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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S281 of 2015

BETWEEN:



**JOEL BETTS**
Appellant

AND

**THE QUEEN**
Respondent

## APPELLANT'S ANNOTATED REPLY

Part I: Publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Reply

1. The appellant does not accept the respondent's formulation of the issue at Part II, viz., that it is a choice between a hearing de novo by the original sentencing court, or a fresh exercise of the sentencing discretion by the appellate court, which may take into account only new material relating to post-sentence events.

2. It is submitted that, once error is found, the appellate court proceeds to a fresh exercise of the sentencing discretion, whereby it may receive new evidence, without a prohibition on the receipt of evidence relating to pre-sentence events. An intermediate appellate court, having found error, may determine for itself the facts upon which the offender ought to be sentenced. The option to remit the whole sentencing exercise is available where it involves factual disputes which are more properly determined by a judge at first instance.

3. The respondent contends at 6.13 that the new reports "appeared to be adduced, not to establish that the offence had been caused by childhood experiences, but to ensure that appropriate consideration was given to the subjective circumstances in any redetermination". Such submission should be rejected. In the appellant's written submissions to the Court of Criminal Appeal, it was noted at para 21 that the sentencing judge concluded: "Thus from the material before me, there is no persuasive material which would suggest that the motivation for his crimes was in some way attributable to what had happened to him at the hands of [his abuser] so many years before during his adolescence". The following, written submission was then made (para 21-22, AB 292):

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It is submitted that this conclusion is infirm, especially in the light of the further, subsequent investigation undertaken by Dr Nielssen, and in particular, his consideration of the effects of the drug dimethyltryptamine (DMT). Significantly, Dr Nielssen concludes at page 8 of his report:

> From the history provided by Mr Betts and the information in the documents provided, I believe his intoxication with a drug with unpredictable mind altering effects, *together with an underlying emotional state shaped by violence and sexual abuse*, and a pattern of substance use, was a significant contributing factor to his sudden decision to end his life and to his offending behaviour.

It is submitted that this finding should be reflected in any sentence imposed upon the applicant. [emphasis added]

4. In oral submissions, senior counsel for the appellant referred expressly (T 1.35 on 4.11.2014, AB 321) to the written submissions at paras "19 to 22". In closing submissions, he stated (T 19.5 on 4.11.2014, AB 339):

> Your Honours, as to the drugs and Dr Nielssen's report, all of that is dealt with in paras 19 and 20 onwards in our written submissions. We can't add to that except to say that what his Honour was referring to in respect of those matters was as it were an absence from Dr Westmore when he said, "I am again not able to indicate that he was suffering from any frank drug induced psychosis which might have relevance to the offence itself". That's as far as Dr Westmore went. He didn't exclude it and Dr Nielssen specifically deals with it. When it comes to resentencing if it should, we submit these are matters that are properly to be taken into account and that that is a matter that goes into the general matrix.

5. Hence, the appellant's contention was that the new evidence should be used to show that, contrary to the findings of the sentencing judge, the offending "was in some way attributable to" the childhood abuse; and that DMT (given an underlying emotional state, shaped by violence and sexual abuse, and a pattern of substance abuse) "was a significant contributing factor to … [the] offending behaviour".

6. Senior counsel's oral submission that "it was never our case [before the sentencing judge] that the crimes were driven from some deep well of a psychologically generated motivation springing from what had occurred to him in his adolescence" was not inconsistent with those contentions, relying upon the new evidence from Dr Nielssen, that the combination of drug intoxication, and an "underlying emotional state shaped by violence and sexual abuse", was a significant cause of the offending.

7. Moreover, it is plain that the Court of Criminal Appeal did not consider that the material was being tendered only for the limited purpose now suggested by the respondent. If the Court had accepted that, then the observations at [47] (AB 388), that the material is "inadmissible", that "[t]he time of sentence was the appropriate occasion for such matters

to be addressed – as they were", and that "an appeal does not provide an opportunity for a second bite of those issues", would have been otiose.

