

THE SENTENCE OF THE COURT

A paper delivered at the National Judicial College Conference on
“Communication in the Courtroom”

Judge John Robertson
District Court of Queensland, Maroochydore

Sydney Museum, 10th November 2007

(Slide 1) - Madam I see that your confinement is near...etc

This is an extract from the transcript of a trial held in regional Queensland some years ago during the empanelment of the jury. It is an example of the first tenet of courtroom communication and that is: “Think before you speak!”

A few years ago, at the end of a difficult trial in my court, a jury convicted a man of a serious offence of violence. The victim of the assault was a 40 year old father of two young children who was left with permanent brain damage and resulting distressing personality change. The verdict was delivered at 9pm on a Friday night, and as I was about to go on extended leave, I offered to sentence immediately which is what occurred. I was tired and emotionally drained. A victim impact statement was tendered which I took some time to read in court. It was a moving and harrowing account of a family engulfed by a tragedy which was not of their making. I asked defence counsel if his client had read the statement. I was told he had not because he could not bring himself to do so. Without thinking, I dredged up from deep in my subconscious memory a word that was a favourite of my mother’s which I had never used. I said “It shows that he is nothing but a rank coward!” “Rank” in this context means “highly offensive or disgusting”. In one sentence, not only had I breached the first tenet but also the second, which is, “Avoid personal abuse of the defendant during the sentence process”. The local paper loved it and the judges here will understand my chagrin at the headline:

(Slide 2) – “Rank Coward” gets six years

My mother would have loved it had she been alive! My 80 year old mother-in-law certainly did – she told me she was glad that I had been tough on a criminal for once!

Many years ago, as a member of an esteemed Full Federal Court which included Brennan and Toohey JJ, Sir William Deane said this of the sentencing function:

“Of all the responsibilities which an Australian judge can be called upon to discharge, probably the heaviest is that of determining the appropriate

sentence to be passed upon his fellow citizen who had been found, or had pleaded guilty, to a serious criminal offence.”¹

When Sir William said this in 1978, the sentencing laws were mainly derived from the common law, the sentencing courts were not under the intense populist scrutiny that exists today, and, as his words indicate, most judges, if not all, were male.

Times have changed. Not only are the criminal courts one of the main sources of material for media reporting and commentary, sentencing laws are much more complex and vary greatly from State to State. In some States, a sentencing judge almost needs a degree in mathematics, in order to calculate the often difficult assessments of presentence custody and time served and parole periods. Unfortunately, the language and form of the sentence hearing and decision has not changed much in the intervening 30 years, and this in turn has led to growing concern about the inability of those most concerned with the outcome to even understand what has happened.

Major Hall, in her paper to follow mine, will refer to these difficulties which she sees in her daily work in the courts. She will tell us what we should already know, and that is that many offenders and victims simply do not understand the process and do not comprehend the often dense legal language and concepts that we use, often without much thought. Our discourse is laced with words and concepts that are not part of regular usage, for example, “general deterrence”, “denunciation”, “totality” and “parity”, to name just a few. These concepts mean little to a lay person unless we explain them in plain terms. They mean less to the vast majority of offenders who have had a significantly compromised education. I can recall clients saying to me anxiously after the sentence had been given, “What did I get?” I am sure that occurs still!

What is not well understood in the community is that for the judge, there is with every sentence, a tension between the need to communicate effectively with those most concerned with the outcome, and the need to ensure that the sentence is legally correct and therefore not subject to what lawyers call “appealable error”!

That tension is more acute in some States than in others. There are many reasons for this and I do not have time to explore all of these today but I will mention just a few because of what I think is their significant impact of effective communication.

In any discussion about sentencing, it must be appreciated that over 97% of sentences imposed in this country annually are imposed by Magistrates. At the other end of the judicial spectrum, only a tiny number of sentences are ever reviewed in the High Court. When a sentence is examined by that court, it usually involves questions of universal principle. A recent example examined in great detail the difference between so called “two tier sentencing” and “intuitive synthesis sentencing”,² concepts that have very little to do with the practical realities of sentencing courts but which do excite criminologists and academics and, I must confess, a few judges!!

