Dangerous minds

Mental illness and future danger

Mental illness is an important factor in sentencing, particularly when the court has to balance the need to protect the community and the offender's moral culpability.

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In a decision that arguably alters the previous approach in treating mental illness and future danger, the NSW Court of Appeal in *R v Windle* [2012] NSWCCA 222 has highlighted the difficulties in balancing the need to protect the community and the recognition that a mentally ill offender may lack control, thus reducing their moral culpability.

For practitioners appearing for clients where there is evidence of mental illness and a future danger to the community, the decision is a reminder that any sentence imposed cannot breach the fundamental sentencing principle of proportionality. A sentence cannot be increased so that it results in preventative detention. Further, in certain circumstances, mental health legislation may be a more appropriate vehicle than the criminal justice system to protect the public from mentally ill offenders.

The case also raises wider issues in assessing the objective seriousness of an offence, particularly after *Muldrock v The Queen* [2011] HCA 39, specifically, whether an offender's mental illness is to be considered when assessing the objective circumstances of the offence and how that impacts the principle of proportionality.

Background

In sentencing proceedings, mental illness is most commonly considered as a mitigating factor. In appropriate cases, because of an offender's mental illness, general deterrence may be given less weight, the offender not being an appropriate person to make an example of. However, where there is evidence of a concern of future danger, the mental illness consideration can sometimes pull in the opposite direction, tending towards a greater sentence.

R v Windle [2012] NSWCCA 222 was a Crown appeal against the sentence in the District Court of Andrew Windle who had been convicted of one count of attempting to strangle with intent to murder. The maximum penalty is imprisonment for 25 years, with a standard non-parole period of 10 years. The offence was committed in custody.

Evidence in the District Court at sentence established that Mr Windle suffered from a number of mental illnesses, including a likely diagnosis of borderline personality disorder and antisocial personality disorder, with the offence a result of an "irresistible impulse" to kill the victim. The medical evidence also disclosed limited prospects of rehabilitation and a real concern for the risk he posed to other inmates and members of the community upon release.

In the District Court, Mr Windle was sentenced to a non-parole period of two years and six months, with an additional term of two years.

NEED TO KNOW

Sentencing and mental illness

- **The principle of proportionality remains paramount.**
- **Danger to the community cannot lead to a sentence amounting to preventative detention.**
- **Moral culpability of the offender continues to be relevant to assessing the objective circumstances of the offence.**

Mental illness and future danger to the community

Section 3A(c) of the *Crimes (Sentencing Procedure) Act 1999* provides that protec-

tion of the community is a statutory consideration on sentence. After the court's decision in *Veen (No. 2)* (1998) 164 CLR 465, it remains a relevant factor on sentence, but cannot amount to "preventative detention".

Veen (No. 2)

In considering Mr Windle's mental condition, Basten JA on appeal referred to *Veen (No. 2)* where the High Court noted that the different purposes of sentencing can often pull in opposite directions, "so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter".[1] The High Court placed an important limitation on the future dangerousness consideration – the consideration of danger to society cannot lead to a sentence that is more severe than would have been imposed if the offender did not have a mental illness or abnormality.

Deane J in *Veen (No. 2)* noted the sentence must not exceed the maximum sentence that is appropriate in all of the objective circumstances. However, as Basten JA noted, Deane J also observed that a "propensity to commit serious offences in the future and the protection of the public could preclude any reduction of the full sentence which is proportionate to the facts of the actual crime, but cannot increase that sentence".[2]

" The offence cannot involve an indeterminate sentence and the punishment must not exceed the proper sentence, 'disregarding the need to protect society'."

The previous position

Prior to *R v Windle*, the NSW Court of Criminal Appeal has commented on the issue of future danger on numerous occasions.

In *R v Israil* [2002] NSWCCA 255, his Honour Spigelman CJ referred, with approval, to the observations of the West Australian Court Appeal in *R v Lauristen* [2000] WASCA 203[3] and noted that, although mental illness is relevant in assessing the level of danger an offender presents, that consideration cannot result in the imposition of a sentence that exceeds the seriousness of the offence. His Honour also noted that just as a mental illness can reduce the weight given to general deterrence, it can also mean less weight is given to personal deterrence.

In *R v Lawrence* [2005] NSWCCA 91, Spigelman CJ noted that not all mental conditions would result in less weight being given to general deterrence.[4] In *Munn v R* [2009] NSWCCA 218, his Honour also noted that although the principle of proportionality prevents a court from imposing a sentence merely by way of preventative detention, *Veen (No. 2)* permits a court to have regard to the protection of society.[5] His Honour continued that issues of retribution, personal deterrence and protection of society can result in a longer period of imprisonment, drawing an important distinction between matters relevant to personal or specific deterrence and the protection of the community.

Issues on appeal

On appeal, one of the Crown's submissions was that the sentencing judge had given insufficient weight to the danger Mr Windle posed to the community. The Crown, in part, relied on the decisions in *Munn* and *Lawrence*.

On behalf of Mr Windle, it was argued that any consideration of community protection must be subject to the principle of proportionality and, as per *Veen (No. 2)*, there can be no element of preventative detention. Additionally, any threat posed by Mr Windle could be dealt with under the mental health legislation or by the parole authorities.

