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Principles, Perspectives & Possibilities

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THE HIGH COURT AND THE SENTENCING ENVIRONMENT

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The High Court and the Sentencing Environment

As you know, the High Court has repeatedly expressed reluctance to grant special leave to appeal against sentencing decisions. Hayne J said recently that[1] "One of the chief reasons given for that course is that it recognizes the advantages which the Courts of Appeal in the States have because of their knowledge of local conditions and local sentencing practices." For myself, I would add a further consideration. By the time I retired from the High Court, 20 years had passed since I had taken part in criminal proceedings at first instance. In that time and in a jurisdiction in which human frailty and community standards play such an important part, much had changed and I was at risk of being out of touch with the contemporary administration of criminal justice. Even more so today. So Ben Wickham, the Special Assistant to Chief Justice Gleeson, has given me much help in preparing to talk to you this evening. The comments, of course, are mine.

Sentencing is a dismal and difficult task. Perhaps it is on a par with the judicial function of awarding custody of and access to children. Judge John Robertson of the Queensland District Court says it is "emotionally draining" on occasions. Sentencing has to do with depriving a person of his (usually "his") freedom or possessions or exposing him to control by others. It takes place with the authority of the State and is enforced by the agents of the State. It follows a public exposure of wrongdoing, oftentimes attended with extensive publicity. Its impact is usually felt by family and friends of the person sentenced. It is a miserable chapter in any life and frequently in lives that have known more than their fair share of misery. So how should we approach the subject of sentencing, knowing that it is a function that must be performed by most judicial officers at some time during their terms of office?

Some years ago, at the inaugural meeting of the International Society for the Reform of the Criminal Law at one of the London Inns of Court, my friend Mr Justice John Kelly of the ACT Supreme Court was invited to contribute to one of the sessions. John is now in the Jindalee Nursing Home, not far from here, battling with advanced Parkinson's disease. John was not an eloquent speaker and he did not purport to expound a theory of criminal responsibility or a philosophy of sentencing, but his contribution electrified the Conference. He was immediately asked to say the occasional Grace at the Conference Dinner. His thesis was very simple. It was this: No person, whether Judge, witness, prosecutor or accused should suffer any loss of human dignity in the conduct of a criminal proceeding. Of course, an offender must receive condign punishment for his offence and, in passing sentence, a judge may make observations about the gravity of the offender's conduct or the circumstances of the offender's life but those comments must be designed to explain the reasons for judgment, not to denigrate the human dignity of the person on whom the sentence is passed. Adopting that approach, the judge not only preserves her or his own dignity but shows that sentencing is an aspect of the rule of law. It is difficult to translate that approach into propositions about judicial conduct, but a judge who puts that approach into practice presides over a court of authority and efficiency.

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[1] *York v The Queen* (2005) 79 ALJR 1919, 1927 [40].

We know that the popular view is that courts are too lenient in the sentences they impose. Clever lawyers and soft hearted judges are believed to pay little attention to the damage done by criminal conduct. That is largely because reports of sentencing understandably focus on the particulars of the crime rather than providing a dreary account of the circumstances of the criminal or an assessment of the need for deterrence or the prospect of the criminal's rehabilitation. Of course, the Courts of Criminal Appeal provide a remedy for a manifestly inadequate sentence but the media do not always publish the reasons if an appeal against the sentence is dismissed. If the level of public concern is high enough, a prosecution appeal may be launched to satisfy the popular clamour even if the circumstances show that the prospects of success in the appeal are minimal. Take, for example, the case of Bilal Skaf whose sentence for appalling sexual offences in New South Wales was reduced from 46 to 28 years by the Court of Criminal Appeal. Although the DPP is reported to have advised the Attorney General that the prospects of further appeal were poor[2], the Attorney pressed on with an application for special leave to appeal to the High Court. It is not surprising that the application failed. Absent specific error, the application failed because, as the Chief Justice said, the High Court "does not intervene simply on the ground that its own appreciation of the seriousness of a particular case may be different from that of a sentencing judge or a Court of Criminal Appeal".

The principles governing the admission of appeals against sentence have long been settled. They were confirmed by the High Court in *Dinsdale v The Queen*[3]. The would-be appellant has to show error in principle, mistake of fact, taking account of irrelevant matter or failing to take account of relevant matter or the passing of a sentence that is manifestly excessive or manifestly inadequate. But as to that last ground, Kirby J noted in *Makarian v The Queen*[4], that "the gateway to this Court in appeals expressed in terms of manifest excess (or inadequacy) of sentence is almost always barred and locked, and the key is rarely found."

