NEW SOUTH WALES

SENTENCING PRINCIPLES OF "TOTALITY" AND "EVENHANDEDNESS"

Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority

Unreported, Court of Criminal Appeal, Kirby P, Campbell and James JJ, 17 December 1993

FACTS

Camilleri was charged with three offences against s15A of the *Clean Air Act 1961* by causing the emission of odours into the air as a result of its carrying on of the business of processing offal into dried food products for pets and other animals. The offences occurred on 16 and 29 January and 8 March 1991. The odours resulted from the use of a fourth cooker used at the plant which was unlicensed. Before Talbot J in the Land and Environment Court, Camilleri pleaded guilty to all three offences and a fine of $105,000 was imposed. Camilleri appealed to the Court of Criminal Appeal on the basis of the severity of the penalties imposed.

DECISION

A preliminary issue which arose before the Court of Criminal appeal was the nature of the hearing before it pursuant to s5AA of the *Criminal Appeal Act 1912*. This was important to the final outcome as evidence had been admitted in the Land and Environment Court of prior emissions of odours (other than those charged). Thus the Court had to determine whether such evidence was properly before it on the appeal; that is, was the appeal one "by way of rehearing" or "by way of rehearing *de novo*". If the latter, the evidence could be excluded, if the former, it could not. The Court held that s5AA(3) does not involve a hearing *de novo* and accordingly it was bound to consider the penalty to be imposed on the basis of the evidence before the trial court and any additional or substituted evidence admitted by the Court of Criminal Appeal.

The Court discussed general sentencing principles (such as the need to consider the seriousness of the offence, mitigating circumstances, etc), as each of the matters required to be considered pursuant to s9 of the *Environmental Offences and Penalties Act 1989*. The Court accepted that the nature of the air pollution caused by Camilleri was "indeed serious" and that were it not for the various mitigating factors it "would be inclined to impose a substantial penalty for each offence."

The Court then referred to the principle of "evenhandedness" enunciated by Street CJ in *R v Oliver* (1982) 7 A Crim R 174 in respect of the penalty to be imposed, and reviewed some 7 decisions of the Land and Environment Court in which penalties of between 37.5% and 75% of the maximum penalty had been imposed. Using those figures as a benchmark the Court concluded that a penalty of $35,000 (28% of the maximum) should be imposed for the first offence.

The Court then considered the "totality" principle as stated by Street CJ in *R v Holder* [1983] 3 NSWLR 245 that overall criminality should be determined and an appropriate sentence imposed on that basis rather than undertake a simple arithmetical addition of the sentences appropriate for the individual offences, since the latter may often exceed what is required in the circumstances. Concluding that the "totality" principle was relevant in the present case, the Court imposed a fine of $35,000 (28% of the maximum) for the first offence, $17,500 (14%) for the second offence, and $8,750 (7%) for the third offence, a total of $61,250.

COMMENT

This decision is extremely important in that it clearly and carefully analyses the process which should be undertaken by the courts in imposing penalties for environmental offences. It enunciates the various principles which are of relevance in that process and constitutes a guideline for courts in that regard.

Importantly, therefore, the decision should lead to greater certainty in the imposition of penalties for various types of environmental offences in accordance with truth in sentencing principles.

Lachlan Roots BEc LLB (Hons)

MEANING OF "NEGLIGENCE" IN S6(2) OF THE ENVIRONMENTAL OFFENCES AND PENALTIES ACT 1989

Environmental Protection Authority v Ampol Ltd

Unreported, Court of Criminal Appeal, Mahoney JA, Finlay and James JJ, 24 December 1993

At the conclusion of a hearing before Pearlman CJ of the Land and Environment Court in February 1993 in which Ampol was charged with an offence against s6(2) of the *Environmental Offences and Penalties Act* 1989 (the EOPA), a case was stated for the determination of the Court of Criminal Appeal pursuant to s5A(1A) of the *Criminal Appeal Act* 1912.

FACTS

Ampol was the owner of land at Mort St Lithgow on which site was a fuel depot leased to Brir Pty Ltd. Underground tanks were located at the depot and used for the storage of petroleum products.

On 4 February 1991, diesel fuel that was stored in an underground tank overflowed and spilled into a nearby creek. The overflow and spillage occurred during the absence of Brir's employee who had responsibility for overseeing the storage of the fuel in the underground tank. Brir was charged with an offence under s6(1) of the EOPA and pleaded guilty.

At its trial for an offence under s6(2), Ampol conceded that the pollution of the creek resulted in harm to the environment, but it disputed that it was negligent. Before Pearlman CJ, it was contended by the EPA that "negligence" within s6(2) should be determined on the basis of the reasonable person test. Ampol, however, submitted that the test of negligence within s6(2) was the criminal standard, namely recklessness.

A stated case was then referred to the Court of Criminal Appeal in the following terms"
"The questions which I have been requested to submit for determination are:
(1) Whether in order to prove its case the Authority must establish that Ampol's negligence:
(a) Was a high degree of negligence entailing recklessness or wantonness?
(b) Amounted to a failure to respond to a foreseeable risk in a manner to be expected of a reasonable person in Ampol's position?
(c) Satisfied another, and if so what, test of negligence?
(2) (a) Whether the Authority must establish that Ampol negligently contributed to any element of the offence alleged against Brir under s6(1) of the EOPA?
(b) If so, to which particular element or elements of that alleged offence must the Authority establish negligent contribution?"

