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INSTINCTIVE SYNTHESIS, STRUCTURED REASONING, AND PUNISHMENT GUIDELINES: JUDICIAL DISCRETION IN THE MODERN SENTENCING PROCESS

ABSTRACT

One consequence of the current push for more rigorous approaches to Australian law enforcement has been the drawing of judicial sentencing into the glare of the political spotlight. The result has been a relentless pressure for greater judicial accountability in sentencing. This exposure has brought into sharp focus a tension existing between competing sentencing principles — a tension that has taken on a particular character in the last twenty years or so as new law and order imperatives have come into play. It is a tension which calls into question the capacity of the courts to impose penalties in a more accountable and consistent way (for that is essentially what is being demanded of them) while at the same time maintaining civilised sentencing values and practices in a wider sense. It is a dilemma which remains unresolved and lies at the core of current public contention over the best way of sentencing offenders. This article examines the sentencing quandary confronting our courts, and Australian society at large, with particular emphasis on the debate between the instinctive synthesis and two-tiered approaches to judicial sentencing and with special reference to the views of Justices Kirby and McHugh in *Markarian v The Queen*,¹ the most recent High Court case to substantially tackle the subject.

I INTRODUCTION

In recent years an intense debate has emerged within the criminal justice system and, indeed, Australian society at large, over the best approach to be adopted in

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¹ (2005) 228 CLR 357 (*Markarian*).

sentencing convicted offenders.² At its widest, the debate focuses on the emphasis to be placed on judicial discretion (at base a subjective process) and certain forms of external influence which come to bear on the exercise of that discretion. In particular, it is the role of the more measured of those external influences that is especially at issue. A number of judicial and extra judicial initiatives — mainly the latter — have been launched with the aim of reforming the sentencing process by making it more rigorous. The intention is to make sentencing more consistent and accountable by tightening the external constraints on judicial discretion in sentencing without sacrificing individualised justice. It's a reformist drive that continues to draw much — perhaps most — of its energy from influences extrinsic to the judiciary.

The central issue in this debate is one of approach focused on whether global or sequential reasoning is better in the sentencing of offenders. Closely related to this is the matter of the relative emphasis to be placed on judicial intuition, or instinct, on the one hand, and formal guidelines external to the sentencer on the other, when setting penalty.

The debate is intensely divisive: there are marked differences of approach to sentencing between legislators and courts, between the Commonwealth and states, and between States. State courts have adopted manifestly different positions on the issue and some legal academics, with differing approaches, are taking issue with the courts on their approach to sentencing.³

It is, then, the apparent distinction between global reasoning or 'instinctive synthesis', and a two-tiered or structured approach,⁴ that lies at the heart of the current division on sentencing. The division sees the High Court taking a different approach from State courts and legislatures. Above all, the contention has left an impression of a judiciary divided on nothing less than the fundamental approach to sentencing. It is an impression which may not be altogether accurate, as will be argued, but which is proving damaging in terms of public confidence in the sentencing process and the criminal justice system.

The intensity of the debate is reflected in the strong language used by a recent legal academic text on the subject. Edney and Bagaric refer to sentencing in Australia as

² See Arie Frieberg, 'Twenty Years of Changes in the Sentencing Environment and Courts' Responses', (Paper presented at *Sentencing Principles, Perspectives & Possibilities*, Canberra, 10–12 February, 2006) 1–11. The broad sentencing concern itself has emerged over several decades. For example, Mary Daunton-Fear identifies a tension between judicial discretion and the 'standardisation of penalties' during the late 1970s in South Australia. Mary Daunton-Fear, *Sentencing in South Australia* (1980) 31–6.

³ For example, Frieberg sees instinctive synthesis as 'opaque at best and unhelpful at worst': Frieberg, above n 2, 9–11.

⁴ I have borrowed the phrase 'structured approach' from Dean Mildren, 'Intuitive Synthesis or the Structured Approach' (Paper presented at *Sentencing Principles, Perspectives & Possibilities*, Canberra, 10–12 February 2006).

being ‘largely a moral and intellectual wasteland’ and as presently existing in ‘the Dark Ages’. The ‘reasoning process of the judicial decision maker remains’, they write, ‘shrouded in mystery’ due to ‘the dominance of the approach to sentencing known as instinctive synthesis’.⁵

The exchange of views on this subject in *Markarian v The Queen*,⁶ and especially those of Justices McHugh and Kirby, illustrate the prevailing judicial thinking on the instinctive synthesis and two-tiered approaches to sentencing. In many ways *Markarian* is a microcosm of the wider judicial thinking on the subject and, accordingly, will be given some emphasis in this article. The wider contest between the two approaches in this case remains very much unresolved and sees Australia without a unified national approach to sentencing despite the best endeavours of various authorities to move it in this direction. Arguably, this sentencing controversy is currently the most important issue in Australian criminal law.⁷

