Sentencing, the District Court and You

A Practical Guide to the Preparation of Sentence Matters

Introduction

1. This paper is directed at junior practitioners and those who do not regularly appear in the District Court
2. It aims to provide a practical guide to the preparation of District Court sentence matters including a list of resources, examples from submissions I've written and suggestions for further reading. Many of the suggestions are fundamental in nature and will be familiar to the experienced practitioner – the intention is to provide a framework from start to finish, for those less familiar with the process.
3. This paper is not legal advice. It may not reflect the current law by the time you read it. You should always make your own inquiries when preparing your matter.

Preparation

Preparation is the most fundamental aspect of running a persuasive and effective sentence matter in the District Court. You are not going to be very persuasive if it is obvious to everyone that you are unprepared. Even if your arguments have a good legal foundation, you as the advocate will lack credibility.

What do I need?

The first step in your preparation should be to ensure that you have all of the necessary documentation in order to conference your client, and be able to take all of the instructions you require. It is not particularly useful, for example, to meet with your client and take instructions only to find that the Crown are choosing to file an indictment to fix some perceived defect in the CAN, change the circumstance of aggravation, or that your client was on parole when you thought they had no criminal history.

The Crown bundle should contain most of the items below, but it will not always be available as far in advance as you might like. There is nothing wrong with seeking out material yourself. As a minimum, I would suggest you obtain the following before meeting with your client:

The CAN or indictment – speak to the solicitor or Crown from the DPP to find out whether they will be filing an indictment, or simply relying on the CAN from the Local Court. There are some further matters to consider regarding CANs/indictments:

1. A CAN is an indictment – see s15 *CPA*
2. The prosecutor requires leave, or the consent of the accused to amend the indictment. Amendment includes substitution – s20 *CPA*
3. If for some reason the substitution of an indictment causes your instructions to change, be aware of s103 *CPA* – this section creates an absolute right for your client to enter a plea of not guilty, even after being committed for sentence. Difficulties may arise if your client has signed a copy of the facts at committal, but that process is beyond the scope of this paper.

An up to date criminal history. Contact the Police Prosecutors and politely request a fresh bail report – you never know what may have changed; your client may have been acquitted of other matters which were on foot, have been charged with new matters, or be the subject of call-up proceedings. Be aware that the DPP should provide a watermark conviction report (not a bail report) as part of the sentence bundle. For the purpose of preparing the case, a bail report is fine, however it is important to have a conviction only report for the sentence proceedings because these reports are almost always shorter (given they don't contain things like breaches of bail) and also more accurate (because they are produced by a unit within the NSWPF which has the time and resources to properly check them).

A current custodial history, whether your client is in custody or not. Request this from sentence.admin@justice.nsw.gov.au and be sure to ask for the copy which includes details of any punishments/other correctional centre discipline. This document will show you:

a. when your client went into custody (keep in mind that they may have spent a night in the police cells, so there could be an additional day at the beginning)
b. movements – if for example your client is in custody and has been moved far away from their family and friends, this is useful to know. They may give you instructions that they were the victim of violence in custody – movement, especially to Long Bay Hospital would help to pin down dates and corroborate your client's instructions
c. whether there have been any 'prison charges' against your client. It is very helpful if, for example, your client instructs that they had a drug problem prior to going into custody, but they have been clean since, to be able to show a custodial history free from charges such as 'fail urine test' or 'possess drug implement'. Equally, you can raise these issues and take instructions on them if your client has these charges. It would be embarrassing and a poor effort on behalf of your client not to obtain this material and call your client to give evidence, knowing that they would deny drug use in custody, in the face of a custodial history with a 'fail urine test' charge.

i. Details of any other sentences including balance of parole. Custodial histories are not perfect but they are generally reliable. If your client is serving out a balance of parole, or another sentence, this will determine what you say to the court about the appropriate commencement date for the sentence. In order to ensure that your client gets credit for each and every day they have been deprived of their liberty, it is your responsibility to know:
    1. How long they have been in custody, to the day. The DPP will usually have a calculation of this, but you should do your own
    2. Whether that time is solely referable to the instant offence/s
    3. If not, what is the latest day on which the sentence should commence (ie the expiry of all current sentences or the balance of parole). Note that this does not prevent the court from starting the sentence earlier (see ss40(3) & (4) *C(SP)A*) , but it determines the <u>latest</u> possible date on which the court could start the sentence.

These and many other details will appear on the Crown cover sheet, however those documents are not always accurate. Prosecutors do not necessarily have the time to cross check the cover sheet that is prepared for them against the documents from which the information is derived. If there is a miscalculation as to the time spent in custody, you will figure it out if you prepare properly.

The facts. If you appeared at committal, you will know whether the facts are agreed. If you did not appear, you should obtain a copy of the facts in the committal bundle sent by the registry and nowhere else – this ensures that you have the copy which reflects any amendments. A copy of this bundle will be sent to you after committal, and using it is the best way to avoid working from the wrong document. If you don't have the committal bundle, go to the registry and ask to make a copy. It is also useful to double check with the DPP – scan an email a copy of the version you're working from and check with them that they are the agreed facts.

Previous reports - Pre-Sentence Reports, Sentencing Assessment Reports, Juvenile Justice Background Reports, psychological assessments and/or psychiatric assessments. You should be able to get a reasonable idea of whether these are likely to exist by looking at your client's criminal history (if any). If there are s32 orders, previous indictable sentence matters or even serious Local Court charges there is a good chance that these documents exist. You may just find a lengthy, detailed report from an esteemed psychologist which will give you lots of information and help you do a better job for your client. These reports are an incredibly valuable source of information about your client, including their subjective case, previous diagnoses and response to intervention. Whilst there is nothing stopping the DPP from searching for these documents too, it is uncommon, and there is no obligation on you to disclose them if you find them, so it is an exercise without any real risk.

