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INTUITIVE SYNTHESIS OR THE STRUCTURED APPROACH?

The Honourable Justice Dean Mildren RFD
Supreme Court of the Northern Territory

Intuitive Synthesis or the Structured Approach?

No subject of the judicial system attracts more attention than sentencing. There is a vociferous minority in the community strongly supported by sections of the media who propound the view that judges are soft on criminals and longer and more severe sentences are warranted. At election times, these sentiments have influenced politicians and political parties to enter into auctions to woo voters with tough-on-crime policies. In the second half of the 20th century this resulted in legislation which in some jurisdictions enacted longer maximum terms and even mandatory minimum sentences. Most notably, the Commonwealth and each of the States and Territories enacted Sentencing Acts or legislated to provide guidelines for sentencers plainly designed to achieve ‘truth in sentencing’ and sentences according to the theory of ‘just desserts’. Over time, these as well as other influences such as guideline sentences and the broadening of judicial discretion to provide for minimum terms, suspended sentences, home detention and other sentencing orders, have made the sentencing process more complex.

A century ago, sentencing was relatively simple. There was often only a fixed sentence available. If there was a discretion, the options were (1) imprisonment; (2) a fine; or (3) a common law bond. In some jurisdictions a suspended sentence was possible for a first offender. The sentencer took little time to pronounce sentence. Often, if not usually, sentence was pronounced immediately after the sentencing hearing. There was no need to reserve to consider all the options, or to read pre-sentence reports. In many of the cases the prisoner was not legally represented. In most jurisdictions no appeal lay against the sentence imposed.

Nevertheless, the purposes of punishment were the same as they are today; to hand out punishment to satisfy victims’ needs for revenge; general and special deterrence; protection of the community; and, to a lesser extent, reform.

During the course of the 20th century great changes were made to the sentencing process. Courts of Criminal Appeal were empowered to hear sentencing appeals. Mandatory minimum sentences were largely abolished, as was the death penalty and corporal punishment. More options were given to sentencers including the ability to fix minimum terms or to impose fully as well as partially suspended sentences. Much more attention was given to the element of reform. Prisoners generally came before the Courts represented by counsel as the result of the establishment of legal aid agencies. Maximum penalties were revised down by legislatures to more realistic levels.

These factors have all combined to make sentencing one of the most difficult tasks which a judge is called upon to perform. In earlier times, when sentencing was, generally speaking, a simpler task, it was true to say as a generalisation that:

... every sentence imposed represents the sentencing judge’s instinctive synthesis of all of the various aspects involved in the punitive process. Moreover ... it is

profitless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination.¹

Those remarks merely reflect what was the practice of the times and the virtual impossibility of allocating an indicated adjustment for each factor relevant to the ultimate sentence to be imposed.

However in Victoria, at least, the view came to be accepted, following *R v Young*², that a departure from the long established practice in Victoria not to engage in any form of structured sentencing amounted to sentencing error. The form of structured sentencing considered in that case involved first, arriving at that head sentence which would be proportionate to the gravity of the offence having regard only at the objective circumstances and then, secondly, arriving at the appropriate sentence having regard to factors personal to the defendant, policy matters, the plea of guilty, the purposes sought to be achieved by the sentence and the totality principle. The sentencing judge had thought it was necessary to proceed in this way since the High Court had held that a sentence could not exceed that which was proportionate to the gravity of the offence. The Victorian Court of Criminal Appeal held that the decisions of the High Court in *Veen (No 1)*³ and *Veen (No 2)*⁴ neither mandated nor approved of a structured or two-staged approach.

However, not all jurisdictions considered that a two-staged approach amounted to sentencing error. Most other jurisdictions rejected a strict embargo on structured sentencing, although no jurisdiction had held that a structured sentence was required as a matter of legal principle. In particular it was common practice in some jurisdictions to indicate the degree by which a sentence had been discounted to reflect a plea of guilty and for assistance given to the authorities.

The debate was resolved by the High Court in *Markarian v The Queen*.⁵ In that case the sentencing judge had imposed a sentence for knowingly taking part in the supply of a commercial quantity of heroin of two years six months and he imposed a non-parole period of 15 months. His Honour had discounted the head sentence by 25 per cent for the utilitarian value of the plea. The Crown appeal to the NSW Court of Criminal Appeal was successful and a sentence of eight years with a non-parole period of four years and six months substituted. The leading judgment was delivered by Hulme J with whom Heydon JA and Carruthers AJ agreed. On re-sentencing the prisoner, Hulme J pointed out that the maximum penalty for the offence was imprisonment for 20 years and that the maximum penalty for supply of less than 250 grams was 15 years imprisonment. His Honour said that the instinctive synthesis approach leads to figures plucked out of the air and that it is far better to expose the reasoning of the sentencer so far as the more significant features of the sentencing exercise are concerned. He

¹ per Adam and Crockett JJ in *R v Williscroft* [1975] VR 292 at 300.

² [1990] VR 951 at 961.

³ (1973) 143 CLR 458.

