CASE COMMENTARY

Shared Psychotic Disorder and the Killing of a Policeman

Barbieri v R [2016] NSWCCA 295

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By December 2012, 19-year-old Mitchell Barbieri had adopted the persecutory delusions of his mother when he stabbed to death a police officer. Initially, both mother and son were charged with murder. After declining to accept his plea of guilty to manslaughter on the basis of ‘substantial impairment’, the prosecution offered the concession that Barbieri had a ‘significant cognitive impairment’ and that the usual mandatory life sentence for killing a policeman did not apply. Subsequently, both Barbieri and his mother pleaded guilty to a number of serious offences and were sentenced to quite disparate terms of imprisonment.

The commentary examines the unique cases of a mother and son who had a shared psychotic disorder and whose charges arose from the same facts and circumstances but whose convictions attracted markedly dissimilar sentences. The relevant sentencing principles derived from recent case authority are considered and the reasoning of the sentencing judge is contrasted with the reasoning of the NSW Court of Appeal, which allowed an appeal from Mr Barbieri’s original sentence.

Key words: mental illness; sentencing principles; shared psychotic disorder; significant cognitive impairment; substantial impairment.

Introduction

The sentencing of offenders who have a major mental illness, particularly in the context of very serious offences, creates unique challenges for the criminal justice system. Despite improving understanding of the association between untreated mental illness and extreme violence¹, balancing the principles of retribution and punishment, denunciation, general and specific deterrence and the potential for rehabilitation in the sentencing of mentally ill offenders can be problematic. The challenges become more pointed when the development and phenomenology of the

offender’s mental illness are difficult for the sentencing judge to accept.

After they had developed the bizarre and uncommon condition currently known as shared psychotic disorder, 44-year-old Fiona Barbieri and her teenage son were both charged with the murder of a senior police officer. The prosecution subsequently acknowledged that at the relevant time, Ms Barbieri was psychotic and suffered from ‘substantial impairment’ within the meaning of s 23A of the Crimes Act 1990 (NSW) and accepted her plea of guilty to manslaughter. Even though he had developed the same

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psychotic beliefs as his mother and held them with the same delusional intensity, the prosecution declined to accept Mr Barbieri's plea of guilty to manslaughter.

The exceptional cases in which a mother and son had a shared psychotic disorder and were subsequently charged with offences that arose from the same facts and circumstances offer a unique opportunity to consider how the application of sentencing principles may diverge and result in markedly different sentences.

Recent Case Authority

Alluding to the frequency with which the mentally ill come into 'collision with the criminal justice system' and the need for 'sensitive discretionary decisions', in *R v Engert* (1995) 84 A Crim R 67, Gleeson CJ said (at [71]):

[T]here may be a case in which there is an absence of connection between the mental disorder and the commission of the offence for which a person is being sentenced, but the mental disorder may be very important to considerations of rehabilitation, or the need for treatment outside the prison system.

In *R v Israil* [2002] NSWCCA 255, Spigelman CJ held (at [23]):

To the extent that mental illness explains the offence ... then an offender's inability to understand the wrongfulness of his actions, or to make reasonable judgments, or to control his or her faculties and emotions, will impact on the level of culpability of the offender, even where the illness does not amount to an excuse at law.

In *R v Hemsley* [2004] NSWCCA 228, Sperling J held (at [33]–[36]) that 'mental illness' had the potential to be relevant to sentencing in the following ways:

- 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

- mental illness may render the offender an inappropriate vehicle for general deterrence and moderate that consideration
- a custodial sentence may weigh more heavily on a mentally ill person; and
- the level of danger which the offender presents to the community ... may sound in special deterrence.

Following its decision in *Tsiaras v The Queen* [1996] 1 VR 398, the Victorian Court of Appeal in *R v Verdins, Buckley and Vo* [2007] VSCA 102 adopted a broader approach by eschewing the expression 'serious psychiatric illness' or other 'diagnostic labels' and adopted the more liberal term 'impaired mental functioning'. In *Verdins*, the Victorian Court of Appeal summarised the principles by which a mental or psychological condition falling short of insanity may be relevant to sentencing:

- the moral culpability of the offence, as distinct from the person's legal responsibility;
- the person's condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served;
- a person suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence;
- specific deterrence may be more difficult to achieve and is often not worth pursuing;
- the mental or psychological condition may mean that a given sentence will weigh more heavily on the person than it would on a person in normal mental health.

In his commentary on *Verdins*, Freckelton described the judgement as ‘Australia’s most sophisticated and subtle analysis of the relevance of psychiatric symptomatology to sentencing’.² More recently, Walvisch has reviewed a number of subsequent decisions from Victoria and posited that the offender’s prospects of rehabilitation is also an important consideration in the sentencing process.³

The principles in *Verdins* have been followed in a number of decisions of the NSW Court of Criminal Appeal.⁴ In *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194, the NSW Court of Criminal Appeal set out an authoritative summary of the principles that courts are obliged to apply when sentencing an offender suffering from a mental disorder. McLellan CJ said (at [177]):

Where an offender is suffering from a mental illness, intellectual handicap or other mental problems the courts have developed principles to be applied when sentencing....

- Where the state of a person’s mental health contributes to the commission of the offence in a material way, the offender’s moral culpability may be reduced. Consequently the need to denounce the crime may be reduced with a reduction in the sentence
- It may also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed
- It may mean that a custodial sentence may weigh more heavily on the person. Because the sentence will be more onerous for that person the length of the prison term or the conditions under which it is served may be reduced
- It may reduce or eliminate the significance of specific deterrence
- Conversely, it may be that because of a person’s mental illness, they present more of a danger to the community. In

those circumstances, considerations of specific deterrence may result in an increased sentence.

