Sentencing: domestic violence now an aggravating factor

Jonathan Michie reports on *Jonson v R* [2016] NSWCCA 286.

Introduction

In *Jonson v R* [2016] NSWCCA 286 (*Jonson*), the Court of Criminal Appeal empanelled a five judge bench to resolve a tension which had developed regarding the ambit of s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides that an offence will be aggravated if it 'was committed in the home of the victim or any other person'.

The court's judgment empowers sentencing courts to play a greater role in deterring domestic violence, and serves as an important reminder of the principles of statutory interpretation, the doctrine of precedent, and the advocate's duty to fearlessly promote and protect his or her client's interests.

Common law position

In *R v Gazi Comert* [2004] NSWCCA 125 (*Comert*), the applicant had been convicted and sentenced for sexually assaulting his wife in their home. In his application for leave to appeal against sentence, the applicant submitted *inter alia* that the sentencing judge erred by concluding that '[a]n additional aggravating feature of the offence is that it was committed in the complainant's own home where she was entitled to feel and to be safe.'[1] Hidden and Hislop JJ allowed the appeal and, of the impugned conclusion, said:

> No doubt, that would have been an aggravating feature if the offender had been an intruder. However, we are unable to see how a sexual assault on a woman by her husband is rendered more serious because it was perpetrated in the matrimonial home.[2]

Section 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

Section 21(A)(2)(eb) was inserted into the *Crimes (Sentencing Procedure) Act 1999* (NSW) upon commencement of the *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) (Amending Act) on 1 January 2008. In the Second Reading Speech for Amending Act, the then Attorney General said the purpose of s 21A(2)(eb) was to preserve 'the notion of sanctity of the home, whereby individuals are entitled to feel safe from harm of any kind', and to reflect the Legislature's view that:

> any offence committed in the home of the victim, even if it is also the home of the accused, or in the home of another person, violates that person's reasonable expectation of safety and security.[3]

The ambit of s 21A(2)(eb) was considered by the Court of Criminal Appeal on several occasions[4], however it was not until *EK v R* [2010] NSWCCA 199; (2010) 208 A Crim R 157 (*EK*) that its juxtaposition with *Comert* was considered. In *EK*, the court said:

> [*Comert*] was concerned with the common law treatment of aggravating factors, s 21A(2)(eb) not being inserted in the Crimes (Sentencing Procedure) Act 1999 until 1 January 2008, but nothing turns on that. Whether at common law or in terms of the statutory provision, it is an aggravating circumstance where an offender intrudes into the home and not where the offender and the complainant reside together. Again, the judge was misled by submissions by the then Crown Prosecutor and by the concurrence of the applicant's former counsel.[5] (*EK* construction)

The Court of Criminal Appeal applied the *EK* construction on several subsequent occasions[6], however a tension developed when, on other occasions, it doubted the correctness of the *EK* construction[7], or sought to distinguish remarks on sentence from findings that would have been at odds with it[8].

Jonson v R [2016] NSWCCA 286

Following a trial, Mark Jonson was found guilty of recklessly inflicting grievous bodily harm on his wife, Belinda Norman, as well as two counts of sexual intercourse without her consent. On sentence, Hanley SC DCJ found Mr Jonson to be a violent and controlling man, who had in the past slapped, punched, hit, kicked and thrown boiling hot tea on Ms Norman, and who would not allow her to contact her family.

The recklessly inflict grievous bodily harm offence was committed when Mr Jonson and Ms Norman were in their bedroom, and he slapped her so hard, and so many times, that one of her eardrums was perforated and she lost partial hearing in that ear. Although Mr Jonson called an ambulance, he told the triple-0 operator that Ms Norman had fallen down some stairs – a lie she repeated to hospital staff for fear that Mr Jonson would hurt their children by way of reprisal. Like the GBH offence, the sexual assaults occurred in the matrimonial bedroom.[9] Mr Jonson was sentenced to an aggregate term of imprisonment of 9 years, which comprised a non-parole period of 6 years and 5 months and a balance of term of 2 years and 7 months.

Mr Jonson sought leave to appeal against his sentence on the basis inter alia that Hanley SC DCJ erred by concluding that the offences 'were aggravated as a result of being committed in the home of the victim'.[10] Mr Jonson relied on Comert, which he said 'had been consistently followed both before and after the introduction of s 21A(2)(eb) into the Sentencing Procedure Act, albeit in some cases with reservations'[11]. He also submitted that:

> s 21A(2)(eb) should be read as either not extending to the situation where the offender was lawfully present at the victim's home or, if it was to be construed in that fashion, such that s 21A(4) limited the operation of the provision to circumstances where the offender was not lawfully present at the victim's home.

