RECENT COURT OF CRIMINAL APPEAL DECISIONS
(SENTENCING CHILDREN)

"YOUTH AS A MITIGATING FACTOR: TO WHAT EXTENT DOES THE PRINCIPLE SURVIVE?"

CHILDREN'S LEGAL SERVICE CONFERENCE

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Is there a point where the seriousness of a crime committed by a child requires that the principle that a court act in the best interests of the child must be totally subsumed by the deterrent and retributive purposes of sentencing?

1. In ***Roper v Simmons*** 543 US 2005, the US Supreme Court held that the death penalty could not be imposed on children. In doing so Justice Kennedy at 15 & 16, (with whom Souter, Ginsberg and Breyer JJ joined, Stevens J concurring, Rehinquist CJ, Scalia and Thomas JJ dissenting), for the majority, made the following points:

   - ***Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.***

   - ***The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.***

   - ***The susceptibility of juveniles to immature and irresponsible behaviour means their irresponsible conduct is not as morally reprehensible as that of an adult.***

   - ***Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.***

- ***The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.***

2. These factors are no less relevant or applicable when sentencing children in New South Wales. A jurisprudence has developed in the context of sentencing young offenders, which recognises the important differences in terms of responsibility between adults and children.

3. Section 3A ***Crimes (Sentencing Procedure) Act*** *1999* sets out the purposes of sentencing:

> *3A The purposes for which a court may impose a sentence on an offender are as follows:*
>
> *(a) To ensure that the offender is adequately punished for the offence,*
> *(b) To prevent crime by deterring the offender and other persons from committing similar offences,*
> *(c) To protect the community from the offender,*
> *(d) To promote the rehabilitation of the offender,*
> *(e) To make the offender accountable for his or her actions,*
> *(f) To denounce the conduct of the offender,*
> *(g) To recognise the harm done to the victim of the crime and the community.*

4. The Legislature has, however, made special provision for the sentencing of children. Section 6 of the ***Children (Criminal Proceedings) Act*** *1987* provides principles relating to the exercise of criminal jurisdiction with respect to children:

> *A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:*

(a) *That children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,*

(b) *That children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,*

(c) *That it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,*

(d) *That it is desirable, wherever possible, to allow a child to reside in his or her own home,*

(e) *That the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.*

5. It was noted by Hulme J in ***DM*** [2005] NSW CCA 181 that the Court of Criminal Appeal in ***Hearne*** (2001) 124 A Crim R 451, pointed out that the principle underpinning the practice of imposing lesser sentences on youthful offenders than those imposed on adults who commit similar crimes lies in the recognition of the immaturity of youth.

6. The reasons for the distinction are summarised in a report by a psychologist which the New Zealand Court of Appeal reproduced and appeared to accept in ***Slade v The Queen*** [2005] NZ CA 19, referred to in ***Regina v Elliot and Blessington*** [2006] NSW CCA 305 at [127]:

> ***It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spear 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents' desire for peer approval, and fear of rejection, affects their choices even without clear coercion Moffitt, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent.***

6. The general principle that when sentencing a child or young person, considerations of punishment and general deterrence may be given less weight in favour of individual treatment aimed at rehabilitation, is, of course, a well established legal principle: ***R v GDP*** (1991) 53 A Crim R 112.

7. In ***R v GDP***, the Court referred to the decision in ***R v Wilcox*** (15 August 1979 unreported), where Yeldham J remarked during the course of sentencing a young offender that ***"in the case of a youthful offender…considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation."*** Yeldham J had relied on ***R v Smith*** [1964] Crim L R 70, where it was said, ***"In the case of a young offender there can rarely be any conflict between his interest and the publics. The public have no greater interest than that he should become a good citizen".***

8. In ***R v C. S & T*** (12 October 1989 unreported), Gleeson CJ accepted a submission that "…***in sentencing young people…the consideration of general deterrence is not as important as it would be in the case of sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed".***

9. That the general principle continues to exist is not in question. What is in question is the degree to which the courts are prepared to subordinate the principles of punishment and general deterrence to the principle of rehabilitation. Or, asked another way, are the rights of children forfeit when a child commits a serious criminal offence?

