A SENTENCING SMORGASBORD

A paper presented to the annual conference of Queensland Magistrates on 25 May 2005
by Judge J.M. Robertson, District Court of Queensland

Recipe for a good sentence

- Keep it simple;
- add as required a touch of totality, a sprinkle of parity, a generous helping of deterrence and denunciation (do not try to explain deterrence!), and a splash of rehabilitation;
- blend together in a way that even the very young court reporter in the back of the court can follow. This may require some knowledge of the forms of communication used in "Big Brother" and "Australian Idol";
- while "serving" the sentence DO NOT engage in any human connection with the customer e.g. do not wish him well, or suggest anything positive about his future AND do not use the f… word (that is "forgiveness");
- keep in mind that sentences that no-one understands but which nonetheless make everyone hopping mad and calling for your head, are the most popular according to the media.

There is no common theme in this paper. It involves a fleeting look at a number of recent developments in this important area of law. The topics I have chosen are to some extent guided by the committee's request – some I have chosen because of their practical utility – some are just random. Depending on your view, you might conclude that the title might better be a "sentencing dog's breakfast".

Sentencing of Multiple Offenders

It is always desirable that co-offenders be sentenced at the same time by the same Magistrate. This is not always practical e.g. one or more defendants abscond, one pleads guilty and agrees to co-operate with the prosecution case against the others etc. As you are aware, where defendants are split, it is quite common for one to blame the others so as to reduce his or her criminal culpability.

The general principle is clearly stated by Gibbs CJ in *Lowe v The Queen* (1984) 154 CLR 606*:*

> *"It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal and such matters as age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account"*

In the same case, Mason J (as his Honour then was) stated the policy reasons behind the general principle thus:

> *"The parity principle … is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them"*

Some exceptions to the application of the general principle are:

(a) Adult and juvenile offenders

Obviously, quite different sentencing regimes come into play in this circumstance. For example in relation to an offence of violence, a juvenile is not exposed to the effect of ss9(3) and (4) of the *Penalties and Sentences Act 1992* and has the advantage of the principle of sentence of a last resort by virtue of the *Juvenile Justice Act 1992.*

Nevertheless, the Court of Appeal has held (by majority) that the parity principle can apply in the case of juvenile and adult co-offenders. In *R v Slattery* [2001] QCA 108, McMurdo P with whom Dutney J agreed, applied the parity principle in reducing a sentence of 3 years imprisonment for armed robbery on a 21 year old who acted as the driver of a 'get away" car. The principal offenders, who actually committed the robberies, were 14 and 15 respectively, and received community based orders. In principle, I think that the dissenting judgement of Moynihan SJA in that case is more persuasive. His Honour said (in dismissing the appeal) that he had:

> *"… grave reservations about the notion that people ought to be advantaged in sentencing because their co-offenders are sentenced under the different juvenile sentencing regime."*

The Court of Appeal recognised this distinction (that is between the *Juvenile Justices Act* and the *Penalties and Sentences Act*) as imposing an "anomalous fetter upon a sentencing judges discretion" in *R v C* [1995] QCA 012.

The significance of the parity principle in such cases is reduced by the judgment of the Court of Appeal in *R v Tuki* [2004] QCA 482; a case involving sentences of imprisonment up to 4 years for robbery and violent armed robbery on an offender who was 17 and 18 at the time of the offences. Juvenile co-offenders had received non-custodial sentences. McKenzie J after distinguishing *Slattery* observed (at 7):

> *"In my view there is no general principle that the mere fact that co-offenders are dealt with differently because one is dealt with as an adult and one as a child, requires this court to reduce the sentence from what is otherwise an appropriate level for the adult offender by resort to the principle of parity. The fact that the sentences are imposed under different schemes of sentencing necessarily implies that there will be differential treatment. The tentative view expressed by Moynihan SJA in Slattery that adults ought not to be advantaged in*

sentencing because their co-offenders are sentenced under the different juvenile justice regime is, in my view, sound."

The upshot of this is that the principle is not irrelevant, but may have significance in only an exceptional case e.g. such as *Slattery*.

(b) Co-operation with Law Enforcement to the Criminal Justice System

Another area in which parity may be largely irrelevant is where one offender agrees to give evidence against the others. This may or may not involve the application of s13A of the *Penalties and Sentences Act.*

For a general discussion of the applicable principles see *R v McGrath* [2001] QCA 131, *R v McQuire & Porter (No. 1) ex parte AIG of Qld* [1999] QCA 205.