It is now well established that if an offender is suffering from a mental disorder, the principle of general deterrence may not have the same application as for a person without any mental disorder.⁵ Citing a passage from Young CJ in *R v Mooney* (unreported, Victorian Court of Criminal Appeal, 21 June 1978), in *Muldock v The Queen* [2011] HCA 39 held (at [53]):

General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others.

After it was recognised that alcohol exposure *in utero* may result in a constellation of neuro-developmental problems in the absence of characteristic facial and other physical features, the term *Fetal Alcohol Spectrum Disorder* (FASD) was introduced.⁶ Two recent appellate decisions from Western Australia have emphasised how the impaired mental functioning of an offender with FASD should be factored into the sentencing. In *Churnside v The State of Western Australia* [2016] WASCA 146, the Western Australian Court of Appeal highlighted how the criminogenic factors in a young indigenous offender’s history may be taken into account in sentencing.⁷

More recently, the Western Australian Court of Appeal considered an appeal from the decision of the Children’s Court in which the sentencing judge found that a 15-year-old indigenous youth appeared to be only minimally remorseful for killing his 25-day-old son. Acknowledging that the appellant’s ability to express his remorse was limited by his ‘immaturity’ and the fact that he had been ‘normalised to aggression and violence’, the sentencing judge took into account that the appellant was ‘a product and a victim of a dysfunctional environment’ and imposed a

sentence of 10 years. After he had been sentenced, the appellant was diagnosed with FASD in prison.

On appeal, the appellant argued that his FASD was a mitigating factor which was unknown to the sentencing judge. Referring to the decision in *AH v The State of Western Australia* [2014] WASCA 228 in which, only 18 months earlier, attention had been drawn to the surprising lack of any FASD assessment of the appellant in that case, the Chief Justice (Martin CJ) in *LCM v State of Western Australia* observed that ‘the arrangements for the assessment and management of offenders suffering from FASD in this State remain quite inadequate’. The Chief Justice held that the evidence clearly established that one of the reasons the appellant was taken into the care and protection of the State in early childhood was the recorded history of alcohol abuse by his mother. The Chief Justice emphasised that in that context, when the appellant manifested behavioural and intellectual difficulties as a young child, it was remarkable that those responsible for his care and protection did not initiate an assessment to exclude FASD. The Chief Justice intoned that unless those arrangements improved, not only would injustice be visited upon those who offended at least in part because of a condition which they suffered through no fault of their own, but also the opportunity to reduce the risk to the community would be lost. The joint judgement of Mazza J and Beech J (at [128]) listed the various ways in which impaired mental functioning in FASDs may be taken into account in sentencing:

- diminished the offender’s moral culpability for the offence;
- moderated the weight to be given to personal and general deterrence;
- diminished the adverse impact of a findings that the offender acted ‘deliberately’ and ‘violently’;
- whether and to what extent the offender was to be seen as lacking remorse, and the weight to be given to that;

- the impact of impaired language skills on the offender’s capacity to explain the offender’s behaviour.⁸

In *R v Windle* [2012] NSWCCA 222, Basten JA (with whom Price J agreed, Campbell J agreeing with differing reasons) emphasised (at [41]) that punishment of a person not in full control of his or her conduct may form a poor vehicle for promoting general deterrence. Basten JA held (at [42]):

[A] proper purpose of the criminal law is not to give effect to the irrational prejudices of ill-informed public opinion. The urge for retribution is, or should be, treated as diminished in the case of the mentally ill.

Fiona Barbieri – The Facts

Ms Barbieri was working for American Express when, in 2001, she and her son moved to a five-acre property on the outskirts of Sydney. In 2002, after Kevin Waters and his family moved into a similarly-sized neighbouring property, relations between the neighbours were initially quite warm.

Ms Barbieri later told assessing psychiatrists that in November 2008 her mental health began to deteriorate. In late 2009, Ms Barbieri’s then partner left after police attended following a complaint of domestic violence. Ms Barbieri’s deteriorating mental condition impaired her ability to work, and at the end of 2009 she took a redundancy. Throughout 2010, her mental state continued to deteriorate in the context of disputes with American Express and WorkCover.

In August 2010, Mr Waters made an offer to purchase Ms Barbieri’s property. By her account, after Ms Barbieri declined the offer, Mr Waters gave her an ultimatum to accept the offer within a week or, Mr Waters warned, ‘I’ll make it uncomfortable for you and your family’. She began receiving threatening phone calls and was abused by Mr Waters in the street. Ms Barbieri later told assessing psychiatrists that she made reports to the Crime Stoppers hotline but police

failed to investigate her concerns. She came to believe that Mr Waters was involved in the criminal underworld and that he was persecuting her and her son. Although she complained to politicians and the police, nothing was done and she began to also suspect the political influence of American Express.

During the evening of 30 September 2010, the Barbieris were victims of a home invasion by four men who tried to force Ms Barbieri into their vehicle. After Ms Barbieri was able to extricate herself, she called the police and the men fled. In October 2010, after Ms Barbieri and her son spent a month away, they found, on their return, that the home had been ransacked, and the contents, furniture, ride-on mower and garden tools had been stolen. Thereafter, the maintenance of the grounds deteriorated and their financial situation became desperate. In January 2011, the electricity was disconnected.

By late March 2011, as Ms Barbieri continued to make repeated complaints to police, she had contact with the Hawkesbury community mental health team, which documented her persecutory delusions about her neighbour. On 5 April 2011, during the first home visit by a community mental health nurse, her son's similar delusional system was also documented, including his belief that his mother would be 'murdered' if he was not present to protect her. On 7 April 2011, during a second home visit, Ms Barbieri was reported to be hostile and disclosed her beliefs about a widespread conspiracy and her fears that she and her son would be murdered by Mr Walters.

