



Sentencing Conference 2010  
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## **Sentencing in so-called 'Technical Rape' Cases**

### **Judge John Nicholson NSW District Court**

Michael O'Connell's paper raises issues suggesting significant dissatisfaction with the criminal justice system as experienced by sexual assault victims and those supporting them. Some of the premises and perhaps some of the aspirations ventilated in Michael's paper should be tested against wider criteria than the relatively narrow field of sexual assault victims and their case-workers' complaints. That is so because the judge, one of the significant targets of the complaints, works in a much wider context, and requiring him or her to focus more narrowly than he would normally do may need to be considered. This focus must not only be on a upon a single victim in an alleged assault case, but must be considered against other criteria that he is working with: for instance who is he dealing with in the sentence, what are the parameters of the powers, and how does he arrive at the final position

The other problem with changing the dynamics of the criminal justice system to allow victims a greater presence, or a greater influence, is that it will necessarily change the way in which the system functions. A fairly good example of it, if I may say so, was presented here: greater victim involvement, as is occurring in America, has a danger of, changing the dynamics of what sentencing is about, in making vengeance a matter that, perhaps, arguably – particularly from the victim's perspective – ought to be given more weight.

One of the slides that you were shown was entitled, "Imposed sentences that rarely if ever equate with the statutory maximums". From a victim impact statement, that is an important proposition. From a judge's statement in a wider context, in most criminal offending, the maximum sentence is rarely imposed and there is a particularly important legal principle behind that. The principle is that the maximum penalty is reserved for the worst-case offender, both in terms of the offence and often, in terms of the offender himself. It is a debate that ought to happen. We, the judges are the better, for hearing the complaints of the victim. We are accountable, but there is a difference between making judges understand the dynamics and giving them a greater role within the dynamics.

In this paper, I have tried to focus upon issues of concern to a judge when sentencing for sexual assault. Judge David Smith attracted national attention when he described in courtroom interchange – not in remarks on sentence but in an interchange between the bench and the bar table – a case before him using the term 'a rather technical rape'. What His Honour said to the Crown – I assume it is the Crown – on condition

of the Crown material having been presented before him was, ‘Madam Prosecutor, can I suggest to you your case becomes a rather technical rape’.

I find myself, particularly having once looked at the case, having a little sympathy for His Honour. I have focused on His Honour’s case for this exercise has been His Honour’s case. This is partly to go through the exercise of what a judge considers and partly so that you may have some insight into the sentencing case that His Honour had.

I will do a little bit of Sentencing Law 101 for you, there are a couple of things that need to be established. Again, this may be seen as something that the victims may not particularly like. Sentencing is not meant to be a feel-good exercise for victim or accused. It is a judicial pronouncement of the outcome of the criminal behaviour measured in some penalty. A sentencing exercise is an exercise in evidence-review, analytical evaluation of the evidence for purposes of identifying features of criminality, selection of appropriate legal principles to be applied, and legal application of the principles to the earlier analytical evaluation

Five features of our system of justice, and the importance of determining contested guilt and contested issues, must be considered in a sentencing hearing. Firstly, the burden of proving essential elements and aggravated matters rests with the prosecution. The standard is *proof beyond a reasonable doubt*. Quite often, the source of the allegations will be the complainant. The method of proof is through tested evidence, and advocacy. Defence counsel is bound by his or her instructions. Counsel is not entitled to filter, dilute, avoid or distort instructions received. In our system of justice, the defence is under an obligation to put all of those relevant instructions that will bear upon the outcome of the sentence, however unpleasant that may be for him or her, and however unpleasant that may be for the complainant or those supporting the complainant.

The hearing is before an impartial judge. It is no part of the trial judge’s function to censor defence questions because he or she finds them unsavoury, unlikely or hurtful to the complainant, as long as the questions relate to a proper defence being mounted, and they are not offensively put or badger the complainant. That is, if the questions conform with due process as we understand it, they should be permitted to be asked.

Finally, mitigating features in favour of the accused are proved on a much lesser criterion, that is, the balance of probabilities. Any and all of those features of our system of justice may make the experience of the complainant uncomfortable and even disappointing for her; again, if we change the dynamics by allowing a greater role for the victim we may well be impacting upon some of those matters which, as I described as Sentencing Law 101, are fundamental to our system of justice.

The independence of judges, and their backgrounds, means that there is no tick-a-box system or prescriptive approach to sentencing. Every judge will take his or her own approach. I can only give you an insight into my own approach. I hope my approach is consistent with what happens in most other courts. I have what I call my *sentencing resource book*. It contains relevant purple passages, sections of Acts, and resources not just related to sexual assault but to a whole host of things. My most used resource is my three-page sentencing general checklist. For sexual assault cases I have selected out of that list some eleven matters. If I was sentencing in New South Wales

– remember, the example I am using is a South Australian case – there would be two other headings relating to standard non-parole periods and assessment of mid-range of seriousness.

