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Sentencing Advocacy

A Paper by
His Honour Judge Stephen Norrish QC
District Court of New South Wales
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"P1: What did he get? What did he get?
P2: 18 months imprisonment
P1: Great result! Well done! *(pause)* What was the charge? What was his record?"

(Unnamed Public Defender – Darlinghurst Courthouse circa 1987)

Introduction

As I understand the Paper I am required to deliver, rather than give an outline of current sentencing law in NSW, I was requested to discuss sentencing advocacy. Particularly, in the words of John Stratton SC, "How to do it!" I understood this to be an invitation to make some observations about sentencing advocacy from my own perspective, what works and what does not. I cannot express universal truths about this aspect of criminal practice. Obviously that is not possible. I would not be so bold, or arrogant, to suggest that what I thought to be appropriate or desirable in sentencing advocacy would be acceptable for other Judges or Magistrates. Of course it must also be recognised from the outset that there are differences in practice and procedure from the various jurisdictions. Assuming the topic is concerned with advocacy at first instance, the type of advocacy needed in the Local Court will be, of necessity, different to that required in the District Court and the Supreme Court. In some respects what is required in the District Court will be different from that required in the Supreme Court, bearing in mind the character of the offences normally dealt with in each jurisdiction and time constraints which more likely will arise in the District Court than in the Supreme Court.

Of course "advocacy" is not solely concerned with what happens in Court. What happens before the hearing is just as, or even more, important. I asked myself, however, in sentencing advocacy for indictable offences: were there "universal truths" or "rules" which underpinned successful or effective sentencing advocacy regardless of the judge or the jurisdiction or even the charge? It is to be recognised that, putting aside the different requirements of individual judges and jurisdictions, every advocate has his or her own personal style which will affect the conduct of the plea, both in terms of style and content of presentation. I wondered whether I should spell out, "The Ten Commandments of Sentencing Advocacy" (with apologies to Professor Irving Younger and of course "The Bible"). Apart from being overbearingly arrogant to do so, a pressing issue is whether sentencing advocacy permits of the type of immutable rules or "commandments" of which the late Professor Younger speaks in his discussion on cross examination. "Thou shalt not" do this, or that, does not ring true in an area of nebulous "science" such as sentencing advocacy.

In any event, I wondered whether, if there were identifiable "commandments" , they numbered ten. "The Seven Commandments" or "The Fourteen Commandments" does not have the same ring. Perhaps the "Seven Deadly Sins" would be a better way to identify the things not to do. If there are any such "Commandments" to be found they may not be immutable, just as "Thou shall not kill", in the real world, is not an immutable rule. More like "Thou shall not kill", subject to the operation of relevant sections of the *Crimes Act (NSW)* and "rules of engagement" in armed conflict etc. Their relevance and applicability may vary depending upon the case at hand. Even Younger's "Ten Commandments of Cross Examination" are there for the breaking at the appropriate time.

Of course the other matter that is relevant to any discussion about sentencing advocacy is that sentencing, particularly from the perspective of the accused, throws up "imponderables" or "dilemmas" which obviously can only be solved on a case by case basis. A shining example of this is whether to call or not to call the offender to give evidence.

The more I thought about the topic the less certain I was about what to say which could be of assistance. As it turns out nothing I say may be of assistance. I bear in mind that I am giving this paper

for the information of counsel and solicitors representing the interest of persons appearing for sentence, not representing the interests of the State. Different imperatives for both practical and ethical reasons arise depending upon which side of the "ledger" one appears. An example is Rule 71 of the New South Wales Bar Rules relating to prosecutors. The great experience of the participants in the seminar means that I probably will end up telling people what they already know or not telling them what they already know.

I will try to undertake "instinctive" or "intuitive" synthesis of some aspects of the topic where appropriate, but of necessity the presentation must be "multi staged" in its approach.

The objective of the sentencing process and some of its constraints
In blunt terms, within ethical constraints, the objective of the sentencing process for the defence advance is to obtain at first instance the best result for the client according to law. "According to law" includes obtaining a result which within the opinion of the advocate is not only "in the strict sense" appropriate, but also realistically likely to stand the test of appeal. Of course your professional judgment may lead you to be satisfied with an outcome but which pleasure the client may not share. This may lead to other representation to pursue rights on appeal, which might take a different view. Thus the outcome is one which should stand the test of appeal, although only the most churlish or self absorbed advocate, having come to the view that a particular penalty was within particular sentencing discretion, would resent a reduction of the sentence imposed and would begrudge a client the fruits of appellate success. It must be said in this regard of course that such circumstances can arise through inadvertent error on the part of the advocate or the judge. This is a consequence that both advocates and judges strive to avoid but obviously in the heat of the moment no one can guarantee that that will be so. It all boils down to doing your best to get the right result.

I mentioned ethical constraints. These are important in a range of ways. They restrain the way the client's case is presented, they govern the advocate's relationship with the Court and the relationship with an opponent. They require the advocate to be honest with the Court, not to put matters inconsistent with instructions, to represent the client's interests dispassionately but fearlessly.

The Bar rules provide some guide even beyond practice at the Bar. Particular reference might be made to Rule 73 (ie "truthful opinion on any matter submitted for advice") as one aspect of practice binding barristers as well as fundamental Rules, operating in all jurisdictions such as Rules 16, 17B and 18, amongst others. Of course, prosecutors who are barristers are required to observe specific "duties" set out at Rules 62-72. Failure to do so may cause a miscarriage of justice to occur (*R v Kneebone (1998) 47 NSWLR 450).*

The advocate should avoid emotional involvement with the client albeit that it is difficult when one has a certain degree of emotional investment in the professional conduct of a client's case. Distance and objective analysis will do more to advance the client's interests than passionate involvement.

A more fundamental constraint is the basic procedural framework in which sentencing operates. The High Court (upon a Victorian Appeal) in the matter of *GAS and SJK [2004] HCA 22* summarised the position as follows:

"[28] First, it is the prosecutor, alone, who has the responsibility of deciding the charges to be preferred against an accused person. The judge has no role to play in that decision.

[29] Secondly, it is the accused person, alone, who must decide whether to plead guilty to the charge preferred. That decision must be made freely and, in this case, it was made with the benefit of legal advice. Once again, the judge is not, and in this case was not, involved in the decision. Such a decision is not made with any foreknowledge of the sentence that will be imposed. …..

