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Understanding the Dennis Ferguson Debate – Part 1

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The words 'Dob in this monster' appeared in large print on the front page of *The Gold Coast Bulletin* on 2 July 2008 following the release of Dennis Ferguson the previous day.[1] Many would say that these headlines and the sentiments expressed within such articles are representative of the community's outrage towards the legal inadequacies in Queensland of dealing with sex offenders. At the risk of offending the 'community' and being unpopular for advocating an alternative viewpoint, it appears that education about the law in this area is sorely needed. The purpose of this article is not to defend Ferguson (he has his own lawyers for that), or others of his ilk. It is to ensure that the discussions that occur in homes, schools and workplaces are informed ones based on knowledge of the correct facts and relevant law.

The facts

Since it is Ferguson's case that stimulated this debate, it seems fitting to examine the facts in his matter.

On 28 June 1988 Dennis Ferguson was convicted of a number of sexual offences against children following a trial throughout which he maintained his innocence. He was sentenced to 14 years imprisonment with Justice Derrington knowing of, and presumably taking into account, Ferguson's criminal history, including five previous convictions for sexual offences against children.[2]

Ferguson was released from custody in 2003. In prison he had continued to assert his innocence and so did not participate in the Sex Offenders Treatment Program which requires an admission of guilt. He served the entire term of his sentence and upon release was not subject to any supervision under parole conditions. Instead, the only legislative protection available to the community was via an application by the Director of Public Prosecutions to bave Ferguson report his residential address and any change of such or any change of his name to police.[3] On the day before Ferguson was due for release, Justice Mackenzie, being satisfied that the requisite substantial risk existed that Ferguson would re-offend by committing sexual offences against children under 16, subjected him to those reporting conditions for the next 15 years.[4]

After his release Ferguson initially lived in Queensland, but moved to New South Wales, where his reporting obligations continued and were expanded to include employment details (among others).[5] Police arrested Ferguson for failing to comply with these obligations in September 2003. He was then remanded in custody and in November, after pleading guilty, a NSW Local Court sentenced him to 15 months imprisonment, without parole.[6]

Returning to Queensland days after his release in December 2004, Ferguson was constantly on the move trying to evade ever-present media attention and picketing residents.[7] On 10 November 2005, he found himself arrested and remanded in gaol for allegedly indecently dealing with two girls.[8]

His defence lawyer unsuccessfully submitted in the Brisbane Magistrates Court that there was no case to answer and Ferguson was committed to stand trial in the District Court.[9] His trial on two counts – (1) indecent treatment on 9 November 2005 of a cbild, 'K', and (2) indecent treatment on 9 November 2005 of a child, 'B' – started on 31 March 2008. When the Crown completed its case on 2 April 2008, Judge Martin found insufficient evidence on the second count. Following the Crown's entry of a *nolle prosequi*,[10] Ferguson was discharged and so was the jury. Judge Martin implied that the first count sbould encounter the same treatment, but the Crown refused, resulting in tbe matter coming before Judge Botting.[11]

Ferguson's lawyers brought a pre-trial application for a stay of proceedings, citing 'adverse pre-trial publicity and ... weakness of the Crown case.'[12] On 1 July 2008 this application was successful and a permanent stay was ordered. As such, the trial was not to proceed and Ferguson was released.

Subsequently Ferguson was again hunted from his accommodation[13] while awaiting the outcome of an appeal against Judge Botting's decision. The Crown contended that the judge bad mistakenly exercised his discretion in ordering a stay.

The Court of Appeal delivered its judgment on 8 August 2008, allowing the Crown's appeal.[14] The upshot was the issue of a warrant for Ferguson's arrest and he is required to stand trial on 2 March next year.[15] In the meantime Ferguson's lawyers have applied to the High Court of Australia for special leave to appeal against the decision of the Queensland Court of Appeal[16] and Ferguson has been granted bail.[17]

The debate about how to deal with Dennis Ferguson and others like him continues to saturate media reports of the written, audio and visual kind, talkback radio and internet blogs. So what issues are raised and wbat laws are in place to address them? Part 1 of this article will deal with the legal issues pertaining to the appeal, while Part 2 (to appear in an upcoming edition of *Legal Eagle*) will consider otber laws relevant to deliberations about Ferguson's treatment, particularly relating to sentencing and protection of the community.

The right to a fair trial and the rule of law

The highest court in Australia has stated that '[t]he central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial according to law.'[18] This principle underpinned Judge Botting's decision in exercising his discretion to stay Ferguson's case.[19] In its decision the Court of Appeal also noted that this fair trial safeguard protected an individual's liberty,[20] quoting Justice Deane in the High Court as follows:

> 'The ability of a society to provide a fair and unprejudiced trial is an indispensable basis of any acceptable justification of the restraints and penalties of the criminal law.

