What to do after a s.32 application is refused

By KAREN WEEKS

Practitioners should be aware of the further steps they can take if their first s.32 application to have a mentally ill or cognitively impaired client diverted from the criminal justice system is knocked back.

Karen Weeks is the principal of Criminal and Mental Health Lawyers, email karen@cmhlaw.com.au.

Receiving instructions from a client with a cognitive or mental health impairment is something that every criminal law practitioner will encounter in their practice. Section 32 of the *Mental Health (Forensic Provisions) Act 1990 (MHFP Act)* creates a diversionary measure which allows a person with a developmental disability, mental illness or mental condition to be diverted from the criminal justice system to be treated in an appropriate rehabilitative context enforced by the court.

When making a s.32 application in the Local Court, a practitioner must have alternative options prepared in the event the application fails.[1] This is particularly important in the case of serious offences and traffic matters where resistance and opposition to the use of the diversionary regime are frequently encountered.

In most cases, after a s.32 application is refused, the matter will proceed immediately to sentence and a practitioner must have submissions in mitigation of sentence prepared.

In other cases, a practitioner may need to consider making an application to have the magistrate disqualified from hearing the proceedings further, appealing to the Supreme Court or making a further s.32 application in the Local or District Court on appeal.

Making an application to disqualify

Prior to the enactment of the *Mental Health (Criminal Procedure) Amendment Act 2005* a magistrate was required to disqualify themselves from hearing the proceedings further if a s.32 application was refused.[2] Concerns in relation to spurious applications and forum shopping, delay and the practical difficulties which arose in regional courts led to the repeal of the provision.[3] Nevertheless, the common law in relation to bias remains and a magistrate can be asked to disqualify themselves on the basis of actual or apparent (apprehended) bias.

The rule against bias – actual or apparent?

The rule against bias is fundamental to natural justice[4] and reflects the principle that "justice should not only be done, but should manifestly ... be seen to be done".[5] Bias may be actual or apparent (apprehended).

The focus of the inquiries and tests involved in each are distinct, as confirmed by the High Court in *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48.[6] In terms of apprehended bias, "the test to be applied ... is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide", the court said.[7]

On the other hand, actual bias "would require assessment of the state of mind of the judge in question. No doubt that would have to be done, at least for the most part, on the basis of what the judge had said and done".[8]

A practitioner contemplating an application to disqualify should consider basing the application on apparent (apprehended) bias rather than on actual bias, given the heavy burden of proof involved in the latter. Apparent (apprehended) bias will achieve the same result and has been described as the more tactful plea.[9]

It is imperative that any application to disqualify on the grounds of bias be made without delay, otherwise the practitioner could be found to have waived the objection.[10]

Forum shopping should never lie behind a practitioner's application to disqualify.[11]

Practitioners should also carefully consider whether it is worthwhile proceeding with an application to disqualify if there is a risk of putting the magistrate offside.

Further, if the application to disqualify also fails, the finalisation of the proceedings will have been delayed, most likely at the client's expense.

There must also be some utility in having the proceedings transferred to another magistrate. If the application to disqualify

is successful, little will be gained in having the proceedings transferred to a magistrate who is known to frequently refuse s.32 applications or be heavy on penalty.

Supreme Court appeal

An appeal against a magistrate's decision to refuse a s.32 application can be made to the Supreme Court under s.53(3)(b) of the *Crimes (Appeal and Review) Act 2001* (CARA). Section 53(3)(b) of CARA provides that any person against whom an interlocutory order has been made by the Local Court with respect to summary proceedings may appeal to the Supreme Court but only on a question of law alone and only with leave of the court.[12] No doubt the narrow circumstances in which an appeal will lie to the Supreme Court explains the limited judicial consideration of s.32 or its precursor[13] in addition to the potential liability of the client for a costs order should the appeal fail.

As s.32 confers a very wide discretion[14] and gives magistrates powers of an inquisitorial or administrative nature,[15] it is necessary to demonstrate an error in the sense articulated by the High Court in *House v The King* (1936) 55 CLR 499.[16] To succeed, it will be necessary to demonstrate there was an error in the exercise of the magistrate's discretion which might include the magistrate acting on a wrong principle or mistaking the facts, allowing extraneous or irrelevant matters, failing to take into account a material consideration or giving undue weight to some of the facts.