On 8 April 2011, police finally agreed to speak with her regarding her complaints about her neighbour. However, at the police station, Ms Barbieri was met by mental health clinicians who detained her under the involuntary treatment provisions of the Mental Health Act and conveyed her to the Pialla Mental Health Unit of the Nepean Hospital. No medication was prescribed during the brief admission, and on 12 April 2011 the involuntary treatment order was revoked and

she was discharged. Ms Barbieri declined to engage with any follow-up, and the community mental health team apparently decided that no assertive follow-up was indicated.

In the twelve months preceding December 2012, Ms Barbieri and her son lived in a house illuminated by candles and had little social contact. Ms Barbieri later told one of the assessing psychiatrists: 'we lost all faith in humanity ... we felt so abandoned, we had no support, we ended up seeking asylum'. After first approaching the Italian embassy, she decided to seek asylum in Russia and sent mails to President Vladimir Putin. She later told assessing psychiatrists that she chose Russia because she wanted to go to a country 'where American Express would not have any influence'.

Mitchell Barbieri – The Facts

Mitchell Barbieri was born on 9 August 1993. When he was aged 10, his parents separated and later divorced. From age 14, he developed an interest in archery and later attended a range at Homebush, became proficient and participated in competitions. In 2010, he was the victim of an unprovoked assault (by his description, he was 'king hit' in the face) whilst at football training and sustained a fractured jaw. Thereafter, by his account, he 'lost confidence' and stopped working.

On the night of 30 September 2010, a month before the start of trial of the man who had assaulted him at football training, the home invasion occurred. Mr Barbieri later confirmed that after the incident on 30 September 2010, he kept knives and a bow and arrow inside the house.

Dispute on property boundary – 6 December 2012

On 3 December 2012, a stick was thrown onto the Waters' property with a note attached. It was never established what was written in the note but the incident may have prompted Mr Waters to arrange for an electrician to install floodlighting along the

boundary between the two properties. Early in the afternoon of 6 December 2012, an electrician was on a ladder installing a floodlight in a tree on the property boundary when he was approached by Ms Barbieri who verbally challenged him and took photographs. Mr Barbieri joined his mother and they loudly remonstrated with the electrician who left the scene to confer with Mr Waters.

After the electrician returned with an employee of Mr Waters, they were approached by Ms Barbieri who was holding a baseball bat and Mr Barbieri who was holding a compound bow. The Barbieris both continued to demand that the electrician leave and abuse was exchanged. By Mr Barbieri's later account, after Kevin Waters and his son Kurt joined the other two and made a verbal threat, Mr Barbieri became more fearful and fired two arrows in the general direction of the men. By Mr Barbieri's later account, he did not aim the arrows directly at anyone and the arrows were blunt-tipped arrows used only for target shooting. The verbal altercation continued until Kevin Waters announced he was going to call the police. The Barbieris then left the area and went inside their house.

Police attend – 2.25 pm on 6 December 2012

At approximately 2:25 pm, uniformed police officers first arrived at the Waters' property where they obtained statements. Other uniformed police arrived over the next hour, and it was determined that by firing arrows, Mr Barbieri had committed an offence and should be arrested. Despite knowing that Ms Barbieri was mentally disturbed and, following an involuntary mental health admission eight months earlier, had not engaged with follow-up and repeatedly made clearly disordered complaints to police, no liaison occurred with community mental health services, and no mental health clinician was asked to be involved in the police intervention or to be available to make a mental health assessment.

Between 2:41 pm and 3:11 pm, either Ms Barbieri or Mr Barbieri sent three emails to

various federal politicians which were blind copied to the President of Russia.

- Let me remind you, we have every right to defend ourselves, our family and our property ... How dare our politicians and police continue to support murderers over the innocent.
- Corrupt police attempting to break into our property whilst Waters front yard is full of his drivers and associates ... We know how the corrupt system works now.
- What sending in reinforcements to target/ambush the innocent mother and son that our Government offered up to be murdered? Do you not know you don't 'sacrifice the innocent'?

At 3:12 pm, as uniformed police officers gathered at the front padlocked gate, Mr Barbieri sent a text message to his father: 'Coppers at our gate clearly to ambush us to [sic] standing up for ourselves'.

Police establish forward command post – 3.20 pm on 6 December 2012

Simpson JA in the Court of Appeal later noted (*Barbieri v R* [2016] NSWCCA 295 at [12]) that Inspector Bryson Anderson arrived at the scene at 'about 3:20 pm' and that police officers donned protective vests before approaching the house. Police reported that over the next 25 minutes, attempts were made to "engage" with the Barbieris through the windows as two large dogs inside the house barked aggressively. Ms Barbieri was later reported to have responded saying that all police were 'corrupt' and alluded to the situation being dealt with 'on an international level'. When Inspector Bryson Anderson went to the rear of the house and announced his name and rank, Ms Barbieri was reported to have responded, 'You say you're not corrupt but look at him with his stars and stripes'. Ms Barbieri was reported to have later said to her son: 'They're trying to break in'.

Police intervention – 3.45 pm on 6 December 2012

It was reported that when Inspector Anderson told Ms Barbieri through a window that she should open the door immediately, Ms Barbieri responded with abuse, saying that the police should leave. When Inspector Anderson announced ‘We’re going in’, another police officer forced the back door open with his boot. As further abuse was yelled from inside the house, two large dogs ran out and were subdued by officers using capsicum spray. It was alleged that almost immediately, Mr Barbieri lunged at Inspector Anderson and stabbed him twice in quick succession. Simpson JA in the Court of Appeal described (at [13]) the sequence of events:

From inside the house, at the doorway, [Mr Barbieri] stabbed Inspector Anderson twice, once in the left cheek area, and once in the chest. [Mr Barbieri] then emerged from the house, still carrying the knife that he had used for the stabbing. Police officers attempted to arrest [Mr Barbieri]. He struggled and resisted.