It is a sad paradox that sentencing is an ill-understood function of the judiciary when public confidence in the sentencing process is essential to the operation of the rule of law. The explanation for this quandary inheres in the very principles which must be observed in sentencing. The retributive basis for sentencing – punishing an offender "because he deserves it" as CS Lewis wrote[5]—looks at circumstances that are in the past but other purposes of sentencing including deterrence, protection of the community and reform of the offender look to the future. The effectiveness of punishment to achieve these future objectives is problematic but of great importance to the community. The retributive basis, on the other hand, evaluates an offender's blameworthiness and demands a certain proportionality between the crime and the punishment to be imposed, thereby placing a limit on the sentencing discretion. The public cannot expect to be informed nor can the public be expected to know all the material relevant to the fixing

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2 *The Sydney Morning Herald,* 4/2/2006.

3 (2000) 202 CLR 321, 324-325.

4 (2005) 79 ALJR 1048.

5 *See Veen v The Queen (No2)* (1988) 164 CLR 465, 473.

of an appropriate sentence. John Robertson has given a dramatic example[6]: He had to sentence a woman who pleaded guilty to dangerous driving causing the death of a two-year-old child when she had a blood alcohol reading of .20%. Was a severe sentence called for? At first sight, certainly. But perhaps not, when it appeared that the child was her own and the mother had started drinking as the result of a severe post-natal depression that had been poorly treated. The concatenation of relevant factors, with which the High Court had to deal in *Veen (No 2)*[7], make sentencing a complex task which, as the Court observed, "calls for a judgment of experience and discernment."

In recent times, the High Court has been insistent on preserving the scope of the judicial sentencing discretion, even when governments have sought to emphasise particular purposes of sentencing by itemizing them in statutory form. In *Wong*[8], a case of drug importation, the High Court denied the utility of a guideline judgment linking the length of a custodial sentence to the weight of the narcotics involved. The leading judgment pointed out[9] that the guideline "was directed to the articulation of proposed results rather than the articulation of the principles which should inform the judge". Their Honours rejected "a mathematical approach to sentencing in which there are to be increment[s] to and decrements from, a predetermined range of sentences … because it does not take account of the fact that there are many and contradictory elements which bear upon sentencing an offender." The task of the sentencer, it was said, was "to take account of all the relevant factors and to arrive at a single result which takes account of them all." This was approved in *Markarian*[10], although the majority in that case rejected the invitation to prescribe a universal rule that a sentencing judge must adopt a process of "instinctive synthesis." In *Wong*[11], the majority insisted that that phrase "is not used … to cloak the task of the sentencer in some mystery but to make plain that the sentencer is called on to reach a single sentence which… balances many different and conflicting features." In *Makarian*[12], McHugh J did not object to that use of the term, denying that it implied some arbitrariness. Indeed, he favoured that approach as conducive to determining the proportionate sentence. He said[13]: "The principle of proportionality is one of the fundamental principles…[requiring] a judgment concerning the relationship of the penalty to the facts. This is a value judgment, based on experience and instinct, derived after taking into account all the facts and circumstances of the case."

The High Court judgments make it clear that, subject to legislative direction, the sentencing discretion is at large within the range of the prescribed maximum. The governing and limiting factor is that the sentence be proportionate to the gravity of the offence. "The principle of proportionality", said the Court in *Veen (No 2)*[14] "is now firmly established in this country." But there is no methodology for calculating a single

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6 *"Are the Courts too Soft?"*, Proctor, October 2005.
7 (1988) 164 CLR 465.
8 (2001) 207 CLR 584, 611-612.
9 (2001) 207 CLR 584 at 602.
10 (2005) 79 ALJR 1048, 1056.
11 (2001) 207 CLR 584.
12 (2005) 79 ALJR 1048.
13 *Ibid* at 1064 [69].
14 (1988) 164 CLR 465, 472.

correct sentence. Indeed, McHugh J has denied that there is a single correct sentence rather than "a range of sentences which experienced judges would regard as appropriate"[15]. The breadth and untrammelled nature of the sentencing discretion may seem like a charter of judicial freedom, but in truth it evokes the most anxious consideration. There is no material element that can be left out of calculation, nor any immaterial element included. There must be an awareness of the broad level of sentences current at the time in the particular community. And any tentative view about an appropriate sentence must be tested to see whether it is proportionate to the circumstances of the offence. Then the factors, or at least the chief factors, which have led the judge to determine the sentence to be imposed must be stated – not only to explain to the offender why that sentence is being imposed but also to satisfy the community of the appropriateness of the sentence.

