"A Country Special"

Criminal Law Continuing Professional Development Seminar

Rivergums Barn, Gordon Country, Inverramsay Road, Goomburra

Saturday, 13 March 2021

Contested Sentences

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Supreme Court of Queensland

[1] In recent years, there has been a steady rise in the number of contested sentences, that is to say, sentence hearings where the legal or factual basis for the sentence is disputed by the parties and requires resolution by the court.

[2] There are no doubt several reasons for these disputes, and many of those reasons will be unavoidable, but a refresher regarding the true character of sentence hearings as well as some of the legal principles commonly engaged may go some of the way towards eliminating unnecessary contests. It is also hoped that a few words about the ongoing misuse of schedule of facts will not go astray.

[3] That is the aspiration, at least, behind this paper. It is limited in scope to contested sentences after the entry of a plea of guilty by an adult offender in a Queensland proceeding. It is not intended to deal with juveniles, Federal Court practice or the approach required to be taken by the court when making findings relevant to sentence following a jury verdict.[1]

The evolution of sentence hearings

[4] It is useful to commence with a personal reflection.

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[1] As to which, see *Cheung v R* (2001) 209 CLR 1, [5], [76], [163].

[5] When I started in practice, Sir Harry Gibbs was the Chief Justice of the High Court and Bob Hawke was the Prime Minister. Although a then well-heeled man from Western Australia had just managed to wrest the America's Cup from the Americans for the first time in the 132-year history of that race sailing a yacht fitted with a revolutionary winged keel, in a number of respects we were a relatively unsophisticated lot. For a start, Mr Hawke declared on the day following that famous victory, "Any boss who sacks anyone for not turning up today is a bum". The No. 1 single for the year strangely enough was not a song. It was a spoken word piece written by a comedian who went by the stage name of Austen Tayshus. The name of the song was "Australiana". It included such memorable lines as, "My mate, Boomer, rang", "Is Bass straight?" and "How much can a Koala bear?". In the field of athletics, someone thought that a footrace from Melbourne to Sydney, a distance of almost 900 kilometres, might be a good idea. It was won by a 61-year-old potato farmer who ran continuously for over five days. He turned up to compete in overalls, gum boots and absent his false teeth because, he said, they rattled when he shuffled along.

[6] Now if any of you are trying to work out to which year I am referring, and guessed 1983, you are correct. Back then, the most instantaneous form of written communication was the Telex, although facsimile machines soon arrived to much bewilderment. There were no mobile phones, let alone an internet capable of transmitting emails. Word-processing involved the use of enormous typewriters, a few of which had some mysterious capacity to save a limited amount of data on storage devices which the technically advanced called "floppy disks". Perhaps most alarming of all to many of you here this morning will be the revelation that cable television did not exist; we had to make do with four free-to-air analog channels. The digital age was yet to dawn.

[7] And so it was back then with the practice of criminal law. Although written submissions, much like cane toads, crept incrementally into the field of civil litigation, criminal lawyers, by and large, only had recourse to typewriters for guest lists and fee notes. Advocacy was spoken, and sentence hearings were no exception.

[8] If your client wished to plead guilty, the first thing you would have done after

obtaining signed instructions would have been to speak to the prosecutor. This often occurred face-to-face. You would have been interested in two things: first, what would be submitted by way of penalty if the accused pleads guilty and, second, what from the depositions would be submitted on the facts. Both aspects, critical of course to the outcome of the sentence, would then frequently become the subject of negotiation and the hoped-for result was an agreed position across the bar table. If so, the case would then be set down for sentence and, at that hearing, the prosecutor would orally advance the legal and factual bases for the plea together with a submission on penalty in accordance with that agreement. The defence would then usually commence by advising the sentencing judge that there was no dispute with the facts submitted by the prosecutor or, indeed, with the submission as to sentence, before moving onto matters in mitigation.

