



Sentencing Conference 2010
Canberra 6 & 7 February 2010

Sentencing in Bushfire Arson Cases

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The 7th February is an appropriate date for this session – indeed as I speak the great bells of St Paul’s Cathedral in Melbourne will be tolling the memory of those who lost their lives as a result of the Black Saturday bushfires.

Bushfire arson is pretty clearly one of a unique group of criminal offences – along with other eco-vandalism, industrial malfeasance, biological sabotage, equipment misuse offences and so on.

But of all of those crimes in this unique group, it is generally only bushfire which seems to attract the political and legal heavy hitters.

Difficult to imagine tours of inspection by all manner of office holders from the Princess Royal and the Heir Presumptive to the Prime Minister and the Australian Cricket Team visiting the scene of an improperly constructed crane, or a blue/green algae breakout caused by chemical misuse – notwithstanding that many persons may have been killed or injured.

Bushfire arson is offending in respect of which the mental element required to be proven is almost invariably recklessness, where the ultimate consequences of the offender’s conduct are often unable to be foreseen at the time of the reckless act occurring.

Of course most states and territories now have specific offences of bushfire arson in their criminal statute or code. These carry significant penalties, and the more so where life has been lost. The general maximum tariff is akin to that for murder.

And these specific offences generally attract statutory defences – such as excluding culpability where the offender lights the fire on his/her own land; or with the permission of the land owner.

Of course, by a curious quirk of parliamentary drafting, you may still be guilty of an offence if the fire spreads beyond the property on which it was carefully ignited; and that was a foreseeable result of the act of ignition.

Indeed the South Australian *Statutes Amendment (Bushfires) Bill 2002* which was never passed into law provides an instructive example of the logic of lawmakers following a tragedy:-

The bill provided *inter alia*

“A bushfire is a fire which burns, or threatens to burn, out of control...”

“A person who intentionally or recklessly causes a bushfire is guilty of an offence – penalty is 20 years imprisonment”

It is a defence if the bushfire only damages property or vegetation on the property of the defendant or of someone who gave permission for the defendant to light the fire.

Sadly, of course, the resources to enable a convicted defendant to put evidence of the reasonableness of his foresight are expensive – and therefore beyond the capacity of most.

And that is a pity because the degree of recklessness, and thus the level of criminality is, in my submission, crucial to the sentencing process.

The second major issue for those defending convicted bushfire arsonists is that of rehabilitation. Dr Doley’s excellent paper highlights the lack of understanding of pre-disposition to arson, or serial arson in Australia. In my experience forensic psychologists who are usually brim full of ideas as to motivation, and consequent rehabilitation and treatment of sex-offenders, armed robbers and murderers – are stumped (pardon the pun) when asked about arsonists.

I offer as background the transcript of argument in

Fardon v. Attorney General for QLD [2004] HCAT 39

As an example of the very real difficulty confronting judges and magistrates if they are called upon to make informed predictions about future criminal behaviour.

I do so to illustrate the point that attempting such an exercise where the psychological modality is virtually non-existent would be folly.

However since this a sentencing conference, I shall concentrate on issues affecting the legal representative of the person convicted of an offence the factual basis of which is bushfire by arson.

In the abstract to my paper I bemoan the disparity in resourcing between the investigating and prosecuting of the Crown case, on the one hand, and defending the accused, on the other.

Whilst addressing this disparity is vital during the pre-trial process of ascertaining a plea, it remains no less important when presenting to the Court on sentencing.

One of the participants at this Conference Victorian Magistrate Jack Vandersteen and I were before, His Honour's appointment, opposed in a bushfire arson matter where some estimates have put the Crown spending on investigation alone at more than \$10 million. The legally-aided accused has a maximum of \$15,000 available to him.

That matter – not yet concluded – will, if the accused is found guilty, present significant issues in sentencing.

Of all the crimes where recklessness constitutes a mental element – bushfire arson is the most problematic.

And the reason for that is the difficulty of foreseeability.

There are straightforward cases of foreseeability from a sentencing point of view – good example is

Attorney General for SA v. Spargo [1991] SASC 3038

Which dealt with an offender who had lit 4 fires in the fire-prone area of the Adelaide Hills using a delayed ignition technique of a cigarette burning down to the butt to which is attached an open box of matches.

Non-straightforward (if that is a word) cases of foreseeability and sentencing are more difficult to find:-

The Queen v. Gray [2003] ACTSC 81 and on appeal [2004] ACTA 12

Where Connolly J in the ACT Supreme Court was responsible for sentencing of a man found guilty of lighting a grass fire which spread to an area of 24m² – before being extinguished by two bouncers from a nearby hotel. The offending occurred in the week after the huge Canberra firestorm in which 4 people lost their lives, and more than 500 homes were destroyed.

His Honour's *ex tempore* sentencing remarks make it clear that evidence as to foreseeability is incredibly important to a just result on sentence.

It follows that the recommendations made by Dr Doley are to be commended.

The third and final issue I seek to highlight is that of victimology – and its place in sentencing for bushfire arson.

I know you won't be surprised when I criticise the use of victimology by the Crown in these types of cases. Indeed, you may find that a broad interpretation of the expression "victim" is appropriate.

It can be argued that when a community facility is damaged by bushfire arson each member of that community is a victim of that arsonist.

The problem for those representing the arsonist is the lack of knowledge of where the Crown, let alone the Court, sits on the interpretation of the word “victim” in these types of cases.

In my view, strong judicial case management is required prior to any plea hearing to enable the issue of victimology to be properly argued – so as to comprehensively inform the sentencer.

Time does not permit me to address the somewhat novel issues in sentencing juvenile bushfire arsonists – but you will have gleaned by my remarks in relation to rehabilitation and the difficulty of predicting recidivism – that Children’s Court sentencers have just as big a problem, if not a greater problem, than those dealing with adults.

Thank you.