CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY

Sentencing Children: Some Issues of Principle

by

Lachlan Carter
Victoria

10th Biennial Conference

Bali Hyatt Hotel, Sanur Beach, Bali
Saturday 2 July – Friday 8 July 2005

SENTENCING CHILDREN: SOME ISSUES OF PRINCIPLE

> *"...A youth who roams the streets at night, drinking alcohol, planning and participating in serious criminal activities, cannot rely upon his immaturity or lack of years when he is caught.*
> *Sadly, with very serious offences such as murder, armed robbery and rape, the age of the offender is reducing to an alarming level. The youthful offender can no longer expect to trade on his or her youth in such cases for the elements of deterrence, condemnation and just punishment are significant matters."*[1]

> *"Bringing the whole weight of the adult criminal processes to bear on children as young as eleven is, in our view, a relic of times when the effect of the trial process and sentencing on a child's physical and psychological condition and development as a human being was scarcely considered, if at all."*[2]

A 20 year old Victorian, DB, recently appealed against a Magistrates' Court sentence of 12 months youth training centre (YTC) detention imposed on him for multiple burglaries and thefts of computers from schools. Since late childhood he had been diagnosed with Asperger's syndrome, a form of autism. He was also diagnosed with obsessive compulsive disorder. In the psychiatric opinion before the County Court on appeal there was a nexus between these diagnoses and his theft of computers.

During his four weeks of incarceration at Malmsbury Juvenile Justice Centre DB was assaulted on three separate occasions by other inmates. As Judge Gebhardt said, DB's statement to the police, which was provided to the Court, "...details unbridled and sustained brutality." Following his transfer to the Juvenile Justice Centre at Parkville after he disclosed the assaults, he was again assaulted. In allowing the appeal, and imposing a 2 year undertaking to be of good behaviour without conviction, he concluded that in DB's case there had been "a gross breach of a duty of care owed to the inmates of youth training facilities of this State." Regarding it as his "judicial duty" to draw attention to these matters, His Honour stated that he could not be satisfied that this may have been

---

[1] *R v PDJ* (2002) 7 VR 612 at 629 [82], [83] per O'Bryan AJA (dismissing an appeal against a sentence of 16 years with a minimum of 12 years imprisonment imposed, after a trial, on a 17 year old for the murder of an elderly woman committed at the age of 15); Eames and Chernov JJA agreeing.

[2] *Case of T. v The United Kingdom* (Application no.24724/94) European Court of Human Rights, 16 December 1999, Joint partly dissenting opinion of Judges Ridruejo, Ress, Makarczyk, Tulkens and Butkevych, p 54 (holding, in dissent, that the trial and sentence of T and V violated Article 3 of the European Convention on Human Rights, which prohibits inhuman or degrading punishment).

an isolated instance. He called for a frank judicial inquiry into the policies, practises, management and recruitment of the Victorian juvenile justice system. His Honour said:

> "If however the adage that a society can be judged by how it treats its young and old has any validity, then something designated as a Youth Training Centre ought to rehabilitate, encourage and nurture, not train the next generation of misfits... ...I posit the following questions:
>
> i) where is the supervision?
> ii) where is the care?
> iii) where is the justice?
> iv) what does Juvenile Justice think or imagine about the consequences to young people who are both vulnerable and at risk?
> v) are we really concerned about the damage done to future generations, about the deep-seated, and justifiable, resentments and anger?"[3]

The Community Services Minister, Sherryl Garbutt, has rejected the demand for a judicial inquiry on the basis that the want of supervision and brutality towards DB was an isolated incident.[4] Whilst any open inquiry is unlikely, the case should at the very least alert us to focus us on the purposes for which sentences, particulary custodial sentences, are imposed on young people.

This paper is confined to the sentencing of children, concentrating on the principles that govern the sentencing of children for what might loosely be described as serious crimes. A Victorian bias is acknowledged.

Children

Article 1 of the *UN Convention on the Rights of the Child* ("the UN Convention") defines a child as being under the age of 18 at the time of the offence. Legislation that came into force in Victoria last Friday increased the age jurisdiction of the criminal division of the Children's Court to children aged under 18 (rather than 17) at the time of the commission of the offence. The intent behind the change was to bring Victoria into line with the UN

---

[3] *DB v The Police* [2005] VCC 438, 25 May 2005

3 It has been reported that three internal inquiries into Victoria's juvenile justice centres identified a number of problems, including a rising incidence of assaults: Hughes, G *"Rough Justice"*,'The Age', 6.6.05, p 13. The State Opposition and the Victorian Council of Social Services supported an inquiry: Hughes, G *"Call for juvenile justice inquiry rejected"*, The Age, 7.6.05, p 3.

Convention. The Attorney General stated that the Bill acknowledges "the particular vulnerability of 17 year olds – as children – in their interactions with the criminal justice system" and will ensure that 17 year old defendants whose charges are heard in the Children's Court are not sentenced to adult prison. [5]

The Children's Court of Victoria has jurisdiction to hear and determine all charges against children except murder, attempted murder, manslaughter, arson causing death and culpable driving.[6]

The increase in the age limit has real practical consequences. A 17 year old offender in the Children's Court cannot be sentenced to adult imprisonment, but to a maximum of 2 years YTC. Previously a 17 year old on serious indictable charges such as intentionally causing serious injury would appear in the County Court and could be sentenced to adult prison[7].

