The *De Simoni* principle and concurrent sentences

Louise Hulmes reports on *Nguyen v The Queen* [2016] HCA 17.

Introduction

The appeal raised two primary issues:

1. Whether the principle enunciated in *R v De Simoni*[1] applies to preclude a sentencing judge from taking into account, favourably to the offender, the absence of a factor which, had it been present, would have rendered the offender liable for a more serious offence.
2. The scope of a sentencing judge's discretion to impose wholly concurrent sentences for offences that are the product of the same act.

Facts

The appellant shot and caused a non-fatal wound to the deceased, who was a police officer, while the deceased was lawfully executing a search warrant in the basement of the appellant's unit complex, in the company of other police officers. In response to the shot fired by the appellant, another police officer fired a shot which was intended for the appellant, but the bullet instead struck the deceased in the neck, fatally wounding him.

About two weeks prior to the incident, the appellant had been a victim of an attempted robbery in the basement of his unit complex by two masked men armed with cricket bats. Following that event, the appellant obtained a pistol, with a view to defending himself against any further attempted robbery. When the appellant was interviewed after his arrest, he gave an account that he thought two men were about to rob him. He told the police about the previous robbery and the police confirmed that account.

Section 421(1)(c) of the *Crimes Act 1900* (NSW) applies to a person who uses force involving the infliction of death where that conduct was not a reasonable response in the circumstances as the person perceives them, but the person believes the conduct is necessary in self-defence or defence of another. In such a case, section 421(2) provides that a person is not criminally responsible for murder but, on a trial for murder, is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

The prosecution accepted that it could not exclude as a reasonable possibility that, when the appellant fired at the deceased, the appellant honestly believed that the deceased was someone posing as a police officer who was attempting to rob the appellant.[2]

The appellant pleaded guilty to the manslaughter of the deceased and to wounding the deceased with the intent to cause grievous bodily harm, each of which are offences with a maximum penalty of imprisonment of 25 years.

Sentencing decision at first instance and in the New South Wales Court of Criminal Appeal

At first instance, the appellant was sentenced to a term of nine years and six months' imprisonment[3] for the manslaughter offence and to a concurrent term of six years and three months' imprisonment[4] for the wounding offence.[5]

In assessing the objective gravity of the manslaughter offence, the sentencing judge contrasted it with what the sentencing judge supposed would have been the gravity of the offence if the appellant had known the deceased was a police officer. The sentencing judge concluded the offence was not in the 'worst category'.[6]

The sentencing judge also determined that the two sentences should be served concurrently, on the basis that the same criminal conduct was common to both offences and that the total criminality constituted by the appellant's offending could be comprehended by the sentence for manslaughter.[7]

The director of public prosecutions (DPP) appealed against the sentences. The Court of Criminal Appeal (CCA) allowed the appeal and held that:

- the sentencing judge erred in assessing the objective seriousness of the manslaughter offence by taking into account that the appellant did not know that the deceased was a police officer when, if he had known that fact, he would have been liable for murder. In upholding this ground, the CCA accepted the DPP's submission that the error constituted a breach of the *De Simoni* principle;
- there had been error in the sentencing judge's determination that the appellant's overall criminality could be comprehended by the sentence for manslaughter; and
- the sentence imposed for each offence was manifestly inadequate.

The CCA quashed the sentences imposed in the Supreme Court and, in their place, sentenced the appellant to a term of 16 years and two months' imprisonment[8] for the manslaughter offence, and a term of eight years and one month's imprisonment[9] for the wounding offence.[10] The sentence for manslaughter was accumulated by 12 months on the sentence for the wounding offence[11] so the aggregate sentence was a term of 17 years and two months' imprisonment.[12]

The *De Simoni* principle

The principle in *De Simoni* is that:[13]

> [A] judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.

Appeal to the High Court

In the High Court, the appellant contended that the CCA erred:

- in its application of the *De Simoni* principle;
- in holding that the sentencing judge was wrong not to cumulate some part of the sentence imposed for the offence of wounding on the sentence imposed for the offence of manslaughter; and
- as a consequence, in holding that the sentences imposed by the judge were manifestly inadequate.

In two separate judgments, the High Court unanimously dismissed the appeal.

