Principled Sentencing Practice

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> *"It is the balancing of objective seriousness against subjective considerations that is the key to successful sentencing practice." – Simpson J in **R –v- Pickett** [2010] NSWCCA 273 at [59].*

Sentencing is really hard. It is hard for the Judge, hard for the Prosecutor, hard for us. Really hard for the client. A short time ago a very experienced Senior Counsel told me that sentencing has become so hard that these days he would rather run a trial than a sentence hearing. There is no doubt that the difficulty of sentencing has been caused by the intervention of Parliament, driven by an abiding popular perception that sentences are generally too light. The Court of Criminal Appeal (CCA) has played its part, too, in its interpretations of the legislature, in such things as Guideline Judgements, and in what seems to me to be the unprecedented number of Crown appeals being lodged and succeeding.

However, sentencing practice remains guided by the same principles that have always guided it. The goal is to do justice by fashioning an outcome that fits the particular offence and the particular offender. I shall touch upon only a couple of areas of sentencing practice that my own recent experiences suggest are areas that can present some considerable difficulties. They are: **the plea**, **the facts**, and **expert reports**. I want to carefully re-consider each of these areas, and look at the principles that underlie their function and operation in practice.

THE PLEA

The High Court told us this in **Meissner –v- the Queen** (1995) 184 CLR 132:

> *A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in the exercise of a free choice in the interests of the person entering the plea. The principle is stated by Lawton LJ in **Inns** [(1974) 60 Cr App R 231 at 233]: "The whole basis of a plea on arraignment in open court is that an accused freely says what he is going to do; and the law attaches so much importance to a plea of guilty in open court that no further proof is required of the accused's guilt…"*

The Court of Criminal Appeal expressed it this way in **R –v- Radic** [2001] NSWCCA 174 at [30]:

> *It is important to remember that a plea of guilty is a solemn matter; it has two effects: first of all it is a confession of fact; secondly, it is such a confession that without further evidence the Court is entitled to, and indeed in all proper circumstances will so act upon it, that it results in a conviction…*

There are always exceptions, of course, but in most cases I cannot emphasis enough how important it is to have, before the plea is entered, full and detailed instructions about what the client did or did not do in the events that comprise the basis of the charge. The plea is **not** a plea to what the Crown's evidence can prove, but is a plea to what the client will **admit**. The client's account, of course, should at least admit each element of the offence. If the client's account does not do so, then there can be no plea of guilty to that particular charge, except in particular circumstances such as the sorts of matters raised in **Meissner**.

This is what Dawson J said in that case at 157:

> *"… a person may plead guilty upon grounds which extend beyond the person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence…"*

When matters come before the appeal courts where an appellant challenges a conviction founded upon a plea of guilty, the issue in the appeal courts is not the question of whether or not the appellant is actually guilty of the offence, but the "integrity of the plea" entered in the sentencing court – **R –v- Rae** (No 2) [2005 NSWCCA 380 at [21] (see **Sauer –v- Regina** [2006] NSWCCA 81 at [8] for a useful summary of the relevant principles and authorities, also **Sabapathy –v- R** [2008] NSWCCA 82). Only one of the factors to be considered in the assessment of the "integrity of the plea" is whether the plea was an expression of a "genuine consciousness of guilt", and it is not necessarily a determinative factor.

This issue of the "integrity of the plea", therefore, is extremely important. Great care, thought and attention must go into the advice given to the client and the instructions taken.

In negotiating with the Crown over an appropriate plea, there must be some proper basis for any plea offer made. It is simply not appropriate to ask the Crown to accept a plea to a lesser charge by way of an ambit claim. You must be able to point to a factual or legal basis for that lesser charge in the brief or in your instructions.

The easiest example is an offence that carries an element of "with intent". It is trite to say that the Crown brief must contain evidence capable of satisfying a properly instructed jury of that element beyond reasonable doubt. Often the evidence on this point is not direct, but to be inferred, usually from the client's conduct. That is one possible reason why the evidence may not be sufficient to support that element. Intoxication can come into play in offences that carry an element of "with intent", and may be another factor in your assessment of the likelihood of a jury being satisfied of this element beyond reasonable doubt. It is too easy to reason backwards, that is, to assume that because the client's conduct caused grievous bodily harm to the victim then that was the client's intention. That is the way police often reason, and why they charge that way. But this kind of reasoning is not allowed in criminal matters, and we must carefully guard against it. Like any form of circumstantial evidence, if the "intent" of the client is to be inferred from the client's conduct, it must be the only rational inference available in all the circumstances.

