

THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMON LAW DIVISION

LATHAM J

THURSDAY 3 NOVEMBER 2005

013397/04 - PROTHONOTARY OF THE SUPREME COURT OF NEW  
SOUTH WALES v NICHOLAS LUKE MCCAFFERY

**SENTENCE**

HER HONOUR: Nicholas Luke McCaffery was convicted on 16 June 2005 of 29 counts of contempt, pursuant to proceedings brought by the Prothonotary of this Court. The offences are constituted by 29 appearances by Mr McCaffery in various courts as a barrister, whilst he was not the holder of a current practicing certificate. Mr McCaffery therefore contravened S48B(1) of the **Legal Profession Act 1987**, and is deemed to be guilty of contempt of any Court where the contravention takes place (s48B(3)).

Mr McCaffery was admitted as a solicitor of this Court on 4 July 1986. On 13 August 1993 he was admitted as a barrister and continued to lawfully practice as such until 30 June 2002.

As at 1 July 2002, Mr McCaffery failed to renew or apply for a practicing certificate. It appears from the evidence that a combination of factors contributed to this state of affairs. Since October 2001 Mr McCaffery had been suffering from severe depression. He was treated with an antidepressant, but his attention to his work

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continued to suffer. He was unable to meet his financial commitments, to the extent that he relinquished chambers in April 2002. He was without sufficient funds to renew his practicing certificate in mid 2002, yet he continued to appear in courts and to act as a barrister. He appeared in the Compensation Court on two occasions and in the District Court on two occasions in the period August to September 2002.

In October 2002 Mr McCaffery was financially able to renew his practising certificate, but realised that to do so, he would be obliged to supply a statutory declaration to the effect that he had not acted as a barrister in the interim. At this time he again consulted a psychiatrist, Dr Michael Armstrong (see Exhibit 1). He continued to practise as a barrister, without a practising certificate, not willing to perjure himself, yet conscious of the peril he was facing.

Between 29 November 2002 and 11 December 2003, Mr McCaffery appeared as a barrister in the Supreme Court, Compensation Court and Local Court on a total of 25 occasions.

On 19 December 2003, the New South Wales Bar Association wrote to Mr McCaffery seeking an explanation for his appearances. On 5 January 2004, Mr McCaffery replied, admitting his conduct. The Bar Association then sought undertakings from Mr McCaffery that he would not

appear or act in any future proceedings.

Those undertakings were supplied on 12 January 2004. Mr McCaffery also supplied the Bar Association with further particulars of his appearances on 19 January 2004.

Not surprisingly, the Bar Association's intervention coincided with a relapse into severe depression.

Mr McCaffery's marriage broke down, he separated from his wife on 1 February 2004, and he came under the care of Dr Rogoz, who prescribed further antidepressant medication.

On 17 December 2004, Mr McCaffery's name was removed from the Roll of Legal Practitioners on the grounds of professional misconduct. (See **Prothonotary of the Supreme Court of New South Wales v McCaffery** [2004] NSW CA470.)

These were grave instances of contempt of Court. Whilst Mr McCaffery's depression may partly explain his persistent offending, it cannot justify or excuse it. The course of offending behaviour outlined above continued for 14 months after Mr McCaffery had elected not to renew his practising certificate because of his reluctance to "come clean". Had he done so in October 2002, the Court may have regarded his conduct as a temporary lapse. Moreover, the deliberate nature of the contempts represents an affront to the trust which the courts place in the practitioners appearing before them. The administration of justice is jeopardised by such conduct.

The lack of any professional indemnity insurance, which is an incident of lawful practice, exposed those for whom Mr McCaffery acted in the relevant period to significant risk. Fortunately, that risk does not appear to have materialised. However, that fact does little to mitigate Mr McCaffery's criminality.

