Case Note
The Burden of Proof at Sentencing: Storey's Case

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INTRODUCTION

The vexed question of the standard of proof to be applied at the sentencing stage of a criminal trial is gradually being resolved. Previous authority supporting a civil standard is being overturned. Most recently, in *Storey* [1998] 1 VR 359, a Full Bench of the Victorian Court of Appeal joined the move to the criminal standard by laying down that disputed circumstances of aggravation must be established by the prosecution beyond reasonable doubt. However, it left circumstances of mitigation to be established by the defendant on the balance of probabilities. Whether proof of mitigation should require the defendant to assume more than an evidentiary burden is still being debated. The High Court could usefully intervene to clarify the rule by adopting the criminal law standard of proof in its entirety as a general common law principle of sentencing in Australia.

THE PROBLEM

What is the standard of proof to be applied in the resolution of disputed facts at sentencing?[1] And on whom lies the onus? The facts needed for sentencing primarily relate to the nature of the offence and of the offender, but can also concern other relevant matters such as the prevalence of the particular class of crime, the availability of rehabilitative or other services for particular types of offender, and the impact of the crime on victims.[2]

In most cases, disputes regarding the relevant facts at sentencing do not arise. The judge or magistrate will ordinarily be informed of what the offender did from the evidence adduced at the trial or hearing, or in relation to indictable offences, from the sworn statements or depositions proffered at the committal. On a plea of guilty, the facts relating to the crime are less developed since the plea only establishes beyond reasonable doubt the basic elements of the offence charged. However, the prosecution and the defence can enlarge upon the circumstances of the crime by an agreed version of the

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[1] See generally, D Thomas, 'Establishing a Factual Basis for Sentencing' [1970] *Criminal Law Review* 80; R G Fox and B M O'Brien, 'Fact Finding for Sentencers' (1975) 10 *Melbourne University Law Review* 163; M Wasik, 'Rules of Evidence in the Sentencing Process' (1985) 38 *Current Legal Problems* 187; K Warner, 'Sentencing Review 1996' (1997) 21 *Criminal Law Journal* 217, 219–224. An extensive review of Australian, United Kingdom, Canadian and United States case law can be found in *Langridge* (1996) 87 A Crim R 1, 3–21.

[2] Required to be taken into account under the sentencing guidelines contained in *Sentencing Act* 1991 (Vic), s 5(2)(da)&(db), *Sessions* (unreported, Supreme Court of Victoria, Court of Appeal, 3 July 1997).

facts and, again in the superior courts, reference can be made to material sworn to as part of the committal proceedings. If a verdict of guilty has been returned after trial, all facts relating to the offence which are clearly implied by the verdict must be accepted and acted upon by the sentencer as proven beyond reasonable doubt. This is so whether or not the sentencer agrees with the verdict,[3] and even if he or she knows the facts to be different.[4]

Even so, the factual implications of the plea or verdict may still be inadequate for sentencing purposes.[5] These inadequacies may touch upon the offence or to the offender. There may be contention because there is ambiguity regarding what might be implied, as when the verdict is consistent with more than one version of the facts.[6] Or a dispute may arise because there are simply insufficient sentencing facts implied in the verdict. For example, a conviction for a strict liability offence carries no implication as to the accused's state of mind with regard to the actus reus. The counts to which the defendant has pleaded or been found guilty may be said to be representative of a greater number of offences which the person denies having committed.[7] Likewise, a person willing to plead guilty to possession of illicit drugs may insist that they were possessed for personal rather than commercial purposes.[8] Even a statement of agreed facts regarding the circumstances of the offence tendered by the parties for the purpose of sentencing may be rejected by the sentencer,[9] or may leave other pertinent matters relating to the circumstances of the offence unresolved.

The most important sentencing facts relating to the accused, concern the person's remorsefulness or otherwise, their motive and initiative in offending, any prior or subsequent criminality, their social and psychological status, and their suitability for any treatment-based measures which might benefit them. That all of these personal factors are potentially the source of dispute at sentencing is acknowledged, in part, by the provisions for filing an intention to dispute the contents of a presentence report contained in the *Sentencing Act* 1991 (Vic).[10] However, these statutory provisions are silent regarding the applicable burden of proof.

Other extraneous facts may also be material to the sentence. These can include the prevalence, or alleged increased prevalence, of the class of crime committed,[11] the hardship the proposed sentence may cause to others

[3] *Boyd* [1975] VR 168.
[4] *Webb* [1971] VR 147.
[5] R G Fox and B M O'Brien, 'Fact Finding for Sentencers' (1975) 10 MULR 163, 171–8.
[6] Eg where a verdict of manslaughter is sustainable under a number of different views of the facts.
[7] M Chapman, 'Specimen Counts and Sentencing: A Principled Approach and the Proper Procedure' (1997) 61 *Journal of Criminal Law* 315.
[8] *Chamberlain* [1983] 2 VR 511; *Anderson* (1983) 177 CLR 520; *Nardozzi* [1995] 2 Qd R 87.
[9] *Chow* [1992] 28 NSWLR 593; *Sagdic* v *Gowing* (1995) 82 A Crim R 26.
[10] *Sentencing Act* 1991 (Vic), s 18K (disputed reports in relation to indefinite sentences), s 95D(2) & s 95E(2) (right to cross-examine makers of victim impact statements or witnesses called in support of such statements), s 99Z (disputed pre-sentence reports), s 99C (disputed drug and alcohol assessment reports).
[11] Eg *Downie & Dandy* (unreported, Supreme Court of Victoria, Court of Appeal, 27 June 1997).

dependent on the offender,[12] and the availability or otherwise of particular services or facilities. Facts relating to the offence, the offender, or related matters may be regarded variously as aggravating or mitigating the offender's criminality. More importantly, an adverse finding in relation to any of them is likely to expose the person to punishment of a different kind, or of a greater severity than otherwise would be appropriate.

