Standard Non-Parole Periods

Part 4, Div 1A, Crimes (Sentencing Procedure) Act (NSW)1999

The NSW government introduced SNPs to increase the severity of sentences handed down in the District and Supreme Courts. The SNP for each particular crime is listed in the table opposite s54D Crimes (Sentencing Procedure) Act. This article seeks to explain the SNP legislative regime in NSW and how it has been interpreted and applied by the courts.

Judicial Discretion

Criminal legislation creates offences and provides maximum sentences for them. However, it does not provide minimum sentences. This means that judicial officers have broad discretion to sentence an offender to anything between nothing and the stated maximum.[1] In reaching the sentence, the judge takes into account the objective facts of the offence and the subjective features of the offender. This often leads to sentences well below the stated maximum.

As a result, tabloid newspapers and certain radio hosts regularly misinform their audiences about supposed 'soft sentences' handed down by judges who are out of touch with community expectations. These reports do not present all the facts or the legal principles applied. They are designed to be sensational and allow the media to be self righteous. Of course, politicians are complicit in this exercise.

Mandatory Minimums

At every state election, both sides of politics compete to be seen as toughest on crime. In the 1990s this led the conservative party to propose removing judicial discretion and imposing mandatory minimum terms on repeat offenders. This was opposed by the socialist party on the grounds that it was racist. They asserted that mandatory minimum terms would disproportionately affect aborigines since they are more likely to commit crimes, be arrested and subsequently sent to prison.

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So the socialists painted themselves into a corner. They needed a way to appear tough on crime without using mandatory minimums. Their answer was to create the SNP regime. This meant there would be 'standard' minimum terms of imprisonment set for serious offences. These ranged from 25 years for murder down to 3 years for reckless wounding.

However, the 'standard' terms were not mandatory, they were merely guidelines. So judges would still have discretion to find special circumstances in appropriate cases and impose a lower non-parole period. And they do. It is extremely rare for any judge to impose the full SNP. In almost every case, they make a finding of 'special circumstances' and depart from the SNP. And so the tabloids and the talk back hosts have no shortage of material.

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1 House v The King (1936) 55 CLR 499 at 505

Muldrock v The Queen[2]

Muldrock was a 25 year old man who was convicted of sexual assault upon a nine year old boy. He had spent three months on remand and was sentenced to nine years in prison. However, Black DCJ set a non-parole period of only 96 days which meant that he was immediately eligible for parole. This gave the tabloids and the talk back hosts a field day. The prosecutors lodged an appeal against the sentence.

What the media reports did not state was that Muldrock was cognitively impaired such that he had the mind of a eight year old. Furthermore, he had also been the victim of child sexual abuse and it was unclear whether he understood that his conduct was criminal as opposed to simply naughty.

The judge accepted that Muldrock was a vulnerable person who would be victimized in an adult prison. On the other hand, there was a bed available in a facility that catered to cognitively impaired adults with inappropriate sexual conduct. Rather than being released back into the community, Mr Muldrock was paroled to live in a facility that met his unique needs and protected the public.

The Appeal

The DPP appealed this sentence to the Court of Criminal Appeal which held that Black DCJ had failed to give enough weight to the objective seriousness of the offence and applied it's earlier decision in Way's Case[3] regarding SNPs.

Muldrock appealed to the High Court which held the Way's Case had been wrongly decided with respect to the operation of SNPs. In doing so, they instead endorsed the ratio in Markarian.[4] The High Court held that the desirability of Muldrock undergoing suitable rehabilitative treatment was capable of being a special circumstance justifying departure from the statutory proportion between the non-parole period and the term of the sentence.

They further held that the sentencing principles of punishment and denunciation did not require significant emphasis in light of Muldrock's limited moral culpability for his offence The upshot is that SNPs are not mandatory. They are simply a legislative guidepost. Judicial discretion is preserved and can be exercised in appropriate cases.

Chris Nowlan
Barrister-at-Law
Ph: (02) 9024 9533
chris@chrisnowlan.com

2 Muldrock v The Queen (2011) 244 CLR 120
3 R v Way (2004) 60 NSWLR 168
4 Markarian v The Queen (2005) 228 CLR 357