The increased aged limit also brings Victoria into line with most if not all Australian jurisdictions. There is, however, no uniformity between the Australian jurisdictions as to the offences that can be heard in specialist youth courts.

The primacy of rehabilitation– common law

It is not difficult to find dicta supporting the notion that when a child is sentenced for a criminal offence, rehabilitation must be the primary purpose of the sentence imposed.[8] Often there is no issue that a child offender will be or already has rehabilitated because, for example, he or she has offended in spectacular fashion as an aberration. In such contexts, the application of rehabilitation as the primary or guiding sentencing purpose does not involve a search for answers and treatment, but ensuring that the potential of the child is not undermined by, for example, being detained.

---

[5] *Children and Young Persons (Age Jurisdiction) Bill* 2004. Hansard, Legislative Assembly, 16 September 2004, p 566

[6] *Children and Young Persons Act* 1989 (Vic), s 16 (1) (b)

[7] For example, *R v Rongonui Chase* [2004] VSCA 25

[8] *P* (1991) 53 A Crim R 112 at 116

As a matter of principle the primacy of rehabilitation in sentencing children should not be diminished by reference to the seriousness of the offence.[9] (As discussed below, this is not an accurate reflection of current statements of principle in the Victorian Court of Appeal).

The rationales for this position are inter-connected. First, from the perspective of the public interest, the public have no greater interest than ensuring that a child who has offended should become a good citizen.[10] That is because the rehabilitation of a child offender promotes community protection[11]

Secondly, the moral culpability of a child offender is usually lesser, especially when immaturity is a significant contributing factor to the commission of an offence.[12]

Thirdly, children (being younger) offer the greatest hope of reformation.

Allied to the primacy of rehabilitation is the principle that a child should not be treated as a "vehicle" for general deterrence. In *R v GDP* Matthews J stated that:

> "..it is generally accepted that in sentencing young offenders considerations of general deterrence are not as significant as in the sentencing of an adult. This reflects an accepted norm of the community interest reflected in the sentencing of a child is not advanced by using him or her as an example but rather in seizing the opportunity to direct the child into rehabilitative efforts."[13]

United States

On 1 March 2005 the United States Supreme Court held, by the narrowest of margins (5:4), that the execution of children aged between 15 and 18 at the time of the offence

---

[9] *Hearne* (2001) 124 A Crim R 451 at 458 [24] per the Court of Criminal Appeal of NSW ("Of course that is not to say that other factors such as deterrence or retribution may not have a relatively greater role to play in more serious offences than in less serious ones"). Hearne committed murder as an 18 year old. His sentence of 27 years was reduced to 18 years.
[10] *Smith* [1964] Crim LR at 70; *Simmons v Hill* (1986) 38 NTR 31 at 33; *M v Waldron* (1988) 90 FLR 355 at 360; *C v Gokel* [1999] NTSC 93 at [11] per Martin CJ
[11] *McKenna* (1992) 63 A Crim R 452 at 464; *C* (1995) 83 A Crim R 561 at 568.
[12] *Hearne* (2001) 124 A Crim R 451 at 458 [25] -[28]
[13] *P* (1991) 53 A Crim R 112 at 116

violated the 8th and 14th amendments of the US Constitution.[14] The immediate effect of the ruling was to ensure that Christopher Simmons and another 72 American children in 12 states were saved from state sanctioned killing.

In the leading majority judgment Justice Kennedy identified three general differences between juveniles under 18 and adults to demonstrate that juvenile offenders cannot with reliability be classified as the worst of offenders. First, comparative immaturity. Secondly, vulnerability. Third, the personal traits of juveniles are more transitory.[15] He reasoned that once the "diminished culpability of juveniles is recognised, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults".[16] Retribution, then, was disproportional if the law's most severe penalty is imposed on one whose culpability is diminished to a substantial degree by reason of youth and immaturity. He continued:

> "As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged in oral argument. In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes...Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, as the plurality observed in *Thompson*, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches weight to the possibility of execution is so remote as to be virtually nonexistent."[17]

Justice Kennedy rejected the argument that, given the Court's own insistence of individualised sentencing, it was arbitrary to adopt a categorical rule barring the imposition of the death penalty on any offender under 18. "We disagree. The differences

---

[14] *Roper, Superintendent, Potosi Correctional Center v Simmons*: No – 03 – 633. Affirming the judgment of the Missouri Supreme Court setting aside the sentence of death. The 8th amendment probibits cruel and unusual punishment. By the 14th amendment this applies to the States. In the 1988 decision of *Thompson v Oklahoma*, 487 US 815 a plurality of the Court determined that national standards of decency did not permit the execution of an offender under the age of 16 at the time of the crime. The following year in *Stanford v Kentucky*, 492 US 361, the Court (5:4) held that the 8th and 14th amendments did not proscribe the execution of offenders over 15 but under 18 because 22 of 37 death penalty States permitted the death penalty for 16 year olds. Then, in *Atkins v Virginia*, 536 US 304, the Court held that the execution of a mentally retarded person was prohibited. The Missouri Supreme Court held that this reasoning extended to juveniles under 18, and declined to follow *Stanford*.