[9] Now, negotiations did not always produce an agreement. Sometimes only the essential facts were agreed, with it being understood that the defence would place additional facts before the sentencing judge. In those instances, the additional facts would be made known to the prosecutor in advance of the hearing. Also, as may be expected, the appropriate sentence quite often could not be agreed and, in that event, the understanding was that the parties were free to make whatever submissions they wished on that topic. However, unlike today, contested sentences were relatively rare because most areas of dispute were ironed out well in advance of the sentencing hearing. The conventional wisdom was also to the effect that such contests never ended terribly well for the accused, or at least those contests in which the accused was called to give evidence. There was also much more emphasis placed on reaching agreement on the essential facts than there seems to be today and an accompanying recognition that peripheral matters would likely not impact on the sentence to any great degree. They were almost always sensibly put to one side.

[10] The result was a sentencing hearing that was focussed on the essential facts and not bogged down by issues at the margins. Almost all prosecutors were capable of advancing to the court a succinct summary of the relevant facts uncluttered by irrelevant minutiae. Only in the most complex of cases would that summary extend beyond a page or so of transcript.

[11] Over time, things changed.

[12] During the 1990s, written statements of facts emerged. That first examples of this occurred in complex Commonwealth cases where a practice developed of the indictment being forwarded by the CDPP to the solicitors for the accused in advance of its presentation together with a draft statement of facts. Soon, that practice caught on to the point where we have for many years become accustomed to statements of fact being advanced in every case, whether Commonwealth or State. Along the way we also seem to have put reliance on the depositions to one side in favour of the creation of a single document that purports to be comprehensive of all of the circumstances of the offending relevant to sentence, the collective authorship of which sometimes produces an account that obscures the essential facts more than it enlightens. On occasion it seems that the exercise of producing such a document, and agreeing on its terms, has been so all-consuming that little room (or time) was left for the parties to identify the real issues, that is to say, those that will be critical to the proper assessment of the sentence to be imposed. A great deal of time is spent on attempts to reach agreement on peripheral facts that will not matter to the sentence and, when agreement cannot be reached on every fact, the unthinking conclusion reached in many cases is that the case must be set down as a contested sentence. That is not so – it will only be where there is disagreement on the essential facts that the dispute may need to be resolved by evidence. Furthermore, there is a widely held view amongst defence practitioners that they are not at liberty to supplement the facts submitted by the prosecutor. Again, that is not so – the defence is free to do that, although notice to the prosecution regarding what will be submitted is always a good idea to avoid a sudden contest on the supplementary facts.

[13] The evidentiary basis for a number of frequently encountered offences has changed as well. Take trafficking in dangerous drugs as an example. Before the advent of mobile phones, a trafficking charge marked the culmination of a wide-ranging investigation, often involving the use of telephone intercepts, covert operatives and/or surveillance. These days, it is not uncommon for such a charge to be preferred following a simple download of the accused's mobile phone. Without other evidence, the messages and other data so obtained are alleged to

support the drawing of an inference beyond reasonable doubt, and therefore the charge, that the accused carried on the business of unlawfully trafficking in drugs. Assuming such an inference is the only reasonable inference that could be drawn to that standard, the nature and extent of the inferred trafficking then become fertile topics for debate. Likewise, in the case of drug possession charges, whether commerciality is to be inferred has become the cause of much disputation.

[14] So, change may not always be a good thing, and a few of the reasons why there has been a noticeable increase in the number of contested sentences may be found in the observations I have just made.

The legal character of sentence hearings

[15] It has been acknowledged at the highest level that the process by which a court arrives at a proper sentence has as much significance for the offender as the process by which guilt is determined.[2]

[16] A judge passing sentence on an offender must decide not only what type of sentence will be imposed but also how lenient or severe that sentence should be in order to fulfill the statutory sentencing objectives, that is to say, to punish the offender to an extent or in a way that is just in all the circumstances, to deter the offender or other persons from committing the same or a similar offence, to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved and/or to protect the community from the offender.[3] In addition, the judge must provide conditions in the court's order that the judge considers will help the offender to be rehabilitated.[4]

[17] Those decisions are necessarily informed by the factual basis from which the judge proceeds. In particular, the judge's conclusions about what the offender did as well as the various factors personal to the offender will have central importance to the imposition of a sentence that is just in all of the circumstances of the case.

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2 *R v Olbrich* (1999) 199 CLR 270, [1].