10. In ***Pham and Ly*** (1991) 55 A Crim R 129, it was stated that general deterrence has a significant role to play, even with youth, especially as persons approach the age of 18, and where the youth ***"conducts himself in the way an adult might conduct himself"***

11. In ***Pham and Ly*****,** the relevant offender was 17 years and 8 months old. In that case Lee J said:

> ***"It is true that courts must refrain from sending young persons to prison unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes…"***

12. In ***R v Bus & A S*** (CCA, unreported, 3 November 1995, S was found guilty of a number of sexual offences including a charge of sexual assault in circumstances of aggravation (that he was in company). S was 17 years and 3 months. The penalty imposed on S was an effective total sentence of imprisonment of four and a half years, consisting of a minimum term of two and a half years and an additional term of two years. It was argued on appeal that the sentencing judge failed to give sufficient weight to the

applicant's youth and the requirements of s 6 of the Children's (Criminal Proceedings) Act 1987. In dismissing the appeal Hunt CJ at CL said:

> ***"…it is obvious that the relevance of the principles stated in s 6 to each individual case depends to a very large extent upon the age of the particular offender and the nature of the particular offence committed. An offender almost 18 years of age cannot expect to be treated according to law substantially differently to an offender just over 18 years of age. In both cases, the youth of the offender remains very relevant. Rehabilitation plays a more important role and general deterrence a lesser role. But that principle is subject to the qualification that, where a youth conducts himself in a way an adult might conduct himself and commits a crime of considerable gravity, the function of the Courts to protect the community requires deterrence and retribution to remain significant elements in sentencing him…"***

13. The emphasis in the authorities appears to have shifted away from the rights and protections afforded to children under section 6 of the ***Children (Criminal Proceedings) Act*** to a more punitive approach. The case law has developed a line of reasoning that imports an artificial distinction between "children's crimes" and "adult crimes", the latter warranting a lesser application of the sentencing principles traditionally applied to youth. Is there such a thing as an "adult crime" and a crime conceptualised as deriving from the offender's state of immaturity?

14. A perusal of Court of Criminal Appeal decisions suggests an affirmative answer to the above question. In ***R v WKR*** (1993) 32 NSWLR 447, the applicant had pleaded guilty to an offence of sexual assault. The complainant was 13 years old, he was 16 years and 9 months. The sentencing judge decided that the offender should be dealt with according to law and imposed a fixed term of imprisonment of two and a half years. The grounds of appeal argued that the sentencing judge erred in dealing with the applicant according to law and, secondly, even if there was no did err in that respect, the sentence was manifestly excessive.

15. In reaching the conclusion that there was no error in dealing with the applicant according to law, Sully J stated:

> ***If, in a particular case, a crime has been committed and it is a crime which is, in the nature and incidents, an adult crime rather than a crime which can be conceptualised sensibly as deriving from the offender's state of dependency and immaturity, then that factor is, in my opinion, a strong warrant for the exercise of the relevant discretion in favour of dealing with the offender according to law. The graver the crime the greater the warrant…In order to fix a fair and objective view of the true level of personal responsibility of a particular offender, it will be appropriate to consider, as well, whether the nature and incidents of the crime, and the personal circumstances otherwise of the offender, are such that the offender should be allowed to shelter behind the accident of age so as to have the quite extraordinary advantages, in terms of penalty, that flow from the application of Division 4 of Part 3 of the Children (Criminal Proceedings) Act.***

16. What must be remembered here is that Sully J was referring to the decision to deal with the offender at law rather than the weight to be given to the principles relating to youth. Error was found in the sentencing judge's decision to impose a fixed term and the applicant was re-sentenced to a minimum term of 11 months and an additional term of 18 months.

17. It does appear however that the general approach to sentencing children, when they come to be sentenced according to law, is that less weight is given to the mitigating aspect of youth where the offence can be categorised as "adult offending behaviour".

18. A more recent example of this approach is to be found in the case of ***Regina v AEM Sr; Regina v KEM; Regina v MM*** [2002] NSW CCA 58, where the two youngest offenders were aged 16 years and 10 months and 16 years and 3 months. There the Court said:

> ***It is well accepted in the case of youth, general deterrence and public denunciation usually play a subordinate role to the need to have regard to individual treatment aimed at rehabilitation…However, important as that principle is, it can not defeat the primary purpose of punishment nor, in circumstances where young offenders conduct themselves in a way which an adult does, can it stand in the way of the need to protect society.***

19. It is difficult to assess the degree to which youth can be regarded as a mitigating factor when a child is being dealt with according to law precisely because the offences regularly dealt with in the District and Supreme Court jurisdictions are largely offences committed by adults. Does this mean that by mere virtue of being dealt with according to law, a child forfeits the rights and protections usually afforded children in sentence proceedings?