Of course, there are matters where the charge is the appropriate one, and coincides with your instructions. No plea negotiation is necessary, however the Facts may be something about which some issues may arise.

THE FACTS

This can truly turn into a bedevilling issue in some sentence proceedings. There seems to be an enormous amount of pressure, first from the prosecution, and, lately, often from the Bench, to produce an "**agreed** set of facts". The reason for the pressure is, of course, largely because it makes life so much easier for the prosecution and the Bench.

Let us get some fundamental principles down.

- A plea of guilty is an admission only to the facts that comprise the elements of the offence – the "essential ingredients". That is all. A plea of guilty does not admit non-essential ingredients of the offence – **R –v- O'Neill** (1979) NSWLR 582 at 588.

- It is for the sentencing judge alone to find the relevant facts for the purpose of deciding the sentence to be imposed - **GAS –v- The Queen** (2004) 217 CLR 198 at [30].

- Any facts other than the facts that comprise the actual elements of the offence must be proved by evidence, or by way of a formal admission such as an "agreed statement of facts", or by an informal statement from the bar table that is not contradicted by the other side – **GAS** at [30].

- The finding of facts upon which an offender is to be sentenced is a very important part of the sentencing exercise and has a great influence on a judge's decision about what penalty to impose and how large that penalty should be – **The Queen –v- Olbrich** (1999) 199 CLR 270 at [1].

- The finding of facts can significantly inform the assessment of the moral culpability of the offender, which can sometimes be more difficult than determining the offender's guilt – **Cheung –v- The Queen** (2001) 209 CLR 1 at [8].

- To think of facts in sentence proceedings as requiring an "onus of proof" is misleading, as sentence proceedings are not proceedings where there is a joinder of issues between the parties. If either party wishes the judge to take some particular matter into account, then the party should bring that matter to the attention of the judge and, if the matter is disputed, or the judge is not prepared to act upon the assertion, to call evidence about it – **Olbrich** at [25].

- Facts that are adverse to the offender must be proved beyond reasonable doubt. Facts that are favourable to the offender must be proved on the balance of probabilities – **Olbrich** at [27] – [28].

- The Crown must ensure that the agreed statement of facts comprehensibly represents the facts and circumstances upon which the Crown asks the Court to sentence the offender, and must be framed in such a way that the Court can see what is an agreed fact and what is an assertion – **Della-Vedova –v- R** [2009] NSWCCA 107 at [14] and [11].

It is absolutely vital that the client understands and agrees with every word in the "agreed facts" upon which he or she is to be sentenced, otherwise the sentencing process may miscarry – **Korgbara –v- R** [2010] NSWCCA 176. Any matter or issue that the client disputes can be resolved by negotiation, or, if that fails, by a hearing on the disputed material before the sentencing judge. These hearings are not uncommon. Indeed, what is uncommon is for your client to agree with every fact asserted by the Crown. The sorts of real problems that can arise quite commonly in negotiations of pleas and agreed facts are exemplified in **Korgbara**. In that case the CCA said this at [36]:

> *…[T]he entitlement of an offender to contest the facts on which he or she is to be sentenced (beyond admitting the elements of the offence) is of fundamental importance to the administration of justice and must always be a paramount consideration in the sentencing process. If the Crown will not accept a plea except on a factual basis that the offender does not accept, it is always open to an offender to preserve his position by openly identifying the offence to which he would be prepared, if arraigned on it, to plead guilty and the factual premises on which such a plea would be based.*

The brief may contain material that is favourable to the client, such as expressions of remorse in the ERISP, or relevant motives, or admissions about drug-taking or intoxication, or suchlike. I have found that this material often does not find its way into the "agreed facts". It should be there. If the prosecutor refuses to include this material in the agreed facts, it is, of course, possible to tender the ERISP or lead the evidence in some way. One useful way to approach this is to draft some "supplementary facts" of your own, and invite the prosecutor to agree to them. I have had some success in the past in drafting my own "agreed facts", which the prosecution adopted.