3 *Penalties and Sentences Act 1992* (Qld), s 9(1).

4 Ibid, s 9(1)(b).

[18] So, too, will the legal basis for the plea of guilty be important. An offender who pleads guilty as a party to an offence (such as an aider or encourager) will have a lesser degree of culpability than the principal offender. Likewise, the objective criminality of a deemed possessor of dangerous drugs[5] will be much reduced compared to that of the actual owner of the drugs.

[19] Consistently with the acknowledgement that a sentencing hearing has as much significance for the offender as the process by which guilt is determined, its essential character is the same; it is accusatorial.[6]

[20] That said, a plea of guilty is the formal admission of each of the essential ingredients of the offence.[7] Where (as in most cases) the prosecution seeks to have the court sentence on a factual basis that goes beyond the facts admitted by the plea, and it is disputed, it is incumbent on the prosecution to establish that basis.[8] That means that the additional factual basis must be proved by the prosecution and, unless it is, it must be disregarded by the court. In contrast, the accused is under no obligation to assist; a sentencing hearing does not cease to be a criminal proceeding on the entry of a plea of guilty.

Some governing principles

[21] Section 15 of the *Penalties and Sentences Act 1992* (Qld) provides that, in imposing a sentence, a court may receive any information, or a sentencing submission made by a party to the proceeding,[9] that the court considers appropriate to enable it to impose the proper sentence. As such, a sentencing

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5 Under s 129(1)(c) of the *Drugs Misuse Act 1986* (Qld).

6 *Strbak v The Queen* (2020) 94 ALJR 374, [32].

7 *Maxwell v the Queen* (1996)184 CLR 501, 508-510.

8 *Olbrich*, [25]; *Strbak*, [32].

9 A "sentencing submission" is defined by s 15(1) to mean a "submission stating the sentence, or range of sentences, the party considers appropriate for the court to impose". This definition was incorporated in the provision in 2016 in response to that part of the decision of the High Court in *Barbaro v R; Zirili v R* (2014) 253 CLR 58 which was thought to restrict a prosecutor from making a submission as to the appropriate sentence. It does not affect the authority of *Barbaro* upon the proper use to be made by courts of comparable sentences: *R v Cobb* [2016] QCA 333, [39]; *R v Compton* [2017] QCA 55, [38]. As to the correct approach to the use of comparable decisions, see *Barbaro*, [41]; *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCA 345, [5]; *Compton*, [38].

court is not constrained by the rules of evidence.[10] It is a matter for the judge to decide what *information* or *submissions* it receives and, if accepted as reliable, the weight to be attached. This provision enshrines the long-standing practice of the courts to permit considerable flexibility in the presentation of evidence and other information to a sentencing court, but the rubber meets the road in the context of the present discussion when some of that information (or, even more to the point, what is submitted by way of allegation) is disputed by the accused.

[22] At common law, it is for the prosecution to prove to the criminal standard (i.e., beyond reasonable doubt) all matters of fact on which it relies that are adverse to the interests of the accused.[11] However, in Queensland, the common law has been modified by statute.

[23] Section 132C of the *Evidence Act 1977* (Qld) provides as follows:

> "**Fact finding on sentencing**
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> (1) This section applies to any sentencing procedure in a criminal proceeding.
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> (2) The sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.
>
> (3) If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true.
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> (4) For subsection (3), the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true."

[24] It will be seen from the terms of s 132C that:

(a) the provision is concerned with *allegations of fact*, further underscoring the accusatorial character of sentence proceedings;

(b) by implication at least, the onus of proof of all such allegations is on the

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[10] *R v Morrison* [1999] 1 Qd R 397.