Statistics - go onto JIRS and print a copy of the statistics. Personally, I don't like to narrow them down by age/plea etcetera – I print the spread of penalties (fine, bond, gaol etc) as well as the non-parole periods and head sentences. This gives me the largest possible sample size for the offence and an overview of the way in which the charge is dealt with on indictment. For some matters, the sample size will be very small, and therefore the statistics wont be of much use to you. Not every Judge will agree, but I think there is some utility in taking them along anyway – that way you can show the court that there is not much to be gained by considering them.

Be aware that offences change – a good example at present is the fact that many of the sexual offences have recently changed. There won't be statistics on the new charges at this stage, although I think it is still worth looking at the old equivalent. If you do this, be very careful – the maximum penalty may be different, there may be a change in the standard non-parole period (or whether there is one at all).

Statistics are good for getting a ball-park idea of where the sentence in your case might fall, subject to a number of qualifications. See in particular the judgment of Spiegelman CJ in *Bloomfield* (1998) 101 A Crim R 404, *McCarthy v Regina* [2011] NSWCCA 64, *Hili & Jones v The Queen* (2010) 242 CLR 520. Reasonable minds might differ on this approach, but I like to (assuming there is a sufficient sample of

statistics) make my own assessment of where the case falls on the theoretical scale of objective seriousness, and then run that assessment by a colleague or two

Look at the spread of statistics. Identify the longest sentence imposed so that you know the realistic range, not just the maximum penalty. Think about what you would consider a 'best case' and a 'worst case' result.

Once you have obtained, read and digested all of this information, you can start to form an idea of what sort of sentence your client might be looking at it. It is a difficult exercise to give your client advise on the length of the sentence they might be looking at, but if you follow the above you will be able to give your client an indication, subject to the qualification that it is not a guarantee, and ultimately it is for the court to decide the appropriate sentence. I have attached to this paper a summary I use, as a sort of 'checklist' so that I have the basics of the matter in my mind at this point. It is not perfect, but it is a good start.

Conferencing your client and taking instructions

A few preliminary matters – these might be unnecessary if you have acted for the client in these proceedings to date, however if you are meeting your client for the first time at this stage, here are some things to keep in mind:

1. **Get to know your client.** It might sound silly, but the first step is to make sure the person in front of you, is the person who is the subject of the charge/s you're dealing with. People give aliases, people have identical names and sometimes things go wrong. Not everything on this list will apply to every client – the list should not be interpreted so as to suggest that everyone charged with a criminal offence has (for example) difficulties with their mental health – the idea is to create a list which will help you to ensure you cover the most important matters. The basic checklist should be:
    a. Full name
    b. Date of birth
    c. MIN if in custody
    d. Driver's licence or other identification document if not.

2. **Remind your client that what they tell you is privileged**. Not everyone will instantly trust their legal representative. It never hurts to remind your client that you are there to advance their interests and that they can confidently tell you (just about) anything.
3. **Give them a quick summary of the matter**. Your client may know the matter very well, or not. Someone before you may have taken the time to discuss all of the details of the matter with the client, or not. Don't assume that this has occurred.
4. **Confirm that it is still a sentence matter** – there is not much point getting halfway through taking your sentence instructions only to find out that your client has changed his/her mind and wants to plead not guilty.
5. **Explain what you're doing** – your job is not just to get the instructions, but to ensure that your client understands the process well enough to participate meaningfully in it. Tell your client that you would like to go through the case with them, to ask them about their life growing up, and now, about the offence, and about what their plans for the future are. This will also give you an opportunity to make your own assessment of your client of their verbal comprehension, memory and presentation.
6. **Don't assume that your client can read**. Not everyone that you act for will be able to read and write well. It is important that you find this out early. A good introductory question is to ask your client about their schooling. Naturally, you will find out when your client left school. I usually follow at this point with something like "*How's your reading and writing?*". This doesn't assume one way or the other what the answer will be. Knowing whether your client can read is also important if they are going to give evidence, and your opponent shows them a document. You can assist your client by mentioning quietly to your opponent that you would like them to read the document to your client rather than just show it to them. If necessary, you can raise the issue with the Judge.
7. **Think about whether your client will give evidence or not**. This decision can be a difficult one and will depend on your Judge, your client, the nature of the matter and what you hope to achieve. If for example you can see your

client is extremely sorry for the offence, it is far more powerful for the Judge to hear that from your client than to read about it in a report. There might be times when your client says they don't regret committing the offence at all. In that scenario it would be a wise choice not to call them. Most importantly, ask your client if there is something they want to tell the court about the case – it might be an explanation, an expression of remorse, their plans for the future or something else. You won't know if you don't ask. If your client wants to give evidence but you think there are good reasons why they shouldn't (eg a charge was withdrawn and you are concerned about those facts coming up in evidence) explain that to them. Ultimately it is their choice.

You also need to get a sense of your client's personal situation. This is a list of things you might like to ask:

1. Where did you grow up
2. Where do live now, or where did you live prior to being arrested
3. Who did you live with growing up – parents, grandparents, foster parents and where are those people now
4. Are your parents alive
5. Do you have any siblings
    a. How many
    b. Ages
    c. Where are they now
6. Do you have a partner/spouse
7. Do you have children
    a. How many
    b. Ages
    c. Where are they now
8. Where did you go to school
9. How far did you go in school
10. How is your reading and writing
11. Are you employed/were you employed prior to being arrested
    a. If in custody, are you working in custody