To understand the form this discussion, and its associated reform initiatives, have taken it is necessary to address the wider contextual influences within which the debate is taking place. It is necessary to be cognisant of the very strong concern with law and order in the community and a wider, and perhaps related, functionality and pragmatism of approach now being applied in all aspects of social ordering, including the conduct of judicial sentencing.⁸

II THE DRIVE FOR RIGOUR AND CONSISTENCY

It has been in approximately the past twenty years that considerable disquiet, fanned by politicians and the media, has emerged over the sentencing of offenders as part of a wider anxiety over law and order in the community. In crude terms, what the politicians and their constituent backers demand are harsher penalties for offenders applied with greater consistency.⁹

⁵ Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (1st ed, 2007) 42, 377. For a dispassionate criticism of the instinctive synthesis approach in favour of ‘structured discretion’ in the Australian, New Zealand and Canadian contexts, see Grant Hammond, ‘Sentencing: Instinctive Synthesis or Structured Discretion?’ [2007] Part 2 *New Zealand Law Review* 211.

⁶ (2005) 228 CLR 357.

⁷ Ian Leader–Elliott sees it as a pivotal development in a wider transition from a common law sentencing system to one that is primarily legislative in character: Ian Leader–Elliott, Editorial (2002) 26 *Criminal Law Journal* 5, 6.

⁸ Freiberg outlines the broad social backdrop to current changes in sentencing, pointing out that this setting is shaped by a dialectical process of social change and thinking. He also identifies economic rationalism as part of the wider setting of change to criminal sentencing. Freiberg, above n 2, 1–2. See also Justice McHugh’s objection to the intrusion of economic rationalism into a particular aspect of sentencing in an exchange with defence counsel during proceedings in *Cameron v The Queen* (2002) 76 ALJR 382: Transcript of Proceedings, *Cameron v The Queen* (2002) (High Court of Australia, McHugh J, 22 November 2001).

⁹ The trend is world wide. For the British context, see Andrew Ashworth, *Sentencing and Criminal Justice*, (4th ed, 2005) 388, 389. For the role of the media

Richard Fox and Arie Freiberg identify two levels of concern with the way sentencing occurs. They point out that at a broad popular level there is a focus on the courts' alleged leniency and dissociation from public opinion'.¹⁰ On a more sophisticated level, they write, critics 'question the criminological knowledge and skills of the judiciary and point to the lack of consistency exhibited by individual sentencers and the disparities revealed when comparative studies of judicial behaviour are undertaken'.¹¹

Whilst the case for inconsistency is far from proven¹² nonetheless the push for greater consistency remains a catalyst for sentencing reform.¹³

in encouraging harsher law and order policies in the United States, see Sara Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48 *William & Mary Law Review*, 397. On a global perspective Sharon Casey and Phillip Mohr caution that claims by politicians and opinion polls that the public is dissatisfied with the criminal justice system and demands reform, and in particular, harsher sentencing policies, may be unsubstantiated: Sharon Casey and Phillip Mohr, 'Law-and-Order Politics, Public-Opinion Polls and the Media' (2005) 12 *Psychiatry, Psychology and Law*, 141, 147. Perhaps this extensive politicisation of sentencing was inevitable. Richard Fox and Arie Freiberg comment that the issue of sentencing is strongly 'value-laden' and 'politically controversial'. They quote the Australian Law Reform Commission (ALRC) on the subject: Richard Fox and Arie Freiburg, *Sentencing State and Federal Law in Victoria* (2nd ed, 1999) 29.

¹⁰ Fox and Freiburg, above n 9, 29.

¹¹ Ibid.

¹² Ibid 29, 30.

¹³ For example, in its 2006 report the Australian Law Reform Commission recommended the introduction of a federal sentencing act with 'clearly stated objects', including the 'promotion of greater consistency in the sentencing of federal offenders', in order to 'ensure that federal offenders are treated in a more consistent manner by state and territory courts': Australian Law Reform Commission, *Same Crime, Same Time*, ALRC Report 103 (2006) [20.58].

The demand for harsher and more consistent penalties was recognised in recent amendments to South Australian legislation. See, eg, *Criminal Law Sentencing Act* 1988 (SA) s 10(2), (3), (4), (5), (6). Furthermore, the recent introduction of a mandatory minimum non-parole period of 20 years for murder at the 'lower end of the range of objective seriousness' has further significantly reduced the scope for sentencing discretion for that offence in South Australia: *Criminal Law Sentencing Act* 1988 (SA) ss 32(5)(ab), 32A(1). In addition, the discretion for 'fixing a non-parole period in respect of a person sentenced to imprisonment for a serious offence against the person' has been tightened by prescribing a mandatory minimum non-parole period of 'four-fifths the length of the sentence': *Criminal Law Sentencing Act* 1988 (SA) s 32(5)(ba). This amendment appears to have been inspired by an earlier move in New South Wales to introduce mandatory non-parole periods for most serious offences. In that state the prescription is 20 years for a murder in the 'middle range of objective seriousness': *Crimes (Sentencing Procedure) Act* 1999 (NSW) Part 4, Division 1A, ss 54A-54D, 54A(1), 54A(2).

