

## Introduction

Discretion suffuses all stages of the criminal justice process; indeed, it has been said that ‘it is the day-to-day discretionary actions of police officers, prosecutors, defence lawyers, judges, psychiatrists, probation and immigration officers, among others, which are the “stuff of justice” and which make for justice or injustice’.<sup>2</sup> This is nowhere more prominent (or, perhaps, more controversial) than in connection with the discretion associated with sentencing decision-making. Despite their undoubted competence to limit, or even oust, judicial freedom of action in this area,<sup>3</sup> legislative bodies in both England and Australia have historically demonstrated a

---

<sup>1</sup> (2005) 228 CLR 357; [2005] HCA 25 (*Markarian*’).

<sup>2</sup> Loraine Gelsthorpe and Nicola Padfield, ‘Introduction’ in Loraine Gelsthorpe and Nicola Padfield (eds), *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (2003) 1.

<sup>3</sup> See *Palling v Corfield* (1970) 123 CLR 52, 58–9 (Barwick CJ), 68 (Owen J).

reluctance to do so.<sup>4</sup> Sentencing legislation has been enacted, to be sure, but often in a manner that is piecemeal and does not detract to a significant degree from the open-textured character of the sentencing exercise. This has meant that, for the most part, the sentencing judge continues to comprise the fulcrum about which the sentencing decision turns. It is therefore unsurprising that the methodological issues associated with sentencing have for the most part fallen to the courts for resolution.

One such issue that has occupied a good deal of judicial attention in recent times has been the soundness of the so-called 'instinctive synthesis' approach, under which the factors bearing on a sentencing decision are aggregated and assessed in a single, global process of reasoning. Opposed to this is the 'two-tiered' or 'sequential' approach, under which the decision-making process is compartmentalised, and particular factors isolated for the purpose of calculating their specific impact on the ultimate tariff. The precise borderline between the two models is difficult to locate because of the multiple meanings ascribable to 'two-tiered'. In a literal sense, a 'two-tiered' process would seem to be adopted whenever a sentence is 'discounted' in respect of a particular factor;<sup>5</sup> as a matter of logic, 'discounts' must operate on pre-existing quantities. Notwithstanding this, prevailing judicial opinion appears to hold that the separate treatment of certain factors, 'few in number and narrowly confined', will not 'compromise the intuitive or instinctive character of the sentencing process

---

<sup>4</sup> Colin Munro, 'Judicial Independence and Judicial Functions' in Colin Munro and Martin Wasik (eds), *Sentencing, Judicial Discretion and Training* (1992) 13.

<sup>5</sup> As Kirby J has observed, the practice of granting a 'discount' in respect of pleas of guilty means that 'we are into staged sentencing. It is just a question of how far we go': Transcript of Proceedings, *Markarian v The Queen* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 3 September 2004).

considered as a whole'.<sup>6</sup> This leaves 'two-tiered sentencing' to refer to a more regimented process in which a 'first tier' sentence is derived from the 'objective circumstances' of the case and then modified '[with] reference to other factors, usually, but not always, personal to the accused'.<sup>7</sup>

The background to the controversy has been summarised elsewhere<sup>8</sup> and will not be recounted in detail here. It will suffice to note that its genesis appears to lie in the following dictum of Adam and Crockett JJ of the Victorian Supreme Court:

ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various elements involved in the punitive process. Moreover, in our view it is profitless to attempt to allot to the various considerations their proper part in the assessment of [particular sentences].<sup>9</sup>

---

<sup>6</sup> *R v Thomson* (2000) 49 NSWLR 383, [57] (Spigelman CJ) ('*Thomson*'); see also *R v Sharma* (2002) 54 NSWLR 300, [24] (Spigelman CJ); *Markarian* (2005) 228 CLR 357, [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ), [74] (McHugh J). During argument in *Markarian*, Gleeson CJ suggested that 'some of the discussion of this subject proceeds on the basis of a false dichotomy. It proceeds on the assumption that there is some necessary inconsistency between the concept of synthesis and the concept of some form, in some circumstances, of staging and that where you have a statutory provision that dictates that you specify the allowance that is made for one mitigating circumstance, that is not necessarily inconsistent with an approach that proceeds generally by way of synthesising various factors. It just means that there is one factor that has to be dealt with separately': Transcript of Proceedings, *Markarian v The Queen* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 3 September 2004).

<sup>7</sup> *Markarian* (2005) 228 CLR 357, [51] (McHugh J).

<sup>8</sup> See Sally Traynor and Ivan Potas, 'Sentencing Methodology: Two-tiered or Instinctive Synthesis' (2002) 25 *Sentencing Trends and Issues*, available at <http://www.judcom.nsw.gov.au/st/st25/index.html>; see also *Markarian* (2005) 228 CLR 357, [110]–[124] (Kirby J).