12. How is your health
    a. Do you take any medication
    b. Physical health
    c. Mental health
13. Have you ever been admitted to hospital and if so why
14. Have you ever had any issues with alcohol
15. Have you ever had any issues with drugs
16. What's your plan once this case is over
    a. Where will you live
    b. Is there a job available to you
    c. Is there anything, in particular, you need to address in the community – mental health, alcohol/other drug addiction, other health condition
17. **Read the facts to your client, verbatim**, and have them sign the document on every page. There is no substitute for reading every word on the facts document to your client. They <u>must</u> know the factual basis on which they are to be sentenced as a fundamental aspect of your responsibility to advance their interests in the case. Ask your client not to comment on the facts while you read them the first time. The first reading is to give your client all the information. You can then stop after each paragraph or as necessary and note down what your client says. The sorts of things you might be checking for include:
    a. Are there problematic details which, if your client gives evidence, might come out? Most commonly this arises where your client has chosen to put or an accept an offer, and as part of that has agreed to a set of facts which do not necessarily reflect their instructions in full, but are advantageous in the sense that they accompany a reduced charge, fewer charges, and avoid the risks associated with a trial. An example could be that a dispute, leading to an assault, arose as a consequence of a drug deal. A victim is unlikely to include the fact that they were buying or selling drugs in their police statement, and the prosecutor is equally unlikely to agree to include that portion of the narrative at the request of the defence. Knowing whether there is 'more to the story'

will help inform your advice to your client about whether they should give evidence or not.

b. Their attitude to the offence – you need to make an assessment of whether your client displays remorse. Don't ask them "*are you remorseful*". Legalese is unhelpful - ask something like "*how do feel about it*?".
c. What happened leading up to the offence/s – had your client been going through a stressful time with personal/familial issues, were they under the influence of alcohol or other drugs, do they have difficulties with their mental health. Here you are trying to put the offending in context. Ask them about the victim, if there is one. How do they know them, what is their relationship with that person like? This can lead to things like provocation.

18. **Make a preliminary assessment of the applicable aggravating and mitigating factors**. Some of these are evident before you meet your client – a plea of guilty for example. Other require further information to assess – prospects for rehabilitation, remorse etc. Again using the checklist below can be helpful.

Some common issues

If you can strike a balance between addressing the negative aspects of the case in a manner which is appropriate and respectful, whilst also advancing your client's interests robustly, you will have credibility as an advocate and achieve a better result for your clients.

This list details some common aggravating and mitigating factors and offers suggestions about how you might deal with them.

Planning - some advocates forget that there are actually three possibilities with respect to this issue:

1. Presence of the aggravating factor – s21A(2)(n) – *the offence was part of a planned or organised criminal activity*. The key case here is *Knight v Regina* [2010] NSWCCA 51 – the threshold is that there must have been planning

which <u>exceeds what would ordinarily be expected in an offence of that kind</u>. For example, taking a knife with you on your way to rob a service station – on a charge of armed robbery, it would be difficult to argue that this represents planning beyond what was required for the commission of the offence. The fact that there was <u>some</u> planning does not mean that the aggravating factor applies – *Fahs* [2007] NSWCCA 26. In my opinion cases where this aggravating factor applies are the exception, rather than the rule. Further authorities to read:

   a. *Legge v R* [2007] NSWCCA 244
   b. *Ta and Nguyen v R* [2011] NSWCCA 32 – applicability of factor to cultivation offences
   c. *NCR Australia v Credit Connection* [2005] NSWSC 1118 – organised criminal activity can arise in a group or an individual situation.
   d. *Hewitt v R* (2007) 180 A Crim R 306 – helpful summary of authorities by Hall J
   e. *Stokes v R* (2008) 185 A Crim R 74 – obligation to raise factor with parties if it is to be taken into account
   f. *Bowden v Regina* [2009] NSWCCA 45 – another good summary of authorities
   g. *Regina v Yildiz* [2006] NSWCCA 97

2. Presence of the mitigating factor – s21A(3) – *the offence was not part of a planned or organised criminal activity*
   a. This refers to the situation where the offence is spontaneous. An example might be in a larceny case where a person comes across a discarded wallet and picks it up, or is walking down the street and runs into someone with whom they have a disagreement and assaults them.
   b. We know that self-induced intoxication is not a mitigating factor, however, it may be supportive of the spontaneous nature of an offence – see *Waters v R* [2007] NSWCCA 219, particularly in matters of violence.
3. Absence of the mitigating factor <u>and</u> the aggravating factor. A common mistake here is to think that offence must be either planned or unplanned. The

reality is that many offences don't fall in either category. Going back to the robbery example – a person might quickly grab a pair of stockings along with the kitchen knife before going to rob a service station. This is certainly planning, however arguably not more than would ordinarily be expected for this type of offence. Consider very careful which category your facts fall into.

Prospects for rehabilitation

Section 21A(3)(h) – *the offender has good prospects for rehabilitation, whether by reason of the offender's age or otherwise*. There are a great many factors which might go towards a finding of this type, including:

a. Youth (fairly obvious)
b. Strong family support
c. A clear plan, supported by evidence in court for the future (inquiries with residential rehabilitation facilities, offers of work, preparation for study etc)
d. A period of offending-free behaviour – perhaps there has been a delay in the prosecution for some reason. If that is the case, and your client has been on bail and not reoffended for two years, that can make for a powerful submission.

