How do JUDGES SENTENCE?

By Jennifer Saunders

As criminal defence lawyers who pride ourselves on a strict adherence to the rule of law and insistence on Crown disclosure, we don't really know very much about how a judge arrives at the sentence, do we?

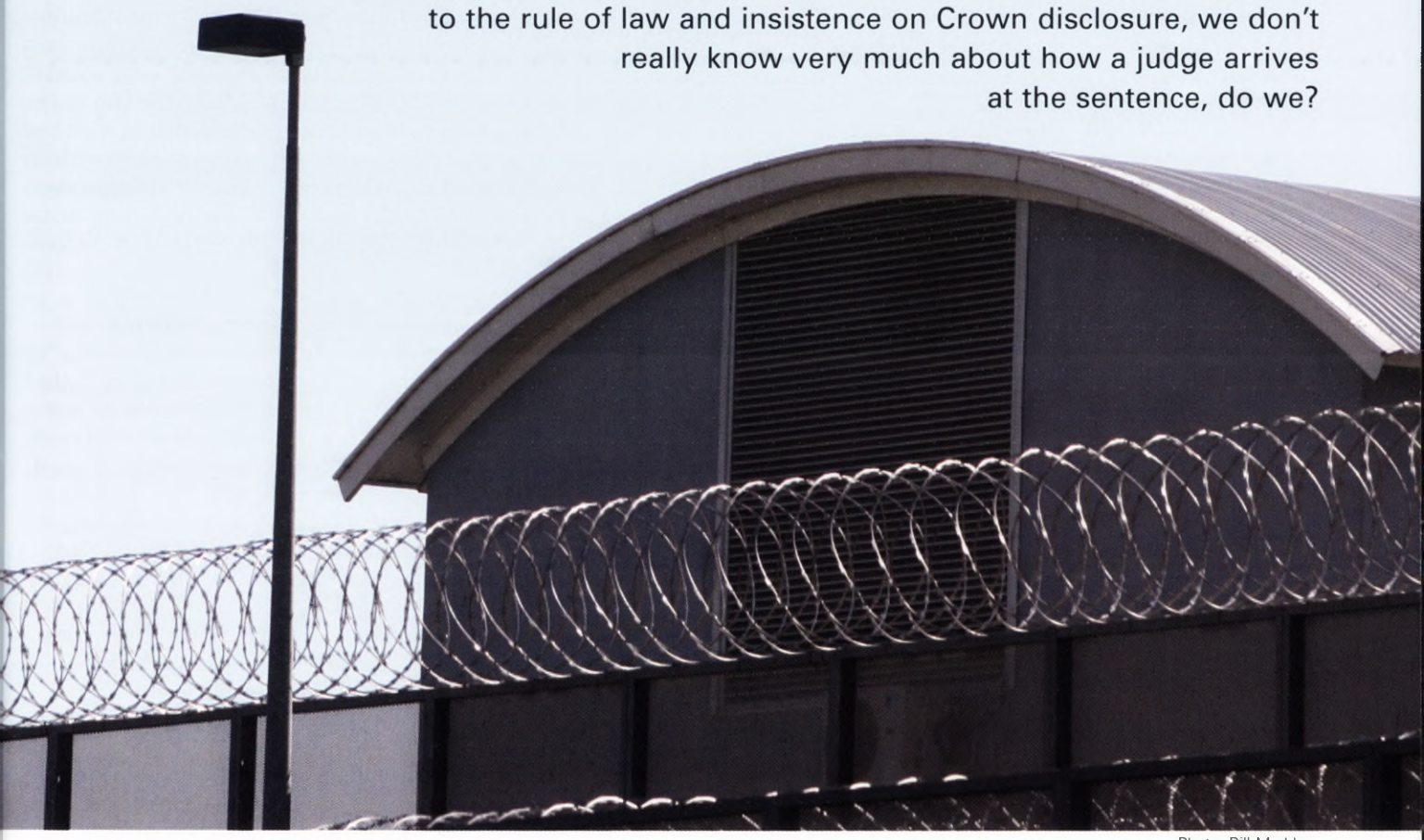

Photo: Bill Madden

Transparency in sentencing and the proper approach for formulating sentences has been discussed recently by the High Court in *Markarian v The Queen*.[1] The majority (Gleeson CJ, Gummow, Hayne and Callinan JJ) found that there can be no universal rule that 'instinctive synthesis' is the correct approach but, following the decision of the court in *Wong v The Queen*,[2] neither can it be said that the 'two-tiered' or 'staged' approach can never be appropriate.

