

Sentencing Advocacy

What's important

Sentencing principles

Section 9 of the *Penalties and Sentences Act* 1992 (Qld) – the principles

“just in all the circumstances” (section 9 (1)(a)).

“will help the offender to be rehabilitated” (section 9(1)(b)).

“to deter the offender or other persons” (section 9 (1)(c)).

“community, acting through the court, denounces the sort of conduct” (section 9 (1)(d)).

“to protect the Queensland community” (section 9 (1)(e)).

Sentencing principles

Section 9 (2)(2A) (3) (4) (5)(6)(6A) (7) (7AA)– the specific factors

- seriousness of offence, impact on victim (including loss)
- character, age, intellectual capacity
- hardship due to age, disability, gender identity...race....religion...
- child sexual offending considerations, child exploitation considerations
- domestic violence
- co-operation
- totality
- compliance with orders
- Indigenous factors

More serious factors follow thereafter where there are factual matters, eg., pregnancy, killing of a child under 12 and many others.

Sentencing?

What will the prosecution say?

- Offence

What will the defence say?

- The client

Sentencing factors – common law

Some common mistakes

- several offences charged in one offence (*R v Stable (a pseudonym)* [2020] QCA 270, applying *R v D* [1996] 1 Qd R 363) – uncharged offences (eg. Sexual offences)

Interstate position slightly more liberal, see *Ebsworth v R* [2020] NSWCCA 229

- plea of guilty and its timing (*R v Freeman* [2019] QCA 150) – not only because the charges have changed. It must be considered to the circumstances of the case (eg. One such circumstances was an attempt to negotiate?)

- totality principle? (*Mill v The Queen* (1988) 166 CLR 59) – Address the “appropriate sentence for all offences” or “total effective sentence” and “not crushing” (*Stubley v Western Australia* [2010] WASCA 36)

- delay (*R v Davis* [2012] QCA 324). Fryberg J stated “Mere delay, by itself, does not warrant mitigation of sentence. The effect of the delay must be examined and assessed in the context of the particular case; although that is not to say that the length of the delay is irrelevant.”

- parity (*Green v The Queen; Quinn v The Queen* [2011] HCA 49). Not equal treatment but equal justice. But remember *R v Owen* [2015] – first low sentence because of wrong facts or other factors does not entitle the second defendant to the same sentence. The first should simply be ‘counting his blessings’

Your client

Represent the person and their circumstances

- Disadvantages? Why are they different?

Manda v Western Australia [2013] HCA 38 – personal circumstances must be balanced against the offence (background of alcohol consumption)

Bugmy v The Queen [2013] HCA 37 – deprived background may mitigate the sentence .. “The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.” Continued disadvantage.

Impact on them

- eg. *R v Abdi* [2016] QCA 298, the effect of deportation

Intoxication/Mental Health

Intoxication – usually not a factor in mitigation BUT

R v Adam [2022] QCA 41 – many decisions within that. One example : a person's disease which led to alcoholism for the purpose of pain relief.

R v Verdins (2007) 16 VR 269 – reduction of moral culpability

However some more development interstate (*Brown v The Queen* [2020] VSCA 212) – engages Verdins principle on the basis of a severe personality disorder

Contested sentence

Sentencing

“.....where the prosecution seeks to have the court sentence on a factual basis that goes beyond the facts admitted by the plea, and which is disputed, it is incumbent on the prosecution to adduce evidence to establish that basis.” (*Strbak v The Queen* [2020] HCA 10).

Principles in common law

Is the third mark of a sentence, a principle?

R v Williams; Ex parte Attorney-General (Qld) [2014] QCA 346

“overall effect of the conclusion”

Conventional approach. Balance between mitigation and punishment and deterrence. The offending conduct might require more than a third?

“Just sentence” is the key

How do you compare a sentence?

Appeals – short introduction

Court of Appeal sits to correct “error”. It does not correct someone else’s judgment. Error is the key.

Could have? Should have?

But what is the error?

Consideration of error by you – pleading is vital

Specific versus general

Express error, example

Inferred error

It's all about principles

How do you compare a sentence? Is that the right question?

Principle, principle, principle

“.....The jurisdiction so conferred requires that error on the part of the sentencing judge be demonstrated before the Court's discretion to vary the sentence is enlivened”

“..due respect must be paid to the skills and experience of sentencing judges, whose almost daily task is to consider how to exercise the discretion in multifarious circumstances.”

“.....a submission about the range of sentences without an articulation of the unifying principles which support those sentences is of no use.”

“.....To draw attention only to the numerical result of a sentence and then to compare that result to other numerical results achieves nothing”

(R v Sprott; Ex parte Attorney-General (Qld) [2019] QCA 116).

Specific Error

Easy pathway to an appeal

Once you show a specific error, then you walk through the door of re-sentencing (*Kentwell v The Queen* [2014] HCA 37)

- However, the court may come to the same conclusion as the original court as to the sentence
- It's not an automatic reduction – you must persuade the court of the sentence that should follow.

Famous errors

“HH failed to give weight to the mitigating circumstances of X”

Sprott continued...

“.....When an appeal court is invited to consider questions of weight involved in the exercise of the sentencing discretion it should not regard itself as being in the same position as the sentencing judge. The appeal court should not set aside a sentence on such a ground unless the failure to give adequate weight to relevant considerations really amounts to a failure to exercise at all the discretion entrusted to the court.” That is because reasonable minds can differ about the weight to be accorded to the factors relevant to the exercise of discretion and it is not the function of the Court of Appeal to substitute its own view about such matters, or about the ultimate decision, for the view of the sentencing court.”

“...it is generally for the sentencing judge and not the Court of Appeal to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising a statutory power.” (*R v Crothers (a pseudonym)* [2020] QCA 268).

Manifest excess

You look to the result to persuade the court that because of it, it must, as a matter of inference, mean that there was a misapplication of principle somewhere in the synthesis.

Not about comparison. It is this:

“Consistency of sentencing is important. But the consistency that is sought is consistency in the application of relevant legal principles, not numerical equivalence.” (*Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2).

That is how you will show error.

Because if there is a misapplication of principle, then you have succeeded in the error, by way of inference. You are entitled to be re-sentenced (*Kentwell*).

The sentences, when read, produce a clear indication that a principle was misapplied.

Not about the individual features of the cases (age, personal circumstances etc) – sentence hard or harsher does not produce an error

Must be a “marked disparity” in the sentences.

Questions