How are disputes between the prosecution and the defence over such matters to be resolved? According to what standard of proof? Who is to bear the risk of non-persuasion? Does it matter that some elements may relate to facts that were an issue in determining guilt, while others may be of an extraneous nature? To what extent should judicial flexibility and informality at sentencing be compromised by insisting upon a degree of persuasion more appropriate to the adjudicative stage of the criminal trial? Not only has Victoria recorded disagreements between members of the Court of Criminal Appeal in respect of these questions in cases such as *Chamberlain*[13] and *Ali*,[14] but significant differences have existed between some of the states in their approach to what ought to be regarded as a fundamental common law principle in sentencing.[15] The High Court has been conscious of the difficulty, but has so far sat on the fence.[16] Its hesitancy in stating a principle of general application may be due to an awareness that the state courts seem to be gravitating towards a common position, but the court still has a role to play in resolving 'differences of opinion between different courts, or within the one court, as to the state of the law'.[17]

In May 1996, the Court of Criminal Appeal of Western Australia, in the case of *Langridge*,[18] convened a Full Bench to review its prior pronouncements on the standard of proof at sentencing. It overturned the earlier view that, where issues relevant to the aggravation of a sentence were contested, the sentencer need only be satisfied of the existence of the aggravating element on the balance of probabilities. It held that it was for the Crown to prove such matters beyond reasonable doubt. In December of the same year, the Victorian Court of Appeal also convened a Full Bench in the case of *Storey*[19] to

[12] *Cobiac* v *Liddy* (1969) 119 CLR 257; *Tame* v *Fingleton* (1974) 8 SASR 507.
[13] [1983] 2 VR 511.
[14] [1996] 2 VR 49 (decided by the newly-created Court of Appeal).
[15] ACT:*Capobianco* (1978) 20 ACTR 29.
NT:*Browne* v *Smith* (1974) 24 FLR 1.
NSW: *O'Neill* [1979] 2 NSWLR 582; *Martin* [1981] 2 NSWLR 640; *Savvas (No 2)* (1991) 58 A Crim R 174; *Chow* (1992) 28 NSWLR 593. See also the later decision of a Full Bench of the NSW Court of Criminal Appeal confirming that the test is proof beyond reasonable doubt, *Isaacs* (1997) 90 A Crim R 587, 592.
Qld:*Welsh* [1983] 1 Qd R 592; *Boney, Ex parte Attorney General* [1986] 1 Qd R 190; *Jobson* [1989] 2 Qd R 464; Clayton [1989] 2 Qd R 439; *Nardozzi* [1995] 2 Qd R 87.
SA:*Law* v *Deed* [1970] SASR 374.
Tas:*Bresnehan* (1992) 1 Tas R 234; *Turnbull* (1994) 4 Tas R 216. See also Warner K, *Sentencing in Tasmania*, Federation Press, 1991, 25–39.
WA: *Collins* (1993) 67 A Crim R 104; *Salisbury* (1994) 12 WAR 452; *Langridge* (1996) 87 A Crim R 1.
[16] *Anderson* [1983] 177 CLR 520.
[17] *Judiciary Act* 1903 (Cth), s 35A.
[18] (1996) 87 A Crim R 1.
[19] [1998] 1 VR 359.

re-examine previous case law supporting a civil standard of proof at sentencing. It too made a major shift towards the criminal standard.

STOREY'S CASE — BACKGROUND

The facts in *Storey*[20] were straightforward. He had pleaded guilty before the County Court to a presentment alleging trafficking and possession offences under the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) and, pursuant to a procedure available under *Crimes Act* 1958 (Vic), s 359AA, had also consented to being sentenced at the same time for the summary offence of possessing a pistol as a prohibited person contrary to *Firearms Act* 1958 (Vic).

The disputed sentencing issue related to the significance to be attributed to Storey's possession of the pistol. The judge clearly thought it was an aggravating element in that the weapon formed part of a 'drug dealer's kit' found in the accused's possession when he was apprehended by police. In sentencing Storey, he remarked that 'the presence of the pistol . . . gives some indication of the lengths to which you were prepared to go to protect your business, [this] and your sole motivation of greed, all point toward condign punishment.'

On the appeal against sentence, counsel for Storey argued that it was clear from these words that the judge had treated the possession of the firearm as justifying a more severe penalty than otherwise would have been imposed. But it was contended that there was insufficient material before the court upon which the judge could have been satisfied beyond reasonable doubt of the accused's willingness to use a pistol to protect a drug trafficking business.

Counsel submitted that because sentencing was such an integral part of the criminal process, the onus and standard of proof of disputed facts at sentencing should be the same as that borne by the prosecution in establishing guilt, namely proof beyond reasonable doubt. The only burden that could be legitimately be cast upon the offender would be an evidential burden to produce credible material supporting circumstances of mitigation. Even then it was argued that the prosecution would have to bear the ultimate burden of displacing the claim of mitigation in accordance with the criminal standard. These submissions went beyond any of the burden and standard of proof rules that had hitherto been recognised in Victoria. However, they drew strength from authorities elsewhere, particularly recent observations by the High Court in relation to South Australian law on the point.