TWO-TIERED APPROACH

The 'two-tiered' approach to sentencing refers to the process whereby a judge determines an 'objective' sentence and then adjusts it by means of a mathematical assessment of other features of the case, such as a plea of guilty or assistance to authorities. The High Court in *Wong* said, 'We consider that it is wrong in principle'[3] and explained that the process 'takes the offender's place in the hierarchy and gives that a particular significance in fixing a sentence but gives the >>

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sentencer no guidance, whatever, about whether or how that is to have some effect on the other elements which either are to be taken into account or may have already been taken into account in fixing the guideline range of sentences'. Clearly the sentencer would have to give a predetermined value or figures for a plea of guilty or assistance – for example, where, in the individual circumstances of the case, such discounts are unwarranted or in fact deserving of far greater consideration.

INSTINCTIVE SYNTHESIS

'Instinctive synthesis', on the other hand, requires the judge to take into account all relevant considerations to arrive at the appropriate sentence. This approach, however, has been criticised for its apparent lack of transparency, and the term 'instinctive synthesis' 'may then be able to suggest an arcane process into the mysteries of which only judges can be initiated' said the High Court in *Markarian*.[4]

In *Markarian,* Justice McHugh agreed with the majority but expounded further on the correct approach to sentencing. Analysing the objections to instinctive synthesis, he says:

> 'The two-tier sentencer contends that using the instinctive synthesis is inimical to the judicial process and is an exercise of arbitrary judicial power, unchecked by the giving of reasons. The two-tier sentencer claims ... that, where the sentence is the result of an instinctive synthesis it makes one "wonder whether figures have not just been plucked out of the air".'

Justice McHugh cites his own judgment in *AB v The Queen,* in which he gives his reasons for preferring the instinctive synthesis approach. A judge who uses a benchmark sentence as a starting point will inevitably give undue weight only to some of the factors to be considered. His Honour says that the judge will be sentencing on the basis of a 'hypothetical crime' instead of the criminality of the accused, and illustrates the point with the example of sentencing a mother for killing her newborn baby where a 'first-tier' sentence is meaningless without taking into account the mother's personal – and doubtless compelling – circumstances. Justice McHugh says that a judge using the two-tier approach must be concentrating on the retributive or deterrent aspects of sentencing and accordingly gives less weight to rehabilitation, mitigation and reformation.

RECENT STUDIES INTO SENTENCING PRACTICE

In her new book, *How Judges Sentence*,[5] Geraldine Mackenzie interviews Queensland judges about their sentencing practices and provides a marvellous insight into that process. There are very few studies into sentencing practice – a UK study involving interviews with 25 judges and an analysis of 96 cases could not be completed because the Chief Justice withdrew his consent. There have been other surveys in Canada and Australia, but Dr Mackenzie's own survey is significant in itself, featuring fascinating interviews with 31 judges of the District and Supreme Courts of Queensland. Sentencing is a lonely job: judges can really only ask for assistance from other judges when they are very new and, even then, in the Supreme Court, they have to be careful not to speak to a judge who might go on to sit on an appeal in the matter later. This book might give those judges some comfort by confirming that they are not alone.

One judge says: 'Sentencing is an attempt to juggle objects of various sizes while walking a tightrope which is being shaken at both ends' – a colourful but no doubt apt description. They talk of the weight they give to the statutory considerations in sentencing – considerations that appear in similar guises in sentencing legislation in all the states – and the results are somewhat surprising. Dr Mackenzie says: 'None of the judges spoke in favour of retribution as a purpose for sentencing and some actively opposed it'[6] while, perhaps not surprisingly, rehabilitation found wide support among the judges.