[30] Thirdly, it is for the sentencing judge, alone, to decide the sentence to be imposed. For that purpose, the judge must find the relevant facts. In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge's capacity to find potentially relevant facts in a given case. …..

[31] Fourthly, as a corollary to the third principle, there may be an understanding, between the prosecution and the defence, as to evidence that will be led, or admissions that will be made, but that does not bind the judge, except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions. In deciding the sentence, the judge must apply to the

facts as found the relevant law and sentencing principles.... The Judge's responsibility to find and apply the law is not circumscribed by the conduct of counsel. …..

[32] Fifthly, an erroneous submission of law may lead a judge into error and, if that occurs, the usual means of correcting the error is through the appeal process. …..".

Similar observations were made in *Chow v DPP (1992) 28 NSWLR 893* (at 604-608). In that matter apart from making some of the observations above set out in *GAS*, Kirby P (as he then was) in discussing the fact finding role of the Judge, whilst cautioning against the Judge taking "an inquisitorial role", noted the need for Judges to raise concerns, "the silent Judge is nowadays regarded, more often than not as a menace". Failure to disclose concerns as to the facts alleged or their basis may amount to "a departure from the rules of procedural fairness". A Judge is not "to passively and unquestioningly accept facts.…Even where the prosecution and defence are agreed, they cannot fetter the Judge's performance of the judicial function by their plea bargaining". But where a plea is to a lesser charge a judge should "hesitate" before assuming a "mistake" has occurred or that the parties are misleading the Court (at 606). A sentencing Judge cannot take into account facts consistent with the elements of a more serious offence rather than the facts which constitute the "essential ingredients" of the offence charged (*The Queen v De Simoni (1981) 147 CLR 383* at 389).

In *R v Palu (2002) 134 A Crim R 174*, the Court of Criminal Appeal reaffirmed the general principles in *Chow*. Justice Howie said (at 179):

> *"It behoves the parties, especially after a "plea bargain", to ensure that the sentencing Court is made aware from the outset of the proceedings whether there is any dispute as to the factual basis upon which the offender is to be sentenced and identify with particularity what matters are in issue. Disputed facts are to be resolved by accusatorial process upon evidence before the Court.. If a statement of facts is to be tendered, it should both support the charge for which the offender is to be sentenced and accord with the offence charged. It should not contain facts that would aggravate the offence in breach of the principle. If it purports to be an agreed statement of facts so that it is intended to provide the factual basis upon which the parties wish the Court to sentence the offender, the facts should be sufficient to permit the Court to exercise its discretion and the Crown should not tender other material which might supplement or contradict the facts set out in the agreed statement. If other material is placed before the Court which relates to the facts of the offence, then the parties should understand that the Court is not bound by the tendered statement of facts or any agreement made between the parties as to the basis upon which the offender is to be sentenced".*

In *Olbrich v The Queen (1999) 199 CLR 270* it was held that a sentencing judge is not bound to sentence an offender on a view of the facts most favourable to the offender and that a sentencing judge may not take facts into account in a way that is adverse to the interests of the accused unless the facts have been established beyond reasonable doubt. Where the judge proposes to take into account facts in favour of the accused those circumstances may be proved on the balance of probabilities. In that judgment, the High Court observed that a judicial officer may not be able to decide one way or the other or may not be able to make findings about all matters that relate to relevant circumstances of the offence.

In *Weininger v The Queen [2003] HCA 14* the High Court dealt with several issues of fundamental importance in sentencing, not just in sentencing an offender for Federal offences. The appellant had never previously been convicted of an offence and evidence was adduced on behalf of the prisoner to suggest that the importation was uncharacteristic or a unique event. The Crown led evidence which suggested that the appellant had been involved in the ongoing business of cocaine importation. On the totality of the evidence the sentencing judge in her remarks on sentence said inter alia that the appellant "cannot be treated as a first offender with the attendant leniency that that status usually attracts".

The majority of the Court said in *Weininger* that many matters that must be taken into account in fixing sentences are matters whose proper characterisation may "lie somewhere along a line between two extremes", that being "aggravating" circumstances and on the other extreme "mitigating circumstances". The High Court observed that "neither human behaviour nor fixing of sentences is so simple".

The majority observed that:

> "A sentencing hearing is not an inquisition into all that may bear upon the circumstances of the offence or matters personal to the offender. Some matters may be fixed by the plea or verdict of guilty although, even there, there may be ambiguities (example manslaughter verdicts). Many of the matters relevant to fixing a sentence are matters which either the prosecution or the offender will draw to the attention of the sentencing judge. Some matters will remain unknown to the sentencing judge. The question then becomes, what use is the sentencing judge to make of what is known, and of the matters urged by the parties? This is not a series of choices for the judge between alternatives. Not only may some things be unknown, some will concern matters in which a range of answers may be open" [23].

Their Honours cautioned against introducing "excessive subtlety and refinement" to the task of sentencing and said that it must be "recognised" that not every matter urged on the judge who is to pass sentence has to be, or can be, fitted into one or other category. The judge may be unpersuaded of matters urged in "mitigation" or in "aggravation" [24].

The sentencing "universe" in which we live

As imponderable as many of the issues that arise in sentencing advocacy may be, it operates within a legal and ethical framework. This "universe" of laws, procedures, principles et al is the context for the process that dictates practical approaches and solutions to problems. Some of the fundamental rules are set out above.

Sir Frederick Jordan, a former Chief Justice in NSW, "famously" said in *R v Geddes (1936) SR 554* (at 555) of the process of sentencing as a "function" of "criminal punishment":

> "…..the only golden rule is that there is no golden rule".

This observation was adopted by Chief Justice Spigelman, in his "Foreword" to the Judicial Commission's "Sentencing Manual", as reflecting the existence of "….a broad sentencing discretion… (where) the ineluctable core of the sentencing task is a process of balancing overlapping contradictory and incommensurable objectives…..(that) do no always point in the same direction". This "golden rule" is known to all practising in the criminal law, at least in NSW, as an aphorism of sentencing law, so strikingly and enticingly simple, direct and "true" that we all wish we had said it ourselves first.

