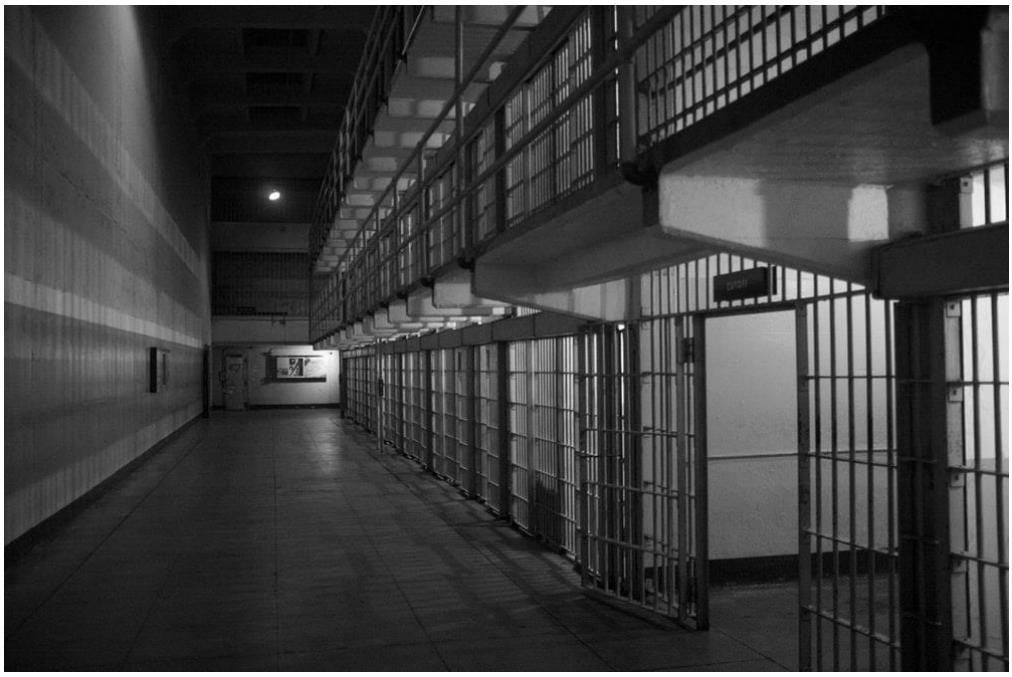
Tips for your District Court Sentence Practice

What to Do and What to Avoid



Reasonable Cause CPD Conference

27 March 2021

Rydges World Square Sydney

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Introduction

Disclaimer

As you will see from the following recommended reading list, many legal minds far superior to mine have put pen to paper on the topics of sentencing law and how to present sentence matters in court. I have endeavoured to avoid duplication as much as possible by focussing on the mechanics of how I prepare and present sentence matters in the District Court, rather than on substantive sentencing law. In the accompanying presentation I intend to draw on my own experience of having regularly appeared as solicitor advocate in District Court sentence matters since 2013. I hope to provide some concrete examples of how I put the following principles into practice. I have also compiled some CCA sentence appeal cases to demonstrate what to avoid in your sentence practice. I cannot promise that experienced practitioners will learn anything new. I hope, however, that the insights provided will assist practitioners to reflect upon and improve their own sentence preparation and delivery, irrespective of the jurisdiction in which they practise. This paper was originally presented to the Aboriginal Legal Service at their Western Zone Conference in Rydal in March 2020 and has been updated with recent case law and materials. Please note that the cover page images were sourced from unsplash.com and pixabay.com.

Recommended Reading List

I recommend the following resources to assist with your sentence practice:

1. The Sentencing Bench Book – Judicial Commission of NSW
2. Sentencing Law NSW (Lexis Advance)
3. Criminal Practice and Procedure NSW (Lexis Advance)
4. All of the Papers under "Sentencing" on Mark Dennis SC's Criminal CPD Website (criminalcpd.net.au/sentencing), including but not limited to:
    a. Sentencing Checklist (Judge Yehia SC)
    b. Sentencing in Serious Criminal Matters (Eric Wilson SC)
    c. Sentencing in the District Court: Practical Considerations (John Stratton SC)
    d. Negotiating with the DPP (NSW) (Chris Maxwell QC)

Preparation

There is a very good reason that the *preparation* section of this paper is significantly longer than the *presentation* part. In his former days as an esteemed Public Defender, Judge Haesler SC would frequently extol the virtues of the *Five Ps*: Proper Preparation Prevents Poor Performance. Some add an extra P before Poor. As any elite sportsperson will tell you, the hard work goes in at the front end. You cannot possibly deliver optimal performance without practice and preparation.

The Brief

It is essential that you know the brief backwards. This will ensure you can properly advise your client about the strength of the Crown case and about reasonable alternative offences to which your client might offer to plead guilty. With a comprehensive knowledge of the brief, you will also be in a position to negotiate relevant mitigating factors into the agreed facts.

For example, buried in a long Electronically Recorded Interview with Suspected Person (ERISP) you might find one of the following:

- A heartfelt expression of remorse;
- Assistance to the authorities within the meaning of s 23 *Crimes (Sentencing Procedure) Act 1999* (NSW) as interpreted in ***Mooney v R* [2016] NSWCCA 231** at [46] to [48]; or
- A credible representation that goes to a mitigating factor such as non-exculpatory duress, provocation or excessive self-defence.

Similarly, obfuscated in voluminous telephone intercept or Cellebrite material you might find one of the following:

- A representation by a complainant or co-accused/co-offender that assists your case i.e. that goes to their own culpability and reduces that of your client; or
- A credible representation by your client, made without knowing the authorities were listening, that corroborates self-serving statements later made to the police, to a report writer, or to the court.

I have had the good fortune of having all those examples come up in my sentence practice and all one needs to do to take advantage is be across the brief. One illuminating example is as follows. I appeared for a client in the Bourke District Court several years ago who was being sentenced for *cultivating a commercial quantity of cannabis* and *firearm possession*. The unlawful possession of a *firearm* in this context was objectively serious, however, I was able to present extracts of the voluminous telephone intercept material that proved the offender possessed the firearm in order to protect himself from brown snakes. The Judge did not find that protection from snakes was the *only* reason for the possession of the firearm, however, the flavour of the narrative shifted and had a tangible impact on the attitude and findings of the Court with respect to the firearms offence.