20. That question must be answered in the negative. In ***Regina v LNT*** [2005] NSWCCA 307, the Court upheld an appeal against the severity of a sentence imposed for an offence of malicious wound with intent (s.33 of the Crimes Act 1900). The applicant was 17 years old at the time of the offence. In upholding the appeal Rothman J, with whom Simpson and Johnson JJ agreed, said:

> *The principles there set out [referring to the judgement in **R v MA** [2004] NSW CCA 92] do not detract from the position that juvenile offenders are sentenced on the basis that may be different to adults and, in the case of minors, under a statutory scheme that includes the qualifications contained in the **Children (Criminal Proceedings) Act 1987**. In every case it is a question of balancing deterrence, retribution and protection of the community, on the one hand, and rehabilitation, on the other. In the case of juvenile offenders, rehabilitation generally plays a far more significant role than it does in the case of mature adults. Of course, where a youth conducts himself in the way an adult might conduct himself and commits a crime of considerable gravity, the youth can expect to be treated in the same way as an adult. **But the fact that a "crime of considerable gravity" has been committed does not, in and of itself, necessitate a finding that the youth has conducted himself "in the way an adult might conduct himself"**. In each case it is a question of bearing in mind the subjective circumstances of the offender, the principles in the **Children (Criminal Proceedings) Act** and balancing rehabilitation on the one hand with deterrence and punishment on the other.*

21. What then is the type of behaviour that falls into the category of "adult offending". I suggest that children are less likely to obtain the benefit of the principles enunciated in the ***Children (Criminal Proceedings) Act*** 1987, where the offences demonstrate planning or a degree of pre-meditation; where that offence involves a significant degree of violence; or where the offending behaviour is part of an organised enterprise.

22. This issue was considered in ***Regina v MA*** [2004] NSW CCA 92. That case involved a Crown appeal against sentence imposed for murder in which the circumstances were that the accused shot and killed an unarmed person who was drunk and acting "obnoxiously". The respondent was 17 years and 3 months at the time of the offence. He pleaded guilty to murder and was dealt with by way of a sentence of 13 years 6 months with a non-parole period of 8 years 6 months. The Court upheld the Crown appeal and increased the sentence to 16 years with a non-parole period of 11 years. In the course of the judgement Dunford J stated:

> ***This Court has held that where immaturity due to youth is a significant contributing factor to an offence, then it may fairly be said that the criminality involved is less than it would be in a case of an adult of more mature years: R v Hearne [2001] NSW CCA 37; and in such cases, the allowance for youth may be greater despite the fact that the offence involved is a relatively serious one. This principle can apply in cases where the conduct constituting the offence is impulsive or a reaction influenced by the immaturity of youth, but not where there is pre-meditated violence as was the case here, by confronting the victim and his companion with a loaded gun.***

23. The danger in creating these categorories of "adult offending behaviour" and the "other", is that even where the conduct is unplanned and impulsive, the mere gravity of the offence is itself regarded as a basis to significantly reduce the weight given to the principle of rehabilitation and to youth as a mitigating factor.

24. An example of such a case is the decision in ***R v KT*** [2007] NSWSC 83. The offender had pleaded guilty at the first opportunity to one count of manslaughter. He was days away from turning 17 at the time of the offence. On the evening of the incident KT and his companions were driving around the streets of Auburn. KT engaged in "egging" and one of the eggs was thrown in the direction of the deceased. It missed him but fell on the ground close to him. The deceased retaliated by throwing either a can or plastic bottle at the car. The object hit the car. The driver turned the car around at the roundabout and returned to the position where the deceased was. KT got out of the car and approached the deceased. KT punched the deceased once to the face causing him to fall hard to the ground. He later died from head injuries.

25. On the aspect of youth, Johnson J said at [117] and [118]:

> ***The offender was 16, almost 17, years of age at the time of the offence. His initial conduct, involving the throwing of eggs at persons in the street, has an element of immaturity about it. However, his conduct in returning to the place where Mr Agang [the deceased] stood for the purposes of engaging in a violent confrontation, which led to the infliction of a very powerful blow by him which felled Mr Agang, was not juvenile behaviour. The offender was powerfully built with the appearance of a young man, and not a child. He had left school and was in employment and was living a life closer to that of an adult than a child. He was out with friends late in the evening.***
>
> ***In my view, the factors of punishment and deterrence are significant factors on sentence in this case. General deterrence is an important factor in this case. Young persons must be made aware that the vulnerability of human beings requires restraint by others and a rejection of unprovoked violent assaults. Specific deterrence is less important, as the Offender has developed some insight into his offence and now has become contrite. However, this was an objectively serious offence committed by a young man living in an adult world. Although the provisions of s 6 Children (Criminal Proceedings) Act 1987 and sentencing principles with respect to young offenders remain relevant, it is appropriate in this case to reflect on sentence the elements of punishment and deterrence which must not be subsidiary to the rehabilitation of the Offender.***

26. In ***Lal v R; PN v R*** [2007] NSWSC 445, McClellan CJ at CL sentenced two 14 year old girls for the manslaughter of a taxi driver. They had pleaded guilty. He imposed a non-parole period of 3 years, six months with an additional term of two years, six months. There was a dispute as to the severity of the physical assault upon the deceased. His Honour concluded that the offender's had used only a moderate degree of force, although sufficient to trigger a heart attack. His Honour was not satisfied that there was any kick to the deceased's head: [12].