The two leading cases in Victoria on the principles to be applied by a sentencing judge in making findings of fact for sentencing purposes were *Chamberlain*[21] and *Ali*[22] decided a little over a decade apart. In *Chamberlain*[23] the Full Court, drawing on a judgment of Dixon J. in *Briginshaw* v

[20] [1998] 1 VR 359.
[21] [1983] 2 VR 511.
[22] [1996] 2 VR 49.
[23] [1983] 2 VR 511.

Briginshaw[24] which allowed for flexible fact-finding standards in the matrimonial causes jurisdiction, held that 'the degree of persuasion required will vary with the nature and consequence of the fact or facts in question'.[25] Though some facts in issue could be determined on a simple balance of probabilities, facts that were 'critical to the determination of the sentence' had to be proven beyond reasonable doubt:[26]

> The basal requirement of the criminal law is that each and every element of the offence charged should be proved beyond reasonable doubt in order to justify a conviction. The requirement does not mean that every fact alleged by the Crown must be proved beyond a reasonable doubt. One piece of evidence may be open to doubt but when it is coupled with other pieces of evidence, each of which may itself be open to doubt, persuasion beyond a reasonable doubt of the ingredient of the offence may result. It follows that when forming his own view of the facts for the purpose of passing sentence a trial judge cannot be required to be satisfied beyond reasonable doubt of every fact which he considers relevant. To require a judge to be satisfied beyond reasonable doubt of every relevant fact might lead in some cases to quite undue weight being given to self serving statements offered by an accused during interrogation or evidence. . . . On the other hand, to allow the finding of a fact which is critical to the determination of the sentence to be imposed upon a basis that admits of the existence of a reasonable doubt about the existence of that fact would plainly be unfair.

In offering this sliding standard of proof, the court had little to say on onus of proof, particularly, in respect of mitigating circumstances.[27] Three years prior to the decision in *Ali*, the High Court had occasion to consider an appeal from South Australia in which the accused had pleaded guilty to an offence of production of cannabis, but had contested the prosecution's allegation at sentencing that the production was for a commercial purpose. The prosecution had, without objection, accepted that it was under an obligation to prove this aggravating factor beyond reasonable doubt, but two members of the Supreme Court of South Australia had said that the prosecution had assumed an onus of proof which properly rested upon the accused.[28] In rejecting this proposition, three members of the High Court of Australia (Deane, Toohey and Gaudron JJ) said in *Anderson*:[29]

> If, on a sentencing hearing after a plea of guilty, the Crown wishes to rely on some alleged, but disputed, factual circumstance as aggravating the offence, the ordinary rule is that the onus lies upon the Crown to establish the existence of that circumstance. It is common ground, and rightly so, that the standard of proof which rests upon the Crown in such a case in South Australia is the ordinary criminal standard, namely, beyond reasonable doubt. If the Crown fails to establish the disputed circumstance of aggravation to

[24] (1938) 60 CLR 336, 360–3.
[25] [1983] 2 VR 511, 514.
[26] *Chamberlain* [1983] 2 VR 511, 514.
[27] There had, however, been earlier unreported authority suggesting that the onus in relation to the establishment of mitigating circumstances rested upon the defendant: *Hoppner* (unreported, Full Court of Victoria, 7 October 1980).
[28] That is, of proving a non-commercial purpose, namely, personal use.
[29] (1993) 177 CLR 520, 536.

that standard of proof, the offender must be sentenced on the basis that that circumstance of aggravation has not been shown to exist.

The same point was confirmed, in a qualified fashion, by the other two members of the Court (Brennan and Dawson JJ) as being the practice in South Australia, but they declined to decide whether that practice was correct 'in respect of facts not amounting to circumstances of aggravation which increase the liability to punishment.'[30] They also noted that while the approach in South Australia had been followed in New South Wales, Tasmania, the Australian Capital Territory and perhaps Western Australia,[31] a different view had been taken in Victoria[32] and Queensland[33]. They did not offer to resolve the conflict.

The court said nothing about the standard and onus of proof for mitigating circumstances and the support of the minority for the general proposition advanced by the majority was qualified by confining it to 'circumstances of aggravation which increase the liability to punishment'. In the particular context, this was a reference to situations in which the elements of aggravation are read as creating a separate aggravated form of the offence accompanied by a higher penalty.[34] With these, the circumstances of aggravation have to be alleged in the presentment and proven by the Crown beyond reasonable doubt together with the substantive elements of the offence in question.[35] It is then for the jury to decide whether those circumstances of aggravation are established.

CIRCUMSTANCES OF THE OFFENCE VS CIRCUMSTANCES OF THE OFFENDER

In *Ali,*[36] in obiter, two members of the Victorian Court of Appeal (Callaway JA and Crockett AJA) broke new ground by urging that in finding sentencing facts, a distinction should be drawn between the circumstances of the offence and the circumstances of the offender. Their idea was that the prosecution should bear the onus of establishing the circumstances of the offence beyond reasonable doubt, leaving it to the offender to establish any relevant

30 Id 526.

31 Decided prior to *Langridge* (1996) 87 A Crim R 1 which over-ruled earlier Western Australian authority supporting a 'balance of probabilities test' for resolving disputed matters of aggravation at sentencing.