<sup>9</sup> *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ) ('*Williscroft*').

Over time, this *descriptive* statement has metamorphosed into a *normative* principle, revolving around the notion that ‘instinctive synthesis’ is the *single correct approach* to the exercise of the sentencing discretion.<sup>10</sup> On this view, to purport to give independent consideration to various discrete sentencing ‘factors’ is not just ‘profitless’, but could constitute legal error. However, the claim that ‘instinctive synthesis’ demands adherence in all cases has not attracted universal support at State level,<sup>11</sup> and had been the subject of some inconclusive discussion in the High Court.<sup>12</sup> In consequence, it is unsurprising that McHugh and Kirby JJ determined that the case of *Markarian* represented an appropriate vehicle for consideration of the matter.<sup>13</sup>

## Background

Markarian was convicted in the District Court of New South Wales of supply of heroin, and sentenced to imprisonment for 30 months with a non-parole period of 15 months. The Crown then appealed the sentence to the Court of Criminal Appeal. There Hulme J (Heydon JA and Carruthers AJ agreeing) determined that the sentence imposed at first instance was manifestly inadequate, and proceeded to derive a substitute

---

<sup>10</sup> See eg *R v Young* [1990] VR 951, 960–1 (Young CJ, Crockett and Nathan JJ); *Wong v The Queen* (2001) 207 CLR 587, [74] (Gaudron, Gummow and Hayne JJ) (‘Wong’).

<sup>11</sup> See the authorities discussed in *Thomson* (2000) 49 NSWLR 383 and *R v Whyte* (2002) 55 NSWLR 252.

<sup>12</sup> See eg *AB v The Queen* (1999) 198 CLR 111, [13]–[18] (McHugh J), [102] (Kirby J), [115]–[120] (Hayne J) (‘AB’); *Wong* (2001) 207 CLR 587, [11]–[12] (Gleeson CJ), [74]–[78] (Gaudron, Gummow and Hayne JJ), [101]–[103] (Kirby J); *Cameron v The Queen* (2002) 209 CLR 339, [69]–[73] (Kirby J); *Johnson v The Queen* (2004) 205 ALR 346, [40]–[44] (Kirby J) (‘Johnson’).

<sup>13</sup> Transcript of Proceedings, *Markarian v The Queen* (High Court of Australia, McHugh and Kirby JJ, 2 December 2003).

sentence through a process of reasoning that involved the making of explicit deductions from the maximum sanction for the relevant offence – ‘not too high a starting point’ in the circumstances<sup>14</sup> – in respect of such considerations as the nature of the offence and Markarian’s plea of guilty.<sup>15</sup> Hulme J was critical of the ‘instinctive synthesis’ approach of the trial judge, suggesting that the sparseness of his reasons for decision led one to ‘wonder whether [the sentence imposed had] just been plucked out of the air’.<sup>16</sup> In the result, Hulme J sentenced Markarian to a term of imprisonment of 8 years with a non-parole period of 4 years and 6 months, describing this as ‘the lowest [sentence] that could reasonably be imposed’.<sup>17</sup> As Kirby J noted during argument on the application for special leave to appeal to the High Court, ‘this [comprised] a very high upping of the ante’.<sup>18</sup>

Markarian presented to the High Court with four grounds of appeal, three of which were disposed of with relative ease. The Court was unanimous in holding that Hulme J had fallen into error in taking the maximum sentence available as the starting point for his process of reasoning; the maximum should have comprised no more than a ‘yardstick [or] a basis for comparison of [a particular] case with the worst possible case’.<sup>19</sup> This finding was sufficient to dispose of the matter. On the other hand, Markarian’s claims that Hulme J had erred in the manner in which he had taken into account a further offence that Markarian had committed,<sup>20</sup> and that the

---

<sup>14</sup> *R v Markarian* (2003) 137 A Crim R 497, [17].

<sup>15</sup> (2003) 137 A Crim R 497, [40], [44].

<sup>16</sup> (2003) 137 A Crim R 497, [33]–[34].

<sup>17</sup> (2003) 137 A Crim R 497, [49].

<sup>18</sup> Transcript of Proceedings, *Markarian v The Queen* (High Court of Australia, McHugh and Kirby JJ, 2 December 2003).

<sup>19</sup> *Markarian* (2005) 228 CLR 357, [31], [33] (Gleeson CJ, Gummow, Hayne and Callinan JJ); see also at [50] (McHugh J), [107] (Kirby J).