27. His Honour acknowledged that the law recognises that when sentencing young offenders considerations of punishment and general rehabilitation should generally be regarded as subordinate to the need to foster rehabilitation. However, his Honour reiterated the view that this principle will have less weight where the offending behaviour demonstrates that the young offender has conducted themselves "in a way that an adult does": [33].

28. In sentencing the two children his Honour said at [34]:

> ***In my view both the need for punishment and personal deterrence must be given significant weight in the present matters. General deterrence is also an important factor. Every member of the community must be reminded of the vulnerability of other people to acts of violence.***

29. It is difficult to reach any certain conclusion as to why there appears to be a diminishing of the principle that when sentencing children considerations of punishment and general deterrence should generally be regarded as subordinate to the need to foster rehabilitation. It may be that social attitudes have changed in that there is a greater focus on punishment as opposed to rehabilitation. The Courts may well simply be reflecting that change in social attitude. It must be a very difficult task indeed for a sentencing judge to give full application to the principle of rehabilitation when the tabloids, the politicians and the shock jocks are baying for blood.

30. Another explanation may be that children are committing more serious offences than they did in past years. However, this explanation does not appear to be supported by the statistics.

PERSONS UNDER 18 FOUND GUILTY & SENTENCE CASES[1]

PRINCIPAL OFFENCE	1998	1999	2000	2002	2003	2004	2005
MURDER	2	1	----	----	----	3	1
MANSLAUGHTER	3	1	6	2	----	5	11
SERIOUS ASSAULTS	9	9	9	13	19	14	17
SEXUAL ASSAULTS	5	----	10	13	12	13	12
ROBBERY	32	19	27	29	31	44	21
ABDUCTION	No category	No category	1	1	4	6	3

31. Whatever the reason for this trend in sentencing children, it is a worrying trend. As Andrew Haesler SC argued in the High Court, a strictly punitive approach to the disposition of offences committed by children is entirely inappropriate and contrary to long-term community interests. The common law, international law and New South statutory provisions all point to that conclusion. These instruments operate to protect the inherent dignity of both the child and the community. They operate to protect the child and the community from the imposition of sentences that are more severe than necessary to achieve the purpose of punishment. They mandate a concern for the welfare of the child, considerations that may be missed if focus is had solely on the nature of the offence. To downplay these important factors because of the severity of the offence is not mandated by common law or statute.[2]

[1] BOSCAR Statistics
[2] MMK v The Queen, Applicant's Summary of Argument 6 April 2006, at para 3.13

32. It is important to remember and refer to the remarks of Allen J in **R v Webster**, unreported CCA NSW 15 July 1991 (the murder by a young man of a teenage girl):

> ***The protection of the community does not involve simply the infliction of punishment appropriate to the objective gravity of the crime. There are other considerations as well – principally although by no means only, the deterrence of others…and the rehabilitation of the offender. The community have a real interest in rehabilitation. The interest to no small extent relates to its own protection ..The community interest in respect to its own protection is greater where the offender is young and the chances of rehabilitation for almost all of the offender's adult life, unless he is crushed by the severity in sentence, is high.***

33. In ***DB v Regina; DNN v Regina*** [2007] NSWCCA 27, the appeal against severity of sentence was upheld. The Court of Criminal Appeal held that the sentencing judge failed to have proper regard to the principles applicable to juvenile offenders. The offences were aggravated armed robberies. In the course of her judgement, Latham J said:

> ***[59] His Honour recognised that it was "quite likely … that he was influenced to become involved in these matters by his brother-in-law [DN]". His Honour went on to say that, despite the applicant's age,***
>
> > ***"he himself took an active part in behaving in a brutal fashion towards the victims and that he was just as guilty as anyone else for the way in which they were struck, threatened and ill-treated. This cannot be regarded as a juvenile escapade gone wrong. He took part in a carefully planned series of raids which aimed to secure large amounts of valuable equipment for the purpose of resale. In his case the fact that he appears to have a problem with drugs may have had some part in it. He may have needed money for that. The fact that he was a brother-in-law [DN] and lived with him may have had something to do with it. …. He may have been young, but as far as I can see he was a willing participant in a very serious venture.***
> >
> > ***Considerable violence was used. A large amount of property was involved and he has a previous criminal record. The significance of that previous criminal record, although a juvenile one, is that it casts some doubt on the extent to which rehabilitation should be regarded as a significant factor. Nevertheless I am making due allowance for rehabilitation in the sentence.***