The next thing to remember is, who does the judge write the sentence for? I have a list of people that I have always considered. Interestingly, out of Michael's presentation I have come to an understanding which may have been obvious to many others but certainly has not been obvious to me, both in my practice as a barrister and in my practice as a judge, which is that apparently victims get hold of these judgments and read them. Now, whether they read them with the help of, or support of, sexual assault workers or welfare workers or whether they just hunt them up on the internet I am not sure.

Whom do I write my judgments for? Firstly, I have an offender whose primary interest is *what* rather than *why*. I write for him or her, usually him in this case, of course. There is a complainant who will quite often not be so interested in the *why* but to know *what*. Nonetheless, I am seeking to explain to the accused, the reasons why I am imposing a legal sanction upon him. I am writing to the prosecutors to explain why I have settled upon the sentencing disposition I have reached so that he or she can explain that sentence to the complainant. I am writing a judgment to the legal representatives of both sides – who may not necessarily be those who presented the case – stating my reasons for setting a sentence, so that those reasons can be evaluated for the purpose of an appeal.

I am also seeking to explain to the appellate courts reasons and facts for sentence, so that errors of fact or reason can be exposed and proper findings of fact and reason can be recognised. I am writing to the Parole Board, the welfare and health workers, and those charged with the care of an offender in custody. I am writing to the gaol sexual assault workers, and perhaps to drug and alcohol workers in the gaol system. I am sometimes writing to the probation- and parole case-managers, who will have oversight of the accused whence released or if I put him on probation. I am writing for general publication as part of my being accountable to the community as a judge of my court.

In the case of the District Court of New South Wales our sentences and our other judgments are published on our website. In my own case, simply because I was a teacher in a past life, I write to educate and instruct. My first target of education and instruction is the accused but I also have in mind young lawyers and anyone of the public who wonders how the criminal justice system works.

In respect of the victim impact statement, I always make a point as part of the education in my Remarks on Sentence of indicating why a victim impact statement is important. Firstly, it provides an opportunity for the victim to be heard in the sentencing proceedings. Secondly, again related to the victim, it may assist in some healing, leading to some closure or some lessening of brooding or resentment. It is important because it gives to the accused an opportunity of hearing first-hand the impact of his criminal conduct upon another human being. It reminds me of the impact criminal offences can have on the ordinary men and women who are the victims of crime. Finally, it provides some evidence, if I accept it, of the impact of the crime for the purposes of sentencing, bearing in mind the legal principle that the impact of crime itself is one of the measures of criminality.

One of the features of my methodology is that when I am making fact-findings and assessing features of criminality I seek to recognise the sensitivities of the complainant, without losing judicial composure or any of the other aims that I have in sentencing. Sometimes, there is a tension between the two. If this is so it is my duty as a judge that invariably must win out. You will see at the top of this sentencing checklist is a quote from a very famous indigenous case, coming out of the Supreme Court of Canada: “What is the appropriate sentence for this offence, committed by this offender, harming this victim, in this community?”

Regarding the introduction there are some technical matters that I need to consider: whether the fellow in front of me is a juvenile, whether there are, at least in our system, any other charges that are not to be proceeded with on indictment, or whether there are other matters to be considered. I commence the introduction with couple of paragraphs that give the social context in which the offence occurred, so that I have an opportunity within that context to recount the charge or charges of which the accused has been found guilty, or to which he has pleaded guilty. This also gives me the opportunity to refer to any other summary or indictable matters that may play some part in the sentencing proceedings. I set out in this part whether the matter has come to me by way of a contested hearing, either at sentence or at trial, or by a plea of guilty.

Quite often, there will be an agreed set of facts. The agreed set of facts is a mechanism which is a way of easing difficulties for complainants. I make clear that the agreed set of facts does not bind me. It may bind the parties but I make clear that my task as a judge is to be the finder of the facts. If, of course, the only document before me is an agreed set of facts then the evidence with which I can work is only that agreed set of facts.

There is another thing which those who are victims particularly should bear in mind. Again, if I can come back to Sentencing Law 101, the matter can only be decided upon the evidence. The relationship between evidence and the truth is moot, at very best. Agreed sets of facts may not reflect a ‘video replay’ of the offence before the court. The court is bound by evidence and findings of evidence and, as I say to juries, we are not concerned with the truth, our system is concerned with what the evidence upon which we decide to act tells us.

One would hope there is some parallel between evidence and the truth because evidence is tested and it is taken on oath, but that is about as near as we can get in a courtroom setting to the reality so victims must understand that evidence is what determines the sentence. The truth may be something different.

In all my introductions, I usually end with a sentence that begins something like this: ‘Today the offender is to be held accountable for his criminal conduct’. I then broadly canvass the issues that the sentence must cover, which would be a lot of those topics which I dealt with in the introductory slide.

These are the facts and circumstances of the offence tended before His Honour Judge David Smith. Those of us from New South Wales would have fallen off our perch. They are eight sentences. We would be lucky to get eight paragraphs.

