The Public Defenders Criminal Law Conference 2011
Taronga Centre, 26 February 2011

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# ADVOCACY: NEAT AND NOT SO NEAT

**Judge Peter Zahra**

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## PURPLE PASSAGES

Extracts of decisions to be referred to in presentation:

### ***R V WAY*: [2004] NSWCCA 131**

(b) What is Constituted by an Offence in the Middle of the Range of Objective Seriousness?

72 It is evident that the sentencing exercise which is now required for Table offences requires a critical focus, not only upon the objective seriousness of the particular offence before the Court, but also upon the abstract, or putative, offence in the middle of the range of objective seriousness, in respect of which the standard non-parole period is specified.

73 There is no statutory definition or guide as to what is an offence in the middle of the range of objective seriousness, even though this is a key to the sentencing exercise.

74 It was urged upon this Court by counsel for the applicant and by the Crown that there is no need for a judge to determine, in any given case, what is an abstract offence in the middle of the range of objective seriousness. It was further submitted that, if any such exercise is required, then it should be approached intuitively and should be based upon the general experience of the courts in sentencing for the particular offence.

75 We do not have any difficulty with the second proposition, but we do not consider that the first proposition is correct.

76 Unless some understanding is reached as to what is a midrange offence, we are unable to see how any meaningful comparison can be made between the offence at hand, and the offence for which the standard non-parole period is prescribed. Difficult and imprecise it might be, but the reference point identified in s 54A has to be kept in mind if the sentencing exercise is to comply with the legislative intention expressed in the Division.

77 We do not however consider that the exercise which is required will differ, to any material extent, from that which has always been necessary in evaluating the objective seriousness of a subject offence. Judges are well accustomed to considering and stating that a particular case falls into the worst category, or into the category of offences at a lower level of objective seriousness: see ***Ibbs v The Queen***; ***Baumer v The Queen*** (1988) 166 CLR 51 at 57, and ***R v Moon*** (2000) 117 A Crim R 497 at 510.

78 Such expressions are commonly seen, for example, in sentences for drug offenders, where the scale of the operation, and the role played by the offender as a courier, or warehouseman, or middle man, or principal, have been factors taken into account.

79 While it may not be the case that particular attention has been given to the precise process of reasoning involved in this kind of assessment, it would appear to us to depend upon a combination of sentencing experience, which is based upon the range of instances which go to make up cases of the relevant kind that come before the courts, combined with an understanding of the facts which are necessary elements of the offence, as well as those which are concerned with its consequences, and the reasons for its commission.

80 Clearly there will have been offences at one end of the spectrum, of which the court is aware, which can be regarded as wholly exceptional in their seriousness and infrequency of occurrence; just as there will be occasions of trivial conduct in which the necessary elements might, in a technical way, be satisfied, but where the moral culpability is minimal.

81 It would neither be necessary, nor productive, in formulating an understanding of the mid range offence for which the standard non-parole period is set, to engage in an exercise of imagination as to the entire range of circumstances that might give rise to the offence. Nor would it be productive, or even relevant, to engage in an exercise that began with an assumption as to the presence of the facts constituting the bare elements of the offence, and that then contemplated a mid point between a range with an offence at one end of the spectrum which possessed all of the aggravating circumstances and none of the mitigating circumstances referred to in s 21A (in each instance being matters properly to be considered as relating to its objective seriousness), and an offence at the other end of the spectrum with none of the aggravating circumstances and all of the mitigating circumstances, so as to arrive at mid range abstract offence between these extremes.

82 It would be no more helpful to assume an offence with the aggravating and mitigating factors in perfect balance, or to attempt an exercise that attributed numerical values to those factors.

83 Any such approach would be artificial in the extreme, given the infinite variations which might arise, and it would reduce the sentencing exercise to an arithmetic nonsense. It would not even begin to reflect long standing practice in which Judges have necessarily, and inevitably, been required to make an intuitive assessment of where the offence before the Court sits in terms of objective seriousness.

84 The sentencing case law is replete with references to objective features of the offence and subjective features of the offender. It has not hitherto been necessary to classify a factor as one or the other. It is now necessary to construe the words “objective seriousness” of an offence.

