

District Court
New South Wales

Case Name: R v Bodnar
Medium Neutral Citation: [2018] NSWDC 76
Hearing Date(s): 29th March 2018; 5th April 2018
Date of Orders: 5 April 2018
Decision Date: 5 April 2018
Jurisdiction: Criminal
Before: Berman SC DCJ
Decision: Sentenced to imprisonment consisting of a non-parole period of 7 months and a head sentence of 14 months.
Catchwords: CRIMINAL LAW – Sentence – Failing to provide child with necessities of life – Accessory to that offence – Naturopath provides misguided advice – Child almost dies – General deterrence of prime importance – Need for those giving advice to do no harm
Legislation Cited: Crimes (Sentencing Procedure) Act
Category: Sentence
Parties: The Crown
Marilyn Pauline Bodnar
Representation: Counsel:
Mr A McCarthy - Crown
Solicitors:
Director of Public Prosecutions – The Crown
Mitary Lawyers – The offender
File Number(s): 2015/201128
Publication Restriction: There is to be no publication of any evidence which would identify or tend to identify the child in this matter

or his parents.

SENTENCE

- 1 Many people in the community shun conventional medicine. Others regard alternative medical treatments as being complementary to conventional medicine. The criminal law does not often get involved in the choice of a person to give or to accept advice based on alternatives to conventional medicine. Thus people are perfectly entitled to portray themselves as able to cure illnesses through the placement of crystals on the body, the use of highly diluted solutions, and the eating of activated almonds.
- 2 But the criminal law does get involved when harm results from dangerous advice and where gross recklessness in the giving of such advice leads to a significant risk of death. Those who purport to be qualified to give medical advice, whether doctors or not, have an obligation to provide advice which is based on proved results, not merely fake science and faith. And those who give advice with the potential to harm others have an obligation to ensure that continued acceptance of that advice does not lead, as in this case, to a real possibility that the well-meaning but seriously misguided advice causes a risk of death of an innocent child
- 3 In this case the advice given by the offender Marilyn Bodnar to the mother of a child with eczema almost led to that child's death. The advice should probably never been given in the first place but the fact that Ms Bodnar continued to give that advice in the face of evidence of the harm that was being caused, and in the absence of Ms Bodnar monitoring the condition of the child, meant that it was seriously criminal behaviour to continue giving such flawed advice.
- 4 The protection of children from harm is one of the most important aspects of the criminal law and where offences are committed against children, principles of general deterrence are usually of considerable importance. That principle is one to which full weight should be given in this sentencing exercise and it explains the sentence I will ultimately impose upon the offender.
- 5 Before proceeding further I remind those present that there is to be no publication of any evidence which will identify or tend to identify the name of

the child. For the purposes of this judgment I will give him the pseudonym Tony.

- 6 He was born in early October 2014. When he was 4 months old he was found to be developing at a normal pace but diagnosed with eczema. A specialist saw him on the 23rd of February 2015. The specialist explained that the eczema could not be cured, only treated. The specialist provided appropriate advice to Tony's mother and booked him in for a skin prick test to test for allergies. An appointment was made to discuss the results of this test but that appointment was cancelled by Tony's mother.
- 7 It was at around this time that Tony's mother was introduced to Ms Bodnar, the offender. Ms Bodnar must have seemed as something of a godsend to her because Ms Bodnar told her that she could cure Tony's eczema, something which the specialist had said could not be done. No evidence presented in these proceedings was tendered in any attempt to prove the accuracy of the offender's claim to have the ability to do what the specialist could not – namely cure Tony's eczema.
- 8 Ms Bodnar's explanation for Tony's eczema was that it could have been caused by the mother's diet and toxins in her body. Accordingly Ms Bodnar advised, and the mother accepted, that she should go on a "raw only" diet.
- 9 From around the 10th of April 2015 the mother began to follow Ms Bodnar's advice, ceased conventional medical treatment for her son's eczema and took up a raw food diet.
- 10 This treatment contributed to the serious harm later suffered by Tony. Not surprisingly the mother lost weight and, given that she was breast feeding Tony exclusively, so did he. The mother lost 11 kilograms and Tony, who was around only 6 months of age at this time, lost 1.6 kilograms. Ms Bodnar was aware of this weight loss but assured the mother that this was normal and that Tony was fat and needed to lose weight.
- 11 In early to mid-May things got worse. Tony began having higher temperatures. Remarkably Ms Bodnar advised the mother to fast and to go on a water only diet. I repeat, Tony was being exclusively breast fed at this time.

