Childhood Sexual Abuse

Case Summaries

Note: Childhood sexual abuse ('CSA') has been taken into account by sentencing courts in relation to persons convicted of **child sexual assault offences**. CSA has also been taken into account in relation to those convicted of **other types of offences** — for example, as contextualising substance addiction considered to have contributed to the relevant offending.

New South Wales

(i) Reducing moral culpability where CSA contributed to child sexual assault offences – relevant to prospects of rehabilitation

***R v AGR* (NSWCCA, 24 July 1998, unreported)** (James J, Mason P and Grove J agreeing)

Child sexual assault offences over 23 year period on complainants aged 3 to 15 – CSA taken into account as reducing moral culpability where contributed to offender's criminality – Appeal allowed

- Per James J (Mason P and Grove J agreeing):

  > In my opinion, if it is established that a *child sexual assault offender* was himself sexually abused as a child and that that history of sexual abuse has *contributed* to the offender's own criminality, that is a matter which can be taken into account by a sentencing judge as a factor in mitigation of penalty as reducing the offender's moral culpability for his acts, although the weight which should be given to it will depend very much on the facts of the individual case and will be subject to a wide discretion in the sentencing judge. Evidence that a child sexual assault offender was himself sexually abused as a child can also be relevant to the offender's prospects of rehabilitation ... (emphasis added)

- Sentencing judge erred in holding rehabilitation was only way in which open to take into account evidence of CSA.
- CCA took into account that applicant had experienced CSA, there was a "connection" between the CSA and dysfunctional childhood and commission of the offences and that applicant was gaining insight into his CSA.

***R v JAH* [2006] NSWCCA 250** (Adams J, Sully J agreeing)

Child sexual assault – clear link between CSA, physical abuse, placement into a violent foster home and refuges, ultimately abusing alcohol and other drugs: at [45]

- These matters of considerable significance and should have been taken into account in mitigation: **at [44]–[47]**; citing ***R v AGR* (NSWCCA, 24 July 1998, unreported)**

- Applicant never received any counselling for his CSA which had a significant effect upon his psychological wellbeing: **at [16]**
- Mitigation arising from appalling childhood circumstances justify a finding of special circumstances: **at [52]**; **s 44 *Crimes (Sentencing Procedure) Act 1999***

(ii) CSA taken into account "as a part of the matrix of subjective features" although CSA did not contribute to offending

***Henry v R* [2009] NSWCCA 69** (Grove J, McColl JA and Howie J agreeing)

Child sexual assault

- Although CSA did not contribute to applicant's criminal conduct and thereby reduce moral culpability, the judge brought the CSA into account "as a part of the matrix of subjective features", recognising that CSA may be taken into account in the subjective assessment of an offender: **at [15]–[16]**; citing ***R v Rich; R v Rich* [2000] NSWCCA 448**

***R v Rich; R v Rich* [2000] NSWCCA 448** (Studdert J, Wood CJ at CL and Whealy J agreeing)

Single offence of child sexual assault

- CSA was a relevant subjective feature to be taken into account: **at [48]–[49]**; citing ***R v AGR* (NSWCCA, 24 July 1998, unreported)** – Crown appeal dismissed
- Respondent's statement referring to CSA was admitted without objection so that the sentencing judge was entitled to act upon it: **at [45]–[46]**

(iii) Judicial reference to research materials

***R v Ryan* [2019] NSWDC 195** (Yehia SC DCJ)

Historical child sexual assault offences – offender priest, aged 81 – CSA, exposure to extreme domestic violence: at [52], [55]

- Effects of childhood trauma – CSA associated with a diverse range of negative outcomes: **at [60]**; citing J Cashmore and R Shackel, *The Long-Term Effects of Child Sexual Abuse* (Australian Institute of Family Studies, 2013)
- Adult offenders who sexually abuse children are most likely to have been exposed to domestic violence and to have been sexually abused as a child. The offender was traumatised by both forms of abuse: **at [61]**; citing Phil Rich, 'Sexually Abusive Behaviours, Victims, and Perpetrators' in *Understanding, Assessing and Rehabilitating Juvenile Sexual Offenders* (Wiley, 2003) 15–37
- Does not excuse conduct but background places offending conduct in proper context particularly having regard to the psychological evidence: **at [62], [58]–[59]**

(iv) CSA not taken into account on sentence – child sexual assault offences

***KAB v R* [2015] NSWCCA 55** (Wilson J, Ward JA and Simpson J agreeing)

Child sexual assault offences over 9 years on step-daughters aged 11–17 – CSA not a mitigating feature; not a contributory factor to offending; no causal connection; not relevant to rehabilitation prospects – appeal dismissed