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Indeed, it is a touchstone of the existence of the rule of law.'[21]

The rule of law requires that everyone is treated equally before the law; even so-called 'rock spiders'[22] are given the benefit of the well-worn adage, 'Innocent until proven guilty'. To ensure that jurors uphold this equality and to provide that their reasoning towards a guilty verdict is based on the evidence about the offence before them rather than on an accused's prior conduct, Australian law has evolved to require that prior criminal history (or propensity evidence) is only admissible in limited circumstances[23] and the Queensland parliament has legislated to prevent accused persons being asked questions about their criminal history unless certain conditions are met.[24]

So there are instances when information about an accused's past misdeeds will be presented to jurors but this is strictly controlled by the court, which can give appropriate warnings prior to and following the disclosure.

Prejudicial pre-trial publicity

Prejudicial pre-trial publicity, that is media attention that has condemned an accused person to guilt or that divulges their prior criminal convictions or other adverse information to potential jurors, arguably cannot be monitored in the same way. Protection for an accused against this kind of prejudice is usually afforded by directions from the judge at trial, following the selection and empanelling of already possibly contaminated jurors. The trial judge generally makes some variation of the following comment to jurors as part of the summing up:

> 'If you have heard, or read, or otherwise learned anything about this case outside this courtroom, you must exclude that information from your consideration. Have regard only to the testimony and the exhibits put before you ... in this courtroom since this trial began. Ensure that no external influence plays a part in your deliberations ...[25]
>
> You should dismiss all feelings of sympathy or prejudice, whether it be sympathy for or prejudice against the defendant or anyone else. No such emotion has any part to play in your decision. [Nor should you allow public opinion to influence you.] You must approach your duty dispassionately, deciding the facts upon the whole of the evidence.'[26]

Where there has been adverse publicity this direction will be stressed a number of times. For example, in the case of the person convicted of burning down the Childers' backpacker hostel causing 15 deaths, the judge directed the jury three times to ignore what they may have 'heard on radio, see[n] on television, or read in the newspapers'[27] and told them not to conduct any private investigation outside the trial.[28]

In Ferguson's case, before the trial began Judge Botting considered that there was much adverse, even vitriolic, public comment about the accused (including disclosure of his numerous convictions) published in widely circulated Queensland newspapers, locally on television and on the internet.[29] He found the media saturation so pervasive that it would be impossible to conceive of a jury who would not be familiar with Ferguson's situation[33] and who could be dispassionate in its judgment.[31]

Stay of proceedings

When a court makes a finding that unfairness will result at this pre-trial stage it is entitled to act to prevent the abuse of process that would follow in the continuation of proceedings.[32] It can do this by ordering that the proceedings are stayed (or stopped) either temporarily or permanently. However, a permanent stay must only be ordered in exceptional or extreme circumstances where there are no other options available to the court to combat the possible unfairness.[33] In the District Court, Judge Botting found that due to the extraordinary nature of the publicity surrounding Ferguson and importantly because of the problems inherent with the evidence in the Crown's case, making it very weak,[34] this was the exceptional case envisaged by earlier decisions.

The Court of Appeal was not similarly persuaded. The bench was unanimously of the view that Judge Botting had acted prematurely in ordering the stay as he had not considered other avenues available to avert unfairness. These options included adjourning the trial to allow for the publicity to dissipate[35] and making use of s 47 of the *Jury Act* 1995 (Qld). That section provides the opportunity for the court to inquire of jury members to determine the impact of the media coverage. The Court of Appeal asserted that failure to use this tool resulted in pure speculation that jurors could not be impartial, infringing against the following comments made by Chief Justice Mason and Justice Toohey in the High Court case of *The Queen v Glennon*:

> 'The mere possibility that such knowledge [of prior convictions] may have been acquired by a juror during the trial is not a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice. Something more must be shown. The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence.'[36]

The public interest in prosecution and the rule of law

The accused's right to a fair trial sits on one side of the scales of justice when the court considers whether to exercise its discretion in ordering a permanent stay. Weighing heavily on the opposite side and influencing the extraordinary circumstances requirement are the rights of the public or the victims in trying those accused of serious crimes. Judge Botting considered these interests, referring to previous cases that discussed the court's need to maintain public confidence in the judicial system.[37] The presumption in favour of 'permitting prosecutions to proceed with procedural and other rulings and directions moulded to achieve a fair trial'[38] is necessary to guarantee that those notorious accused, who often generate the most interest and consequently the most adverse media attention, are not immune from prosecution.[39] Those accused of the most heinous crimes must also be accountable under the rule of law. Otherwise if the judicial system is undermined, and the only trial that occurs is in the court of public opinion, victims or other members of the public may be inclined take the law into their own hands.[40] Dennis Ferguson experienced such vigilante behaviour, being exposed to repeated verbal abuse and threats.

Despite the allegations on this occasion amounting to only a 'tenuous' Crown case,[41] the Court of Appeal did not

consider that this impacted on whether the case was exceptional. Rather it emphasised that the integrity of the system must be maintained by leaving the case in the first instance to jurors, who have taken an oath to make their decision according to the evidence, to determine.[42]

Further, the Court of Appeal noted that protections are already built into the system with the ability to appeal where there has been a miscarriage of justice due to an unreasonable or unsupportable verdict.[43]

Conclusion

The decision to release Dennis Ferguson, staying his proceedings, was met with condemnation from the community at large and was reported widely in the media. The subsequent furore seemingly fulfilled Judge Botting's prophecy that it would be difficult for Ferguson to receive a fair trial. The District Court judge tried to avoid what he perceived as an inevitable conclusion of a trial upon scanty evidence following media hype and public pressure upon a jury – unfairness resulting in a miscarriage of justice.