85 The multiplicity of purposes of sentencing set out in s 3A of the Act, quoted above, do not suggest a narrow perspective as to the range of facts and matters that are to be regarded as “objective” facts and matters which may affect the judgment involved in assessing “seriousness”. It is too narrow a perspective to confine attention to the physical acts of the offender and their effects, as those acts or effects could be observed by a bystander. The inquiry which we consider to have been intended is one

that would take into account the actus reus, the consequences of the conduct, and those factors that might properly have been said to have impinged on the mens rea of the offender (see for example ***Fox and Freiberg***, Sentencing, 2nd Edition at paras 3.506 to 3.510).

86 Some of the relevant circumstances which can be said "objectively" to affect the "seriousness" of the offence will be personal to the offender at the time of the offence but become relevant because of their causal connection with its commission. This would extend to matters of motivation (for example duress, provocation, robbery to feed a drug addiction), mental state (for example, intention is more serious than recklessness), and mental illness, or intellectual disability, where that is causally related to the commission of the offence, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected: ***Channon v The Queen*** (1978) 20 ALR 1 and ***R v Engert*** (1995) 84 A Crim R 67. Such matters can be classified as circumstances of the offence and not merely circumstances of the offender that might go to the appropriate level of punishment. Other matters which may be said to explain or influence the conduct of the offender or otherwise impinge on her or his moral culpability, for example, youth or prior sexual abuse, are more accurately described as circumstances of the offender and not the offence.

87 Questions of degree and remoteness arise which will need to be developed in the case law. There are potential areas of overlap. For example, impaired mental or intellectual functioning can go to either, or both, the seriousness of the offence and punishment, so far as deterrence is concerned.

88 In an assessment of the objective seriousness of the subject offence it seems to us that attention must accordingly be given to the factors mentioned above. Some of these relevant factors will be elements of the offence itself. Others will fall within the list of aggravating and mitigating factors referred to in s 21A (2) and (3) of the Act, so far as they relate to purely objective considerations. .

89 That there is a comparison which can properly be made, and which has always been made, in the course of sentencing, between an offence in the abstract, and an individual offence, when assessing the relative seriousness of the latter is inescapable as a matter of logic, and it was something which was adverted to in ***Walden v Hensler*** (1987) 163 CLR 561 at 577 per Brennan J and at 595 per Dawson J.

90 In that comparison, it is necessary to reflect the distinction between circumstances which go to the seriousness of the offence considered in a general way, and matters that are more appropriately directed to the objectives of punishment.

91 If that distinction is respected then the spectrum of offences, and the identification of those which fall in the mid range of seriousness can be confined to matters which are directly or causally related to its commission.

92 For instance, while the antecedent criminal history, or the fact that the offender has reoffended while on conditional liberty can be relevant for a determination of an appropriate level of punishment where either:

> *"illuminates the moral culpability of the offender in the instant case, or shows dangerous propensity, or shows a need to impose condign punishment to deter the offender and other offenders from committing similar offences" per the majority in* ***Veen*** *[No. 2], considerations of this kind are more relevant to the measure of punishment for the individual offender, than they are to a consideration of where the offence before the Court falls within the spectrum of conduct which may constitute the offence in the abstract.*

93 The existence of this dichotomy between matters relevant to the offence and to the offender, or put another way, between matters to be taken into account as relevant to an assessment of the objective seriousness of an offence, and matters going to the punishment of the offender for its commission, has not always been fully recognised, or at least expressly reflected, in the reasons which are given for sentence.

94 That is illustrated by reference to the terms in which the authorities have spoken of the factor last mentioned, namely re-offending while on conditional liberty, and of the factor that the offender has a prior record for similar offences.

95 Very often these factors have been spoken of in terms suggestive of their demonstrating "an increased animus and culpability for the instant offence", per Angel J in ***R v Mulholland*** (1991) 1 NTLR 1 at 13, or of having been matters which elevated "the offence to a higher level of criminality" per Badgery-Parker J in ***R v Moffitt*** (1990) 20 NSWLR 114 at 128.

96 On other occasions, for example ***R v Richards*** [1981] 2 NSWLR 464, per Street CJ and ***R v Plocharski*** NSWCCA 14 September 1988, the significance of these factors has been more directly related to the aspect of punishment, and particularly the need for deterrence, so as to make it clear for example, that offenders who abuse their conditional liberty will receive additional punishment.