III THE DISPUTED TERRITORY

Sentencing reform has, then, a very strong emphasis on judicial accountability. Clearly, there is a strong impetus for such reform which has inevitably brought pressure to bear on the judiciary to conform with a community aspiration for more rigorous and consistent approaches to passing sentence. One manifestation of this is the tension between the instinctive and structured approaches to judicial sentencing which has surfaced recently in a series of State and High Court cases, and in related legislative and policy moves by government. This has culminated so far in the High Court case of *Markarian* and the governmental moves which have followed that case.

In the short time that the High Court has been considering sentencing issues,¹⁴ a succession of cases has charted a troubled and contentious course of judicial decision-making in which the courts have come into conflict with those in society wanting a more guided approach to sentencing. *He Kaw Teh*,¹⁵ *Olbrich*,¹⁶ *Cheng*,¹⁷ *Cheung*,¹⁸ *Wong*¹⁹ and *Markarian*²⁰ are all cases around this very broad theme. While the particular issues have varied, the underlying concern in each of these cases has been the parameters to be left for judicial discretion by recent sentencing reforms.²¹

A Instinctive Synthesis versus Two-tier Sentencing

The differing judicial views on basic sentencing approach have come to focus on the relative merits of what are perceived as two distinct approaches to sentencing. On one approach — the two-tier approach — the sentencer begins with a penalty figure matching the gravity of the crime and then makes adjustments up and down in response to the applicable aggravating and mitigating factors. An instinctive synthesiser, on the other hand, considers all the relevant factors together and makes a global judgment on sentence in a single step.²²

¹⁴ For an edifying account of the short history of High Court sentencing appeals and the delayed development of Australian sentencing principle, see Richard Edney, 'In Spite of Itself?: The High Court and the Development of Australian Sentencing Principles' (2005) 2 *University of New England Law Journal* 1.

¹⁵ *He Kaw Teh v The Queen* (1985) 157 CLR 523.

¹⁶ *R v Olbrich* (1999) 199 CLR 270.

¹⁷ *Cheng v The Queen* (2000) 203 CLR 248.

¹⁸ *Cheung v The Queen* (2001) 209 CLR 1.

¹⁹ *Wong v The Queen* (2001) 207 CLR 584 ('Wong').

²⁰ *Markarian v The Queen* (2005) 228 CLR 357.

²¹ The cases indicate that this issue has arisen in the High Court over approximately the past 25 years. Since all these cases were focussed on drug offences we can see from them the disproportionate influence that drug crime sentencing is having on criminal sentencing generally.

²² For the classic initial definition of instinctive synthesis, see *R v Williscroft* [1975] VR 292, 300. For a clear recent re-statement of this sentencing approach see McHugh J's

The High Court maintains a position of strong support for instinctive synthesis. However, on the surface at least, its approach has been a divided one. In a succession of recent High Court cases, most notably in *Wong*²³ and *Markarian*,²⁴ a continuing division is evident between a majority viewpoint in favour of instinctive synthesis and Justice Kirby's persistent minority position in favour of a two-tier approach.²⁵ *Wong* focused primarily on the effect of a guideline judgement on a decision of the New South Wales Court of Criminal Appeal to increase sentence and was decided on the basis of a much wider range of issues than simply sentencing approach. Of the six judges on the bench — Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ — it was only the majority judges who addressed the matter of the two approaches directly. Of these, Gaudron, Gummow and Hayne JJ, in a joint judgement, emphatically endorsed instinctive synthesis as the correct approach to sentencing and strongly criticised two-tier reasoning.²⁶ Kirby J sided with the joint judgement in his conclusion but signalled his dissent on basic sentencing approach, favouring a two-tier approach over instinctive synthesis.²⁷ However, it was only a limited statement of his view. A consideration of sentencing approach was not essential for him in making a finding, hence he deferred a fully developed statement of his views on the subject.

This judicial division seemed to develop some intensity in *Markarian*. It is, perhaps, especially the opposing views of Justices McHugh and Kirby in *Markarian* which have contributed to this impression of intensity. This may be attributable in part to the strength of some of the language their Honours used in *Markarian*. For example, McHugh J's reference to the 'pseudo-science of two-tier sentencing' is tantamount to an accusation of charlatanism, and for his part Kirby J, by implication, accuses instinctive synthesisers of defying the rule of law.²⁸ The two approaches were fully and squarely at issue in *Markarian* and the case represents the high water mark of judicial examination of the basic approach to sentencing.

explanation of the two approaches in *Markarian v The Queen* (2005) 228 CLR 357 [51].

²³ *Wong v The Queen* (2001) 207 CLR 584.

²⁴ *Markarian v The Queen* (2005) 228 CLR 357.