⁴ (1988) 164 CLR 465.

⁵ (2005) 215 ALR 213.

considered that, given the way Parliament had structured maximum penalties for various levels of offending, the starting point in this case was 15 years. His Honour then worked backwards, reducing the sentence by a third because the defendant's role was that of a courier rather than a principal and then he gave a further discount of 25 per cent for the plea. He then added a further 18 months to two years to take into account other offences and then reducing it back to eight years to take into account, as well, other factors which pointed in different directions such as the double jeopardy principle.

The High Court unanimously allowed the appeal. All of the Justices were of the opinion that the starting point of 15 years based on the notion that any case involving more than 250 grams is likely to be a worse case than an amount involving less than 250 grams, was fallacious. A majority of the Court, Gleeson CJ, Gummow, Hayne and Callinan JJ, held that there was no absolute prohibition against a structured sentence and therefore an approach which departed from 'instinctive synthesis' was not necessarily sentencing error. McHugh J was very strongly of the opinion that any form of structured sentence was wrong in principle. Kirby J preferred the structured approach.

The majority judgment referred with express approval to a passage in the judgment of Gaudron, Gummow and Hayne JJ in *Wong v The Queen*⁶ where it was said that a mathematical approach to sentencing, in which there are 'increments' to or decrements from, a predetermined range of sentences, is not only apt to give rise to error, but is an approach which departs from principle and should not be adopted. The reason it departed from principle, their Honours said, was because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender.

Attributing a particular weight to some factors, whilst leaving the significance of all other factors substantially unaltered may be quite wrong. We say 'may be' quite wrong because the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. This is what is meant by saying the task is to arrive at an 'instinctive synthesis'.

Nevertheless, the majority held⁷ that in a simple case in which the circumstances of the crime had to be weighed against a small number of other important matters, 'indulgence in arithmetical deduction by the sentencing judge' is not absolutely forbidden.

It is now commonplace in some jurisdictions for sentencers to indicate the extent of the discount given for a plea or for assisting the authorities. The majority referred to the decision of the Court of Criminal Appeal in *Place*⁸ where a bench of five judges held that the extent of the reduction given for a plea of guilty should be identified. The majority did not specifically say that this was wrong. McHugh J, whose judgment is extremely critical of the two-staged approach, and who is a strong proponent of the instinctive synthesis method, did not object to specific discounts for 'non-sentencing purposes', ie, for such things as a plea of guilty or for willingness to facilitate the course

⁶ (2001) 207 CLR 584 at 611–612; [74]–[76].

⁷ *Markarian v The Queen* (supra) at para [39] (pg 224).

⁸ (2002) 81 SASR 395 at 424–425, [80]–[83].

of justice.⁹ Kirby J, who favoured the two-stage approach, pointed out that if a sentencer may identify those sort of considerations separately, as a matter of logic and principle, ‘the same approach would necessarily apply to any other distinct factor in sentencing, important to the particular case, that caused a measurable and clearly identifiable adjustment to the sentence that warranted explicit mention ...’¹⁰

Kirby J’s critical dissent in *Markarian* concludes with 2 paragraphs worth quoting.¹¹

[138] All that seems to be left from the original imperatives, traced to the decisions in *Williscroft* and *Young*, is a prohibition on mathematical adjustment in deriving the ultimate sentence imposed on an offender. Yet even this is not now absolute. Specification, in a staged or sequential approach, of the degree of reduction of what would otherwise have been the penalty for a plea of guilty is, it seems, sometimes permissible. So presumably is re-adjustment for any assistance to authorities. So indeed, by statutes in many parts of Australia, must now be specific reductions and adjustments expressed in terms of identified quantification or percentages. Even occasionally (albeit in unexplained circumstances) arithmetical indulgence will now, it seems, be overlooked. However, preferably that will happen only where the factors adjusted are comparatively few and the case is ‘simple’.

[139] So analysed, the residue of this judicial debate over twenty years—in this Court over the past five years—is revealed for what it is. Australian judges must now express their obeisance to an ‘instinctive synthesis’ as the explanation of their sentencing outcomes. It might be prudent for them to avoid mention of ‘two stages’ or of mathematics. Yet in many instances (and increasingly by statutory prescription) if judges do so, no error of sentencing principle will have occurred. Such mention may, in fact, sometimes even be required. The lofty and absolute prescriptions of *Williscroft* and *Young* remain in place like the two vast and trunkless legs of stone of Ozymandias. But, with all respect, they are now beginning to look just as lifeless. One day, I expect that travellers to the antique land of this part of the law of sentencing will walk this way without knowing that the two proscriptions once were there.