Negotiations: Charges, Facts and Discount

At least half of the work in sentencing is done at the front end, negotiating charges and facts. Any plea of guilty should be to an offence with the lowest possible maximum penalty, to facts that are as benign as possible, and be entered at the earliest reasonable opportunity to maximise the discount on sentence. To this end, all roads lead to the negotiating table and you should familiarise yourself with the applicable Prosecution Guidelines and Chris Maxwell QC's aforementioned paper on negotiating with the ODPP.

A well negotiated set of facts, that are as benign as reasonably possible, and that include references to agreed mitigating circumstances, will do most of your work for you in the sentence hearing. Remember, a 25% discount for pleading guilty to a serious offence with an unfavourable set of facts is not a very good deal at all, albeit one that is *occasionally* unavoidable, depending on the evidence.

To provide an example, I once appeared in a very serious gaol assault case where my client nearly stabbed another inmate to death with a shiv. My client pleaded guilty to *wounding with intent to cause grievous bodily harm* and was facing a very significant period of time in custody, particularly having regard to his criminal history, his existing sentence, and the operation of s 56 *Crimes (Sentencing Procedure) Act*. The offender ultimately received a very lenient sentence, however, due to, *inter alia,* the inclusion of the following critical points in the agreed facts: that the stabbing occurred in the context of excessive self-defence; and that the Crown could not prove that the resulting stroke and facial paralysis were *caused* by the stabbing.[1]

Taking a Comprehensive Subjective History

Taking a comprehensive subjective history from your client as soon as possible is essential. It has the following benefits: you get to know your client and build rapport; you get a sense of the important factors on sentence; and you can set about marshalling objective contemporaneous evidence.

Marshalling Objective Contemporaneous Evidence

Marshalling objective contemporaneous evidence is one of the most important aspects of a successful sentence practice. It can be resource-intensive but, as you will see further below, skipping this step can not only result in a worse outcome for your client, but can also lead to a finding of *incompetence of counsel* on appeal.

The following are some typical examples of the sorts of evidence that I routinely obtain in preparation for sentence and why:

- **Justice Health records** that are frequently relevant to issues such as *mental health*, *prospects of rehabilitation,* and to substantiate instructions about *onerous conditions of confinement,* such as *segregation* or *protective custody*.
- **School records** that substantiate *cognitive impairments* such as an *intellectual disability.*
- **Obstetric records** that show your client was, or may have been, born with *Fetal Alcohol Spectrum Disorder* (FASD).
- **Discharge summaries and counselling notes** from hospitals and inpatient psychiatric units that substantiate *mental health diagnoses*, *suicide attempts*, *medication*, *physical injuries*, and *episodes of psychosis*.

[1] Credit to Rebecca Mitchell of Counsel who, in her former role, had carriage of the matter before me.

- **Evidence of rehabilitation, training, education and workplace achievements** that assist in making submissions about *prospects of rehabilitation* and *likelihood of reoffending*.
- **Evidence from the Department of Communities and Justice** that substantiate a history of *social disadvantage*, thereby enlivening the principles enunciated by the High Court of Australia in ***Bugmy v The Queen*** **[2013] HCA 37**.

Most of these can be obtained under authority from your client and therefore do not fall into the hands of your opponent, unlike documents obtained under subpoena.

An example from my own practice that illustrates the importance of this point is as follows. I once inherited a matter that was already negotiated and set down for sentence in the District Court. A report had already been requested from a forensic psychologist. What had not happened, however, was the marshalling of any objective contemporaneous evidence. The only documents sent to the expert were the agreed facts and criminal history. When I received the report, it contained various opinions based on the self-report of the offender and the observations of the expert having spent 90 minutes with my client.

This report was an edifice without supporting foundations and was correspondingly weak. This was not the fault of the author. One particularly alarming finding was that my client *may* have had a developmental disability. This was simply left hanging and it was entirely inappropriate for me to proceed to sentence with a report that was ambiguous in such a material respect.

I set about taking comprehensive instructions from my client and ascertaining that he was in various special classes in school and could not read or write. Under signed authority, I obtained hospital, school and Justice Health records that variously substantiated that my client had a developmental disability and was born prematurely to a mother who had drunk alcohol heavily throughout the pregnancy.

Having marshalled this evidence and vacated the original sentence date, I obtained an updated report from the psychologist who made a conclusive finding of *developmental disability* and opined that there was a *causal connection* with the index offending. They were able to do this on account of the longitudinal objective contemporaneous evidence from multiple sources that provided a rock solid foundation for their findings.

When the matter did proceed to sentence, the Court accepted the above evidence, my ***DPP (Cth) v De La Rosa*** **[2010] NSWCCA 194** submission was made good, and my client's sentence was moderated accordingly.

The Report: SAR, Psychiatric, Psychological or Psychosocial?

I very rarely rely on court-ordered Sentencing Assessment Reports (SAR) in District Court sentence matters. The reasons that reports from Community Corrections are infrequently used in serious criminal sentencing matters are well understood and documented by other practitioners. The following is a summary of those reasons from my perspective:

- **Control.** You do not have any control once the report is ordered by the court and prepared by Community Corrections. You have no say in the questions that will be asked of your client. If your client has engaged in a *convenience plea*, you cannot ask the report writer to refrain from asking questions regarding their attitude to the offence. All too frequently, adverse comment is made by Community Corrections about the offender's allegedly poor attitude and their lack of insight and remorse.[2] You cannot focus the attention of the report writer on a particularly advantageous aspect of the subjective case. You cannot stop your opponent and the court from seeing the SAR, though objection can be taken to all or part in appropriate circumstances.

- **Qualifications.** Unless your case involves a sexual offence, Community Corrections will not have a psychiatrist or psychologist assist in the preparation of the report and therefore they will be unable to make any formal diagnoses.

- **Sentencing Options.** In some cases, with a client who is genuinely remorseful, and for whom an alternative to full-time custody is realistic, a report from Community Corrections *may* be your best ticket. In many sentence matters proceeding on indictment, however, that is not the case. Where the question is really about how long the term of imprisonment will be, getting your own report is almost always the better option.

If you have the necessary resources and choose to obtain your own report, the next question is *what type of report*? Generally speaking, if your client has a mental illness, then you will want to consider getting a psychiatrist to prepare the report. If your client has a developmental disability, on the other hand, it would be preferable to brief a psychologist to prepare the report. And if your client has an executive functioning impairment, you might consider obtaining a neuropsychologist to prepare the report.

