Rising Of The Court:

Use And Abuse

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On the second of March 1998, at Lismore Local Court, Matthew Julius Bleckman, 32, unemployed, of Rosebank pleaded guilty to stealing an electronic antenna worth $10.69 from *Crazy Prices* store. Bleckman had similar convictions for stealing in 1991, 1994 and 1997. After hearing the plea Magistrate Jeff Linden sentenced Bleckman to the Rising of the Court (ROC). For that purpose, he said, the court will rise at 4pm and Bleckman was sent to the police cells as a "signal that this is going to stop" as he had "reached the end of the road". On the same day, Jeremy Anson, 23, unemployed, of Mullumbimby pleaded guilty to possessing 19 grams of cannabis leaf in Lismore. Anson had previous convictions for similar offences in 1995 and 1997. Mr Linden stated that Anson too could go into police custody until 4pm "just so he knows it's serious". Again this was done pursuant to the power of the court to sentence to ROC.[1] These cases raise several important issues relating to this sentencing practice.

A sentence to ROC is commonly used by courts to deal with minor or additional offences. Over the past eight years the power has been used in almost three percent of offences finalised in the local court in New South Wales, and less than one percent in the higher courts.[2] The power to sentence to ROC appears to be a common law power of all sentencing courts, and is not mentioned in any legislation. The practice of sentencing to ROC has been referred to and imposed by the Court of Criminal Appeal.[3] Little has been written or recorded about its origins, and indeed it does not rate a mention in *Halsbury's Laws of England* or Australia, the *Laws of Australia* or the loose leaf services on criminal law and procedure.

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1 Rogers, J, "Offenders Kept in Cells as Warning", *Northern Star*, 3 March 1998, p 3.

2 Weatherburn, D, *Bureau of Crime Statistics and Research, Statistical Reports*, 1987 - 1996.

3 *Thurgar*, Unreported, NSW CCA, 17 December 1990.

The effect of a sentence to ROC is that the convicted person still obtains a criminal record and thus it is not the equivalent of a finding that the offence is proven but dismissing it pursuant to s 556A *Crimes Act* NSW 1900.

A Nominal Penalty

The view expressed in Australian and English criminal law texts that discuss the penalty[4] is that it is a nominal penalty only. The Judicial Commission of New South Wales describes it as "one of the most lenient penalties available to the sentencer" and specifically states that it "lacks the stigma or personal trauma of detention in a cell".[5] This view is endorsed by the Law Reform Commission of New South Wales which in its recent Sentencing Report discusses ROC within the context of community based sentencing. It specifically considers ROC as a sentence that involves the sentenced person "remain(ing) in the court until the adjournment".[6] The Federal Court has also described it as a "nominal penalty".[7] Thus the standard wording employed by courts is "You are sentenced to the rising of the court and for that purpose the court has now risen". Clearly the Lismore Magistrate has employed ROC as more than just nominal detention and utilised it as a short sharp shock. To the extent that it is used as more than just a nominal penalty, it is argued that such a sentence is not lawful.

An Unknown Quantity

The penalty is not recorded statistically as a term of imprisonment by the Bureau of Crime Statistics and Research.[8] They record ROC as a separate category. Strictly speaking this is not correct. A sentence to the ROC is in fact a term of imprisonment[9] for a short period of time - usually only a matter

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4 See for example: Brown, D, et al, *Criminal Laws*, The Federation Press, Sydney, 1996, p 1386.

5 MacKinnel, I, "Sentenced to the Rising of the Court" *Sentencing Trends* No 11 Jan 1996, Judicial Commission of New South Wales.

6 Law Reform Commission of New South Wales Discussion Paper 33.9 - *Sentencing: Community Based Sentences* 1996.

7 *Knight v Birch* (1992) 106 FLR 109 at 119.