- 12 The situation reached a critical stage on or around the 21st of May 2015 when Tony was unsettled. His mother believed he needed more food. Ms Bodnar suggested that she could give him some goat's milk but when the mother tried this, Tony vomited it up. Ms Bodnar suggested that the mother try to dilute the goat's milk with water and try again but Tony vomited that also.
- 13 Eventually, and thankfully, the mother took Tony to her General Practitioner. She told the GP that she had been advised by a naturopath to have an exclusion diet for herself and to avoid introducing any solids to the baby in an attempt to control the eczema. The doctor found that Tony was in a shrunken state with a loss of body fat and muscles. He appeared to be dehydrated. The doctor referred Tony to The Children's Hospital where he was found to be in a critical condition, the doctors forming the opinion that had he not presented to hospital he could have died within a number of days.
- 14 He had lost a lot of weight. At 6 months of age he weighed 8 kilograms but on admission at 7½ months he weighed only 6.4 kilograms. There was evidence of developmental delay which correlated with the mother taking Ms Bodnar's advice, his development at 8 months was assessed as being equivalent to that of a 3 month old. He remained in hospital for more than a month. He still needs to be assessed by medical experts over the next few years in order to ascertain whether or not he will suffer any long-term developmental delays as a result of what has happened to him.
- 15 As a result of what I have described, the offender has pleaded guilty to having aided, abetted, counselled or procured the commission of an offence by the child's mother, that being an offence of being a person having parental responsibility recklessly and without reasonable excuse failing to provide Tony with the necessities of life, the result of that failure causing a danger of death to Tony. That is an offence which carries a maximum penalty of 5 years imprisonment.
- 16 This is an objectively serious example of crimes of this type. Particularly important in making that assessment are:
 - the length of time over which the offence occurred, the 22nd of February 2015 to the 22nd of May 2015,

- the gross recklessness of the offender in firstly providing such advice to the mother but perhaps more importantly failing to observe or perhaps ignoring the effect of that advice upon Tony, and
 - of course the age of Tony is a matter of some importance as well. It's not as though Tony was able to feed himself.
- 17 The offender pleaded guilty to this charge, not at the earliest opportunity, but not at the latest opportunity either. The procedural history is somewhat complicated but it is agreed between the parties that the sentence I impose upon the offender should be about 15% less than it would otherwise have been.
- 18 The offender is a mature woman 62 years of age. She has a close healthy relationship with her 2 children and her husband. After finishing high school she qualified as a registered nurse, continuing her training so that she qualified in emergency post-surgical procedures and then as a mid-wife in 1978.
- 19 In that year, at age 22, she was diagnosed with breast cancer. This proved benign but the undoubted crisis in her life that arose at this time led to her developing an interest in good diet and alternative therapies.
- 20 She studied naturopathy before in 1983 establishing her own business. She offered massage services, gave diet advice and ran cooking classes treating children as well as adults. There is no evidence to suggest that anyone else has been harmed by the treatments she offered.
- 21 The offender has provided a letter of apology to the Court and expresses her remorse. She says that she never intended her suggestions to cause any harm to Tony or the mother. That is easily accepted, Ms Bodnar is not charged with being an accessory to an offence involving intentional harm to Tony.
- 22 Ms Bodnar has no relevant criminal convictions. The only offences on her criminal history being driving offences committed in 2008 and 2013. There is no doubt that she is a caring and well-meaning individual and that her intentions in providing advice to Tony's mother were based on what she believed to be some connection between Tony's eczema and the mother's diet. But once it became clearly apparent that there was a risk of harm to Tony through the mother following her advice it was a seriously criminal thing to do to ignore the effect of her advice on Tony's well-being.