Because of the objective seriousness of the offence, the sentence was ultimately increased to a period of imprisonment of five years and four months, with a non-parole period of four years. However, Basten JA, with whom Price J agreed, observed it was not an appropriate function of the criminal law to protect society when that would result in a sentence that exceeds what is appropriate for the gravity of the offence.

Basten JA identified the ambiguity that lies in the approach identified by the High Court in *Veen (No. 2)* and noted: "The ambiguity lies in the failure to identify whether the yardstick within which an element of preventative detention can operate (identified as the legitimate purpose of protection of the public), namely the greatest sentence which can be imposed 'proportionate to the gravity of the offence', includes the element of mental illness. If it does, and it is difficult to see how it cannot in a case where the mental illness constitutes an element of the offence (in the concept of diminished responsibility), it would be difficult to take the mental illness (now described as a propensity to commit crime) into account

in a manner which is set off against the diminished moral culpability, without the sentence being increased beyond the limit imposed by the yardstick of proportionality. On the other hand, if mental illness is removed from the calculation of proportionality, a critical element central to the assessment of moral culpability is ignored. When reintroduced, it is offset by the protective element."[6]

His Honour's reasoning identifies the artificial nature of the approach. The principle of proportionality dictates that a sentence must not exceed that which is proportionate to the gravity of the offence. If that assessment takes into account the mental illness (diminished moral culpability), then by allowing the protection of the community consideration to offset the diminished moral culpability, there is a danger that the sentence could be increased beyond that which is proportionate to the offence. Additionally, if the assessment of proportionality does not include mental illness, it fails to take into account a critical assessment relevant to the assessment of moral culpability.

His Honour concludes that the offence cannot involve an indeterminate sentence and the punishment must not exceed the proper sentence, "disregarding the need to protect society".[7] Basten JA pointed out that mental health legislation may be a more appropriate mechanism for the long-term protection of the public.

On the contrary, Campbell J, although agreeing with the ultimate increase in sentence, disagreed with Basten's approach in relation to the protection of the community, noting that the protection of society remains a relevant sentencing consideration.[8]

Proportionality after Muldrock

Basten JA's reasoning raises questions concerning proportionality and whether mental illness is to be considered as part of the objective circumstances of an offence. The principal of proportionality dictates that a sentence should be no more or less than the gravity of the crime, having regard to the objective circumstances.[9]

In *Muldrock v The Queen* [2011] HCA 39, the High Court, in finding that *R v Way* (2004) 60 NSWLR 168 was wrongly decided, observed that the objective circumstances of the offence is to be "assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending".[10] There is no further analysis of what constitutes the nature of the offending.

Although *Muldrock* would appear at first glance to alter the position in respect of mental illness and the objective circumstances of an offence, it makes no statement about the moral culpability of an offender.

The position is not settled. In *Yang v R* [2012] NSWCCA 49, Hulme J commented that although Muldrock appears to have rejected the notion that matters personal to an offender affect the objective seriousness of an offence, his Honour used the phrase, "'appears to have rejected', because it has not been universally accepted".[11]

Moral culpability has previously been considered as a factor relevant to the objective circumstances of the offence.

Before *Muldrock*, in *R v McNaughton* (2006) 163 A Crim R 831, Spigelman CJ, found that prior convictions did not form part of the objective circumstances of the offence and implied that the moral culpability of an offender was relevant to the objective circumstances.[12] That is also consistent with the way in which an offender's motive has been treated, impacting the moral culpability of the offender and, as a consequence, the objective seriousness.

Conclusion

It would seem artificial to assess the objective circumstances of an offence without reference to the moral culpability of the offender, disregarding the personal circumstances of the offender. In the writer's view, that is still consistent with the approach in *Muldrock* which, although finding that *R v Way* was wrongly decided, did not establish that moral culpability was not relevant to assessing the objective circumstances.

If that is the case, and mental illness is still relevant in assessing the objective circumstances, the approach taken by Basten JA is an important one as it recognises that the protection of society is a relevant sentencing consideration. However, in a case like Mr Windle, where his severe mental conditions substantially reduced his moral culpability, an approach that essentially cancels out this mitigating factor has the potential to breach the principle of proportionality and risks resulting in preventative detention. □

ENDNOTES

1. *R v Windle* [2012] NSWCCA 222, at [43], quoting from *Veen (No. 2)* (1998) 164 CLR 465 per Mason CJ, Brennan, Dawson and Toohey JJ.
2. Ibid at [45].
3. *R v Lauristen* [2000] WASCA 203 at [48].
4. *R v Lawrence* [2005] NSWCCA 91 at [24].
5. *Munn v R* [2009] NSWCCA 218 at [6]-[7].
6. Above n.1, at [46].
7. Ibid at [57].
8. Ibid at [72].
9. See *Veen (No. 2)*; *R v Dodd* (1991) 57 A Crim R 349; *Hoare v The Queen* (1989) 167 CLR 348.
10. *Muldrock v The Queen* [2011] HCA 39 at [27]. See "Changing the *Way* we sentence", *LSJ*, February 2012.
11. *Yang v R* [2012] NSWCCA 49 at [28].
12. *R v McNaughton* (2006) 163 A Crim R 831 at [22]. □