[15] ibid, pp 15-16.

[16] ibid, p 17.

[17] ibid, pp17-18.

between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[18]

The dissenting judges rejected the categorical rule adopted by the majority. Justice O'Connor attacked the "sweeping conclusion" of the Court that only in rare cases could a 17 year old murderer be sufficiently mature and act with sufficient depravity to warrant the death penalty.[19] Justice Scalia (with whom Chief Justice Rehnquist and Justice Thomas joined) was scathing of the majority:

> "To support its opinion that states should be prohibited from imposing the death penalty on anyone before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position.....In other words, all the Court has done today, is to look over the heads of the crowd and pick out its friends."[20]

England

In England in 1993 T and V, each aged 10 ½ at the time of the offence[21], were convicted of the murder of two year old toddler James Bulger. They were sentenced, as is automatic for offenders under the age of 18 convicted of murder, to be detained at Her Majesty's Pleasure. The trial judge recommended, as required, a period of 8 years be served by T and V to satisfy the requirements of retribution and deterrence. He stated in his report that:

> "...8 years is very, very many years for a ten or eleven year old. They are now children. In eight years time they will be young men."[22]

The Lord Chief Justice recommended a tariff of 10 years. Following the receipt of a petition signed by 278,000 people calling for the boys never to be released, and a press campaign, the State Secretary fixed a tariff of 15 years.

---

[18] ibid, p 19.
[19] ibid, O'Connor J dissenting at pp 13-14.
[20] ibid, Scalia J dissenting at pp 10-11.
[21] The age of criminal responsibility, as in Victoria, being 10. A child between the aged of 10 and 14 is presumed, at common law, to be doli incapax (incapabable of crime). The presumption can be rebutted by evidence that the child knew the acts were seriously wrong. It was abolished in England in 1998, but still applies in Victoria: *R (a child) v Whitty* (1993) 66 A Crim R 462; *R v ALH* [2003] VSCA 129 at [70] ff per Cummins AJA.
[22] Extracted in the judgment of Lord Woolf MR in the House of Lords: [1998] AC 407 at 428

T and V sought judicial review of the 15 year tariff, arguing that it was disproportionately long and fixed without due regard to the needs of rehabilitation. Ultimately, the majority of the House of Lords quashed the tariff, holding that it was unlawful for the Secretary of State to adopt a policy in application of the tariff system which – even in exceptional circumstances – treated as irrelevant the progress and development of a child detained at Her Majesty's pleasure. The majority also held that the fixing of the tariff involved the exercise of power akin to sentencing and that accordingly the Secretary of State, like a sentencing judge, was bound to remain detached from the pressure of public opinion. As the Secretary had given weight to public protests about the level of the tariff, his decision was also rendered unlawful on this ground.[23]

Statutory juvenile justice principles

The legislative expression of sentencing principle in juvenile justice legislation in all States and Territories, largely, reinforces the primacy of rehabilitation. Section 139 of the *Children and Young Persons Act 1989* (Vic) ("*CYPA*") provides that the Children's Court must, in determining which sentence to impose on a child, have regard to:-

(a) the need to strengthen and preserve the relationship between the child and the child's family; and
(b) the desirability of allowing the child to live at home; and
(c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
(d) the need to minimise the stigma to the child resulting from a court determination; and
(e) the suitability of the sentence to a child; and
(f) if appropriate, *the need to ensure that the child* is aware that he or she must bear a responsibility for any action by him or her against the law;
(g) if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts *of the child.* (my emphasis)

[23] *R v Secretary of State for the Home Department; ex parte Venables and Thompson* [1998] AC 407. See the analysis of what followed by: Mc Diarmid C, *Childen Who Murder: What is Her Majesty's* Pleasure? [2000] Crim L.R 547

Similar statements of principle, some more detailed than others, are contained in the applicable legislation in other States and the A.C.T.[24] In the Northern Territory, the long title of the *Juvenile Justice Act* includes the stated intention "...that juveniles be dealt with in the criminal law system in a manner consistent with their age and level of maturity (including their being dealt with, where appropriate, by means of admonition and counselling)..."[25]

The principles in the CYPA apply even when a child is not sentenced in the Children's Court of Victoria. Section 276 of the *CYPA* provides that the County Court or Supreme Court may impose any of the orders available under the *CYPA*. It has been held that the sentencing principles set out in sections 139 of the *CYPA* are as a consequence engaged in cases where a child is sentenced in the County and Supreme Courts.[26]