The distinction between reports from psychologists and psychiatrists, in the context of applications under the old s 32 *Mental Health (Forensic Provisions) Act* 1900, received judicial attention in the recent case of ***Jones and Anor v Booth and Anor*** **[2019] NSWSC 1066**. In that case, Johnson J relevantly stated the following:

[2] See *Brown v R* [2018] NSWCCA 257 at [72]-[77] – this case is referred to on page 17 below.

> [57] A Magistrate would fall into error if a blanket approach was adopted so that reports of psychiatrists only could be received on applications under s.32 MHFP Act. The type of report which may be appropriate will depend very much on the particular case.
>
> [59] As the present case makes clear, there are areas where a psychologist may report and conduct testing which bear upon these issues. In reality, there is no bright line test which delineates, for the purpose of s.32 MHFP Act, areas where a psychological report can or cannot be received.
>
> [61] Any attempt to generalise as to which cases may be appropriate for a psychologist to report on under s.32 MHFP Act, or cases where a psychiatric report may also assist the Court (in addition to or in place of a psychological report) is not helpful. It is, of course, not possible to articulate all the permutations and combinations of factors which may arise with respect to a particular defendant and it would be pointless to seek to undertake that exercise.

Those principles are analogous to sentencing cases and show that things are not always black and white, particularly when our clients frequently present with multiple issues i.e. comorbidities. Importantly, however, do ensure that your expert confines their opinions to their relevant area of expertise, so as to avoid the type of criticism meted out by Wood J in ***R v Peisley*** **(1990) 54 A Crim R 42** at 51-52:

> Although I do not wish to venture into that area, having regard to the fact that the sentence appeal is withdrawn, I do not wish to depart from this appeal without expressing some concern as to one aspect of the evidence placed before his Honour. That related to the opinion of Mr W J Taylor, a clinical psychologist whose opinion on this issue was objected to by the Crown. Mr Taylor observed at one stage that there were suggestions in the test results that the appellant could have suffered a dissociative disorder and particularly a neurosis at the time of the offence, even though somewhat inconsistently he said his test results showed no signs of any personality disorder or emotional instability on the part of the appellant.
>
> In my view, that opinion lacked all weight and suffered from at least two serious defects. First, **it is apparent from the report that the so-called test results were nothing more and nothing less than the history given by the appellant of the shooting** [emphasis added]. Second, Mr Taylor entirely omitted from account earlier incidents when the appellant had shot his brother and had been convicted of street fighting, together with the evidence of the conversations concerning prior threats by the appellant to shoot Rixon and Forester.
>
> **I consider it necessary to observe once again that it is important that clinical psychologists do not cross the barrier of their expertise** [emphasis added]. It is appropriate for persons trained in the field of clinical psychology to give evidence of the results of psychometric and other psychological testing, and to explain the relevance of those results, and their significance so far as they reveal or support the existence of brain damage or other recognised mental states or disorders. It is not, however, appropriate for them to enter into the field of psychiatry, and in the present case Mr Taylor's opinion was entirely unsupported by the psychiatric opinion.

> Additionally. I would express my concern that a report from Mr Taylor was placed before the sentencing Judge framed in terms as follows:
>
> > 'It could well be that ... indicate that he may have been expressing a brief episode of depersonalisation neurosis.'
>
> That is a diagnosis, if it can be called such, which is so imprecise, so tentative, and so uncertain, that it should not have been placed before the learned sentencing Judge even if it was within Mr Taylor's field of expertise.

There is a third species of report that I have had a lot of success with over the years, namely a psychosocial report prepared by inhouse social workers at Legal Aid NSW. These are particularly advantageous where there are either no relevant diagnoses or clear existing evidence of same, and you want the report to reflect a thorough exploration of you client's background and subjective case. In my experience, social workers trained to prepare such reports are willing to engage in a deep dive of your client's background by speaking with third parties and investigating and reporting on corroborative evidence. The resulting product is usually impressive and *most* judicial officers have been similarly moved.

The Report: Briefing the Expert

A very helpful starting point is contained in the NSW Young Lawyers' publication, *The Practitioner's Guide to Briefing Experts*.[3] From my perspective, it is imperative that you provide the expert with contemporaneous objective evidence to support their findings. If you take one lesson from this paper, and its accompanying presentation, it should be that it is woefully inadequate for your report writer to reach conclusions based on the offender's self-report in a one-off 90-minute meeting, in conjunction with simply reading the facts and record.

In addition to the provision of background evidence, you will want to prepare a clear and concise letter of instruction that sets out exactly what you are looking for.[4] It is also important to set out any areas that you do *not* want the report writer to address, if that is tactically necessary. The obvious example is to prevent any discussion of the offence itself if you are dealing with a convenience plea. In the accompanying presentation, I will refer to a redacted example of one of my own letters of instruction.

[3] https://www.lawsociety.com.au/sites/default/files/2018-05/The%20Practitioner%27s%20Guide%20to%20Briefing%20Experts%20-%201st%20edition%20online.pdf

[4] It is equally important to critically read the report once you receive it, to ensure the expert has *actually answered* your carefully drafted questions; sadly, I have had to requisition experts in a number of my recent matters as they have simply omitted to answer specific questions, such as those directed to the impact of COVID-19 on my client's time on remand.

Preparing Submissions: Oral and Written?

It is trite to say, but you cannot escape making oral submissions on sentence. You can, on the other hand, dispense with written submissions – the question is, however, *should you?* Like many practitioners, for my first ten or more District Court sentence appearances *sans* counsel, I prepared comprehensive written submissions. This was to ensure I covered all bases and to give me an insurance policy should the matter end up in the Court of Criminal Appeal (CCA).

What I then found was, sometimes the presiding judge would indicate that they agreed with everything in my written submissions, thereby robbing me of the opportunity to improve my oral advocacy. Wanting to accumulate experience on my feet, I then embarked upon a phase of relying *only* on oral submissions.

This phase came to an end, however, when one of my matters from Broken Hill did end up in the CCA. In the matter of ***Kerwin v R*** **[2018] NSWCCA 23**, the CCA noted at [21] that the *"applicant gave evidence to the sentencing Judge, and there was tendered on his behalf a number of expert reports and medical records"*. The CCA went on to say at [43]:

> The sentencing Judge was invited by the applicant's submissions to him to find that the applicant's mild intellectual disability had a causal connection to his offending and so would operate to reduce his moral culpability and to reduce the importance of general deterrence.