- For CSA to be taken into account as a mitigating feature, the fact of the abuse and a conclusion the CSA was a contributory factor to the offending must be established on balance of probabilities: **at [64]**; citing ***R v AGR* (NSWCCA, 24 July 1998, unreported)**
- Applicant gave no evidence of his CSA; his account was not able to be tested in cross-examination. The sentencing judge was entitled to treat the claims with some circumspection: **at [65]**; citing ***R v Qutami* [2001] NSWCCA 353 at [58]–[59]**
- Even if the applicant's self-report to the expert was sufficient to establish CSA occurred, there was no evidence to establish a causal connection to the offences. The psychiatrist did not positively conclude a link existed: **at [66]**
- In considering prospects of rehabilitation, the judge did not need to consider the CSA where there is no causal connection. If the CSA had no relevance to the offending, the applicant's determination to seek counselling or treatment could have had no impact on the prospects of rehabilitation: **at [67]**
- Weight to be given to CSA is a matter for the sentencing judge. The fact that the judge accorded little or no weight is not demonstrative of error: **at [68]**

***Dousha v R* [2008] NSWCCA 263** (Fullerton J, Bell JA and Latham J agreeing)

Child sexual assault – single incident of CSA aged 13 – appeal dismissed

- No direct evidence CSA contributed to offending; psychologist did not consider CSA contributed to offending: **at [47]**
- Absence of any causal connection; no bearing upon prospects of rehabilitation – CSA incident not relevant to sentencing discretion: **at [47]**; citing ***Cunningham* [2006] NSWCCA 176 at [67]**

***R v Cunningham* [2006] NSWCCA 176** (Bell J, Grove and Simpson JJ agreeing)

Child sexual assault – offences committed in breach of bond

- Benefit for CSA already received at original sentence: **at [67]**
- Psychiatric evidence did not suggest CSA contributed to offences: **at [67]**; citing ***R v AGR* (NSWCCA, 24 July 1998, unreported)**

(v) CSA not taken into account – offending other than child sexual assault

***Nand v R* [2014] NSWCCA 293** (Schmidt J, Gleeson JA and Bellew J agreeing)

Sexual assault against adult complainant

- No evidence of connection between CSA and offending: **at [95]**–**[96]**; citing ***Dousha* [2008] NSWCCA 263 at [47]**
- Applicant's account of CSA provided in expert reports: **at [74]–[78]**; applicant did not give evidence about CSA at sentencing hearing and not pursued in submissions: **at [92]**; sentencing judge did have regard to expert report that applicant relied on drugs to self-medicate due to recurrent distressing memories of CSA: **at [97]–[98]**; an appeal, further evidence as to CSA not received as new evidence: **at [95]**

***R v Lett* (NSW CA, 27 March 1995, unreported)**

Murder of 6-year-old child – sexual motive

- CSA not a mitigating factor; CSA cannot properly be given very much (if any) weight; Court unable to see how CSA could mitigate murder committed in order to cover up a child sexual assault by someone with such a history.
- Court rejected any link that CSA led to applicant's alcohol dependency.

(vi) CSA contextualised drug or alcohol addiction that was seen to contribute to offending – offending other than child sexual assault

***Linden v R* [2017] NSWCCA 321** (Wilson J, Simpson JA and RA Hulme J agreeing)

*Drug supply – CSA aged 5–14 by stepfather – powerful case in mitigation including using cannabis in teenage years to "cope with emotional distress and to block out traumatic memories": **at [4]***

- Subjective mitigating features include: offending significantly motivated by drug addiction in circumstances where resort to drugs related to childhood trauma (**at [10], [52]**), and applicant's dysfunctional and traumatic background: **at [10]**; citing ***Bugmy v The Queen* (2013) 249 CLR 571**
- Moral culpability for offending considered less (although minimally so) on account of depression, anxiety and PTSD: **[8]–[9]** – substantial leniency extended based on subjective case (and hardship to children): **at [15]**

***Edwards v R* [2017] NSWCCA 160** (Garling J, Hoeben CJ at CL and Fullerton J agreeing)

*Robbery – applicant's subjective case taken into account on re-sentence: **at [47]***

- Disadvantage emanating from exposure to CSA by uncle and domestic violence and later drug addiction; history of abusive relationships: **at [8]–[10]**
- Deprived background, most disadvantaged upbringing: **at [15]**; citing ***Bugmy v The Queen***

