



Legislative Assembly Hansard,

Extract from NSW Legislative Assembly Hansard and Papers Thursday, 9 March 2006.

CRIMES (SENTENCING PROCEDURE) AMENDMENT (GANG LEADERS) BILL

Bill introduced and read a first time.

Second Reading

Mr ANDREW TINK (Epping) [10.14 a.m.]: I move:

That this bill be now read a second time

The purpose of this bill is to amend the Crimes (Sentencing Procedure) Act to make leadership of a gang involved in an offence an aggravating factor to be taken into account in determining the appropriate sentence for the offence. I was motivated to bring in this bill after seeing what happened to the case of *Regina v. Bilal Skaf* in which Bilal Skaf was convicted of a number of counts of extremely serious sexual assault. He was convicted and sentenced before Judge Finnane in the District Court to an extremely long prison term, I believe a total of 55 years, for what the public rightly considered to be one of the worse gang-rape crimes in New South Wales history. The case later went to the New South Wales Court of Appeal—*R v. Bilal Skaf* [2005] NSWCC 297—and judgment was handed down on 16 September 2005.

The three judges who presided over that case were Justices Studdert, Bell and Latham. Their finding in quite dramatically reducing Bilal Skaf's sentence for these crimes is what has brought this bill before the Parliament. There were two crimes in respect of which sentence was imposed and an appeal subsequently dealt with by the court, but I want to focus on the events of 10 August 2000. In paragraph 65 of the Court of Criminal Appeal judgment, their honours found that there was evidence upon which it was open to the trial judge to find that the applicant, Skaf, adopted a leadership role. That is to say that Skaf was the leader of a gang of pack rapists who, on 10 August 2000, proceeded to commit one of the most appalling pack rapes in New South Wales history. The Court of Criminal Appeal found that he played a leadership role, or to put it another way, confirmed that it was appropriate or open to the trial judge to find that the applicant had adopted a leadership role.

The Court of Criminal Appeal found, at paragraph 41, that the crimes in respect of which Skaf had been found guilty "cannot individually or collectively be regarded as the worst category of aggravated sexual assault". It has been my view for a long time in relation to this case, and I think it holds good for serious crimes of any type, that leadership of a gang should of itself put that gang leader in the worst category of that crime. If you lead a gang of armed robbers you ought automatically, through your leadership role, be placed in the worst category of criminal for that type of offence. If, as in the case of Skaf, you lead a gang of pack rapists, your leadership role should place you in the worst category of that crime. I say that because gangs require leaders, gangs are built around leaders. Gangs certainly do not exist for a combined criminal purpose unless there is leadership.

Any gang requires leadership and is defined by leadership. A gang is motivated by leadership and acts through leadership. There is a very important public policy point here: if we want to try to deal with gang crime, if we want to try to stop gang crime, if we want to try to deter gang crime, then one of the key ways to do it is to target the leaders and to make it clearly understood that if anyone leads any sort of gang that is involved in a crime, then that person, if convicted, will face the worst category of penalty for that type of offence. That is what this bill does, in a slightly roundabout way. I have tried to keep the amendment consistent with the Crimes (Sentencing Procedure) Act, but have added a component to the existing law that will, in substance, achieve what I have just been talking about.

The Crimes (Sentencing Procedure) Act was passed in 1999, and it contains several subsections dealing with aggravating and mitigating factors for sentencing. For example, an aggravating factor might be that special cruelty was used in the offence. A mitigating factor might be that the person was enraged or that there was a problem connected with the person's mental faculties—short of the person being incapable of committing the crime—or the offender had otherwise been of good character. What I am trying to do by this amendment is to make it an aggravating factor to be taken into account in determining a sentence under the Crimes (Sentencing Procedure) Act if a person is the leader of a gang and has just been convicted of a gang-related crime.

This is not a big stretch because the aggravating factors in the Crimes (Sentencing Procedure) Act include "acting in company", which is a fancy, legal way of saying "acting as a member of a gang". "Acting in company" has been known for a long time to the criminal law, probably since the very beginning of the Crimes Act some 100 years ago. "Acting in company"—that is, a group of people doing something—has always, in the eyes of criminal law, been seen to be worse than an individual doing something, because gangs are inherently more threatening and inherently more powerful: often it is the force of many against the sole victim. The idea of being in company, being in numbers, being in a gang, is well known to the criminal law.