Its continuing currency has been recognised on many occasions beyond the Chief Justice's general observations quoted above. It has appeared in different terms in many important judgments over the years, including those of the High Court. Recently in *Wong v The Queen (2001) 207 CLR 584* at [77] the majority said:

> *"The core of the difficulty lies in the complexity of the sentencing task. A sentencing judge must take into account a wide variety of matters which concern the seriousness of the offence for which the offender stands to be sentenced and the personal history and circumstances of the offender. Very often there are competing and contradictory considerations. What may mitigate the seriousness of one offence may aggravate the seriousness of another. Yet from these the sentencing Judge must distil an answer which reflects human behaviour in the time or monetary units of punishment."*

There is however a certain amount of irony that Chief Justice Jordan's observation still is regarded as encapsulating the indefinable uncertainty of the sentencing process, when one considers that it was an observation made when he spoke for a majority in a successful Crown appeal against the inadequacy of sentence for manslaughter, when the majority increased the sentence at first instance from 1 year imprisonment to 3 years imprisonment. Owen J. dissented as to whether there was demonstrated inadequacy. The sentencing judge apparently was not aware of the existence of the "golden rule" to which the learned Chief Justice was referring. Perhaps sub silentio to the judgment was another "golden rule", to be observed by all judges and which still applies:

> *"Never be too lenient (or too excessive) when sentencing in the minds of those who will review the judgment even if it is recognised that reasonable minds may differ on the same topic".*

A second irony of the currency of the aphorism in present times is that the words of Jordan CJ reflect a much simpler time for sentencing practice. His comments were made at a time when sentencing was a much simpler affair in practical terms as well as philosophical. Amongst other things Courts were not able to fix non parole periods and the options were essentially gaol, recognizance or fine. The "science" of sentencing was essentially to be found in common law rules, not in legislation. The reference to "a golden rule" appears in the context, not often cited, where his Honour said:

> *"The function of the criminal law being the protection of the community from crime, the judge should impose such punishment as, having regard to all the proved circumstances of the particular case, seems at the same time to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others. When the factors are such as to incline the judge to leniency, the prisoner's record may be a strong factor in inducing him to act, or not to act, upon this inclination. Considerations as broad as these are, however, of little or no value in any given case. It is obviously a class of problem solving which is easy to see when a wrong principle has been applied than to lay down rules for solving particular cases, and in which the only golden rule is that there is no golden rule".*

Simpler times indeed! No mention of rehabilitation or reform. No mention of victims, denunciation or even accountability of offenders. His summation of the purposes or function of sentencing might be compared with what the majority in *Veen v The Queen [No 2] (1988) 164 CLR 465* (at 476) said when it summarised "the purposes of sentencing" or "the function of the criminal law" in the following terms:

> *"However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions".*

Pointing in different directions, but who can read the guideposts accurately? Satisfying the "purposes of criminal punishment", in the particular case, is the ultimate exercise in undertaking instinctive or intuitive approach to sentencing.

Simpler times in sentencing law continued well into the 1980's. Of course, in the meantime legislative change had complicated the matter, the *Parole of Prisoners Act (1967)*, the *Probation and Parole Act (1983)* as well as amendments to the *Commonwealth Crimes A*ct, particularly Part 1A, made the task more complex. Sentencing options expanded; periodic detention, community service etc were introduced in the 1960's and 1970's. Even by the early 1980's however judgments on sentence rarely went for more than fifteen minutes and the issues addressed turned largely upon the objective circumstances of the offence and the relevant subjective matters. Decisions were made quickly. The appellate courts usually decided whether the sentence was too much or too little. Concepts such as totality, (*R v Holder and Anor (1983) 3 NSWLR 245),* parity *(Tisilandis (1982) 2 NSWLR 430)* and delay (*R v Todd (1982) 2 NSWLR 517)* amongst other issues required more complex reasoning. Recognition commenced of the weight to be given to the plea of guilty (eg *R v Ellis*) as courts struggled to manage their lists.

In September 1989 the enactment of the *Sentencing Act* in NSW changed the ground rules of sentencing significantly, particularly with the abolition of remissions and greater restrictions in relation to the fixing of non parole periods, the accumulation of sentences etc. This led to a plethora of cases on what constituted "special circumstances" and perceived error if they were not adverted to by the sentencing judge.

In September 1995 the *Evidence Act* became law. Although of limited relevance to sentencing, the Act may still apply if the Court directs that it be so (*s.4(2)* of the Act).

The legislature is not the only dynamic force in sentencing law. Before the *Crimes (Sentencing Procedure) Act* was enacted, the High Court in *Pearce v The Queen* said:

> *"A judge sentencing an offender for more than one offence must fix an appropriate sentence for*

> *each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality" [45].*

The difficulty in underlying the implications of this judgment has been reflected by the apparent explosion of the Crown and prisoner appeals claiming error by sentencing judges applying these principles. Even in 2003 it was observed in the Court of Criminal Appeal that: "the full ramifications of this statement of sentencing principle have not yet been clearly established" (*R v Bahsa (2003) NSW CCA 36* at [63].) Of course the interesting aspect of *Pearce* was that it was principally not an appeal concerned with sentencing. It was an appeal concerned with issue estoppel, double jeopardy on conviction and abuse of process in charging for separate offences on the supposed same facts. The Court was commenting on the structure of the sentences imposed with implications for the ultimate determination of an appeal against the failure to grant a stay of proceedings. On one view of it, strictly understood, the views of the majority may have cast doubt upon the decision of the High Court in *Mill v The Queen (1988) 166 CLR 59* (particularly at 62-65), however recently the High Court in *Johnson v The Queen (2004) HCA 14* put everyone's mind at rest concluding that no inconsistency existed. However, *Johnson* still leaves for resolution by advocates and judges alike the complications post *Pearce* discussed in such cases as *Bahsa*, *Hammoud (2000) 118 A Crim R 66*, *Gorman (2002) NSW CCA 516* amongst many others.