¹ Channon v The Queen [1978] 33 FLR 433 at 458

² Markarian v The Queen (2005) 215 ALR 213; [2005] HCA 25

For the sake of brevity, I have chosen today to examine the different approaches to sentencing in the higher courts in my State Queensland about which I know a bit, and Victoria, about which I know much less. My analysis is necessarily superficial and I hope that no one feels left out. I suspect that the tensions that I will mention in relation to the Victorian Courts are very similar to those experienced by judges in this State. Certainly, if one has regard to the comments of the President of the NSW Court of Appeal in a paper concerning appellate personal criticism of trial judges, in a recent paper delivered to the JCA Conference on 6th October 2007, my suspicions are justified. The very title of his paper “Throwing Stones”, says it all!

As a general proposition, the sentence in Victoria will be delivered in a quite rigorously structured format. I suspect that many judges use templates to ensure that they don't miss anything out. Sometimes the sentence can literally run for hours, with a detailed recitation of the facts and personal circumstances of the offender, followed by detailed discussion of relevant principle which may include reference to, and quotes from, authority, concluding with an application of principle to the circumstances of the offence and the offender and the actual sentence. In Queensland, although this structured approach is employed from time to time, the sentence tends to be much less rigorously structured with a brief summary of the facts and personal circumstances of the offender, and much less reference to principle or decided cases.

I am sure there are many reasons for this difference and I will mention only a few.

Firstly in Queensland, the District Court, unlike the County Court of Victoria, exercises a very extensive concurrent jurisdiction with the Magistrates Courts for a whole range of offences which fall at the lower end of the spectrum of seriousness. An offender can elect the court to hear the sentence and many take the District Court option. Whereas in Victoria the judge may do only one or two sentences in a day, and reserve frequently to write a considered judgment, in Queensland, a judge may do up to 16 or more sentences in one day and reserve very few. This simply means that although we do more cases, the workload is probably very similar.

The second reason is somewhat controversial. In a paper delivered a few years ago, Geoff Eames, who was then a member of the Victorian Court of Appeal, analysed the successful appeals to that court against conviction and concluded that over 50% had been decided on a point or points never raised at trial. He said that in his State, a specialist criminal appellate Bar had developed, whose members did only appeal work. He made the point that it would be certain that if every trial transcript was subjected to intense scrutiny by a highly skilled criminal lawyer, it is probable that most would reveal some error no matter how minor. This has not occurred in Queensland probably as a consequence of scale, or it could be because we have better weather!!

As the judges in the audience will know, a sentencing decision, unless governed by mandatory laws, is an exercise of discretion to be carried out within the framework of the relevant law in the particular State or Territory. There is a long line of authority from the High Court to the effect that an appeal court should not interfere with a sentence unless the court below has acted on a wrong principle,³ either because an

³ House v The Queen (1936) 55 CLR 499

error is discernible or demonstrated by manifest inadequacy or excessiveness.⁴ The appeal court should not interfere simply because it would have imposed a slightly different sentence.

From conversations with colleagues in Victoria, I strongly suspect that the trend observed by Geoff Eames in relation to appeals against conviction also applies to sentence appeals and particularly those instituted by the DPP against allegedly manifestly inadequate sentences.

Although some of my colleagues do not agree – one of my more senior colleagues affectionately refers to our Court of Appeal as the Court of Adjustments – my firm view based on analysis, is that the Queensland Court of Appeal is more supportive of sentences imposed in the lower courts, and more inclined to strictly apply the principles I have mentioned earlier.

By way of example, in a recent decision of that court, the Chief Justice, after considering the differing circumstances in a number of cases, said:

“...sentencing judges should be accorded appropriate latitude. While an appellate court usefully provides indicative ranges, they must be flexible enough to accommodate varying factual situations and never presented or approached as if prescriptive.”⁵

Other members of that court have been even more direct in asserting the fundamental principles that should underpin the appellate approach to sentence appeals. In one case where the majority made what appeared to be a minor adjustment of a sentence, the dissenting judge said to do that would rightly expose that court to the charge of tinkering!