Jonathan Michie, 'Sentencing: domestic violence now an aggravating factor: *Jonson v R* [2016] NSWCCA 286'

Statutory interpretation

The Court of Criminal Appeal repeated the often-stated principle that statutory construction begins and ends with consideration of the text itself, and that although a statutory provision must be considered within its context – so that its construction is consistent with the language and purpose of the statute as a whole – that context does not displace the meaning of the text itself, and courts must not search for what the Legislature had in mind.[12]

Applying these principles, the court held that the text of s 21A(2)(eb) 'does not impose as a pre-condition for its operation that the offender be an intruder into the victim's home', and that the Legislature did not intend for s 21A(2)(eb) to be limited to offences committed by intruders because the section is expressed as extending 'to the home of any other person'.[13]

The court also rejected the limitation imposed by the *EK* construction on the basis that it was contrary to the purpose of the section, and the purpose of the Legislature as outlined in the Second Reading Speech for the Amending Act.[14]

Contrary to any Act or rule of law?

The Court of Criminal Appeal also rejected the submission that s 21A(2)(eb) was circumscribed by s 21A(4) and said that, in order for s 21A(4) to be enlivened, there would have to be an Act or rule of law which stated that:

> unless the offender was an intruder or unlawfully present at the home of the victim, the fact that the offence was committed at the victim's home **could not** be an aggravating factor on sentence.[15]

In this connection, with the exception of *Comert EK* and *Ingham v R* [2011] NSWCCA 88, the court held that there was no authoritative support for the *EK* construction, and noted that in *R v Kershaw* [2005] NSWCCA 56 the court had referred to the judgment of Hidden and Hislop JJ in *Comert*, and said that it was 'related to the case then under consideration and [was] not intended to establish and [did] not establish any general principle'[16].

Conclusion

The Court of Criminal Appeal held that the *EK* construction of s 21A(2(eb) was 'plainly wrong and should be overruled'.[17] It follows that, hereafter, s 21A(2)(eb) operates to aggravate:

> any offence committed in the home of the victim, even if it is also the home of the accused, or in the home of another person, [that] violates that person's reasonable expectation of safety and security.[18]

Endnotes

1. *Comert* at [21].
2. *Comert* at [29].
3. New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, page 2667, John Hatzistergos.
4. See *Aguirre v R* [2010] NSWCCA 115 at [52]-[59]; *Palijan v R* [2010] NSWCCA 142 at [21]-[22]; and *OH Hyunwook v R* [2010] NSWCCA 148 at [35]-[40].
5. *EK* at [79].
6. See *Ingham v R* [2011] NSWCCA 88 at [112]; *BIP v R* [2011] NSWCCA 224 at [61]; *MH v R* [2011] NSWCCA 230 at [34]; *DS v R* [2012] NSWCCA 159 at [145]; *Essex v R* [2013] NSWCCA 11 at [72]; *Pasoski v R* [2014] NSWCCA 309 at [54]; and *Erazo v R* [2016] NSWCCA 139 at [51].
7. See *Melbom v R* [2013] NSWCCA 210 at [2], [43]-[44]; *Montero v R* [2013] NSWCCA 214 at [42]-[47]; *Aktar v R* [2015] NSWCCA 123 at [45]-[64]; and *Erazo v R* [2016] NSWCCA 139 at [46]-[50].
8. See *NLR v R* [2011] NSWCCA 246 at [23]; *DJM v R* [2013] NSWCCA 101 at [9]-[10]; *Melbom v R* [2013] NSWCCA 210 at [51]-[53]; *Montero v R* [2013] NSWCCA 214 at [52]-[54]; *Monteiro v R* [2014] NSWCCA 277 at [94]-[95]; *Aktar v R* [2015] NSWCCA 123 at [65]; *GP v R* [2016] NSWCCA 150 at [66]-[67]; *Sumpton v R* [2016] NSWCCA 162 at [150].
9. *Jonson* at [65]-[66].
10. *Jonson* at [2].
11. *Jonson* at [12]-[13].
12. *Jonson* at [39].
13. *Jonson* at [40].
14. *Jonson* at [41]-[42].
15. *Jonson* at [45] (emphasis in the original).
16. *Jonson* at [24], [47].
17. *Jonson* at [50].
18. New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, page 2667, John Hatzistergos.