32 'The degree of persuasion required will vary with the nature and consequence of the fact or facts in question', *Chamberlain* [1983] 2 VR 511, 514.

33 'In this State it has heretofore been taken to be on the balance of probabilities for any additional relevant circumstances which are not elements of the offence covered by the guilty plea, but the standard should be taken as reflecting the seriousness with which the issue should be determined', *Nardozzi* [1995] 2 Qd R 87, 90 per Macrossan CJ.

34 This was not such a case.

35 *Kingswell* (1985) 159 CLR 264; *Meaton* (1986) 160 CLR 359; *Ernst* [1984] VR 593; *Martin* [1984] 2 NSWLR 236; *Bridges* (1985) 20 A Crim R 271. Examples are to be found in *Crimes Act* 1958 (Vic), s 32, s 75A and s 77.

36 [1996] 2 VR 49.

circumstances arising out of his or her personal situation on the balance of probabilities.

In their formulation, no distinction was drawn between aggravating and mitigating circumstances, even though it was implicit that the circumstances the offender would be relying on as relevant to sentence would only be mitigating ones. No accused would be interested in proving his or her prior convictions. Yet these are ordinarily not a circumstance of the offence, but a circumstance of the offender. The existence of priors is an aggravating element either because recidivism is visited with a higher maximum statutory penalty, or because priors negative the assumption that the person before the court is of good character. In *Ali*, it was conceded that this would have to be one of the exceptions to the proposed rule that offender circumstances had to be proven by the offender. [37]

In *Storey*, decided a year later, the majority (Winneke P, Brooking, and Hayne JJA and Southwell AJA) recognised that the rationale for excepting prior convictions was that they were an aggravating factor and, as such, were for the prosecution to prove. But if prior convictions were to be exempted, why not other manifestations of bad character? Furthermore, character, an obvious attribute of the offender rather than the offence, could be good as well as bad. How should this affect the burden of proof? The members of the majority were able to compile a list of other factors which seriously undermined the validity of a 'circumstances of offence'/'circumstances of offender' dichotomy.[38] For example, how should the manner in which the offender has responded to earlier sentencing leniency be regarded? If the offender's response was a good one (notwithstanding the current offence) it might be pressed by the offender as a favourable sentencing consideration; but if the response was bad (as evidenced by the current offence) this would be a matter for the prosecution despite it being a circumstance of the offender. The same would also be true if, when committing the current offence, the offender was on bail, or serving a suspended sentence of imprisonment, or on parole. Likewise, family background which was a circumstance of the offender could be of relevance in diametrically opposed ways. Extreme disadvantage and deprivation might make a crime, such as theft, understandable if not forgivable. But the same crime in a person who had benefited from an advantageous and indulgent family environment might be regarded as particularly mean and inexcusable. Even the holding of a position of trust could work both ways — either being relied upon as evidence of good character in the offender or, if the offence is one of breach of that trust, as an aggravating circumstance of the offence.

The last example highlights the fact that one element may be both an aspect of the offence and a characteristic of the offender.[39] The same applies to some mental states such as intention, recklessness or negligence, but not to others,

[37] Id 60.

[38] *Storey* [1998] 1 VR 359, 365.

[39] Cf 'The criticism that a particular fact may be as much a circumstance of the offender a of the offence carries little weight, for obviously the rule relating to the circumstances o the offence would prevail', *Storey* [1998] 1 VR 359, 376 per Callaway JA.

such as motive. On the other hand there may be factual elements, such as the prevalence of the crime, which though well recognised as relevant to sentence appear to be neither a circumstance of the offender, nor an immediate circumstance of the instant offence.[40]

The response, in *Ali*, to these difficulties was that the detailed application of the proposed distinction between the circumstances of the offence and those of the offender for the purpose of proof would have to be worked out on a case by case basis.[41] However, both the proposed rule, and the manner in which it was to evolve was rejected out of hand in *Storey*:[42]

> The distinction between circumstances of the offence and the circumstances of the offender is a distinction which does not identify sufficiently the kind of problem that has to be solved and, in particular, does not focus upon the use that is to be made of findings of fact in sentencing or upon the way in which disputes about such facts arise . . . To divide facts between those that constitute the circumstances of the offence and those that constitute the circumstances of the offender assumes that all of the facts that are relevant to the question of sentence can be classified in this way. In our opinion, no such *a priori* classification is possible.

The preference of the Full Bench was to follow the approach approved for South Australia by the High Court in *Anderson's case* and to draw a distinction between aggravating and mitigating circumstance's when allocating the onus and standard of proof:[43]

> . . .We consider that principle requires the conclusion that if the circumstance is one that the judge considers aggravates the offence, the judge must be satisfied of that fact beyond reasonable doubt.

Counsel for Storey tried to persuade the members of the Court of Appeal that the Crown bore the onus of proving all factual matters connected with sentence and that the applicable standard was proof beyond reasonable doubt. The Director of Public Prosecutions conceded that facts likely to aggravate the sanction should be so proven, but denied that every fact relevant to sentence was the Crown's responsibility.[44] In particular, he argued that the onus of establishing matters in mitigation fell upon the offender on the balance of probabilities. The Court agreed:[45]

> . . . we consider that the principles to be applied are those which we have earlier identified, namely that the judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have

[40] '. . . it is not a circumstance of the offence. It is a circumstance of other offences, which may have a bearing on general deterrence', *Downie & Dandy* (unreported, Supreme Court of Victoria, Court of Appeal, 27 June 1997).