The judge's responsibility in the sentencing process cannot be delegated to, or governed by, the agreement of the prosecution and the offender. Plea bargaining is not the method by which criminal punishment is determined. In *GAS v The Queen*[16], the Court clearly stated that "it is for the sentencing judge alone to decide the sentence to be imposed. For that purpose, the judge must find the relevant facts." Although the prosecution and defence may reach an understanding about the evidence that will be led or admissions that will be made, that does not bind the judge, "except… that the judge's capacity to find facts will be affected by the evidence and the admissions." Similarly, it is the "judge's responsibility to find and apply the law" and that cannot be circumscribed by counsel's submissions.

The judicial responsibility of finding the facts in sentencing is a vexed problem. When an accused pleads not guilty to a criminal charge, there is a joinder of issues material to the guilt of the accused. The onus and standard of proof in the trial have been well settled. But there is no such joinder of issues in the sentencing process. The majority so held in *R v Olbrich* [17] but the party which invites the sentencing judge to take a particular matter into account must bring it to the judge's attention. The judge is not bound to accept a mere assertion of a fact, especially if the assertion is not conceded. The judge may require the asserting party to call evidence. The Court has adopted the ruling of the Victorian Court of Appeal in *Storey* [18]that judicial satisfaction of a matter adverse to an accused requires proof beyond reasonable doubt but satisfaction of a favourable matter requires proof on the balance of probabilities. However, not every matter relevant to a sentence is to be characterized as a matter in aggravation or mitigation. In *Weininger v The Queen*[19], the majority judgment pointed out that elements of human behaviour do not always fit into one or other category. Moreover, it is not always possible for a court to be apprised of all the circumstances relevant to an offence, particularly in cases such as drug importation where some of the relevant circumstances may have occurred overseas. The judge has to do the best that she or he can with the material known to the Court, avoiding "excessive subtlety and refinement."

15 *Markarian v The Queen* (2005) 79 ALJR 1048 at 1063 [66].
16 (2004) 217 CLR 198.
17 (1999) 199 CLR 270, 281.
18 [1998] 1 VR 359, 369.
19 (2003) 212 CLR 629, 637.

The High Court has been astute to preserve the scope of the judicial sentencing discretion Mandatory sentences destroy the proportionality of the discretionary sentence or deny the relevance of mitigating circumstances. It is only by taking account of all the relevant factors that justice can be done in each case.

The Court has also given a narrow construction to statutes which might otherwise impact on the fundamental principles of sentencing. This approach is manifest in the cases in which the Court has considered the role of the sentencing court dealing with the detention of offenders after the expiration of a fixed term of imprisonment. In *Chester v The Queen*[20], the Court allowed an appeal against an order made under a section of the Criminal Code of Western Australia authorizing the detention of a convicted offender "during the Governor's pleasure" after the expiration of his fixed term of imprisonment. The joint judgment recalled that the common law "does not sanction preventive detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender…In the light of this background of settled fundamental legal principle, the power to direct or sentence to detention … should be confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm." In *McGarry v The Queen*[21], the statute authorized indefinite imprisonment if the sentencing court was satisfied that the offender on release after a fixed term would otherwise "be a danger to society, or a part of it" because of one or other of a number of factors. The joint judgment held that "a bare conclusion that it is probable that the offender will commit some indictable offence in the future" was not enough to justify an order for indefinite imprisonment. As the factors include "exceptional seriousness of the offence" and "exceptional circumstances", attention has to be given to "whether, were the offender to be released at the end of the nominal sentence, the offender would engage in conduct, the consequences of the commission of which would properly be called 'grave' or 'serious' for society as a whole, or for some part of it." Kirby J described an order of indefinite imprisonment as "a serious and extraordinary step" by reason of "the respect which the law accords to individual liberty and the need for very clear authority, both of law and of fact, to deprive a person of liberty, particularly indefinitely."

The High Court has expressed some views on particular factors that are to be taken into account in sentencing, such as the effect of pleas of guilty[22] and the role of good character[23]. I do not propose to deal with those, with one exception. That exception relates to the matters considered in *York v The Queen*[24]. A woman convicted of drug trafficking had assisted the police and had received death threats. Atkinson J imposed a head sentence of 5 years imprisonment but suspended the sentence because her Honour

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20 (1988) 165 CLR 611, 618.