²⁵ The division is also evident in *AB v The Queen*, where Kirby J expressed a contrary view to that expressed by McHugh and Hayne JJ on sentencing approach: *AB v The Queen* (1999) 198 CLR 111 [99]–[100] (Kirby J) [16] (McHugh J) [115] (Hayne J).

Similarly, in *Johnson v The Queen* Kirby J briefly expressed his opposition to 'the "instinctive synthesis" approach to the sentencing process favoured by some members of [the High Court]'. In a joint judgement, Gummow, Callinan and Heydon JJ stressed that sentencing 'is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision': *Johnson v The Queen* (2004) 205 ALR 346 [40]–[44] (Kirby J) [12] (Gummow, Callinan and Heydon JJ). See also below n 67.

²⁶ *Wong v The Queen* (2001) 207 CLR 584 [74]–[78].

²⁷ *Ibid* [101]–[103], [149], [150].

²⁸ *Markarian v The Queen* (2005) 228 CLR 357 [84] (McHugh J) [132] (Kirby J).

B *State Differences*

We can also see varied judicial attitudes at the state level to the two sentencing approaches.

Victoria has long maintained an instinctive synthesis approach. The two seminal cases on the subject — *Williscroft*²⁹ and *Young*³⁰ — are Victorian. Victoria and New South Wales perhaps present the starkest contrast in sentencing approach. The difference is well illustrated by two recent pre-*Markarian* drug offence cases. In *R v Luong, Nguyen and Cao*,³¹ the Victorian Court of Criminal Appeal decided the sentence very conspicuously on the basis of unquantified instinctive synthesis. This was in line with but without reference to *Wong*, the most recent High Court authority on the subject to that point. In the same year, by contrast, the New South Wales Court of Criminal Appeal in *R v Otto*³² applied instinctive synthesis but in a heavily quantified way on the basis of the relevant Commonwealth legislation.

By way of further contrast, a recent post-*Markarian* case suggests that South Australia falls somewhere between these two extremes in avoiding totally unquantified instinctive synthesis on the one hand while rejecting inappropriate mathematicisation in sentencing in complex cases on the other. In *Randal-Smith & Davi*,³³ the Full Court of the South Australian Supreme Court applied *Markarian* in rejecting nonsensical mathematicisation in the sentencing process. It was a split decision, focusing on whether the calculation used by the trial judge to determine a sentence for two young bank robbers was permissible under *Markarian*. The trial judge had begun the calculation with a notional sentence based on the severity of the crime. His Honour had then made reductions on the basis of applicable mitigating factors and the broad principle of totality. The trial judge decided on a starting point for each of the multiple offences and totalled these to arrive at an initial overall sentence of 43 years.³⁴ With reductions, this came down to a head sentence of 16 years³⁵ — a significant cut of almost 45 per cent. On appeal Doyle CJ considered that the calculation, although permissible, had led to an incorrect result and that the penalty ought to have been harsher.³⁶ Gray and Layton JJ, on the other hand, thought that the calculation amounted to a two-tier deliberation of the kind disallowed by *Markarian* but that, curiously, the resulting sentence was correct.³⁷ Their Honours took the view that the sentencing approach of the trial judge ‘created an air of unreality about the sentencing process’,³⁸ as the starting

²⁹ *R v Williscroft* [1975] VR 292.

³⁰ *R v Young* [1990] VR 951.

³¹ [2005] VSCA 94.

³² *R v Otto* [2005] NSWCCA 333 (*‘Otto’*).

³³ *R v Randal-Smith & Davi* (2008) 100 SASR 326 (*‘Overall Bandits Case’*).

³⁴ *Ibid* [85].

³⁵ With a non-parole period of 8 years. *Ibid* [87].

³⁶ *Ibid* [1]–[54].

³⁷ *Ibid* [55]–[115].

³⁸ *Ibid* [90].

sentence of 43 years was too high and the reductions to compensate were excessive and disproportionate.³⁹

In terms of basic sentencing principle, the difference in reasoning between the two appellate opinions in the *Overall Bandits Case* is a fine one. Both are firmly grounded in support for *Markarian* instinctive synthesis, diverging only on the basis of their subjective interpretation on how to apply that approach to the particular circumstances of this case. Tellingly, Doyle CJ's judgement includes a dictum pointing out that his Honour would have reached the same conclusion 'whatever [sentencing] approach [he] took'.⁴⁰

In the longer term, then, State courts will continue to employ an approach within the broad parameters laid down by *Wong* and *Markarian*. However, it may be that they will, by a process of legal rationalisation and in response to local State factors, pursue a line somewhat independent of the spirit, if not the letter, of the High Court pronouncements.⁴¹ This may well be a contentious approach. Both Freiberg and Kate Warner draw attention to the fact that 'appellate courts in Tasmania, South Australia and Western Australia have distinguished or explained *Markarian* and [that] the tension between the two approaches [that is, instinctive synthesis and structured reasoning] may never be resolved'.⁴²

There are state differences, too, when it comes to guideline sentencing. The courts of New South Wales seem willing to create guideline sentences in response to pressures in that direction.⁴³ In South Australia the courts appear to be moving in the opposite direction from those in New South Wales, with at least one case advancing an unquantified guideline sentence,⁴⁴ and another declining legislative invitation to provide guideline sentences.⁴⁵

IV SENTENCING GUIDELINES

The link between judicial discretion in sentencing and external penalty guidelines is a very close one. Indeed, judicial discretion and guidelines may be seen as two sides of the same sentencing coin, since the latter exist to regulate the former in order to achieve consistent and proportionate penalties.⁴⁶ Two kinds of guideline

³⁹ Ibid [87] [93]–[108].