[41] [1996] 2 VR 49, 60.

[42] *Storey* [1998] 1 VR 359.

[43] Id 369.

[44] Victim impact statements are likely to aggravate the penalty (but could mitigate it if the victim is forgiving). The Crown does not represent the victim, indeed the victim is entitled to be separately represented, *Mileham* (1995) 83 A Crim R 449. What standard of proof should the victim be required to discharge before the evidence of impact is taken into account as a relevant sentencing fact?

[45] *Storey* [1998] 1 VR 359, 370–1.

been established beyond reasonable doubt, but if there are circumstances which the judge proposes to take into account in favour of the accused,it is enough if those circumstances are proved on the balance of probabilities.

ONUS OF PROOF

The Court of Appeal agreed that the Crown was not required to assume a general burden of proving all facts relevant to sentence, or to establish what was an appropriate sentence for the offender. The court held that there was no general issue joined between the Crown and the offender at sentencing as there was at the trial proper:[46]

> There can be no question of either party's undertaking any onus of proving any further fact unless and until it is suggested that there are matters beyond the bare elements of the offence (elements that are established by the verdict or plea) which the judge should take into account in passing sentence . . . It follows that in most cases it will be one or other of the parties which will seek, in the course of the plea, to raise particular issues for consideration by the judge. It will then usually be apparent whether the asserted fact is controverted by the other party or (as may sometimes happen) is not accepted by the judge.

At minimum, this imposes an evidentiary onus on the parties. But it was also pointed out that situations could arise in which neither the prosecution nor the defence had adverted to a factor which the sentencer regarded as important. Even if raised by the sentencer, this did not necessarily mean that an issue was now joined between the parties. Both sides might concede the matter was germane to the exercise of the discretion once the sentencer drew their attention to it. Other situations have arisen in which the parties have proffered a set of agreed facts at sentencing as the result of the plea bargain, only to find the sentencer unwilling to act on them and calling for evidence.[47] On whom the onus of proof was then placed, and at what standard, would turn, according to *Storey*, on whether the different view of the facts taken by the sentencer was adverse or favourable to the offender's interests. However, the court denied that it was appropriate to call upon the prosecution to assume a general burden analogous to the one it bore at the adjudicative stage of the trial.

AGGRAVATING VS MITIGATING CIRCUMSTANCES

Though the distinction between aggravating and mitigating circumstances suffers from many of the same ambiguities as the alleged distinction between offence and offender,[48] the Court of Appeal returned to an earlier line of authorities holding that it was for the offender to prove facts in mitigation,

[46] Id 527. A similar approach is taken to the question of fitness to plead: *Presser* [1958] VR 45.

[47] *Chow* (1992) 28 NSWLR 593; *Mieliki* (1994) 73 A Crim R 72.

[48] See discussion infra in text at fn 65.

irrespective of their characterisation as circumstances of the offence or of the offender. In an earlier Victorian drug case in which the true extent of the defendant's involvement was in issue at sentencing (and not resolved by the trial or plea), the Victorian Full Court had called upon the defendant to at least satisfy the evidential standard:[49]

> The applicant's failure to prove on the hearing of the plea any mitigating circumstances of the offence, as opposed to mitigating factors personal to himself, is a relevant matter . . . The extent of his participation will hardly ever appear from overt acts which the Crown will be able to prove. If the offender does not give evidence, he can hardly complain if the Court declines to make inferences in his favour.

However, in *Storey* it was decided that the offender must bear the entire risk of non-persuasion in relation to circumstances of mitigation. If not accepted by the prosecution, the existence of those circumstances has to be proven by the offender on the balance of probabilities. Both the evidentiary and the legal burdens with respect to disputed circumstances of mitigation fall upon the offender. Unless such mitigating circumstances are established on the balance of probabilities, the sentencer is to proceed on the basis that they do not exist.[50] Certainly, in the view of the majority of the court, the prosecution does not have to disprove, beyond reasonable doubt, matters which a sentencer proposes or is invited to take into account in favour of the offender.

Callaway JA, citing the Western Australian case of *Langridge*,[51] strongly dissented on this point:[52]

> So far as principle is concerned . . . the facts which justify the sanction are no less important than the facts which justify the conviction, and both should be subject to the same standard of proof. If that is so, the principle cannot be confined to circumstances of aggravation. It must extend to circumstances of mitigation in respect of which the prisoner has discharged the evidentiary onus.