And at [46]:

> The applicant submitted in this Court that although the sentencing Judge had concluded that the applicant suffered from a mild intellectual disability, he did not pay any attention to the submission with respect to the reduction in moral culpability and in a reduction in the weight to be given to general deterrence. The applicant submitted that a reading of the Remarks on Sentence of the sentencing Judge indicates that no examination or consideration of the applicant's disability was undertaken by the sentencing Judge.

The CCA then concluded at [59]:

> Here, there was clear evidence that there was a causal connection between the applicant's intellectual disability and the commission of the offence. That connection lessened the applicant's moral culpability and, to an extent, impacted upon an assessment of how general deterrence should weigh in the instinctive synthesis process involved in this sentence.

The applicant received a 12-month reduction of his non-parole period and a 9-month reduction of his head sentence (see [68]). Upon reflection, I have concluded that I may have done my client and the Court a disservice by not having committed my submissions to writing. This is because there was a delay between the sentence hearing and his Honour delivering judgment. Without the benefit of written submissions or a transcript (the decision was only reserved for a relatively short period of time), the sentencing Judge may have simply overlooked that particular submission in the context of a busy remote circuit list.

Since that experience I have generally always handed up *at least* an outline of the relevant points I wish to make in District Court sentence matters. This provides a scaffolding for fleshing out those points in oral submissions. Armed with such an outline, there is a clear record for the ongoing reference of all concerned, without having to resort to a transcript.

Preparing Submissions: A Word on Brevity

I was fortunate enough during my time studying law at the University of Wollongong to spend a month in 2007 doing work experience with the Public Defenders Office in Sydney. I have little doubt that those weeks spent with Richard Button SC (now his Honour Justice Button), as my supervisor, helped to mould me into the lawyer I am today. One of the many lessons I learned in that time was the value of brevity and pithiness.

Appreciating the lesson and putting it into practice, however, are two very different things, as the length of this paper attests to. Being concise is difficult for lawyers for two principal reasons. First, lawyers are generally loquacious types. Second, lawyers are also often anxious, risk-averse and fretting types who are dreadfully frightened of missing something and being criticised later. The combination all too frequently results in verbosity.

My advice is therefore to ensure that your submissions are succinct, and their length is proportionate to the complexity of the case. Do not, however, confuse simple expression with simple subject matter. Great advocates have a knack for expressing complex concepts in simple and intelligible ways. That is what we should all strive for.

Should you need further proof that I have not yet mastered putting the above advice into practice, in the accompanying presentation, I will refer to a redacted example of my own submissions.

Overarching Principles: Proportionality and The Queen v Olbrich

Despite promising not to venture into substantive sentencing law in my disclaimer, I consider it warrants briefly touching on these two overarching sentencing principles.

One of the most fundamental aspects of sentencing is the assessment of the objective gravity of an offence so as to fix an appropriate sentencing disposition – the punishment must fit the crime. A sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: ***R v McNaughton* [2006] NSWCCA 242**; ***Veen v The Queen (No 2)* [1988] HCA 14**; and ***Hoare v The Queen* [1989] HCA 33**. In *R v McNaughton*, Spigelman CJ stated the following at [15]:

> It is authoritatively established that the common law principle of proportionality, propounded in *Veen v The Queen (No 2)*, requires that a sentence should not exceed what is proportionate to the gravity of the crime, having regard to the objective circumstances. (*Hoare v The Queen* (1989) 167 CLR 348 at 354.) In a line of cases, commencing with *R v Dodd* (1991) 57 A Crim R

> 349 at 354, referred to and affirmed by a five judge bench in *R v Whyte* (2002) 55 NSWLR 252 at [156]–[158], the proportionality principle is also held to apply so that a sentence should not be less than the objective gravity of the offence requires.

In ***The Queen v Olbrich*** **[1999] HCA 54** at [27]-[28], the majority of the High Court confirmed that a sentencing judge may not take facts into account in a way that is adverse to the interests of the offender unless those facts have been established beyond reasonable doubt; conversely, the offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour.

The Defence Bundle

I have been preparing, serving *then* filing Defence Bundles for as long as I have been appearing in sentence matters in the District Court. I always appreciated receiving a well-structured and presented Crown Bundle and wanted the judge to have a correspondingly impressive bundle from the other side of the Bar Table. Preparing a Defence Bundle puts into practice all of the principles above and focuses your mind well in advance of the hearing date.

The practice of filing and serving the defence material in advance is now mandated by the ***District Court Criminal Practice Note 20,*** which relevantly states at para 15:

> (b) The offender is to file and serve any documentary material, including expert reports, to be relied upon on at [sic] sentence no later than **seven days** prior to the sentence.
>
> (c) The prosecution and the offender are to file and serve any further documents they rely on and an outline of submissions no later than **three days** prior to the sentence date.

The types of material that I routinely include in my Defence Bundles include the following:

- Expert reports.
- Relevant extracts from the brief, for example, *telephone intercept* or *ERISP* material that goes to a discrete mitigating factor (see *"The Brief"* on page 4 above).
- Relevant extracts from the objective contemporaneous evidence I have marshalled, such as Justice Health records, medical records, discharge summaries, rehab progress and completion letters, and certificates of achievement.
- Character and employment references.
- Evidence of future plans, whether linking with the NDIS, living somewhere on parole, or taking up gainful employment.
- Statistics and comparable cases.[5]

[5] Notwithstanding the various warnings re same, sentencing statistics and comparable cases are aids that are part of the material which a sentencing judge **must** [emphasis added] take into account: *Barbaro v The Queen* [2014] HCA 2 at [41] and *The Queen v Pham* [2015] HCA 39 at [48].

It is worth noting that I endeavour to avoid burdening the report writer, my opponent, and the court with, for example, all 10 volumes of Justice Health material. They rarely need all the voluminous vital sign charts and prosaic progress notes. My approach is to select the salient documents that go to the issue at hand, whether that be, for example, *mental health,* or *institutionalisation*. The exception is where the defence expert requests everything.

In the accompanying presentation, I will refer to redacted examples of the contents page of some of my own Defence Bundles.

Oral Evidence: Defence Witnesses

In the preparation stage, it is important to consider whether any witnesses, including your client, might be worth calling or at least obtaining an affidavit from. This could include parents, teachers, employers, and counsellors. Once again, preparation is key when it comes to adducing evidence. If you observe a witness giving evidence-in-chief and being cross-examined, you can usually tell if the advocate calling them has properly prepared them.