The Queensland approach can lead to extreme examples. One of my former colleagues, long since retired, was a great communicator and used the minimum number of words to convey his meaning. He was rarely misunderstood. He was direct, decisive and at times, a little impatient. He had a few pet phrases. One was to remark, at the start of your plea in mitigation, which had been carefully prepared after a number of intense conferences with a client who believed that only you could save his liberty, “I was thinking of community based orders, are you trying to talk me out of it?”

If there was a category of “Shortest Sentence in the History of the Common Law World”, he would win hands down. After a gruelling trial of a self represented defendant charged with incest of his two daughters, during which the accused had taken his Honour to the brink of despair, the jury returned guilty verdicts after only a 20 minute retirement. His Honour asked the defendant if he had anything to say before he passed sentence. The defendant replied contemptuously “No mate” to which his Honour responded:

⁴ Griffiths v The Queen (1977) 137 CLR 293 at 329-330; Everett v The Queen (1994) 181 CLR 295 at 300

⁵ R v Saltmarsh [2007] QCA 25

(Third Slide): “Neither have I. 7 years on each count concurrent. Remove the prisoner.”

I think that the need for the judge to ensure that the sentence is legally correct so as to avoid intervention by the appeal court, is the most significant barrier to effective communication, and why we still cling to language and concepts that lead to confusion and misunderstanding amongst lay people. There are very good public policy reasons why a judge should endeavour to give a legally correct decision. A proper sentence ends the process. An appeal is costly with the added costs almost always falling on the public purse. A “weakly merciful” sentence at first instance may make the judge feel good but is cruel to the defendant as the correct sentence will be imposed some months later in the Court of Appeal.

What can be done?

The National Judicial College, the Judicial Commission of NSW, and the Victorian Judicial College, have all invested in the development of professional development programmes for judicial officers designed to improve communication in the court room. One of the modules is the judgment writing course conducted under the direction of James Raymond who is a retired Professor of English from the US. His programme focuses not on the law but on the writing or the language of the judgment of a court, and uses professional writers, some of whom may be judges, to teach language communication skills. His methods apply to sentencing as well as other judgments of the court.

As those of you who have been fortunate enough to attend his course will know, his methods concentrate on the language of communication and emphasise simplicity and brevity. He urges us to write like a good journalist.

He says that the starting point for the judge is to consider the audience. In the sentence process this will be the offender, the victim if there is one and their supporters, the lawyers, the press and wider community and the appeal courts. He promotes plain English and the avoidance of legalisms and archaic terminology. Instead of saying “the principle of general and personal deterrence is particularly relevant here”, a judge could say “it is necessary for me to punish you in a way that sends a message to you and anyone else who may be tempted to do something similar”.

How many of us naturally employ double negatives? I read a comment in a recent Court of Appeal judgment to the effect “the sum of money stolen was not inconsiderable”. And how many of us use what Don Watson calls weasel words such as “in terms of”? Latin is out. What is the point in saying to an offender “You are to be sentenced *inter alia* for a number of offences of dishonesty, or using expressions such as “condign punishment”? Professor Raymond urges us to use the actual names of people rather than terms such as “prisoner” or “complainant”. Some judges sentence as if the offender is not actually there e.g. “John Smith is to be sentenced for

the offence of stealing. On the night of Tuesday the 13th May last year he..etc”, or use only his or her last name e.g. “Smith stand up...”.

In the same vein, it is vital that a sentencer avoid personal abuse and insult when imposing sentence even when the offence is particularly heinous. It may be important to condemn the conduct of the offender, but to resort to name calling can inflame what might already be a highly charged hearing and it may lead to criticism and even interference on the ground of perceived bias in the appeal court. I came across this beauty recently. The judge was sentencing a man for an offence of serious violence that had occurred in a public place. In the course of a long rather discursive judgment the judge said:

(Slide 4) - “One may ask if your behaviour was almost pithecanthropic” (which means “ape-like but extinct but classified under the genus homo)

I added the meaning which I had to look up in the Macquarie dictionary. I suppose that the offender did not even know that he was being insulted.