DECISION

The Court of Criminal Appeal was most critical of the form of the stated case. It was considered that the intention of s5A(1A) of the *Criminal Appeal Act* 1912 was not that stated cases be submitted for determination "in the abstract and out of their factual context." Rather, it was said:

> "The proper course in such cases as this is ordinarily for the trial judge first to determine the facts ... [and] then determine whether those facts, in the context of the case, satisfy the statutory test of negligent contribution to the offence. If questions are to be submitted for consideration ...ordinarily the questions should raise for determination whether error of law would be involved in holding that such acts or omissions constituted negligent contribution to the offence."

Despite the Court's misgivings as to whether, therefore, the stated case could properly be answered, it nonetheless gave some indication of how "negligence" as used in the statute should be construed.

The Court referred to the traditional criminal law for the proposition that it did not, historically, impose liability for negligence as such, but that the language of "negligence" was used for other purposes, for example to indicate that unintentional conduct may be of a criminal nature. Further, the history of development of the criminal law indicated that unintentional defaults "be of a greater rather than a lesser degree of blameworthiness", and consequently terms such as "reckless" and "wanton" were commonly used.

However, when concerned with a statutory offence, the word as used in the statute must be construed as a matter of standard statutory construction. That is, the meaning to be ascribed to the word "negligent" is not based on determining whether traditional criminal law notions of negligence are relevant but what the context and meaning of the Act requires. This may or may not amount to the same standard(s) applied in the traditional criminal law. That is, the question of what is relevantly "negligence" within s6(2) of the EOPA involves determining "what default is sufficient for the purposes of the statute."

The Court stated

> "... it is necessary for the court to identify the acts or omissions which constitute the "contribution" to the conditions giving rise to the commission of the offence. It is necessary to show beyond a reasonable doubt that they resulted from the act or omission of the company. And it must appear that, intentional acts aside, that which constituted the contribution was something which, having regard to the purpose and intention of the legislation, the company ought not to have done. If these things are established and the matter be of a moment sufficient to attract criminal sanction, the evidence would ...allow the conclusion that the offence had been committed."

The Court also concluded that the EPA is not, in respect of a person charged under s6(2) of the EOPA, required to establish that that person negligently contributed to the offence committed by another under s6(1) thereof. The EPA need only establish that the alleged s6(2) offender *contribute to the conditions* of the s6(1) offence, not that it contributed to the *offence* as such.

COMMENT

The Court of Criminal Appeal decision is significant in a number of respects. First, it highlights the problems associated with the stated case mechanism and the somewhat unfortunate consequences faced by the Court when the device is incorrectly used. Second, the Court has given some indication of the meaning of "negligent" under s6 of the EOPA. That is, the statutory concept of "negligence" used in the EOPA is not to be determined by regard to the traditional criminal law but by regard to the contribution and the conditions in question and the circumstances of the case.

Note: The matter was referred back to Pearlman CJ. Judgment was reversed.

Lachlan Roots BEc LLB (Hons)

PRIVILEGE AGAINST SELF-INCRIMINATION AND CORPORATIONS

Environment Protection Authority of New South Wales v Caltex Refining Co Pty Ltd

Unreported, High Court of Australia, Mason CJ, Toohey, Brennan, Deane, Dawson & Gaurdron JJ

24 December 1993

Renewed calls for a statutory privilege against production of voluntary environmental audits in all states are likely to follow the decision of the High Court of Australia in *EPA v Caltex Refining P/L.*, in which a 4:3 majority held that corporations were not entitled to claim the privilege against self-incrimination.

FACTS

In 1990, the NSW State Pollution Control Commission - now the Environment Protection Authority - commenced prosecution against Caltex in the Land and Environment Court under the *Clean Waters Act* 1970 (NSW) and the *State Pollution Control Commission Act* 1970 (NSW) in respect of alleged breaches of Caltex' pollution discharge permit. Eighteen months after the commencement of the prosecution, the SPCC served on Caltex a notice issued pursuant to s29(2)(a) of the *Clean Waters Act* 1970 requiring Caltex to provide it with certain documents in Caltex' possession. The SPCC also served on Caltex a notice to produce issued under the Land and Environment Court Rules. That notice required production of the identical documents specified in the s29(2)(a) notice. The sole purpose of the notices was to gather evidence for use by the SPCC in the proceedings against Caltex. Section 29(2)(a) makes no mention of the privilege against self-incrimination, but the Rules of the Land and Environment, by incorporating the rules of the NSW Supreme Court, specifically preserve the privilege. Caltex claimed that the s29(2)(a) notice was not issued for a valid purpose and in the alternative, it raised a claim of privilege against self-incrimination. In respect of the Notice to Produce under the Court Rules, Caltex raised the claim of privilege against self- incrimination.

