COP IT SWEET – Representing and Sentencing people who want to be Imprisoned.

Sentencing aims to penalise or punish a person found guilty of an offence. The enforceable and coercive powers of the State are justified on that basis. But what if the person being sentenced wants to be imprisoned. Is the sentencing process being corrupted in these circumstances? How does Counsel present such a case? How does the Court apply established sentencing principles in these cases?

Criminal lawyers will know that the reasons why an offence is committed can be complex. There may be a series of events leading, seemingly inevitably, to the outcome before the Court. The reasons behind actions leading to an offence may be commendable and at times (almost) excusable. The mother who is destitute and whose children are hungry will consider the options. She may decide that the commission of an offence and the consequences should she be detected is the lesser of the 2 evils when considering her children's welfare (and having excluded other options available on the day). This paper does not seek to consider the sentencing principles applicable in these cases. Given the very specialised questions relating to mental illness, I will not consider those with a mental illness. Much has been written about conscientious objectors, those who refuse to comply with a public enactment based upon a moral principle. To some extent the principles applicable to conscientious objectors are relevant to this debate.

This paper considers issues and principles when people who have consciously decided to commit an offence and who want to be apprehended and subjected to punishment under the criminal justice system, are to be sentenced. Sometimes their for reasons for offending can not be dismissed lightly. In particular I am considering people who want to be imprisoned. That is the choice that they have made. It is somewhat paradoxical that when a person is imprisoned they lose autonomy, that is choice, in everyday matters (Walker p 148).

Not everyone plans to commit an offence, but it is my experience that most people who plan offences do not factor into the equation apprehension, let alone

punishment. Or if they have considered apprehension, they have concluded that they will not be apprehended.

This paper raises situations where apprehension **and** punishment is the expectation of the person committing the offence. Cases include people who are in fear of their lives, are the subject of domestic violence, are destitute, are being abused (including sexually abused), who have not coped in the 'real' world after an earlier period of imprisonment, who see going into detention or custody as a rite of passage to adulthood or who have been unable to obtain publicity with respect to a safety issue. This list is not intended to be exhaustive. I imagine participants at this CLANT Conference can think of other examples.

The offences these people commit may be quite serious. They do not seek to persuade the Court that a non-custodial sentence is warranted or justified. They may mask their true wishes with defiance or a "don't care" attitude. This attitude can be effective in achieving imprisonment.

In my presentation I will outline some examples of these categories of cases that I have experienced both as a lawyer and as a magistrate.

Aims of Sentencing

In Australian criminal justice jurisdictions, it is generally accepted that imprisonment is the penalty of last resort. Findlay, Odgers and Yeo set out the principal justifications or aims of sentencing as retribution, deterrence and rehabilitation. Retribution, or just deserts, provides that offenders receive only the penalty as they deserve. Retribution invokes the principle of proportionality. Deterrence as an aim of sentencing is justified if the sentence achieves the effect of inhibiting the person (specific deterrence) or others (general deterrence) from committing offences in the future. Deterrence looks to the future. The Courts address the offender in an effort to deter them (and/or others) from contemplating future offences. Some types of offences are reported to be especially receptive to deterrence based sentencing. Rehabilitation is also forward looking, and aims to move the person from criminal behaviour through a therapeutic model. This is

different from deterrence in that the positive rehabilitation of the offender is seen as of benefit to the community (and the individual). (pp 239-240)

Later in the paper I will consider whether these sentencing principles can apply in cases under consideration – or whether there is the need to categorise these types of offences differently.

Necessity

Before addressing these issues I would like to consider some issues relating to necessity, as this may assist in analysing the dilemma before the Court.

There is a suggestion in some cases that if necessity is allowed as a defence to a charge that it may encourage barbarism. In Dudley's case (1884) 14 QBD 273 a young sailor had been killed and used as food after his crew mates had been adrift for some time. The sailors who made the decision and took the life of the sailor were found guilty of murder; a death sentence was imposed but later commuted to 6 months imprisonment. The defence of necessity was not accepted and it was said at page 288 of the case that if necessity is admitted as an excuse for murder it "might be made the legal cloak for unbridled passion and atrocious crime" (Fisse p 556).

In *Loughnan* the Victorian Full Court cited Lord Denning MR from *Southwark LBC v Williams* [1971] Ch 734 at 743 where he said, "the doctrine so enunciated must, however, be carefully circumscribed. Else necessity would open the door to many an excuse". ([1981] VR 443 at 447)

Where a person is actively seeking to achieve a particular sentence (in this case imprisonment) the Court is likely to respond in a similarly cautious fashion.

Commentators suggest that necessity is often not allowed at Trial, but when sentencing takes place the penalty reflects what in fact had been a defence.

"There is no doubt, however, that the problem of necessity – which is often a subjective matter – is often solved, however roughly, by leniency in sentencing". (Walker p 49)

The cases I am considering will often involve a choice of lesser harm (and I accept this leaves wide open the question of what is harm). This also arises in cases of necessity.