The Totality Principle

The totality principle is inferentially referred to in s9(2)(k),(l) and (m) of the *Penalties and Sentences Act* as being a mandatory consideration for the sentencer if applicable. It is an aspect of the sentencing purpose *"to punish the offender to an extent or in a way that is just in all the circumstances"*: s9(1)(a). Still the best general statement of principle comes from DA Thomas "Principles of Sentencing" which was quoted with approval by a majority of the High Court in *Mill v The Queen* (1988) 166 CLR 59 at 63:

"… when a number of offences are being dealt with and specific punishments in respect of them are being tallied up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong …"

In the same case, the Court quoted with approval extensively from the judgment of Street CJ in *R v Todd* [1982] 2 NSWLR 517 at 519-520. At p.66, the High Court observed:

"Todd is correct and reflects a just and principled approach to the problem of sentencing when an offender comes to be sentenced many years after the commission of an offence because during the intervening period he has been serving a sentence imposed in another State in respect of an offence of the same nature and committed at about the same time … The principle is not confined in its operation to the fixing of a non-parole period. It applies also to the fixing of a head sentence which, when considered in association with the head sentence imposed by the first sentencing court, must be seen to be appropriate in all the circumstances … ***the proper approach which his Honour should have taken was to ask what would have been likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at the one time."***

In *R v Larsen* (1989) 44 A Crim R 121 Badgery-Parker J, after referring to *Todd* and *Mill* observed (at 126):

> *"… the principle of totality must always inform the sentencing process when a prisoner comes to be sentenced for an offence at a time when he is already serving a sentence."*

Particular care should be taken to ensure that the total sentence is just in cases in which cumulative sentences are being considered: *R v Clements* (1993) 68 A Crim R 167; and in cases involving joint offenders where the court is required to carefully assess the blameworthiness of each offender. The Court of Appeal put it this way in *R v Holdsworth & Crossman* [1999] QCA 322:

> *"It is fundamental in the sentencing function that the offender be punished according to his own conduct – Although several offenders may be convicted of the same offence, each must be punished according to the reprehensibility of his own conduct."*

Principles of parity and totality still apply even in cases in which the imposition of the cumulative sentence is mandatory by virtue of s156A of the *Penalties and Sentences Act:* see for example *R v Maclean & Bannerman* [2000] QCA 367; *R v Shillingsworth* (2001) 121 A Crim R 245 and *R v Irving* [2001] QCA 472. The sentencer must still ensure that the total sentence is not crushing; while still observing the mandatory requirements of the law.

Other Practical Issues in Sentencing

(a) To declare or not to declare that is the question

If s161(1) applies, the sentencer must declare the time served in custody. Section 161(4) has proved to be a headache for sentencers, despite it being introduced to make sentences clearer and more certain. The Court of Appeal has construed s161(4) strictly. For example, in *R v Guthrie* [2002] QCA 509, a case in which the defendant had been held in custody continuously for a series of offences, some of which the DPP elected not to proceed with, the court construed the words *"continuously … and for no other reason"* as having their natural and ordinary meaning and held that the time served could not be declared pursuant to s161. The legislative amendments recommended by Mr Justice Williams in that case are still "in the pipeline".

Obviously if s161 does not strictly apply, the sentencer must nevertheless frame a sentence that is just and taking into account the time already served *R v Ainsworth* [2000] QCA 163; CA No 26 of 2000, 5 May 2000 and *R v Skedgwell* [1999] 2 Qd R 97 are both authority for the proposition that s161 does not limit or exclude the general sentencing discretion to consider as a mitigating factor, a period of pre-sentence custody not strictly within s161, either by reducing the head sentence, or accelerating the date for consideration of parole eligibility; and that it is desirable that the sentencer make plain in his or her reasons whether and to what extent such allowance has been made.

One of the practical problems that we all encounter is that the information from the prosecution and/or Corrective Services may be inaccurate. The time held in custody is calculated administratively and undoubtedly errors occur. At least

now there is a facility to re-open a sentence on the basis of "a clear factual error of substance": s188(1)(cc); and when such errors are made and then reflected in the sentence, it is no longer necessary for an appeal to correct the mistake.

I often observe that I did not think I would need qualifications in pure mathematics when sentencing, but at times the calculations are difficult; and if wrong can lead to a justifiable sense of grievance with significant implications for the peaceful control of prisons. When I was in practice, I recall how the defendant was not interested in how the sentence was arrived at; only how much would have to be served.

(b) Is it fine to fine?

I am aware that fines are the most commonly imposed sentencing orders in your court. There are many reasons for this some of which are historical, some of which are practical. Judge Irwin tells me that the number of fine option orders has dropped substantially, and the belief is that defendants who do not pay prefer to take their chances with SPER.