> *"Fearless advocacy is the duty of the advocate and practitioners should not become reluctant to consider the diversionary regime if a s.32 application is unsuccessful."*

A denial of procedural fairness can also give rise to an appeal to the Supreme Court. The s.32 diversionary powers must be exercised in accordance with procedural fairness requirements,[17] for example, a party must be given an opportunity to address the court on relevant matters and reasons must be provided for a decision.[18]

If such errors can be demonstrated, the appellate court can exercise its own discretion in substitution of the magistrate's.[19] Sometimes the matter will be remitted back to the magistrate with an order it be determined in accordance with law. Success could therefore be bittersweet.

Making a second s.32 application in the Local Court

There is no prohibition on making more than one s.32 application in the Local Court and it can be made at any stage of the proceedings.[20]

A second or subsequent s.32 application is best made after some time has elapsed since the first was refused. Time might permit the client to implement or demonstrate compliance with a treatment plan.

It is doubtful whether a second s.32 application would succeed in the absence of fresh material or some change in circumstances.

Pleading not guilty

In a limited number of cases, a practitioner will have received instructions to enter a plea of not guilty after a s.32 application is refused and the matter will proceed to a defended hearing.

The matter is likely to be further adjourned for the service of a brief of evidence and/or for hearing on a future date.

A second or subsequent s.32 application could be made when the matter returns to court.

Pleading guilty – submissions on sentence

In the majority of cases, a practitioner will have instructions to enter a plea of guilty (or confirm an earlier plea of guilty) after a s.32 application is refused, and the matter will move immediately to sentencing. A practitioner must be prepared to make submissions in mitigation of sentence. Any reports and other material tendered in the s.32 application can be tendered in the sentencing proceedings.

Sometimes a magistrate will adjourn the proceedings after ordering a pre-sentence report (PSR) be prepared if a duty report cannot be prepared that day. As noted above, there is nothing preventing the practitioner making a further s.32 application when the matter returns to court.

The significance of mental illness of an offender in the sentencing exercise has long been accepted at common law.[21] More recently, sentencing legislation has permitted courts to take into account an offender's mental health or cognitive impairments on sentence.[22] Practitioners should be familiar with the relevant provisions and case law and refer to them in submissions on sentence. Sometimes it will be possible to persuade the court to exercise the s.10 discretion.[23]

The common law

In *R v Hemsley* [2004] NSWCCA 228, the NSW Court of Criminal Appeal described the ways in which mental illness is relevant in sentencing: "Mental illness may be relevant – and was relevant in the present case – in three ways. First, where mental illness contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced; there may not then be the same call for denunciation and the punishment warranted may accordingly be reduced: *Henry* at [254]; *Jiminez* [1999] NSWCCA 7 at [23]; *Tsiaras* [1996] 1 VR 398 at [400]; *Lauritsen* [2000] WASCA 203; (2000) 114 A Crim R 333 at [51]; *Israil* [2002] NSWCCA 255 at [23]; *Pearson* [2004] NSWCCA 129 at [43]."[24]

Second, mental illness may render the offender inappropriate for general deterrence and the court may moderate its consideration of that as a factor.[25]

Third, a custodial sentence may weigh more heavily on a mentally ill person.[26]

A fourth, and countervailing, consideration may arise, namely, the level of danger which the offender presents to the community which may sound in special deterrence.[27]

The mental health problems of an offender need not amount to a serious psychiatric illness before they will be relevant to the sentencing process .[28]

In addition to the common law, practitioners may need to rely on s.10(3) and s.21A of the *Crimes (Sentencing Procedure) Act 1999* (CSPA) in their submissions on sentence.

Section 21A

Section 21A(3) of the CSPA lists the mitigating factors a court can take into account on sentence. They are not exhaustive, supplement the common law and include:

"(h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise

(j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability ..."

