Criminal Law Congress

Sentencing, Politics & the Media – 9:45 am Friday 14 October 2016

Before I start on the topic I am going to indulge myself a little.

When this conference was held for the first time I had the pleasure of being part of the organising committee with Kevin Borick and Phil Scales who were the main protagonists. The year was 1985, so almost half my life ago. We travelled around a bit chasing speakers and having a bit of fun.

Ultimately we had a very successful conference at the Adelaide Hilton from memory, highlighted by, among other things, the extravagant way in which Colin Lovitt hopped into Paul Delianis from the Victoria Police Homicide Squad and later the National Crime Authority in a plenary session. It was a vintage discussion.

The other highlight for Adelaide in 1985, apart from the first of these conferences, was the first running of the Australian Grand Prix as a Formula 1 race in modern times. I only mention it because, sadly, it is a sport to which I have been long addicted.

The 1985 Australian Grand Prix was around the Adelaide street circuit which, to most local people, is now better known for the Clipsal 500 – the opening round of the V8 Supercar series in March each year. By contrast, the 1984 non-championship AGP had been held at Calder Raceway which is now just an eyesore.

The Grand Prix in Adelaide was the last round of the F1 championship for that year.

The race was significant for several reasons:

- The great Ayrton Senna, who had debuted in F1 the previous year in Brazil and who was killed in 1994, had pole position for the race;
- The father of current F1 points leader Nico Rosberg, Keke Rosberg won the Grand Prix;
- That first Adelaide Grand Prix race was Niki Lauda's last F1 race;
- The world champion for that year was Alain Prost in a McLaren despite blowing an engine in the Adelaide race and not finishing.

It was this very race that put Australia back on the Formula 1 map. It stayed here for 10 years until Jeff Kennett got involved and it moved to Albert Park in 1996. So, thanks to Adelaide, we have had 30 years of Formula 1 in Australia.

By the time the Adelaide Grand Prix commenced, our conference had been run and won and planning was under way for the next one. I suspect that no individual went to both our conference and the Grand Prix. The excitement from doing so would have been unendurable.

Introduction

So today I want to discuss this topic of Sentencing, Politics & the Media in two aspects.

First, I want to speak about the intersection between politicians, sentencing judges and the media and offer some comments about the pressures that trichotomy creates.

Second, I will make the point that despite that pressure we as judges maintain an objective and principled sentencing regime which is increasingly under scrutiny and in some quarters under regular attack. We can't seem to have this discussion without reference to "out of touch with community expectations" criticism of us that so often appears in the media.

Finally, for the sake of history I will take a look at death penalty cases to illustrate the extreme interference of politics and media both here in Australia and in similar cases and in our region.

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When we hear politicians regularly re-stating that the job of governments is to protect the community from criminals, we straight away know that, true as that is, politics plays a significant role in sentencing.

I need to be clear about an important distinction. Of course the parliament makes the law in relation to sentencing to a significant degree. There is a substantial amount of legislation both State and Federal that affects the sentencing process.

However my interest here is in the politics of sentencing to the extent that it becomes a political point scoring issue and is used as a weapon in the contest between political parties. That is in the context of the oft repeated mutual allegation made from time to time that one side or the other are "soft on crime".

The media of course know that the public have a constant and legitimate interest in crime and the way in which the courts deal with it. In some sections of the media, cases are sensationalised in a way which adversely affects the process. The Chamberlain case is perhaps the best example in recent times.

In 2014 the New York Times examined the behaviour of the media and its effect on public opinion in that case as well as in the OJ Simpson case and the then prospective trial of Oscar Pistorious. As John Bryson, the author of Evil Angels, the book about the Chamberlain case, said: "Celebrity cases are momentously silly, inaccurate, overblown largely because we in the media have such a good time with it"[1].

The media are entitled to criticise the work that sentencing judges do. But on occasions the criticism is of the judge or judges rather than the particular outcome. It seems that where a sentence is claimed by a journalist to be inadequate, that is sometimes claimed to arise from a shortcoming in the particular judge or judges generally.

For example, Rita Panahi in the Herald Sun on 18 March 2015:

> *No group excels more at being proudly out of touch than the learned men and women of the judiciary. The sneering attitude many in legal circles*

[1] New York Times 16-11-14

have to legitimate concerns about sentencing is indicative of the divide between community standards and judicial attitudes to crime and punishment.

That was said in the context of criticising my colleague Justice Hollingworth because a sentence she imposed in what was effectively a fraud/insider trading case was heavier than she had imposed in another case the journalist referred to involving personal violence and, therefore, was to be criticised and for that difference alone.

For the record, in the fraud matter the DPP did not appeal, one of the accused did and the Court of Appeal left things as they were.