⁴⁰ Ibid [48].

⁴¹ Edney and Bagaric suggest that in two cases — the South Australian case of *R v Place* (2002) 81 SASR 395 and the New South Wales case of *R v Sharma* (2002) 54 NSWLR 300 — the court sought to 'confine the scope of the instinctive synthesis approach prescribed by the majority in *Wong*': Edney and Bagaric, above n 5, 22.

⁴² Freiberg, above n 2, 11. Kate Warner, 'Sentencing review 2004–2005' (2005) 29 *Criminal Law Journal* 355.

⁴³ See, eg, *R v Jurisic* (1998) NSWLR 209.

⁴⁴ *R v D* (appellant) [1997] SASC 6350.

⁴⁵ See *R v Payne* (2004) 89 SASR 49 ('*Payne*'). See notes and accompanying text below for a discussion of this case: n 50, 51 and 52.

⁴⁶ See Ashworth, above n 9, 42.

currently operate: those contained in model sentences handed down by judges as examples to be followed for certain kinds of crime (guideline judgements); and statutorily defined sentencing parameters for particular kinds of offence (legislative guidelines).

Both forms of guideline are very new. It is in New South Wales that the stronger initiatives on guidelines, particularly for robbery and drugs offences, have occurred. A clear tendency to quantify penalties for such offences has emerged in that state in a way inevitably creating tension between the High Court and NSW State authority, as indicated by *Wong* and *Markarian*. In *Wong* the High Court considered a NSW State guideline judgment, in the form of a detailed grid of sentencing options, in its application to a drug offence. *Markarian* was a NSW drugs case which hinged on the application of a State statutory penalty scheme which measured the severity of the offence by the quantity of drugs involved.⁴⁷ In both cases the High Court rejected the State guidelines for their lack of flexibility, excessive mathematicisation of penalty, and general unsuitability to provide a satisfactory sentencing outcome.

There is, then, clear tension between State governments and the High Court over the latter's recent decisions in *Wong* and *Markarian*. In South Australia, the State Parliament legislated in 2003 to outmanoeuvre *Wong* by making provision for sentencing guidelines by a two-tier process.⁴⁸ In addition, in a move contrary to the general spirit of *Wong* and *Markarian*, this same Parliament has legislated recently to limit judicial discretion by setting standard non-parole periods for murder and serious offences against the person.⁴⁹ The question now is how the South Australian courts will interpret this legislation. In *Payne*⁵⁰ the Court of Criminal Appeal declined to produce a guideline judgment under the 2003 legislation,⁵¹

⁴⁷ See the headnote and opening paragraphs of the majority judgement: *Markarian v The Queen* (2005) 228 CLR 357 [1]–[19].

⁴⁸ *Criminal Law (Sentencing) (Sentencing Guidelines) Amendment Act 2003* (SA). The two-tier process is implied in the legislation. The *Criminal Law (Sentencing) Act 1988* (SA) s 29A(3)(a), (b) now provides that a sentencing guideline may (a) indicate an appropriate range of penalties for a particular offence or offences of a particular class, and (b) indicate how particular aggravating or mitigating factors (or aggravating or mitigating factors of a particular kind) should be reflected in sentence. The political nature of this move is clear by implication from Attorney General Michael Atkinson's reply to a 'Dorothy Dixier' in the South Australian State Parliament: South Australia, *Parliamentary Debates*, House of Assembly, 4 May 2004, 1969 (Peter Lewis). Referring to this legislation in *R v Payne* (2004) 89 SASR 49 at [30], the Full Court of the South Australian Supreme Court commented: '[t]he Attorney-General's Second Reading Speech on the amendment ... indicates that another reason for the legislation was to provide statutory support for the giving of guideline judgements, in the light of some doubts cast on the practice, or at least some aspects of it, by the High Court decision in *Wong*.'

⁴⁹ See above n 13.

⁵⁰ *R v Payne* (2004) 89 SASR 49.