Section 21A(3)(j) is strict in its requirements. While disability includes mental illness, s.21A(3)(j) is confined to a mental illness which has the result that the offender "was not fully aware of the consequences

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NEED TO KNOW

When a s.32 application has been refused

- **Make another s.32 application in the Local Court.**
- **Make another s.32 application in the District Court on appeal.**
- **Appeal to the Supreme Court.**
- **Make an application to have the magistrate disqualified on the grounds of actual or apparent bias.**
- **Plead not guilty.**
- **Plead guilty and make submissions in mitigation of sentence where mental health or cognitive impairments can be taken into account.**

of his or her actions".[29] The requirements are more onerous than the common law principle which may reduce an offender's moral culpability where their cognitive impairment is causally related to the commission of the offence.[30] The requirements in s.21A(3)(j) are also more restrictive than the list of considerations in s.10(3) of the CSPA.

Section 10

In appropriate cases, a practitioner may be able to persuade a magistrate to exercise the s.10 discretion after a s.32 application is refused. This may be particularly so in traffic matters where there is often reluctance by courts to dismiss a charge without conviction and discharge an offender under s.32.

Unlike s.21A(3)(j), the exercise of the s.10 discretion does not require a causal nexus between the mental illness and the offence[31] and permits consideration of a mental illness which has only arisen after the offence was committed.[32] Section 10(3) of the CSPA provides: "In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors: (a) the person's character, antecedents, age, health and mental condition".

In *David Morse (OSR) v Chan Anor* [2010] NSWSC 1290, the Supreme Court confirmed that in some cases where a s.32 application is refused, the exercise of the s.10 discretion will be properly available. In such cases, the sentencing exercise will require a consideration of the evidence as to the nature of the offence, the defendant's mental illness and its consequences, both at the time of the offence and at sentencing, in addition to the other matters referred to in s.10(3) in light of the objective seriousness of the offence.[33]

A decision to exercise the s.10 discretion in the case of serious offences does not necessarily involve error, although it will be more difficult to obtain a s.10 in such cases.[34]

Making a second s.32 application in the District Court

If all else fails, a further s.32 application can be made in the District Court on appeal. In some cases, the client will have nothing to lose, apart from delay and any additional costs, as a worse result cannot be obtained on appeal.[35]

While there is no automatic right of appeal against a magistrate's refusal of a s.32 application, any person who has been convicted or sentenced by the Local Court has an automatic right of appeal to the District Court against the convic-

ENDNOTES

1. Hopefully, a well prepared s.32 application will be successful. For assistance in preparing and making a s.32 application, see K. Weeks, "To s.32 or Not – Applications under s.32 *Mental Health (Forensic Provisions) Act 1990* in the Local Court", *LSJ*, May 2010. A copy can be downloaded at *www.cmhlaw.com.au* (see the s.32 page).
2. See s.34 of the *Mental Health (Criminal Procedure) Act 1990* (now repealed).
3. Second Reading Speech, Parliamentary Debates, Legislative Assembly, 8 November 2005.
4. J.R.S. Forbes, *Justice in Tribunals*, 2010, 3rd edition, The Federation Press, at p.274.
5. *R v Sussex Justices; Exparte McCarthy* [1924] 1 KB 256 at [259] per Hewatt LCJ as cited by Forbes (2010), ibid at p.282.
6. The High Court overturned a decision of the NSW Court of Appeal which had found there had been reasonable apprehension of bias of the trial judge (Einstein J as he then was).
7. *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48, per Gummow ACJ, Hayne, Crennan and Bell JJ at [31], [33] & [67]
8. Ibid.
9. Above n.4, at p.279.
10. In *Michael Wilson & Partners Limited v Nicholls (above n.7)*, the High Court said that waiver as a result of delay in taking objection was well established in civil proceedings. While the question did not arise for determination the court considered the principle "may well extend" to criminal proceedings, see [76]. See also above n.4 at [303]-[304].
11. Above n.4, at p.283.
12. Any decision of a magistrate refusing an application to disqualify on the grounds of bias could also be the subject of a Supreme Court appeal.
13. *DPP v El Mawas* [2006] NSWCA 154 per McColl JA at [59].
14. Ibid per Spigelman CJ at [4] and *Mantell v Molyneux* [2006] NSWSC 955 per Adams J at [40].