8 Bureau of Crime Statistics and Research, Statistical Reports 1987 - 1996

9 Fox, R, and Freiberg, A, *Sentencing: State and Federal Law in Victoria*, Oxford University Press, Melbourne, 1985, p 354. The view that it is a custodial penalty is endorsed by MacKinnell, already cited n 5 and the Law Reform Commission of New South Wales 1986, already cited n 6. See also *Harris* 1989 A Crim R 257 (Sup Ct Tas).

of seconds. The reason for the separate recording is sensible if the penalty is only nominal. On the other hand if magistrates or judges are going to use it as a method of sentencing as a warning or to show the seriousness of an offence, then the Bureau may well need to change its recording practices. Apart from anything else, it is impossible to know the prevalence of this type of sentencing until there is a mechanism for recording the length of time of the custody imposed.

Is the Practice Appropriate ?

Prior to sentencing a person to any period of imprisonment a court must consider all possible alternatives and come to the conclusion that no other course is appropriate. This common law principal has been codified in New South Wales by s 80AB *Justices Act* 1902 and in the Commonwealth by s 17A of the *Crimes Act* 1914. Further, Magistrates are required to state that all other alternatives were considered when imposing a custodial sentence. The New South Wales Law Reform Commission has recommended that magistrates and judges should provide reasons for any decision to impose a sentence of imprisonment of six months or less, including reasons why a non-custodial sentence was not appropriate.[10]

In the instant cases it is difficult to see how a court could come to the conclusion that no other alternatives were available. Both crimes are non-violent and at the bottom end of the scale. Sentencing to a term of imprisonment is the toughest penalty our criminal justice system has to offer and it should be a sentence of last resort - even if it is for a period of hours rather than days. The cases involve shoplifting and possession of a small quantity of cannabis. Both matters would be appropriately dealt with by the imposition of a bond.

Is the Practice Legal ?

As indicated above, it is submitted that anything other than a purely nominal sentence is beyond the scope of the penalty of ROC. There are three further issues here. Firstly, where a person is sentenced to a term of imprisonment pursuant to the *Sentencing Act* 1989 the Department of Corrective Services has custody of the person, and they are to be taken to a prison as soon as possible. I can find no lawful authority for the police to

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10 NSW Law Reform Commission, *Sentencing Report 79*, December 1996.

detain a convicted person in police cells pursuant to a ROC order. The common law power appears to be only that the person is to be held within the confines of the court. Thus any person detained by police pursuant to a ROC order may well have an action for false imprisonment against the police who detain them.

Secondly, it also must be ascertained when the court rises. If the person is sentenced at 10am to ROC but that is notionally set at 4pm as in the instant cases, what if the court rises early? Further, what of the luncheon or morning tea adjournments - are they not "risings"? My search for answers to these questions led only to further questions - in English authorities[11], the rising of the court refers to the end of the "session" - that is a period of weeks or months rather than hours. In an era of permanent court sittings, the term rising of the court has been replaced by adjournment, and the normal statement at the end of a days sitting is that "this local court is now adjourned". It is thus contended that that courts do not have the power to set nominal rising times that do not reflect the actual "rising" or adjournment of the court.

Thirdly, there is the issue of the legality of ROC in its entirety. The preamble to the *Sentencing Act* NSW 1989 states that its purpose is, *inter alia*, to "provide for the procedure to be followed in sentencing prisoners to imprisonment". Pursuant to s 13 the sentencing provisions specifically do not apply to periodic detention, imprisonment in default of payment of any fine or penalty, imprisonment for life or for any other indeterminate period, to detention in strict custody under ss 25 or 39 of *the Mental Health (Criminal Procedure) Act* 1990; or to imprisonment under the *Habitual Criminals Act* 1957.

It is arguable that the *Sentencing Act* 1989 is intended to cover the field in terms of sentencing powers of the court with the exception of those matters listed in s 13. Given the stated general purpose of the Act, and that it explicitly excludes certain classes of sentences in s 13, it is arguable that the power to sentence to ROC has been overruled by the *Sentencing Act*, which has usurped any common law power of sentencing. After all, if ROC were meant to be preserved it could have been listed under s 13.

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11 Osborn, P G, *A Concise Law Dictionary* (3rd ed), Sweet and Maxwell, London, 1947.