A similar position applies, at least, in New South Wales. Under section 6 of the *Children (Criminal Proceedings) Act 1987* a court that sentences children *shall* have regard to the principles in (a) to (e) of that section. This extends to a child who is being sentenced in an adult court because he or she has committed a "serious children's indictable offence" (s 17) and must therefore be sentenced "according to law". These principles have application whenever a court sentences a young offender, whether sentenced "according to law" or under the C (CP) Act. In *R v R* [27] it was held that "according to law" means according to the principles of sentencing ordinarily applied by the Courts. Hunt CJ at CL added:

> "The courts must nevertheless have regard to the principles stated in s 6 of the Act to be applicable in every case where criminal jurisdiction is exercised...whatever the nature of the offence"[28]

---

[24] See, for example: *Childrens Services Act 1986* (ACT), s 5; *Childrens (Criminal Proceedings) Act 1987* (NSW), s 6; *Juvenile Justice Act 1992* (Qld), s 4; *Young Offenders Act 1993* (SA), s 3; *Young Offenders Act 1994* (WA), s 7.

[25] Referred to by Martin,CJ in *C v Gokel* [1999] NTSC 93 at [11].

[26] *R v PP* [2002] VSC 578 at [28] per Nettle J; *The Queen v PP* [2003] VSCA 100 at [6], footnote 1 per Callaway JA.

[27] (1993) 32 NSWLR 447

[28] ibid, Hunt CJ at CL at 449 (B) And see 449 (C)

A dilemma arises because judges in the Victorian County and Supreme Courts' must have regard, at the same time, to the purposes of sentencing contained in section 5 of the *Sentencing Act*[29] and s139 of the CYPA. The principles are different. The tension between the principles is most acute on the question of general deterrence.

General deterrence is included as a purpose of sentencing in s 5 (1) (b) of the *Sentencing Act,* but section 139 of the *CYPA (above)* excludes it. The Victorian provision was based on section 7 of the *Children and Young Offenders Act 1979* (SA). In the 1980's the South Australian Full Court twice (by majority) construed the equivalent section as a prohibition on the application of general deterrence in sentencing children. In the first case King CJ held that:

> "The important thing to observe about s 7 of the Act is that it does not include the concept of general deterrence....Where it is appropriate to have regard to the protection of the community, it must be the protection of the community from the violent or other wrongful acts of the child, not the criminal acts of others who might be deterred by the treatment accorded to the child before the court. The legislature has quite clearly eschewed the concept of general deterrence in the treatment of persons under the age of 18"[30]

The majority view was upheld two years later in *The Queen v Wilson* [31], with Wells J describing general deterrence as "forbidden territory" in sentencing children[32]
Whilst the South Australian legislation now allows for general deterrence in limited circumstances when sentencing children [33], the construction advanced in those cases clearly still has application to statutory principles which exclude, by omission, general deterrence.

---

[29] Section 5 (1) provides that the only purposes for which sentences may be imposed are (in my summary) – (a) punishment; (b) specific and general deterrence; (c) rehabilitation; (d) denunciation; (e) community protection; (f) a combination of purposes.
[30] *R v S* (1982) 31 SASR 263 at 266 per King CJ, Zelling J agreeing at 268, Mathieson J (dissent) at 269. The case involved co-accused children who had been tried and convicted in an adult court after the case was transferred from the Children's Court.
[31] (1984) 35 SASR 200
[32] ibid at 204. White J agreed: "Court may not make an example of the child to warn and deter others like minded" (at 205) Bollen J at 207 expressed criticism of the position.
[33] *Young Offenders Act 1993 (SA)*, s 3 (b) - when a youth is being sentenced as an adult. see s 29.

In Western Australia section 7 (d) of the *Young Offenders Act* refers to the general principle of protecting the community from illegal behaviour. The WA Court of Criminal Appeal has contrasted this provision with the SA provision, holding that Parliament has authorised weight to be given to general deterrence in sentencing children as s 7 (d) is not confined to the child being sentenced.[34] Further, in WA young offenders who commit serious offences after having previously received two custodial sentences must be sentenced on the basis that the protection of the community is the primary consideration.[35]

United Nations Convention on the Rights of the Child (1989)

Australia is a signatory to the UN Convention. The Convention provides that in all actions concerning children undertaken by courts the best interests of the child shall be a primary consideration.[36] It is recognised that the imprisonment of children should only be as a measure of last resort and for the shortest appropriate time.[37]

Parties to the convention recognise the right of children sentenced to have account taken of their age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society.[38] Article 20 states that a child temporarily deprived of his or her family environment shall be entitled to special protection and assistance provided by the State.[39]

The Convention does not form part of Australian domestic law until implemented by specific legislation[40], but courts should favour an interpretation of statutes in the case of ambiguity, that is consistent with the Convention.[41]

---

[34] *MC v The Queen* [2003] WASCA 205 at [17] per Mc Lure J, Steytler and Pullin JJ agreeing.
[35] *Young Ofenders Act* 1994 (WA), s 125. See *R v DP* [2003] WASCA 92
[36] Article 3 (i)
[37] Article 37 (b)
[38] Article 40 (1)
[39] See also the *UN Standard Minimum Rules for the Administration of Juvenile Justice* 1985 (Beijing Rules). Article 26.3 states that juveniles in institutions shall be kept separate from adults.
[40] *Dietrich* (1992) 177 CLR 292 at 305
[41] *Teoh* (1995) 183 CLR 273, Mason CJ and Deane at 287; *Kruger* (1997) 190 CLR 1 at 70,71

Mandatory sentencing of children

Whilst abolished in the Northern Territory in 2001, mandatory custodial sentencing of children still takes place pursuant to the "three strikes" provisions of the Western Australian *Criminal Code*. A repeat young offender who commits burglary shall be sentenced to at least 12 months imprisonment or detention as the Court thinks fit.[42]

Can the primacy of rehabilitation "give way" to punitive considerations?