I should indicate to you that I understand that proceedings are still ongoing in respect of this matter so I have sought not to identify either party. “On 6 June 2008 the named accused and A.S., the victim, were drinking at PJ O’Brien’s.” Now that is all the evidence I have about PJ O’Brien’s. I do not know whether it is Mr PJ O’Brien’s home, but I guessed it was a pub. I may even have done him or her a disservice there. “The accused and A.S. were unknown to each other before the night.” So, what were the circumstances in which they met? I do not know. “A.S. was heavily intoxicated and the accused was aware of that fact. The accused was moderately to heavily intoxicated.” Well, which was it? Was he as bad as she was, but just managed to survive a little longer? I do not know. “At some point during the night, the accused and A.S. exited PJ O’Brien’s and entered the parklands on the eastern side of the city.” I happen to know, because somebody told me, that the parklands on the eastern side of the city have got some trees around there, but I do not get that from the agreed facts. “After talking for a few minutes, the accused inserted his fingers into the vagina, believing that A.S. was consenting. During this, A.S. appeared to pass out or to fall asleep, however the accused continued to insert his fingers into her vagina a couple more times, knowing that A.S. had passed out or was asleep and finally: “the accused’s friend, A.R. appeared and witnessed the act occurring.”

Breathtakingly brief. Eight sentences. No material on the impact on the victim. No material on how it came to be that the victim found out that she had been ‘interfered with’, if I can use that term, after she had gone to sleep. No material on whether to regard the arrival and observations of the third party as an aggravating feature. No material as to what reason or motive the offender had in the penetration subsequent to the victim falling asleep, and no material upon whether the defendant’s behaviour in the absence of consent was reckless or constituted deliberate malice.

During submissions, counsel for the accused informed His Honour, without objection from the Crown, that the couple went from PJ O’Brien’s to the east parklands, where consensual sexual activity occurred. His Honour was told the pair started to touch one another sexually, a fairly important fact, one would have thought, that should have been included in the original agreement of facts. That the complainant took her pants down, I would have thought relevant to the original agreement of facts. The accused consensually inserted his fingers into her vagina. Defence counsel told Judge Smith, “when she appeared to fall asleep or pass out, the accused continued to insert his fingers into her vagina on two further occasions”. Defence counsel’s submission was that the incident occurred in circumstances of initial consensual sexual conduct. I note the prosecution did not seek to challenge any of the factual assertions made by defence counsel, or His Honour’s capacity to act upon them. Notwithstanding the circumstances referred to above, and the accused’s own level of intoxication, the prosecution sought a term of imprisonment but conceded that it would not be a sentencing error if the court suspended it.

What was interesting about this sentence is the mechanism by which consent turned into absence of consent. Firstly, let me say this: there is nothing in the etymology of the word ‘consent’ that predicates or predicts the existence of consent only upon an awareness that the action permitted by consent will cease in the absence of any awareness, other than, of course, death. If you think about ‘consent’, consent is given in a range of life circumstances where it survives the awareness of the consenter, and even in terms of acts upon the consenter’s body consent will survive. So, was the

consent terminated? Withdrawn? Lapsed? Dissolved? Negated? Or, deemed to be at an end? And, if so, what or who was the cause of the termination, lapse, and so on.

In South Australia there is in effect a deemed absence of consent when someone is asleep. See section 46 of the *South Australia Criminal Law Consolidation Act*. In New South Wales the same result is achieved, though, by a deemed negation of consent. See section 61 HA *Crimes Act*, which makes an assumption that the consent may have been given but negates it. There is clearly intention there but those of you who are aware of the elements of sexual assault will have been ahead of me.

What was his mechanism of knowing how the absence of consent came about? We will look at the objective criminality. The way in which I do it is, I look at the various elements of the offence – in this case. In other cases I use other methods.

The first is the analysis of the elements. Firstly, the complainant, what do we know about her? She was not young. She was not vulnerable. She was mature. She was drunk but she was consenting. Then, I would move on to the type of intercourse. There are varying types of intercourse defined in the various Acts. I would consider the level of force used, the duration of the intercourse, the discomfort levels, and what mechanism the accused used in terms of planning, scheming or persistence.

The absence of consent? The absence of consent here was not a rejection. No screaming, no shouting, no struggle. No use of gender power by him, no persistence. No indication of and, in fact, no withdrawal of consent - simply falling asleep. The offender's knowledge of the absence of consent? The way in which I approached it is that he would have thought, as most of us would have thought, 'God, she's asleep. I wonder if she's still consenting?' – and to continue.

The law says she was not consenting. In those circumstances it is a recklessness. On all of those factors, that is, the objective factors which have the overwhelming impact, this has to be right down the bottom of the range of criminality.

But for the time, I would have taken you through the objective facts, of which we have nothing, and those other matters which I had canvassed. I have some sympathy for Judge Smith.

Thank you.