<sup>20</sup> (2005) 228 CLR 357, [40]–[43] (Gleeson CJ, Gummow, Hayne and Callinan JJ), [50] (McHugh J), [107] (Kirby J).

sentence imposed was unreasonable,<sup>21</sup> were rejected. It was the fourth ground of appeal, raising the methodological issue of whether the purported adoption of a sequential approach constituted legal error, that was the source of most contention. Markarian's submissions, in effect, 'invited the court to ... state as a universal rule to the extent that legislation does not otherwise dictate, that a process of instinctive synthesis is one which sentencing courts should adopt'.<sup>22</sup> Given the obvious significance of this issue to the decision to grant special leave to appeal in the first place,<sup>23</sup> it was unsurprising that McHugh and Kirby JJ each responded to this argument with forceful comments as to the nature of the sentencing process. On the other hand, the joint reasons of Gleeson CJ and Gummow, Hayne and Callinan JJ ('the joint reasons') were somewhat less expansive.

## The Joint Reasons

The joint reasons emphasise the importance of broad judicial discretion in sentencing, stating that:

Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictate the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is ... *what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached.*<sup>24</sup>

---

<sup>21</sup> (2005) 228 CLR 357, [44] (Gleeson CJ, Gummow, Hayne and Callinan JJ), [50] (McHugh J); cf at [108] (Kirby J).

<sup>22</sup> (2005) 228 CLR 357, [35] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>23</sup> See (2005) 228 CLR 357, [50] (McHugh J).

<sup>24</sup> (2005) 228 CLR 357, [27] (emphasis added); see also *Wong* (2001) 207 CLR 587, [75] (Gaudron, Gummow and Hayne JJ).

In consequence of this, ‘judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies’.<sup>25</sup> Whilst the joint reasons decline to set down a ‘universal rule’ enshrining instinctive synthesis as the single correct approach to sentencing decisions,<sup>26</sup> they endorse a passage from *Wong v The Queen* to the effect that a ‘two-tiered approach’ is ‘apt to give rise to error’, ‘departs from principle’ and ‘should not be adopted’, because the extraction of particular factors from their context for the purpose of establishing a notional ‘first-tier’ sentence tends to ‘distort’ the sentencing ‘balancing exercise’.<sup>27</sup> The joint reasons culminate in a paragraph worth reproducing in full:

Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. This is not to say that in a simple case in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of ‘instinctive synthesis’, as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression ‘instinctive synthesis’ may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. Accessible reasoning is in the interests of victims, of the parties, appeal courts and the public. There may be occasions when some indulgence in arithmetical process will better serve these ends. This case was not however one of them

---

<sup>25</sup> *Markarian* (2005) 228 CLR 357, [27].

<sup>26</sup> (2005) 228 CLR 357, [36].

<sup>27</sup> (2001) 207 CLR 587, [74] (Gaudron, Gummow and Hayne JJ), cited *Markarian* (2005) 228 CLR 357, [37].

because of the number and complexity of the considerations which had to be weighed by the trial judge.<sup>28</sup>

The meaning and implications of this paragraph are obscure. It appears that the joint reasons do not reject the sequential approach outright, but rather see its usefulness as limited to certain circumstances; as John Anderson has written, they 'seem to be searching for a "middle ground"'.<sup>29</sup> However, it is problematic that no practical criteria are provided as to when 'indulgence' in arithmetical processes will be appropriate or permissible. The joint reasons do suggest that sequential reasoning could be tenable in a 'simple case', but other than to state that the instant matter does not comprise one, they provide no indication as to what that might be.<sup>30</sup> Their exhortation to transparent reasoning is likewise of little assistance; the kinds of 'occasions' on which sequential reasoning will better expose the true basis of a sentence are not elaborated. There is, then, little prospective methodological guidance to be derived from the joint reasons; whilst in general they affirm the 'instinctive synthesis' approach as correct, they also render it subject to certain ill-defined exceptions. In the result, whilst the 'categorical rejection of two-tier or two-stage sentencing' suggested in Wong may have been 'watered down',<sup>31</sup> it is not in the least clear to what degree or to what end. It is telling that the joint reasons have been cited in State courts both as establishing that two-tiered sentencing constitutes legal error,<sup>32</sup> and as seeming to allow some space

---

<sup>28</sup> *Markarian* (2005) 228 CLR 357, [39].

<sup>29</sup> John Anderson, 'Standard Minimum Sentencing and Guideline Judgments: An Uneasy Alliance in the Way of the Future' (2006) 30 *Criminal Law Journal* 203, 212.

<sup>30</sup> Kate Warner, 'Sentencing Review 2004–2005' (2005) 29 *Criminal Law Journal* 355, 360.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Mulato v The Queen* [2006] NSWCCA 282, [13] (Spigelman CJ) (*'Mulato'*).



for it to take place.<sup>33</sup> The diverging interpretations might be in part attributable to definitional issues, but this just throws into relief the fact that the joint reasons do little to clear up the conceptual doubts that exist in this area.

