

Brown v The Queen

Personality Disorders, Evidence Based Sentencing and Individualised Justice

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Brown v The Queen

R v Verdins

The Principles

What kind of mental condition?

R v O'Neill

The exclusionary rule

Brown v The Queen

Clarity and caution

Where to from here?

Brown v The Queen - The Principle in *Verdins*

R v Verdins [2007] VSCA 102

[32] Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.

Brown v The Queen - The Principle in *Verdins*

R v Verdins [2007] VSCA 102

[32] Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.

Brown v The Queen - The Principle in *Verdins*

R v Verdins [2007] VSCA 102

[32] Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.

Brown v The Queen - The Principle in *Verdins*

R v Verdins [2007] VSCA 102

[32] Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.

Brown v The Queen - The Principle in *Verdins*

R v Verdins [2007] VSCA 102

[32] Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.

Brown v The Queen - The Principle in *Verdins*

R v Verdins [2007] VSCA 102

[32] Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.

Brown v The Queen - The Principle in *Verdins*

R v Verdins [2007] VSCA 102

[8] The sentencing court should not have to concern itself with how a particular condition is to be classified. Difficulties of definition and classification in this field are notorious. There may be differences of expert opinion and diagnosis in relation to the offender. It may be that no specific condition can be identified. *What matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time.*

le: not necessarily diagnosis dependent

Brown v The Queen - The Principle in *Verdins*

R v Verdins [2007] VSCA 102

[13] Where a diagnostic label is applied to an offender, as usually occurs in reports from psychiatrists and psychologists, this should be treated as the beginning, not the end, of the enquiry. As we have sought to emphasise, the sentencing court needs to direct its attention to how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances - that is, at the time of the offending or in the lead-up to it - or is likely to affect him/her in the future.

le: must be informed by evidence as to the effect of the diagnosis

Brown v The Queen - The *O'Neill* Exclusion

R v O'Neill [2015] VSCA 325

[71] First, the principles are enlivened only where the offender suffers from an impairment of mental functioning. Whether there should be any moderation of general deterrence, and if so its degree, will depend upon the nature and severity of the impairment of mental functioning. It is important to keep in mind that, in *Verdins*, and in this Court's subsequent application of *Verdins*, the Court has consistently stated that the principles in *Verdins* relate to offenders who suffered from 'mental impairment' or 'impaired mental functioning', whether at the time of the offending or at the time of sentence. While the Court in *Verdins* regarded the particular diagnostic label as not being determinative, the principles expressed have always been confined to cases in which the offender suffered an impairment of his or her mental functioning. ***They do not apply to personality disorders such as those from which the respondent suffered.***

Brown v The Queen - Clarity and Caution

Brown v The Queen [2020] VSCA 212

O'Neill Reversed

[6] After hearing argument, we concluded that both the applicant's submission and the Director's concession should be accepted. **An offender diagnosed with a personality disorder should be treated as in no different position from any other offender who seeks to rely on an impairment of mental functioning as mitigating sentence in one or other of the ways identified in *Verdins*. Statements to the contrary in *O'Neill* should no longer be followed.** Whether and to what extent the offender's mental functioning is (or was) relevantly impaired should be determined on the basis of expert evidence rigorously scrutinised by the sentencing court.

Brown v The Queen - Clarity and Caution

Brown v The Queen [2020] VSCA 212

Must be Evidence Based

[61] Evidence-based decision-making is, of course, precisely what *Verdins* both authorises and requires. What the sentencing judge needs is not a diagnostic label but a clear, well-founded expert opinion as to the nature and extent of the offender's impairment of mental functioning and, so far as it can be assessed, of its likely impact on the offender at the time of the offending and/or in the foreseeable future.

Brown v The Queen - Clarity and Caution

Brown v The Queen [2020] VSCA 212

Limits on Severity?

[68] Looking ahead, it would seem from the expert evidence that a personality disorder is likely to engage the *Verdins* principles only in a case of some severity. But, plainly enough, it is not for this Court to suggest any threshold level of severity which must be reached before those principles would become applicable. Senior counsel for the Director properly conceded that this was so.

Brown v The Queen - Clarity and Caution

Brown v The Queen [2020] VSCA 212

Potential Exclusions?

[69] Nor is it appropriate to say more about those categories of personality disorder (anti-social personality disorder and narcissistic personality disorder) about which the expert witnesses expressed scepticism. As we have noted, their evidence was that the attachment of those diagnostic labels may be no more than descriptive of maladaptive behaviour and, hence, will provide no insight into an offender's mental functioning. Whether in a particular case involving such a disorder the expert evidence establishes a clinically significant impairment of mental functioning will, of course, depend on the circumstances of the case and the nature and content of the expert opinion.

