



Précis Paper

Fresh Evidence in Sentencing Appeals

A discussion of the key case of *Costello v R* [2017] NSWCCA 32

Discussion Includes

- Fresh evidence
- Sentencing considerations
- Background of Mr. Costello's case
- Factual material
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Fresh Evidence in Sentencing Appeals

In this edition of BenchTV, Georgia Lewer (Barrister – Forbes Chambers, Sydney) and Janet Witmer (Solicitor – Legal Aid NSW, Sydney) discuss the recent decision of *Costello v R* [2017] NSWCCA 32 as an example of the way fresh evidence may impact upon an individual's sentencing.

Fresh evidence

1. In this case, Mr. Costello was appealing a sentence that had been imposed on him in the District Court of NSW. Normally to succeed in the Criminal Court of Appeal (CCA), the appellant would need to demonstrate that there was an error in the way the sentencing judge sentenced him as per the *Criminal Appeal Act 1912* (NSW), but that was not what occurred in this case. This appeal was based on fresh evidence.
2. Appeals are concerned with the evidence in the court below, and the parties are bound by the way they conducted the proceedings in the court below. On this occasion, the Applicant was seeking to put on fresh evidence because there had been a significant change in Mr. Costello's life since he had been sentenced.
3. Mr. Costello had not appealed his sentence at the time he was sentenced. Normally you have 28 days to appeal against a sentence unless you get the leave of the court to apply outside of that 28 day period. Mr Costello sought leave to appeal his sentence because 4 months after he was sentenced, his de facto wife of 8 years, and the mother of their two young children, was diagnosed with a terminal illness. The terminal illness was likely to be terminal not long after his release and possible before. Her circumstances were that she could barely take care of the children, and sometimes could not get herself to medical appointments..
4. The courts have always drawn a distinction between what they call fresh evidence and new evidence. Fresh evidence is evidence that was not capable of being discovered by the parties at the time the matter was dealt with in the first place. New evidence is evidence that might have been able to have been discovered with reasonable inquiries.
5. There is authority that says for fresh evidence to be accepted by the appellate court, it has to be not known, but existing at the time of the original sentencing. The unfortunate circumstances of Mr. Costello's de facto was that she was ill at the time of his sentence, but had not yet been diagnosed.

6. The Court draws a limit about the need for there to be the condition in existence at the time because of the principles of finality. Without doing so, incarcerated individuals would constantly be appealing their sentences once a family member is ill.
7. In the District Court there was some discussion in Costello's sentencing proceedings about the effect of his incarceration on his partner and the children, but Yehia DCJ found that the circumstances were not exceptional and therefore did not have regard to it. If her Honour had been aware of the illness the partner was suffering at the time, she would have taken that into consideration when sentencing Costello.

Background of Mr. Costello's case

8. Costello was an applicant for leave to appeal his sentence in the NSW Court of Criminal Appeal. He had been sentenced in the District Court of NSW for an offence of dangerous driving causing death, contrary to s 52A of the *Crimes Act 1900* (NSW), carrying a maximum penalty of 10 years imprisonment.
9. Costello was a truck driver and was involved in a motor vehicle accident where he struck and killed a cyclist. He received a head sentence of 3 years and 3 months, a non-parole period of 1 year and 10 months, and a parole period of 1 year and 5 months. Costello had no complaints with the original sentence until he discovered that his partner was unwell, which led to the application for leave to appeal.

Sentencing considerations

10. When courts are sentencing offenders they have to have regard to a range of principles, some things increase the likely sentence, and some things decrease the likely sentence. The decision in *R v Edwards* (1996) 90 A Crim R 510 outlines that hardship to the offender or the offender's family frequently arises. The courts will consider whether the hardship to the offender and their family is really of exceptional quality.
11. The Courts have repeatedly held that regard can be had to the hardship, and it can mitigate a sentence so that a person receives a much more lenient sentence than would otherwise apply. The principles operate in a way that the normal principles mean that a person should receive 'X' sentence, but the Court will intervene and do justice where the circumstances are exceptional.
12. In this case, the Court had to consider on the fresh evidence point whether or not they would accept this new evidence, and if they did accept the evidence, is it evidence of such a quality that the Court should intervene and give him a lesser sentence?

13. Many appeals are law based, but in this case, apart from the distinction between fresh and new evidence, it was mostly a fact based appeal. There were two discreet points about whether this was fresh evidence, and whether it was exceptional circumstances, but apart from that Costello was asking the Court to accept new factual material.

Factual material

14. Costello's legal team got a letter from his partner's oncologist, which stated her prognosis and confirmed that the illness would have been in existence at the time Costello was sentenced, it was just yet to be diagnosed. The letter also stated the partner's symptoms, how poorly she was coping, and the possibility of further surgery.
15. The de facto partner provided a very long affidavit about the difficulties her symptoms caused her. She often could not go out, and sometimes could not get the children to school due to the pain and suffering her symptoms were causing her. Also included in the affidavit was reference to a potential surgery that had the potential to extend her life, but she would require care after the surgery while she recovered.
16. In total there was an affidavit from the partner, evidence about the potential operation, evidence from the partner's doctor, and an affidavit from the client. Costello's legal team spoke with all relevant parties again shortly before the hearing to see if anything had changed to ensure all information and evidence was up to date.
17. In these cases, circumstances can change frequently and rapidly, so it is important to keep all parties, and the Court, apprised of any new developments. This was important in this case as the Crown wanted to ensure that no circumstances had changed. Ultimately, when the material was served on the Crown they did not oppose the Court receiving the material, and did not require any of the persons who deposed to affidavits to attend the hearing and be cross-examined.
18. The Crown essentially argued that whilst they were sympathetic to Mr. Costello and his family, they believed he had already received a fairly lenient sentence to begin with and taking into account this evidence, no lesser sentence was warranted. The Court then had to apply principles relating to hardship of third parties.
19. It has been long established that going to jail, or any penal penalty, might have adverse impacts on offenders and their families, but the courts have always said there is a category where they will have regard to it, but it has to be exceptional.