Fisse says that in *Loughnan* [1981] VR 443 the Victorian Full Court applied a defence of necessity in terms of balance and proportionality of harm, and that the defendant's culpability was assessed on the basis of choice of lesser evil rather than choice under pressure of circumstance. (p 563-564)

Fisse later states "a further issue is the extent to which prior fault on the Defendant's part disqualifies him from relying on a defence of necessity". (Footnote p 563)

The cases I am considering will naturally raise questions of prior fault on the defendant's part. I say naturally because I believe it would be contrary to human nature to ignore such issues.

Fisse states "...it is incorrect to assume that offences protect values that must be upheld at all cost, or that a defence of necessity contradicts the protected value. Even human life is not absolutely protected, as is evident from the requirement of socially justifiable risk in reckless murder and manslaughter by criminal negligence, and from the availability of the defence of self defence or defence of another. Besides, D may be faced with conflicting legal duties." (p 566)

While not a simple matter for a Court, there are occasions when a person is faced with conflicting duties, whether legal or moral duties.

Fisse states "the test is whether given the pressure of circumstance, the defendant was nonetheless expected to have complied with the law." (p 567)

Background Issues

The questions I am considering overlap with necessity to some extent. While necessity is a defence to a charge, it is often raised at the penalty stage. It involves a deliberate decision on the part of the individual.

Some cases will involve self-preservation in the sense that some real or perceived harm will result unless the person seeks the protection they believe imprisonment can provide. I do not regard these cases in the same way as the rites of passage type cases. How can the criminal justice system, which has been established to punish those who commit wrongdoings, accommodate situations where a person is acting for reasons of self-preservation? They have made a conscious decision to commit an offence ensuring that they are incarcerated, but their motivation and reasoning does not fit neatly within criminal law.

Courts often see cases where the person has been on a self destructive path which seems almost inevitably to lead to the offending before the Court, and indeed the offending can be seen as further self-destructive behaviour. But what if the person is acting in a self preserving way? The offending acts as a circuit breaker to achieve the protection of being in custody.

There may be an immediate threat to their welfare, for example, a person who fears domestic violence. The offending is intended to lead to incarceration. A person being blackmailed. A person who has been threatened. In each case they have weighted up options and find the choice to offend acts to protect them.

In s.24 of the Bail Act (NT) one of the factors to be considered in a bail application is the protection of the person applying for bail. Section 24(1)(b) (iv) of the Bail Act (NT) states that the Court can have regard to 'whether or not the person is...in danger of physical injury or in need of physical protection'. Someone can be remanded in custody for no other reason than their own protection. While this is not sentencing, it does demonstrate a focus on the person charged with an offence.

Cases have stated that the criminal justice system does not exist in order that inadequacies in the social justice system can be remedied. That is, the drunk who seeks to get off the grog can not be sentenced on the basis that the best place to achieve that is within the prison system. If the offence and the circumstances of the case warrant imprisonment that person will be imprisoned – and not otherwise.

Fox and Freiberg state that " 'drying out' an alcoholic, or providing an offender with an opportunity for treatment (following *Brown v Nunn* [1984] WAR 186), is not of itself sufficient reason to support imprisonment. Nor can incarceration be used to make up for the failure of the community's social services for those in need of psychological or medical assistance". (Page 651-2)

Fox and Freiberg then cite *Roadley's* case (1990) 51 A Crim R 336 at 342 where the Victorian CCA held that in sentencing, a court cannot surrender its "duty to act judicially in order to supplement the community's social services which society has failed to provide in adequate measure". *Roadley's* case cited with approval the English Court of Appeal case of *Clarke* (1975) 61 Cr App R 320 at 323 where it was stated that "Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their sentencing powers to dispose of those who are socially inconvenient ... The courts exist to punish according to the law those convicted of offences. Sentences should fit crimes". (Page 652)

The duty to act judicially acts as a guide to all sentences being imposed.
But if sentences should fit the crime, we can not ignore the motivation for the offending.

Issues for Counsel

A person who seeks to be imprisoned will not present the some way as your usual client. He or she will not assist by providing exculpatory instructions. You will be challenged in the sense that your training is aimed at presenting a plea in mitigation. You have a duty to the Court and to your client. The Court should be

told of your client's predicament – if not, the Court will not know all the facts relevant to the case prior to sentencing.

It is important to explore options (other than imprisonment) with your client prior to the plea being presented. Has the situation changed since the offending, such that imprisonment is no longer such a pressing imperative? Can your client be referred to an agency or service which could assist prior to the plea? Pressures of time and geography can make this difficult. But I believe that it is part of your duty to both the Court and your client for these efforts to be made.

As always, the Court looks to you for guidance on sentencing options. It would be inappropriate to simply put the ball in the Judges' or Magistrates' "court" without any options being pursued. You will need to advise the Court of the work you have done to explore the options and the outcome of these enquires.

Prosecutions may become involved at this stage – their access to authorities such as the police may assist in resolving your client's situation. On the other hand, such involvement may only inflame the situation. What if your client instructs that they do not want the Court informed of their predicament and the reasons for the offending? Your client's instructions need to be respected in these circumstances. You will need to remind those who have committed relatively minor offences, that imprisonment is unlikely.