Is Kirby J right? In most jurisdictions the sentencer is required to fix a minimum term which may be a non-parole period or a wholly or partially suspended sentence. Is the sentencer required to intuitively arrive at this as part of one exercise of instinctive synthesis or are they in reality two separate exercises? Kirby J¹² said it is impossible to conceive that a purely instinctive synthesis or ‘single-tiered approach’ could be taken in such circumstances. Indeed in some jurisdictions the matter is made more complicated by a variety of different factors to be considered which relate only to the minimum term: eg factors relevant to the discretion not to fix a minimum term; statutory restrictions preventing a minimum term; statutory provisions placing limits on the minimum term which can be set, eg by reference to a percentage of the head sentence; statutory provisions which prevent the imposition of a suspended sentence; and provisions, such as s19AB(4) of the Crimes Act 1914 (Cth) which require sentencers to

⁹ see 215 ALR at 234–235, para [74].

¹⁰ at 247, para [123].

¹¹ at 251, para [138]–[139].

¹² at 247, para [125].

state their reasons as to why the court has decided not to make a recognisance release order. Plainly Kirby J is right. But it may nevertheless be said that in arriving at the ultimate minimum period to be served the sentencer has simply engaged in another intuitive process of reasoning.

But surely, even that is not the complete answer. Does not the sentencer have to ensure that there is a proper relationship between the head sentence and the minimum term? So, does this mean that there is a third process of intuitive synthesis?

Other examples might be given of a similar character; eg when applying the totality principle to a series of sentences; or when deciding whether or not to make some sentences cumulative or only partly concurrent. On the other hand it would often be difficult to give reasons as to why particular sentencing orders are arrived at. How does one justify by the giving of reasons that the overall sentence has been reduced by a particular amount to satisfy the totality principle?

A significant part of the debate revolves around the desirability of giving reasons for imposing sentence. Hulme J said that the ‘instinctive synthesis’ approach made him wonder whether figures have not just been plucked out of the air and that it is far preferable that the reasoning be apparent in respect of the more ‘significant features’. Nevertheless his Honour accepted that in many sentencing exercises there will be an element of subjective choice or value judgment which is impossible to avoid. Kirby J¹³ said that judicial officers should be encouraged to reveal their processes of reasoning:

Simply to assert that they have considered a list of relevant matters, without identifying, in general terms, the weight that has been given to the most important matters, may represent an error in sentencing.

But surely it is already common practice for judges to indicate, in general terms, what weight they have attached to the more important aspects of their task even if no more is said than ‘I give little weight’ or ‘I have given considerable weight’ or some such choice of words and surely this is enough. The majority judgment¹⁴ said:

The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve those ends.

Presumably their Honours would not normally require more than the kind of indication to which I have referred. Clearly McHugh J was of this view when his Honour said:¹⁵

The synthesising task is conducted after 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 of the particular case.

¹³ at 250, para [135].

¹⁴ at 225, para [39].

¹⁵ at 237, para [84].

The end result is that there are no absolute rules about how to approach the sentencing task. As was said by Jordan CJ in *R v Geddes*¹⁶ in a passage quoted by McHugh J¹⁷, ‘the only golden rule is that there is no golden rule’. Nevertheless there is considerable guidance.

The important thing is to get the right result regardless of which path is chosen to get there. In arriving at a sentence, a sentencer has a considerable discretion. That discretion will not be interfered with unless there is error demonstrated and, even then, it does not automatically follow that the appeal court will allow the appeal.

It is well to remember that in all Australian jurisdictions, Courts of Criminal Appeal can only allow a sentencing appeal if some sentence, other than the sentence actually imposed, is warranted. Typical of these provisions is s411(4) of the Criminal Code (NT):

On an appeal against a sentence the Court, if it is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefore and in any other case shall dismiss the appeal.¹⁸

The first decision which any sentencer must make is whether or not to impose a custodial sentence. Once it is clear that there must be an actual sentence of imprisonment, the next question is: how long? Sentencing tariffs often do not exist.

Judges, especially experienced judges, are familiar with the sentencing range. Statistics and records of other sentences kept on Court sentencing databases and guidance from appeal courts on matters of sentencing principle provide some basis for arriving at a starting point, even if it is difficult if not impossible to articulate how the starting point may be arrived at.

Decisions of Courts of Appeal in Tasmania, South Australia and Western Australia since *Markarian* have held that indicating the starting point is not error and in effect have approved of a two-staged process: see *Dennison v Tasmania*,¹⁹; *R v Sladic*²⁰; and *Chivers v WA*²¹.

So is all this debate much ado about nothing—an exercise in semantics? From the point of view of a District Court Judge or a Supreme Court Judge who has time to reserve to consider his sentence and deliver carefully prepared sentencing remarks, perhaps not. For the busy Magistrate who might have to deal with upwards of 30 cases in a day, the argument might be very difficult. But in the end, the Judge or Magistrate imposing a prison sentence still has to decide—how long? In deciding this question he or she has a broad discretion as to which there is often no truly correct answer.

¹⁶ (1936) 36 SR (NSW) 554 at 555.

¹⁷ at 231, para [65].

¹⁸ see *Dinsdale v The Queen* (2000) 202 CLR 321.

¹⁹ [2005] TASSC 54.

²⁰ (2005) 92 SASR 36.

²¹ [2005] WASCA 97.