

SVENSON
BARRISTERS



Exceptions to Mandatory Sentencing

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When do mandatory sentences apply?

- Parliament have created offences that, within the Sentencing Act, require a Court to impose a term of imprisonment. These are known as Category 1 and Category 2 offences
- Some offences also attract mandatory minimum sentences or mandatory minimum non-parole periods
- There are however exceptions that apply that, when engaged, allow a Court to either fully or partially allow a Court to move away from these mandatory provisions

Category 1 Offences

- Category 1 offences are found in the definitions section (section 3) of the Sentencing Act, and include:

murder, causing serious injury intentionally in circumstances of gross violence, causing serious injury recklessly in circumstances of gross violence, trafficking in a large commercial quantity of a drug of dependence, cultivation of a large commercial quantity of a narcotic plant, rape, rape by compelling sexual penetration, incest with child, lineal descendant or step-child (if victim under 18), sexual penetration of a child under 12, persistent sexual abuse of a child under 16, causing serious injury intentionally to an emergency worker, custodial officer or youth custodial officer, causing serious injury recklessly to an emergency worker, custodial officer or youth custodial officer, causing injury intentionally or recklessly to an emergency worker, custodial officer or youth justice custodial worker, aggravated home invasion aggravated carjacking, intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving (where injury caused).

- When sentencing an offender for a category 1 offence, the court must impose a custodial sentence, excluding a combination sentence, unless an exception is met (which we will come to)

Category 2 Offences

- Category 2 offences are also found in the definitions section (section 3) of the Sentencing Act, and include:

manslaughter, child homicide, causing serious injury intentionally, kidnapping, arson causing death, trafficking in a commercial quantity of a drug of dependence, cultivation of a commercial quantity of a narcotic plant, providing documents or information facilitating terrorist acts, intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving, armed robbery (where a firearm was used, a victim suffered injury or the offence was committed in company), home invasion, carjacking culpable driving causing death, dangerous driving causing death.

- When sentencing an offender for a category 2 offence, the court must impose a custodial sentence, excluding a combination sentence, unless an exception is met (which we will come to)

Mandatory Minimum Offences

- Sections 9B – 10AE of the Sentencing Act requires that specific lengths of custodial sentences, or non-parole periods, are required for particular offences
- These include manslaughter – gross violence or single punch, causing serious injury (gross violence), certain offences against emergency/custodial workers on duty, aggravated home invasion, aggravated car jacking

Starting Point

- Determine whether the offending your client is charged with is a Category 1 or 2 offences, and whether it carries with it a mandatory minimum sentence or NPP
- If the offence is only a Category 1 offence – look at the s 5(2G) and (2GA) exceptions (which we will come to)
- If the offence is only a Category 2 offence – look at the s 5(2H) and (2I) exceptions (which we will come to)
- However, if the offence has a mandatory minimum sentence or NPP, your starting point is the s 10A special reasons test
- *** However – can this offence be negotiated out? Conversely, have the police not laid an offence they should? Consider when negotiating

Section 10A Special Reasons

- A Court may find a special reason exists if:
 - The offender has assisted or has given an undertaking to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence; OR
 - The offender proves on balance of probabilities that:
 - at the time of the commission of the offence, he or she had impaired mental functioning (provided this was not caused substantially by self-induced intoxication) that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability
 - he or she has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment
- The court proposes to make a Court Secure Treatment Order or a residential treatment order in respect of the offender
- There are substantial and compelling circumstances that are exceptional and rare and that justify doing so

Impaired Mental Functioning

10A(2)(c)(i)

- 10A(2)(c)(i) BOP (only applies to c – *Fariah*) - at the time of the commission of the offence, he or she had impaired mental functioning (provided this was not caused substantially by self-induced intoxication) that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability
- Impaired mental functioning means:
 - a mental illness within the meaning of the Mental Health Act 2014 ; or
 - an intellectual disability within the meaning of the Disability Act 2006 ; or
 - an acquired brain injury; or
 - an autism spectrum disorder; or
 - a neurological impairment, including but not limited to dementia
- Mental illness is defined in section 4 of the Mental Health Act to include a medical condition that is characterised by a significant disturbance of thought, mood perception or memory.

Impaired Mental Functioning

10A(2)(c)(i)

- Obtain a report or reports from suitably qualified professionals to comment on this (you would ordinarily have the comment on the next exception at the same time – RE burden of imprisonment)
- Higher threshold test than *Verdins*.
- Similarly, we need to show a causal link between the IMF and the commission of the offence
- We also need to show that it ‘substantially and materially’ reduces their culpability
- When you are having your report written, be certain that your cover letter, and the report when produced, comments on the above – you don’t want an ambiguous report

Impaired Mental Functioning 10A(2)(c)(i)

- Case by case assessment
- Often arguing IMF itself is not overly difficult, a medical history, or very basic report can establish this. These issues are common, mental illnesses and similar diagnosis
- Biggest issue is the causal link and reducing their culpability, and that the IMF wasn't caused solely by self-induced intoxication