⁵¹ See Michael Jacobs, 'Tough talk is rough justice', *The Adelaide Review* (Adelaide), 4 August 2004, for a discussion of the court's reasons for declining a guideline judgment.

and did so in a way that suggests such sentences will not be issued unless there is a very good reason to do so.⁵² It is too early to predict the reaction of the South Australian courts to the standard non-parole period legislation. Unlike New South Wales, where the criteria for departing from the standard are flexible, there is only limited flexibility for South Australian courts in the setting of non-parole periods for murder and other serious offences.⁵³

We can see, then, in these High Court and State cases, the nexus between the reformist push for guidelines in the political arena and the tension between instinctive synthesis and structured sentencing approaches in the judicial sphere. Eric Colvin points out that the joint judgement in *Wong* ‘link[ed] condemnation of all numerical guidelines with a rejection of “two-stage” and an endorsement of “instinctive synthesis” as the correct sentencing methodology’.⁵⁴

V MARKARIAN V THE QUEEN

It is especially *Wong* and *Markarian* that have helped to create the impression of a judiciary divided on the matter of instinctive synthesis and structured and guided sentencing. *Markarian* may be seen as a watershed case for the entire judicial debate on the approach to sentencing. The case amounts to a microcosm of the wider thinking on the issue and its value lies in the insight it can bring on current judicial deliberation on the subject. *Markarian*, very largely on the basis of *Wong* where the two approaches were addressed fully and squarely by the majority, concluded emphatically that instinctive synthesis was the correct method of deciding a sentence.⁵⁵

Given the strong contention over the two sentencing approaches, perhaps the most notable feature of the majority judgement is that the distinction drawn between them is not a hard and fast one. There is significant flexibility in what the majority had to say in coming down on the side of instinctive synthesis. This lends considerable weight to the view advanced by Kirby J, as we shall see, that the difference between the two approaches is more apparent than real. Clearly, the issue for the majority was not whether a trial judge should make his or her reasons for

⁵² *R v Payne* (2004) 89 SASR 49 [18], [24], [20], [29], [44], [55], [65].

⁵³ Section s 32A(3) of the *Criminal Law (Sentencing) Act* 1988 (SA) allows for a departure from the mandatory minimum non-parole period on the basis of three factors:

- (a) the offence was committed in circumstances in which the victim’s conduct or condition substantially mitigated the offender’s conduct;
- (b) if the offender pleaded guilty to the charge of the offence — that fact and the circumstances surrounding the plea; and
- (c) the degree to which the offender has co-operated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.

⁵⁴ Eric Colvin, ‘Sentencing Principles in the High Court and the PSA’ (2003) 3 *Queensland University of Technology Law and Justice Journal* 86, 102–3.

⁵⁵ See especially, *Markarian v The Queen* (2005) 228 CLR 357 [1]–[47], [37].

handing down a sentence clear — that was unequivocally accepted as a necessity in modern sentencing⁵⁶ — but one of the emphasis to be placed on sentencing factors in arriving at the decision.⁵⁷ Their objection was to the placement of an exaggerated emphasis on some factors by attaching numerical values to them in a way tending to skew the final sentence.⁵⁸ Their Honours were not opposed to a logical, structured, sequential and, where needed and appropriate, numerical, approach to sentencing. Indeed, the majority judgement expressly endorsed such a rational approach and eschewed arcane and subjective reasoning in the exercise.⁵⁹ Their Honours emphasised that instinctive synthesis has a strong accommodation with the need for ‘transparency’ and ‘accessible reasoning’ in sentencing and implicitly rejected the notion that sentencing is ‘an arcane process into the mysteries of which only judges can be initiated’.⁶⁰

In understanding the approach of the majority, it is important to pay attention to the opening remarks in their judgement.⁶¹ It is not useful, their Honours point out, to ask whether a staged process was used in arriving at the final decision, for that is a meaningless exercise in terms of the applicable basic legal principle.⁶² Instinctive synthesis and staged reasoning, they say, are not necessarily distinct from one another in any hard and fast way and to begin by concentrating on the kind of reasoning used is to focus in the wrong place.⁶³ Rather, according to the majority, the focus should be initially on the much broader test identified in *House v The King*⁶⁴ in assessing the original sentence: Is specific error shown [in the way that the trial judge arrived at the sentence]’?⁶⁵

Read properly, then, the majority in *Markarian* lend much more support to structured and sequential reasoning in sentencing than some commentators give them credit for.⁶⁶ The majority judgement is not antipathetic to structured reasoning per se. Rather, it is opposed to structured reasoning badly conceived and applied. Where there is a gap between the majority’s approach to sentencing and that of Kirby J as a proponent of the more structured approach, it is a relatively narrow one. In the end, the majority objection seems to be to a particular kind of structured reasoning — the kind that quantifies certain factors at the expense of others in a way leading to a misplaced emphasis on them. It is this kind of distortion that the

⁵⁶ Ibid [39].

⁵⁷ They cited the majority in *Wong* in support of this principle: Ibid [37].

⁵⁸ Ibid.

⁵⁹ Ibid. The majority used the phrases ‘staged sentencing process’ and ‘reasoned sequentially’ with implicit approval and certainly without disapprobation: Ibid [24].