I understand fully the utility and expediency of this particular sentencing option, but I wonder to what extent a busy Magistrate with a large list takes into account the requirements of the Act set out in s48(1). Certainly, the court can fine even though it has been unable to find out about the financial circumstances of the offender, and the nature of the burden that payment of the fine will be on the offenders. I am sure that this provision (s48(2)) does not release the court from its duty to enquire into these matters.

A failure to do so could constitute appellable error. See for example *R v Prentice* [2003] QCA 34, where the defendant's lack of capacity to pay the fine imposed in the District Court was held to result in a sentence which was "crushing" and effectively destroying any hope of rehabilitation.

The Act provides us with extensive sentencing options including a range of bonds or "recognisances"; and other community based orders.

The *Juvenile Justices Act* is more stringent, and a fine can only be imposed on a child if the sentencer *"is satisfied that the child has the capacity to pay the amount"*: s190.

(c) Recording of a conviction

(i) Juveniles

When I was President of the Children's Court of Queensland, I was inundated with sentence review applications on the sole ground that a conviction had been recorded. The sentence review is a right given only to parties to criminal proceedings involving a child, and enables the Children's Court of Queensland to review and change the sentence without the necessity of finding an error of principle. In an attempt to encourage consistency and to reduce the number of review

applications, I published a reasoned judgement on 13 April 2000 in the matter of *DRH, BES & TKL* a copy of which is attached to the paper. I also asked the then Chief Magistrate to circulate the judgment, and it certainly had the desired effect. Although the section number has been changed in the amended Act, the principles remain the same and I commend them to you. The disclosure sections in the Act to which I also refer in the case, have been substantially amended.

(ii) Sentencing Adults

Again, the principles that arise when s12 of the *Penalties and Sentences Act* applies are well known, and I won't repeat them. These principles are discussed in cases such as *R v Briese* (1997) 92 A Crim R 75 and more recently in *R v Seiler* [2003] QCA 217. The recording of a conviction is a part of the sentence, and can significantly add to the overall punishment of an offender. Some of the practical difficulties that confront Magistrates sitting as Children's Courts which I mentioned in the case of *DRH and ors*, also exist in the adult courts. There is the sheer number of cases and, often the absence of any information about such things as social, economic and employment impacts; and, I am told, often no reference in the submissions of either party to the issue. In each case the issue must be determined as a matter of discretion having regard to the s12 matters and the way in which the Court of Appeal has construed that provision.

(iii) Where there is no appearance

I have been asked to specifically mention this issue as I have recently heard two appeals against the recording of convictions where the offender has elected to plead guilty in writing.

In both cases, I delivered *ex tempore* judgments so they will not be on the Courts home page, but in relation to the first *Leroux v Langsdorf* No 433 of 2004, 14 January 2005 I have provided a copy to Judge Irwin for any of you who are interested.

In that case, a 41 year old teacher with no previous convictions pleaded guilty in writing to one offence of indecent behaviour. He was found sun-baking in the nude on a remote Coolum Beach by a couple of keen constables. He elected to plead guilty in writing. He provided a very full explanation for his behaviour for which he apologised, but did not refer to his occupation. Despite it being a very minor offence, and his lack of any criminal history, he was find $100 and a conviction was recorded. The implications of this order did not become clear to him until some years later when he applied for a job with a private school, and he was required to provide a police clearance. He did not get the job, and to avoid such a result in the future he then applied for an extension of time in which to appeal, which I granted, and I allowed the appeal and set aside the recording of the conviction. The reason I sent it to Judge Irwin was because the appellant, in his lengthy and

well researched outline of argument referred to a quote from a Legal Aid Handbook to the effect that *"you have to turn up at court to obtain no conviction recorded."* This suggested that Legal Aid believed that if you did not turn up, then a conviction would be recorded, which of course would be contrary to law. I am assured, as I thought, that there is no such practice and, indeed, the Legal Aid Handbook is to be amended as a consequence.

Obviously, whether or not a person elects to plead guilty in writing is an irrelevant consideration on this issue, and the court is obliged to consider this issue as if the person were there in person or represented. In other words, the same principles apply.