***Miller v R* [2015] NSWCCA 86** (Schmidt J, Meagher JA and Simpson J agreeing)

Break and enter for purpose of obtaining drugs – appeal allowed

- CSA and physical abuse by mother's partner; drug and alcohol abuse aged 12; homelessness; youth refuges and foster care; drug addicted adult: **at [17]–[18]; [104]–[107]**
- Full extent of applicant's personal history and circumstances not taken into account by sentencing judge: **at [35], [119]**; citing ***Bugmy v The Queen* (2013) 249 CLR 571**

***R v Henry* [1999] NSWCCA 111; (1999) 106 A Crim R 149** (per Simpson J)

Armed robbery – drug addiction stemming from CSA

- Drug addiction can have origins in social disadvantage, poverty, emotional, financial, or social deprivation, poor educational achievement, unemployment, and the despair and loss of self-worth that can result from these circumstances. Sometimes drug taking stems from sexual assault or exploitation, sometimes committed when the person is very young, and sometimes the precipitating events have occurred many years before: **at [336]**
- Drug abuse may reflect the socioeconomic circumstances and environment in which an offender has grown up: **at [339]**; **cf *R v Fernando* (1992) 76 A Crim R 58 62–3**

***R v CB; R v IM* [2006] NSWSC 261** (Buddin J)

Murder and maliciously inflict GBH – evidence suggests offenders developed drug dependency after being subjected to CSA: ***at [111]***

- Condition of offenders largely drug induced; not "fully aware of the consequences of [their] actions" by reason of their mental condition at the time: **at [112]**
- However, only limited weight to be given, particularly given the passage of time between CSA and offences, and that their actions demonstrated considerable deliberation: **at [113]**

(vii) CSA leading to a psychiatric or psychological condition

***R v Hutchison* [2019] NSWSC 25** (Hamill J)

Manslaughter / substantial impairment – psychiatric illnesses resulted from horrendous childhood abuse including CSA by stepfather: ***at [17], [36]***

- Offender forced into refuges, shelters and streets; drug use and long-standing substance abuse disorder; problematic and dependant relationships: all of these outcomes are familiar to lawyers and counsellors in dealing with cases and victims of serious and ongoing CSA: **at [36]**

> [37] The considerations that arise when an offender's life has fallen apart because they were the victim of CSA are similar to the sentencing principles that apply when the offender was the victim of domestic violence (*R v TP* [2018] NSWSC 369) or when their early life was marred by significant social deprivation and exposure to alcoholism and violence (*Bugmy v The Queen* (2013) 249 CLR 571) …

***JL v R* [2014] NSWCCA 130** (McCallum J, Hoeben CJ at CL and Harrison J agreeing)

Child sexual assault against daughter aged 7–11 over 4-year period – appeal dismissed

- Repeated instances of CSA by uncle during childhood. Sentencing judge accepted CSA resulted in applicant suffering from depression and drinking more, which lessened applicant's moral culpability to some degree, though did not accept depression contributed to offending: **at [47]–[48]; [38]–[39]** citing ***AWF* [2000] VSCA 172; (2000) 114 A Crim R 434 at [6]** where Ormiston JA stated "in general it is not so much the cause that is important: rather it is the consequences which flow from those earlier events."
- Contributing factor of CSA given relatively minor weight in all the circumstances, having regard to the serious nature of offending: **at [49]**

Victoria

***R v AWF* [2000] VSCA 172; (2000) 114 A Crim R 434** (Chernov JA, Ormiston JA and Buchanan JA agreeing) (cited in ***JL v R* [2014] NSWCCA 130 at [38]–[39]**)

Child sexual assault offences against daughter and stepdaughter – relevance on sentence – leading to psychiatric or psychological condition which takes away from the criminality of that behaviour may have some greater significance – appeal allowed

- Sentencing judge erred in rejecting unchallenged psychiatric evidence explaining appellant's offending that "there is an association between having been personally abused and the tendency to abuse": **at [29]–[31] per Chernov JA**
- Sentencing judge erred in concluding appellant's CSA experience was irrelevant. The fact the appellant was abused as a child was clearly relevant, bearing upon the offender's personal circumstances and goes to the issues of moral culpability and rehabilitation. It does not excuse the offending conduct, and weight to be given to it is another matter: **at [34] per Chernov JA**
- An offender's history and psychological condition can provide an explanation "but by no means a true excuse for that behaviour": **at [5] per Ormiston JA**; citing ***Lomax* [1998] 1 VR 551; (1997) 91 A Crim R 270**
- "The importance of an offender's background will vary according to its connection with the offences charged and the extent to which the Court may properly take that factor into account. Almost without exception it cannot be seen as excusing the relevant behaviour, but if it leads to a psychiatric or psychological condition which takes away from the criminality of that behaviour, then it may have some greater significance.": **at [3] per Ormiston JA**