EXPERT REPORTS

Expert opinion evidence by way of medical, psychological, psychiatric or psycho-social reports can be very effective in providing material that mitigates, or, in the new favourite word in the CCA, ameliorates the sentence. However, they can backfire, or, almost as bad, say nothing useful in the proceedings, and so great care, thought and clear advice needs to be given and instructions taken before such a report is ordered and again before it is served on the Crown and tendered.

The beauty of ordering such reports is that, unlike a Pre-Sentence Report (PSR), you can decide whether or not they see the light of the courtroom.

Since the CCA decision of **R –v- Qutami** [2001] NSWCCA 353 there has been a lot of heartache among defence practitioners about one of the apparent ratios of that decision: that a sentencing judge should give little weight to self-serving untested statements made by an offender to experts preparing reports for sentence (see **Qutami** at [79]). This is an issue that has been raised a number of times in CCA matters since – see **R –v- McGourty** [2002] NSWCCA 335, **Regina –v- Elfar** [2003] NSWCCA 358, **Regina –v- Hooper** [2004] NSWCCA 10, **Munro –v- Regina** [2006] NSWCCA 350.

The simple response to this apparent principle in this line of authority is to call the client to give evidence that, at the very least, adopts and verifies the account given to the expert who recorded it in the report and based the opinion on it.

However, a careful reading of the line of authorities would indicate that the principle is not quite what is often thought. In **McGourty** and **Elfar** (which quotes at length from **McGourty**) the principle is expressed in a way that is a little narrower than what appears to be the principle in **Qutami**. The following part of the judgement of Wood CJ at CL in **McGourty,** with whom the other justices agreed, is discussing a finding by the sentencing judge that the offender had not been involved in the planning of the offence, which was a very nasty kidnapping:

> *[24] So far as I can see, there was no factual basis for the finding made by his Honour beyond a self-serving and untested statement made by the respondent to a psychologist. Recently this Court has criticised the practice of placing material of this kind before sentencing judges,* ***in an attempt to minimise the objective seriousness of the crime*** *otherwise apparent on the face of a record: Regina –v- Quatami (sic) [2001] NSWCCA 353 at paras 58 and 59 per Smart AJ, and at para 79 per Spigelman CJ).*
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> *[25] I whole heartedly agree with the criticism offered in that case. If an offender appearing for sentence wished to place evidence before the court* ***which is designed to minimise his/her criminality****, then it should be done directly and in a form which can be tested*.
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> [The emphases are mine]

In **Elfar**, Whealy J (with whom the other justices agreed) expressed the principle in this way at [25]:

> *Considerable caution should be exercised in reliance upon* ***such exculpatory material where there is a matter in dispute*** *and where no evidence is given by an offender or other direct evidence is not placed before the court.* [My emphasis]

Elfar is an extremely instructive case, because the **Qutami** point was being argued by the Crown in the appeal on the basis that two major components of the offender's case – that he acted under a certain amount of coercion from a violent and abusive father to commit the crime, and that he expressed contrition and remorse – were contained in psychological assessments that were tendered in the absence of any direct evidence by the offender. The Court rejected the Crown's argument, saying that at first instance, the prosecutor made no objection to the tender of the material, nor suggested that there was any dispute about the offender's father's coercion or the expressions of remorse. During the proceedings, the offender's lawyer offered to call the offender's grandmother to give evidence about the offender's father's behaviour, and the prosecutor did not demur when the sentencing judge stated that for his part he did not require the evidence to be given directly and that he was content to rely on written statements before him.

The facts in **Qutami** itself are also instructive on this point. The offender did not give evidence in the sentence proceedings, but a number of medical and psychologist's reports were tendered. The CCA was critical of a number of findings of fact favourable to the offender that were made by the sentencing judge and derived, it appears, from the material in the reports. For example, the case was about a charge of *Solicit to murder*, and the sentencing judge found that it was "unlikely the prisoner would have carried through with the plan to have [his niece] killed but recognised that this opinion may be wrong". The CCA said that the evidence did not entitle the judge to make this finding, because it was inconsistent with the conduct of the offender disclosed by the Agreed Facts, from which the only favourable conclusion to be

drawn was that the only reason the offender did not go through with the plan was that he was arrested.

In **Hooper**, one of the issues was about statements made by the offender to a psychologist, that sought to minimise or justify some of the offending behaviour, and contained expressions of remorse that his Honour at first instance found were not consistent with the offender's other offending behaviour. The CCA held that his Honour was correct in disregarding the assertions of remorse, in these circumstances and where there was no direct evidence given by the offender, on the **Qutami** principle – [43] – [50].