   Prospects for rehabilitation are often expressed by advocates as 'some', or 'guarded' or in similar terms. This subsection is about the applicability, or not, of the mitigating factor. Be careful not to confuse the potential for rehabilitation with this mitigating factor. Know whether you are simply advancing a generally positive point on behalf of your client, or whether you are relying on this statutory mitigating factor. Some cases to read:

   i. *Barlow v R* [2008] NSWCCA 96
   ii. *Elyard v R* [2006] NSWCCA 43

Substantial Harm

This is a very similar to point to the one about planning. Practitioners can be confused between the applicability of the aggravating factor of substantial harm (s21A(2)(g)), the mitigating factor that the harm was not substantial (s21A(3)(a)), and the situation in which neither the aggravating nor the mitigating factor applies.

a. Aggravating factor – *the injury, emotional harm, loss or damage caused by the offence was substantial*. This should be read similarly to planning – the threshold is greater injury/harm/loss/damage than would ordinarily be expected for an offence of that type. Although in the context of emotional harm, a good authority to use on this point is *Youkhana* [2004] NSWCCA 412 and see also *Moore* [2005] NSWCCA 407. *Williams* [2005] NSWCCA 99 was a manslaughter case in which it was held that it was an error for the Judge to take into account the death as an aggravating factor. It supports the argument that more is needed that that which would be expected for an offence of that type.

b. Mitigating factor – *the injury, emotional harm, loss or damage caused by the offence was not substantial*. See the cases above and below. I would suggest that just as care needs to be taken with the aggravating factor, care should be taken here also. It is a bold submission to say that the harm suffered was not substantial, however when appropriate, it should be made robustly. One example might be where property was stolen, but returned a short time later in original condition. Be careful in financial cases where the victim is indemnified by an insurer, because whilst it might be the case that the victim is made whole, they will likely be faced with higher premiums in future, and ultimately the insurer has paid out because of the actions of your client, and the suggestion that this is irrelevant because they are not the 'victim' may not be well received by a Judge or Magistrate.

c. Neither aggravated nor mitigated on the basis of the harm/loss/injury. This will likely cover the majority of cases, such as:
    i. Assaults (whether ABH, wounding or GBH) where the injuries are what might be expected for offences falling within the respective categories.
    ii. Robberies which fit within the Henry (1999) 46 NSWLR 346 guideline

iii. Sexual offences which cause ongoing psychological harm (this is not in any way suggested to 'normalise' this type of offending or minimise the harm suffered – the authorities are clear that evidence of more is required)

Cases to read:

a. *Josefski v R* (2010) 217 A Crim R 183 – only harm that was intended or course reasonably foreseen can be taken into account
b. *Signato v The Queen* (1998) 194 CLR 656
c. *The Queen v De Simoni* (1981) 147 CLR 383
d. *R v Wickham* [2004] NSWCCA 193
e. *Huynh v R* [2015] NSWCCA 179 – psychological harm must be appreciable but need not be permanent
f. *R v Ross* (2006) A Crim R 526 – the requirement for evidence (facts, VIS, otherwise) before this aggravating factor can apply.
g. *R v Solomon* (2005) 153 A Crim R 32 – use of VIS to support aggravating factor, the requirement for harm to exceed what would be presumed for the offence.
h. *Stewart v R* [2012] NSWCCA 183 – sexual assault offences – adverse psychological consequences presumed – need to avoid double counting
i. *Aslett v R* [2006] NSWCCA 360 – can apply to spouse and dependents
j. *Taylor v R* [2006] NSWCCA 7
k. *Heron v R* [2006] NSWCCA 215
l. *Vale* [2004] NSWCCA 469
m. *Berg* [2005] NSWCCA 300

Written Submissions

Personally, I like written submissions. I suggest that the following advantages are available if you use them:

Structure – you are forced to take the time to consider the structure of your arguments – whether you address the negative or positive aspects of your case in a particular order, or together, or something else

Thoroughness – you are far less likely to miss a significant point if you commit your arguments to writing. This does not mean writing down every single argument you intend to make, it means identifying the most significant matters. It can be helpful if the matter ultimately ends up before a higher Court, to have a clear record of your position on various matters. Transcripts are great, but written submissions are generally more concise.

Organisation – both for you as the advocate, and for the Judge. Having a professional, logical, structured document shows that you are well organised, and allows the Judge or Magistrate an opportunity to consider your arguments ahead of time. It would be a rare day indeed for a judicial offer not to be grateful for such an opportunity. It certainly will not hurt your reputation with the Court.

How to structure your submissions

There are many ways to structure written submissions, some better than others. You will develop your own style. I offer this series of headings as a starting point:

History

A checklist:

a. Date of offence
b. Date of arrest/charge
c. Date of plea of guilty
d. Date of committal

Charges

For example:

a. One count of recklessly inflicting grievous bodily harm pursuant to s35(2) *Crimes Act 1900* upon Jane Smith, aged seventeen at the date of the offence.
b. The maximum penalty is 10 years' imprisonment.
c. There is a standard non-parole period of 4 years.

Form 1:

Details of any matters on Form/s 1 including reference to the relevant paragraph of the facts, and the maximum penalty

Custody:

A checklist:

a. Whether the accused is in custody
b. The date they went into custody
c. Whether they are serving another sentence/balance of parole etc
d. An accurate calculation of the period of pre-sentence custody – it is absolutely vital that you know how long your client has been in custody. Every day counts and you must be able to provide the Court with this information. Also have a date handy to offer the Court in response to the question "so what date should the sentence start". This might not be the date your client went into custody if for example there was a period on bail or they have been serving some other sentence.

Discount for plea

Strictly speaking this falls under the aggravating/mitigating factor, however it is not normally a point of contention (even less so now since the introduction of s25D *Crimes (Sentencing Procedure) Act 1999*) and I think it is a great idea to deal with it early in your submissions. It also helps to lay the foundation for later submissions about remorse, prospects for rehabilitation and likelihood of reoffending.

Criminal History

Was your client subject to conditional liberty at the time? Is there concurrent breach action?

Does your client have any criminal history at all? Include a sensible summary of previous charges as relevant. For example you probably don't need to include that PCA offence from 1992 in submissions for large commercial drug

supply, but on a robbery sentence you should definitely include a concise summary of previous convictions and sentences for robbery matters

Again this is a matter which falls within s21A however, it is a good opportunity to either get in the Judge's mind that your client doesn't have any/a significant criminal history, or deal with a difficult aspect of your case early if that isn't the case

Objective Seriousness

This is determined without reference to your client's subjective case. There is no requirement to determine whether a standard non-parole period offence is a 'mid range' offence – see *Mudlrock v The Queen* (2011) 244 CLR 120 at [27]. Strictly speaking, there is no requirement to actually make a finding as to objective seriousness (*Muldrock* at [29]). In practice it almost always happens and in my opinion, you should absolutely have a view on it, and reasons to support that view.