Impaired Mental Functioning 10A(2)(c)(i)

Causal link and culpability:

- Often both are argued simultaneously, as often most if not all of the same factual matrix or submissions is relevant to both issues
- No one size fits all
- Get creative, be flexible. What can you point at to show a causal link?
 - Delusions, psychosis, priors (or absence of) – is this out of character, how was your client acting before emergency workers attended, who called emergency workers and why, was their judgment impaired and why
- Culpability:
 - Did the IMF reduce their ability to exercise appropriate judgment, make calm/rational choices, have clear thoughts, understand wrongfulness of their conduct, obscure their intent, or were they disinhibited

Impaired Mental Functioning

10A(2)(c)(i)

IMF does not apply where caused substantially by self-induced intoxication (per 322T of Crimes Act – unless involuntarily, OR because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, OR from the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it

- The issue of self-induced intoxication seems to arise frequently in these matters
- How can you move it away from being caused substantially by self-induced intoxication?
 - Why were they intoxicated, self-medication, was there an underlying condition, was it being appropriately treated

Impaired Mental Functioning 10A(2)(c)(i)

Intoxication – *Haberfield case*

O attended a music festival and consumed a cocktail of drugs.

O returned home in a delusional state. O's family attempted to take him to a hospital, but O escaped and hid in a dog kennel before going the door of some strangers and entering. One of the occupants called 000 and an ambulance arrived staffed by V1 and V2. O subsequently attacked Vs, causing injury

- Judge Tinney, on appeal found he was delusional, in a state of psychosis. Accepted the experts evidence: “ *[O] had an enduring mental illness and the substances exacerbated that underlying illness. He [the expert] likened it to fuel thrown onto a fire. He said: “The fire was already grumbling and the illicit substances acted as potent fuel and have severely exacerbated his mental state which was already disturbed” . He said that this severely disturbed state would not have occurred absent the illicit drugs”*

Impaired Mental Functioning

10A(2)(c)(ii)

- 10A(2)(c)(ii) – BOP he or she has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment
- IMF, same definition as previously
- Consider:
 - Treatment – are they having significant treatment with the community and this would change if incarcerated (Eg. NDIS, DSP, regular psychs/GP etc.), how will they relate to other prisoners (does the IMF impact social settings), would they struggle to pick up normal cues, heighten stress (more so than the ordinary burden), suicidal, risk of exacerbating conditions/developing new conditions or having previous diagnosis re-emerge, does the IMF make you more vulnerable in the prison setting due to pressures/lack of understanding/lack of awareness
- Make the link clear – what is unique about their IMF, and how would that specifically meet the ‘substantially and materially greater’ test

Substantial and Compelling

10A(2)(e)

A court may find a special reason exists if there are substantial and compelling circumstances that are exceptional and rare and that justify doing so (note this is seen at s 5(2H) as well, relevant to Category 2 offences, at present it appears given the test is the same the principles are the same for both tests)

- This is said to be a residual category of limited scope, and a high hurdle that will not often be surmounted (*Farmer v The Queen*)
- A stringent test, one that is not discretionary, and present a higher hurdle than *Verdins* (*Peers v the Queen*)

Substantial and Compelling 10A(2)(e)

- Issue: what is substantial and compelling circumstances that are exceptional and rare and that justify doing so (IE finding a special reason)
- Often, particularly in the Magistrates' Court, the argument against is that the offender's circumstances are not dissimilar to what is often seen by the Court
- Counter this:
 - *Fariah v The Queen (VSCA)*
s 5(2H)(e) does not impose a burden on an offender to prove on the balance of probabilities the existence of substantial and compelling circumstances that are exceptional and rare. That is an evaluative judgment for the judge to make once the relevant underlying facts have been established in accordance with settled principle. We also consider that the mere fact that some individual circumstances may commonly be encountered by sentencing judges in the County Court will not by that fact alone necessarily deprive them of their character as substantial and compelling and exceptional and rare. Every case will necessarily depend on its particular facts. Circumstances which individually are relatively common may in combination enliven the exception in s 5(2H)(e). Indeed, in our view, the applicant's appalling childhood experiences, coupled with his youth and other factors relied upon, were sufficient in combination to engage s 5(2H)(e)

Substantial and Compelling 10A(2)(e)

Further:

Farmer v The Queen (VSCA)

The judge was correct in concluding that a young offender who will be vulnerable in custody and who suffers from anxiety but who has committed a very serious offence is not rare or unforeseen. Generically, the factors relied on by the applicant are often seen.

However, although each of the aspects on which the applicant relies fit within a category or type that is common, in our view, the accumulation of detail was exceptional...

