

DILEMMAS FOR THE LAW : **The Case of Garry David**

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In 1990, the Victorian Government became concerned about the imminent release of a long-serving prisoner reputed to be very violent, one Garry David (also known as Garry Webb).

Garry David (as he preferred to be called) was completing a fourteen year sentence (less remissions) arising from the attempted murder of three people at a pizza parlour in Rye, Victoria, in 1982. Mr David had a long criminal record. He originally came from a very unstable and deprived family background and went into institutional care at the age of about six as a neglected child. He spent the greater part of his life in institutions since the age of eleven. Garry David was considered by prison authorities to be a difficult prisoner, with a history of violent acts, violent threats and self-mutilation. He is alleged to have had a deep hatred for authority in general, and for the police in particular.

Over many years Mr David, whilst in jail, was certified by various psychiatrists as "mentally ill" and was thus transferred, on numerous occasions from prisons to secure psychiatric institutions as an involuntary patient. However, no clear, long-term program of treatment or rehabilitation was followed to help him cope with eventual freedom in the broader community.

The Government's dilemma

The Victorian Government formed the view that if Garry David was released at the expiry of his sentence in February 1991, he would represent a danger to members of the public. This view was based on his medical and criminal history, including threats he had spoken and written - for example, some of Garry David's writings, such as his "Blueprint for Urban Warfare", spoke of committing extravagant massacres in the general community. The Government was faced with conflicting interests: on the one hand the need to protect the community from the possibility of this threat being carried out, whilst on the other the need to respect Garry David's fundamental right to be free in the community, upon the completion of his sentence of imprisonment.

Garry David, like anyone else, was entitled to the presumption of innocence and thus his liberty until charged with a further crime, convicted in a court of

The Government considered various options, including dealing with its dilemma by using the *Crimes Act 1958* to charge Garry David with making a threat to kill. However, it was not confident of obtaining a conviction under the relevant section of that Act, which is designed to deal with threats to kill specific individuals, rather than more generalised threats.

Mental Illness?

Accordingly, the Government turned away from the criminal justice system and sought to detain Mr David within the mental health system. It asked several psychiatrists from the Health Department, and private practice to examine Garry David and decide whether Garry David was "mentally ill" within the meaning of the *Mental Health Act 1986*. A Health Department psychiatrist decided in January 1990 that Mr David was "mentally ill", in that he suffered from a "personality disorder". The psychiatrist then issued the appropriate certificate. The result was that Garry David could be legally detained as an involuntary patient, because of mental illness, in a psychiatric institution.

However, under the Act, Mr David was entitled to appeal against the decision to an expert tribunal, the Mental Health Review Board. This he promptly did, and his appeal was heard by the Board in February and March of 1990. The central question in this hearing was whether a "personality disorder" is a "mental illness". Conflicting answers were given by eleven psychiatrists and two doctors who were called to give evidence, just as there had been conflicts between the psychiatrists and doctors who had treated Garry David in the past. While the experts all agreed that he suffered a "personality disorder", they strongly disagreed about whether this condition should be categorised as a "mental illness". The distinction lies in the belief that, whereas a mentally ill person may experience intense and debilitating distress and/or may enter a fantasy world and lose touch with reality, a person with a personality disorder does not experience intense distress and is well aware of what is going on around him. Whereas mental illness can be medically treated, a personality disorder cannot. In May 1990, the Board handed down its decision that Garry David was not "mentally ill", and ordered that he be discharged as an involuntary patient.

The Community Protection Act

The Government then attempted to resolve the dilemma by introducing a new piece of legislation. The *Community Protection Act 1990* was passed by the

entirely at one citizen: and secondly, it created an exception to the general rule that no person shall be imprisoned unless a court comprised of a judge or jury is convinced, beyond reasonable doubt, that the person has actually committed a serious criminal offence. Under the *Community Protection Act*, a judge of the Victorian Supreme Court was given the power to place Garry David in "preventive detention" if s/he was convinced, on the evidence placed before him/her and on the balance of probabilities, that Mr David:

- is a serious risk to the safety of any member of the public; and
- is likely to commit any act of personal violence to any other person.

In making the decision, the judge could consider hearsay evidence and other material normally inadmissible in criminal proceedings.