So, judges are not just out of touch (whatever that means) – we are profoundly out of touch and I infer that in the opinion of journalists like this one, the Government should be encouraged to interfere to curb the sentencing discretion of judges by means of some form of mandatory sentencing so the community, who vote, can get what they want.

The argument seems to proceed on the premise that longer prison sentences are a cure-all for an increasing crime rate and it also exploits a desire for unpleasant extended punishments.

The point about all this is that what the media will not grapple with and perhaps what the politicians often don't think about is the effort that goes into sentencing, including the complexity of principle that now applies to it. And judges in the main, to my observation maintain a fierce independence and objectivity which is precisely as it should be.

Of all the functions of a judge sitting in criminal cases, sentencing has long been regarded by those who have to do it as one of the most

difficult of judicial tasks. It can be emotional given that, at least in Victoria, the process involves the judge speaking directly to the prisoner, looking someone in the eye and telling them that they will be in custody for the next 15 or 20 years can take something of a toll on the judge.

Courts of Appeal regularly refer to the difficulty of the task of sentencing, often when they are about to interfere with the outcome. "His Honour was faced with a very difficult sentencing task". The cynics might argue that the sub-text implied might be "this was a difficult job and you simply weren't up to it". I am sure that is not what appellate judges think!

Of course magistrates and judges impose thousands of sentences every day of the working year and the vast majority do not come to public notice.

But sentencing in what might be described as high profile cases always involve the media and some politics, at least indirectly.

Apart from the legal complexity in high profile cases, a sentencing judge will be well aware of the public pressure and media expectations. Although I suspect that most judges are far more concerned about the prospect of criticism from the Court of Appeal than from the tabloid press, there is nonetheless a public reaction to a sentence that is hard to ignore.

Often the sentence just won't be enough. As I have said before publicly, for the victims and families of victims it will often never be enough and that is a sentiment that I fully understand. If a child of mine had been the victim of a homicide I doubt that whatever sentence was imposed

would be enough to make any difference to the grief I felt. In addition, as I have already mentioned, often the sentence is insufficient for a many of the commentators and critics.

The role of the politician is slightly more complex. First, they are the legislators. I actually think that most politicians are conscientious about the role of the legislature in making sentencing law. They are entitled to have opinions about the criminal justice process and they are also entitled to express the views that they think represent the electorate.

However, they also, if in power at the time,try to benefit from an atmosphere of fear by curating a "tough on crime" image. If they are in opposition then they benefit from being able to say that crime is out of control and that the government of the day is "soft" on criminals.

Unfortunately, in many cases they seem to be agreed that the easiest way to make the community safer is to take away some of the discretion of judges, make sentences longer and build more prisons. It's a straightforward approach the community understands.

So, the involvement of the media and politicians complicates an already difficult job. Let me be clear though – there is nothing wrong with that involvement except that so often it is ill-informed.

In 2011, the Baillieu Government in Victoria partnered with the Herald Sun newspaper to conduct a survey aimed at giving Victorians an opportunity to 'have their say on justice and sentencing'. Apparently 72 newspaper editors of metropolitan and regional newspapers were invited to participate. Curiously the Age's editor was not sent an invitation. Of the 72 invitations extended, only the Herald Sun agreed to

include a hard copy of the survey in one of its issues. The survey asked participants to sentence offenders in 17 hypothetical scenarios. The scenario in which participants are asked to impose a non-parole period, if any, on an offender convicted of murder summarises the circumstances of the offending in a pithy 107 words none of which provide any details of the personal circumstances of the offender themselves. Perhaps unsurprisingly the most common non parole period selected by 60% of participants was no non parole period at all, in other words, life without parole.

The idea that a person taking this survey could make an informed decision on an appropriate sentence with only a few paragraphs of relevant information to work from is absurd. To try to reduce sentencing to this level of simplicity is simply not possible.

The survey I've just described was designed to help draft the now defunct Napthine Government's 2014 baseline sentencing legislation – an example of a desire by politicians to steer a course through the mandatory sentencing issue to increase sentences on particular offences. It was based on the political philosophy that the way to reduce the risks of crime is to protect the community by imprisoning more offenders. It was a regime that sought to require the court in sentencing to maintain a target median sentence for particular offences which were specified. The Victorian Court of Appeal said of this approach:

"In summary, then, while it is possible to give a meaning to the statement of intention, it is impossible to give meaningful content to the obligation to impose sentences 'compatibly with' that intention. Stating that Parliament intends a certain statistical outcome to be achieved, at some indefinite time in the future,

gives no guidance to a sentencing judge as to how to impose a sentence for a particular offence.

The baseline provisions are therefore incapable of being given any practical operation. As we have explained, that is the consequence of the legislature having expressed its intention not by reference to a starting-point taken from sentencing law, but by reference to an end-point taken from the field of statistics.