Of course, it is entirely unethical and impermissible to *coach* a witness. You can *never* tell a witness *what* to say. You also do not want your witness giving their evidence in a rote fashion. I suggest, however, that it is a miscarriage of your function to call a witness without properly preparing them. Preparing your witness means going through the questions so that the witness knows what you are going to ask in court, and you have a reasonable expectation of what they are going to say in response. Discussing the likely cross-examination is also important so that your witness knows what to expect and you are cognisant of the weaknesses in their account. For me, this means using role play and pretending we are in court. Armed with this information, from one or two practice runs, you will limit the likelihood of *surprises* or you may decide not to call them at all.

Presentation

I owe a significant debt of gratitude to Craig Smith SC and the Australian Advocacy Institute (AAI) for my approach to advocacy and for generally not being flayed alive when I open my mouth in court. I did the AAI course in Sydney in 2015 with five years of post-admission experience under my belt. The lessons I learned really struck a chord with me and marked a point of significant improvement in my career as an advocate. If you ever get the chance to participate in the AAI, I strongly recommend it, even if you are not attracted to the idea of being filmed in role play and then watching the video with the instructor while being critiqued.

Primacy and Stating the Objective

Starting with your best point and stating your objective at the outset are powerful tools but I caution you to not always lead with your best hand. I often, but not always, start my written submissions with an emboldened sub-heading of **"Objective**". The truth is that infuriating refrain heard so often in our profession: *it depends on the facts and circumstances of the case*. It also depends on your audience. Some judicial officers are affronted by the bold submission as to your objective at the outset and would prefer some juridical foreplay. Others appreciate knowing the proposed destination of the journey up front.

Frankness, Credibility and Delivery

These points should not require much by way of elaboration. Your credibility as an advocate is your currency. Do not let rampant inflation set in or it will not be worth much. The paramount duty to the court and the administration of justice, as well as frankness in court, are not only mandated by the applicable Solicitor and Barrister Rules,[6] but your very reputation before the bench depends on your compliance with these obligations. If you think solicitors and barristers have informal *form guides* on the bench, you can bet the reverse is true.

Additional golden rules are to listen to the bench and answer *the actual question* being asked of you. There may be times where you need to batten down the hatches, put on your flak jacket, and firmly but respectfully defend yourself from a judicial onslaught. Usually, however, you will quickly engender the respect of the bench by *listening* and *answering their questions,* as succinctly and directly as reasonably possible.

As for delivery, there are as many styles as there are personalities and you should endeavour to cultivate your own. What I do recommend, however, is that you practise out aloud so that your delivery in court is not the first time you have uttered the words. This will help you to look up and keep your eyes on your audience as opposed to down on the page. Saying something aloud will also alert you to infelicities in your language and structure.

You should also be as economical with language as possible. When examining witnesses, remember the one proposition per question rule and avoid overly long, complex, unclear or multiple-barrelled questions. Also, some questions have to be expressed in the negative. It is always best to have the witness indicate whether they agree or disagree, rather than simply saying yes or no, as the latter can be ambiguous on the transcript in those circumstances.

[6] See rr 3 and 19 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*; and rr 23 to 34 *Legal Profession Uniform Conduct (Barristers) Rules 2015*.

CCA Sentence Appeals

My practice of law is motivated by my overwhelming desire to avoid public embarrassment. To that end, it is helpful to know about the circumstances in which such humiliation might occur. The following is a summary of some important principles when it comes to CCA sentence appeals and how to avoid falling afoul of them.

Incompetence of Counsel

In ***R v Abbott* (1985) 17 A Crim R 355**, Street CJ stated the following at 355-356:

> On the hearing of this appeal, the appellant's counsel has come equipped with affidavits that prove further quite significant matters affecting her general emotional state at the time [of the offence] and providing assistance in the form of a psychiatrist's report and a psychologist's report. This material is highly relevant and ought to have been produced at the sentencing proceedings as it bears very significantly upon the determination of the sentence and the non-parole period. In the absence of that material, there can be little quarrel with the sentence, and the non-parole period determined by the learned judge, but taking into account that material, it establishes a case in which a shorter sentence and non-parole period were adequate to meet the requirements of criminal justice.
>
> …
>
> The evidence, it should be stated at the outset, does not qualify as fresh evidence but we have decided that it should be admitted in consequence of it having been made good on behalf of the appellant that she was **incompetently represented** [emphasis added] at the sentencing proceedings and that that incompetence has brought about a miscarriage of justice. This case crosses the borderline separating poor quality, perhaps even inefficient, representation on the one side and incompetence of a degree causing miscarriage of justice on the other side. In order to remedy that we have thought it proper to admit the evidence and to proceed to evaluate the sentence ourselves in the light of the additional evidence.

In ***Munro v R* [2006] NSWCCA 350**, the Court considered the law in relation to appeals asserting *incompetence of counsel* and how sentence appeals are analogous to conviction appeals:

> [23] Incompetent representation may be of such a degree that it amounts to a miscarriage of justice such as to require the Court to intervene. In *Nudd v The Queen* (2006) 80 ALJR 614; [2006] HCA 9, Gleeson CJ pointed out at [9] that "*[a]s a general rule, counsel's decision bind the client*". His Honour further pointed out, at [10], that "*[a] court of criminal appeal is an unsatisfactory forum for assessing the performance of trial counsel*". His Honour continued:
>
> > "To the extent to which it is reasonably possible, the focus of attention should be the objective features of the trial process. Nevertheless, there may be circumstances where it is relevant to ask why some act or omission occurred."

His Honour further observed that a party seeking appellate intervention will often be dissatisfied with counsel's performance at trial. His Honour continued, at [12]:

> "Inevitably, in some cases, trial counsel will be blamed for failure. Such blame is pointless unless it can be related to a legal rubric of relevance to the jurisdiction being exercised by the court of criminal appeal. The relevant rubric is miscarriage of justice."

[24] *Nudd's* case involved an appeal against conviction. However, there is no difference in principle in the case of an appeal against sentence. Sentencing retains aspects of adversarial litigation. Evidence sought to be adduced on sentence is subject to the same principles of admissibility and weight as in a trial, although parties often do not take objection to evidence in inadmissible form. Nonetheless, the rules remain and the Court that determines the sentence needs an appropriate level of satisfaction as to the evidence on which it is asked to make what is, after all, a most significant decision for the accused person in particular, and for the criminal justice system generally.

A serious miscarriage of justice was found to have occurred in ***Loury v R* [2010] NSWCCA 158**. In this particularly egregious case, the CCA concluded that in the proceedings below: there were no written instructions to plead guilty; no suggestion that the agreed statement of facts had ever been read over, signed or explained; the agreed statement of facts *were "entirely inconsistent with the instructions…"*; and the appellant was not aware of his solicitor's plea negotiations with the Crown. I will speak more on this particular case in the accompanying presentation.