Brown v The Queen - Clarity and Caution

Brown v The Queen [2020] VSCA 212

Protection of the Community

[72] Consideration of personality disorders, and of DB's case in particular, brings this issue into sharp focus. **Precisely because of the enduring character of a personality disorder, the issue of community protection is likely to arise frequently.** The risk of reoffending will fall to be considered whenever the expert evidence establishes to the court's satisfaction that the offender's mental functioning was impaired at the time of the offending and that the offending was attributable to the impairment.

Brown v The Queen - Where to From Here?

Brown v The Queen [2020] VSCA 212

Significant acceptance both in Victoria and nationwide.

DPP v Dolheguy [2020] VSC 704

Cooper v The Queen [2020] VSCA 300

Haberman v DPP [2020] VSCA 286

Gordon v Tasmania [2020] TASCCA 17

Bogers -v- The State of Westwe AUSTRALIA [2020] WASCA 174

Apps v The Queen [2020] ACTCA 53

Brown v The Queen - Where to From Here?

Cooper v The Queen [2020] VSCA 300

21 However, we have considered for ourselves the totality of the evidence in the light of *Brown*. There was simply no evidential foundation to draw the necessary link between the disorder and the offending. It is to be recalled that the judge made a positive finding that the offending was actuated by the applicant's pursuit of drugs or money for drugs and that he was not psychotic time of the offending.[23]

22 The applicant's personality disorder was the subject of a single sentence in the report co-authored by Dr Kokkinias and there was no suggestion that it constituted an impairment that had caused the offending. Dr Walton's supplementary report reveals a somewhat sceptical approach to the diagnosis and any contributory effect it may have had. His report provides no support for the submission the applicant now advances.

23 There was no evidence of clinically significant impairment of mental functioning referable to the applicant's personality disorder. There was little more than the listing of a diagnosis in Dr Kokkinias' report, without any consideration of its aetiology or practical impact on the applicant's judgment or decision-making. To use the language in *Brown*, that was to do no more than attach a label. There was of course a history of frank psychosis referable to his schizophrenia but, as the judge found, this did not contribute to the offending. In short, the applicant's submission is bereft of any evidential foundation and must fail.

Brown v The Queen - Where to From Here?

Gordon v Tasmania [2020] TASCCA 17

In *Director of Public Prosecutions v O'Neill* [2015] VSCA 325, 47 VR 395 at [71], the Court said that the *Verdins* principles could not apply to personality disorders such as those from which the respondent in that case suffered. This has been taken as authority for the broad proposition that personality disorders do not enliven the *Verdins* principles. However, in *Brown v The Queen* [2020] VSCA 212 at [6], the Court held that an offender diagnosed with a personality disorder should be treated as in no different a position from any other offender who seeks to rely on impairment of mental functioning in one or other of the ways identified in *Verdins*. Whether and to what extent the offender's mental functioning is or was relevantly impaired should be determined on the basis of expert evidence.

Brown v The Queen - Where to From Here?

Bogers -v- The State of Western Australia [2020] WASCA 174

89. It is unnecessary to decide whether the reasoning in *Brown* should be applied in this State. This is because, as we explain below, there was no evidential basis upon which to conclude that the appellant's APD impaired his mental functioning in any relevant manner.

90. Assuming (without deciding) that the appellant's APD was a mental impairment capable of reducing his moral culpability for his offending behaviour, and accepting (as the sentencing judge found) that the appellant's APD was causative of that behaviour, whether the appellant's moral culpability was in fact reduced depended upon the existence of evidence that proved on the balance of probabilities that the APD impaired his mental functioning in such a manner and to such an extent as to reduce his moral culpability.

91. As defence counsel acknowledged at first instance, there is no evidence to this effect. There was nothing in the way of expert evidence before the sentencing judge that was capable of demonstrating that the appellant's APD reduced his moral culpability for the offending.

Brown v The Queen - Where to From Here?

Apps v The Queen [2020] ACTCA 53

40. The appellant contended that his personality disorder and the other psychological conditions from which he suffered were mental conditions that were relevant in the same way that Mr Fisher's schizophrenia was relevant; Mr Fisher's mental condition was not a distinguishing feature. The appellant relied on the decision of *Brown v The Queen* [2020] VSCA 212, in which the Victorian Court of Appeal (comprising a bench of five judges) determined that the "Verdins principles" (the principles directing the manner in which mental illness may inform sentencing) were not necessarily excluded in the case of personality disorders. At [69], the Court said:

Whether in a particular case involving such a disorder the expert evidence establishes a clinically significant impairment of mental functioning will, of course, depend on the circumstances of the case and the nature and content of the expert opinion.