⁶⁰ Ibid [24], [39].

⁶¹ Ibid [24], [25].

⁶² Ibid.

⁶³ Ibid.

⁶⁴ (1936) 55 CLR 499.

⁶⁵ *Markarian v The Queen* (2005) 228 CLR 357 [25].

⁶⁶ See, eg, Edney and Bagaric, above n 5, 24, 25, where the perception of the majority judgement is one of vacillation and lack of clarity in judicial decision-making rather than flexibility and accommodation.

majority wanted to rule out by stating that the correct approach to sentencing was one of instinctive synthesis. Instinctive synthesis in the mind of the majority has plenty of room for structured reasoning of a certain kind.

In similar vein, it is instructive to consider the views of McHugh and Kirby JJ as an illustration of the way in which judicial thinking appears to have diverged on the subject without there necessarily being much substance to that divergence. Both Kirby and McHugh JJ, in a roundabout way, end up saying something very similar in their respective judgments. And both judgements are, in their own way, essentially in line with the majority, notwithstanding Justice Kirby's stance to the contrary.

At first sight, their Honours appear to be intractably on opposite sides in the debate — Kirby J as a two-tier sentencer and McHugh J as an instinctive synthesiser. This case was the first opportunity for both judges to give full judicial expression to their views on the subject in the High Court and this may have contributed to the vigour of their apparent opposition.⁶⁷ McHugh J took the view that the 'appearance of objectivity and unfolding reason' in two-tier sentencing was 'illusory'.⁶⁸ That process, his Honour said, lacked the precision and certainty its proponents claimed for it.⁶⁹ McHugh J's view was that, despite its claim to be a structured approach, in the end it still relied upon judicial value judgment and it was misleading to suggest otherwise.⁷⁰ Kirby J, on the other hand, championed the two-tier approach because it meant that the sentencer met the needs of accountability and reasonableness required in modern sentencing.⁷¹ McHugh J is troubled by what he sees as the nonsensicality of the two-tier process whereas Kirby J seems to be making out a case for two-tiered reasoning on the grounds that it is clearer and more informative.

⁶⁷ For both judges, *Markarian* brought to a head thinking that had been developing for some years and which had hitherto existed in inchoate form in their dicta in previous High Court cases. For example, in *AB v The Queen* both gave brief expression to opposing views on sentencing approach: *AB v The Queen* (1999) 198 CLR 111 [99]–[100] (Kirby J), [16] (McHugh J). Furthermore, in *Ryan v The Queen* (2001) 206 CLR 267 at [144], McHugh J stated his opposition to two-stage sentencing but without elaborating because it was not sufficiently at issue for him to do so. McHugh J was not on the bench in *Wong* but Kirby J was and took the opportunity to make a broad observation on the issue. However, as discussed earlier in this article, his Honour did not consider the two approaches to be directly relevant to the issues at hand and, accordingly, deferred a full expression of his views: *Wong v R* (2001) 207 CLR 584 [101]–[103]. Furthermore, in *Johnson v The Queen*, although his Honour made some observations on the issue, Kirby J pointed out that it was not necessary to revisit the 'controversy over the "instinctive synthesis" approach to the sentencing process' because at that stage a decision on the two sentencing approaches was not 'conclusively held' by the High Court, there being only *obiter dicta* on the matter: *Johnson v The Queen* (2004) 205 ALR 346 [40].

⁶⁸ *Markarian v The Queen* (2005) 228 CLR 357 [56].

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid* [135].

However, on closer scrutiny, the differences between the two judgements appear significantly less and it may well be that their respective positions are much closer than first appears. For example, it is clear from the following that McHugh J accepts that new and old restraints on judicial discretion — judicial instinct — have a legitimate role to play:

The acceptance of the role of instinctive synthesis in the judicial sentencing process is not opposed to the concern for predictability and consistency in sentencing that underpins the rule of law and public confidence in the administration of criminal justice. ... [J]udicial instinct does not operate in a vacuum of random selection. On the contrary, instinctive synthesis involves the exercise of a discretion controlled by judicial practice, appellate review, legislative indicators and public opinion. Statute, legal principle, and community values all confine the scope in which instinct may operate.⁷²

Elsewhere in his deliberation McHugh J uncritically referred to guideline judgments as something that may guide ‘the judicial “instinct”’ in passing sentence.⁷³ It appears, therefore, that on this fundamental aspect of sentencing McHugh J is at one, or very close to it, with Kirby J. For his part, Kirby J makes it clear that he is not arguing for a rigidly structured approach to sentencing. Rather, he too favours a flexible approach leaving scope for judicial discretion, so long as this is within proper limits:

I agree that there is no single correct sentence ... I also agree that sentencing is not a mechanical, numerical, arithmetical or rigid activity in which one starts from the maximum fixed by Parliament and works down in mathematical steps. The process is not so scientific. Because there are a multitude of factors to be taken into account ... the evaluation ... is necessarily imprecise. Human judgment is inevitably invoked ... That said, there are outer boundaries. They control the scope for judicial officers to indulge individual idiosyncracies.⁷⁴

So, where do the differences — if they really exist — lie between the two judges? Kirby J seems to think that there are no real differences between two-tier sentencers and instinctive synthesisers. The difference between the two approaches, he speculates, may be little more than a semantic one:

⁷² Ibid [84].