21 (2001) 207 CLR 121, 130 [23]; cf *Lowndes v The Queen* (1999) 195 CLR 665

22 *Cameron v The Queen* (2002) 209 CLR 339.

23 *Ryan v The Queen* (2001) 206 CLR 267.

24 (2005) 79 ALJR 1919.

believed that, if the offender were imprisoned, she "would face the very real danger of being killed." The Queensland Court of Criminal Appeal held that, notwithstanding that danger, the offender should serve a custodial term. The High Court allowed an appeal, restoring the original sentence. The risk of a prisoner being killed or injured in gaol was accepted as a relevant factor in sentencing.

The decision reflects what McHugh J called "the common law's equal concern for the physical safety of each citizen" – a concern which, I venture to suggest, the lawyers of my generation did little to promulgate. Too long have we accepted gaol conditions which are incompatible with human dignity. Allegations of overcrowding, drug abuse, physical abuse and rape have been made without stirring the conscience of lawyers, much less the conscience of the general public. Even anecdotal evidence of young offenders being stood over to procure their families to smuggle drugs into the prison or to submit to sexual depradation have failed to elicit substantial protest. Advocacy for prison reform has been largely the work of social workers, chaplains and Prisoners' Aid Societies. But if I hark back to John Kelly's call for respect to be shown to the human dignity of all involved in the sentencing process, I am saddened to think that lawyers have not really come to grips with the reality which faces many of those on whom a term of imprisonment is imposed.

The responsibility for determining an appropriate sentence rests squarely and solely on the sentencing judge. There is no other body or person with whom the judge may share that responsibility, although reference to what other judges have done and informal collegial contact will assist the judge in discharging that responsibility.

Conscious of that position, and concerned that inaccurate public impressions of sentences may erode confidence in the judicial process, Spigelman CJ floated an idea which might provide judges with another input into their considerations[25]. The idea, though put forward "in a tentative manner" and "with the diffidence appropriate for a novel proposal", is that there be an "in camera consultation process, protected by secrecy provisions, by which the trial judge discusses relevant issues with the jury after evidence and submissions on sentence and prior to determining sentence." His Honour sees the proposal as a way of bringing the representatives of the community into the sentencing process and thereby "improving the quality of sentence decision making and enhancing public confidence in the administration of criminal justice." Any proposal advanced by Spigelman CJ commands careful consideration. But, for a reason to which His Honour refers, I find it difficult to accept this proposal. As experience in the United States has shown and as His Honour points out, "[t]he scope of relevant considerations is such that sentencing requires the synthesis of a range of incommensurable factors. This cannot be done by a group, without an undesirable process of compromise. Ultimately, an experienced criminal judge must decide, often quite instinctively, where the balance should lie." I respectfully agree and, while I also agree that every trial judge has "the highest degree of respect for the deliberations of a jury", the functions of a juror are significantly different from the functions of a sentencing judge. The jury finds a particular set of facts and is wonderfully suited to that task; it does not give expression

[25] *"Reform"* Issue 86, Winter 2005, 51.

to values (other than a finding of what is "reasonable" conduct in specific circumstances). It is unsuited to the evaluation of "incommensurable factors" much less to the evaluation of a synthesis of those factors. To invite the jury to advise on sentence is to invite the possibility—indeed, the likelihood—of a disparity between the opinion of some or a majority of the jurors and the opinion of the judge. Yet it is the opinion of the judge to which, by common consent, effect must be given. With respect, I doubt that any "in camera" provision would diminish the prospect of publicity highlighting sentences at odds with a juror's opinion.

So, in the absence of major legislative intervention, the sentencing judge stands alone, her or his discretionary decisions on sentence being open to the chill winds of criticism. It is a lonely function. The judge is limited by the armoury of penalties available to do justice in the particular case, and may be given only partial information about the matters which are troubling her or him, but there is nobody else who is better equipped with information and submissions to weigh up the competing purposes of sentencing which, "are guideposts to the appropriate sentence but sometimes they point in different directions"[26]. It is a heavy responsibility but the community reposes its confidence in the judges to discharge it. To those of you who are discharging or will be discharging that responsibility, I pay my respects and wish you peace of mind and satisfaction in the performance of your high office.

26 *Veen v The Queen (No 2)* (1988) 164 CLR, 476.