

29/94

## SUPREME COURT OF VICTORIA

***R v MILEHAM***

Coldrey J

18 August 1994 — 83 A Crim R 449

**SENTENCING – VICTIM IMPACT STATEMENT – PSYCHOLOGIST’S REPORT ATTACHED TO STATEMENT – WHETHER REPORT ADMISSIBLE – WHETHER VICTIM ENTITLED TO LEGAL REPRESENTATION – WHETHER STATEMENT SHOULD BE DISTRIBUTED IN ADVANCE – WHETHER PROSECUTOR SHOULD BECOME INVOLVED: SENTENCING (VICTIM IMPACT STATEMENT) ACT 1994, S5.**

M. pleaded guilty to a charge of incitement to murder. T. filed a victim impact statement with the Court attached to which was a psychologist’s report (not in the form of a statutory declaration).

**HELD:**

**1. In the absence of consent, the psychologist’s report did not form part of the victim impact statement. If the psychologist were not called as a witness, the report would not normally be received by the Court.**

**2. As a matter of practice, it is desirable that a victim impact statement be filed and distributed prior to the hearing of the plea.**

**3. A victim is entitled to be legally represented.**

**4. Where a victim desires to give evidence, the Prosecutor should take on the role of *amicus curiae*.**

**COLDREY J: [91]** In this matter the subject of the incitement to murder, Mr Peter Talbot, filed a victim impact statement with the Court, a procedure permitted by Division 1A of Part 6 of the *Sentencing Act* 1991 (the Principal Act). This is the first occasion upon which this Court has had to consider the operation of the provisions of Division 1A and it may be helpful to comment upon them in greater detail than is to be found in my *ex tempore* remarks made during the course of the hearing. Pursuant to s5 of the *Sentencing (Victim Impact Statement) Act* 1994, s5(2) of the Principal Act is amended by adding to those matters to which a Court must have regard in sentencing an offender:

"(da) the personal circumstances of any victim of the offence; and

(db) any injury, loss or damage resulting directly from the offence; ..."

Section 4 of the amending Act provides for the inclusion of a definition of "victim" in section 3(1) of the Principal Act in the following terms:

"'Victim', in relation to an offence, means a person who, or body that, has suffered injury, loss or damage as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender;"

On the basis of the material contained in the victim impact statement filed with the Court, Mr Talbot fell within the definition of "victim", he having suffered injury of a psychological nature upon learning of the existence of the plan to kill him. That psychological injury, was, in my view, "a direct result of the offence". For the purposes of the present case it is unnecessary to determine the breadth of the concept of "victim" and whether, having regard to the wording of [92] that definition and the addition to the sentencing guidelines in section 5(2) of the Principal Act, which came into operation on 31/5/94, the scope of the decision in *R v Penn* ((1994) 19 MVR 367, CCA decision 9/5/94), requires consideration.

The form of a victim impact statement is set out in s95A(2) and (3) and it may be in writing by statutory declaration (as in the present case) and orally by sworn evidence. I add that there is

no reason to regard these modes of placing material before the Court as being mutually exclusive. That section also provides for a victim impact statement to be made by another person on behalf of a victim who is under the age of 18 years or who is incapable, because of mental illness or any other reason, of making a statement or, is not an individual. Section 95B provides that a victim impact statement contain particulars of any injury, loss or damage suffered by the victim as a direct result of the offence and, further, enables the Court to rule inadmissible whole or part of any such statement. In the present case, while some of the material may be regarded as of a hearsay nature, counsel for the offender expressly took no objection to it and consequently it was not necessary for me to make any ruling on admissibility.

Attached to the victim impact statement itself and referred to in it, was a psychological report relating to the victim. This was not in the form of a statutory declaration. Moreover, the psychologist who compiled the report was not present at Court to give evidence in [93] support of its contents or to be cross-examined upon it. In regard to this latter aspect s95E enables a victim to call a witness to give evidence in support of any matter contained in the victim impact statement and provides for the cross-examination of such person. In my view the psychological report does not form part of the victim impact statement and, in the absence of the psychologist as a witness would not normally be received by a Court. However, in the present case, it was before the Court by consent.

I turn to the mechanics of the presentation of the material. Section 95C of the Principal Act creates a mandatory pre-requisite to the acceptance of the victim impact statement that a copy of it be filed with the Court and provided to both the offender (or legal practitioner representing the offender) and the prosecutor. In the instant case this was done in the interval between the hearing of the plea in mitigation and the passing of the sentence. As a matter of practice it is desirable that any such victim impact statement be filed and distributed prior to the hearing of any plea in order that all the issues may be dealt with at the same time. No objection was taken to the timing of the distribution of the material in the present case and, given that on a literal reading of the section the distribution occurred within time, the matter proceeded forthwith.

The issue of representation of the victim also fell for consideration. Section 95D provides for the examination of the victim as follows:

[94] (1) The court may, at the request of the offender or the prosecutor, call a victim who has made a victim impact statement, or a person who has made a victim impact statement on behalf of the victim, to give evidence.

(2) A victim or other person who gives evidence under sub-section (1) may be cross-examined and re-examined."

Section 95E provides for the calling of witnesses in these terms:

"(i) A victim, or a person who has made a victim impact statement on behalf of the victim, may call a witness to give evidence in support of any matter contained in the victim impact statement.

(ii) A witness who gives evidence under sub-section (1) may be cross-examined and re-examined.

(iii) Any party to the proceeding may lead evidence on any matter contained in a victim impact statement."

As previously noted s95A enables a victim to give sworn evidence. Section 95D enables the court to (*inter alia*) call a victim who has made a victim impact statement to give evidence. This would appear to assume the circumstance that the victim impact statement has been made in writing. Although this section vests in the Court an overriding discretion, one would envisage that it would be exercised in favour of the applicant, and in particular in favour of the offender, given the potential effect of the contents of a victim impact statement upon the sentence to be imposed upon such offender. These provisions, together with those relating to the calling of witnesses, lead me to the conclusion that a victim, given direct access to the court in the manner I have detailed, is entitled to legal representation. Accordingly, in the instant case, I ruled that Mr Talbot [95] could be represented by his solicitor. The current legislation casts no responsibility on the prosecution for the preparation of a victim impact statement.

However, insofar as the adducing of oral evidence from a victim is concerned, the references in s95D to the calling of a victim who has made a victim impact statement “at the request of.... the prosecutor”, as well as the provision for re-examination, strongly suggest a role for the prosecutor, at least in the capacity of *amicus curiae*, in some circumstances where the victim is required to give evidence. The admissibility of a victim impact statement may well be affected, if a victim, having filed and distributed such statement, subsequently declines to present him or herself for cross-examination when requested to do so, but this is not a matter upon which I am required to rule.

As to the victim impact statement itself, it appeared convenient to have it tendered as an exhibit and, given the public nature of the criminal process and the fact that the contents of the document were to be the subject of cross-examination by counsel for the offender, I had Mr Talbot’s solicitor read the contents of the statutory declaration into the record. (As previously indicated that is not the only method of placing the relevant material before the Court). The legislation does not address the question of costs of the victim impact procedure and no submissions were received on that issue.

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