At first instance, the Land and Environment Court required Caltex to comply with the notices, holding that the privilege against self-incrimination should not enure for the benefit of corporations, but referred a number of questions to the NSW Court of Criminal Appeal. The Court of Criminal Appeal held that as a matter of principle, the privilege should be available to corporations, but that it had been excluded by implication in s29(2)(a). The Court did not require Caltex to comply with the s29(2)(a) notice, however, because it was invalidly issued. In the view of the CCA, s29(2)(a) did not permit the EPA to demand documents for the sole purpose of obtaining evidence to use in enforcement proceedings that had already been commenced. Caltex was not required to comply with the notice to produce under the Land and Environment Court Rules because it could claim the privilege against self-incrimination. The EPA appealed to the High Court.

DECISION

The High Court reviewed authorities in the United Kingdom, New Zealand, Canada and the United States and held by a 4:3 majority that corporations were not entitled to the privilege against self incrimination. The majority[1] traced the historical foundation for the privilege and examined its modern justification, to conclude that the privilege was aimed at protecting individual rights and freedoms, and that such a focus had no application to corporate entities. In taking this view, the majority adopted the position taken by Murphy J - the only High Court judge to have expressed a view on the question before now - in three separate High court decisions.[2]

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[1] Mason CJ, Toohey, Brennan and McHugh JJ.

[2] *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150 per Murphy J; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346-347 per Murphy J; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 395 per Murphy J

Having precluded Caltex from claiming the privilege against self-incrimination, the majority held that the company should be required to comply with the notice issued under s29(2)(a). In its view, that notice was issued for a valid purpose despite being for the sole purpose of gathering adverse evidence. The majority saw no reason for limiting the operation of that section to production of documents for investigative purposes. Mason CJ, Toohey and McHugh JJ were of the opinion that Caltex should also comply with the notice issued under the Rules of the Land and Environment Court, because it could not claim the privilege against self-incrimination.

The Privilege Against Self-Exposure to a Civil Penalty

Brennan J, however, joined with the dissentients on the answer to the question of whether Caltex had to comply with the Court - issued notice to produce (albeit for different reasons) so that Caltex were not required to comply. He held that although Caltex could not avail itself of the privilege against self-incrimination, it could still raise the privilege against self-exposure to a civil penalty in respect of the Court-issued notice. In his opinion, the fine that could be imposed following a successful prosecution was akin to a civil monetary penalty. He held further that the rationale underlying the so-called "penalty-privilege" permitted its extension to corporations because unlike the privilege against self-incrimination, which protected individuals' freedom, the penalty privilege was concerned with the limitation which courts place on the exercise of their powers to compel a defendant to furnish evidence. The exercise of the Court's powers did not depend on whether the defendant was a corporation or a private individual.

The dissenting view

Deane, Dawson and Gaudron JJ took the view that the privilege against self-incrimination was available to corporations. While the privilege had its origins in the Star Chamber's inquisitorial procedures, the minority believed that in modern society it was an extension of the Crown's burden of proving the guilt of the accused beyond reasonable doubt. In order to maintain an appropriate balance between the people and the State, the minority held that the privilege should be available to corporate entities as well as individuals. In the minority's view, Caltex should not be compelled to comply with the court-issued notice to produce because it could claim privilege.

Having taken the view that corporate entities were entitled to the privilege against self-incrimination, Deane, Dawson and Gaudron JJ found that when read in context there was a clear legislative intention to exclude the privilege in s29(2)(a). Thus, the minority held that Caltex would have to comply with the statutory notice provided it had been validly issued. On this question, the minority interpreted s29(2)(a) narrowly. It held that the powers conferred on the EPA should be limited to the administrative function of controlling pollution, and did not extend to collecting evidence to use against Caltex in a prosecution that had already been launched.

The Final Order

It has already been noted that, in conjunction with Brennan J's view on the "penalty privilege", a 4:3 majority of the Court held that Caltex should not have to comply with the notice to produce issued under the Rules of the Land and Environment Court. The final order is phrased in such a way, however, that it suggests that the reason for this exemption is the availability of the privilege against self-incrimination. This conflicts with the majority's position that the privilege could not be claimed by corporations. It remains to be seen whether this anomaly in the Order is amended.

COMMENT

The decision is significant for its denial of the privilege against self-incrimination for corporate entities and for its broad construction of the EPA's powers of discovery under s29. It confirms industry's concerns

that reports and documentation that result from voluntary compliance audits may be seized and used against companies in prosecutions - a major disincentive to undertaking such audits in the first place. The NSW and Victorian EPA's have both stated that they will generally not use voluntary audit reports as the basis of a prosecution, but neither statement is binding on the Authorities and they provide cold comfort for the regulated community in light of the Caltex decision. Victorian legislation does at least permit some claim of protection, but does not protect companies or individuals from derivative use of protected material. The *Environment Protection Act* 1993 (South Australia) and the Tasmanian *Environmental Management and Pollution Control Bill* 1993 both include statutory protection for environmental audit reports, provided the applicant has obtained governmental approval before undertaking the audit. It seems likely that pressure will be brought to bear on other state governments to include similar statutory protection in their pollution control legislation.

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