Although the court is not required to assess the objective gravity of a standard non-parole period offence by reference to notional offences in the mid-range of objective seriousness (see s 54A(6)), proper attention should still be paid to the objective seriousness of the particular offence under consideration: *R v Campbell* [2014] NSWCCA 102 at [27]. An assessment of the objective seriousness of an offence is a critical component of the sentencing process and a mere recitation of the facts of an offence will not satisfy the requirements of that process: *R v Van Ryn* [2016] NSWCCA 1 at [133], [134]; *R v Cage* [2006] NSWCCA 304 at [17].

Aggravating factors

I like to use separate headings for each factor – here is an example:

> The offence was committed in the home of the victim – s21A(2)(eb)
>
> At the time of the infliction of the injuries by the offender, Victimina was living with the offender as her foster child. This factor is directed towards offences committed in the sanctity of the home. Previous authority that an offence committed in a home shared by the victim and the accused could not support this aggravating factor was overruled in the five-judge bench decision of *Jonson v R*[1]. The court held that decisions stating that s 21A(2)(eb) is restricted to cases where the offender was an intruder are plainly wrong and should be overruled. Accordingly, there is no "rule of law" within the meaning of s 21A(4) to restrict the scope of s 21A(2)(eb) in the manner suggested in the above cases: *Jonson v R*[1] at [50]. The Crown submits that the aggravating factor applies in this case, and indeed at [40] *Jonson v R*[1] specifically contemplates a scenario in which the offender resides with the victim, determining that the aggravating factor applies.

Mitigating factors

I make the same suggestion for mitigating factors as for aggravating factors. Include the applicable section, reference to the facts, and any relevant authorities.

> The remorse shown by the offender – s21A(3)(i)
>
> The remorse[1] expressed by Ms Offender as demonstrated by her plea of guilty and the clear acknowledgement of her wrongdoing demonstrated in the ERISP conducted on 25 September 2010. This interview shows clear and detailed admissions by Ms Offender as to her involvement in the offence, for example at page 6 in response to question 72 Ms Offender admits holding the victim down and subsequently in response to question 75 admits to "*put[ting] [her] hands over his mouth so no-one can hear…"*.

Comparable cases

As a defence lawyer, you have more freedom to put numbers to a judicial officer (see *Barbaro v The Queen* [2004] HCA 2). CCA sentence appeals are generally short, and incredibly useful to read.

Here is an extract of some written submissions I prepared for a robbery matter (the formatting has been changed):

> The guideline judgment for armed robbery, *Regina v Henry Barber Tan Silver Tsoukatos Kyroglou Jenkins*[1] has been held to apply in matters of robbery in company[1]. Of the seven characteristics discussed in *Henry*[1], it is respectfully submitted that the following five apply to the present case:
>
> 1. Young offender with little criminal history
> 2. Limited degree of planning
> 3. Limited actual violence
> 4. A vulnerable victim (although *Henry*[1] contemplates vulnerability seemingly in a different sense)
> 5. Small amount taken
>
> It is respectfully submitted that the present case is appropriately categorised as less serious than a case that would fall within the range of the guideline in *Henry*[1] for the following reasons:
>
> 1. The threat of a weapon is significantly greater than of two women, and thus the present case should be viewed as being less serious.
> 2. Further, compared to other offences of robbery in company, the threat of two women would be substantially less confronting or intimidating than the threat imposed by a greater number or persons, or by large males as is regularly encountered in offences of this type.
> 3. The level of violence actually perpetrated is slight as discussed above at paragraph X.
> 4. The amount taken (the amount not recovered) is $50. This is appropriately viewed as being at the very lowest end in terms of seriousness. The victim's wallet was recovered and was missing $50 in Australian currency.
> 5. That the guideline in *Henry*[1] contemplates a late plea with respect to the discount and it is respectfully submitted that Ms Offender's plea was entered at the earliest available opportunity.
>
> *Regina v Sharpe*[1] was a successful appeal resulting in a sentence of three years with a non-parole period of 21 months for a charge of robbery in company. Although not entirely analogous, the matters derive similarity from the vulnerability of the victim due to age, the short length of the offence and the lack of significant violence. Relevantly however, *Sharpe*[1] involved an offence which did not occur in the home of the victim, and the offender appears to have a more significant record of prior convictions than in the present case.
>
> The relevant facts were:
>
> 1. The offence occurred near Central railway on Eddy Avenue, whereby the co-offender verbally instigated the counter demanding money from the victim who was 15 years old.
> 2. The applicant was involved in the conversation however the co-offender made threats to stab the victim.
> 3. The applicant struck the victim on the face with an open hand, with a subsequent threat to use his fist next time.
>
> It is submitted that the present case would not warrant a sentence in excess of that in *Sharpe*[1].
>
> In the case of *Jessica Carrol v Regina*[1] the applicant appealed against a sentence of five years imprisonment with a non-parole period of two years and three months for a charge of robbery in company.
>
> This sentence was imposed after a finding of guilt following a trial where the relevant facts were as follows:
>
> 1. The victim was known to the applicant through her work as a prostitute. On the night in question the victim had won $1000 while playing a poker machine and the applicant was aware of this.
> 2. The applicant offered the victim her services but he declined.
> 3. The victim subsequently changed his mind after receiving a telephone call from the applicant, who then travelled to the victim's premises.
> 4. Upon arrival the applicant telephoned the victim telling him she was in the laneway outside his flat and required assistance due to her sprained ankle.
> 5. When the victim went to assist the applicant he was set upon by her and a male.
> 6. The male's hand was around the victim's throat and the applicant had a strong hold around the victim's shoulders. The victim was pushed to the ground, and $300, some papers and a mobile phone were taken.
> 7. The applicant said during the robbery "Don't hurt him or kill him"
>
> It is respectfully submitted that the level of planning and the level of violence utilised in this case is greater than in the present case, although it is conceded that at [12] it is revealed that Her Honour Freeman DCJ determined that it was an offence of limited planning, and an unsophisticated and opportunistic one.
>
> Adjusting for the present case in which the accused has pleaded guilty, it is respectfully submitted on the basis that *Carrol*[1] represents a more serious example of the offence, that a shorter term of imprisonment is appropriate. It is notable also that a significant finding of special circumstances was made in *Carrol*[1]. Reference is made at [34]-[35] to the particularly harsh nature of the time in custody experience by the applicant as well as her progress while in custody and family circumstances. It is not entirely clear whether those matters were raised at first instance.

