

# The Impact of COVID-19 on Sentencing

*Scott v R* [2020] NSWCCA 81 and  
*Cabezuela v R* [2020] NSWCCA 107

By Damian Beaufile

On 29 April 2020, the New South Wales Court of Criminal Appeal allowed an appeal against the sentence imposed upon Mr Scott.

In resentencing Mr Scott, the Court took into account evidence as to the impact COVID-19 would have on Mr Scott as an inmate. The appeal followed the conviction and sentence of Mr Scott in the District Court following a jury trial presided over by her Honour Judge Flannery SC. Mr Scott was convicted of three counts of assault with an act of indecency on a child under 16 years and one count of sexual intercourse with a child under 10 years of age. Mr Scott was sentenced to an aggregate sentence of 6 years with a non-parole period of 3 years and 6 months.

Mr Scott raised a number of appeal grounds and his appeal was heard on 4 September 2019. One of his appeal grounds was that the sentence he received was manifestly excessive.

## The COVID-19 Pandemic and the reopening of the case

After his appeal was heard, Australia had fallen into the grip of the COVID-19 pandemic. Prior to his appeal being determined Mr Scott filed written submissions asking the Court to take the pandemic into account. On behalf of Mr Scott it was submitted that “in the current COVID-19 pandemic [Mr Scott] falls into the most vulnerable category and his prolonged incarceration together with a large number of inmates placed him in a high-risk category to contract the virus. If he does, on the current statistics, his life is in danger”: at [154].

As the written submissions were filed without leave of the Court, Mr Scott was required to file further submissions and evidence. Mr Scott provided the Court with further submissions attaching a facsimile transmission from Justice Health listing Mr Scott’s medical conditions as at 8 April 2020 including asthma, ‘Pre-Type 2 diabetes’ and atherosclerotic disease. The submissions also included a number of websites that contained articles, reports



and papers about the pandemic: at [155] – [158]. In response to Mr Scott’s further submissions the Crown provided the Court with a report prepared by the Director of Corrections Strategy, Department of Health relating to the Departments response to the COVID-19 pandemic and an email from the Nursing Unit manager at Kirkconnell & Oberon Correctional Centres outlining Mr Scott’s circumstances.

## Determination of Appeal

Justice Hamill, with Justice Brereton and Justice Fagan agreeing, found that the evidence supported a submission that some of Mr Scott’s medical conditions make him more susceptible to complications if he contracts COVID-19. The evidence also established that there had been no confirmed cases of COVID-19 in the NSW Prison population. Justice Hamill accepted that some of the strategies used by Corrective Services NSW to minimise the spread of COVID-19, such as the suspension of all personal visits, make the conditions of incarceration more onerous. It was also accepted that Mr Scott, due to his age and medical conditions, will ‘experience a level of stress, anxiety, and even fear at the potentially fatal consequence to him were he to be infected with COVID-19 virus in prison’ that is greater than a younger, healthier, inmate: at [163].

As the sentence imposed by Judge Flannery SC was found to be manifestly

excessive due to other factors not relating to COVID-19, the new material in relation to COVID-19 was taken into account as part of a re-sentencing exercise. Justice Hamill considered that the applicant’s age, his medical conditions did make him more vulnerable to potentially grave complications should he contract COVID-19. The onerous nature of suspending all social and family visits due to COVID-19 was also taken into account: at [164].

Ultimately, Mr Scott received an aggregate sentence of 5 years with a non-parole period of 2 years and 6 months: at [170].

## Scott distinguished in *Cabezuela v R* [2020] NSWCCA 107

Shortly after the decision of Scott was handed down the Court of Criminal Appeal had a further opportunity to consider the impact that COVID-19 could have on a person serving a period of imprisonment. Mr Maximo Cabezuela was convicted and sentenced to a term of 28 years imprisonment with a non-parole period of 18 years, he was 79 at the time of sentencing. Mr Cabezuela appealed against his sentence on the ground that the circumstances of COVID-19 were such that the Court would conclude that he suffered an additional burden by his imprisonment making his sentence manifestly excessive: at [119].

Like Mr Scott, Mr Cabezuela’s age and poor health meant that he came under the category of a vulnerable inmate if COVID-19 were to infiltrate the prison system. However, Justice Walton, with Chief Justice Hoeben and Justice Harrison agreeing, found that the admission of the evidence in relation to COVID-19 was not fresh evidence. This meant that it was not material that could be taken into account to impugn the sentencing judgment which is not otherwise susceptible to challenge on manifest excess ground: at [131]. As the Court in this case did not find that the sentence was manifestly excessive the evidence as to the implications of COVID-19 could not be taken into account for the purposes of re-sentencing as they were in Scott: [129].

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