Since the *Community Protection Act* was introduced four Judges of the Supreme Court between September 1990 and September 1992 agreed to Government applications for Garry David's future detention. The first was Justice Fullagar in mid 1990 who ruled that under the terms of the *Community Protection Act 1990*, it was unnecessary for him to resolve the question of whether or not Mr David was in fact mentally ill. Since these cases, the Parliament of Victoria, in 1992, extended the Act's life indefinitely. Thus, Garry David continued to be held in prison, initially in J Ward Ararat, a psychiatric institution and formerly a branch of Pentridge prison, and then in Pentridge Prison.

Finally, on 11 June, 1993, Garry David died, of peritonitis as a result of a wound he had reopened several times. He was still, at that time, a prisoner under the extended *Community Protection Act*. Since this Act applies to nobody else, whilst it remains on the statute books, it has no effect. The question is: did the Government act correctly?

Arguments for the Government's actions

The Government argued that it was necessary to restrict Garry David's civil liberties to the extent necessary to protect the community from a serious risk of violence. It would be irresponsible, it believed, not to take all possible steps - including the introduction of specific legislation - to prevent Mr David from turning his words into deeds.

matter to the victim of a shooting whether the person who shot him/her was suffering a "personality disorder" or a "mental illness": either way s/he has been needlessly injured.

The Government also argued that the people who wanted Garry David's civil liberties restored did not put forward any alternative way of dealing with the risk which he represented. Although the psychiatric experts disagreed over how likely it was that Garry David would carry out his threats, they all agreed that such future conduct was possible.

Arguments against the Government's actions

The opposing view is that by taking away the presumption that Garry David was innocent of any crime until he was found guilty of actually committing it, the Government destroyed one of the fundamental protections which our criminal justice system gives to accused individuals. Critics of the Government's actions contended that the *Community Protection Act* created a precedent for many people to be locked up on the flimsy pretext that they might in future commit a crime. The Act, they argued, made it easier for many long-serving prisoners with similar problems to be further detained, merely on the basis of speculation as to future behaviour. These fears were in fact subsequently realised with the passage of the *Sentencing (Amendment) Act 1993* by the new conservative Government.

There was also concern that the Government used problems of relating to a person's mental health improperly i.e. as a way of avoiding the procedures of the criminal justice system. According to the Government's critics, the question of mental illness should always be dealt with as a medical problem. People innocent of any crime but suffering mental illness (even one which involves a tendency to violence) should not be imprisoned through the use of the criminal law or any other law. There is always the danger that such a course enables the label of "insanity" to be applied very broadly, e.g. to the detriment of anybody who dares to challenge Government policy. This has occurred in the past, for instance, in the former Soviet Union and Eastern European countries.

A further criticism is that the authorities have shown little interest in rehabilitating Mr David and in helping him prepare to live in the community again. Garry David himself conceded that he was not ready for release and stated that he wanted to go into an appropriate "half-way house" or similar

According to the Anglican Chaplain of Pentridge prison, Mr David's writings about wanting to stage some kind of massacre were written in the context of professional therapy, as a way of expressing and thereby coping with his frustration and anger against authority. A more sensitive response from the government would have recognised this aspect and continued therapy, instead of placing Mr David in prolonged preventive detention.

Despite Mr David's unhappy death, these questions remain even more significant in Victoria, since the *Sentencing (Amendment) Act 1993* catches many categories of prisoners, and places them at risk of detention upon suspicion of crimes not yet committed.

Suggestions for classroom discussion

1. Under what circumstances did the Victorian Government introduce the *Community Protection Act 1990*? What role do you think public opinion might have played?
2. What is the proper role of the Parliament and the judiciary in deciding to detain a particular person or class of persons?
3. Should a person be detained because s/he might commit a crime in the future? If so, what guidelines should there be for deciding that a person should be so detained? Can the presumption of innocence be preserved? Should the standard of proof and normal rules of evidence be altered specifically for such cases?
4. Is it appropriate that persons with a "personality disorder" or who are classified "mentally ill" are jailed because they cannot be cured?
5. Should certain individual rights be protected and guaranteed and therefore be placed beyond Parliament's power to alter?
6. In order to avoid the problem of individual acts of law for individual persons, and in consideration of "equality before the law", should there be a Dangerous Persons Act?