In a Commonwealth fraud case I provided a similar list which I have included in case it might be of assistance – keep in mind it is a few years old.

Cases Useful in Determining an Appropriate Range for Sentence

1. *Wood*[1] involved the following relevant features:
   - (i) The sentence was a total of three months imprisonment;
   - (ii) The total value of the benefit gained was $151,170. Full repayment was made prior to the date of sentence;
   - (iii) The appellant had significant responsibilities in terms of care of his mentally disabled daughter.
2. *McMillan*[1] involved the following relevant features:
   - (i) The total sentence after appeal was a term of imprisonment of 3 years with an effective minimum term of 9 months
   - (ii) The total value of the benefit gained was $29,084.12;
   - (iii) The nature of the deception bears some similarity to the present case – the appellant used two false names to claim additional Centrelink benefits
3. *Aller*[1] involved the following relevant features:
   - (i) The sentence was one of two years, suspended on entry into a good behaviour bond for a term of five years;
   - (ii) The total value of the benefit gained was $146,706.56 with repayments totalling $11,897.64 made by the date of sentence;
   - (iii) The appellant had care of her 40 year old disabled son;
   - (iv) The appellant herself suffered significant mental and physical illnesses.
4. *Sayed*[1] involved the following relevant features:
   - (i) The sentence imposed was ultimately one of three and a half years with a non-parole period of eighteen months;
   - (ii) The total value of the benefit gained was approximately $1.15 million;
   - (iii) The offending was significantly more sophisticated. Specifically:
     - i. The offender was a director of a company registered as a governing body of a school known as Muslim Ladies College of Australia;
     - ii. The offender caused documents to be submitted which declared that either 186 or 189 students were enrolled, when in fact the accurate enrolment figure lay between 80 and 100;
     - iii. This caused a benefit to flow on the basis of per-capita funding for the school;
   - (iv) It is respectfully submitted that this case would be appropriately categorised as more serious than the present case.
5. *Graziosi*[1] involved the following relevant features:
   - (i) The sentence was one of imprisonment for three years with a non-parole period of 18 months;
   - (ii) The nature of the offending was the submitting of false claims for diesel fuel excise rebates;
   - (iii) The extent of the advantage obtained was approximately $1.125 million;
   - (iv) The offender was a person of good character and it was found that he was unlikely to reoffend;
   - (v) There had been repayments totalling $200,000;
   - (vi) It is respectfully submitted that this case represents more serious offending than the present case.
6. *Desborough*[1] involved the following relevant features:
   - (i) The sentence was one of imprisonment for two years with a non-parole period of three months;
   - (ii) The offender had a minor criminal history;
   - (iii) The offending occurred over 139 fortnights and variously involved false representations relating to her income and familial circumstances;
   - (iv) The total advantage obtained totalling $49,334.55;
   - (v) It is respectfully submitted that this case would fall at a similar or slightly lower point on the scale of objective seriousness when compared with the present case.

Subjective features

The bench book provides the following guidance:

> "In *Imbornone v R* [2017] NSWCCA 144, Wilson J set out at [57] a number of principles to be applied when a sentencing judge is faced with an untested statement made to a third party:
>
> 1. Although statements made to third parties are generally admissible in sentence proceedings (subject to objection and the application of the rules of evidence) courts should exercise very considerable caution in relying upon them where there is no evidence given by the offender. In many cases such statements can be given little or no weight: *R v Qutami* [(2001) 127 A Crim R 369] at [58]–[59].
> 2. Statements to doctors, psychologists, psychiatrists, the authors of pre-sentence reports and others, or assertions contained in letters written by an offender and tendered to the court, should all be treated with considerable circumspection. Such evidence is untested, and may be deserving of little or no weight: *R v Palu*[(2002) 134 A Crim R 174 at [40]–[41]]; *R v Elfar* [2003] NSWCCA 358 at [25]; *R v McGourty* [2002] NSWCCA 335 at [24]–[25].
> 3. It is open to a court in assessing the weight to be given to such statements to have regard to the fact that an offender did not give evidence and was not subject to cross-examination: *Butters v R* [2010] NSWCCA 1 at [18]. It is one matter for an offender to express remorse to a psychologist or other third party and quite another to give sworn evidence and be cross-examined on the issue: *Pfitzner v R* [2010] NSWCCA 314 at [33].
> 4. If an offender appearing for sentence wishes to place evidence before the court which is designed to minimise his or her criminality, or otherwise mitigate penalty, then it should be done directly and in a form which can be tested: *Munro v R* [2006] NSWCCA 350 at [17]–[19].
> 5. Whilst evidence in an affidavit from an offender which is admitted into evidence without objection may be accepted by a sentencing judge (see *Van Zwam v R* [2017] NSWCCA 127), generally the circumstances in which regard should be had to such untested evidence is limited. Affidavits relied upon in the absence of oral evidence on oath frequently contain self-interested assertions of a character which makes them almost impossible to verify or test (particularly when served on the Crown in close proximity to, or on, the date of hearing). In the absence of any independent verification of the asserted behaviour, or state of mind, or of a tangible expression of contrition, "to treat this evidence with anything but scepticism represents a triumph of hope over experience": *R v Harrison* [(2002) 121 A Crim R 380] at [44]."