> ***[60] His Honour appears to recognise the probability that the applicant was influenced by an adult co-offender, yet goes on to discount that factor on the basis that the applicant was a willing participant. The applicant's prospects of rehabilitation are doubtful, according to his Honour, yet "due allowance" is made. These remarks fall short of a proper consideration of the principles to which a court must have regard when exercising criminal jurisdiction with respect to children, in particular, that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance (s 6(b)), and that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind (s 6(e)). In fact, in relation to the Burwood Heights offence, the applicant received a sentence greater than that imposed upon DN.***
>
> ***[61] As was noted by Hulme J. in R v DM [2005] NSWCCA 181, this Court in R v Hearne (2001) 124 A Crim R 451; [2001] NSWCCA 37 pointed out that the principle underpinning the practice of imposing lesser sentences on youthful offenders than those imposed on adults who commit similar crimes lies in the recognition of the immaturity of youth. The fact that the applicant may have been a willing participant does not dispose of the need to have regard to the extent to which his relative immaturity made him vulnerable to the influence of an older family member, particularly one upon whom he was dependent for food and shelter.***
>
> ***[62] Similarly, the general principle that greater weight may be given to a juvenile's prospects of rehabilitation, at the expense of general deterrence, was not discussed in the course of the remarks on sentence. Thus, it remains unclear whether his Honour accepted the principle in making "due allowance" for rehabilitation, or whether his Honour determined that the general principle did not apply in the particular circumstances of the case.***
>
> ***[63] This ground has been made good.***

34. What then can an advocate do to ensure that the principles relating to sentencing children are given adequate weight? I suggest that it is insufficient to simply rely on the statutory provisions and the relevant authorities (although knowledge of and reference to these authorities is vitally important). As advocates, we have to think more creatively in terms of presenting a case that compels a sentencing judge to give full

application to considerations of rehabilitation and youth as a mitigating factor, where that entails the subordination of punishment and deterrence as sentencing imperatives.

35. The sentencing of children must involve an assessment of their level of responsibility and maturity, both generally and in the circumstances of the specific offender. Reports from child psychologists are necessary to place evidence before a court relating to that aspect.

36. Evidence relating to a particular child offender's level of cognitive ability or susceptibility to peer group pressure may also be useful in supporting a submission that principles of punishment and deterrence should be given less weight.

37. It must be stressed in any sentence proceeding where you appear for a child that it is not simply that the seriousness of the offence that requires the subordination of consideration of youth to punishment and deterrence. Rather one needs to identify the point:

> ***At which the seriousness of the crime committed by [a young man] is of such a nature, is so great, that that principle [the consistently pointed out need to give young offenders a chance and to refrain from sending them to gaol or dealing heavily with them if that course can be avoided] must, in the public interest, give way:*** per Hulme J in **JL C-H** [2004] NSW CCA 70 at [25].

38. It is apparent from what has already been said that the Courts have not been consistent in their application of the principles relevant to youth. A further example is provided in the different approaches taken in sentencing young sex offenders. In **JDB** [2005] NSW CCA 102, Mason P citing **GDP** said of a 13 year-old sex offender:

> ***"For an offender of this age, facing his first time in custody, extreme youth should have meant that rehabilitation and not deterrence was the primary focus of attention.***

39. In contrast in **DM** [2005] NSWCCA 181, Simpson J when dealing with another 13 year-old sex offender, held that the general principle that in the case of an extremely young offender more emphasis can be given to questions of rehabilitation, even at the expense of deterrence, was not universal and did not mean that, in appropriate cases, issues of general deterrence are not of significance (at [61]).

40. Notwithstanding these different approaches, a submission should always be made that rehabilitation must be the primary aim in relation to the sentencing of a child. In ***Blackman & Walters*** [2001] NSW CCA 121 Wood CJ at CL referred, with approval, to the following passage from the judgement of King CJ in Yardley v Betts (1979) 22 SASR 108 at 112-113:

> ***"The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence has the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an order to avoid offending in the future, the protection of the community is to that extent enhanced. To say that the criminal law exists for the protection of the community is not to say that severity is to be regarded as the sentencing norm.."***

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