A miscarriage of justice was found in ***Grant v R* [2014] NSWCCA 67**. In this case, the appellant pleaded guilty to manslaughter on the basis of excessive self-defence in circumstances where the legal representative at first instance: failed to explain to the client the various *mens rea* applicable to the offence; failed to obtain clear instructions on same; and informed the court about the client's intention without having obtained clear instructions on the issue.

In ***Pym v R* [2014] NSWCCA 182**, Fullerton J explained as follows:

> [76] … The sole question is whether the failure to place the entirety of the material relevant to the applicant's mental state before the sentencing judge has resulted in a miscarriage of justice. If that question is answered affirmatively, the second ground of appeal does not need to be considered.
>
> [84] For my part, I am satisfied that in light of the failure to tender material that addressed the applicant's mental health prior to the offending, at the time of the offending and for a measurable time thereafter, evidence which supported the opinions Dr Furst expressed in his unredacted third report, it is unsurprising that the sentencing judge was unable to afford any weight to Dr Furst's report. I am satisfied that were his Honour to have had the entirety of that evidence before him, his findings with regards to the relevance of the applicant's mental state at the time of the offence would not have been open to him. On any view, they were made on the basis of incomplete information.

In ***Brown v R* [2018] NSW 257**, the applicant, who had a hearing deficit and did not speak English, was sentenced after only meeting his barrister for the first time, for 20 minutes, on the day of his sentence hearing. There was a pre-sentence report indicating he was *not* remorseful, and his lawyers did not take him through this. He gave evidence on the appeal that he told his lawyers that he wanted to give evidence on sentence, but his barrister told him he did not need to. Payne JA, with N Adams J agreeing with additional reasons, and Johnson J dissenting, upheld the appeal and found as follows:

> [41] In the present case, **the applicant's representation on his sentencing fell below the standard expected** [emphasis added] of legal practitioners experienced in the criminal law. Nevertheless, I would not have concluded that this was a case in which there was any practical injustice, save that the applicant was not asked to and did not give instructions that he agreed not to give evidence and the applicant was never advised that he had a right to give evidence if he so chose. This failure must be considered in the context of the pre-sentence report which addressed the applicant's lack of remorse which was a critical issue in the sentence proceedings.
>
> [43] The failure by the applicant's representatives to call the applicant to give sworn evidence, as he wished to do and as was his right, is properly described as a **gross failure** [emphasis added].

Her Honour N Adams J relevantly added:

> [105] It is to be accepted that legal representatives will often have to make a difficult decision as to whether to call an offender to give evidence at his or her proceedings on sentence. A forensic opinion may be arrived at that an offender may not convey any genuine contrition in his or her sworn evidence and advice will be given accordingly. A decision will then be made **consistent with instructions** [emphasis added]. But that is not what happened in this case. In this case there is no evidence that, given the contents of the PSR, the applicant's legal representatives made any forensic decision at all as to whether the applicant should give evidence in circumstances where he wanted to do so.

The case of *Brown* provides a clear reminder to always: properly prepare and conference your client before sentence; take your client through any material that the Court will have regard to on sentence, such as reports, whatever their provenance; and explore the issue of giving evidence and take signed instructions on *their* decision whether to do so or not.

In ***Rae v R* [2019] NSWCCA 284**, the appeal against sentence was successful on the basis that defence counsel in the District Court did not place evidence of the offender's history of mental illness before the court. In fact, the offender did not give any evidence before the District Court; no documents were tendered on his behalf; and there was no report of any kind available to assist the sentencing judge. This resulted in a miscarriage of justice. Harrison J, with whom Macfarlan JA and Cavanagh J agreed, had the following to say at [37]:

> In the present case, the decision to proceed to sentence before his Honour without seeking an expert medical opinion cannot strictly be characterised as a forensic decision in the sense that it involved a choice, made by Mr Rae's legal representatives on his behalf, between competing possibilities with associated but unpredictable advantages and disadvantages. It is difficult to detect the existence of any substantive disadvantage to Mr Rae that might, or could, have resulted from adjourning the sentencing proceedings for that purpose. This does not appear to me to be a case in which Mr Rae should be bound by a decision made by his legal representative if the sentencing tribunal can be shown to have been deprived, *for whatever reason*, of the significant advantage of having material before it that potentially informed a very significant aspect of Mr Rae's subjective case. Nor is this a situation in which Mr Rae is seeking to abandon the case on sentence that he ran before his Honour or to alter his course and run a substantially different case in this Court. Mr Rae's simple proposition is that, for whatever reason, he has lost the opportunity, or has been deprived of the chance, of a better outcome that was fairly open.

In ***Momoa v R* [2020] NSWCCA 328**, a miscarriage of justice was found to have occurred because of the incompetence of the applicant's solicitor on sentence. The solicitor was found to have failed to adduce relevant evidence on sentence and then failed to provide an affidavit for the appeal, despite the Crown requesting one. In upholding the sentence appeal, McCallum JA, with whom Johnson and R A Hulme JJ agreed, held as follows:

> [7] Whatever else those exchanges revealed, they confirmed that two factors relevant to the sentencing task (**assistance to authorities and the applicant's mental health at the time of the offences** [emphasis added]) were not made known to the sentencing judge. Further, the evidence before this Court establishes that those were matters of substance warranting the conclusion that the sentencing judge, through no error on his Honour's part, proceeded on the basis of incomplete information…
>
> [11] Before leaving this topic, however, it is appropriate to record something about the obligations of a legal practitioner in such a case. The solicitor's correspondence indicates that she was uncertain as to whether she should provide an affidavit in response to a request from the Director of Public Prosecutions. To put that issue beyond doubt, she should have. No issue of client legal privilege arose, the client having waived it. Her overriding duty was to the Court. As already explained, her response to the allegations would have been relevant to determining whether a miscarriage of justice had occurred. That is always an important question; it was important in the present case because it involved the liberty of a young man who is barely an adult and who (as is now clearly established by the evidence tendered by his current representatives) suffers from a mental illness for which he was unmedicated at the time of the offences.
>
> [12] The correspondence indicates the solicitor may have apprehended that she should be communicating with the new solicitor for the applicant rather than assisting the Crown. That was misconceived. As already explained, it is perfectly proper for the Crown to seek an affidavit in such cases. Indeed, it is arguably more appropriate for such evidence to be presented by the prosecutor, whose primary obligation in such a case is to assist the court, than by the lawyer making the allegation of incompetence. I accept that it might be

> confronting or uncomfortable for a lawyer to give an account of their conduct of a case in the face of an allegation of incompetence but it should go without saying that such feelings must give way to the interests of justice and the lawyer's higher duty to the Court.