It has been submitted that Mr McCaffery's conduct may properly be characterised as akin to contumacious contempt. In **Maniam (No. 2)** the Court noted:

"The most serious class of contempt, from the point of view of sanction, is contumacious contempt. Not every intentional disobedience involves a conscious defiance of the authority of the Court which is the essence of this class of contempt: See **Australian Consolidated Press Ltd v Morgan** (1965)112 CLR 483 at 500. This class of contempt is reserved to cases where the behaviour of the contemnor has been shown to be aimed at the integrity of the courts and designed to degrade the administration of justice, as distinguished from a simple interference with property rights manifested by a Court order".

The term "contumacious" was considered in the context of contempt charges in **Wood v Galea (No. 1)** (1995) 79 ACrimR 567, where at 570 Hunt CJ at CL held the term to mean "stubbornly resistant to authority; willfully obstinate" or "willfully and obstinately disobedient to authority".

It is not contended that Mr McCaffery intended to degrade the administration of justice by his failure to renew his practising certificate. It is asserted that his intentional disobedience of his obligations under the

**Legal Profession Act** places these offences at the upper end of the range of objective gravity.

The assignment of a point on the spectrum of objective gravity for a given offence of contempt is problematic. By its very nature the offence does not lend itself to easy comparisons, given the extremely broad range of conduct capable of amounting to a contempt. This much has been recognised: See **Commissioner For Fair Trading v Oliver** [2004] NSWSC 722 per Studdert J.

That said, the objective features of Mr McCaffery's offences do, in my view, warrant consideration of a custodial penalty.

The principles applicable to the punishment of contempt are well established. In **Manian (No. 2)** Kirby P, as he then was, stated the rationale for punishing a contemnor at 314 as follows:

"A conviction of contempt of Court is a conviction of an offence, criminal in nature. Punishment of the convicted Contemnor must therefore take into account the considerations normally applicable to the punishment of crime and apt to uphold the purpose of this jurisdiction, namely, the undisturbed and orderly administration of justice in the Courts according to law. Thus, in determining the punishment which is apt to the circumstances which have led to a conviction of contempt, it is appropriate to bear in mind the purposes of punishing the Contemnor, deterring the Contemnor and others in the future from committing like contempts; and denouncing the conduct concerned in an appropriately emphatic way: See **Director of Public Prosecutions v J John Fairfax & Sons Limited** (1987) 8 NSWLR 732 at 741".

Other decisions have stressed the importance of

specific and general deterrence in determining the sentence to be imposed: See **Registrar In Equity v Froome** [2001] NSWSC 1029; **Pelechowski v Registrar of the Court of Appeal** (NSW) (1999) 198 CLR 435 at 485. In this case, the principle of general deterrence is attenuated by Mr McCaffery's depressive illness, which contributed significantly to his offending.

In many ways, Mr McCaffery was correct in his comments to the Court that his life has been destroyed. From a relatively prosperous and supportive family environment, he chose the law as his profession for noble motives. He served the law capably for a number of years and enjoyed it immensely. His downfall cannot be more keenly felt, nor more complete, involving as it did the estrangement of his wife and eight year old daughter, to whom he has some access at his mother's house where he now lives. He harbours hopes of returning to work full-time as a law clerk in order to support his wife and child. He now recognises the crippling nature of his depression and is content to receive ongoing treatment. He expressed his abject apologies to the Bar Association, the Court of Appeal, and this Court for his behaviour. At no stage did he attempt to avoid or minimise responsibility for that behaviour.

Having regard to the provisions of the **Crimes (Sentencing Procedure) Act 1999**, in particular s 21A, I

take into account Mr McCaffery's very real contrition and remorse, his early admissions of guilt, his prior good character, the fact that these were a series of offences over a significant period of time and the abuse by Mr McCaffery of the trust placed in him by the Courts of this State in the sense explored above.

I propose discounting the sentences to be imposed by 25 per cent in recognition of the utilitarian value of the acknowledgement of guilt. I have, however, reached the view that nothing less than a custodial sentence is called for.