He would have the offender bear an evidentiary burden,[53] but once that was discharged, the circumstances of mitigation would have to be assumed in his or her favour unless negatived by the prosecution beyond reasonable doubt. This approach, which had been championed in South Australia by Bray CJ in *Law* v *Deed*,[54] is attractive not only in the balance it achieves between the parties through its separation of the evidential burden from the persuasive one thus obviating the need for the prosecution to rebut matters of mitigation

[49] *King* (unreported, Supreme Court of Victoria, Full Court, 6 October 1978) 13.
[50] *Arts & Briggs* (1997) 93 A Crim R. 56.
[51] (1996) 87 A Crim R 1, 22 per Kennedy J.
[52] *Storey* [1998] 1 VR 359, 379 per Callaway JA.
[53] Callaway JA makes the point that an evidentiary burden cannot be discharged simply by a statement from the Bar table. Unless the truth of the assertion is accepted by the other side, there must be some evidence or other material before the court, *Storey* [1998] 1 VR 359, 377–8.
[54] [1970] SASR 374, 379, even in the case of circumstances of mitigation peculiarly within the knowledge of the offender. The latter proposition was expressly rejected by McGarvie J in the case of *Hoppner* (unreported, Full Court of Victoria, 7 October 1980).

in advance before they are raised by the defence, but also in its underlying understanding that guilt and punishment, though allocated in two separate stages of the criminal litigation, are complementary parts of the censure being administered by the court. This is reinforced by the *Sentencing Act* 1991 (Vic), s 7 and s 8 which make it clear that the recording of a conviction is itself a significant part of the punishment of the offender. The approach also reflects an awareness of the difficulties which may arise because some mitigating factors will be drawn from the circumstances of the offence itself, eg small quantity of the drug (in which case they attract the orthodox burden of proof rules) while others, eg personal use, might be of an extraneous nature and will be subject to the rule propounded by the majority in *Storey* which places the persuasive as well as the evidential burden on the offender. Callaway's dissenting position in relation to challenged mitigating factors has some support from other jurisdictions in Australia[55] and perhaps from the High Court itself,[56] but the matter awaits an authoritative ruling.

THE PROSECUTION'S BURDEN

> The 'golden thread'[57] is not severed by the scissors of conviction. The question is the extent, if any, to which it is frayed . . .[58]

What burden does the prosecution now have to bear in respect of aggravating factors? First, without going so far as to cast a general onus of proof on the prosecution in a way that parallels the trial proper and which would compel it to negative mitigating factors as well as proving aggravating ones, *Storey's case* has reaffirmed the centrality of the principle in the criminal law that all elements of the state's accusations against the accused should be proved beyond reasonable doubt. Second, this principle applies not only to proof of guilt at trial, but also to elements of aggravation which would enhance punishment at sentencing.

The Director of Public Prosecutions, foreseeing the additional work this might mean for the Crown, sought to revive the *Briginshaw* v *Briginshaw*[59] approach supported by *Chamberlain*,[60] by calling for some sliding scale of standard of proof of adverse disputed facts so that only some (the 'critical' or 'important' ones) would have to be proved beyond reasonable doubt. Other 'less important', disputed facts which the sentencer proposed to take into account adverse to the interests of the accused could be established by the prosecution on the balance of probabilities. This too was rejected.[61] In any

[55] Eg *Nash* v *Haas* [1972] Tas SR 1.
[56] *Anderson* [1983] 177 CLR 520, 539.
[57] *Woolmington* [1935] AC 462, 481.
[58] *Storey* [1998] 1 VR 359, 375 per Callaway JA.
[59] (1938) 60 CLR 336, 360–3.
[60] [1983] 2 VR 511.
[61] *Storey* [1998] 1 VR 359, 370. But the court also emphasised that 'just as on a trial the Crown does not have to prove every fact on which it relies beyond reasonable doubt in order for the jury to conclude that the offence is proved, so too on sentencing, attention must be directed to the relevant issue and it is the issue that must be established to

event, the authority of *Briginshaw* for a standard of proof based on a sliding scale has now been eroded by comments of the majority of the High Court in *Neat Holdings Pty Ltd* v *Karajan Holdings Pty Ltd*,[62] where it was affirmed that, in a civil case, the standard of proof remained one on the balance of probabilities, notwithstanding what was said in *Briginshaw*.

Though the Court of Appeal now requires adherence to the criminal standard of proof in respect of matters of aggravation, it has been keen to emphasise that it does not wish to add excessive procedural subtlety and refinement to the task of sentencing:[63]

> That is . . . why it is important to resolve the issue that we are now considering in a way that is simple and is readily understood and applied. We believe that the distinction between matters according to whether they are to be taken into account for or against the offender meets that test . . . we are not to be taken as suggesting that in a case in which a judge does have to make a finding on a matter which the parties have not expressly or implicitly accepted it will be necessary for the judge to do more than state in substance that he or she is satisfied of the relevant fact. Nor are we to be taken as suggesting that some particular verbal formula should be adopted by the judge. Of course the judge will have to bear in mind, and apply, the principles which we have set out, but we are not to be taken as saying that the bare fact that the judge does not expressly refer to the relevant standard of proof in the course of sentencing remarks is itself evidence of sentencing error.

WHAT IS ADVERSE?

Though rejecting the Director's attempt to distinguish 'critical' facts from less important ones, the bench was prepared to concede that:[64]

> It may very well be that the descriptions of aggravating and mitigating circumstances will be useful shorthand expressions to refer to the distinction we draw. They are, however, no more than shorthand expressions. It would not be right to argue from the tag that is applied to the category of circumstances to some conclusion about whether a particular circumstance is or is not in one group rather than the other. Factors cannot be characterised as always aggravating or always mitigating. For example, the taking of drugs or alcohol will sometimes be put forward as a mitigating factor but it may, in a given case, be held to aggravate the crime. Good standing in the community will usually tend to mitigate but may tend to aggravate if it has been misused. One must always ask what the tendency of the circumstance is in the particular case under consideration. No doubt there will be cases in which the same facts can be seized on by both the Crown and the accused and described by one as an aggravating circumstance and the other as a mitigating circumstance. 'Aggravating' and 'mitigating' must be understood in a wide sense, and without, drawing the distinction which might be drawn

the requisite standard — not each of the individual facts which is said to bear upon the issue', *Storey* [1998] 1 VR 359, 372.