Tactical Decisions, Completeness and Finality

Sentencing proceedings, like trials, are governed by the principle that *"a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted"*: ***Khoury v R*** **[2011] NSWCCA 118** at [104]; ***Tran v R*** **[2014] NSWCCA 32** at [12]; and ***CL v R*** **[2014] NSWCCA 196**.

Appeals do not afford the opportunity to reformulate the case below: ***Stewart v R*** **[2012] NSWCCA 183** at [56], citing ***Zreika v R*** **[2012] NSWCCA 44**. The appellant is not permitted to run a *"new and different case"*: ***Betts v The Queen*** **[2016] HCA 25** at [2].

Where deliberate tactical decisions were made as to the issues to be pursued or abandoned, and the evidence to be adduced or discounted, there is nothing unfair, and there will be no miscarriage, in holding an appellant to such decisions, even though it is conceivable that other decisions or something else may have worked better: ***R v Diab*** **[2005] NSWCCA 64** at [19] citing ***Ratten v The Queen*** **(1974) 131 CLR 510** at 517.

In ***Tsiakas v R*** **[2015] NSWCCA 187**, Beech-Jones J, with whom Leeming JA and Johnson J agreed, dealt with a single sentence appeal ground asserting incompetence of counsel. This was said to have been occasioned by the solicitor on sentence: not obtaining any reports; not advising about the discount potentially available for assistance; and not calling evidence from the offender's family. In **dismissing** the appeal, his Honour relevantly stated the following at [44]:

> With both appeals against conviction and sentences, it is not sufficient to warrant intervention to simply point to some failing, even a gross failing, of the legal representative who appeared during the sentence proceedings. In conviction appeals, where incompetence to the relevant standard is demonstrated, the Court considers whether there is a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial (*Nudd* at [24]). In sentence appeals an analogous principle applies. Thus this Court has considered whether "compelling material was available but not tendered, or its significance not appreciated" (*Pym v R* [2014] NSWCCA 182 at [75] per Fullerton J, with Hoeben CJ at CL and Price J agreeing; "*Pym*"), whether material of "significance" was not presented (*R v Abbott* (1985) 17 A Crim R 355, 356 per Street CJ) or whether the sentencing court was deprived of a consideration of an offender's circumstances (*Munro* at [25] per Beazley JA). However, it has also been said that "it will be a very rare case" that a miscarriage of justice will have occurred "simply because of a defect in submissions made to a sentencing judge by defence counsel" (*Puan* at [55] per Howie J). Again these observations reflect the approach adopted with complaints of a denial of procedural fairness namely that "[f]airness is not an abstract concept. [it] is essentially practical" and that "the concern of the law is to avoid practical

injustice" (*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37] per Gleeson CJ).

And at [66]:

> Otherwise, in so far as the applicant told the sentencing judge that he believed he had been previously diagnosed as "bipolar" and the sentencing judge referred to the absence of a psychiatrist's report, then this material does not advance matters. Other than the applicant's assertions, there is no material before this Court evidencing much less explaining any such diagnosis.

And finally at [67]:

> The evidence demonstrates that the former solicitor's representation of the applicant in this respect **was less than the standard** [emphasis added] to which the applicant or any other offender was entitled. He was entitled to expect that at least genuine consideration would be given to obtaining a psychiatrist or psychologist's report on his behalf. Instead a consideration of the necessity to obtain such a report appears to have been dismissed on a false basis…

In ***Nauer v R* [2020] NSWCCA 174**, the applicant appealed against her sentence for multiple counts of *dangerous driving occasioning death* and *grievous bodily harm*. The single ground of appeal asserted that a miscarriage of justice had been occasioned by the failure of the applicant's solicitor to present relevant evidence of the offender's subjective case. The only documentary material, concerning the applicant, before the sentencing judge was a Sentencing Assessment Report. In **dismissing** the appeal, Cavanagh J, with whom Hoeben CJ at CL and Fagan J agreed, relevantly held:

> [42] I accept that the legal representative of the applicant did not put material before the sentencing judge which was relevant to the sentencing process and which should have been presented. **It is hardly necessary to say that a legal representative of an offender should ensure that all relevant material that might inform the sentencing process is properly gathered and made available to the sentencing judge at the time of sentence** [emphasis added]. If it is apparent to the legal representative that there might be material that would be relevant and, indeed, that would assist the offender in terms of the sentence that may be imposed, its absence should be raised with the sentencing judge. It might be appropriate to delay sentence until the material has been obtained.
>
> [48] There were deficiencies in the presentation of the applicant's subjective case on sentence. However, that does not necessarily lead to success on this appeal, as this Court would need to be satisfied that the failure of the applicant's legal representative to obtain and lead such evidence resulted in a miscarriage of justice.

The cases of *Tsiakas* and *Nauer* provide a stark reminder that falling short in your conduct in a sentence at first instance will not only rob your client of the opportunity for a decent initial result, but *may* also deprive your client of any chance of fixing it on appeal.

These principles are further highlighted in the recent case of ***Korovou v R*** **[2021] NSWCCA 28**, where the sentence appeal was **dismissed** by Wright J, with Hoeben CJ at CL and Bellew J agreeing, who relevantly found as follows:

> [68] It can be noted that in the present case there was no psychiatric evidence at all nor was there any evidence as to the likely progress in the future of the applicant's PTSD…
>
> [73] Thus, it appears to me that the applicant on this appeal is seeking, in effect, to put a different case from that put to the learned sentencing judge. It is now sought to be argued, in substance, that the applicant suffered PTSD as a result of the trauma of childhood physical abuse in addition to the trauma of discovering he was adopted, that there was a causal connection between the PTSD and the offending…
>
> [76] A significant problem for the applicant in the present case is that there was no "most compelling material available on the plea that was not used or understood". In my view, the submissions put by both the applicant and the Crown at first instance were plainly based on the material available and dealt with it appropriately and in sufficient detail. There was no significant material that was not used or understood….