Substantial and Compelling

10A(2)(e)

- Therefore, the case studies show, that we can rely on a combination of factors that, in isolation may not be substantial/compelling/exceptional/rare, however in combination are
- Incredibly high threshold, consider all arguments such as:
 - Health (mental and physical), deformities, up bringing (*Bugmy* case), drugs, alcohol, children, work
- However, there are some factors the Court must and must not take into account

Substantial and Compelling 10A(2)(e)

(2B): In determining whether there are substantial and compelling circumstances under subsection (2)(e), the court

- must regard general deterrence and denunciation of the offender's conduct as having greater importance than the other purposes set out in section 5(1); and
- must give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence; and
- must not have regard to—
 - the offender's previous good character (other than an absence of previous convictions or findings of guilt); or
 - an early guilty plea; or
 - prospects of rehabilitation; or
 - parity with other sentences.

Substantial and Compelling 10A(2)(e)

Must also have regard:

- the Parliament's intention that a sentence of imprisonment should ordinarily be imposed
- whether the cumulative impact of the circumstances of the case would justify a departure from that sentence and, where relevant, minimum non-parole period.

What does it mean if you satisfy a special reason?

- Depending on what special reason you satisfy will depend what the Court can do
- If you have satisfied the Court of a special reason, your client is not necessarily able to avoid imprisonment
 - They have only reached the threshold to avoid the mandatory sentence/NPP
- If the offence is a Category 1 offence, and falls into (ca), (cb), (cc), (ic) or (id) of the definition in s 3, the Court will then have some alternatives

5(2G) and 5(2GA)

- Section 5(2G) subsection (2GA), in sentencing an offender for a category 1 offence, a court must make an order under Division 2 of Part 3 (IE a term of imprisonment, excluding a combination sentence)
- (2GA) for an offence referred to in (ca), (cb), (cc), (ic) or (id) (CSI, RCSI, ICI, RCI, intentional exposure to risk by driving, aggravated offence of intentional exposure to risk by driving – ALL of which are in circumstances where victim was emergency worker/custodial officer on duty, and O knew or was reckless to this...
Where the Court has found under s 10A a special reason exists, and having regard to parliament's intention, a court must make either:
 - an order referred to in subsection (2G) – IE imprisonment (note no mandatory minimum though) OR

5(2G) and 5(2GA)

- a mandatory treatment and monitoring order (CCO with mandatory conditions – s 44A) a residential treatment order or a Court Secure Treatment Order **IF**
 - the offender proves on the balance of probabilities that, at the time of the commission of the offence, the offender had impaired mental functioning that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability (IE – can only avoid prison, if s10A(2)(c)(i) is your special reason) and
 - the court is satisfied that a mandatory treatment and monitoring order, a residential treatment order or a Court Secure Treatment Order, as the case requires, is appropriate.
- Before the Court makes a mandatory treatment and monitoring order, residential treatment order or a secure treatment order, must have received a report on the above issues (IMF and the test) by a psychiatrist or registered psychologist and have regard to the report and other relevant evidence
- Therefore, for all category 1 offences, unless the above applies, mandated to receive a term of imprisonment

Category 2 Offences

2H: In sentencing an offender for a category 2 offence, a court must make an order under Division 2 of Part 3 (term of imprisonment excluding a combination sentence) unless:

- the offender has assisted or has given an undertaking to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence
- the offender proves on the balance of probabilities that
 - at the time of the commission of the offence, he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability (again must not be caused substantially by self-induced intoxication)
 - the offender has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment
- the court proposes to make a Court Secure Treatment Order or a residential treatment order in respect of the offender
- there are substantial and compelling circumstances that are exceptional and rare and that justify not making an order under Division 2 of Part 3

THEREFORE: for category 2 offences, unlike category 1, can avoid prison if any of the above is met

Cases

Farmer v The Queen - VSCA

- Armed robbery with 2 co-offenders (category 2 offence), originally sentenced to 9 months YJC
- Leave to appeal granted, substantial and compelling circumstances
 - Diagnosis of alopecia – profoundly affected his life to date, risk of being ridiculed in prison, anxiety, link between his physical affliction and becoming involved in the offending – without peer support and unduly influenced
- Leave granted, sentenced to time served (unclear what this was)

Cases

Fariah v The Queen – VSCA

- Armed robbery, no priors, received 26 months with NPP of 12 months
- Substantial and compelling: youth, disadvantage, deprived background, lack of criminal history (though this is limited to just absence of priors per the legislation), risk of deportation, heightened custodial burden due to Covid-19 and risk of deportation
- Re-sentenced to 9 months imprisonment

Cases

DPP v Haberfield – VCC

- RCI to female paramedic on duty – mandatory minimum 6 months NPP, category 1 offence.
- HH Judge Tinney satisfied both s 10A(2)(c)(i) and (ii) made out
 - Whilst there was a drug induced psychosis, drugs brought about the underlying condition, schizophrenia diagnosis, 22 year-old, no prior or subsequent criminal history, evidence of rehabilitation, risk of deterioration in custody, heightened suicide risk
- As such, given 10A(2)(c)(i) was met – HH imposed an 18 month mandatory treatment and monitoring order