8. The respondent contends at 6.20 that there "is a considerable inconsistency between the case now presented, and that presented at sentence". This should be rejected. At sentence, counsel for the appellant led evidence as to the childhood abuse, although the evidence adduced was inadequate to establish any causal link between abuse and offending. The new evidence is adduced to establish those links.

10. As regards drug intoxication, Dr Westmore stated "[T]here is no clear evidence or indications to suggest that he was suffering from a drug induced psychosis at the time of the offending behaviour". As stated by senior counsel in the Court of Criminal Appeal, Dr Westmore concluded "I am again not able to indicate that he was suffering from a frank drug induced psychosis which might have relevance to the offence itself". For that reason, senior counsel observed: "That's as far as Dr Westmore went. He didn't exclude it and Dr Nielssen specifically deals with it" (AB 339)

11. That the appellant gave no evidence "that he had a drug induced psychosis or that his offences were caused by a mental disorder or by his childhood experiences" (respondent's submissions at 6.23) is not significant. He lacked any expertise to be able to assert such a causal connection. His claim that his stabbing of the victim was "very spontaneous" (T 21.25, AB 40) was consistent with the new evidence. He said, "I couldn't account for what I was thinking at the time" (T 24.27, AB 43); and, it was "difficult to discount the trauma that I suffered for the first 20 odd years of my life" (T 34.44, AB 53). He stated, "I'm trying to understand this more and more every day," but he rejected the proposition that his offending was "simply a matter of wounded ego" (T 34.47, AB 53). He was not asked any questions about the drug use, about which he had told Dr Westmore, no doubt because Dr Westmore had not expressed an opinion that would support a finding that the appellant was suffering from a drug induced psychosis at the relevant time.

12. The appellant's evidence that the attack on the victim was "spontaneous" was a claim that it was unplanned. The sentencing judge rejected that claim, but the new evidence provides some support for it, or at least creates a reasonable doubt as to whether the appellant "planned" the offences (and was "driven by a profound jealousy").

13. As regards the respondent's attack on Dr. Nielssen's report, the contention that, "Dr. Nielssen's opinion appeared to be based on the appellant's account that the attack lasted 45 seconds and ended with a bent knife" (at. 6.42) provides no support for the attack. Beyond the mere recitation of the account given by the appellant, and now emphasised by the respondent, the timing of the assault appears not to have featured at all in the opinion formed by Dr. Nielssen. In any event, a court would not proceed on the assumption that a highly experienced and reputable psychiatrist would form an opinion based solely upon the unverified account given by an offender. More important, Dr. Nielssen expressly noted "the narrative in the Agreed Facts" (p. 6, AB 346.33). He referred also to the findings of the primary judge "that the crimes were planned and were not a fleeting decision on the part of Mr. Betts" (p. 6, AB 346.37). It would have been perfectly clear to him that there was variation between the account given by the appellant, the agreed statement of facts, and the

facts found by the learned sentencing judge. Notwithstanding such variation, Dr. Nielssen arrived at the conclusions expressed in his report.

14. The next attack on Dr. Nielssen's report is his recording of the appellant's statement that he must have experienced some sort of psychosis. This was said to be "incorrect and traversed the plea" (at 6.43). How the mere recitation of an offender's account can render an expert's report inadmissible is unclear. The matters relied upon by the respondent go to the weight of the evidence, rather than admissibility - issues which may be fleshed out at a hearing.

15. The same can be said about the next criticisms, which are to the effect that Dr. Nielssen failed to refer to two particular pieces of evidence. Regardless of whether he referred to those or not, he was aware of them, since they were matters noted in the agreed statement of facts, and in the remarks on sentence, all part of the materials considered by him.