[11] *Olbrich*, [27]; *Strbak*, [32].

prosecution;

(c) the sentencing judge may act on an allegation of fact that is admitted or not challenged, but is not obliged to do so;

(d) where an allegation of fact is not admitted or is challenged, the sentencing judge may act on the allegation if satisfied on the balance of probabilities that it is true; and

(e) the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.[12]

[25] Section 132C accordingly effected a radical change to the common law by requiring only the civil standard of proof of disputed facts relating to sentence, whilst recognising that the standard varies according to the *Briginshaw* test.[13] It follows that the required degree of satisfaction may be very high where proof of the disputed fact (or inference) carries with it significant consequences for the accused's sentence, including the making for example of a serious violent offence declaration.[14] Furthermore, s 132C does not confer a discretion; it places a burden on the prosecution to prove the facts upon which it relies if those facts are not admitted.[15]

[26] It should also be appreciated that s 132C goes well beyond the presentation by the prosecution of the primary facts; it also governs the making of an allegation based on inferences said to arise from those facts (such as motive). To the point, the information advanced to a sentencing court (whether through the medium of an agreed statement of facts or otherwise) does not suddenly become some sort of grab bag for the court to make of it what it will. It is for the prosecution to allege what is to be inferred and, where that allegation is not admitted or challenged by the accused, it is for the sentencing judge to decide whether such an inference

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[12] See *R v Geary* [2002] QCA 33.

[13] The so-called "sliding scale" which requires the court to bear in mind the gravity of the allegation, the inherent probability or improbability of it and the likely consequences if it is established. See *Briginshaw v Briginshaw* (1938) 60 CLR 338, 361-362. And see *R v Potts* [2019] QCA 74, [25].

[14] *R v Ta* [2019] QCA 53, [12]-[13]; *R v Cumner* [2020] QCA 54, [53].

[15] *R v Carrall* [2018] QCA 355, [9].

should be accepted.

[27] A sentencing judge is not obliged to accept defence assertions from the bar table, even if no evidence is led by the prosecution to the contrary and even if the prosecution makes no submission about the matter. However, if the sentencing judge is inclined to reject such an assertion, that inclination must be made known to the accused who must be given a reasonable opportunity to make good that which has been asserted.[16] Of course, even if evidence is then tendered to prove the asserted fact, the sentencing judge is not obliged to accept it.[17] Otherwise, the usual principles that govern the judge's acceptance or rejection of disputed facts apply, including that the decision must be justified by reasons.[18]

[28] When sentencing an offender where there is a dispute as to the facts constituting the offence, the sentencing judge must not draw an adverse inference by reason of the offender's failure to give evidence.[19] Just as the prosecution cannot compel a person charged with a crime to testify,[20] so too it cannot compel a person convicted of a crime to assist in the further discharge of the prosecution's onus of proof in relation to the nature and extent of the crime for the purpose of increasing the sentence to be imposed.[21] There can be no expectation that the accused will give evidence and, accordingly, no inference can be drawn from the choice not to do so. Nothing in s 132C affects that onus of proof, it being only concerned with the standard of proof.[22]

Some practical considerations

[29] It has been said many times before about sentence hearings that the most critical work is done out of court. Clear lines of communication between the prosecution

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16 *R v Field* [2017] QCA 188, [48].

17 Ibid.

18 Ibid.

19 Save in rare and exceptional circumstances, which circumstances are explained in the joint reasons of the High Court in *Azzopardi v The Queen* (2001) 205 CLR 50, [52], [61]-[62], [64] and [68].

20 See *RPS v The Queen* (2000) 199 CLR 620, [27] – [28]; *Dyers v The Queen* (2002) 210 CLR 285, [9], [52] and [120]-[121].

21 *Strbak*, [31].

22 *Strbak*, [31]-[32].

and the defence are as important now as they have ever been. Early identification of points of dispute will greatly assist their resolution, either by the parties or the court.

[30] All sentences involve some degree of disputation but not all matters of dispute will be important enough to make any material difference to sentence. Most will be minor and will be unlikely to materially affect what sentence is imposed. It is only where disagreement on the facts (or the inferences to be drawn from those facts) may have a real impact on the sentence to be imposed that a contested sentence will be warranted. Contested hearings should be seen as a solution of last resort.

[31] The parties should never lose focus on what the real issues on the sentence are likely to be. Striving to an obsessional level to reach agreement on every fact contained in a draft statement of facts is unlikely to be productive of anything more than distraction. Even when agreement is reached, consideration should be given to treating the statement of facts as a tool for preparation only. Think about distilling the essential facts from that agreed statement and then either preparing a much shorter form of document for tender or advance the facts orally at the sentence hearing.