There may be cases where you can not do your duty to the client and the Court and ceasing to act is the only option. It may be that you advise your client they have a defence to the charge. It is not uncommon for clients to reject advice to enter a plea of not guilty. But when combined with a stated intention to be imprisoned, your task becomes very difficult.

I leave the question of how best to represent someone in these circumstances as an open one and welcome comments from the participants at the CLANT conference.

Issues for the Court

Unrepresented defendants will often present themselves in cases being considered and they are likely to be identified by their lack of concern about the possibility of imprisonment and the unhelpful material being put before the Court. Of course, they may simply adapt that "I don't care" attitude. How many Courts have seen that before – and will again. Their defiance and lack of concern for their immediate future can mask the reality of the situation. The Court may sentence the person to imprisonment none the wiser.

They will decline invitations for adjournments, bail and legal advice.
I have referred to the duty to act judicially. As part of this duty the Court must offer the opportunity for legal advice and adjournments. But the defendant cannot be forced to take up these opportunities. The Court can remain faced with a person intent upon being imprisoned.

I believe that options need to be explored once the person's dilemma is before the Court and, to that extent, in the public forum. The Court can not ignore what is being put to them.

It may be that the fault of the defendant will become the focus of attention of a Court when considering their response to a person who wants to be imprisoned. The need versus greed distinction has long been part of the sentencers' lexicon. It is common for notions of fault to be part of sentencing reasons. Those seeking the protection the prison system can provide them, should be treated differently than those who commit offences in order that they be sent to Don Dale or Berrimah as a rite of passage. (Don Dale is the juvenile detention centre in the Northern Territory and Berrimah is the adult prison in Darwin). The rites of passage cases are different from other cases in that they can not be said to have committed the offence(s) for reasons, which are, on balance, justifiable. Their actions, committed with a desire to prove themselves as 'adult' through offending and being imprisoned, are not (at least in the opinion of this writer) justifiable in the same way as a person who acts because of, for example, fear of abuse.

I accept that this distinction lays the debate open to value judgments as between "good" reasons and "bad" reasons for wanting to be imprisoned and it also raises questions as to how far back we look for "fault" on the part of the person offending. A young person whose experience has been limited to a violent community background, where offending is the norm, should not be "blamed" for that experience. But when a Court is faced with an expressed desire to be imprisoned there must be some attempt to look at the decision making process that has lead to the offending.

In the Northern Territory Juvenile Justice system, there is the ability to have a sentencing decision reconsidered pursuant to s.61 of the Juvenile Justice Act (NT). In rites of passage cases where serious offences have been committed necessarily warranting imprisonment, I suggest that cases be reconsidered as a matter of course. The Court can then seek the assistance of report writers, community members and counsel as to how detention has impacted on the juvenile. At that time the programs and projects available to move the young person from offending can be explored. This mechanism may be able to provide intervention prior to the young person becoming hardened by detention.

For adults, a sentence could encompass supervision of Correctional Services, with particular attention being taken of the need to divert the person away from the criminal justice system.

Those who have fears of harm on the outside are more problematic. If their fears are ignored, and a non-custodial sentence is imposed, they may resort to more serious offending to achieve the goal of imprisonment. This would be counter productive and result in further harm.

Once again I leave the question of how to sentence a person in these circumstances as an open question.

Are the aims of sentencing applicable in these cases ?

If retribution is considered, the offence will either justify imprisonment or it will not. And some may say that is the only relevant issue. If the person has been savvy enough to commit a serious offence, they will get their wish and be imprisoned. But cases where a person has committed a more moderate offence, and the sentencing process is more finely balanced, the wishes of the defendant will became more problematic. What of the other aims of sentencing ? Do the most well known sentencing principles apply at all?

Specific deterrence will not be relevant to these cases. The individual has already demonstrated that when faced with the possibility of imprisonment, that is their choice. They are encouraged, rather than deterred, by this sentencing option.

General deterrence will also not be relevant – those who seek imprisonment will in fact be encouraged by the actions of the person about to be sentenced

Rehabilitation is not relevant in most of the categories of these cases, as the person is not entrenched in their criminal behaviour, but rather responding to a particular situation.

I treat the rites of passage cases differently at this point. Their rationale for offending can be addressed though programs and Court orders which are aimed at moving the person from criminal behaviour. I believe that this aim of sentencing is relevant to this category of offenders.

Save for rehabilitation with respect to rites of passage cases, I am of the opinion that none of the principle aims of sentencing are applicable in these cases. They form a separate and particular category of cases for sentencing, which need to be treated differently. The particular motivation for offending can not be ignored and needs to be addressed prior to sentencing. Once that is done, the sentencing process can take place.

Final Words

I am confident that people who want to be imprisoned are more frequently before the Court than lawyers and authorities realise. The duty to act judicially and the principle that imprisonment is the sentence of last report will be the guiding principles when a Court is faced with a person who wants to be imprisoned. As always, Counsel will need to balance their duty to the Court and their client.

I trust that this paper has raised some food for thought in an area in the criminal justice system raising complex and difficult issues. I look forward to discussing the issues with CLANT participants.

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Texts referred to :

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