

Supreme Court of Victoria Considers Relevance of Human Rights to Sentencing

DPP v TY (No 3) [2007] VSC 489 (28 November 2007)

In sentencing a young offender found guilty of murder, Bell J of the Supreme Court of Victoria had regard to international human rights principles, including the rights of the child under the *Convention on the Rights of the Child*, in the exercise of his sentencing discretion.

Facts

At the time of the offence, TY was 14 years old. The victim, Christopher Williams, was 18 years old, and was celebrating his last day of school with a group of friends. On the afternoon of 21 October 2003, the victim and his 'happy-go-lucky' group of friends walked to a tram stop where TY was sitting with an adult friend.

TY, who 'did not go out looking for trouble that day', nevertheless had a propensity for getting into arguments and fights. When Christopher Williams and his friends approached the tram stop, TY made an abusive and insulting remark about Rachael, one of Williams' friends, to which Williams reacted verbally.

In his evidence, TY stated that he felt intimidated and believed he was going to get bashed by Williams or his friends. However, Bell J found no evidence that Williams or his friends had in any way behaved aggressively towards TY. In the spur of the moment, TY struck Williams twice to the head with a golf umbrella that he was carrying, driving the umbrella's sharp metal tip into Williams' brain. Williams was fatally wounded.

TY pleaded not guilty to the charge of murder and manslaughter, claiming he was acting in self-defence. The jury found him guilty of murdering Christopher Williams.

Decision

Justice Bell acknowledged that youth is a mitigating factor in the sentencing discretion. In doing so he referred to art 40(1) of the *on the Rights of the Child*. By becoming a party, Australia recognised:

the right of every child ... recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

His Honour stated that the Convention had not been incorporated into Australian law and so could not be a direct source of law. However, provided the subject matter of the case before the Court came within the scope of the human right, and was not inconsistent with relevant legislation or the common law, then that right could be a relevant consideration in the exercise of judicial powers and discretions. His Honour considered that, in this case, art 40(1) was in keeping with, and reinforced, general law.

Consequently, Bell J took the Convention into account, first, because 'the sentencing discretion will be the better for it ... providing a further basis for, and to reinforce the existing principles of, giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children'. Second, art 40(1) reinforces for courts that 'in the sentencing process, they can promote both [children's] positive development and the growth of their understanding of, and respect for, the human rights of others'.

Of course, in this case, taking international human rights into account would 'cut both ways'. The victim – barely 18 himself – had been denied the most 'precious human right'; the right to life. Further, Bell J noted that while youth was a mitigating factor, the more serious the crime the less flexible courts could be with their discretion.

In all the circumstances, TY was sentenced to 12 years imprisonment, with a minimum eight year non-parole period. Justice Bell recommended to the Adult Parole Board that TY serve his term in a youth justice centre rather than an adult prison.

Application to the Victorian *Charter*

This decision demonstrates how human rights principles are increasingly informing decision making in Victorian courts.

With the full operation of the *Charter* commencing on 1 January 2008, these considerations need not be secondary any longer, but rather can be direct and primary. Relevantly, section 17(2) of the *Charter* states that 'every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. Section 23(3) of the *Charter* requires that 'a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age'. A future decision of this kind might well have regard of these rights, particularly given that the *Sentencing Act 1991*, like all legislation, will be required to be interpreted compatibly with human rights pursuant to s 32(1) of the *Charter* from 1 January 2008.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2007/489.html>.

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