[32] In this regard, it is wrong to think that agreement on a statement of facts is an essential prerequisite to the case being set down for sentence. Although both the Form 2 and the Online Portal enquire whether agreement has been reached on a statement of facts, that enquiry is made so that the answer can be supplied to the sentencing judge by way of information in advance of the hearing. To the point, a failure to agree on a statement of facts will not prevent the case from being set down for sentence. The more critical question is whether agreement has been reached as to the legal and factual bases for the plea. Unless agreement has been reached in both respects, the case will either be set down as a contested sentence or will not be set down at all.

[33] In every case, the parties should be slow to conclude that a resolution of the dispute can only be obtained from the court. Often, what is presented to the court as a contested sentence is no more than a matter of argument from

uncontroversial facts. In other cases, proof short of oral testimony can be adduced through the gathering and exhibiting of relevant documentary evidence. Time and time again, contested sentences are resolved on the eve or morning of the hearing once a true appreciation of the real issues is gained. Indeed, the experience of the courts is that parties who are directed to file short written submissions identifying the factual contest very often come to the realisation that there is no point to the contest or find another way to resolve it short of a hearing. Timely preparation can avoid all of that.

[34] Last, a few words about outlines of argument and comparable authorities.

[35] Whatever the preference of individual judges, practitioners should by now be aware that a written outline of argument is expected by most judges on (at least) the Supreme Court. Therefore, an outline should be prepared in every case. Even if not handed up to the court, I think that an outline of argument is an indispensable step in the preparation of any case for hearing. It is a great way to focus the mind on the real issues and add structure and clarity to your advocacy. That said, to the extent that there is an expectation that written outlines of argument will be provided to the sentencing judge, that does not mean that lengthy written submissions (as opposed to outlines) should be produced. Indeed, in a straightforward case, an adequate outline of argument might not exceed a page. A regurgitation of the facts (already included in a tendered agreed statement of facts and then advanced orally) will usually add nothing other than repetition. It is enough if the outline concentrates on the salient aggravating and mitigating features of the case, makes a brief submission as to the sentencing levels for the offence in question (followed by a citation of the leading authority for that submission) and then advances a submission regarding how it is contended the sentence ought be structured.

[36] A practice has grown up whereby any number of allegedly comparable decisions of the Court Appeal are emailed to the judge's associate on the afternoon before the sentence hearing. No doubt that has come about because of the terms of *Practice Direction No 5 of 2014*; relevantly, that it is "is the responsibility of practitioners to ensure that the sentencing Judge is provided prior to the sentence with any substantial reports or other materials to be tendered on the sentence".

Leaving to one side whether comparable cases qualify as "materials" within the meaning of this requirement, the practice is as I have just stated. It follows that the sentencing judge will already have to hand each of the cases emailed to his or her associate. There is accordingly no need to hand another copy of those cases up to the court during the sentencing hearing. Nor is there any need to make expansive submissions about the cases, unless called on to do so by the bench. A sentencing judge will be interested in what can be discerned from those cases about the appropriate sentencing level for the offence or offences at hand. The judge will not be terribly assisted by a comparison of the facts of one case to the facts of the case at hand because rarely (if at all) will the circumstances of one case be sufficiently comparable with the circumstances of another case to derive much assistance from such an exercise. Indeed, it would be quite inappropriate for a sentencing judge to grade the criminality in a case at hand through a comparison of aggravating and mitigating factors in other cases as if there could only ever be a single correct sentence.[23]

Conclusion

[37] Before opening up to questions and discussion, may I take this opportunity to remark on how privileged we are, for a fourth time, to gather together in the Goomburra Valley in such a spectacular setting. But of course, it is much more than a setting; this property has been home to five generations of the Gordon family and so I thank Sarah and her husband Sam Campbell for once again opening up their home to us all and providing such unsurpassed hospitality.

[23] *Markarian v The Queen* (2005) 228 CLR 357, [27]; *R v Dwyer* [2008] QCA 117 at [37]; *R v BCX* [2015] QCA 188, [36].