

The De Simoni Principle

R v De Simoni (1981) 147 CLR 383

The De Simoni principle is often cited among lawyers as the basis for amending police Facts Sheets. It is probably the most misquoted and misapplied sentencing principle in New South Wales. This article is designed to explain the De Simoni principle to assist practitioners appearing in the Local Court of NSW.

When charging someone with an offence, the police serve two documents:

1. a Court Attendance Notice (summons), and
2. a Facts Sheet.

The Facts Sheet is a narrative alleging the circumstances of the offence and any aggravating factors. These allegations are not set in stone and can be negotiated to create a set of 'Agreed Facts'. For more on Facts Sheets, [click here](#).

The Principle

The De Simoni Principle provides that a court cannot take into account as an aggravating factor a circumstance that would warrant conviction for a more serious offence. So when the prosecutor accepts a plea to a lesser charge in full satisfaction, they must amend the Facts Sheet to make out the less serious charge and not the more serious one that is withdrawn.

The Facts of De Simoni

Mr De Simoni broke into houses and stole property to fund his drug habit. One day he broke into what he believed was an empty house and was surprised in the dark by the occupant. He believed the occupant was a young man and he was in danger. He defended himself and only afterward did he find out the occupant was an elderly lady.

Mr De Simoni showed immediate remorse. He helped the elderly lady into a chair, apologised to her and brought her a glass of water and a telephone so she could call someone to assist her before he fled the scene.

Mr De Simoni was subsequently charged and pleaded guilty to *Robbery*. However, the Fact Sheet alleged that he had 'wounded' the victim which amounted to a more serious offence of *Robbery in Circumstances of Aggravation*. The trial court took the wounding into account and effectively sentenced De Simoni for the more serious offence even though he had not been charged with it.

The High Court found that the trial court had erred and should not have accepted *Agreed Facts* that amounted to a more serious offence than what had been charged. An offender can only be sentenced for the offence of which he is convicted. So a court must disregard any circumstances that would amount to a different offence.

Application

So, let's apply the principle to a hypothetical scenario. The law distinguishes between assaults based on the injury to the victim. Intentional contact that does not leave a mark is '*common assault*'. If the contact leaves a mark it amounts to '*Assault Occasioning Actual Bodily Harm*' (AOABH). If both layers of the skin are punctured, then it amounts to a '*wounding*'.

So, if the prosecutor accepts a plea of guilty to AOABH, the court cannot then make a finding of fact that the skin of the victim was punctured. This is more than an aggravating factor, it amounts to the more serious offence of wounding. Likewise, if the prosecutor accepts a plea to common assault, then the court cannot find that the contact left a mark as this amounts to AOABH.

Another example is a drunk driver who is charged with Low-Range Prescribed Concentration of Alcohol (PCA). The Facts Sheet can only allege a Blood Alcohol Content up to 0.079. If the Facts allege 0.08, this would amount to the more serious offence of Mid-Range PCA.¹

When the De Simoni principle does not apply

Allegations which are not relevant

If allegations in the Facts Sheet do not relate to the offence charged, then they are not relevant and should be excluded on this basis. This is not a De Simoni issue. For example, if the Facts Sheet alleged negligent driving and failing to display P-Plates but the P-Plate offence wasn't charged, then the P-Plate allegation should be excluded as irrelevant.

Allegations which are in dispute

If allegations in the Fact Sheet are not conceded by the defendant, then the matter must go to a 'disputed facts' hearing. This is not a De Simoni issue. A De Simoni issue relates solely to whether the allegation is an aggravating factor or amounts to a more serious offence. This is a question of law and can be determined without regard to any evidence.

Allegation which are really submissions

Statements such as:

'The defendant showed a total disregard for the law and endangered other people'

do not belong in the Facts Sheet. This is a conclusion that might possibly be drawn from the facts and the prosecutor can make this submission on sentencing - but only after the facts have been determined. It is not fair to ask the Accused to agree with such a conclusion as they may have an explanation.

Should you have any issues, I am available every day.

Chris Nowlan
Barrister-at-Law
Ph: (02) 8251 0066
chris@chrisnowlan.com

¹ s108 Road Transport Act 2013