Both immediately before and after the oft quoted passage from *Pearce* which has generated so much judicial activity, the majority said inter alia:

> *"It is highly undesirable that the process of sentencing should be become any more technical than it is already"….. ."It should, however, be emphasised that (whether sentences are to be concurrent or not) is not to be attended by "excessive subtleties and refinements". It should be approached as a matter of commonsense, not as a matter of semantics"…. ."Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision." (Pearce v The Queen (1998) 194 CLR 610) [39], [42], [46])*

This is ironic given what has occurred over the past 6 or 7 years consequent on the judgment.

Further, since 1998 the NSW Court of Criminal Appeal has handed down a number of "guideline judgments", commencing with *R v Jurisic (1998) 45 NSWLR 209*. Initially the jurisdiction for promulgating guideline judgments lay in the powers available under the *Criminal Appeal Act (1912)* in relation to Crown and other appeals against sentence. However the legislature embraced the concept and now the legislative fiat for such judgments is to be found at *ss.36-42 Crimes (Sentencing Procedure) Act.* The range of guideline judgments are well known, some have involved numerical guidelines, some have been concerned with matters of procedure and sentencing practice, some applications for guideline judgments have not been granted, at least to promulgate a numerical guideline where sought, such as for breaking, entering and stealing (*s.112(1) Crimes Act*) and "assault police". (*s.60(1) Crimes Act)*. Guidelines for sentencing Federal offenders for drug importation offences in *R v Wong and Leung* were struck down in the judgment of the High Court earlier cited.

In *Jurisic*, the Chief Justice in promulgating the need for a guideline judgment observed:

> *"There are a multiplicity of factors that need to be considered in sentencing… There is, however, tension between maintaining maximum flexibility in the exercise of the discretion, on the one hand, and ensuring consistency in sentencing decisions, on the other. Inconsistency in sentencing offends the principle of equality before the law. It is itself a manifestation of injustice. It can lead to a sense of grievance amongst individuals on whom uncharacteristically severe sentences are imposed and, amongst the broader community, or victims and their families, in the case of uncharacteristically light sentences" (at 216).*

He went on to say:

> *"Such guidelines are intended to be indicative only. They are not intended to be applied to every case as if they were rules binding on sentencing judges. Decisions of appellate Courts on sentencing are not to be treated as binding precedents" (at 220D).*

He explained:

> *"The critical difference between judicial guidelines and statutory guidelines – whether minimum penalties or a grid system – is the flexibility of the former. There is provision for the special or exceptional case. There is recognition that sentencing must serve the objective of rehabilitation, as well as the objectives of denunciation and deterrence. A trial judge can respond appropriately to all the circumstances of a particular case" (at 221A).*

Justifying "guidelines" as a "starting point" or a guide to structure discretion, the Chief Justice said:

> *"The existence of multiple objectives in sentencing – rehabilitation, denunciation and deterrence, permits individual judges to reflect quite different penal philosophies. This is not a bad thing in a field in which "the only golden rule is that there is no golden rule" (quoting Jordan CJ in R v Geddes) …however there are limits to the permissible range of variation. The Courts must show that they are responsive to public criticism of the outcome of sentencing processes. Guideline judgments are a mechanism for structuring discretion, rather than restricting discretion (Jurisic at 221D-E).*

The "golden rule" still lived, even when discretion was structured. Where guidelines have been set, for particular offences, the Court has sought to identify "typical cases" (such as in *Jurisic, R v Henry (1999) 46 NSWLR 346)*, and most recently in relation to high range PCA offences (see *(2004) NSW CCA 303).* The criteria for a "typical case" where such a typical case has been identified have themselves taken on a life of their own in a range of ways. An example of that, by reference to the *Henry* guideline, is the discussion in cases such as *Fernando [2002] NSW CCA 28* and *Hayes [2002] NSW CCA 237* whether a blood filled syringe was to be regarded as "more serious" than the category of weapon considered in *Henry.* The "abandonment of responsibility" in dangerous driving cases has given way to shades of "moral culpability" (*R v Whyte (2002) NSW CCA 343*), prompted in part by observations of Simpson J and the late Badgery-Parker J in different cases that blameworthiness in such cases was not a "black and white" situation but rather represented by a continuum of conduct.

Numerical guidelines set down before 2000 were overtaken to some extent by the decision of *Thomson and Houlton* (*(2000) 49 NSWLR 383)* where the Court of Criminal Appeal (at [160]) lay down a guideline for a discrete discount for the "utilitarian value of the plea", measured in percentage terms. The earlier guidelines were said to reflect a sentence where the plea was of "limited" value. *Wong (and Anor) v The Queen* and *Cameron v The Queen (2002) 76 ALJR 382,* in the High Court, prompted *R v Sharma (2002) 54 NSWLR 302,* confirming *Thomson*, particularly in light of *s.22 Crimes (Sentencing Procedure) Act, 1999..* Subsequent decisions have reaffirmed that the discount is available notwithstanding the strength of the Crown case and must be articulated and recognised, at the judge's peril. In sentencing, where a gaol term is to be imposed, the calculation of the appropriate discount has become the first point of reference, at least in submissions.

In addition to the general philosophical themes developed which underpin sentencing law and practice in modern sentencing, vital to successful advocacy as well as proper judgment, consideration must now also be given to the myriad of provisions (under NSW law) now relevant in the *Crimes (Sentencing Procedure) Act*. The introduction of this Act in 2000 further expanded and complicated the "rules" relevant to each sentencing exercise and expanded sentencing options. Between 2000 and the present time there have been significant amendments to that legislation, eventually leaving us with provisions relating to the fixing of non parole periods (*s.44*) that take us back to Mr Yabsley's vision of the means of fixing non parole periods, a process not without complexity as anyone who has read *Moffitt v The Queen (1990) 20 NSWLR 114* would understand.

Now, provisions such as *ss.3A, 5, 21A, 22, 22A, 23, 44* (where applicable), *54A-D*) etc, *Pearce* principles (*Pearce v The Queen (1998) 194 CLR 610*), the guideline judgments and the various statutory provisions and principles relevant to the various alternatives now available under sentencing law etc have to be taken into account when relevant to any sentencing exercise. Failure to advert to a relevant matter may constitute error. Judges have never been more dependent on advocates.