It is also imperative that the judicial officer maintain his or her composure during the process. In *Mills v The Police* [2000] SASC 362, the Magistrate had accused the offender during the course of the sentencing hearing of “latching on to the social nipple” and also had bet the offender “my next 2 years salary that your children will be crims”.

Justice Gray put it very well in these terms:

“It is important that magistrates communicate effectively with a wide range of people. The effectiveness of this communication is dependent upon their ability to be flexible and to adopt language which is most suited to the particular individual involved.

Dealing with numerous cases under pressure forms a normal part of a magistrate's day. It is understandable that magistrates may feel frustrated with recidivist offenders but as judicial officers they must maintain their composure and refrain from using language which may be considered offensive by those appearing before them and their families.”

One of Jim Raymond's slides sets out a check list for style which I suggest applies equally to communication in the sentencing process;

(Slide 5) – Jim's PowerPoint

A judge may be called upon to communicate in the sentence process other than in the judgment. Sentencing by its nature is likely to be highly charged and emotions can easily overflow. I mention a few examples from my own experience immediately

acknowledging that we all have different styles and these examples may not appeal to everyone.

- Speaking to the victim or family

This again is controversial and I know that some judges will simply never do this as they believe it is not part of their role as judges. Many years ago the Chief Justice spoke to the mother of a murder victim before sentencing the offender. Following his lead I spoke to members of a family who had suffered terrible loss as the result of the actions of a drink driver.

In the incident, one member of each generation of this family had been killed; the 72 year old grandfather, the 38 year old father and a ten year old child. In court at the time of sentence was the 38 year old wife who, with her 10 month old baby, had suffered terrible injuries, and the 70 year old grandmother. Their victim impact statement was very moving.

Before I sentenced the offender, I said to the family words to this effect: “I am very moved by your statements and I cannot imagine the grief and sadness that you are feeling. I want you to know that I will take into account what you have said when I come to sentence this man. Nothing I can do can bring back your loved ones or return your health. The sentencing process is extremely complex and requires me to take into account a lot of matters including the terrible consequences to your family. I sincerely hope that once this process is over and with the passage of time, you can come to find some peace”.

I was told later that my words meant a lot to them particularly the fact that I had acknowledged their presence in court and their loss.

I have done a similar thing on perhaps 20 occasions over 13 years as a judge and usually in the driving cases. Only in one was my remarks to the victims used as a ground of appeal i.e. it was said that I had placed too much weight on the effect on them, but the Court of Appeal unanimously rejected that argument.

- Educating the public and the media

In rare cases, it may be legitimate to use the sentence decision in part as a means to inform the community about the case and the reasons for the sentence imposed. In a recent case, after a trial, a 16 year old boy was convicted of 2 counts of arson involving over \$14 million. As you can imagine, the fires and the criminal proceedings attracted extensive media interest. After the verdict, the sentence had to be adjourned to enable pre-sentence reports to be prepared, and in the intervening period, a number of media outlets weighed into what should happen. One commentator told me that the maximum penalty was 14 years, while one of the young TV front men told me it was life! In fact the maximum was 10 years. In sentencing him to 3 years detention, I carefully and clearly set out the binding principles from the law dealing with offences by children, and copies of my judgment were made available to media.

The response to the sentence was fair and muted. Some was critical; that it was too low but the criticism was not rabid. In Queensland, uniquely in this country, it is the Attorney who makes the decision to appeal against a sentence on the ground of inadequacy so the political nerve is very much exposed in controversial cases. There was no appeal.

Special skills are necessary in sentencing in specialist courts such as Childrens' Courts and Drug Courts, and Judges involved in sentencing regularly in indigenous communities and in Courts in which a wide range of ethnic groups are represented. As I do not have time to deal with these special skills in this paper, I have noted a number of references at the end of the paper for those who may be interested in reading further.