## Justice McHugh

McHugh J was far less circumspect than the joint reasons in endorsing the instinctive synthesis approach, delivering an opinion that both reinforced and built upon the views he had expressed in *AB v The Queen*.<sup>34</sup> It was not his contention that the approach comprised an ideal mode of decision-making; indeed, he was quick to acknowledge the inherent unsatisfactoriness of all decisions 'based on indeterminate standards and human judgment'.<sup>35</sup> Rather, his conclusion rested upon an appeal to realism; in light of the pervasive uncertainties intrinsic to the sentencing exercise, the instinctive synthesis model represents 'the best we can do'.<sup>36</sup> For McHugh J, the sequential approach fails to approximate authentic judicial thought processes, and its purported application does little more than paper over the inescapable fact of broad judicial discretion with spurious 'junk science'.<sup>37</sup> For this reason its 'adoption' is little more than an obfuscation, and is liable to generate error.

The arguments that McHugh J adduces in support of his position are divisible into two broad strands, the first comprising a number of reasons for regarding the sequential approach as untenable, and the second consisting of a positive defence of instinctive synthesis as the best available alternative.

---

<sup>33</sup> *Chivers v Western Australia* [2005] WASCA 97, [24]–[27] (Steytler P); *R v Pham* [2005] NSWCCA 314, [2] (Sully J), [3] (Hidden J).

<sup>34</sup> (1999) 198 CLR 111, [13]–[19].

<sup>35</sup> *Markarian* (2005) 228 CLR 357, [72].

<sup>36</sup> (2005) 228 CLR 357, [72].

<sup>37</sup> (2005) 228 CLR 357, [71].

McHugh J's central criticism of the sequential approach is that it is artificial. For his Honour, the concept of 'instinctive synthesis' encapsulates what judges 'do', and always have 'done', in sentencing offenders.<sup>38</sup> Moreover, what judges 'do' in sentencing offenders cannot be *made* to resemble the sequential approach, because that approach is insensitive to the subtleties that the sentencing exercise must deal with. In the first place, the sequential approach tends to concentrate initial judicial attention on a limited subset of 'objective' factors that ought not, as a matter of universal principle, to assume decisive significance in the sentencing process.<sup>39</sup> Thus, the sentencing judge could be precluded from according proper weight to all factors relevant to the sentencing decision and deriving a proportionate sentence.<sup>40</sup> In the second place, the purported use of sequential reasoning can never represent more than a retrospective rationalisation of the sentencing decision-making process, because intuitive reasoning cannot be excised from that process through a simple declaration to that effect. The circumstances of criminal matters are too various to be made 'the subject of mathematical equations'.<sup>41</sup> On a realistic appraisal of how a two-tiered approach would operate in practice, 'the first tier [sentence must] itself be derived by an instinctive synthesis of the "objective circumstances" of the case' and modifications to it must take shape through

---

<sup>38</sup> (2005) 228 CLR 357, [77] (see also at [66]: '[t]he only novelty in *Williscroft* was the description that it gave to the sentencing process').

<sup>39</sup> (2005) 228 CLR 357, [53]–[54]; cf at [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>40</sup> (2005) 228 CLR 357, [69]. See also Cyrus Tata, 'Accountability for the Sentencing Decision Process – Towards a New Understanding' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society: International Perspectives* (2002) 399, 412 ('[s]entencers must necessarily make judgments about the [subjective] moral responsibility and moral character of "the offender" if they are to understand and interpret the seriousness of "the offence" before them. The operational abstraction of "offence" and "offender" from the whole case is impracticable').

<sup>41</sup> *Markarian* (2005) 228 CLR 357, [52].

‘intuitive’ reasoning.<sup>42</sup> Thus, the two–tiered approach arrogates to itself a false air of precision, as its ‘numbers’ represent little more than ‘a series of value judgments and quantification of intangibles’.<sup>43</sup>

In consequence of these defects, McHugh J argues that decisions purporting to be products of the sequential approach will tend to manifest appealable error.<sup>44</sup> In particular, the artificial compartmentalisation of the sentencing process will provide aggrieved parties with multiple points of attack. For McHugh J,

[i]t is no answer to [this] criticism that ... because [a sequential approach] reveals the error, it permits an appellate court to correct the error. The need for appellate intervention arises only because the two–tier approach is inherently susceptible to error ... [indeed] sentences imposed by using the two–tiered approach are likely to be upheld only by appellate courts declaring that, given the circumstances, there has been no miscarriage of justice because the sentence imposed was within the appropriate range.<sup>45</sup>

In essence, McHugh J’s argument appears to be that the sequential approach requires more precise reasons for decision than the law in this area – which has developed around the core element of discretion – is capable of supporting.

If the sequential approach fails as a general model for the exercise of sentencing discretion, then the field is left to less structured ‘intuitive’ processes. However, McHugh J rejects the suggestion that these processes ‘operate in a vacuum of random selection’,<sup>46</sup> stating that ‘although a judge does ultimately select a number, it is not from thin air that the

---

<sup>42</sup> (2005) 228 CLR 357, [55].