From 1 February 2003 the *Crimes (Sentencing Procedure) Act* was significantly amended. The observations of the majority in *Veen [No 2,]* cited above, with their nod to Sir Frederick Jordan's formulation, morphed into *s.3A* of the Act, with added criteria reflecting shifts in sentencing philosophy. The earlier version of *s.21A* (reflecting many of the criteria identified by Justice Grove in *Ponfield* – the "guideline judgment" on breaking, entering and stealing offences), was substantially amended into a form which has provided fresh grist for the appellate mill. For example, to find as an aggravating factor that a victim was "vulnerable" because of her age (8), when the fact she was under 10 was a pleaded

aggravation is an error given the terms of *s.21A(2)* of the Act. (*R v JDB (2005) NSW CCA 102*). I know, I made the error. As earlier mentioned, *s.44* was amended to revert to sentencing practice under *s.5 Sentencing Act, (1989)* and of course Part 4 Division 1A was introduced, amongst other amendments at this time.

The Attorney-General in introducing these amendments observed:

> *"The imposition of a just sentence in the individual case requires the exercise of a complex judicial discretion. The sentencing of offenders is an extremely complex and sophisticated judicial exercise"*

The legislature acknowledges the continuation of "the golden rule" but the context in which it operates does not have the same simplicity of earlier times.

The interrelation of these various provisions was explained in *R v Way (2004) 60 NSWLR 168,* which itself has been analysed or discussed in other judgments, most notably in *R v Pellew [2004] NSW CCA 434.* In the context of explaining the proper construction of *ss.54A-54D*, the Court in *Way* said that if *s.54B* did not apply:

> *"it seems to us that the Court should exercise its sentencing discretion in accordance with establishing sentencing practice and by reference to the matter identified in ss.3A, 21A, 22, 22A and 23 of the Act. The ultimate objective remains one of imposing a sentence that is just and appropriate having regard to all the circumstances of the offence and the offender, so as to give effect to the purposes mentioned in s.3A (of the Act" (para 120).*

However, perhaps to complicate matters, the Court also went on to say:

> *"In this approach the standard non parole period can properly take its place as a reference point, or benchmark, or sounding board, or guidepost, along with the other extrinsic aids such as authorities, statistics, guideline judgments and the specified maximum penalty, as are applicable and relevant. In particular, it can have a direct relevance as a reference point to be compared with the sentence which is provisionally reached after an assessment has been made of the relative seriousness of the subject offence and of the various aggravating and mitigating factors, as well as any other subjective factor which may be present, including in particular the fact…that the offender entered a plea of guilty" [122].*

These "guideposts" might only point in one direction. In fairness the Court in *Way* also observed:

> *"Had there been an intention to convert sentencing to a precise arithmetic exercise….then those reference points would need to have been identified and consideration given to the weight to be attached to the adjusting factors. The absence of any provision of that kind (in Part 4 Division 1A Crimes (Sentencing Procedure) Act, 1999) is a further pointer towards the continuation of a wide area of discretion, without resort to some rigid mechanistic or arithmetic approach, of the kind which would be untotally suited to the difficult task of sentencing."*

In the background to the common law and legislative developments bubbling away has been the conflict between the concept of the "multi staged" approach to sentencing, required in part when recognising discounts for the plea of guilty as well as cooperation with authorities, and the "instinctive synthesis approach". In *Thomson and Houlton* the Chief Justice had said in response to comments by the High Court in *AB v The Queen*:

> *"The instinctive synthesis approach is the correct general approach to sentencing. This does not however necessarily mean that there is no element which can be taken and treated separately, although such elements ought be few in number and narrowly confined. As long as they are such there is separate treatment will not compromise the intuitive or instinctive character of the sentencing process considered as a whole".*

Later, in *Way,* the Court said:

> *"The approach which we have outlined does not seem to require a departure from the intuitive or*

> *instinctive synthesis approach to sentencing which received judicial support in R v Thomson….. and which was favoured in the joint judgment in Wong v The Queen but which has also attracted some criticism ….. nor do we see it as requiring resort to a rigid two tiered approach which involves determining an objective sentence and then adjusting it to take account of subjective factors of the kind which was criticised in AB v The Queen" [127].*

Yet underpinning the veneer of technicality and rigidity, or "structure", there remains room for return to fundamental principles of fairness, mercy and commonsense. In *R v Henry* the Chief Justice acknowledged the continuing relevance of Mahoney ACJ's observations in *Lattouf (NSW CCA – 12 December 1996),* at [10], in the context of guideline judgments. In *R v Blackman and Walters (2001) NSW CCA 121,* in the context of considering *s.12 S.P. Act*, Wood CJ at CL, reflected upon the particular relevance in the instant case of the observations of the South Australian Full Bench in *Kovacevic (2000) 111 A Crim R* and *Yardley and Betts (1979) 22 S.A.S.R.* 108 (at *[43]-[44]).*

This perhaps brings us full circle to what Sir Frederick Jordan said 69 years ago. In reality although there is still to be recognised "a wide judicial discretion", the universe in which that discretion is exercised is as different today from 1936, as is our knowledge today of the wider universe compared to what it was at that time. There may be "no golden rule", but there is a lot more to take into account than was required in *Geddes.*

The practicalities: "How to do it"
Well, having tried to define the objective of the sentencing process and outline the philosophical and technical framework or "universe" in which the system works, how is the objective achieved? In my view, the advocacy part, is in many respects the easy part. What is said in Court is like the tip of an iceberg. It is a small part of the entire body of work required to effectively represent your client on sentence. As we all know that what occurs before the actual presentation of the case provides the advocate with a number of important opportunities for achieving a reasonable or appropriate outcome. It gives the advocate the confidence to press for the appropriate result and it also better informs the judgment to be made as to what is, in reality and appropriate or reasonable result. The old saying that success is "90% perspiration and 10% inspiration" is as true of advocacy as any other area of intellectual endeavour, inside or outside the law. There are of course the truly gifted who from time to time fluke the right result without fully preparing but this occurs only from "time to time". When mistakes are made they are made with calamitous results, for judges and advocates alike.