- Evidence relevant where there is no dispute and expert evidence connects the CSA with the offender's offending. CSA does not automatically lead to some reduction of sentence. In general it is not so much the cause that is important: rather it is the consequences which flow from those earlier events. If there is evidence to link them to a condition or state of mind which is a proper basis for viewing the criminality of an offender as less serious and for saying that specific or general deterrence (or both) should have a smaller part to play in the overall sentencing process, then that condition will have a greater relevance and significance: **at [6] per Ormiston JA**

***DPP v Walsh (a Pseudonym)* [2018] VSCA 172** (Maxwell P, McLeish JA agreeing, Ashley JJA agreeing appeal be allowed but disagreeing as to sentence)

Incest; stepdaughter aged 11–13 – CSA only of moderate weight in mitigation – Crown appeal allowed

- Expert evidence that due to CSA the link between providing sexual gratification and being shown affection was a part of the respondent's experience and became normative: **at [32]**
- The CSA deserved only moderate weight in mitigation. Incest involving a child is an offence of very high culpability, since it is so obviously contrary to every tenet of parental care for children and since every parent is taken to understand that sexual activity is absolutely prohibited: **at [33]**
- The respondent knew it was wrong to have sex with his young stepdaughter. It is difficult to accept his moral blameworthiness is significantly less than that of any other offending parent. The link with his own experience explains why he committed the offence "but it could hardly be said to excuse it": **at [34]**; citing ***Lomax* [1998] 1 VR 551 at 560–1**

***DPP v Tewksbury (a Pseudonym)* [2018] VSCA 38** (Tate and Kyrou JJA and Kidd AJA)

Child sexual assault of stepdaughter over 2.5 year period aged 12–14 – notwithstanding absence of link between history (including CSA) and offending, history found to be a relevant mitigating factor – offender gave private testimony at Royal Commission into Institutional Responses to Child Sexual Abuse – Crown appeal allowed

- The respondent's experiences of neglect and abuse as a child (and emotional hardship in custody as a consequence of his traumatic experience as a youth in an institutional setting, and the presence of his abuser at the same correctional facility) are important matters that can be taken into account in mitigation: **at [103]–[104]**; citing ***AWF v R* [2000] VSCA 172; (2000) 114 A Crim R 434; *GEM v The Queen* [2010] VSCA 168 at [54]**
- Notwithstanding the absence of evidence of any link between the respondent's "traumatic history" (including neglect and abuse by mother and sexual abuse at boys' home) and offending, that history was a relevant mitigating factor in the circumstances: **at [97]**
- Taken together (with plea and deportation), the mitigating circumstances warranted a significant discount on sentence. However, those circumstances to be balanced against gravity of the offending: **at [98]**

***Beevers v R* [2016] VSCA 271** (Priest and Santamaria JJ)

Arson; attempt obtain property by deception – weight to be given to CSA – procedural unfairness where judge rejected CSA

- An offender will carry the onus of establishing the fact of CSA and the manner in which it is relevant to sentence. The weight to be given to an offender's childhood sexual abuse will vary from case to case. There should be no general expectation there will be a substantial reduction in every set of circumstances: **at [35]**; citing ***R v AWF* [2000] VSCA 172 at [7]**
- Judge denied applicant procedural fairness in rejecting CSA without giving notice and inviting further submissions, given that CSA at the core of the plea in mitigation, CSA and its effects was accepted by judge during discussion, and the prosecution made no challenge to its occurrence: **at [39]**

***GEM v R* [2010] VSCA 168** (Maxwell P and Weinberg JA)

Child sexual assault offences – CSA – appropriate weight – nexus

- The weight properly to be given to CSA as a factor in sentencing "will vary greatly from case to case": **at [54]**; citing ***AWF* [2000] VSCA 172 at [3]**
- Expert evidence as to whether or not there is a nexus between the abuse and the offending will usually be critical. In the present case, the expert could only say the appellant "perceived" there to be such a nexus. This may be contrasted with a case where the evidence before the court confirms an objective link between the earlier abuse and "a condition or state of mind which is a proper basis for viewing the criminality of an offender as less serious …' ***AWF* [2000] VSCA 172 at [6]**