It should be emphasised that this is no mere technicality. What these reasons have demonstrated is that the problem is a fundamental one. Parliament's stated intention cannot be given effect to because the provisions contain no mechanism for its implementation and it is beyond the function of the Court to devise one." (*DPP v Walters* [2015] VSCA 303 at [59])

The lesson here is that a government is either willing to trust the sentencing discretion of the judges it appoints or it is not. If it is, then leave things as they are and monitor the outcomes. Increase maximum penalties if necessary and rely on the DPP to appeal when it is appropriate.

On the Austlii web site, most of the sentences of Australian courts and the consequent appeals are published. So every citizen and every journalist with access to the internet can find them, read them and report on them. The point though is that often that does not occur. In their commentary the mass media usually describe the crime and the sentence imposed in the cause of claiming sentencing failure.

Importantly what is often left out are the important aspects of the judicial reasoning process which led to the particular sentence that was imposed.

The public, of course, take most of their information on this topic from the mass media and so do many politicians. Thus the ability of the media to set agendas and influence policy is obvious.

In a piece for the ABC's column "The Drum" Melbourne lawyer David Kelsey-Sugg summed it up well:

The view that sentences for certain classes of crime are lenient is a familiar one. But it's not a view that comes from gazing at the legal system at all.

Rather, it comes from gazing at the newspaper. The problem isn't actually lenient sentences, but the distorting influence of popular media on our perceptions of sentencing.

In areas the public rightly feels very strongly about, such as domestic violence, high profile individual cases can tend to obscure our view of the bigger picture. Focusing too heavily on individual cases can create a misleading impression of sentencing practices, undermine public confidence in the courts more generally and ultimately force unwarranted changes to the law.

And let me refer to the views of someone who does understand this topic, Professor Arie Frieberg, the chair of the Sentencing Advisory Committee:

Speaking at a panel discussion in May of this year under the title, Courts media and public opinion, who's leading who?, he said, as quoted in

Lawyers Weekly, that the media is influential in shaping penal policy as both an agenda setter and the creator of public opinion.

"For most people, the mass media still remains the primary source of information about crime and punishment,"

Focusing on a disproportionately small number of dramatic and violent cases and leaving out much of the relevant information.

"We've found again and again that the more information people have about sentencing, the less likely they are to support harsher sentences," he said.

"All of these simple solutions; mandatory sentencing, indefinite sentences, increasing maximum penalty, tougher parole laws, sex offender registration and public notification, sending juvenile offenders to the adult courts, all of these ignore the wealth of evidence about the causes of crime and effective solutions."

Prof Frieberg said that those solutions are often incoherent, divisive and create more anxiety than they seek to allay.

"Politicians are meant to be responsive to the public, that's what democracy is about, but my argument is that they are responding to media perceptions of the public views that are not accurate reflections of what the public thinks, nor reflects the real views of the public."

And from that same panel discussion came the following from lawyer and Melbourne radio presenter Jon Faine:

"I do think the legal system and the legal profession and lawyers and judges in particular bear enormous responsibility, and they're not basically fulfilling it," Mr Faine said.

"You have to communicate effectively to people, and you can't any longer talk in language they don't understand. Other courts, other jurisdictions, other countries at the highest levels have resolved these issues, ours have not."

According to Mr Faine, every participant in the legal system must understand that their job is not to talk in code, but in fact to speak in plain language and to make the system accessible for everybody.

I agree.

I think we as lawyers and judges need to accept that this will never change. Lawyers and judges are occasionally said to have a vested interest in resisting change.

But more importantly no journalist is ever going to analyse reasons for sentence in the way that lawyers do. Neither is any politician. For us the response is obvious. Rather than be strong and silent, in my opinion judges should be out in the community talking about the work we do and helping the community to understand it.

If we needed a lesson on politics, media and sentencing then we can have that by the simple comparison of Victoria with the Northern Territory.

In Victoria at 30 June 2015, the number of adult prisoners in Victorian prisons was 6,219, an increase of 2% (108 prisoners) from 2014. The adult imprisonment rate was 134 prisoners per 100,000 adult population, remaining unchanged from 2014.

In the Northern Territory as at 30 June 2015 the number of adult prisoners was 1,593, an increase of 7% (101 prisoners) from 2014. The

adult imprisonment rate was 885 prisoners per 100,000 adult population, an increase from 829 prisoners per 100,000 adult population at 30 June 2014. This was the highest imprisonment rate of any state or territory.

So, those figures were about mandatory sentencing and various other policies designed to appease a population who had been frightened into thinking that crime was out of control particularly amongst indigenous youth. As the figures illustrate, those policies have not achieved their intended purpose.

Death Penalty Cases

Of course the ultimate in the involvement of politics in the sentencing process fanned by the media is in death penalty cases. We have some lessons to learn from our history.

Well, you say, we don't have the death penalty in Australia so what's that got to do with it?