It was alleged that as Mr Barbieri struggled with police, Ms Barbieri emerged from the house and began swinging a sledgehammer before she was also restrained.

It is relevant to note that police had established a secure cordon around the Barbieri property and there was no threat to anyone’s life inside the barricaded house, and that the occupants of the house had no way of leaving the property. The *Code of Practice for the NSW Police Force Response to Domestic and Family Violence* stipulates a standard operating procedure of ‘isolate, contain and negotiate’ in cases where family members barricade themselves inside a house.⁹ Clearly, the standard operating procedure was not followed and the police intervention against the Barbieris appears to have been precipitous. Police made no meaningful attempt to negotiate with the Barbeiris. Since early 2011, the Barbieris were well known to Hawkesbury community

mental health team. Even though Ms Barbieri had also had an involuntary admission to the Pialla Mental Health Unit of the Nepean Hospital in April 2011, no mental health clinician or police liaison officer was asked to assist in the police intervention.

Although it was later reported that there had been a ‘protracted siege’,¹⁰ Simpson JA in the Court of Appeal noted (at [15]) that the Barbieris were arrested at approximately 4:14 pm, less than two hours after police first attended the Waters’ property and less than an hour after Inspector Anderson arrived at the scene and established the police forward command post.

At approximately 4:25 pm, ambulance officers arrived and attempted to resuscitate Inspector Anderson before taking him to Hawkesbury Hospital where he was pronounced dead. An autopsy later revealed that the fatal wound between the first and second rib on the right anterior chest had penetrated deeply into his lung.

Interviews with police

Mr Barbieri was taken to Penrith police station. When asked about his arrest, Mr Barbieri said: ‘Yes, we were ambushed in our home’. When asked if he was prepared to participate in an interview, he answered:

No, I’m not, not at this point in time, until I receive the Consular assistance that I requested ... I am requesting you be in touch with the Russian consular office, whether it be in this country or in Russia itself, possibly through this country’s office.

Mr Barbieri told police that he was trying to revoke his citizenship and obtain political asylum, as a result of ‘persecution in this country ... for having reported and stood up against human rights abuse, corruption and terrorism’.

Ms Barbieri was also taken to Penrith police station where she asserted her right to silence, saying that she and her son were ‘ambushed by an army of police officers’ and that their actions

were ‘self-defence’. During the interview, she was highly irritable and thought disordered and asked to speak with the Russian President or one of his representatives, saying that she didn’t trust anybody in ‘the Australian bureaucratic system’. She referred to ‘corrupt police’ and the ‘corrupt federal parliament’ and that it was ‘an international matter’.

Legislation

The defence of ‘diminished responsibility’ had developed as part of the common law of Scotland before it was introduced by statute in England in 1958.¹¹ In 1974, s 23A of the Crimes Act 1900 (NSW) introduced the defence of ‘diminished responsibility’. Following the recommendations of the New South Wales Law Reform Commission,¹² the Crimes Amendment (Diminished Responsibility) Act 1997 (NSW) introduced a new s 23A provision which re-named the defence ‘substantial impairment by abnormality of mind’.

By section 19B (1) of the Crimes Act 1900 (NSW), a court is required to impose a sentence of imprisonment for life for the murder of a police officer if the murder was committed while the police officer was executing his or her duty. However, by Section 19B(3), the mandatory life sentence does not apply if the person had a significant cognitive impairment at the relevant time. The term ‘significant cognitive impairment’ was not defined in the Act. When the Crimes Amendment (Murder of Police Officers) Bill 2011 was introduced, the then Minister for Police simply indicated that ‘the decision on whether a cognitive impairment is “significant” would be a matter for the courts to determine’. At the time of the Barbieris’ trial, the construction of the term had not been judicially considered.

The Sentencing – *R v Barbieri, Mitchell; R v Barbieri, Fiona* [2014] NSWSC 1808

Fiona Barbieri – Expert Opinion

After she was remanded into custody, Ms Barbieri was assessed by clinicians of Justice

Health NSW and diagnosed with persecutory delusions. On 31 January 2013, she was transferred to the Long Bay Psychiatric Hospital where she was commenced on antipsychotic medication.

After they were committed for trial, both Barbieris were listed for trial before a jury. On 5 November 2014, the day the trial was due to commence, both pleaded guilty. The facts of the offences of both Barbieris were put before the sentencing judge by way of an Agreed Statement of Facts in each case, which were supplemented by a large quantity of witness statements.

The sentencing judge (Hulme J) also had expert reports which had been prepared for the purpose of considering whether either Ms Barbieri or her son might avail of a mental illness defence or the partial defence of ‘substantial impairment’ provided by s 23A of the Crimes Act.

Ms Barbieri did not give evidence in the sentence proceedings. The sentencing judge received two expert reports. After reviewing the statements made by witnesses, medical records and other material, a psychiatrist retained by the prosecution had provided an initial report (dated 23 June 2013) relating to both Barbieris and two supplementary reports (dated 15 October 2014) relating to each of the two Barbieris.

Among the material provided to the psychiatrist retained by the prosecution was a huge volume of documentary material seized from the Barbieri house including notebooks, diaries and other handwritten notes and letters to various world figures such as the Pope and the President of Russia, as well as federal and state politicians and television presenters. The psychiatrist retained by the prosecution described the themes emerging from the material as revealing ‘a complex delusional belief system alleging corruption, persecution and perceived grievances of a wide ranging nature’ and concluded that Ms Barbieri had developed chronic paranoid schizophrenia.

The psychiatrist retained by the defence provided his first report (dated 24 October

2014) in which he made a provisional diagnosis of schizoaffective disorder with differential diagnoses of bipolar affective disorder or a schizophrenic illness.