In relation to the first issue, Gageler, Nettle and Gordon JJ held that the CCA was correct in holding that the sentencing judge erred in her assessment of the objective gravity of the offence of manslaughter by contrasting it with what the judge supposed would have been the gravity of the offence if the appellant had known the deceased was a police officer. That is because if the appellant had known the deceased was a police officer, and had shot him with intent to cause grievous bodily harm, the appellant would have been guilty of murder (as there would have been no basis to invoke the partial defence of excessive self-defence).[14] In other words, it is irrelevant in assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder.[15]

Gageler, Nettle and Gordon JJ held that the CCA was not correct, however, in characterising the judge's comparison as a contravention of the *De Simoni* principle. That principle prohibits a judge from taking into account, as an aggravating circumstance of the offence, a circumstance or factor that would render the offence a different and more serious offence.[16] It has nothing to say about the impropriety of a judge taking into account the absence of a circumstance which, if it were present, would render the subject offence a different offence. The latter course is erroneous simply because it is irrelevant to the assessment of objective gravity.[17]

That principle prohibits a judge from taking into account, as an aggravating circumstance of the offence, a circumstance or factor that would render the offence a different and more serious offence.

In relation to the second issue, their Honours also expressed doubts about the CCA's conclusion that it was not open to the sentencing judge to decline to cumulate any part of the sentences. Their Honours accepted that there could be circumstances in which the judge might properly have concluded that the criminality of the offence of wounding with intent to cause grievous bodily harm was sufficiently comprised within the criminality of the offence of manslaughter to warrant that the sentences be made wholly concurrent.[18]

However, both issues only had relevance if the sentence was not otherwise manifestly inadequate. Although the CCA reference to the *De Simoni* principle was misplaced, Gageler, Nettle and Gordon JJ considered it was not a material error. Ultimately, their Honours found that the Court of Appeal was correct to find that the sentence imposed by the judge for the offence of manslaughter, and consequently the total effective sentence, was manifestly inadequate.[19] The offence of manslaughter was a particularly serious instance of the crime. In the circumstances, it was also appropriate to cumulate a small part of the sentence imposed for the offence of wounding on the separate sentence imposed for manslaughter. The offences were separate and distinct and, despite the commonality of the acts which comprised them, the offence of wounding with intent to cause grievous bodily harm involved an element of intent which was absent from the offence of manslaughter.[20]

In their separate judgment, Bell and Keane JJ agreed that the CCA's adoption of the *De Simoni* principle was misplaced, but noted that contrary to the appellant's argument in the High Court, that the CCA did not conclude that the offence was in the worst category of case. Their Honours stated that the CCA reasoned that the hypothesised case suggested that the sentencing judge wrongly considered that the appellant's lack of awareness that the deceased was a police officer lessened the objective seriousness of the manslaughter. This conclusion explained the imposition of a sentence that was manifestly inadequate.[21]

In relation to the structure of the sentences, Bell and Keane JJ held that in the circumstances, it could not be said that it was

not open to the sentencing judge to impose wholly concurrent sentences, provided the criminality of both offences was appropriately reflected in the sentence for manslaughter.[22] The appellant's liability for the manslaughter was inextricably linked to the wounding offence.[23]

However, the appellant was unsuccessful, on the basis that Bell and Keane JJ, like Gageler, Nettle and Gordon JJ, held that the CCA's conclusion that the original sentence was manifestly inadequate to reflect the seriousness of the offence, was plainly correct.[24]

Endnotes

1. (1981) 147 CLR 383; [1981] HCA 31.
2. *Nguyen v The Queen* [2016] HCA 17 ('Judgment in *Nguyen*'), Gageler, Nettle and Gordon JJ at [47].
3. With a non-parole period of seven years.
4. With a non-parole period of four years and nine months.
5. *R v Nguyen* [2013] NSWSC 197 at [72].
6. *R v Nguyen* [2013] NSWSC 197 at [57].
7. *R v Nguyen* [2013] NSWSC 197 at [69].
8. With a non-parole period of 12 years.
9. With a non-parole period of six years.
10. *R v Nguyen* (2013) 234 A Crim R 324 at [128].
11. *R v Nguyen* (2013) 234 A Crim R 324 at [123].
12. With a non-parole period of 13 years*; R v Nguyen* (2013) 234 A Crim R 324 at [126].
13. (1981) 147 CLR 383 per Gibbs CJ at 389.
14. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [57].
15. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [58].
16. (1981) 147 CLR 383 at 389 per Gibbs CJ (Mason and Murphy JJ agreeing at 395).
17. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [60].
18. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [62].
19. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [66].
20. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [67].
21. Judgment in *Nguyen*, Bell and Keane JJ at [35]
22. Judgment in *Nguyen*, Bell and Keane JJ at [39].
23. Judgment in *Nguyen*, Bell and Keane JJ at [39].
24. Judgment in *Nguyen*, Bell and Keane JJ at [43].

Verbatim

James Patrick ('Jimmy') Page from Led Zeppelin giving evidence in Los Angeles: 15 June 2016.

Q: Well, I imagine you picked up the guitar at a younger age. How old were you?

A: About 12.

Q: And I guess it's safe to assume you weren't a session musician at 12, correct?

A: That's absolutely correct.

Q: Later on -- you had a gift in being able to play the guitar, correct?

A: Well, yeah.

(Laughter.)

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