In *R v Mills*[43] a 20 ½ year old first offender who had been sentenced to 18 months imprisonment with a minimum of 9 months for a count of recklessly causing serious injury successfully appealed against that sentence to the Victorian Court of Appeal. Batt JA, with whom the other members of the Court agreed, held that the sentencing judge had erred by not having proper regard to the principles applicable to youthful first offenders. Mills was re-sentenced to 12 months with 8 months of that sentence suspended for 3 years. The Court accepted three basic propositions as emerging from existing cases:

1. Youth of an offender, particulary a first offender, should be a primary consideration for a sentencing court where that matter properly arises

2. In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender.)

3. A youthful offender is not to be sent to prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark for what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and, where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified. (This proposition is a particular application of the general principle expressed in s.5 (4) of the *Sentencing Act*)[44]

---

[42] Criminal Code, s 401 (4) (b). A repeat offender is defined in section 400 (3) as a person who has twice committed a relevant offence in respect of a place ordinarily used for human habitation.

[43] [1998] 4 VR 235

[44] ibid at 241. Batt JA stated that the Crown's acceptance of these "general propositions" was correct, referring to: *R v Martin* [1973] VR 854 at 856; *R v Seymour* (1983) 5 Cr App R (S) 85 at 87; *R v Smith* (1988) 33 A Crim R 95 at 97; *R v GDP* (1991) 53 A Crim R 112 at 116; *R v Edwards* (1993) 67 A Crim R 486 at 489 and *R v Missoka* (unreported, Court of Appeal, 9 November 1995) at 6-7 per Callaway JA and at 10-11 per Vincent AJA.

Batt JA went on to observe that the cases he had cited, some of which concerned violent crimes, show that to say of a violent crime that it requires a sentence effecting the purpose of general and specific deterrence is not to show that the case is other than "usual" for the purpose of the above propositions.[45] These principles are routinely referred to in cases involving young offenders.

However, in a plethora of cases since 1998 the Victorian Court of Appeal has emphasised that the propositions in *Mills* are just general propositions and may have to yield or give way to other sentencing objectives[46] Arguably, such statements represent a dilution of the force of the principles spelt out and applied not just in *Mills*, but in many cases before then.

Does it make sense that the public interest in the rehabilitation of young offenders can yield to others considerations? Whatever be the correct position regarding young offenders generally, surely it is difficult to justify such a position with children? This is not to say that there are not cases where loss of liberty for children is inevitable. But it is crucial that that the authorities concerning "young offenders" are not too readily blurred with those concerning "children", where the primacy of rehabilitation is surely most compelling.[47]

The case of PP

PP, a Year 11 secondary school student, was aged 15 years and 11 months. He was working part time in a fish and chip shop in the Melbourne suburb of Kew. A week earlier he had attended an "after party", where a friend of his was involved in a scuffle with another student named Olaver. PP was not responsible, and had tried to break up the fight. Olaver, however, blamed PP for what had happened and arranged with a number of friends to wait for PP to leave his place of work and assault him.

---

[45] ibid at 242.

[46] See, for example: *R v Sherpa* (2001) 34 MVR 345 at [11] (20, culpable driving); *R v Tran* (2002) 4 VR 457 at [11] -[14] (20, culpable driving); *R v Toombs* (2001) 34 MVR 509 (17, culpable driving); *R v Bell* (1999) 30 MVR 115 (20; reckless conduct endangering life); *R v Giles* [1999] VSCA 208 at [20] (21, murder and rape); *DPP v GAS and SJK* [2002] VSCA 131 at [65] (15 and 16, manslaughter).

[47] *R v Adamson* [2002] NSWCCA 49 at para [29]; *Mc Kenna* (1992) 63 A Crim R 452 at 464.

PP was warned about this, but was unable (despite his best efforts) to contact Olaver and assure him he had done him no harm. A number of Olaver's friends, including DH, gathered to wait for PP to finish work. They had all been drinking during the day. PP's brother SP and a friend had arrived at the shop to meet him to go out after work. Growing tired of waiting for Olaver to arrive, four of his friends (including DH) approached SP and one of PP's friends outside the shop. At least two of them were armed with shopping trolley handle poles. PP's brother was struck across the head with one of the shopping trolley poles and a fight erupted between the six youths (PP was not involved). The owner of the shop attempted to stop the fight and the fight moved from the footpath immediately outside the shop to the centre of the car park.