Let me remind you.

On 3 February 2017 we will pass the 50th anniversary since the execution of Ronald Ryan at Pentridge prison. For those of you who are not Victorian let me remind you of what happened courtesy of Evan Whitton's contemporary account:

> *On Sunday, 19, December, 1965, a small-time thief named Ronald Ryan and an equally small-time thief named Peter Walker went over the top at Pentridge. Ryan inadvertently - I give the word what I judge to be its proper weight - killed a warder named Hodson in the process. They rattled round Melbourne for a while, knocking off a bank here, Walker*

shooting a tow-truck operator named Boofhead Henderson there. At that time the cops also rattled around Melbourne, crashing parties (allegedly in search of Ryan and Walker) and generally having the fun of Cork.

Eventually Ryan and Walker tired of the sport of eluding the Melbourne cops. They hightailed it up to Sydney, via the coast road, in a 1959 De Soto, with a view to doing £40,000 worth of business with a bank, and then boarding a boat for extradition-free South America. Men on the run live at a high pitch of emotional energy. Ryan felt the need of some psychic release, and got in touch with a nurse at a Sydney hospital. By this time there was $10,000 on his head: the girl got in touch with the police. Sergeant Del ('Ding Dong') Fricker was substituted for the nurse, and at 9.25 pm on Wednesday, 5 January, 1966, Ryan and Walker were jumped by the police outside Concord Repatriation Hospital.

The hand of Inspector Ray Kelly, bane of a thousand criminals, still retained its cunning, and had placed, under the eyes of the mortified Melbourne cops, one more crown upon the towering fabric of his finished work. A man to give credit where it was due, Ryan said: 'Congratulations, Mr Kelly - a bloody great pinch.'

Until then, the last execution in Victoria had been two men, Robert Clayton and Norman Andrews and a woman, Jean Lee, in 1951 for a murder they had all been convicted of. Lee was the first woman to be executed in Victoria since 1896 and the last.

In order to understand the Ryan case you need to know that some 5 or 6 years earlier a man named Peter Robert Tait had been found guilty by a

jury of the murder of an 82 year old woman in a church vicarage in Hawthorn. His defence at his trial was insanity. After numerous appeals, Victorian Premier Bolte had declared that Tait would hang despite even the protests of the son of the victim. However at last minute a new Mental Health Act was coming into force and, under its terms, government psychiatrists would have the authority to declare Tait mentally ill. They did and the High Court restrained the execution and Henry Bolte was furious. The next opportunity was Ronald Ryan 5 years later.

Bolte expressed the opinion that a hanging does no harm at the polling booth. Ronald Ryan was hanged at 8 a.m. on 3 February 1967. A journalist asked Bolte what he was doing at the time. He retorted: `One of the three Ss, I suppose'. When asked what he meant, he replied: `A shit, a shave or a shower'.

There was public campaign against the execution of course but the single beneficiary of the whole sorry saga was the Victorian Liberal government. In the State election two months later in April 1967 the Liberal government led by Bolte increased its number of lower house seats by 6.

That was it for me until 2002 when Van Nguyen was arrested by police at Changi airport with 390 grams of heroin in his possession. In December 2005 he was hanged for that offence. He was always going to be executed because Lee Hsien Loong took the political view that a mandatory death penalty in almost all Singapore drug cases acted as deterrent. As I understand, the research showed to the contrary (see *The Abolition of the Death Penalty in International Law* – William Schabas).

The case quickly became a case about international politics, diplomacy and the media. The sentencing judge imposing the mandatory death penalty was little more than a bit player.

Then in 2005 the Bali 9 were arrested and, ten years later, a disappointing Joko Widodo did what he could to use executing Andrew Chan and Myuran Sukumaran as a sign of political strength when, in reality, it was a sign of pathetic weakness. But he gave in to the desire for political survival.

Conclusion

So, what do we make of this continuing intersection between the media, politics and sentencing.

First the collisions will continue. Media and politics are significant elements in the community and everybody is entitled to have a view and express it. However the sentencing process is not a show. It does not exist for public entertainment but rather is part of a process by which law regulates our community. Indeed it's a process on which our regulated and relatively peaceful community depends.

There is and has always been a strong public interest in crime. Why? I think there are two elements – one is voyeurism and the other is fear that it could happen to them.

That public interest is almost always informed by the media. The commercial media's primary objective is of course to make a profit from their enterprise and they do that by selling copy or by selling advertising which only works if people are reading or watching what is being

published. The public demand for information will increase the more salacious the case or the more tragic or the more dangerous.

My wish is that the public debate about sentencing was less polarised and better informed and, as I have said, I think judges and courts have a role to play in that.

Ultimately the real issue is providing the community with knowledge and understanding about how our system works. I think we all have a responsibility to participate in that.