<sup>43</sup> (2005) 228 CLR 357, [58]; see also at [56].

<sup>44</sup> (2005) 228 CLR 357, [64].

<sup>45</sup> (2005) 228 CLR 357, [64]; see also at [71].

<sup>46</sup> (2005) 228 CLR 357, [84].

judge selects it'.<sup>47</sup> McHugh J lists a number of factors that operate to compel the formulation of sentences falling within acceptable parameters. First, he points to judicial knowledge and experience (both individual and corporate) as having a normative effect on sentencing outcomes.<sup>48</sup> Secondly, he argues that (direct or inferential) guidance obtained from criminal statutes assists judges to locate sentences within a range commensurate with the seriousness of the relevant crime, as comprehended by Parliament.<sup>49</sup> Thirdly, he notes that the potential for appellate review forces careful attention to 'impermissible paths of reasoning and the permissible factors which will be relevant to the sentencing process in a particular case'.<sup>50</sup> Fourthly, he claims that the prospect of public criticism of, or 'legislative interference' with, the sentencing function leads judges to 'attempt to impose sentences that accord with legitimate community expectations'.<sup>51</sup> Fifthly, he argues that the principle of proportionality overarches the intuitive exercise in such a manner as to 'guard against hidden errors in the process, the kind later identified on appeal as manifest excess or leniency'.<sup>52</sup> Finally, he seeks to dispel the perception that the instinctive synthesis approach is hostile to the exposure of reasons and reasoning, stating that it should involve 'a full and transparent articulation of the relevant considerations including an indication of the relative weight to be given to those considerations in the circumstances'.<sup>53</sup>

---

<sup>47</sup> (2005) 228 CLR 357, [76].

<sup>48</sup> (2005) 228 CLR 357, [77]–[78]. McHugh J acknowledges that corporate knowledge can be augmented by support systems such as the sentencing database maintained by the Judicial Commission of New South Wales: see at [79].

<sup>49</sup> (2005) 228 CLR 357, [80].

<sup>50</sup> (2005) 228 CLR 357, [81].

<sup>51</sup> (2005) 228 CLR 357, [82].

<sup>52</sup> (2005) 228 CLR 357, [83].

<sup>53</sup> (2005) 228 CLR 357, [84].

It should be noted that McHugh J places one qualification on his general rejection of sequential reasoning, being that a quantified discount could be acceptable where it reflects 'a purpose distinct from a sentencing purpose'.<sup>54</sup> Thus, discounts relating to utilitarian goals to do with 'the administration of criminal justice', such as discounts for pleading guilty or assisting authorities, are capable of calculation and regularised application. This suggests that the proper subject of the 'instinctive synthesis' is, in effect, offence seriousness, and reflects the current predominance of the desert-based approach to the punishment of criminals; discounts arising from policies extrinsic to desert operate on the sentencing exercise in a different manner. This, to be sure, is a more useful criterion for distinguishing acceptable from unacceptable quantification than the 'simple case' test at which the joint reasons hint.

## Justice Kirby

Kirby J was the only member of the Court to express doubt about the universal soundness of the 'instinctive synthesis' approach. Like McHugh J, he had foreshadowed his general attitude in prior cases,<sup>55</sup> and took the chance presented by *Markarian* to draw it into sharper focus. Kirby J did not contend for the kind of regimented, mathematical approach (involving the separate consideration of 'objective' factors) against which much of the argument of McHugh J was directed. Rather, he was concerned that the other judges' concentration on 'instinctive synthesis' obscured the legitimate and useful role that numerical factors could fulfil in the explication of sentencing reasoning. Kirby J felt that the marginalisation of

---

<sup>54</sup> (2005) 228 CLR 357, [74].

<sup>55</sup> See eg *AB* (1999) 198 CLR 111, [102]; *Wong* (2001) 207 CLR 584, [101]–[103]; *Johnson* (2004) 205 ALR 346, [40]–[44].

sequential calculation as a legitimate mode of reasoning was counter to a considerable corpus of jurisprudence,<sup>56</sup> but his main contention was that a general ‘anathema’ to the two-stage approach,<sup>57</sup> and the entrenchment of instinctive synthesis as singularly ‘correct’ in principle, would have a deleterious effect on the quality and clarity of judicial expositions of the sentencing reasoning process.<sup>58</sup> He acknowledged that talk of ‘arithmetical’ sentencing was specious: ‘because there are a multitude of factors to be taken into account ... the evaluation [of an appropriate] sanction ... is necessarily imprecise. Human judgment is inevitably invoked’.<sup>59</sup> Notwithstanding this, it is clear that he was of the opinion that certain aspects, at least, of the sentencing decision are susceptible of articulation in a quantitative form,<sup>60</sup> and that in certain circumstances the ‘exposure of particular discounts’ would not constitute an error of law. However, it is unfortunate that he did not go into detail as to which discounts, or classes of discount, these are, other than to suggest that sequential reasoning ought to be used where it is ‘more transparent’ than the alternative,<sup>61</sup> and to refer to discounts ‘for a plea of guilty, the provision of assistance to authorities or other considerations that seem most significant’.<sup>62</sup> Without elaboration of the content of the latter group of considerations, it is impossible to determine what distance, if any, lies between Kirby J and McHugh J on this point – let alone relate the holding of either to that of the joint reasons.