Before the fight had quitened down, PP became agitated with what had sent through the shop window, particularly the pole attack on his brother. He picked up a filleting knife from the shop's knife rack. Against the pleas of co-workers, he ran out of the shop yelling words to the effect that they could not bash his brother. Initially PP responded to his employer's demand to go back into the shop and work, but the fight suddenly re-activated. PP ran with the knife in his hand to the far side of the car park and stabbed DH, twice, in the back. DH, a student aged 16, died from one of wounds which severed his aorta.[48]

PP was charged with murder and remanded in custody for two weeks before being granted bail. He had no prior convictions. His offer to plead guilty to manslaughter was rejected by the Crown. After an 11 day trial in the Supreme Court of Victoria, the applicant was found not guilty of murder but guilty of manslaughter.[49]

Nine witnesses were called on his behalf in the course of the plea hearing, including his High School principal, who gave evidence that he could continue his excellent progress at the school despite his conviction. PP's treating psychologist, who had been seeing him

[48] This outline of the facts are taken from the findings of the sentencing judge, Justice Nettle. *R v PP* [2002] VSC 578 at [2] to [21].

[49] Manslaughter in Victoria has carried a maximum penalty of 20 years imprisonment since 1997.

for the 16 month period between the crime and sentence, gave evidence of the treatment regime he had been under and of his profound and debilitating remorse. PP's counsel argued that he should in all the circumstances receive a non-custodial disposition, such as probation under the CYPA. Alternatively, it was submitted that if detention was required, it ought to be by way of YTC sentence. The Crown's position was that a YTC sentence was inappropriate because it was limited to 3 years. At the conclusion of the plea hearing the sentencing judge requested a pre-sentence report pursuant to determine PP's suitability for a YTC order. He was assessed as suitable for such an order.[50]

The sentencing judge sentenced PP, then aged 17, to six years imprisonment with a minimum term of four years. In August 2003 the Victorian Court of Appeal held that the sentencing discretion was re-opened on the basis that the minimum term was manifestly excessive, and re-sentenced PP to five years imprisonment with a minimum term of two and a half years.

Why, then, *if* PP had to be deprived of his liberty, was he not sentenced to YTC? He had no prior convictions, was of exemplary prior character, was genuinely remorseful and had offered to plead to the crime of which he was convicted. He had acted spontaneously, in a context of provocation. Justice Callaway described the circumstances as "exceptional."[51] Yet PP, a child, was sentenced to adult prison for an unintentional killing at the age of 15.

Three related matters of principle seem to underpin the reasoning of the sentencing judge and the Court of Appeal. First, PP's continued rehabilitation was not held out as the primary purpose of the sentence to be imposed. In his judgment Callaway, JA approved of dicta in the series of recent Victorian Court of Appeal judgments that stress that the principles in *Mills* are to be regarded as general propositions only.[52] None of the authorities referred to by Callaway, JA, with the exception of *DPP v GAS and SJK*[53]

---

[50] The two criteria for ordering YTC are set out in section 32 of the *Sentencing Act*. The court must believe there are reasonable prospects for the rehabilitation of the young offender and that the young offender is particulary impressionable, immature or likely to be subjected to undesirable influences in an adult prison.

[51] *The Queen v PP* [2003] VSCA 100 at [19]

[52] *The Queen v PP* [2003] VSCA 100 at [20] (and footnote 13), referring to the cases listed at note 46 above. For further examples of such pronouncements, see *R v Teichelman* [2000] VSCA 224 at [20]; *R v Hatfield* [2004] VSCA 195 at [11] and *R v Hennen* [2004] VSCA 42 at [24].

[53] In *DPP v GAS and SJK* the three authorities referred to by the Court of Appeal as to sentencing young people did not concern children either: *R v Mills* [1998] 4 VR 253 (20); *R v Bell* (1999) 30 MVR 115 (20); *R v Sherpa* (2001) 34 MVR 345 (20).

(discussed below), involved the sentencing of children.

Secondly, like the sentencing judge, the Court of Appeal held that 3 years detention was inadequate to properly punish PP.[54] The maximum period of YTC that can be ordered by the Supreme or County Court is 3 years.[55] There is no power to fix a minimum term. This reasoning indicates that punitive considerations eclipsed the primacy of rehabilitation.

Arguably, this reasoning also involves an unarticulated, and invalid comparison, between imprisonment and YTC. The invalidity of the comparison arises from the fact that the nature and purposes of the two sentences are dramatically different. The central emphasis of a YTC sentence is rehabilitative, focusing on individualised counselling, education and training. Of course, the deprivation of liberty involved in a YTC sentence is also punitive. But imprisonment is largely, if not wholly, punitive.[56]

Rejecting YTC on the basis that 3 years is "not enough" also seems to invert the order of inquiry, where the starting point for a child (who must, as a last resort) be detained is that it be in a youth training centre. It is wrong in principle when imprisoning a child to commence with an appropriate head sentence for an adult and then to discount it because the offender is a child.[57]

Further, given the different purposes of sentences under the two regimes, it does not follow in law or logic that a rejection of the adequacy of 3 years YTC should result in the imposition of a term of imprisonment of *greater* than 3 years.[58]

---

[54] *The Queen v PP* [2002] VSC 578 at [37]; *The Queen v PP* [2003] VSCA 100 at [13]

[55] *Sentencing Act*, s 32 (3). 2 years is the maximum if the YTC order is made by the Children's Court: *CYPA*, s 189 (2).