Despite having the voluminous reports and medical records, the sentencing judge did not consider in any detail the collateral gathered by the assessing psychiatrists in relation to the deterioration in the mental state of both the Barbieris. The sentencing judge minimised the recent history by simply finding (at [9]) that the relationship between the Barbieris and their neighbours ‘became antagonistic from about 2010. The Barbieris came to believe that Mr Waters wanted to force them from their property so he could buy it cheaply. They also came to believe that he was conspiring to have them killed’.

Fiona Barbieri – Sentenced for Manslaughter, Other Offences

Initially, Ms Barbieri was charged with murder, despite the fact that Inspector Anderson had already sustained his fatal injuries before she emerged from the house. However, following a committal hearing and on the day the trial was to commence, the prosecution accepted Ms Barbieri’s plea of guilty to manslaughter on the basis that she suffered from substantial impairment within the meaning of s 23A of the Crimes Act. She also pleaded guilty to using an offensive weapon to hinder the lawful apprehension of her son, assault of a police officer causing actual bodily harm and possessing a prohibited weapon.

In sentencing Ms Barbieri for manslaughter, the sentencing judge indicated (at [86]) his reluctance to fully acknowledge the significance of her chronic mental illness at the time of the offences:

I accept that she did do some things on the day that could be described as rational; for example, withdrawing from the argument over the side fence with the neighbours and tradesmen. But one simply cannot ignore the fact that she was largely driven by her delusional thought processes, for example, that she thought she was

being persecuted and that all police were corrupt.

The sentencing judge held (at [88]) that the offence had all of the ‘attributes of murder’ aside from Ms Barbieri’s mental condition. The sentencing judge summarised the various sentencing principles relevant in Ms Barbieri’s case:

I accept that it was not a planned killing but it cannot be ignored that it was the product of planning to inflict serious harm upon any unwanted intruder. The fact that the victim was a police officer performing his duty is a feature that significantly elevates the seriousness of the offence. On the other hand, Ms Barbieri was not the principal offender. Further, her mental condition was more than just enough to establish the partial defence. It operates in further mitigation of penalty by reducing her moral culpability from the high level it otherwise would be at. It also warrants moderation of the weight given to retribution, denunciation and deterrence.

Ms Barbieri was sentenced to a total term of 10 years’ jail with a non-parole period of 7 years and 6 months. The sentencing judge emphasised (at [158]) that the sentence specifically attributable to the manslaughter of Inspector Anderson was 9 years and that if not for the plea of guilty, the sentence would have been 10 years.

Mitchell Barbieri – Expert Opinion

After his remand into custody, Mr Barbieri was also assessed by clinicians of Justice Health NSW and was diagnosed with a delusional disorder. During his imprisonment, although he was not prescribed any psychotropic medication, his mental state apparently improved and he began to question the persecutory delusions he shared with his mother.

Although Mr Barbieri did not give evidence in the sentence proceedings, the sentencing judge had a report from the psychiatrist retained by the prosecution and

reports from two other psychiatrists retained by the defence. After reviewing the recording of his first interview with police, the psychiatrist retained by the prosecution was satisfied that Mr Barbieri had adopted his mother's persecutory delusions and that Mr Barbieri believed that he and his mother had been 'ambushed by police'.

The psychiatrist retained by the prosecution also opined that the correspondence between Mr Barbieri and his mother between December 2012 and March 2013 when they were remanded in custody disclosed considerable evidence of a 'shared delusional system':

[T]hey developed an intense interdependency with reliance on one another for differing reasons. They existed in an isolated, compromised state emotionally, materially and ultimately as a pair who believed they were both being persecuted in an elaborate global manner. Over time, [Mr Barbieri] lost any insight that he may have had and now suffers the effects of unchallenged beliefs to the point where they are now delusional. Delusional beliefs by definition mean that an individual is impervious to reason or fact that may dispel those beliefs.

Mr Barbieri told the assessing psychiatrists that after he was assaulted at football training, he 'lost direction' and motivation. He described the subsequent home invasion on 30 September 2010 as a 'turning point' in his life. After their house was ransacked in their absence, their financial position deteriorated and they lived in squalor.

The first psychiatrist retained by the defence, who made assessments on 7 June 2013 and again five months later on 17 October 2013, opined that, at the time of the stabbing, Mr Barbieri had a delusional disorder and would be able to raise both the defence of 'mental illness' and the partial defence of substantial impairment by abnormality of mind. The first psychiatrist also opined that Mr Barbieri had a 'significant cognitive impairment' within the meaning of s 19B of the Crimes Act 1900 (NSW).

The assessment of the second psychiatrist retained by the defence, made on 15 February 2014, was essentially the same. The second psychiatrist also agreed that Mr Barbieri could raise the defence of mental illness. On 6 October 2014, less than a month before the trial was due to commence, the defence permitted Mr Barbieri to be assessed by the psychiatrist retained by the prosecution. It is not clear why, having already obtained expert reports from two forensic psychiatrists, both of whom supported a 'mental illness' defence and a partial defence of 'substantial impairment', the defence allowed Mr Barbieri to be assessed by the psychiatrist retained by the prosecution.

In his report dated 15 October 2014, the psychiatrist retained by the prosecution agreed with the diagnosis of delusional disorder. However, although he agreed that the partial defence of substantial impairment was available, the psychiatrist retained by the prosecution did not consider that a mental illness defence was available and referred to various acts of Mr Barbieri on the afternoon of 6 December 2012 which, in his opinion, 'demonstrated considered reasoning and decision-making'.