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tion or sentence (or both).[36] An appeal against conviction and/or sentence does not look at whether a magistrate committed an error and is heard de novo. In determining an appeal, the District Court may exercise any function that the Local Court could have exercised in the Local Court proceedings, including making a s.32 order.[37]

When lodging an appeal, a practitioner will need to decide whether to lodge a severity appeal or an all-grounds appeal.[38] A potential disadvantage of lodging an all-grounds appeal is that transcripts will be ordered and, while they may assist the practitioner to prepare the s.32 application for a second time, there may be some delay in their preparation.

Don't despair

Given the wide discretion afforded to magistrates, the latitude permitted and the breadth of the inquiry involved,[39] different magistrates will approach the diversionary regime in different ways: "It is a discretionary judgment upon which reasonable minds may reach different conclusions in any particular case."[40]

Fearless advocacy is the duty of the advocate and practitioners should not become reluctant to consider the diversionary regime if a s.32 application is unsuccessful. The practitioner is likely to learn something from every s.32 application that is prepared and presented. Given the recent findings of the NSW Law Reform Commission that s.32 is underused in relation to defendants with intellectual disability and other cognitive impairments,[41] practitioners are encouraged to continue making s.32 applications after one has been refused. ☐

15. *DPP v El Mawas* per McColl JA at [74].
16. *Mantell v Molyneux* at [38].
17. Above n.13, per McColl JA at [73].
18. See Judicial Commission of NSW Bench Books, *Procedural fairness*, see *tinyurl.com/alkjdqw*. Section 32(4A) also requires a magistrate to provide reasons.
19. *House v The King* (1936) 55 CLR 499 per Dixon, Evatt & McTiernan JJ.
20. MHFP Act, s.32(1).
21. Above n.13 per McColl JA at [71].
22. For a detailed discussion on the legal principles see the NSW Law Reform Commission's Consultation Paper 6, *People with Cognitive and Mental Health Impairments in the Criminal Justice System : Criminal Responsibility and Consequences*, "Chapter 8 Sentencing: Principles and Options", 2010. See also the discussion by D. Howard SC and Dr. B. Westmore, *Crime & Mental Health Law in New South Wales,* 2010, LexisNexis Butterworths at pp.520-557.
23. *Crimes (Sentencing Procedure) Act 1999*, s.10.
24. *R v Hemsley* [2004] NSWCCA 228, per Grove J Dowd J & Sperling J.
25. *Pearce* (NSW CCA, 1 November 1996, unreported); *Engert* (1995) 84 A Crim R 67 at 71 per Gleeson CJ; *Letteri* (NSW CCA, 18 March 1992, unreported); *Israil* [2002] NSWCCA 255 at [22]; *Pearson* [2004] NSWCCA 129 at [42].
26. *Tsiaras* [1996] 1 VR 398 at 400; *Jiminez* [1999] NSWCCA 7 at [25]; *Israil* at [26]
27. *Israil* at [24]; and *R v Hemsley* per Sperling J, at [33]-[36].
28. *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 at [178].
29. See *David Morse (OCR) v Chan* [2010] NSWSC 1290 at [56].
30. Above n.22, at [8.12], [8.13] and [8.26].
31. Above n.29, at [66].
32. Ibid at [74].
33. Ibid at [91], [96] and [97].
34. Ibid at [92].
35. A court must indicated if a more severe sentence is contemplated in accordance with the decision in *Parker v DPP* (1992) 28 NSWLR 282 at 295.
36. CARA, ss.11 and 20.
37. CARA, s.11. See also *Mackie v Hunt* (1989) 19 NSWLR 130 per Campbell J, at 139.
38. In one appeal in which the writer was involved Registry staff at Burwood Local Court insisted the appeal had to be lodged as an all grounds appeal as a conviction had been entered and a s.32 application sought an order without conviction. Elsewhere, registry staff have been ambivalent.
39. Above n.13, per McColl JA at [74].
40. *DPP v Confos* [2004] NSWSC 1159 per Howie J at [17].
41. NSW Law Reform Commission Report 135, People with cognitive and mental health impairments in the criminal justice system – Diversion, 2012, at [4.85] see *tinyurl.com/bypfmv4*. ☐

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