Best Interests of Client and Duty to Avoid Adducing Damaging Evidence

Subject to your paramount duty to the court and the administration of justice, one of the most important *other fundamental ethical duties* is to always act in the best interests of your client.[7] This means you have to be careful to avoid adducing evidence that will negatively impact on the interests of your client. The most obvious example in sentencing is the decision to call your client. You need to give reasoned advice to your client about the pros and cons of giving evidence. If your client entered a convenience plea and is prone to aggressive outbursts about the complainant, then you would likely err on the side of caution and *not* call that particular client on sentence.[8] You are then, however, faced with relying on untested evidence in support of your client and the applicable principles as set out further below.

To provide another example from my own practice. Years ago, I appeared in a *supply* sentence at Dubbo District Court for a client on Supreme Court Bail. I had dutifully obtained a report from a psychologist in which my client claimed to have been abstinent from drugs since being granted bail and confirmed he was staying away from the drug subculture and people who used drugs. This was relevant to his prospects of rehabilitation and likelihood of reoffending. I read the report aloud to my client and he confirmed its content. When I sent the report to the Crown, however, they promptly sent me a recent COPS entry disclosing that my client was present, while on Supreme Court Bail, with other drug users in a known drug house while the police executed a search warrant and found a significant amount of drugs and drug

[7] See r 4.4.1 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*; and r 35 *Legal Profession Uniform Conduct (Barristers) Rules 2015*.

[8] Acknowledging that the decision ultimately rests with your client, however, one would expect their decision to be made pursuant to your reasoned advice.

paraphernalia. It was anticipated that my client would soon be charged with further offences relating to drug supply.

It was immediately apparent that my client had lied to the report writer and to me. When confronted with this in conference, my client confirmed that he had still been using drugs while on bail, though he denied supplying. Consequently, my client accepted my advice not to rely on the report. The Crown confirmed that they would not adduce evidence of this recent episode, provided I did not lead any evidence or make any submissions suggesting that my client had been clean while on bail. I was thus able to avoid damaging evidence being adduced against my client through proper preparation and tactical decision making.

Untested Statements and the Decision to Give Evidence

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].

In ***Moore v R*** **[2019] NSWCCA 264**, the CCA dismissed a sentence appeal where, in the proceedings below, the appellant relied on a report from Dr Furst, Forensic Psychiatrist, but did not give or call any sworn oral evidence. The following parts of the judgment are apposite to this analysis:

> [39] The judge found it "somewhat difficult" to determine whether there were any mental health issues. His Honour said that Dr Furst's opinion had been "**constructed on an assumption of the accuracy of the history which has not been proved** [emphasis added]".[9] He continued:
>
> > "[69] The offender, therefore, has not proved on the balance of probabilities any relevant mental health issues other than possibly the adjustment disorder with depressed mood noted by Dr Furst - but which is explicable by reference to his being detained in custody as much as anything else."
>
> [72] The judge was right to be concerned about the lack of a clear explanation for why the applicant offended as he did. In the absence of any oral evidence, the documentary material provided a **flimsy basis** [emphasis added] for the applicant to discharge his onus of establishing these mitigating factors on the balance of probabilities.

Adhering to the Agreed Facts

It is perfectly permissible for defence practitioners to adduce evidence on sentence of contextual matters such as motive and other non-exculpatory mitigating factors. It is important, however, to ensure that this evidence, and any accompanying submissions, are consistent with, and do not contradict, the agreed facts.

In ***R v Crowley*** **[2004] NSWCCA 256** at [46], Smart AJ observed:

> Agreed facts should always be carefully checked by all parties and their legal representatives, and especially by counsel for an offender. This should not be perfunctory.

You should also read aloud to your client any reports and evidence upon which you intend to rely on sentence and take explicit instructions on whether the client agrees with the content and its use (see *Brown v R* on page 17 above).

[9] This is a perfect example of a report being an edifice without supporting foundations which is correspondingly weak (see page 6 above); and why I consider it woefully inadequate for your report writer to reach conclusions based on the offender's self-report in a one-off 90-minute meeting, in conjunction with simply reading the facts and record (see page 9 above).

In ***Taitoko v R*** **[2020] NSWCCA 43**, Leeming JA, with whom Hoeben CJ at CL and Lonergan J agreed, made the following comments about defence counsel who did not seem to appreciate this principle:

> [37] The impression with which I am left from this exchange, combined with the transcript of the sentencing hearing, is that counsel appearing for the applicant was and continues to be unaware of the effect of his client agreeing to facts for the purpose of sentencing. In particular, it is difficult to understand how on the same morning, the applicant actually signed in the presence of his lawyers the document which had previously been negotiated by them with the Crown, and his counsel then articulated and maintained a case which went materially beyond that document.
>
> [38] The point of signing the Agreed Facts was for that agreement to bind the applicant and to form the foundation of the sentencing discretion. It is ordinarily quite wrong for submissions to be made contrary to facts to which an offender has agreed. There can be no proper basis for criticism if evidence is adduced contrary to what the offender has agreed (and in the present case, had signed with legal assistance earlier that morning) for that evidence to be tested against the document to which the offender had adhered.

Emotive and Intemperate Language

In the recent case of ***McLaren v R*** **[2021] NSWCCA 12**, a sentence appeal was upheld, in part, on the basis that the sentencing judge used emotive and intemperate language. Some of the relevant parts of the judgment of Hamill J, with whom Hoeben CJ at CL and Rothman J agreed, are set out as follows:

> [68] It is one thing for a Judge to make almost exclusively adverse findings against a person standing for sentence and to emphasise the serious and repetitive nature of the offending and the impact of the crimes on the victims. It is another thing for the sentencing proceedings and remarks to give the appearance of a **lack of temperance and impartiality** [emphasis added].
>
> [69] The reference to the applicant not speaking to the police or giving evidence in the proceedings was inapposite, and the ominous quasi-religious flavour of the reference to "judgment day" was unnecessary and inappropriate.
>
> [70] His Honour, as he was entitled to do, relied on his vast experience as a practitioner and judge but did so in similarly **emotive language** [emphasis added] …

What can be extrapolated from this judgment is that both defence and prosecution lawyers ought avoid submissions that are unnecessarily inflammatory, emotive or intemperate, if only to assist the Court to avoid that same fate.

Conclusion

I hope that these suggestions and cautionary tales have resonated with you. I again implore you to review the many other authoritative resources on the topic, some of which are set out on page 3 above. If there is one fundamental take home from all of this, it is the imperative to get on the front foot and marshal contemporaneous objective evidence to furnish your report writer and the court with. This will build the foundations upon which your submissions will be made good and provide you with a decent CCA and professional insurance policy.

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