Mitchell Barbieri – Plea of Guilty to Murder

Because Mr Barbieri pleaded guilty to the charge of murder, the 'mental illness' defence and the partial defence of 'substantial impairment', which were supported by the two psychiatrists retained by the defence, were never considered. In determining whether to plead guilty to murder, Mr Barbieri was faced with a dilemma which arose from the potential intersection of s 23A and s 19B of the Crimes Act. Mr Barbieri had indicated his preparedness to plead guilty to the lesser charge of manslaughter, on the basis of s 23A (his capacity to understand events, or to judge whether his actions were right or wrong, or to control himself were substantially impaired by an 'abnormality of mind' arising from an underlying condition). Notwithstanding that

the prosecution had accepted a s 23A plea of guilty to manslaughter by his mother, the prosecution was not prepared to accept a s 23A plea from Mr Barbieri. Although the prosecution was not obliged to give reasons for adopting that position, an explanation was given by the Crown Prosecutor who appeared on the sentencing proceedings:

- Mr Barbieri's mental condition was 'a derivative one' rather than 'an organic illness' of the kind suffered by his mother;
- whatever illness Mr Barbieri suffered did not deprive him of 'all of his reasoning abilities'; and
- on a post-arrest interview, Mr Barbieri was able to provide logical answers that demonstrated an understanding of what had happened.

Mitchell Barbieri – Sentenced for Murder, Other Offences

The sentencing judge noted (at [118]) that although, by his plea of guilty to murder, Mr Barbieri had 'abandoned any reliance upon any mental health defence', the existence of his serious mental condition was relevant to sentence generally and also to the question of whether a mandatory life sentence must be imposed.

In considering the 'apology letter' that Mr Barbieri wrote in mid-2013, the sentencing judge found (at [125]) that it did not convey 'any credible acceptance of responsibility' and in the absence of Mr Barbieri giving evidence, the sentencing judge was not prepared to 'divine some benevolent interpretation for him'. The sentencing judge held (at [126]–[128]):

It was submitted that the plea of guilty was the 'most powerful of objective indicators of remorse'. But the plea was only forthcoming after the Crown indicated that it would be conceding that the mandatory life sentence provision did not apply. This does not support a finding of remorse.

In the end, I am not persuaded that Mr Barbieri has accepted responsibility for his

actions. As in the case of his mother, I am prepared to accept that he might *now* regret what happened and is probably sorry for the harm that was caused on 6 December 2012 but I am not persuaded that he is genuinely remorseful.

Mitchell Barbieri entered his plea of guilty on the day his trial was due to commence.

...

The lateness of the plea and the slight dilution of the utilitarian benefit leads me to conclude that the reduction of sentence on account of the plea should be about 10 per cent.

The sentencing judge acknowledged (at [138]) that the prosecution had conceded that a mandatory life sentence for the murder of a police officer provided for in s 19B of the Crimes Act was not engaged because, at the relevant time, Mr Barbieri 'had a significant cognitive impairment'. The sentencing judge also heard submissions in relation to a number of 'special circumstances' including:

- the 'isolated and somewhat bizarre circumstances of his relationship with' his mother
- 'the influence of his delusional disorder on his perceptions'
- the lack of specific intent and premeditation
- his youth, absence of prior criminal history and his prospects for rehabilitation.

The sentencing judge disposed of these 'special circumstances' briefly, saying (at [142]) that these were all matters taken into account in the assessment of the overall sentence:

I am prepared to accept that Mr Barbieri's moral culpability is less than it otherwise would be on account of his mental condition but not to any substantial degree. Because the nature of his condition was one that was secondary to that of his mother and he seems to have overcome it with the enforced separation from her, I cannot see any need to lessen the weight I give to general deterrence which is such an important feature of

sentencing in a case like this. Personal deterrence is not a matter that looms large. Finally, there is no evidence that a custodial sentence will weigh more heavily upon him.

The sentencing judge held (at [143]) that there were further aspects to consider in the sentencing:

He was a young man of 19 years of age at the time of the offence. He was aged around 17 when he started to adopt the delusional beliefs of his mother. The reason he did so was obviously because of their close relationship and increasing social isolation. But I accept that it was also partly due to his relative immaturity which made him less equipped to recognise his mother's condition and deal with it in an appropriate way. I do not find that the immaturity of youth was a material factor in the events of 6 December 2012; but I accept that the offender's significant cognitive impairment was.

The sentencing judge accepted the psychiatrists' assessment that Mr Barbieri's prospects of rehabilitation were good and that he had a low risk of reoffending and that he would be able to make the most of vocational training and other rehabilitation opportunities. The sentencing judge also highlighted (at [147]) that in Mr Barbieri's case, there were no features such as premeditation and planning, multiple victims, torture or gratuitous violence, which tend to attract life sentences.

After acknowledging that the Crown had conceded that a life sentence was not warranted under s 61, the sentencing judge held (at [147]):

[E]ven taking into account Mr Barbieri's reduced moral culpability, a lengthy sentence is required. That is particularly so because of the requirements of retribution, denunciation and punishment, to recognise the harm caused, and the need to send a clear message of general deterrence.

On 18 December 2014, for the offence of murdering Inspector Anderson, and taking into account four other offences (two assaults, one resisting arrest and one possessing a

prohibited weapon), the sentencing judge imposed a sentence comprising a non-parole period of 26 years with the balance of the term of the sentence of 9 years with a total sentence of 35 years. The judge noted (at [162]) that if not for the plea of guilty, the sentence would have been 38 years.

The Appeal – *Barbieri v R* [2016] NSWCCA 295

Mr Barbieri sought leave to appeal his sentence on various grounds.

Decision of Simpson JA (McCallum J agreeing)

In the Court of Appeal, Simpson JA (McCallum J agreeing at [195]), granted leave to appeal and allowed the appeal. Simpson JA held (at [74]–[75]) that it was erroneous for the sentencing judge to conclude that Mr Barbieri's moral culpability was not reduced to any substantial degree either:

- because his condition was secondary to that of his mother; or
- because he had recovered from the condition after separation from her.