It surprises me, therefore, that leadership of a group of people in company is not an aggravating factor. That is what this bill is designed to remedy. The bill does not define leadership and it deliberately does not do so because that is something left to the sentencing judge to determine based on the facts. I put that the aggravating factor of being a leader is not relevant in determining whether a person is innocent or guilty, but it is relevant in determining whether a person should receive a harsher sentence. So it is open to the judge, or judges on appeal, to come to a view, based on evidence, that somebody is in fact a leader of a gang. That is precisely what happened in the case of Bilal Skaf. In that case the court found that it was open to the trial judge to find, on the evidence, that Skaf had been the leader of this gang on one of the two instances when a gang rape took place.

I do not propose to define "gang" in the bill. I do not think it would be that easy to do, but I am confident that I do not have to do it because in the Skaf case the judge at first instance—in a decision approved now and given a tick by the Court of Criminal Appeal—in fact said that Skaf played a leadership role, and the Court of Criminal Appeal did not disagree with that finding. So judges are well able to come to a view about whether the evidence suggests somebody is a leader or not. I think it can remain on that basis.

There is a third reason why I am introducing the bill today. We pushed very hard for the Attorney General to exercise the powers given to him by this Parliament, but rarely used, to appeal a matter himself. Normally it is left to the Director of Public Prosecutions to appeal judgments. In this particular case, the Director of Public Prosecutions chose not to appeal, and the Attorney General sought leave to appeal to the High Court. Just recently the High Court decided not to entertain the appeal. I will say, and I do not think it is unreasonable to do so, that I had hoped that the High Court might look at this issue of gang leadership being an aggravating factor in sentencing.

I understand and accept that the High Court does not often buy into, review or overturn decisions of the Court of Criminal Appeal. But I had hoped, as I suspect the Attorney General did—and this is why I pushed him to appeal and why I support the decision he took to appeal—that the High Court would take the opportunity to come to grips with the idea of gang leadership being an aggravating factor. The High Court chose not to, and I do not make any further comment other than to observe that it chose not to. So that is the end of the line as far as the judiciary is concerned, and the ball is back in our court to do something about it, which I think the public would expect. If the judges, for whatever reason, are not comfortable recognising gang leadership as an aggravating factor in sentencing—I would have thought it would be open to them to do that—then the public have put us here to make a decision about whether to change the rules in the form of an Act of Parliament. It will provide direction for the judges and, so to speak, tell them that gang leadership should be an aggravating factor.

That is why the bill is before the House. I foreshadowed the introduction of this bill some time ago and it is brought forward now because it is the right time to bring it forward. I do not think the public would want a delay on this matter. Regrettably since this case occurred we have seen some appalling examples of gang activity in southern Sydney. I think most members of the public consider gangs to be a huge problem. Gangs are a major feature of organised criminal activity at the moment and are of great concern to the public and to the police, who have to deal with these matters. Leadership of a gang needs to be identified as an aggravating factor to act as a deterrent.

In the Court of Criminal Appeal decision in the Skaf case, the judges were Justices Studdert, Bell and Latham. I note that Justice Latham was probably at the time the most junior judge of the New South Wales Supreme Court, although I acknowledge that she did have experience on the District Court bench. I do not doubt the competence of the judges for a second. However, I am sure if members asked their constituents to concentrate for a moment on recent criminal behaviour and consider what would be one of the worst cases that has come before the criminal courts, no doubt at the top of everybody's list—or close to it—would be the Bilal Skaf gang rape case. I could not imagine a different result.

My final point is that in future when these sorts of matters go to the Court of Criminal Appeal, it should not be a question of the competence of the presiding judges but a question of their experience. The most experienced judges in New South Wales should hear appeals in these sorts of cases. In the Skaf case I do not understand why the Chief Justice, the Chief Judge at Common Law and the President of the Court of Appeal, or the next most senior judge in the criminal division in New South Wales, did not hear this appeal. I do not know how these judges were chosen or why. We in Parliament are often asked to be more transparent about the way the Attorney General appoints judges. I think when it comes to appeal benches the judges need to be a bit more transparent about how appeal benches are selected.

The judges hearing the appeal from the Skaf sentence determination should have been the most senior judges in the State. I have in my mind that that is the real issue here and that maybe we have to look at the way things are done in the Family Court. We must consider having senior Supreme Court judges preside over criminal appeals. I would like to think it is commonsense that the Chief Justice, the Chief Judge at Common Law and the next most senior judge would sit on the bench in important appeals cases. That did not happen in the Skaf case so I believe Parliament should provide some direction in this matter.

Mr Barry Collier: Why the Family Court?

Mr ANDREW TINK: Because the Family Court has this system. I appreciate that it is a civil court but it has a system whereby senior judges are identified to sit on appeals benches. We may have to look at introducing a system that provides for senior Supreme Court judges to preside over criminal appeals. I commend the bill to the House.