⁷³ Ibid [80].

Allan Abadee sees these remarks by Justice McHugh as a strong endorsement of the compatibility between guideline judgements and instinctive synthesis even suggesting that it may extend as far as McHugh J being supportive of the validity of numerical guideline judgements within the context of global reasoning. Alan Abadee, ‘The Role of Sentencing Advisory Councils’ (Paper delivered at *Sentencing Principles, Perspectives & Possibilities*, Canberra, 10–12 February 2006) 15.

⁷⁴ Ibid [133].

Where then have we arrived at the end of this judicial journey? The joint reasons continue to chastise the ‘two-tiered approach’. Yet if it is merely a ‘sequential’ approach, involving distinct factors, it is apparently unobjectionable ...

Perhaps, in the end, the ‘instinctive synthesis’ means nothing more than that the sentencing judge is to take everything relevant into account and to reach a final judgment. But that is what judges have always had to do. So what does the reference to ‘instinctive’ add except to distract?⁷⁵

In a somewhat similar vein, closer scrutiny of McHugh J’s opposition to tiered sentencing reveals that he, too, thinks that the two approaches are tantamount to the same thing. His Honour states that ‘[t]he correctness of the sentence always depends on the correctness of the value judgment in assessing the first-tier sentence.’⁷⁶ It is fallacious, his Honour implies, to assess accurately the second tier by any process other than instinctive synthesis because it is simply beyond the capacity of the judicial human mind to do so.⁷⁷ It is on the basis of this analysis of the two-tier process that McHugh J concludes that ‘its appearance of objectivity and unfolding reason is illusory’.⁷⁸

So, although they appear to analyse the sentencing process from very different positions, both judges are, in effect, very close to saying the same thing. Despite the apparent differences, we can see a core of common agreement in their statements which is broadly in line with the thinking in the majority judgement. The two sentencing approaches have, insofar as they can be said to be truly separate, a strong compatibility with one another. The fact that the New South Wales Court of Criminal Appeal was able to apply instinctive synthesis in such a mathematicised way in *Otto* strongly suggests this. Hall J, in his very quantified leading judgement in *Otto*, relied partly on McHugh J in *Markarian*.⁷⁹ As we have seen, *Markarian* did not prohibit mathematical adjustments to sentence, but neither did it wholeheartedly embrace them. A reading of Hall J’s judgement in *Otto* indicates that it was this ambiguity that allowed his Honour to reason as he did.⁸⁰ And the fact that the appellate judges in the *Overall Bandits Case* reached different sentencing conclusions, having reasoned from the same broad *Wong/Markarian* instinctive

⁷⁵ Ibid [136], [137].

⁷⁶ Ibid [56].

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ For Hall J’s reliance on *Markarian* and McHugh J’s judgement in particular see *R v Otto* [2005] NSWCCA 333 [48]–[105]. See especially, [56], [57], [75]. The strongly quantified application of *Wong/Markarian* instinctive synthesis is particularly evident at [86]–[105].

⁸⁰ This same ambiguity in *Markarian* enabled Doyle CJ to accept a significant degree of mathematicisation in the sentencing approach of the trial judge in the *Overall Bandits Case* [2008] SASC 99 [17], [11]–[34].

synthesis premise, further suggests that any difference between the two approaches may be largely academic in its significance.⁸¹

VI CONCLUSION

It is characteristic, then, of the judicial debate on sentencing approach that McHugh and Kirby JJ in *Markarian* are very close to saying the same thing and that neither is very far from the majority. The strong suggestion in that case is that the apparent sharp distinction between instinctive synthesis and two-tier sentencing is more illusory than real. If the differences in approach within the judiciary in the end are minimal, it could well be that the line of demarcation in the debate has been drawn in the wrong place. Viewed thus, the difference is not so much between soft instinctive synthesisers and two-tier proponents within the judiciary but between the judiciary and hard measurers — stern utilitarians — located outside the judicial sphere. Seen in this light, it is more a contest between judges and their critics in academia, the media and politics than it is a serious schism within their own ranks.

In *Wong* and *Markarian* the judiciary has gone as far as it can in elucidating the correct broad approach to sentencing. The most pressing need now is not for further definition of the approach in the abstract, but for the judiciary to find better ways of expressing reasons for the sentences handed down in particular cases. Arguably, the common judicial ground on sentencing is strong enough for such an approach to yield the clear and consistent sentencing being demanded of them.

⁸¹ Certainly Doyle CJ's dictum in this case referred to above suggests this. See *Overall Bandits Case*, above n 40 and associated text, [48].