Kirby J reserved his most stinging criticism for the continued use of the term ‘instinctive synthesis’ itself. For Kirby J, it:

---

<sup>56</sup> *Markarian* (2005) 228 CLR 357, [110]–[124].

<sup>57</sup> (2005) 228 CLR 357, [117].

<sup>58</sup> See eg (2005) 228 CLR 357, [131].

<sup>59</sup> (2005) 228 CLR 357, [133].

<sup>60</sup> See eg (2005) 228 CLR 357, [117], [122], [125], [134].

<sup>61</sup> (2005) 228 CLR 357, [132].

<sup>62</sup> (2005) 228 CLR 357, [134].

sends quite the wrong signals for the law of sentencing in Australia. Who are those who have the ‘instincts’ in question? Only the judges. This is therefore a formula that risks endorsement of the deployment of purely personal legal power. It runs contrary to the tendency in other areas of the law, notably administrative law, to expose to subsequent scrutiny the use of public power by public officials. It is also contrary to the insistence of Australian courts, including this court, that judicial officers give reasons for their decisions.<sup>63</sup>

His Honour proceeded to express concern that the option to explain sentencing decisions in terms of ‘intuition’ will encourage judges to render them opaque to appellate review:

If, in reasoning, [a judge] does make a significant adjustment for a particular factor – measurable in the judge’s opinion in quantitative or percentage terms – the choice before the law is whether that factor should be specifically imposed in the reasons or not ... [If it need not, some] judges will feel it is safer, wiser or even essential to keep the process of reasoning secret. This course is good neither for the parties, nor the community, nor for the discharge of the functions of sentencing, nor for appellate review.<sup>64</sup>

The thrust of Kirby J’s argument, then, is that to jettison sequential reasoning would be retrograde, as it has some potential to augment the principles governing the exercise of sentencing discretion, which should not in the first place be allied to notions of ‘intuition’ or ‘instinct’. However, he does not explain in detail the situations in which sequential modes of reasoning ought to be invoked, which renders the extent of his practical divergence from the other members of the Court difficult to assess.

---

<sup>63</sup> (2005) 228 CLR 357, [129].

<sup>64</sup> (2005) 228 CLR 357, [131]. This argument dovetails with Kirby J’s earlier observation that it was only Hulme J’s decision to express himself in quantitative terms that rendered his errors manifest to a superior court: see at [96]–[98].

## Discussion

Kirby J acknowledges that the distinction between the sequential and instinctive synthesis approaches as discussed in *Markarian* is, to some extent, 'semantic'.<sup>65</sup> It is clear that both approaches 'require the making of value judgments, assessments, comparisons and the final balancing of a diverse range of considerations that are integral to the sentencing process'.<sup>66</sup> The views that McHugh and Kirby JJ express in *Markarian* do not sit in direct opposition, and indeed it is arguable that they could be brought into concordance with relative ease. Kirby J did not seek to advocate the kind of regimented 'two-tiered' approach that much of McHugh J's argument is directed to dismantling. Rather, the mainspring of his opinion is the argument from transparency. However, as the joint reasons point out, 'identifying "instinctive synthesis" and "transparency" as antonyms ... misdescribes the area for debate'.<sup>67</sup> McHugh J was careful to emphasise that 'instinctive synthesis' does not amount to a negation of logic or constraint,<sup>68</sup> and doubtless none of the judges in *Markarian* would have found anything objectionable in Kirby J's holding that '[j]udicial officers engaged in sentencing should be encouraged to reveal their processes of reasoning'.<sup>69</sup> It is generally recognised that the 'obligation' to give sentencing reasons is a necessary incident of the 'fundamental principle of the common law that justice must not only be done but be seen to be done'.<sup>70</sup> Indeed, 'lack of transparency', in the sense of 'legally inadequate reasons for judgment', has been held to have formed the basis of the joint reasons' rejection of the

---

<sup>65</sup> (2005) 228 CLR 357, [132].

<sup>66</sup> Traynor and Potas, above n 8.

<sup>67</sup> *Markarian* (2005) 228 CLR 357, [36].

<sup>68</sup> See eg (2005) 228 CLR 357, [76].

<sup>69</sup> (2005) 228 CLR 357, [135].