[56] *The Queen v PP* [2002] VSC 578 at [35]. See also *R v Vassalo & Tasioulas* (unreported, Court of Appeal, Vic, 7/5/98, Brooking JA at 5).

[57] *C (A Child)* (1995) 83 A Crim R 561 at 570.

[58] See, recently, *DPP v Karipis* [2005] VSCA 119. A sentence of 3 years YTC held on a Crown appeal to be manifestly inadequate. Re-sentenced to 4 years with non-parole period of 2 years.

Thirdly, the sentence imposed on PP is intended, in part, to make an example of him to other potential offenders. Apart from the dilemma of the conflict in the principles between the *CYPA* and the *Sentencing Act* identified above (which is not confronted by the Court of Appeal), was PP really an appropriate recipient of general deterrence? Although it is an article of faith of most sentencing judges, surely the legitimacy of general deterrence hinges on the capacity of an offender to rationally weigh up the potential consequences of his or her course of conduct.[59] This will rarely be the case in relation to a child who offends in circumstances such as PP. It is not the case, for example, that he had gone out armed looking for trouble. It is completely at odds with the primacy of rehabilitation for general deterrence to have a role, much less any significant role, in sentencing children.

It must be mentioned that in Victoria sentencing judges proceed on the basis that the placement of a sentenced person is a matter for the executive. Children sentenced to prison are routinely transferred to YTC by order of the Adult Parole Board.[60] This happened in the case of PP and the Court of Appeal was aware of this. But the Court was bound to, and did, proceed on the basis that PP may serve every day of his five year head sentence in an adult prison.[61]

At the same time the Court of Appeal has accepted that incarcerating a young person in adult prison should be avoided wherever possible as it has the "potential to cause damage of a kind for which both the offender and the community pay dearly in the long term".[62]

The High Court and sentencing children

The High Court has refused to grant special leave to appeal from three judgments of the Victorian Court of Appeal where it has been asserted that the Court has failed to apply

---

[59] Fox and Freiberg *Sentencing: State and Federal Law in Victoria* (2nd ed) OUP, page 211, para 3.409.
[60] s 244, CYPA. Judges sentencing children to prison facilitate the making of such orders by providing relevant materials, or recommendations, to the Adult Parole Board. See *R v LMA* [2005] VSC 152 at [10]; *R v TY* [2005] VSC 109 at [10]
[61] *The Queen v PP* [2002] VSC 578 at [39]; *The Queen v PP* [2003] VSCA 100, Callaway, JA at [19], footnote 12. See further *R v Yates* [1985] VR 41 at 44-45.
[62] *R v Missoka* (unreported, Court of Appeal, Vic, 9/11/95, Vincent JA at 10); *R v Hill* [1996] 2 VR 498 at 504.

proper principles to the sentencing of young offenders. The last two have concerned children.

In *Heblos*[63] the Crown appealed as manifestly inadequate a sentence of 15 years imprisonment with a 10 year minimum imposed on 20 year old who was 18 at the time of the offence of murder. He had no prior convictions was convicted after a trial. The Crown appeal was allowed and Heblos was re-sentenced to 21 years with a minimum term of 16 years. Eames JA, for the Court, held "...that factors of general and specific deterrence, in the circumstances of this case, should have outweighed the factor of the youth of the respondent."[64] Special leave to appeal was sought on the basis that the quoted passage revealed an error of principle, and was contrary to the principles in *Mills,* was refused. Gaudron and Kirby JJ refused special leave as it could not be said that the sentence of the Court of Appeal was infected by error of sentencing principle.[65]

In *R v SJK &GAS*[66] a 15 and 16 year old child were charged with the murder of an elderly woman in her own home. Ultimately, they pleaded guilty to manslaughter by unlawful and dangerous act. Each child blamed the other. The cause of death was asphyxia caused by manual neck compression or choking, though some element of smothering in the mechanism of death could not be excluded. The Crown put it to the sentencing judge that as they could never establish who killed the deceased, the proper way to sentence was to "...place it at the lowest common denominator, that is, they were aiders and abettors, that is the Crown cannot point to who was the principle offender".[67]

The sentencing judge imposed sentences of 6 years imprisonment with a minimum of 4 years on each child. He stated, in sentencing SJK,

> "...you are, for the purposes of the criminal law, still a child. That fact must be a primary consideration in determining a sentence to be imposed. Rehabilitation of someone as young as you is far more important in the sentencing process than any question of general deterrence. Your rehabilitation benefits not only yourself but

---

[63] (2000) 117 A Crim R 49
[64] ibid at 55.
[65] *Heblos v The Queen* M 136/2000 (10 August 2001) per Gaudron and Kirby JJ.
[66] [2002] VSC 94
[67] *GAS &SJK v The Queen* (2004) 78 ALJR 786 at [5]

the community."[68]