Simpson JA held (at [74]) that these two considerations were irrelevant to the question of Mr Barbieri's mental state at the time of the offending:

[T]he fact that, within a relatively short time of separation from Fiona Barbieri, ... [Mitchell] recovered from the delusional condition and discarded his delusional beliefs says nothing of their existence at the time of the offences.

Having earlier referred to recent authority,¹³ Simpson JA held (at [75]) that it was erroneous to fail to reduce the weight given to general deterrence and that Mr Barbieri was an unsuitable vehicle for general deterrence because his 'undoubted mental illness' reduced his moral culpability. Simpson JA emphasised (at [76]):

His conduct after arrest, in seeking political asylum in Russia, graphically illustrates the extent to which [Mr Barbieri] was labouring under delusional beliefs at the relevant time.

Deferring to recent High Court authority,¹⁴ Simpson JA held (at [80]) that because an error has been disclosed in the approach taken by the sentencing judge to the question of Mr Barbieri's 'undoubted mental illness', it was necessary that the Court of Appeal exercise the sentencing discretion afresh.

Referring to the unique legislative framework in NSW, Simpson JA highlighted (at [92]–[93]) that at the time he entered his plea of guilty to murder, Mr Barbieri was faced with an extraordinarily difficult decision:

He had available to him substantial psychiatric evidence, on which to base a plea of not guilty to murder, and to proffer a plea of guilty to manslaughter, on the basis of substantial impairment, a plea which he did in fact proffer, but which was refused. There can be no challenge to that prosecutorial decision.

Simpson JA held (at [98]) that the circumstances of Mr Barbieri's plea ought to have warranted a greater reduction in sentence. Simpson JA also observed (at [113]–[118]) that while Mr Barbieri and his mother stood for sentencing on very different bases, the evidence showed that Mr Barbieri shared his mother's delusional beliefs and it was erroneous of the sentencing judge to attribute far greater weight to his mother's mental illness than he did to that of Mr Barbieri. Simpson JA held (at [119]–[121]):

[Mr Barbieri] lived alone on a rural property with a mentally ill mother whose delusions he came to share.

Even more important than his youth is [Mr Barbieri's] own mental illness which was plainly severe. His mental illness diminished his moral culpability to a very significant degree. It therefore reduced to a very significant degree the emphasis that ought to be placed upon general deterrence. It makes no difference that the mental illness was 'secondary' or 'derivative'. It was, as I have suggested, severe, and it was directly

causally related to the offence. Moreover, [Mr Barbieri's] recovery means (as the sentencing judge found) that personal deterrence was of minor importance.

The evidence persuades me that [Mr Barbieri] is genuinely remorseful, that he has accepted responsibility for his conduct, and that this indicates that he is unlikely to re-offend.

Decision of Price J

In his separate judgement, Price J granted leave to appeal and allowed the appeal, but disagreed with the sentence imposed on re-sentence. Price J held (at [139]) that the sentencing judge's assessment of Mr Barbieri's moral culpability was neither founded upon the nature of his condition being secondary to that of his mother or his apparent recovery after enforced separation from his mother and that these were reasons for the sentencing judge's conclusion that no lesser weight should be given to general deterrence.

On the issue of moral culpability, Price J extracted and reproduced (at [147]) passages from the report of the psychiatrist retained by the prosecution:

There remains an unanswered question about the extent of the perceived threat exacerbated by police breaking into his home and the need to defend that by potentially lethal action.

There is a critical issue about whether or not the victim had actually entered the premises and was being forcibly thrown out or whether the victim at all times remained outside of the premises and was attacked before he could enter and/or threaten Mr Barbieri directly. The question of the decision-making about brandishing a knife at all or about placing a knife potentially in readiness to deal with intruders, has not been addressed sufficiently, as far as I am aware. [Emphasis added by Price J.]

Referring to all the expert reports, Price J held (at [148]):

Regrettably, these issues were not examined during the proceedings on sentence by the

psychiatrists being called to give evidence. In my view, they should have been. Nor did Mitchell Barbieri give evidence supporting his accounts to the psychiatrists. These matters go to the weight to be given to the psychiatrists' opinions.

Price J concluded (at [151]):

[I]t was open to the sentencing judge to conclude that [Mitchell Barbieri] knew what he was doing at the time of the stabbing and that he was aware of the wrongfulness of his actions but nevertheless proceeded with an intention to kill Inspector Anderson. Whilst some reduction in [Mitchell Barbieri's] moral culpability was required because of his mental illness, his Honour was not obliged to find that Mitchell Barbieri's moral culpability was lessened to a *substantial* degree.

Re-sentencing by the NSW Court of Appeal

On 12 December 2016, the Court of Appeal sentenced Mr Barbieri to a non-parole period of 15 years (expiring on 5 December 2027) with a balance of term of 6 years and 3 months (expiring on 5 March 2034).

Discussion

Since it first appeared in the French literature, the term *folie-à-deux* ('madness of two')¹⁵ has been used to describe a phenomenon in which the psychotic features of an unwell person (the 'primary patient') develop in another person (who becomes the 'secondary patient'). Case reports and reviews have since used various synonyms including 'double insanity', 'imposed psychosis' and 'induced delusional disorder'.

In the DSM-IV (1994), 'shared psychotic disorder' appeared under 'Schizophrenia and other psychotic disorders', with the following diagnostic criteria:

- a delusion develops in an individual in the context of a close relationship with another person(s), who has an already established delusion

- the delusion is similar in content to that of the person who already has the established delusion
- the disturbance is not better accounted for by another psychotic disorder (eg schizophrenia) or a mood disorder with psychotic features and is not due to the direct physiological effects of a substance ... or a general medical condition.¹⁶

Shared psychotic disorder was previously considered to be relatively uncommon.¹⁷ However, it is likely that many cases previously went unrecognised because they were classified individually or only one person was diagnosed. Since those who develop shared psychotic disorder lack insight into their illness, they do not seek treatment.