[62] (1992) 67 ALJR 170, 170–1.

[63] *Storey* [1998] 1 VR 359, 372–3.

[64] Id 371.

> between the significance for another purpose on the one hand of a circumstance which renders the crime more serious (for example, the use of a weapon) and on the other hand of a prior or subsequent conviction. The test is not what tag can or should be applied to any particular fact but what use the judge proposes to make of the fact in relation to the offender. If it is a use adverse to the interests of the offender then proof beyond reasonable doubt is required; if it is a use in favour of the offender then proof on the balance of probabilities will suffice.

While some factors, such as use of violence, abuse of trust, or high value of the property involved are regarded inevitably as aggravating the crime, others, such as alcohol consumption or mental disorder are less easily or consistently categorised as aggravating, mitigating or neutral. For instance, mental disorder may be regarded as a mark of reduced culpability and thus operate as a mitigating factor, yet may also be regarded as a pointer to dangerousness and intractability warranting a more severe sentence.[65] Furthermore, the relationship between aggravating and mitigating elements is complicated by the fact that the opposite or negative of an aggravating factor is not necessarily a mitigating one, or vice versa. Thus, a plea of guilty is a mitigating factor, but it is improper to treat a plea of not guilty as an aggravating one. If the same feature of the crime can be characterised as aggravating or mitigating (eg whether the purpose of the drug dealing was commercial or non-commercial), the rule relating to proof of aggravating circumstances should prevail.[66]

Whether a circumstance is be classified as a matter of aggravation turns on its characterisation as adverse or otherwise to the interests of the offender in receiving the least restrictive sanction for his or her wrongdoing. A use adverse to or in favour of the offender implies some pointer on a scale of punishments ranging from least to most severe. A fact is adverse if reliance on it is 'likely to result in a more severe sentence than would otherwise be the case'.[67] Severity can be measured by both quantum and type of sanction. While a longer prison term is usually recognised as more severe than a shorter one, appearances are deceptive.

For instance what if the disputed facts are relevant to the question of whether a life sentence or a determinate one short of life should be imposed?[68] While it might appear that the indeterminate nature of a life sentence will always make it a graver sanction than any determinate one, the truth is that a person serving a life sentence is more likely to be released earlier than anyone awarded a fixed term sentence in excess of 20 years.[69] There are a number of offences under both state and federal legislation carrying statutory maxima of 25 years which indicates the sort of sentences the legislature might have in mind in the upper range of determinate sentences.[70] In *Blake*,[71] the argument

[65] R G Fox, 'Sentencing the Mentally Disordered Offender' (1986) 60 LIJ 416; *Parnis* (1993) 126 ALR 423; *Tsiaras* [1996] 1 VR 398; *Clarke* [1996] 2 VR 520.
[66] *Anderson* (1993) 177 CLR 520, 539–40.
[67] *Langridge* (1996) 87 A Crim R 1, 21 per Kennedy J.
[68] As in *Crimes Act* 1958 (Vic), s 3, s 9A, s 70B, s 321C & s 321I.
[69] This problem is discussed by Tadgell J in *Zeccola* (1983) 11 A Crim R 192, 200.
[70] Eg *Crimes Act* 1958 (Vic), s 44, s 45, s 49A, s 63A & s 75A.
[71] [1962] 2 QB 377.

was put that a 42 year sentence was excessive because it was deliberately designed to be longer than the effective term of a life sentence. This argument was rejected by the English Court of Criminal Appeal because it involved speculating on the manner in which the Executive might vary the execution of the sentence by deciding to release the offender on licence. A life sentence had to be accepted on its face as a sentence for the entire life of the prisoner, unlikely though that might be. That approach is now given statutory expression in Victoria in the recently amended *Sentencing Act* 1991 (Vic) which, by s 5(2AA)(a), now directs that:

> Despite anything to the contrary in this Act, in sentencing an offender a court must not have regard to any possibility or likelihood that the length of time actually spent in custody by the offender will be affected by executive action of any kind.

Likewise, as the range of sentencing options not involving confinement expands, it is not always self-evident whether one type of non-custodial sanction is more or less severe than another. Is a suspended sentence of imprisonment more or less severe than a community-based order of equivalent length? The former permits unsupervised release back into the community, the latter does so under supervision. An offender may regard it adverse to his or her interests to be subject to the onerous core and program conditions of a community-based order[72] and might demand that any disputed facts at sentencing important to the selection of that measure be proven beyond reasonable doubt. But it is submitted, that an offender's personal rating of the relative severity of the proposed sanctions, is not relevant. The hierarchy of sanctions found in s 5(4)-(7), s 7 and s 109 of the *Sentencing Act* 1991 (Vic) defines relative gravity, and according to that hierarchy, a community-based order is less severe than a suspended sentence.

OTHER RULES?

