



Supreme Court of New South Wales

Sentencing Symposium – March 2014

- 1 As the Chief Justice has explained, the purpose of this Seminar is to help increase the understanding of judicial decision making when sentencing. Each of the following presenters – Justices Johnson and R A Hulme will take a different aspect of this topic. What I wish to do is to provide a general overview of sentencing principles and their application.
- 2 Sentencing is not an idiosyncratic exercise depending upon the particular beliefs of the Judge or his or her background. It requires the application of principles, some of which are prescribed by law, some of which are prescribed by previous judicial authority, and many of which pull in different directions. It is not without reason that Judges often say that the most difficult thing that they have to do is to sentence.
- 3 In recent days, commentators, particularly those in the media, have sought to reduce the sentencing process to a simple equation. A serious crime has been committed and there is a maximum penalty prescribed for that crime. Therefore the maximum penalty should be imposed. End of story. In most cases, the analysis goes no further than that. If that result does not occur, either the individual Judge is personally attacked or the judiciary as a whole is castigated on the basis that it is out of touch.
- 4 Such an approach, apart from being unfair, involves a fundamental misunderstanding of what happens in sentencing. The sentencing process is much more complex than that.
- 5 In order to put maximum penalties in context, I quote from a High Court decision of *Markarian v R* [2005] HCA 25; 228 CLR 357 which has consistently been reaffirmed by the High Court and which sets out how sentencing judges are to approach maximum penalties.



“30 It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. That having been said, in our opinion, it will rarely be, and was not appropriate for [the Judge] here to look first to a maximum penalty, and to proceed by making a proportional deduction from it. That was to use a prescribed maximum erroneously, as neither a yardstick, nor as a basis for comparison of this case with the worst possible case.”

6 Before proceeding further, it is important to understand the purposes of sentencing under NSW law. These are set out in section 3A of the *Crimes (Sentencing Procedure) Act 1999* as follows:

- To protect the community.
- To ensure that the offender is adequately punished.
- To prevent crime by deterring the offender and other persons from committing similar offences.
- To promote the rehabilitation of the offender.
- To make the offender accountable for his or her actions.
- To denounce the conduct of the offender.
- To recognise the harm done to the victim of the crime and to the community.

In the case of a young offender, however, promoting his or her rehabilitation is ordinarily to be treated as more important than the principles of general deterrence and public denunciation.

7 There is no single correct process of reasoning towards a sentence but the following considerations may assist in demonstrating the sometimes conflicting principles which have to be applied by a sentencing judge.



- 8 A usual start point is to consider the objective seriousness of the offence for which the sentence is to be imposed. Part of that process, but only part, is to compare the worst possible case with the case before the court, having regard to the maximum penalty. In addition, however, there are the important factors in section 21A of the *Crimes (Sentencing Procedure) Act* 1999. That section sets out matters of aggravation and of mitigation, which must be taken into account by sentencing judges.

Aggravating factors – the status of the victim, actual or threatened use of violence, actual or threatened use of a weapon, threat or actual use of explosives, causing the victim to take an intoxicating substance, whether the offence was in company, in the presence of a child or in the home of the victim, whether gratuitous cruelty was involved, whether the injury was substantial, whether the offence was motivated by hatred or prejudice, whether it was committed without regard for public safety, whether there was grave risk of death to another person, whether the offender was on conditional liberty, whether the offender abused a position of trust, whether the victim was vulnerable, whether there were multiple victims or a series of criminal acts, whether the offence was part of a planned or organised activity, whether it was for financial gain.

Mitigating factors – that the injury was not substantial, the offence was not part of a planned or organised criminal activity, was provoked by the victim, whether the offender was acting under duress, whether no previous or significant criminal record, whether good character, whether unlikely to re-offend, if there are good prospects of rehabilitation, remorse, if offender not fully aware of the consequences because of age or disability, whether there is a plea of guilty and assistance to authorities.

- 9 In addition to these statutory factors, a number of sentencing principles have been developed as a result of previous decisions of Courts of



Criminal Appeal, in particular the High Court. In that regard, the following principles need to be kept in mind by a sentencing judge:

Proportionality: It is a fundamental principle at common law that the court must impose a sentence that is proportional to the offence, i.e. the sentence should never exceed that which can be justified as appropriate or proportionate to the objective seriousness of the crime.

Parity: The parity principle is an expression of the concept of equal justice. It requires that there be parity between the sentences imposed on co-offenders, such that like conduct is treated as like, and due allowance is made for differences between the offenders.

The De Simoni principle, i.e. offenders should be sentenced only for the offence for which they are convicted. This principle provides that a court in imposing a sentence is entitled to consider all of the conduct of the offender, including that which would aggravate the offence but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.

Totality: This principle applies where a court sentences for multiple offences, or sentences an offender for a fresh offence where he or she is already serving a separate sentence. It requires the Court to have regard to the effect of the total length of the sentence for all of the offences and in doing so, avoid a “crushing” sentence. To achieve this sentences for particular offences may be made partially or wholly concurrent.

- 10 A sentencing judge has to have regard to the subjective circumstances of the offender, i.e. his or her character, general background, offending history, age, physical and mental condition (including any cognitive or mental health impairment). These subjective considerations can have a significant effect on the sentence ultimately passed. This is evident from



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two recent decisions of the High Court. In *Muldock v The Queen* [2011] HCA 39; 244 CLR 120 the High Court emphasised that cognitive and mental health impairments might reduce the offender's moral culpability, might render the offender an inappropriate vehicle for general deterrence, might eliminate the significance of specific deterrence and might mean that a custodial sentence might weigh more heavily on the offender. In *Bugmy v The Queen* [2013] HCA 37 the Court emphasised that an offender's deprived background should always be given full weight and effect, regardless of the passage of time.

- 11 Pleas of guilty and assistance to authorities are recognised in the sentencing process by allowing discounts of up to 25 percent for an early plea of guilty and a further additional discount if an offender has provided assistance to the authorities, depending on the extent of that assistance.

- 12 The above is a very brief, and by no means a comprehensive summary, of some of the matters which a sentencing judge has to take into account. As can be seen, these principles and factors can often pull in different directions and yet all have to be taken into account before a final sentence is imposed. Accordingly, the prevailing knee-jerk reaction of commentators, to the effect that sentences currently imposed by the Supreme Court are inadequate, fails to have regard to the complexity of the process, the statutory requirements and the requirements imposed by precedent, in particular decisions of the High Court.

Justice CRR Hoeben AM RFD
Chief Judge at Common Law

20 March 2014