Approaches will vary from one court to another, but it is a good idea to be mindful of these principles. If you aren't calling your client to give evidence, there is a risk that there will be less weight given to statements from third parties as to their subjective circumstances.

That being said, if you are in the position of not being able to call your client, for whatever reason, you are better off working with what you have – whether it's a psychological/psychiatric report, Sentencing Assessment Report or evidence from family members. The worst case scenario is that the evidence is given no weight – so you are no worse off that you were to begin with.

Although they will not apply in every case, you must always ensure that you ascertain whether the principles in *Bugmy v The Queen* (2013) 249 CLR 571, *R v Fernando* (1992) 76 A Crim R 58, *R v Kennedy* (unrep, 29/5/90, NSWCCA)

Fernando sets out seven principles which were endorsed in *Bugmy* – it applies equally to Aboriginal and non-Aboriginal offenders. You should be mindful that *Fernando* was decided before s21A(5AA) of the *Crimes (Sentencing Procedure) Act 1999* and so comments about intoxication should be read carefully. Arguably

difficulties with alcohol are still relevant where they are a result of exposure to alcohol abuse from a very young age. They are not, now, however a mitigating factor where the intoxication is self induced. , whilst not being aggravating or mitigating here is authority for the argument that self-induced intoxication can still be explanatory - *R v Fletcher-Jones* (1994) 75 A Crim R 381, *SK v R* [2009] NSWCCA 21 at [7]; *BP v R* [2010] NSWCCA 159. The principles in *Fernando* are:

> *(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.*
>
> *(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but, rather, to explain or throw light on the particular offence and the circumstances of the offender.*
>
> *(C) It is proper for the court to recognise that the problems of alcohol abuse and violence, which to a very significant degree go hand in hand within Aboriginal communities, are very real ones and require more subtle remedies than the criminal law can provide by way of imprisonment.*
>
> *(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.*
>
> *(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.*
>
> *(F) In sentencing persons of Aboriginal descent, the court must avoid any hint of racism, paternalism or collective guilt, yet must nevertheless realistically assess the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.*
>
> *(G) In sentencing an Aboriginal person who has come from a deprived background, or is otherwise disadvantaged by reason of social or economic factors, or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him or her and which is dominated by inmates and prison officers of European background, who posses little understanding of Aboriginal culture and society or of the offender's own personality.*

Significantly, you should keep in mind from *Bugmy* (at [42]-43]) that the effects of profound deprivation do not diminish over time and should be given full weight in determining the sentence in every case. What this means is, that if the court is asking "why should your client's deprived background mitigate the sentence when it is the fifth offences of this type", then you will know the answer.

Some suggested further reading on this area:

- *Kentwell v R (No 2)* [2015] NSWCCA 96
- *Ingrey v R* [2016] NSWCCA 31
- *Kiernan v R* [2016] NSWCCA 12
- *Drew v R* [2016] NSWCCA 310

Special circumstances

The statutory regime for setting terms of imprisonment is in Part 4 of the *Crimes (Sentencing Procedure) Act 1999*.

The starting point is in s44(2) (or s44(2B) for aggregate sentences), which provides that the balance of the term must not exceed one third of the non-parole period. For example, if the non-parole period is six months, the balance of the term should not exceed three months.

That statement in s44(2) (and that in s44(2B)) is qualified as follows "…*unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision*).

So what are special circumstances? There is no definitive list, but it is likely that it can be anything that is a subjective circumstance - *R v Simpson* (2001) 53 NSWLR 704. My view is that they apply more often than not. Here are some examples of matters which can constitute special circumstances with some suggestions as to how you might approach them:

Rehabilitation – this can be approached in a way which includes both the need for rehabilitation (for example your client has made inquiries and wishes to undergo a three month residential rehabilitation program), the fact that your client has good prospects for rehabilitation (*Arnold v R* [2011] NSWCCA 150). A common argument from the prosecution is that there is no, or limited evidence to suggest that making a finding for this purpose has any real likelihood of success. That is wrong. The threshold is that the offender has prospects of rehabilitation, and that the prospects would be assisted by a longer parole period – *Thach v R* [2018] NSWCCA 252.

Risk of institutionalisation – very much a discretionary matter (*Dyer v R* [2011] NSWCCA 185), but an important one. Even if your client has a very

significant record (ie in all likelihood the risk has manifested) such a finding is still open – *Jackson v R* [2010] NSWCCA 162.

Drug and alcohol addiction – often goes hand in hand with rehabilitation, above - if your client will require significant assistance to address an alcohol or other drug addiction, this can justify a finding. If your client has already made progress, this will be of significant assistance in persuading the court – *R v Vera* [2008] NSWCCA 33

> "…there are a great many health conditions which might support a finding of special circumstances. Mentall illness is a good example – see *Devaney v R* [2012] NSWCCA 285 at [92] - Contrary to the views of the sentencing judge, the mental illness, its capacity for treatment and the views of the psychiatrists as to the desirability of an extensive period of conditional release under supervision made this case particularly apt for a shorter non-parole period than 75 per cent under the *Crimes (Sentencing Procedure) Act*, s 44."