16. At 6.45, a further criticism is made by the respondent, which is, again, puzzling. The respondent stated, "Dr. Nielssen noted that Judge Toner found that the crimes were planned and not a fleeting decision on the appellant's part (p. 6, AB 346.38) however this was also not strictly correct." This relates to Dr. Nielssen's report, where he states, "Judge Toner found that the crimes were planned and were not a fleeting decision on the part of Mr. Betts" (p. 6, AB 346.37). This cannot be said to be an inaccurate summary of the primary judge's findings, verbatim (ROS para 36-7, AB 265.11-15):"These crimes were planned... There was nothing fleeting about his intention to kill Samantha Holland."

17. For these reasons, the assertion that "[t]hese were significant errors and omissions in Dr. Nielssen's report" (at 6.46) should be rejected.

18. There is no substantiation of the assertion that Dr. Nielssen "was in no position to offer [his ultimate] opinion either because the subject matter was outside his area of expertise or because he did not have the information necessary to form the opinion" (at 6.47) - an assertion, which follows an unwarranted attack on his use of the one word, "sudden", in the concluding paragraph of his report.

19. Indeed, all of the matters about which Dr. Nielssen opined are quintessentially within the expertise of a psychiatrist. Any assertion that he lacks the requisite expertise evaporates upon closer analysis. The respondent's contention is no more than this: "it is not clear that the toxicology of DMT or alcohol is within [his] area of expertise", and, such evidence is "usually given by specialists in pharmacology" (at 6.49).

20. The respondent's assertion that Dr. Nielssen did not have sufficient information on which to form his opinion, because "[i]t was clearly not possible to determine the appellant's level of intoxication from an unknown quantity of drugs" (at 6.49) is also unfounded. Dr. Nielssen, pointing to professional articles, which he co-authored, referred specifically to the fact that multiple, self-inflicted stab wounds are strongly associated with the presence of psychotic disorder, or an equivalent state induced by an hallucinogenic, or dissociative, drug. The agreed statement of facts confirmed that the appellant had inflicted wounds upon himself (para 19, AB 10.55 - AB 11.1; para 25, AB 12.20); and had goaded

the victim into stabbing him as well (para 21-22, AB 11.32-50; para 24, AB 12.8; para 25, AB 12.12-20), *see also* para 39, AB 15.1-20. In those circumstances, there was indeed available an inference that the appellant was under the effects of an hallucinogenic drug. The criticisms advanced by the respondent at 6.50 and 6.51 are without foundation.

21. Equally important, at no stage did the Crown in the Court of Criminal Appeal attack any evidence on any of the bases now advanced. Nor were any of the witnesses, and in particular Dr. Nielssen, required for cross-examination. No submissions were advanced by the Crown as to why the reports, in particular that of Dr. Nielssen, should not be afforded full weight. Nor did the Court below refuse to admit the evidence on the basis that it was of limited probative value. Yet, in this Court, the respondent seeks to advance myriad issues, not previously advanced, and which can only be properly ventilated by calling the various witnesses to give them an opportunity to respond to criticisms advanced only now.

22. The respondent suggests that the language of s. 6(3) *Criminal Appeal Act 1912 (NSW)*, which mixes past and present tenses, demonstrates that the redetermination of the sentence is one based on the facts as found by the primary judge, supplemented by material concerning events, which have transpired since the passing of the sentence, *see* at 6.55. It is submitted that the language, even though complicated by mixing tenses, does not provide any guide as to the method of redetermination. Given that the appellate court is to exercise the sentencing discretion afresh, and new evidence may be received (which includes new evidence relating to circumstances post-dating the original sentencing) the use of past tense does not support the respondent's position.

23. As regards the suggested test for admissibility under s. 12(1) (*cf.* at 6.57) being one of necessity, the provision refers to what is "necessary *or expedient* in the interests of justice". "The ordinary natural grammatical meaning of 'expedient' is 'advantageous', 'desirable', 'suitable to the circumstances of the case'": *Riddle v. Riddle* (1952) 85 CLR 202 at 221-2 *per* Williams J. Use of the word "expedient" encapsulates a far more permissive power than suggested by the respondent, requiring the focus to be on "the interests of justice".

Dated: 8 March 2016

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