Turning to GAS, His Honour said:

> "As in the case of SJK the principal consideration to be taken into account in fixing a sentence is your youth and your prospects of rehabilitation. I must consider these above questions of deterrence and the other considerations which, although they remain relevant, play a somewhat lesser role. The difficulties in sentencing to which I have already referred are compounded here by the further difficulty of applying the paramount principle of rehabilitation in the case of a youthful offender whilst still giving adequate weight to the important consideration of denouncing a crime as horrendous as that in which you and SJK are involved. Such denunciation can only be effected by the imposition of a significant gaol term even if it is tempered by your age and the considerations that go with it." [69]

Justice Bongiorno's sentence was followed by a tabloid media campaign against the said inadequacy of the sentence. SJK and GAS were demonised as monstrous, evil granny killers. The sentences were appealed by the DPP on the sole ground of manifest inadequacy. A particular of that ground of appeal asserted that the sentencing judge gave too much weight to youth and prospects of rehabilitation. The Court of Appeal agreed and substituted sentences of nine years with a minimum term of six years.[70] The formulation of governing principle in the joint reasons is in stark contrast to that of the sentencing judge. Having made strong statements as to the seriousness of the crime and the level of the respondent's culpability, the Court stated:

> "These remarks are not intended to diminish in any way the considerable significance to be accorded to youth and rehabilitation as factors to be taken into account in the determination of an appropriate sentence on a youthful offender. They are intended, however, to emphasize that these factors constitute only some of a number of matters that must be taken into account and that, even in the case of a young offender, there are occasions on which they must give way to the achievement of other objectives of the sentencing law.

---

[68] [2002] VSC 94 at [37]
[69] ibid at [52].
[70] *DPP v SJK & GAS* [2002] VSCA 131

> In this case, given the seriousness of the offence and of the offending and the lack of any real remorse shown by the respondents in relation to their crimes and given that there is little evidence to show that they have reasonable prospects of rehabilitation in the near future, the principles of general and specific deterrence and the need for the court to express denunciation of the crime assume considerable significance for sentencing purposes so that there is correspondingly less scope for leniency on account of the respondent's youth."[71]

The High Court did not grant special leave to appeal on the grounds that the Court of Appeal had erred in failing to hold that rehabilitation was the primary purpose of the sentences to be imposed and in its assessment of the applicant's prospects of rehabilitation. However, special leave was granted on the sole ground that the Court of Appeal had erred by permitting the DPP to conduct his appeal against sentence in a manner contrary to a plea agreement.[72] This is another topic in itself. The High Court, in a unanimous judgment, dismissed the appeal.[73] The High Court determined that there was no error in the Court of Appeal's conclusion of manifest inadequacy on the basis that Bongiorno J gave too little weight to the objective circumstances of the crime vis a vis the subjective circumstances of the offenders.[74] But because of the restricted grant of special leave the High Court did so without addressing the statements of principle concerning the sentencing of children which were intrinsic to Bongiorno J's exercise of the sentencing discretion.

Finally, last year the High Court refused special leave to appeal from the Court of Appeal's judgment in *PP*[75], on the basis that the case did not raise an issue of principle suitable to a grant of special leave and that the interests of justice did not require such a grant.

---

[71] ibid at [65] – [66].
[72] *GAS v The Queen, SJK v The Queen* [2003] HCA Trans 393 (Gummow and Hayne JJ). There were no reasons given for not granting special leave to appeal on these grounds.
[73] *GAS &SJK v The Queen* (2004) 78 ALJR 786
[74] ibid at 795 [38]
[75] *PP v The Queen* [2004] HCA Trans 207 (18 June 2004) per Gleeson CJ and Hayne J. The grounds of appeal addressed the issues discussed above and included that the Court of Appeal erred by failing to hold that rehabilitation is the primary purpose of the sentence imposed on a child.

Despite increased attention to sentencing principles in recent years[76], it would appear that the refusal to grant special leave in these three cases is consistent with the High Court's unwillingness to take on cases that involve the application of sentencing principle to particular categories of people, whether it be young people[77], members of the Stolen Generation[78] or heroin addicts[79]. Whatever the merits of this state of affairs, the issues of principle raised by the sentencing of children clearly have enduring public importance.

Lachlan Carter[80]

[76] *Ryan v The Queen* (2001) 206 CLR 267 at 294 [90] per Kirby J.
[77] The High Court did consider the question of youth to a limited extent in *Inge v The Queen* (1999) 199 CLR 295, holding that the South Australian Court of Criminal Appeal erred in holding that the youth of Inge, aged 23 at the time of the murder he committed, counted against him in the fixing of a non –parole period.
[78] *Fuller-Cust v The Queen* [2003] HCATrans 394 (Gummow and Hayne JJ)
[79] *Dang v The Queen* B 62/1999 (21 June 2000), Gleeson CJ, Kirby and Callinan JJ. Special leave refused by majority.
[80] Barrister, Victorian Bar. Any comments on this paper are welcomed. E-mail: lcarter@vicbar.com.au