20. In *Stumbles v R* [2006] NSWCCA 418, there was evidence at the sentence to start with that one of the offenders children had autism, but since the sentence and before the matter was listed for hearing in the CCA, a second child had been diagnosed with autism. The Court found that the diagnosis of the second child in combination with the behavioural problems already affecting the older child placed significantly greater strain on the Applicant's wife, and highlighted the relevance of the Applicant's imprisonment to the welfare of the family. The second child's diagnosis was such that it was causing hardship to the family that the CCA intervened and reduced the Appellant's sentence.
21. In *Mokhaiver v R* [2011] NSWCCA 10, there had been a diagnosis of the Applicant's 3 year old daughter with a condition that affected the brain and peripheral nerves. There was a lot of expert evidence in this case about the effect of the diagnosis on the child and the family, and again that was found by the Court to be in the category of exceptional circumstance so the Court intervened. There have been various other cases where the offender has been diagnosed with an illness and incarceration causes hardship.
22. In the *Costello* case, the Court received the evidence and determined that it did fall within the category of exceptional circumstances. Had the primary judge been aware of it at the time of the sentence, there is no doubt that it would have been taken into account and a lesser sentence would have been imposed. The Court was particularly cognizant of the fact that it was not just a terrible illness, it was an illness that occurred without any prior notice to a relatively young woman, and that she had the care of their two young children.
23. There was a constellation of factors that meant the incarceration of Mr. Costello was having dramatic impacts upon his family. The Court also considered the seriousness of the offence, noting that this was an offence that caused the death of a person, the facts of the case which weren't challenged by either party, and they also considered Mr. Costello's history.
24. The Court ultimately decided that it should intervene, and it should give a lesser sentence. The Court reduced the total effective sentence down to 3 years from 3 years and 3 months. This was important because it had the practical impact that for sentences of 3 years or less, the Court can order a person's immediate release to parole on the day of hearing. The Court also reduced the non-parole period so that he was eligible for release immediately.
25. In reaching their decision, the Court also had regard to how long he had already been in jail by the time the matter was listed for hearing. Costello may not have had as much success had he only served 3 or so months of his original sentence, but effectively he had served a large proportion of his sentence.

Key takeaways

26. If a client approaches you with something that was not put before the sentencing judge, the first thing to consider is, is this new evidence or is this fresh evidence? New evidence is evidence that could have been produced, but was not, or evidence that is discoverable if you were to reasonably inquire. Fresh evidence is evidence that must have been in existence at the time, but nobody knew about it, or even if they were reasonably diligent could not have discovered.
27. From this you must work out whether you have something that can be taken to the CCA on the fresh evidence basis, and you must then back that fresh evidence up with supportive material such as medical reports, affidavits, and so on.
28. Before sentencing, it is important to undertake inquiries to look into what is the situation with the offender and their family, because if you do not undertake inquiries that are reasonably open, it is possible that the evidence will not be admitted if there is an appeal. It is important to take a comprehensive summary of all of the relevant factors, and to ask the relevant questions to ensure that if there are any issues of hardship, that this can be properly raised before the sentencing judge. This may mean that in some circumstances, sentences need to be deferred to get that evidence ready so that you can put that before the Court. If the judge does not have regard to the evidence provided regarding the exceptional circumstances, you can appeal on the basis that the judge made a typical kind of error.

BIOGRAPHY

Georgia Lewer

Barrister – Forbes Chambers, Sydney

Georgia was admitted as a legal practitioner in NSW in 2009 and called to the bar in NSW in 2014. She accepts briefs in all areas of law, however she specialises in Criminal law, Inquests and Inquiries and Public law. Georgia lectures at UNSW in both Evidence and Proof and Court Process. Prior to being admitted, she was Tipstaff to the Hon. Justice David Kirby in 2008. From 2011-2012 she acted as a solicitor for the Children's Legal Service (Legal Aid NSW) and Aboriginal Legal Service (NSW/ACT).

Janet Witmer

Solicitor – Legal Aid NSW, Sydney

Janet Witmer commenced her professional career as a Solicitor for the Melbourne firm then known as Mulcahy Mendelson & Round. She has had a long association with the legal assistance sector and has been a regular volunteer for community legal centres in NSW and Victoria. Since joining Legal Aid NSW in 1996 she has held a number of positions, including Acting Solicitor in Charge of the Prisoners' Legal Service and Acting Solicitor in Charge of the Indictable Appeals Unit. An accredited specialist in criminal law, she is currently a solicitor in the Legal Aid NSW Indictable Appeals Unit. In this role she acts for applicants, appellants and respondents in the NSW Court of Criminal Appeal and the High Court of Australia

BIBLIOGRAPHY

Focus Case

Costello v R [2017] NSWCCA 32

Benchmark Link

[*Costello v R* \[2017\] NSWCCA 32](#)

Judgment Link

[*Costello v R* \[2017\] NSWCCA 32](#)

Cases

Stumbles v R [2006] NSWCCA 418

Mokhaiver v R [2011] NSWCCA 10

R v Edwards (1996) 90 A Crim R 510

Legislation

Criminal Appeal Act 1912 (Cth)

Crimes Act 1900 (NSW)