- 23 In submissions from Mr Mitry who appeared for the offender today the offender sought to gain comfort from the fact that she never saw Tony in the state revealed by photographs tendered by the Crown, but this is part of the criminality of the offender in continuing to advise a restricted diet for Tony's mother without ever seeing Tony and seeing just how obviously ill he was.
- 24 I accept that Ms Bodnar has suffered significantly since these matters came to light. Her business has suffered, she has been subject to ongoing restrictions imposed by the Health Care Complaints Commission, she has been the subject of abuse on social media, and she has been extremely stressed over a number of years, such stress resulting in symptoms of anxiety and depression being displayed.
- 25 I should at this stage speak about the sentence imposed upon Tony's mother. The principles of parity clearly apply. For that reason I was provided with material tendered to the magistrate who sentenced Tony's mother as well as his Honour's remarks on sentence. The magistrate imposed a sentence of imprisonment of 14 months but suspended its execution under s12 of the Crimes (Sentencing Procedure) Act.
- 26 It is to be noted that the magistrate clearly identified the reason that a sentence of full time imprisonment was not imposed. He said,
- "in my view, but for the offer and willingness on the part of the defendant to agree to give evidence against the co-accused, a period of full time imprisonment would be otherwise appropriate...".
- 27 This offender, who does not get the benefit of a discount under s 23 of the Crimes (Sentencing Procedure) Act, cannot really complain therefore if a sentence of full time imprisonment is imposed upon her especially given that Mr Mitry accepts that the criminality of Tony's mother and his client is similar. Of course the Crown can't rely on the principle of parity but in my view the offender would not have a justifiable sense of grievance were I to ultimately impose a sentence of full time imprisonment upon her.
- 28 I will take into account that this is a matter which could have been dealt with in the Local Court. As it turns out the sentence I impose upon Ms Bodnar does not exceed the jurisdictional limit of that Court.

- 29 I accept that the principles of specific deterrence have little part to play. The evidence would suggest that Ms Bodnar is unlikely to commit a similar offence in the future, even if she were in a position to do so. But as I began these remarks on sentence, general deterrence is of great significance. Children such as the child in this matter are defenceless and vulnerable, particularly so when they are entirely dependent upon others for their nutrition and welfare.
- 30 Well intentioned but seriously misguided advice is, as the facts of this case demonstrate, capable of causing great harm and even death to vulnerable children. Those giving such advice need to have it made clear to them that if they give such advice they need to make sure that it is not going to do harm and if they continue to give such advice they need to continue to ensure that no harm is being caused.
- 31 It is a serious matter, but not necessarily a crime, to tell a breast feeding mother to restrict her diet. It is even more serious when such advice continues after being told that both the mother and child have lost weight. And it is serious indeed and highly criminal for such advice to continue to the state where a child was at risk of death within a few days, in circumstances where the person giving the advice hadn't even seen the state the child was in as a result of his or her advice being followed
- 32 As part of his submissions Mr Mitry relied on a decision of a judge of this Court when sentencing an offender for a charge of failure of a person with parental responsibility to provide appropriate care. This is an unusual matter and I mean no criticism of Mr Mitry at all when I say that he was relying on a single case. I am sure that it is the only case he could find. But it remains the case that a single decision by another judge of this Court says very little indeed, if anything, about the sentence I should impose in the present case.
- 33 I accept of course that sentences of imprisonment are very much sentences of last resort. It is a serious thing to do to send a 62 year old woman with no criminal history to gaol for the first time but I am satisfied that no other form of sentence would reflect the objective gravity of her conduct and the need to deter others who may also give well meaning but misguided advice of a medical nature which has the potential to cause great harm and even death.

34 There are special circumstances in this case relating not only to this being the offender's first time in custody but also her age and the fact that she is displaying symptoms of anxiety and depression.

35 I impose sentence as follows: I set a non-parole period of 7 months and a head sentence of 14 months to date from today the 5th of April 2018. The non-parole period will expire on the 4th of November 2018.

Amendments

05 April 2018 - Paragraph [15] typographical error

[REDACTED]