41. In Mr Fisher's case, there was expert opinion about the impact of the condition of schizophrenia. The sentencing judge was entitled to take it into account. In the case of the appellant, there was no such expert material.

Brown v The Queen - Where to From Here?

DPP v Dolheguy [2020] VSC 704

55 Impaired mental functioning at the time of offending may reduce an offender's moral culpability if it had the effect of impairing an offender's ability to exercise appropriate judgment, think clearly or make clear and rational decisions, if it made the offender disinhibited or contributed causally to the commission of the offence. Since the decision of the Court of Appeal in *Brown v The Queen*, an offender diagnosed with a personality disorder should be treated as in no different position from any other offender who seeks to rely on an impairment of mental functioning as mitigating sentence in one or other of the ways identified in *R v Verdins*.

56 The prosecution submitted that whilst *Verdins* principles can apply in an appropriate case, there is no realistic connection or causal link in your case. I disagree with the proposition that there is no realistic connection or causal link.

57 I am satisfied that the disorder and its profound psychological deficits were active at the time of the offending and significantly impaired your mental functioning. In this regard, I accept the opinion evidence of Dr Carroll and Dr Sullivan on the plea.

Brown v The Queen - Where to From Here?

DPP v Dolheguy [2020] VSC 704

58 In your case, once you had reached an acute level of anger and were in an aroused state, your emotional dysregulation made it extremely difficult for you to control the impulse to act out that anger so that while you were aware that strangling Mr Rathod was wrong and you knew what you were doing and could in fact organise the steps that led to the actions which caused Mr Rathod's death, I am satisfied that your cognitive state (that is your capacity to think clearly and logically about your actions) was likely to have been severely impaired, particularly at the time of the doing of the act. Furthermore, your reduced capacity to experience and express empathy meant that you were not sufficiently responsive to Mr Rathod's distress to stop.

59 In all the circumstances, your moral culpability for the offending is significantly reduced by reason of your severe personality disorder, which relevantly impaired your mental functioning at the time. As a result your sentence must be significantly moderated.

Brown v The Queen - Where to From Here?

Brown v The Queen [2020] VSCA 212

Challenges for clinicians and report writers (and instructors):

- Causation
- Classification system
- Longitudinal component
- Prognosis
- Behaviour v Cognition
- Availability of Experts

Brown v The Queen - Where to From Here?

Brown v The Queen [2020] VSCA 212

Challenges for clinicians and report writers:

- Causation
 - Direct causal relationships
 - Indirect causal/contributory relationships
 - Emotional dysregulation
 - Impulse Control
 - Empathy deficits
 - Cognitive impairments
 - But for...
 - Necessary and sufficient

Brown v The Queen - Where to From Here?

Brown v The Queen [2020] VSCA 212

Challenges for clinicians and report writers:

- Classification system
 - DSM-5
 - Alternative DSM-5 Model for Personality Disorders
 - ICD-11

Brown v The Queen - Where to From Here?

Brown v The Queen [2020] VSCA 212

Challenges for clinicians and report writers:

- Longitudinal component
 - Enduring, pervasive and the need for documentation
 - ICD-11:
 - An enduring disturbance characterized by problems in functioning of aspects of the self...
 - The disturbance has persisted over an extended period of time (> 2 years).
 - DSM-5
 - Enduring pattern, inflexible and pervasive across a broad range of personal and social situations.
 - The pattern is stable and of long duration, and its onset can be traced back at least to adolescence or early adulthood.

Brown v The Queen - Where to From Here?

Brown v The Queen [2020] VSCA 212

Challenges for clinicians and report writers:

- Prognosis
 - Availability of treatment
 - Issues in custody - timing of intervention
 - Risk

Brown v The Queen - Where to From Here?

Brown v The Queen [2020] VSCA 212

Challenges for clinicians and report writers:

- Behaviour v Cognition
 - “their evidence was that the attachment of those diagnostic labels may be no more than descriptive of maladaptive behaviour and, hence, will provide no insight into an offender’s mental functioning.”
 - Clinically valid?

Brown v The Queen - Where to From Here?

Brown v The Queen [2020] VSCA 212

Challenges for clinicians and report writers:

- Availability
 - Reports will be challenged
 - If you're making big claims, make sure you can call your expert
 - Timeframes - meet or exceed them, or expect adjournment requests from the Crown