of his participation in the rehabilitation programmes in Queensland.
42. Justice Campbell stated of this apparent criticism: "…[t]his is problematic on a number of levels. First, it is one thing to acknowledge that full and frank disclosure of offending may entitle an offender to a degree of leniency, or in some circumstances even a regard to the sentencing discount:… It is quite another to use that consideration to his disadvantage having regard to the right to silence, a fundamental value of the common law. Secondly, when the offender explained his difficulty to those conducting the Queensland course he was advised he need not, in the circumstances, at that time make full disclosure. Thirdly, when the charges were formulated he was extradited to New South Wales and pleaded guilty at the first available opportunity; a sign of acceptance of full responsibility, if not remorse in this case, having more than utilitarian value. Finally, a reluctance to discuss the matters may be taken to have evinced his uncertainty about what would happen when he was sentenced in

New South Wales, a consideration, as I have pointed out, relevant to the principle expounded by Street CJ [in R v Todd [1982] 2 NSWLR 517]." (WC v R [2016] NSWCCA 173 at [63].)

Use of the term "opportunistic"

43. In discussion of the case with Mr Tuckey, Mr Healey stated that "opportunistic" was a term frequently used in sentencing. However, caution should be exercised in regard to the use of the term.

44. The NSWDCJ had rejected a psychiatric report that supported a finding that WC's risk of reoffending was low. The psychiatrist had concluded: "… with regards [to] risk of recidivism, [WC's] offences were intra-familial and opportunistic, and the conditions in which the offences took place are unlikely to arise again. [WC] is not a recidivist offender, and the overall rate for sexual offenders is lower than for other categories of offence, and declines with age. There was no history of a pattern of substance abuse of a psychiatric disorder affecting impulse control that might increase the possibility of further similar offences. [sic] [WC] has participated in counselling to improve his self-awareness. He may derive some benefit from further counselling, for example, participation in the maintenance program, prior to his release." Relevantly, The NSWDCJ rejected the use of the word "opportunistic" to describe WC's offending. The NSWDCJ said: "it is inappropriate to use the word…when dealing with persistent sexual abuse of a child over a period of seven years." For this reason, the NSWDCJ, rejected the psychiatrist's assessment of the risk of future offending. (See WC v R [2016] NSWCCA 173 at para [41].

45. Justice Campbell also had difficulty with the use of "opportunistic" in the report. He said: "Opportunistic" is not a term of art in sentencing law. [The NSWDCJ] was entitled to form his own view of whether it was an apt descriptor of the offending in this case. Given the length and nature of the applicant's ongoing offending conduct, his Honour's rejection of Dr Nielssen's description of it as opportunistic was well and truly open. Some offending involved a degree of planning. In this regard I note that counsel for the applicant accepts that 'views could reasonably differ on whether it was appropriate to use the word "opportunistic"' … Read in context, Dr Nielssen's assessment of the offending as opportunistic was an integral part of his overall assessment of the risk of re-offending. The sentencing judge's rejection of it necessarily undermined the acceptability of Dr Nielssen's opinion in that regard. I would reject the grounds of appeal relating to the sentencing judge's treatment of Dr Nielssen's report." (See WC v R [2016] NSWCCA 173 at [66-68].)

Sentence handed down by NSWCCC

46. The CCA in this case set aside the District Court's sentence and re-sentenced WC. Mr Healey observed in discussion with Mr Tuckey that the new sentence for the NSW offences was 17 years imprisonment with a non-parole period of 11 years and 9 months.

47. Mr Healey observed that the total period of sentencing imposed on WC is therefore is 19 years with a non-parole period of 13 years and 9 months.) On appeal WC received a reduction of 1 year and 3 months from his non-parole period component.

BIOGRAPHY

Person's name 1

Mr Simon Healey

Person's name 2

Mr Will Tuckey

BIBLIOGRAPHY

Focus Case

WC v R [2016] NSWCCA 173

Benchmark Link

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http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2016/173.html

Cases

R v WC District Court of NSW (unreported) 16 February 2015, Conlon DCJ
R v Todd [1982] 2 NSWLR 517
Mill v The Queen [1988] HCA 70; 166 CLR 59

Legislation

Crimes Act 1900 (NSW) ss 66C(2), 78A

Crimes (Sentencing Procedure) Act 1999 (NSW) s.47(2)