The three major aspects of any form of advocacy, might be conveniently identified as:
· Knowledge
· Preparation
· Presentation

These matters interrelate and overlap and in many respects inform each other, Knowledge and proper preparation (in some respects two sides of the one coin) help the advocate to think on her or his feet, adjust tactics quickly, identify opportunities, strengths and weaknesses. Most of the matters I speak about are self evident and known to all of us. Each aspect is naturally enhanced by experience, either personal or from the observation of others. Naturally experience is a matter of time and trial and error. Importantly in all aspects one should strive to learn from others. Watch how more experienced advocates operate. Take time to watch and listen. If you work with someone more experienced do not be afraid to ask questions about why something was done a particular way or why was something not done the way you expected it to be done. Much of advocacy is from "standing on the shoulders of giants", to paraphrase the words of Sir Isaac Newton.

Knowledge
(a) **Know the law** - this goes without saying. This is not just a matter of knowing the relevant legislative provisions, but it requires knowledge of relevant decisions of superior Courts dealing with general principles of sentencing some of which I have cited above as well as specific principles arising out of the particular case you have, whether it be principles of "proportionality", "totality", "parity", "double jeopardy", "comparative sentencing", "*Pearce"* or "*De Simoni"* principles etc, etc. In terms of options in sentencing, particularly in relation to sentences of imprisonment, may I recommend Justice Howie's analysis in *R v Zamagias [2002] NSW CCA 17* particularly at [24]-[32].

(b) **Know the jurisdiction and its procedures.** Obviously, generally speaking, you would not run a plea in the Local Court the same way that you would run a plea in the Supreme Court, on the other hand, there may be instant cases that require one to take a quite different approach, foreign to the usual procedures of the Court. If you propose to step out of the square so to speak then it is vital to let the Court know that you are going to do that and why.

(c) **Know the prosecutor**. Have some understanding of how you expect the opponent to conduct his or her case. Your knowledge may be confined to your own experiences, it might be based upon what you learned from colleagues, it might require direct contact with the Prosecutor to discuss the way in which the material may be presented.

(d) **Know the judicial officer**. Understanding the way a particular judicial officer conducts his or her Court will be vital to effective communication. It is not simply a matter of knowing what the judicial officer's "form" is when sentencing, but how the judicial officer prefers material to be placed before the Court, what the judicial officer's knowledge of the particular area of sentencing (or sentencing in general sense) may be, past errors or triumphs.

(e) **Know the prosecution case.** Obviously you will need to identify its strengths and weaknesses, the detail of it and to be able to draw from the Crown's own case relevant aspects of the matter that may require the case to be distinguished for example from a relevant guideline judgment, or the operation of Part 4 Division 1A referred to above, or identifying matters that will need to be particularly addressed either by the calling of a relevant prosecution witness, or calling witness in the prisoner's case. Most importantly it requires having sufficient knowledge of the prosecution case to get a feel for where the case stands in a range of cases involving the subject offence(s).

(f) **Know the client's case.** This goes hand in hand with a proper understanding of the prosecution's case. It may be drawn from the material in the Crown case, particularly material from interviews with the accused or telephone intercepts, it may be drawn from evidence from third parties.

(g) **Know the client.** Find out who he or she is, the weaknesses, the strengths, the needs. Not just on the client's say so, but also from the other material available from both the Crown and defence cases. You should understand what the client wants and how he or she expects it to be done.

Preparation
Proper preparation flows from knowledge and understanding of all relevant matters which includes many self evident matters, some of which are referred to above.

Basic steps to be taken in preparation include:
· having access to all relevant Crown material
· reading all the relevant material provided by the Crown
· obtaining proper instructions including adequate time to confer with the client and witnesses, proofing them and advising them on the "dos and don't's" of giving evidence ie: "keep your voice up, listen to the questions, answer the question you are asked (not some other question), keep answers short" etc.
· undertaking all relevant research either on matters of general legal principle, specific legal issues arising, relevant legislation, judicial commission statistics and / or in relation to matters of evidence, particularly in relation to matters arising in the Crown case in the form of expert opinion or requiring further expert opinion
· properly briefing expert witnesses with relevant material and issues to be addressed to provide relevant reports
· ensuring that references are addressed to the Court and advise that the referee is aware of the charges or the character of the allegations and the reference is to be used for Court purposes
· preparing your examination of Crown witnesses, to do it succinctly and effectively.

Two aspects of preparation require particular comment. Again they may inform each other. One aspect is identifying what material should form part of the Crown case. Obviously a form of "Agreed Facts" is the best of all worlds. Once "Agreed Facts" are settled then consider whether any additional material at all from the Crown brief ought be before the Court in light of what has been said about this matter in *Palu* which is quoted above. More practically, the more reading the Court is saved in relation to the Crown case the better the advocate can constrain or fashion the fact finding process, or at least proceed with some confidence as to where the matter(s) sits in the range of objective seriousness.

Do your best to either get rid of, or substantially amend, the "Facts Statements" prepared by the arresting police for the information of a bail Registrar or the first appearance in the Local Court. These documents are usually unhelpful, inaccurate, incomplete, unintelligible, irrelevant, inadmissible in form and / or unfairly prejudicial (or all of the above). Attempt to get the Crown to prepare its version of the facts. If your opponent can prepare written submissions, he or she can put some work into settling the facts upon which the Crown relies.

Beware of inadmissible or inaccurate material: other charges revealed that are no longer relevant,

allegations not proved or relied upon, admissions by co-accused not admissible against the prisoner, inaccurate compensation figures, incorrect summaries of ERISP's etc. Pay particular attention to pre-sentence reports for errors, misunderstandings etc. If you cannot change the facts at least you can point out their deficiencies and / or what is objected to as irrelevant or admissible, inaccurate or incomplete. Particularly, remember that the Crown should not tender material that supplements, or more importantly contradicts facts set out in an agreed statement of facts. Make sure that you identify and have removed matters of aggravation not pleaded (*Chow (at 604-605): R v Brown (1989) 17 NSWLR 472).* Victim impact statements may present particular problems, especially when their contents go beyond the ambit of their purpose.

The second matter is the issue of identifying witnesses to be called to give oral evidence both for the Crown and the defence. You may need the victim to give evidence, or the probation officer where agreement is not reached with the Crown on matters relevant to their accounts. The most difficult question you will always ask yourself is: Should I call the client? One answer may be whether s/he has something interesting to say or in how s/he says it. The impression you believe the client will make needs considerable thought. If there is no need to impress then there is usually no need to call the client.