However, taking into account, as I said, the very real nature of Mr McCaffery's contrition and remorse, his prior good character, and the fact that the courts can have confidence, I believe, in his complete rehabilitation, I have determined to suspend the sentences under s 12 of the **Crimes (Sentencing Procedure) Act**. Accordingly I sentence as follows:

On charges 1 to 4 of the Statement of Charge annexed to the summons in proceedings 13397 of 2004, on each charge I sentence the defendant to nine months imprisonment to date from 3 November 2005, expiring 2 August 2006, comprised of a non-parole period of six months to date from 3 November 2005, expiring on 2 May 2006, the balance of the term being three months.

On charges 5 to 12 of the Statement of Charge I sentence  
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the defendant to ten months imprisonment on each charge to date from 3 January 2006, to expire on 2 November 2006, with a non-parole period of five months to date from 3 January 2006, expiring on 2 June 2006.

On charges 13 to 29 of the Statement of Charge I sentence the defendant to 12 months imprisonment on each charge to date from 3 January 2006, to expire on 2 January 2007, with a non-parole period of six months to date from 3 January 2006 to expire on 2 July 2006.

It follows that the aggregate non-parole period will expire on 2 July 2006. Pursuant to s 12 of the **Crimes (Sentencing Procedure) Act 1999**, I suspend the sentences of imprisonment, subject to the defendant entering bonds under s 12 with the conditions recognised by s 95 of the **Crimes (Sentencing Procedure) Act** for the terms of those sentences.

The further order that I make is that the defendant is to pay the plaintiff's costs in these proceedings.

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HER HONOUR: Now, Mr McCaffery, you will have to enter those bonds in the Registry and just for more abundant caution, could I explain to you that the aggregate term of the sentence dates from today, 3 November 2005, and expires on 7 January 2007. So effectively for that period of time you are subject to the terms of the various bonds under section 12 and the usual conditions that I refer to are that you are to be of good behaviour for the terms of those sentences and to appear before Court at any time if called upon to do so. Do you understand that?

DEFENDANT: Yes, your Honour.

HER HONOUR: The aggregate non-parole period, as I said, dates from today and expires on 2 July 2006.

DEFENDANT: Your Honour, am I going to prison today or not? I am sorry, my mind is a little disturbed.

HER HONOUR: I am sure Mr Cogswell will explain it to you. My understanding is that if you go to the Registry and enter those bonds there is no need for you to actually be entered into custody.

DEFENDANT: Thank you, your Honour.

HER HONOUR: Anything that I have overlooked, Mr Cogswell?

COGSWELL: Perhaps an undertaking from Mr McCaffery to attend the Registry now.

DEFENDANT: I give that undertaking now.

COGSWELL: We were a bit concerned about section 215 just as far as costs, as whether they need to be specified or not, section 215 of the Criminal Procedure Act.

HER HONOUR: I had a look at orders made in the past and the only order that has ever been made is the plaintiff pay the costs of the proceedings. I assume that is because one has to then compute the costs to date and then there can be no argument about the fact that this includes all the costs of the proceedings. Do you want me to specify an amount?

COGSWELL: Yes, is the answer, and we have an up-to-date list. I tender a document called Memorandum of Costs and Disbursements and I will put today's date in blue on it. Mr McCaffery has seen this.

HER HONOUR: I will amend the last order to this extent; the defendant to pay the plaintiff's costs in these proceedings, which have been determined at \$26,819.10.

DEFENDANT: Is that an order for the payment of that amount, is it?

HER HONOUR: It is an order for the payment of costs which have been determined in that amount as \$26,918.10. I think as far as that is concerned ultimately you will have to reach some arrangement as to how that amount is paid.

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DEFENDANT: All I have is the same document your Honour has.

HER HONOUR: Again I think Mr Cogswell can probably enlighten you on that score as well.

DEFENDANT: Your Honour, one further matter, I am sorry to do this, your Honour, could you just refresh my memory as to the completion of the term of the sentences, just the last date would be sufficient.

HER HONOUR: Overall the sentences expire on 2 January 2007 and the non-parole period overall expires on 2 July 2006.

DEFENDANT: Thank you, your Honour.

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