I should not leave this topic without mentioning two other extensions of the principle, although they are common sense. The same principle has been held to apply to statements made by the offender to a probation officer and recorded in a PSR - **R –v- Palu** [2002] NSWCCA 381 at [40] – [41]; – and to statements made by an offender in a note or letter by the offender addressed to the sentencing judge and tendered in the proceedings – **Elfar**.

One final observation: I am becoming more and more persuaded that psychological and psychiatric reports are less and less useful in sentence proceedings, unless they can be used properly as evidence upon which a submission can be firmly grounded that the case brings into play the principles applying to offenders who suffer from serious psychological or psychiatric impairment. They can contain very powerful evidence that may go to the question of the offender's moral culpability, or to any of the other factors set out in the authorities such as **R –v- Scognamiglio** (1991) 56 A Crim R 81, **R –v- Engert** (1995) 84 A Crim R 67, **R –v- Israil** [2002] NSWCCA 255, that are all collected and usefully summarised in **R –v- Hemsley** [2004] NSWCCA 288 at [33] – [36] and, most recently, in **Director of Public Prosecutions (Cth) –v- De La Rosa** [2010] NSWCCA 194 at [177].

There is, of course, a warning contained in **Israil**: sometimes the evidence of mental impairment cuts the other way, and increases the offender's future dangerousness, so that the protection of the community looms larger than it otherwise might. It should be noted that there is a specific authority that says that a sentencing judge who is dealing with an offender classified as having an "antisocial personality disorder" should give more weight to the protection of the public – **R –v- Lawrence** [2005] NSWCCA 91 per Spigelman CJ at CL at [24].

In the course of considering the utility of obtaining or tendering a psychological or psychiatric report, it is useful to bear in mind the matters set out in **R –v- Way** [2004] NSWCCA 131 at [86] as part of a discussion about what factors might be considered to impinge generally upon the "objective seriousness" of an offence:

> *Some of the relevant circumstances which can be said "objectively" to affect the "seriousness" of the offence will be personal to the offender at the time of the offence but become relevant because of their causal connection with its commission. This would extend to matters of motivation (for example duress, provocation, robbery to feed a drug habit), mental state (for example, intention is more serious than recklessness), and* ***mental illness, or intellectual disability, where that is causally related to the commission of the offence, insofar as the offender's capacity to reason, or to appreciate fully the rightness of wrongness of a particular act, or to exercise appropriate powers of control has been affected****…Such matters can be classified as circumstances of the offence and not merely circumstances of the offender that might go to the appropriate level of*

> *punishment. Other matters which may be said to explain or influence the conduct of the offender or otherwise impinge on her or his moral culpability, for example, youth or prior sexual abuse, are more accurately described as circumstances of the offender and not the offence.* [My emphasis]

It is important to note that the material contained in a psychological or psychiatric report may be useful in the assessment of either or both objective seriousness and subjective factors. It is not necessary that there be causal connection between the psychiatric illness or intellectual disability and the offence; in other words, it can be relevant only to the subjective case – see **Benitez –v- R** [2006] NSWCCA 21 at [32] to [42].

Hope?

Do I detect something of a re-calibration of the principles of sentencing in some recent CCA cases? I refer you to Simpson J in **Pickett**, cited at the very beginning of this paper. In that case, the Crown appealed the inadequacy of a 20 month suspended sentence for an *Ongoing supply* of cocaine, with a number of other supplies on a Form 1. The essence of the Crown's argument on appeal was that the sentencing Judge had not properly assessed the objective seriousness of the offence, had allowed far too much weight to the substantial subjective case for the offender, and in doing so had included a number of "subjective" factors in the assessment of the objective gravity. The Court rejected the Crown's argument. In the course of her judgement, Simpson J said at [59]:

> *It is perfectly legitimate to use personal circumstances in the determination of the overall sentence although, of course, they must not be used as a vehicle to reduce the sentence to one that is unacceptably low having regard to the objective seriousness. It is the balancing of objective seriousness against subjective considerations that is the key to successful sentencing practice. It is useful to recall the discussion in **Markarian –v- The Queen** [2005] HCA 25; 228 CLR 357.*

This is perhaps a timely reminder of the overarching sentencing principle: that the sentence is a just balance between the often competing interests in play.

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