Accumulation – where the court is not imposing an aggregate sentence, it is often necessary to adjust the non-parole period for one or more sentences in order to achieve the overall ratio intended by the Judge – for example, if two sentences of 12m imprisonment with a 6m non-parole period were imposed, this would suggested the Judge intended a 50% finding of special circumstances. If those sentences were to be served entirely cumulatively, the practical effect would be an 18m sentence with a 12m non-parole period – clearly inconsistent with the finding of special circumstances. What might be appropriate in that case would be to reduce the non-parole period for the second sentence to 3m in order to achieve an 18m sentence with a 9m non-parole period. This particular example would give rise to concerns about ratio of less than 50%, and arguably an aggregate sentence might be more appropriate, but it illustrates the way in which a finding of special circumstances might be necessary in order to fulfil the Judge's intention as to the appropriate ratio. There is not much point determining that someone will benefit from an extended period of supervision on parole if that extended period is reduced by virtue of the structure of the sentences.

Protective Custody – Evidence, evidence, evidence. It is absolutely critical that if you want to rely on this factor, you have evidence – *Mattar v R* [2012]

NSWCCA 98 for example. The offender must show that the conditions under which they are held will be more onerous than usual. There are different types – Protective Custody Direction, Special Management Area Placements, Protection Limited Association and Protection Non-Association – restrictions vary for each. Subpoena their treatment, case and custody notes, and movement history from Corrective Services in order to ascertain whether for example your client has spent time in segregation. Assist your client to draft an affidavit setting these matters out (keeping in mind that the Crown may require them for cross-examination). The more recent authorities arguably make it more difficult to get a reduction on this basis – *Clinton v R* [2009] NSWCCA 276 provides that a mathematical approach is inappropriate, and there is not always a difference between being in protection and being in the general population. Evidence from your client is one of the best ways to address this.

Youth – where the offender is particularly young, or particularly old, special circumstances may be found – *Hudson v R* [2007] NSWCCA 302, *R v Mammone* [2006] NSWCCA 138, *Moffit* (1990) 20 NSWLR 114

Hardship to Third Parties – the bar for this one is really high. It is an unfortunate reality that incarcerating someone is likely to have a devastating effect on those close to them. The threshold has been said to be 'highly exceptional circumstances' – *King v R* [2010] NSWCCA 202, and (despite what anyone who is reasonably empathetic might think) it does not normally extend to the care of young children – *R v Murphy* [2005] NSWCCA 182. Where the offender cares for a child suffering a disability however, the situation may be different – *R v Maslen* (1995) 79 A Crim R 199, *R v Hare* [2007] NSWCCA 303.

First time in custody (though on its own, there is doubt as to whether this factor will be enough – *Regina v Clarke* [2009] NSWCCA 49)

You should not approach the concept of special circumstances from the perspective that they need to be 'unusual'. There is nothing 'special' about many matters in which special circumstances are found – see *R v Fidow* [2004] NSWCCA 172.

Further reading on special circumstances:

- *R v GDR* (1994) 35 NSWLR 376
- *Director of Public Prosecutions (NSW) v RHB* (2008) 189 A Crim R 178
- *Musgrove v R* (2007) 167 A Crim R 424
- *Wakefield v R* [2010] NSWCCA 12
- *Russell v R* [2010] NSWCCA 248
- *Briggs v R* [2010] NSWCCA 250
- *Etchell v R* (2010) 205 A Crim R 138
- *GP v R* [2017] NSWCCA 200
- *Dunn v R* [2007] NSWCCA 312
- *Brennan v R* [2018] NSWCCA 22
- *Markarian v The Queen* (2005) 228 CLR 357
- *Fitzpatrick v R* [2010] NSWCCA 26
- *R v El-Hayek* (2004) 144 A Crim R 90
- *Caristo v R* [2011] NSWCCA 7
- *Markham v R* [2007] NSWCCA 295
- *R v Huynh* [2005] NSWCCA 220
- *Langbein v R* at [54];
- *Ho v R* [2013] NSWCCA 174
- *Trindall v R* [2013] NSWCCA 229
- *Clarke v R* [2009] NSWCCA 49
- *R v Cramp* [2004] NSWCCA 264
- *Muldrock v The Queen* (2011) 244 CLR 120
- *R v Fidow* at [19]
- *Jiang v R* [2010] NSWCCA 277

Conclusion

Appearing for the offender on sentence is an enormous responsibility, and it should be taken very seriously. You need time to properly consider the facts of the case, talk to your client, and prepare cogent, persuasive submissions. If you have a thorough knowledge of the facts, your client's personal circumstances, and have properly considered the applicable law you will be in a good position to robustly advance your client's case.

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Sentence Checklist

1. Charge
2. Section
3. Maximum penalty (double check if historical offence)
4. Standard non-parole period
5. Guideline judgment
6. Date of offence
7. Plea of guilty entered in Local Court?
    a. When
8. In custody
    a. Since when
    b. Solely referable to this matter
9. Conditional liberty at the time of this offence
    a. Is there current breach action?
10. In brief:
    a. Aggravating factors (s21A(2) *C(SP)A*))
        i. Victim exercising public/community functions
        ii. Actual/threatened use of violence
        iii. Weapon
        iv. Explosive/chemical/biological agent
        v. Cause victim to be affected by drug/substance
        vi. Record of previous convictions
        vii. In company
        viii. Presence of child <18
        ix. Home of the victim/any person
        x. Gratuitous cruelty
        xi. Substantial harm
        xii. Hate crime
        xiii. Risk to national security
        xiv. Grave risk of death
        xv. Conditional liberty
        xvi. Abuse of trust
        xvii. Vulnerable victim
        xviii. Series of criminal acts
        xix. Organised
        xx. Financial gain
        xxi. Prescribed traffic offence in presence of child <16
    b. Mitigating factors (s21A(3) *C(SP)A*))
        i. Harm not substantial

ii. Unplanned
iii. Provocation
iv. Duress
v. No record
vi. Good character
vii. Unlikely to re-offend
viii. Good prospects for rehabilitation
ix. Remorse
x. Not fully aware of consequences
xi. Plea of guilty
xii. Pre-trial disclosure
xiii. Assistance to authorities
xiv. Offer rejected, subsequently found guilty of same charges