Does *Storey's case* also bring into the sentencing stage of a criminal prosecution all the evidentiary rules applicable to the trial proper, including the exclusion of hearsay? To force all sentencing facts through the needle's eye of the evidentiary standards applicable at trial would mean that most of the background information about the offender now utilised by judges and magistrates would no longer be available. The judges in *Storey* were not prepared to restrict the general approach to free admissibility of sentencing information, but did accept that seriously contested matters would have to be decided on their merits. Their expectation was, however, that in most cases there would be little real dispute about the relevant facts at sentencing, or if a dispute arose, it would be resolved expeditiously:[73]

> Ordinarily, much of what is relied on in sentencing is not the subject of

[72] *Sentencing Act* 1991 (Vic), ss 38–9.
[73] *Storey* [1998] 1 VR 359, 371.

> evidence given on the plea. Judges have always relied heavily on what is asserted from the bar table and we see no reason why that practice should not continue. We are not to be taken as suggesting any departure from current practices on sentencing hearings. As we have said, judges can, and commonly do, act in such hearings on matters that are not proved by evidence that would be admissible at trial. There will, however, be cases, we venture to suggest relatively few cases, in which there will be significant disputes of fact that can be resolved only by the calling of appropriate evidence.

In most instances, the facts required for sentencing will either be common ground or uncontroverted and the sentencer will be satisfied of them from the evidence, depositions, or other material properly before the court. Moreover, the task for the sentencer is to apply the appropriate standard of proof to an *issue* relevant to sentence (eg motive, degree of participation, use of weapons, profit, influence of mental disorder, alcohol or drugs, remorse, etc) and not to every single fact which might contribute to a conclusion that the point in issue has been established to the requisite standard.[74]

An important additional procedural point relates to the manner in which contested issues may emerge at sentencing when the parties have not raised an issue or referred to a factual aspect at the sentencing plea, but the sentencer does. They may have assumed it to be irrelevant or of little weight, but the sentencer has taken a different view. He or she is then duty bound under the *audi alteram partem* rule to mention the matter so that the parties can identify their position and, if necessary, be given an opportunity to make submissions upon it if it is contested.[75]

It should also be remembered that there are limits on how far alleged aggravating circumstances accompanying the offence can be taken into account in evaluating whether the offender should be liable to a higher penalty. The general rule is that circumstances of aggravation which could have been the subject of a separate charge, or which would have warranted a conviction for a more serious offence, but were not so used, should not be relied upon as aggravating factors in fixing sentence.[76]

So far as the facts in *Storey* were concerned, the Court of Appeal accepted that, in the particular circumstances of the case, it was not open to the trial judge to be satisfied, beyond reasonable doubt, that Storey possessed the fire arm to protect his drug business. As the possession of the pistol for this purpose had wrongly been treated as an aggravating sentencing element the application for leave to appeal against sentence was granted, the appeal allowed and the length of the custodial sentence reduced.

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[74] *Storey* [1998] 1 VR 359, 372 joint judgment of Winneke P, Brooking and Hayne JJA and Southwell AJA. 'Accordingly, if there is a question whether trafficking was committed as part of a commercial operation, that must be proved beyond reasonable doubt, but there may be a large number of individual facts showing the nature of the operation. They do not all have to be proved beyond reasonable doubt', per Callaway JA, at 374.

[75] *Brand* v *Parson* [1994] 1 VR 252.

[76] *De Simoni* (1981) 147 CLR 383; *Wyllie* [1989] VR 8; *Vallis* [1996] 1 VR 269; *Dale* (1995) 80 A Crim R 50; *Sessions*, (unreported, Supreme Court Victoria, Court of Appeal 3 July 1997). See discussion of the ruling in *De Simoni* in K Warner, 'Sentencing Review 1996' (1997) 21 *Criminal Law Journal* 217, 224–8.

UNIFORMITY

How far the process of trial and sentencing should be regarded as a unity, though taking place in two stages, has been a continuing concern for the courts. Sir James FitzJames Stephen, commenting in 1863 on the discrepancy which existed between the attention to procedural and evidentiary detail at trial and the absence of such attention at the sentencing hearing, reminded his readers, in a much quoted phrase, that 'the sentence is the gist of the proceeding. It is to the trial, what the bullet is to the powder'.[77] Nowadays sentencing is less perfunctory and more complex than when Stephen was writing, but his warning remains apposite. *Storey's* case correctly stands for the proposition that the burden of proof rules for the allocation of punishment should parallel those for the allocation of guilt. The principle that an accused is entitled to the benefit of any reasonable doubt is no longer to be limited to evidence which only goes to establish guilt of the offence charged. It now applies to facts which are alleged to aggravate the gravity of the wrong-doing and which thus expose the offender to increased punishment.

But because this principle is still not consistently applied throughout Australia,[78] it is submitted that the High Court should now endorse it more fully than it did in *Anderson's case* in the interest of clarifying and laying down an important common law principle of general application. The law relating to the standard of proof at the adjudication stage of a criminal prosecution does not vary from jurisdiction to jurisdiction in this country; why should it still do so at the dispositional stage?

In looking again at the standard and onus of proof at sentencing, the High Court should also heed the urging of Callaway JA in *Storey,* and the late Chief Justice of South Australia in *Law* v *Deed,* that the correspondence between the burden of proof rules at trial and those at sentencing should be made complete in respect of contested issues of mitigation as well as aggravation.

[77] 'The Punishment of Convicts', (1863) 7 *Cornhill Magazine* 189, reprinted in L Blom-Cooper, *The Language of the Law* (1965), 63–4.
[78] Eg *Nardozzi* [1995] 2 Qd R 87.