And it makes sense that the *Sentencing Act* was intended to override residual common law sentencing powers. Prior to legislative provisions, courts had the power to sentence those convicted to terms of imprisonment under common law principles and procedures such as warrants and orders. If these remained then the courts could simply bypass the *Sentencing Act* provisions altogether. And that clearly was not the intention of Parliament.

If it is correct that the only lawful procedure to adopt for short custodial sentences in New South Wales is the *Sentencing Act*, and a Magistrate wishes to sentence someone to a short period of imprisonment pursuant to s 8 of the *Sentencing Act*, it is not permissible for a Court to set a *time* for release - only a date. It appears to be left to the prison authorities to determine the time for release. Thus, it is only possible for a court to sentence people to, say, a night of custody, and then only if the considerations of s 80AB of the *Justices Act* or the common law equivalents have been considered.

Should the Practice Continue ?

Reasons have been touched on above as to why this practice should be discontinued - because the penalty is supposed to be nominal only, there is confusion as to the "rising" of the court, imprisonment was not the only alternative for these offences, the period of detention is not statistically recorded and there is a question mark over the courts ability to order the detention of the convicted person in a police cell.

But there are other reasons as well. Periods of imprisonment that are very short are effectively unappealable. In country areas in particular the Magistrate that sentences the person is the person who determines the flow of the list, and the bail pending an appeal. The reality is that in most cases the punishment will have been served before an appeal can be lodged.

Further, there is no evidence that the short sharp shock approach deters at all. Until there is some evidence that the locking of people in police cells for a period of hours provides an effective deterrent to crimes, the practice should be discontinued. After all, the imprisonment cannot be said to be for purposes of community protection or rehabilitation. The chances are that both these defendants already spent some hours in police custody whilst being processed following their arrests - it is hard to see that a further few hours locked up will

deter any further. It may well be that being locked up in this unappealable fashion is a negative experience that breeds a lack of respect for the law and those who administer it.

Other Alternatives

Courts which wish to impose a short period of custody can only do so in accordance with the *Sentencing Act*. They could place a particular matter to the end of the list so that the defendant must wait around all day for their matter to come before the court. They could also impose a very small, nominal fine as an alternative.

In researching this paper, lawyers mentioned to me that some Magistrates use the *Bail Act* 1978 to detain people for short periods to teach them a lesson. I recall one case where I appeared for a young man on a shoplifting case. He had been refused bail when he had represented himself the day before and had made some injudicious comments on a plea. The Magistrate had determined that he would sentence him the next day, and refused bail in the interim, presumably to teach the defendant a lesson. This was despite the fact that the young man had been on bail and had willingly appeared at court as required. This is certainly an unlawful use of the *Bail Act*. In determining bail, a court must only consider the s 32 *Bail Act* criteria. Teaching someone a lesson or otherwise punishing them by refusal of bail are not within the set criteria.

Proposals for Reform

It is not appropriate to have unclear common law sentencing powers which are effectively unappealable and where the term is currently unrecorded. If ROC is to be retained then it must be legislated so that the parameters are clear and it is only a nominal punishment. There are other nominal penalties available, including s 556A and small fines. Judicial officers need to be educated about the supposed value of the short sharp shock theory and the lack of evidence to support it. If there are Magistrates or Judges who persist in using very short periods of incarceration, a study should be undertaken as to the deterrent effect.

In the interim, the Police should seek urgent legal advice as to their liability. It is likely that they could face false imprisonment suits if their detention of those sentenced to ROC is, as argued, unlawful. Defence lawyers should be prepared to argue in the face of the court that a penalty of

detention pursuant to ROC is unlawful, and that other nominal penalties are available. Of course there is the risk that the court will respond by sentencing the person to a single day of imprisonment under the *Sentencing Act*. However, in the Lismore cases above, such a sentence would be unlikely to survive an appeal.

Finally, Magistrates and Judges should be educated as to their responsibilities with respect to sentencing to imprisonment as a last resort. It does not matter if the detention is for one hour - the principle is the same. In the words of Justice Nagle in the Report of the Royal Commission into New South Wales Prisons (1978):

> "Imprisonment as a concept is not a desirable state for man or animal and it should be carefully justified and not dispensed without careful thought."