<sup>70</sup> *Thomson* (2000) 49 NSWLR 383, [42] (Spigelman CJ).



reasoning of Hulme J.<sup>71</sup>

If this is the case, then the 'debate' is reducible to quite a simple and limited difference of opinion as to whether or not it is useful, legitimate or sensible to endeavour to explain the sentencing process in numerical terms at a point antecedent to the statement of the ultimate sanction imposed. For McHugh J and the joint reasons, the attempt to do so is in general speculative, serves no useful function, and is liable to lead to error. This does not entail, however, their agreement with the holding in *Willisroft* that it is 'profitless to attempt to allot to the various [sentencing factors] their proper part in the [overall] assessment'.<sup>72</sup> Rather, it indicates an opinion that it is ordinarily 'profitless' to attempt to measure the effect of those factors on the overall assessment *in precise terms*. The real issue, then, is in what circumstances reasons explained in mathematical terms are more 'transparent' than those explained otherwise; as Gummow J recognised in the course of argument, '[a] lot of [the] debate is really about what has to be expressed in reasons'.<sup>73</sup>

No judge, however, is able to provide a comprehensive answer on this point. Kirby J does not offer unqualified support for quantified discounts in relation to all sentencing factors. The thrust of his opinion, rather, is that their use ought not to be considered erroneous in principle *a priori*. However, neither McHugh J nor the joint reasons argue that there is *no* role for the articulation of quantified sentencing factors, where calculable. The difficulty is that none of the opinions are clear as to *when* or *why* quantification will assist a sentencing court to expose its reasoning process. However,

---

<sup>71</sup> *Sanchet v Department of Public Prosecutions* [2006] NSWCCA 291, [16] (Basten JA) ('*Sanchet*').

<sup>72</sup> *Willisroft* [1975] VR 292, 300 (Adam and Crockett JJ).

<sup>73</sup> Transcript of Proceedings, *Markarian v The Queen* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 3 September 2004).

it is notable that in discussing the 'utility' of 'identifying specifically, in quantitative or percentage terms, discounts for various considerations', Kirby J cites discounts for 'pleas of guilty' and 'specific assistance to the authorities' as matters in respect of which quantification could be valuable.<sup>74</sup> These are precisely the matters excepted from McHugh J's injunction against numerical calculation.<sup>75</sup> Kirby J elsewhere seems to endorse the revelation of 'logical and rational processes' so far as it is 'reasonably' possible and 'useful',<sup>76</sup> and of 'significant adjustments' for 'particular factors' that are 'measurable in the judge's opinion in quantitative or percentage terms'.<sup>77</sup> However, these are nebulous standards indeed, and it is difficult to guess at whether or not he envisages a significantly broader role for quantitative analysis than does McHugh J.

That said, McHugh J's position on the legitimate role of numerical specification appears to be a sensible one. It is underpinned, as aforementioned, by the notion that 'offence seriousness' can only be evaluated in light of the meshing of all material circumstances, both objective and subjective.<sup>78</sup> Thus, it acknowledges the essentially qualitative judgment that lies at the heart of any sentencing system in which sentence severity is expected to have some correlation with offence seriousness.

---

<sup>74</sup> *Markarian* (2005) 228 CLR 357, [117]; see also at [122].

<sup>75</sup> (2005) 228 CLR 357, [74]. In argument, counsel for Markarian noted that '[s]o far as our researchers have considered across the States, the only two issues where specific quantification for public policy reasons has occurred is in relation to either the plea of guilty or assistance to authorities, nothing else': see Transcript of Proceedings, *Markarian v The Queen* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 3 September 2004).

<sup>76</sup> *Markarian* (2005) 228 CLR 357, [130].

<sup>77</sup> (2005) 228 CLR 357, [131].

<sup>78</sup> As McHugh J rhetorically asks, '[h]ow can a judge possibly fix a first-tier or indeed any sentence for the mother who has killed her newborn baby without taking into account her personal circumstances?': (2005) 228 CLR 357, [53].

However, mitigating factors that operate on a sentence otherwise than by reason of their bearing on the seriousness of the relevant offence can be dealt with extrinsically, and in accordance with the policy from which they arise.<sup>79</sup>

It is difficult, of course, to dispute Kirby J's observation that '[t]alk of instinctive synthesis is like the breath of a bygone legal age. It resonates with a claim, effectively, to unexplainable and unreviewable judicial power.'<sup>80</sup> As Ian Leader-Elliott has suggested, '[i]t would be hard to devise a less attractive banner to rally support for a defence of principled judicial discretion in sentencing'.<sup>81</sup> However, it is clear that there is a disjunction between the conventional meaning of 'instinctive' and the sense in which the term is used in the sentencing context:

[Sentencing] involves a value judgment, which should be articulated as far as possible. That attempt should not be avoided by describing the outcome as "instinctive". It is inevitably instructed by a knowledge of comparable cases and relevant sentencing principles. A result based on knowledge and experience is the antithesis of "instinctive". Nevertheless, the term is used to describe the effect of weighing a number of disparate elements to reach a considered conclusion.<sup>82</sup>

In other words, the term 'instinctive synthesis' seems simply to be used as a shorthand expression referable to

---

<sup>79</sup> See also *Pavlic v The Queen* (1995) 5 Tas R 186, 200–5 (Slicer J); cf *R v Gallagher* (1991) 23 NSWLR 220, 228 (Gleeson CJ) (noting that '[i]t must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risks to which he thereby exposes himself, will form a complex of inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical').