DETERRENCE

Deterrence, a very interesting subject, found unexpected results. Jeremy Bentham, the 18th century philosopher and jurist, theorised that offending was a choice – if the pain of doing an act was greater than the pleasure achieved by it, the offender would desist. The act of committing an offence was therefore a choice (although it is not difficult to think of cases where offences are committed without much thought at all of the consequences). General deterrence, whereby others are warned against committing offences by using this offender as an example of the consequences, can be quite illogical. The publicity given to the vast majority of cases coming through the courts is minimal – so how are those tempted to offend to learn of the consequences? Most criminal lawyers are clear that what really deters potential villains is the likelihood of being caught, not the prospect of sentencing!

General deterrence

General deterrence has, however, found favour with judges, although it was the most controversial of the purposes of sentencing in this study. The Queensland judges reported that, while most were sceptical about it, they continued to take it into account because it was in the legislation and because of media pressure and possible pressure from the Appeal Court. General deterrence has a broader and more obvious application to some types of cases – white-collar crime is an obvious example, as well as welfare fraud and professional misconduct. Some of the judges interviewed were critical of the use of general deterrence as a sentencing consideration, one saying that judges used it 'in a less than honest intellectual manner'[7] and another, 'Generally, deterrence is a fiction which makes it easy to get heavy on crime'.[8]

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Specific deterrence

Personal or specific deterrence is, of course, intended to stop the offender committing further offences. It is quite common to see sentences for recidivists becoming heavier and heavier with each new offence but, since the previous sentences clearly did not deter the offender, why bother with the pretence that a heavier sentence will do so this time? Some judges said they considered the use of personal deterrence to be justified in cases of premeditated, deliberate criminal conduct. However, the judges also said it was not justified in cases such as killing under provocation or where the offender acted on the spur of the moment, or was affected by drugs or alcohol. The judges did, however, specifically say that deterrence was not the same as punishment and none supported the concept of retribution.

COUNSELS' SUBMISSIONS

I was particularly surprised – and pleased – to read that judges place considerable weight on the submissions of counsel. So all that work we put into submissions on sentence are not wasted after all! Dr Mackenzie says:

> 'Generally speaking, the judges tended to rely on counsels' submissions to establish the appropriate range of sentences and saw counsels' submissions as fairly crucial. Two judges spoke of keeping within the bounds of the sentencing ranges submitted by counsel, noting that they would not normally sentence over the prosecutor's submitted maximum, nor under the defence's submitted minimum.'[9]

CONCLUSION

Sentencing is one of the most difficult tasks for counsel to do well. It is important to have mastered the facts in the case at hand and to have researched comparable sentences using the Sentencing Indication System set up by the Judicial Commission of NSW, or by conducting searches of other cases. It is clear from the judges' remarks quoted above that it is important to have a realistic range worked out for your submissions on sentencing – but don't set it too high! On the other hand, a sentence that is much too low will give rise to a Crown appeal, which is in nobody's interest, least of all the prisoner.

The mystery that is sentencing need not be such a mystery when we know how judges approach the task. We know that some of them find sentencing very difficult and worry about it a great deal, while others – usually judges with a considerable criminal practice at the bar – find it relatively easy. Every single case is different, of course, which is what makes 'grid sentencing', mandatory sentencing and guideline judgements such an affront to judicial discretion. Not surprisingly, the judges interviewed by Dr Mackenzie disapproved of those practices, one judge saying that 'not having judicial discretion in sentencing leads to harsh results'. The harsh results that follow, such as the notorious cases of imprisonment of Aboriginal people in the Northern Territory for the theft of a can of beer and other insignificant items, speak for themselves. Transparency of judicial thinking and reasons for sentencing have never been so important in demonstrating judicial discretion. We should fight to make sure that the discretion exercised by judges is never eroded by political expediency or as a vote-grabbing exercise by politicians. ■

Notes: **1** [2005] HCA 25. **2** (2001) 207 CLR 584. **3** Para 32. **4** Para 39. **5** Federation Press, 2005. **6** p93. **7** p102. **8** p100. **9** p23.

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