Obviously there is no "golden rule" in this area. Ultimately there is a value judgment to be made as to whether there is more to be lost than gained by the exercise. In circumstances where the prosecution case includes either material directly contrary to instructions or alternatively material from the accused himself in the course of an interview or a telephone intercept that needs to be explained or refuted or clarified or expanded upon, then ultimately the potential disadvantages will more than likely be seen as risks that have to be taken. If there are important facts disputed, calling evidence from the client may be the only option available.

In regard to the issue of calling witnesses in your client's case, one matter that might solve the problem, one practical way or the other, is by early service of material either indirectly or directly coming from the client (reports, statements, references) to ascertain prior to hearing what the Crown's attitude will be to the material. In many sentence proceedings the issues to be raised by the accused are not really matters in dispute or are matters of which the Crown cannot have instructions or material to refute. Service of material may remove the necessity for a particular witness, including the accused, to be called.

There are several subsidiary principles that might reflect upon the need to call the accused, or some other witness able to give evidence in respect of a fact in issue. One is the need to ensure that there is acceptable evidence available upon which the Court may act. The other is that there may need to be reliable evidence available of relevant matters upon which opinions of experts, particularly psychiatrists and psychologists, rely, to have the opinions accepted, or given some weight. In *R v McGourty [2002] NSW CCA 335* Wood CJ at CL said (at [24]).

> *"So far as I can see, there was no factual basis for the finding made by his Honour beyond a self-serving and untested statement made by the respondent to the psychologist. Recently this Court has criticised the practice of placing material of this kind before sentencing judges in an attempt to minimise the objective seriousness of a crime otherwise apparent on the face of the record: Regina v Qutami [2001] NSWCCA 353, at para 58 and 59 per Smart AJ, and at para 79 per Spigelman CJ. I wholeheartedly agree with the criticism offered in that case. If an offender appearing for sentence wishes to place evidence before the Court which is designed to minimise his/her criminality, then it should be done directly and in a form which can be tested."*

In *R v Elfar [2003] NSW CCA 358* Whealy J cited the above passage and the judgment of *R v Qutami (2001) 127 A Crim R 369*, when he said:

> *"[25] The matters of principle stated in R v McGourty and R v Qutami are plainly important. They require emphatic endorsement by this Court. Indeed it needs also to be further emphasised that this principle extends not only to statements in psychological reports, but also to statements by offenders in pre-sentence reports - (R v Palu per Howie J with whom Levine J and Heydon J agreed (2002) 134 A Crim R 174 at 185). In addition, the current practice of tendering a note or letter from an offender in sentencing proceedings attracts the same admonishment. Considerable caution should be exercised in reliance upon such exculpatory material where*

> *there is a matter in dispute and where no evidence is given by an offender or other direct evidence is not placed before the Court. The essential reason for treating the material in that way is precisely because it remains untested. Indeed, where the Crown has either objected to the tender of this type of material or has made it clear, either at the time of tender or when submissions are made, little or no weight should be placed upon the material, that the sentencing Court would be entitled to treat the material as being of little or no weight. Indeed, in an appropriate case, it ought to do so"*

Whether the material is objectionable or rather of little weight may be a moot point. Counsel should be alert to the fact that simply tendering a report with a number of out of Court representations by the accused about facts in issue, and endeavouring to put the client's case before the Court in that form, even if not subject of "objection", may not provide material of sufficient weight to be persuasive. It must be said that many of the reports tendered are of little value, in any event, so far as the opinions relied upon are concerned. The operation of the *Evidence Act* of course will have an impact on this matter as well.

Presentation
(1) Evidence
In presenting your client's case there seem to me to be a number of mundane or self evident considerations. They include:

(a) Always endeavour to put on a public face of courtesy to the judge and your opponent, no matter how you may feel inside.

(b) Try to be "engaging". I appreciate this is a nebulous concept in some respects, but by whatever method, whether it is an astute observation, a smile, a courtesy, a method of expression obviously, it is vital that you engage the court's interest in the matters that you regard as important. The critical objective is to develop communication with the Bench. Do not be afraid to debate the issues with the judge. I invite it and enjoy it. It helps me make up my mind or can persuade me to a different view. Do not be put off by apparent hostility. Calming the judge down may be half the battle won. Being told you are not giving an advocate "a fair go" is a sobering experience for any judge.

(c) Always provide copies of documents to be tendered, to your opponent (well beforehand) and to the judge.

> No civil case in which I have sat has ever involved a failure by counsel when tendering reports, extracts from medical records and the like, to provide a "working copy" for the judge. The habit or practice of giving a judge any document that he or she has to photocopy his or herself in order to mark it, is just adding to the time out of Court the judge or his or her staff will be involved preparing any judgment. Working copies available in Court enable the judge to mark the relevant document during the proceedings, reluctant as judges are to mark or highlight documents then and there.

(d) When the Crown presents its case, clearly articulate what is and what is not objected to or, alternatively, if not objected to, what is in dispute and what aspects of the Crown case will be the subject of material from the defence either to contradict or explain the Crown case. Remember there is a distinction between an objection and identifying a matter in dispute.

(e) Usually, in the District Court at least, the Crown case is in documentary form and is usually presented over a matter of minutes, rather than hours. Before presenting your material, give the judge the opportunity to digest what has been presented by the Crown. Do not be afraid in the course of the presentation of the Crown material to draw to the judge's attention particular matters to which you would wish to make reference at a future time;

(f) In your own case, don't be afraid to open it either in its own terms or by reference to the Crown's case. I am not suggesting an opening of any great length, but identification of the critical factual issues, be they objective or subjective matters, an outline of the material to be presented on behalf of the accused or highlighting key passages from material to be tendered will greatly assist the Court to concentrate on the matters that will ultimately, from the defence viewpoint, be important. It might

require relating material in the Crown case to that to be presented by the accused. There are no fixed rules. However, even if it is a matter for making 4 or 5 separate short points. It is important to focus the Court on important matters.

(g) Tender important, if not all, written material before oral evidence is called, subject to the Court's approval, and give the Court either an opportunity to digest it or alternatively draw the Court's attention to particular matters arising from it. Flagging and / or marking with highlighter relevant passages of working copies is a great assistance. Explain the material briefly as you tender it. Tender it piece by piece, not as a bulk tender. Also, make sure you tell the Court what you believe the case is not about, either on the Crown case or on the defence case.