Conclusion

I recall a telling moment the first time I attended Jim Raymond's judgment writing course with a group of Family Court judges and Federal Magistrates. As part of his technique he invites participants to present draft judgments to be subjected to his techniques of good and plain communication.

A Family Court judge had submitted a draft which dealt with very complex property and child issues in which his introduction i.e. before discussing the discrete issues in the case, extended over 80 paragraphs. Jim reduced this to ten paragraphs which sublimely covered the topics in the first draft. The universal cry from all the participants was "What about the appeal Court? If we don't mention something they will say we did not take it into account."

All sentencing judges are aware of cases in which an appeal court has interfered with a sentence because the judge did not state the obvious, and that is that she or he had taken the offender's plea of guilty into account. Jim's response was that appeal judges had to learn and apply the same techniques and to give trial courts some slack when a genuine attempt is made to communicate better with the people most concerned with the outcome. None of us were very convinced about that but he is probably correct and, in some appeal courts there are signs that even they are trying to communicate more effectively and not hide behind turgid and complex language and techniques.

If appeal courts more robustly supported sentencing decisions made by lower courts instead of succumbing to the urge to interfere with a sentence simply because they would have done something different, then these courts perhaps will be more inclined to communicate better with the lay people most affected by the sentence.

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DISTRICT COURT
LAURA A. BRENT

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA,) Cause No. DC 06-0323
Plaintiff,)
Judge Gregory R. Todd
vs.)
ANDREW SCOTT MCCORMACK,)
Defendant.)

SENTENCING MEMORANDUM

Mr. McCormack, you pled guilty to the charge of Burglary. To aid me in sentencing, I review the pre-sentence investigation report. I read with interest the section containing Defendant's statement. To the question of "Give your recommendation as to what you think the Court should do in this case," you said "Like the Beatles say, 'Let It Be'".

While I will not explore the epistemological or ontological overtones of your response, or even the syntactic or symbolic keys of your allusion, I will say **Hey Jude, Do You Want to Know a Secret?** The greatest band in rock history spelled their name B-E-A-T-L-E-S.

I interpret the meaning of your response to suggest that there should be no consequences for your actions and I should just **Let It Be** so that you could live in **Strawberry Fields Forever**. Such reasoning is **Here, There and Everywhere**. It does not require a **Magical Mystery Tour** of interpretation to know **The Word** means leave it alone.

I trust we can all **Come Together** on that meaning.

If I were to overlook your actions and **Let It Be**, I would ignore that **Day in the Life** on April 21, 2006. Evidently, earlier that night you said to yourself I **Feel Fine** while drinking

beer. Later, whether you wanted **Money** or were just trying to **Act Naturally**, you became the **Fool on the Hill** on North 27th Street. As **Mr. Moonlight** at 1:30 a.m., you did not **Think for Yourself** but just focused on **I, Me, Mine**.

Because you didn't ask for **Help**, **Wait for Something** else, or listen to your conscience saying **Honey Don't**, the victim later that day was **Fixing a Hole** in the glass door you broke. After you stole the 18 pack of Old Milwaukee you decided it was time to **Run for Your Life and Carry That Weight**. But when the witness said **Baby It's You**, the police responded **I'll Get You** and you had to admit that **You Really Got a Hold on Me**. You were not able to **Get Back** home because of the **Chains** they put on you. Although you hoped the police would say **I Don't Want to Spoil the Party and We Can Work It Out**, you were in **Misery** when they said you were a **Bad Boy**. When the police took you to jail you experienced **Something New** as they said **Hello Goodbye** and you became a **Nowhere Man**.

Later when you thought about what you did, you may have said **I'll Cry Instead**. Now you're saying **Let It Be** instead of **I'm a Loser**. As a result of your **Hard Day's Night**, you are looking at a **Ticket to Ride** that **Long and Winding Road** to Deer Lodge. Hopefully you can say both now and **When I'm 64** that **I Should Have Known Better**.

DATED this *26th* day of February, 2007

Gregory R. Todd
HON. GREGORY R. TODD, DISTRICT COURT JUDGE