The most recent systematic review of *folie-à-deux* found that the vast majority occurred within a nuclear family and that social isolation was often a prominent feature.¹⁸ Cases of *folie-à-deux* in which paranoid delusions were shared by a mother and her son are well described,¹⁹ as are cases involving whole families.²⁰ The confluence of close familial ties and social isolation in a rural setting was well illustrated in one case in which four co-habiting adult siblings shared delusions about their neighbours.²¹

Sentencing of Fiona Barbieri

Ms Barbieri pleaded guilty to manslaughter despite the fact that she had not actually attacked or even planned to attack Inspector Anderson. At the relevant time, Ms Barbieri was profoundly psychotic and, in her delusional state, she feared for her life when the police surrounded the house and forced their way in by breaking down a back door.

During the sentencing, even after accepting her plea to manslaughter, the prosecution submitted that in a moral sense, Ms Barbieri was 'more blameworthy' for the death of Inspector Anderson than her son because she was the dominant one in the relationship and she had

fostered the atmosphere of paranoia and hostility to the police. Whilst first acknowledging (at [88]) that the killing was ‘not planned’, in the absence of any cogent evidence, the sentencing judge was satisfied that the killing was the ‘product of planning to inflict serious harm upon any unwanted intruder’.

Sentencing of Mitchell Barbieri

At the time he stabbed Inspector Anderson, Mr Barbieri held the persecutory beliefs of his mother with the same delusional intensity and also feared for his life when police broke into the house. Simpson JA observed (at [29]):

On the basis of the available psychiatric evidence, it may be thought that [Mitchell Barbieri] had reasonable prospects of persuading a jury that, by reason of the s 23A circumstances, he ought to have been acquitted of murder and convicted of manslaughter.

Later, more poignantly, Simpson JA said (at [78]):

[A]n important aspect of the consideration of the weight that ought, in sentencing, be given to mental illness is the extent to which the mental illness had a causal effect to the offence ... there can be no dispute that [Mitchell Barbieri’s] delusional disorder, a product of Fiona Barbieri’s psychiatric disorder, was the direct (and probably the only) cause of [Mitchell Barbieri’s] conduct on 6 December 2012.

Finally, referring to the decision of the sentencing judge to reject the prosecution submission that ‘in a moral sense, Ms Barbieri was more blameworthy for the death of Inspector Anderson than her son’, Simpson JA noted (at [115]–[116]):

It is apparent that the sentencing judge attributed far greater weight to Fiona Barbieri’s mental illness than he did to that of [Mr Barbieri].

...

Why that should be true of Fiona Barbieri and not of [Mr Barbieri] who, all the

evidence showed, shared her ‘delusional thought processes’, is not clear to me.

The atomistic reasoning of Price J in the Court of Appeal over the interpretation of the opinion of the psychiatrist retained by the prosecution demonstrates a disquieting lack of understanding of the effect an active psychosis has on the capacity of a deluded person to reason when that person is in a highly agitated state and especially when that person fears for his or her life. Price J held (at [178]): ‘By his plea to murder, Mitchell Barbieri accepted that his mental illness was not so substantial so as to reduce murder to manslaughter’.

But it is clear that Mr Barbieri did not make that concession at all. Instead, Mr Barbieri took the safe course of accepting the prosecution offer of pleading guilty to murder with the stipulation that he had a ‘significant cognitive impairment’ and that the usual mandatory life sentence for killing a policeman would not apply.

Mr Barbieri could have gone to trial pleading either not guilty of murder by reason of ‘mental illness’ or guilty only of manslaughter by reason of ‘substantial impairment’. However, if at trial he failed to persuade the jury of at least all the components of the defence of substantial impairment, he ran the risk of being subject to the mandatory life sentence provided by s 19B(1). At that time of his sentencing, the construction of the term ‘significant cognitive impairment’ had not been judicially considered. Neither Mr Barbieri nor his defence counsel could predict whether a failure of the defence of ‘substantial impairment’ might also be equated to a failure to establish ‘significant cognitive impairment’ within s 19B(1).

Both Mr Barbieri and his mother had developed a shared psychotic disorder at the time of the stabbing of Inspector Anderson. Although their respective charges arose from the same facts and circumstances and both entered guilty pleas, Mr Barbieri and his mother attracted markedly dissimilar sentences.

A head sentence of 10 years for Ms Barbieri may appear harsh considering how psychotic

she was at the relevant time. The more draconian approach taken by the sentencing judge in Mr Barbieri's case has been only partially ameliorated by the decision of the NSW Court of Appeal. It can be argued that by imposing a head sentence of 15 years on a young man whose profound mental illness developed untreated over many months in isolated social circumstances, the NSW Court of Appeal has adopted a very strict interpretation of the principles established by a line of authority since the Victorian Court of Appeal decisions in *R v Verdins*, *Buckley and Vo* and the New South Wales Court of Criminal Appeal in *Director of Public Prosecutions (Cth) v De La Rosa*.

Postscript

The re-sentencing of Mitchell Barbieri by the Court of Appeal was reported to have outraged Inspector Anderson's family and the NSW Police Association.²² On 6 January 2017, the NSW Director of Public Prosecutions announced that an application would be made to the High Court for special leave to appeal the decision of the NSW Court of Appeal.²³ On 12 May 2017, the High Court (*R v Barbieri* [2017] HCATrans 111) held that the Court of Appeal decision in Mr Barbieri's case did not involve any error of legal principle and refused special leave to appeal.

Note

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Disclosure Statement

No potential conflict of interest was reported by the author.