97 Similarly in ***Veen v The Queen*** [No. 2] (1998) 164 CLR 465 it was said by the Court at 477 (in a passage applied by this Court in ***R v McDonald*** NSWCCA 12 October 1998):

> *"There are two subsidiary principles which should be mentioned. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences:* ***Director of Public Prosecutions v Ottewell*** *(1970) AC 642, at p 650. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind."*

## GUIDELINE JUDGMENT IN HENRY (1999) 46 NSWLR 346:

***R v Henry***, Judgment of Wood CJ at CL (with whom Spigelman CJ, Newman J, and Hulme J agreed) said the following in relation to the relevance of drug addiction in sentencing for the offence of armed robbery:

> "In my view the relevant principles are as follows:
>
> (a) the need to acquire funds to support a drug habit, even a severe habit, is not an excuse to commit an armed robbery or any similar offence, and of itself is not a matter of mitigation;
>
> (**b) however the fact that an offence is motivated by such a need may be taken into account as a factor relevant to the objective criminality of the offence in so far as it may throw light on matters such as:**
>
> > (i) the impulsivity of the offence and the extent of any planning for it; (cf ***Bouchard*** (1996) 84 A Crim R 499 at 501–502); and ***Nolan*** (1988) VSCA 135 (2.12.98);
> >
> > (ii) the existence or non existence of any alternative reason that may have operated in aggravation of the offence, eg that it was motivated to fund some other serious criminal venture or to support a campaign of terrorism;
> >
> > (iii) the state of mind or capacity of the offender to exercise judgment, eg if he or she was in the grips of an extreme state of withdrawal of the kind that may have led to a frank disorder of thought processes or to the act being other than a willed act;

## *R V ISRAEL*: [2002] NSWCCA 255

***R v Israil*** [2002] NSWCCA 255 at [23] Spigelman CJ Re: relevance of mental illness:

> *"To the extent that mental illness explains the offence — as her Honour found to be the position in the present case — then an offender's inability to understand the wrongfulness of his actions, or to make reasonable judgments, or to control his or her faculties and emotions, will impact on the level of culpability of the offender, even where the illness does not amount to an excuse at law."*

***MULATO V REGINA:*** **[2006] NSWCCA 282**

Per Spigelman CJ:

37 Characterisation of the degree of objective seriousness of an offence is classically within the role of the sentencing judge in performing the task of finding facts and drawing inferences from those facts. This Court is very slow to determine such matters for itself or to set aside the judgment made by a first instance judge exercising a broadly based discretion. The question must be whether or not the particular characterisation which her Honour gave to the circumstances of the offence was open to her Honour. In my opinion it was open, although I have some hesitation in deciding so and find it to be at the lower end of the range which could reasonably be held to be so characterised.

Per Simpson J.

45SIMPSON J: I have read in draft the judgments of the Chief Justice and of Adams J. I agree with the Chief Justice. I wish merely to underline my agreement in respect of one matter. Most emphatically, I agree with his Honour's observations at [37].

46 The assessment of the objective seriousness of an offence is quintessentially for the sentencing judge. It is, if not a finding of fact, then the exercise of an evaluative process akin to fact finding or the exercise of a discretion. As such it is reviewable in this Court only on the principles stated in ***House v The King*** [1936] HCA 40; 55CLR 499. The importance of respecting the role of a first instance judge should never be underestimated. It is not the function of this Court to substitute its own view of objective seriousness for that of the first instance judge. That is not because objective seriousness is something determined by reference to the evaluation of the credibility of witnesses, in respect of which it is conventionally held that the first instance judge is in a superior position. It is because it is a fundamental aspect of the appellate system. Each judicial officer in the hierarchy has his or her own function, and those at appellate level need to take care not to trespass upon the role of those at first instance.

47 One consequence of this (which might aptly be termed a separation of powers) is the need for first instance judges to make clear findings of fact, and clear evaluations of such matters as objective seriousness. Absence of clarity in such findings may result in the need for the appellate court to undertake the task itself.

48 Here, if there was a fault in the approach taken by the sentencing judge, it was in failure to state in clear terms a conclusion as to objective seriousness. Her Honour noted that she was urged to find that the case fell below the mid-range of objective seriousness. She immediately followed that with reference to a series of matters, which, as the Chief Justice has suggested, carry the clear implication that she rejected the proposition put on behalf of the applicant.

49 In my opinion her Honour's reasons for coming to that implicit conclusion are clear. So also are her reasons, notwithstanding that conclusion, for not imposing the standard non-parole period.