(h) In calling witnesses, there is no need for them to labour over material that is already before the Court or otherwise not in dispute. For example, a prisoner in his account of his / her upbringing need not necessarily go through the whole story "chapter and verse". Details of history might be summarised in a Probation and Parole Service report or be set out (as it usually is) in a psychiatrist's or a psychologist's report. The witness may simply attest to the fact that he or she has read the relevant report and attests to the accuracy of its contents, has provided the relevant information to the best of his knowledge and belief. The critical thing however is to enable the witness in his or her own words to either expand upon or dwell upon a particular matter or matters critically relevant to the case at hand. It may involve explaining some aspect of the report or expanding upon information contained within a report. Certainly try and avoid having a witness repeat what is already self evident in the written material. There are a number of ancillary issues that arise.

(i) Be careful how you deal with the issue of family or support persons in Court that are not to be called to give evidence. Also be careful about the manner in which apologies are extended to relevant victims.

(2) Submissions

The making of submissions that are right for the particular case is the real "art" of advocacy. No two cases necessarily require the same approach, either in style or detail. Then again, it is much easier to change the detail rather than one's style, at least from case to case. In preparation of submissions it is helpful to draw up a checklist of the issues that are to be concentrated upon in submission such as, reasonable alternatives, matters for discount, parity issues, *s.21A* issues, (and other *Sentencing Procedure Act* issues where applicable, such as *ss.22A, 23, 24, 54A-54D),* special circumstances, *Pearce* principles, guidelines, critical objective and subjective features, custody issues (time spent, classification) and soon. Perhaps a "proforma" exhaustive check list may be prepared to be amended from case to case, something like a "settlement sheet" in conveyancing. Written submissions of course assist to identify issues that arise.

I have always thought that the best way to open submissions is to put quite squarely to the Court the result or the range of result that is appropriate for the case. Depending upon the judicial officer (and of course the jurisdiction) that course may bring the issues for resolution to a head and ultimately lead to a quick resolution. An obvious or arguable non custodial case may be the subject of enquiry by the judicial officer of the Crown as to its attitude before submissions go too far. Of course, in the Supreme Court, it would be a very rare case indeed where by setting out at the outset what was sought, one would get an early indication from the Bench saving further submissions as the sentencing exercise is of necessity much more complex having regard to the limited options usually available in the Supreme Court, particularly the exceptional character of a non custodial order for the types of offences usually dealt with in that Court. Setting out what you want from the outset, provides a focal point or a target, so to speak, for the subsequent argument which should be built as a justification for the Court taking that approach.

It is not appropriate in my view to tell the Court that private discussions with the Crown indicate that the Crown agrees with what is proposed. This courtesy to the Crown requires the Crown to have its own opportunity to express the Crown's position rather than being "verballed".

An appropriate ultimate order or range or orders and the principle issues which justify that approach may be stated in shorthand form. For example:

> *"It is submitted that a non custodial order (of a particular type) is appropriate having regard to the fact that in this case the maximum benefit should be given for the utilitarian value of the plea, the matter can be distinguished from the guideline judgment in X (for this or that reason) and there are compelling objective factors including a lack of pre-meditation. His previous good*

character, steps towards rehabilitation since arrest, restitution made, changes to the prisoner's situation since the offence, particularly in relation to matters which contributed to his conduct, in the context of the objective features, justify an order such as I have foreshadowed".

In developing a particular aspect of the matter it is important to draw the judge's attention to some feature that may not be self evident in the material or drawing some matter that, while self evident, may have a particular salience in the sentencing proceedings. Of course, particularly in a strongly contested plea, on the facts, or for the result, greater effort and time will be required. Getting to the point, however, will enable you to better capture the Court's attention.

Endeavour to put your submissions forward as separate, but orderly points, separating the issues clearly. Indicate when moving to a different topic. Most importantly in addresses it is vital to bring the judge's attention to the critical matters arising from the written material rather than leaving the judge to digest the material and work it out for him or herself. I have earlier referred to physically highlighting or marking relevant material, be it extracts from reports, or judgments. Reading a critical passage, to make a point, is always an effective means of drawing the material to the judge's attention, rather than leaving him to his own devices. Referring in detail to essential or general principles, in sentencing relevant to the particular case may underline the ultimate objective of the exercise. It will engage the court's interest. Brevity is bliss for all judges.

Obviously the best approach is to prepare written submissions, picking the "eyes" out of the material, but set out (in skeletal form perhaps) how you would wish the judgment on sentence to be written. Of course this is not always possible.

If authorities are to be relied upon, either for matters of principle or comparative sentencing purposes, it is very important that the particular point arising from the judgment be clearly drawn to the judge's attention. Matters of general principle are generally more helpful to judges than particular outcomes. In dealing with comparative sentencing (either for one's own purposes or to comment upon the Crown's cases) you need to be particularly astute to identify the differences and the similarities between the case at bar and the authority cited. Statistics have their limitations (discussed amongst other places in *R v Bloomfield (1998) 44 NSWLR 734*) but can be useful (where the sample is big enough) to show the range and incidence of particular options.

Conclusion

Ultimately, there is no golden rule. There are no "Commandments" which cannot be broken without attracting the "Almighty's" wrath. We are all different in our manner, our capacity, our experience and our judgment of what is right or what is wrong. Too much material may be just "too much". Not enough may turn out to be a stroke of genius. On thing is certain, helping the judge understand the material will reap dividends. Do not "give up the ghost" so to speak on the judge. But, then again, usually there is no point flogging a dead horse. Always work hard and ethically for your client.

You will however have to do more than the barrister, who legend has it, after a conviction in the Supreme Court of a particularly nasty sexual assault, when asked to make his submissions for the prisoner, simply said: "Time served to count! Time served to count!". Then again the same barrister had once begged a sentencing judge "to fling the prison gates open to enable the prisoner to be embraced by his loving mother at the earliest opportunity". It was an emotional moment, until the judge gently reminded counsel that the prisoner was an orphan. It helps to check your facts before you speak. One more thing, make sure you have a calculator handy. Notwithstanding what the superior courts have said, mathematics will come into consideration at some stage.