<sup>80</sup> *Markarian* (2005) 228 CLR 357, [129].

<sup>81</sup> Ian Leader-Elliott, 'Editorial: Instinctive Synthesisers in the High Court' (2002) 26 *Criminal Law Journal* 5, 8 (emphasis in original).

<sup>82</sup> *Sanchet* [2006] NSWCCA 291, [17] (Basten JA).

the combining of all of the factors that feed into sentencing decision-making process.<sup>83</sup> Kirby J argues that used in this sense, the term is misleading and ‘distracting’:

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 ... this is what judges have always had to do.<sup>84</sup>

This is true enough, and it must be acknowledged that the abandonment of the term could render judicial explanations of the sentencing decision-making process more comprehensible and compelling. However, as McHugh J points out, ‘critics of the instinctive synthesis method tend to place too much emphasis on the “instinct” and too little on the “synthesis”’.<sup>85</sup> Looking to the substance of the matter, the term operates to focus attention on the fact that the exercise of sentencing discretion is ‘an integrated process directed to the determination of a just sentence’.<sup>86</sup> The attempt to extricate individual factors from this process in order to evaluate their numerical consequence for a sentencing outcome is liable to lead into legal error as it could lock judges into regimented and artificial modes of reasoning that are incompatible with the proper balancing of all relevant considerations. In this sense, the two-tiered approach is unacceptable precisely ‘because it

---

<sup>83</sup> *Markarian* (2005) 228 CLR 357, [77] (McHugh J), [133] (Kirby J); see also *Wong* (2001) 207 CLR 584, [75] (Gaudron, Gummow and Hayne JJ) (‘[the] expression [‘instinctive synthesis’] is used ... to make it plain that the sentencer is called on to reach a single sentence which ... balances many conflicting features’).

<sup>84</sup> *Markarian* (2005) 228 CLR 357, [137].

<sup>85</sup> (2005) 228 CLR 357, [73].

<sup>86</sup> *R v McDougall and Collas* [2007] 2 Qd R 87 (Jerrard, Keane and Holmes JJA).

*impermissibly confines the sentencing discretion*'.<sup>87</sup>

Once an accurate complexion is placed upon the term 'instinctive synthesis', it is clear that the Court's decision in *Markarian* comprises 'a powerful restatement of the wide discretion enjoyed by a sentencing judge'.<sup>88</sup>

What *Markarian's* case, and more recent authorities, conclusively demonstrate is that the entire selection, fashioning and eventual imposition of any sentence, or series of sentences, remain at the discretion and responsibility of the sentencing Judge always having regard to established principles and the need for comparative justice to be maintained.<sup>89</sup>

## Conclusion

The decision in *Markarian* suggests that the High Court remains of the opinion that it is 'undesirable that the process of sentencing should become ... more technical than it is already'.<sup>90</sup> This would seem to reflect a belief that the need to ensure that sentencing outcomes are individuated precludes appellate courts from imposing too significant a degree of methodological direction on sentencing judges. Whether or not this is a tenable position depends, on large part, on one's opinion as to the effectiveness of judicial self-regulation as a normative influence on the exercise of the sentencing

---

<sup>87</sup> *Mulato* [2006] NSWCCA 282, [13] (Spigelman CJ) (emphasis added); see also *R v Harman* [1989] 1 Qd R 414, 421 (de Jersey J) (noting that the use of numerical reasoning 'could tend to focus [attention] on the pattern or scale, rather than upon particular circumstances. Such a situation could lead to rigidity, and in a practical sense, impose fetters on the sentencing discretion').

<sup>88</sup> *Moore v The Queen* [2005] NSWCCA 407, [39] (Hoeben J).

<sup>89</sup> *Western Australia v Reynolds* [2006] WASC 31, [67] (Heenan J); see also *R v Barker and Gibson* [2006] NSWCCA 20, [55] (Howie J).

<sup>90</sup> *Pearce v The Queen* (1998) 194 CLR 624, [39] (McHugh, Hayne and Callinan JJ).

discretion. Whatever the case, the holding in *Markarian* indicates a belief that the incumbent approach is adequate to ensure that criminal matters are disposed of in a manner that is reasonable, consistent and fair.

**Ross Abbs**

BA (Hons)/LLB (Hons)