In the other case *Owen v Queensland Police Service* No 386 of 2004, 11 March 2005, a first year Arts/Law student pleaded guilty to one count of public nuisance. He came out of a local night club in the early hours of the morning and, in a fit of youthful exuberance, grabbled a steel post and swing himself off the ground as he circled the bar. It was not even suggested that he was heavily intoxicated. He was issue a notice to appear by police who witnessed the incident, and sent in a lengthy and persuasive written explanation which included details of his background and excellent character and an apology for his conduct. He was 18 with no previous convictions. In his absence, he was fined $150 in default three days and a conviction was recorded. I allowed the appeal and set aside the orders, and in lieu, released him absolutely pursuant to s19(1)(a) of the *Penalties and Sentences Act.*

In neither case was any reasons recorded for imposing a conviction. I understand why, given the large number of cases that you as Magistrates have to dispose of in this way; but if reasons are not disclosed that in itself, may be sufficient to enable an appellate court to interfere.

<u>Sentencing Violent Offenders</u>

The 1997 amendment of the *Penalties and Sentences Act* removed offenders of violence from the general principle contained in s9(2)(a) that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable. S9(3) now states:

> *" … the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence:*
>
> *(a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or*
> *(b) that resulted in physical harm to another person."*

Obviously this provision would apply to a large number of offences of violence routinely dealt with in your courts on a daily basis.

Certainly in relation to very serious violent offences the Court of Appeal has, in a series of cases in which the Chief Justice has presided and sometimes delivered the leading judgment, invoked these amendments to s9(3) in part justification for a general increase in tariff for such offences.

In R v Bryan; Ex parte A-G (2003) 137 A Crim R 489 at 490 the Chief Justice noted (in a case of grievous bodily harm inflicted with a knife):

> *"By Pt 9A introduced into the Penalties and Sentences Act in 1997, the legislature clearly signalled a hardened intolerance of serious violent offending which sentencing courts must be astute to acknowledge and respect. In cases like this one, deterrence, punishment and community denunciation (s9(1)(a), (c) and (d) Penalties and Sentences Act) will ordinarily assume much greater significance than the personal circumstances of the offender."*

In a series of Attorney-General appeals, the Court of Appeal has strongly emphasised the importance of deterrence, punishment and community denunciation in relation to serious offences of violence. See *R v Chambers, Harrison and Fisher; Ex parte A-G (Qld)* 2002 136 A Crim R 89 (grievous bodily harm with intent resulting in permanent and massive brain injury); *R v Rankmore; Ex parte A-G (Qld)* [2002] QCA 492 (rape and torture); *R v King and Morgan; Ex parte A-G (Qld)* (2002 134 A Crim R 215 (grievous bodily harm); *R v Waerea Ex parte A-G (Qld)* [2003] QCA 20 (unlawful carnal knowledge with a circumstance of aggravation); *R v Wilde; Ex parte A-G (Qld)* (2002) 135 A Crim R 538 (dangerous driving causing death) and in *R v E; Ex parte A-G (Qld)* (2002) 134 A Crim R 486 (torture and rape by a 16 year old where the court referred to the more lenient regime under the *Juvenile Justices Act 1992*), and *R v Roelandts* (2002) 131 A Crim R 603 (torture) in which the court permitted the applicant to withdraw his appeal against sentence in accordance with *Neal v The Queen* (1982) 149 CLR 305, after indicating its intention to substantially increase the penalty imposed.

The extent to which this obvious trend affects sentencing tariffs in your courts and mine for less serious offences of violence is not at all clear. For example there has been no general trend upwards for sentences for assault occasioning bodily harm, or unlawful wounding, undoubtedly offences caught by s9(3).

There may be another reason. For offences caught by s9(3), a sentencer is required to have "regard primarily" to the matters set out in s9(4) of the Act. The way in which I construe these sections is that if s9(4) comes into play the court must first look at such matters as are relevant to the particular case set out in s9(4), but the sentencer can still consider s9(2) matters but not s9(2)(a). It follows that such issues as age, antecedents and character of the offender are still of primary consideration and, of course, the purposes of sentence must always be kept in mind and these include in s9(1)(b) *"conditions … that the court considers will keep the offender to be rehabilitated;"*.

Conclusion

Can I end on a serious note; having started on a light one, Sir William Deane observed once when he was on the High Court that sentencing is the most important and the most difficult task facing a judicial officer. Magistrates impose the vast

majority of sentences delivered each day in our country. We all have the potential to become jaded and cynical particularly when we come face to face with some of the worst features of human behaviour. I can recall some sentencing days when at the end of it I have felt quite overwhelmed by it all, and drained because in part, I recognise that it is an enormous burden to have the power to take away the liberty of another citizen. Every sentence you impose is important. It is most important to the offender. I urge you to keep that in mind, even on those days when your list seems never ending and the parade of human misery saps your spirit.