In overturning the District Court decision the Court of Appeal too warned the media that '[c]ontinuing adverse pre-trial publicity may, notwithstanding all judicial and systemic safeguards, imperil [the fundamental right to a fair trial]. It is, therefore, to be hoped that the media will exercise restraint in its reporting of matters relating to the respondent.[44]

However, given that in Australia prejudicial pre-trial publicity has only ever been successfully argued on one unusual occasion,[45] its continued use in the future would be unexpected – especially when, even in a case where two independent judges have now indicated that the evidence in Ferguson's case should not result in a finding of guilt, the Queensland Court of Appeal has denied that the circumstances warrant the extremity required for the application of a permanent stay.

The Court of Appeal anticipated that the impact of its finding may be to unduly prolong proceedings. Indeed the outcome (if the reasoning of the Court of Appeal is upheld by the High Court) may be that the trial in March results in an acquittal, due to lack of evidence; or alternatively, if a conviction is obtained on the current evidence, an appeal may be lodged on the ground that the jury's verdict is unreasonable and unsupportable. On the other hand, the High Court may find that the original decision of the District Court should stand. In the end then the matter may come full circle with Ferguson free again. And, particularly if it is a result of a judicial decision, the public is unlikely to be satisfied by assurances that the proper procedures have been followed along the way. This is because of the legitimate concern about protecting the vulnerable members of our community, children, from sexual predators. But that will be discussed in Part 2 of this article, so you will have to wait for the next instalment to continue your debates.

References

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5. By virtue of ss 9-10 *Child Protection (Offenders Registration) Act* 2000 (NSW).
6. 'Imprisoned paedophile screams at magistrate', *The Courier-Mail* (25 November 2003).
7. 'Paedophiles and public rage', *The Courier-Mail* (3 February 2005).
8. 'Ferguson charged with child sex crime', *The Australian* (11 November 2005).
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10. A document which indicates that the Crown does not want to continue with the prosecution.
11. *The Queen v Dennis Raymond Ferguson* [2008] QDC 136, 3-4.
12. Ibid 4.
13. See, eg, 'PM joins "right to know" protesters - Ferguson furore rages as Government seeks answers', *The Courier-Mail* (5 July 2008).
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15. 'Trial date set for accused molester', *The Courier-Mail* (22 August 2008).
16. 'Ferguson launches High Court appeal', *The Courier-Mail* (21 August 2008).
17. 'Ferguson bailed to appeal decision', *The Courier-Mail* (12 August 2008).
18. *McKinney v The Queen* (1991) 171 CLR 468, [23] (Mason CJ, Deane, Gaudron and McHugh JJ).
19. Above n 11, 7, and quoting from a number of other judgments on pp 8-16.
20. Above n 14, [23].
21. *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 58.
22. The slang term reserved for paedophiles in Australia.
23. Where its probative value outweighs its prejudicial effect – see, eg, *Phillips v R* (2006) 225 CLR 303 and *Pfennig v R* (1995) 182 CLR 461; or where legislative provisions allow admission – such as s 132B *Evidence Act* 1977 (Qld).
24. Section 15(2) *Evidence Act* 1977 (Qld).
25. Queensland Supreme and District Court Benchbook – Summing Up – General – No 24.2, available at http://www.courts.qld.gov.au/2265.htm.
26. Queensland Supreme and District Court Benchbook – Summing Up – General – No 24.5, available at http://www.courts.qld.gov.au/2265.htm.
27. *R v Long; ex parte A-G (Qld)* [2003] QCA 77, [171].
28. Ibid [172].
29. Above n 11, 4.
30. Ibid 6.
31. Ibid 7.
32. *Walton v Gardiner* (1993) 177 CLR 378, 392.
33. See *Jago v District Court (NSW)* (1989) 168 CLR 23, *Barton v The Queen* (1980) 147 CLR 75 and *Williams v Spautz* (1992) 174 CLR 509.
34. Above n 11, 26.
35. Above n 14, [58].
36. (1992) 173 CLR 592, 603.
37. Above n 11, 9.
38. *R v Johannsen and Chambers* (1996) 87 A Crim R 126, 135.
39. See the discussion in above n 11, 12, of Brennan J's comments in *Jago v District Court (NSW)* (1989) 168 CLR 23, [28].
40. See, also, above n 36, 613-614.
41. As described in above n 11, 9 and 25.
42. Above n 14, [39].
43. Ibid [63].
44. Ibid [59].
45. In the case of *Tuckiar v The King* (1934) 52 CLR 335.

Where do you stand?

With reference to the recent Queensland decisions regarding Dennis Ferguson, do you favour the views of Judge Botting or the Queensland Court of Appeal?

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