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LEGAL PRACTICE

Barbaro v *The Queen* and the Significant Change of Landscape for Submissions on Sentence

On 12 February 2014 the High Court handed down judgement in the case of *Barbaro v The Queen; Zirilli v the Queen* [2014] HCA 2. Whilst the case related to an appeal against the decision of the Victorian Court of Appeal to dismiss sentencing appeals of two convicted drug traffickers, the judgement has cast its effects Australia wide insofar as placing significant restrictions upon the prosecution, and arguably the defence, when the time comes to making submissions on sentence.

Barbaro and Zirilli had been previously convicted of drug trafficking which related to an importation of some 15 million ecstasy tablets which had been secreted in a shipment of tinned tomatoes. It was the largest ecstasy bust in Australian history. Both men had pleaded guilty at first instance to the charges and Barbaro was sentenced to life imprisonment whilst Zirilli received a head sentence of 26 years.

The appeal to the High Court was not on the basis that the sentences were excessive, but rather that the sentencing process had miscarried by virtue of the Sentencing Judge's refusal to hear submissions from the Crown Prosecutor on what would be the appropriate sentencing range for both men.

As is common practice, discussions had been held with lawyers from the defence and prosecution prior to the sentence as to what the prosecution were going to submit would be the appropriate sentencing range. The sentencing range proposed was accepted by the defence and the matters proceeded as sentences. That range was less than what the Sentencing Judge ultimately imposed (after refusing to hear such submissions). The complaint to the High Court was, among other things, that there has been a denial of procedural fairness because the Judge would not hear from the prosecution on the question of range.

The practice of a prosecutor submitting ranges as to what would be the appropriate sentence in any given case had been, in Victoria at least, borne out of the early decision of *R v MacNeil-Brown* [2008] VSCA 190, in which the Victorian Supreme Court of Appeal held that the prosecution should in fact make such submissions on range to assist the Court in coming to a conclusion.

Such a practice has been in place in Queensland for many years and, certainly in the superior courts, crown prosecutors would almost always put forth a submission to the court on what was considered to be the appropriate sentencing range in the given case. That practice has now, suddenly, come to a halt in Queensland following the *Barbaro* decision where the majority of the High Court stated at paragraph 23:

> *To the extent to which MacNeil-Brown stands as authority supporting the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences, the decision should be overruled. The practice to which MacNeil-Brown has given rise should cease. The practice is wrong in principle.*

The procedural fairness arguments by the defendants in the High Court were essentially that the sentence had miscarried because plea agreements had been made and the cases had settled based on the anticipated position the prosecution were to advise the court as to the appropriate sentencing range, and, that they had been disadvantaged by not being able to rely on that position.

In answer to those complaints in *Barbaro*, the majority simply said that such arguments were based on flawed premises in that they depended upon the proposition that the prosecution's

submission on range was a submission of law. It was flawed, the High Court said, because it is for the court and the court alone to determine the appropriate sentence - submissions on range are not submissions of law, but merely matters of opinion, and therefore ought not be permitted to be expressed.

From a practical point of view, such discussions in Queensland have formed a pivotal role in the resolution of matters which may have otherwise proceeded to trial. That is, ought the defendant be prepared to accept the range to be submitted, even though it is entirely a matter for the court to determine the appropriate penalty, it is rare for a sentence to be imposed that is higher than the top end of the range put forth. An example would be where, following negotiations, the prosecution agreed to make a submission that a wholly suspended sentence was within range.

There has been consternation (and disagreement) within the legal industry as to the precise practical application of the decision. For example, does the decision also prohibit the defence from making submissions on the appropriate sentence, or does it only apply to the prosecution?

In a recently published District Court decision of *R v Costin* [2014] QDC 39, His Honour Judge Smith was of the view that whist *Barbaro* prohibited both the prosecution and the defence from placing ranges before the Court (being impermissible statements of opinion), because of the different roles that lawyers for the defence and prosecution play, it remained the law that it was still permissible for the defence to make a specific submission as to a particular result – that not being a submission of opinion, but rather a submission for which that party contends.

In differentiating the roles and duties of the opposing sides, His Honour concludes that a prosecutor's primary role is to assist the court to fairly arrive at a proper conclusion, whereas defence counsel also owe an additional duty to the client for whom they are acting.

Additionally, following submissions from the prosecutor that the ratio of *Barbaro* extended to both parties not being able to submit on matters such as the recording of convictions, breaches of community based orders, suspended sentences – should they be resentenced or activated, or for how long disqualification periods should be imposed where driving offences are concerned, His Honour disagreed saying that such a construction would lead to undue delay as a result of that lack of assistance being provided to the Court. As such, His Honour suggested that submissions of that kind (the prosecution included) assist the court and may, despite *Barbaro,* still be permissible.

Because of the recency of the *Barbaro* decision its effects and specific interpretation are still matters of great conjecture amongst the legal fraternity (Police Prosecutions included). Given the long held practice of both the prosecution and defence being able to negotiate matters into pleas of guilty - based on a level of comfort of what sentence might be achievable having regard to the range settled upon, there is a real concern that matters which otherwise resolved may now proceed to trial. The effects on the administration of justice, defendants, and victims of crime are obvious.

Finally, assumed "closure" (for both the defendant and victim) post-sentence will be eroded due to the court being unaware as to what the prosecution considered to be an appropriate sentence. This has the real potential of causing an increase of Attorney-General's appeal.

For these reasons it is this writer's opinion that legislative amendment is urgently required restoring the ability of <u>both</u> sides of the bar table to offer their learned opinions – based on appropriate precedent where available, to assist court in arriving at the most just decision in sentencing matters.

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