EASTERN SUBURBS LAW SOCIETY ANNUAL LAWYERS LEARNING FOR CHARITY CONFERENCE

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SENTENCING IN DISTRICT COURT CRIMINAL MATTERS

1 At the outset I intend to provide a practical paper for those solicitors who either practise in criminal law or on occasions find themselves before the District Court in sentencing matters. This is as opposed to an academic treatise on sentencing.

2 I have now been a Judge of the District Court for 10 years and have never seen it busier. Indeed when I was appointed in mid-2009 I remained the junior or baby Judge, for one week shy of one year. However, towards the end of 2018 and the first months of 2019 there have been at least 10 new appointments to the Bench. As the busiest trial court in Australia the accent quite rightly has been on trying to reduce the large backlog of outstanding trials. There has already been some success but the backlog stands at around 1800 trials. This automatically means that a significant proportion of prisoners who are bail refused are serving time on remand. A significant proportion of these will either be acquitted or receive sentences that are less than the time spent in custody awaiting trial. This is therefore a pressing problem which automatically puts pressure on the Court to deal not only with trials but also sentences and appeals in a timely fashion.

3 The difficulty with sentencing is that the NSW Supreme Court of Criminal Appeal (CCA) looks very carefully at District Court sentences which are taken on appeal either by the Crown or the defence, or both. A practice has evolved whereby sentencing Judges must be careful to articulate full reasons for any sentence. There seems to be little scope for the CCA accepting that an experienced Judge has taken into account various matters unless they are specifically mentioned in the reasons for sentence.

4 Consequently it is very important that if you are acting on a sentence matter you are fully prepared by the time you come before the actual sentencing Judge.

5 I acknowledge that your role in sentencing begins well before you actually appear in front of the District Court. The scope of this paper is not meant to canvass your gaining instructions and navigating the path through the Local Court until you appear on sentence in the District Court.

6 However, there is no need to tell you that it is most important that from first contact with your client, whether it be in custody or not, that they understand the steps that will ultimately lead to sentencing proceedings in the District Court. This may occur after a defended trial or following a plea of guilty.

7 Of course, as defence solicitors you must be acutely aware of the need to advise your clients of the severe consequences of running an unsuccessful trial or failing to plead guilty at the first reasonable opportunity.

8 For instance, in a serious drug matter carrying a maximum sentence of life imprisonment, running a trial unsuccessfully could result in a head sentence of say 16 years. The sentence would have been 12 years had the offender not run a contested trial and received the full 25% discount.

9 Another matter that needs dealing with sooner rather than later in non-trial matters is settling on the Indictment and the Agreed Statement of Facts. You may be surprised to know that it fairly regularly becomes apparent that offenders have signed Agreed Facts and/or pleaded guilty to certain Indictments which they do not truly understand or agree with.

10 As a defence solicitor you should, with or without counsel, liaise with the prosecution to obtain the best Indictment for your client and the most advantageous Agreed Facts. Sometimes it is necessary to run a disputed facts hearing prior to sentence if agreement cannot be reached with the Crown.

11 For instance, in regard to the Indictment you may be able to convince the prosecution to put a number of matters on a Form 1, thus reducing the number of charges on the Indictment to which pleas are formally entered. Further, you may be able to negotiate a lesser charge than that first formulated by the police and then the DPP. You may be able to, for example, negotiate on a serious assault matter, 'intent' down to 'recklessness'. With standard non-parole periods in play this can be a very significant outcome for your client.

12 When you have settled on the Indictment and the Agreed Facts and prior to any sentencing hearing in the District Court you should decide whether your client requires a Sentence Assessment Report and/or any medical or psychological reports.

13 Sentence Assessment Reports require around 6 to 8 weeks to prepare and medical and psychologist's reports can be equally hard to obtain immediately.

14 Your client should be told to cooperate fully with report providers and if appropriate have members of his family and/or friends prepared to contribute. Your client should not give a different version of the Agreed Facts to those briefed to prepare reports. Surprisingly this often occurs and it creates an unfavourable situation for the offender.

15 In regard to psychiatric and psychologist's reports we are increasingly deluged with very long documents containing a lot of largely irrelevant information. Even more dangerously they often contain histories that include a different version of the Agreed Facts.

16 Sentencing is an acquired yet still instinctive skill and Judges quickly get a feel for the matter from the charges, their maximum penalties, the Agreed Facts and of course, any criminal antecedents of the offender.

17 I can only strongly advise that you liaise carefully with psychologists and psychiatrists to provide the court with material relevant to the sentence. As you know where an offender does not give evidence on sentence very considerable

caution must be exercised by Judges in relying on statements made to psychiatrists and psychologists. You must weigh whether you call your client and subject him or her to possible cross-examination by the Crown. Sometimes the prosecution will take little issue with the history provided by the client to a report writer but you must be fully aware that the courts do not appreciate long winded and irrelevant material.

18 Again, the decision whether to call your client or not will depend on that client and the circumstances of the case. Matters such as rehabilitation, genuine remorse and the likelihood of reoffending can all be better addressed if an offender is called. However, offenders can be their own worst advocate and these are decisions that must be made on a case-by-case basis.

19 Whether psychiatrists and psychologists have become used to providing very detailed reports in exchange for reasonable remuneration is something that I cannot comment on. However, as a Judge I would rather receive a five page report touching on the real issues rather than a dozen or more pages. These are matters that should be worked out by you well prior to sentence, and if possible the report should be served on the Crown well in time.

20 References for the offender should be obtained in good time and acknowledge the serious charges faced by the offender and be signed and dated and served on the Crown. You would be surprised to hear how many referees still say that an offender's actions are 'out of character' when the offender has a long list of similar transgressions.

21 When all the Crown sentence documents are settled and you have marshalled whatever evidence you wish to call either in court or by tendering documents, references and reports you should consider whether you will make short written submissions.

22 The court does not require a detailed exposition of the law and once again appreciates quality rather than quantity in receiving submissions from both the Crown and from the defence.

23 It is not a bad idea to follow a fairly set formula in writing submissions by dealing with matters in the following order: the name, date of birth, charges, maximum penalties and standard non-parole periods should be briefly canvassed.

24 The Agreed Facts should be acknowledged. You should then turn to an assessment of the objective seriousness of the offence or offences and include those aggravating and mitigating factors that you find applicable. In this regard also see s.21A of the Crimes (Sentencing Procedure) Act 1999 (CSPA).

25 It is essential for each Judge in each case, and in each charge to assess the seriousness of the offences.

26 This of course involves careful attention to the maximum penalty and whether or not there are any standard non-parole periods.

27 As you know standard non-parole periods attach to cases where the offender has pleaded not guilty and where the offence is found to fall within the mid-range of objective seriousness.

28 Accordingly you should note that your client has pleaded guilty and seek the appropriate discount given the date on which he pleaded.

29 If there is a Victim Impact Statement you should deal with this and make a submission as to whether or not the emotional harm and distress is in accordance with the serious nature of the offence.

30 In helping the court to assess objective seriousness your input can be of great assistance. The most difficult area of sentencing is in cases where the court must decide whether a fulltime sentence of imprisonment must be imposed or whether there is a non-custodial option.

31 Often with the most serious charges the issue is of course what is the appropriate head sentence and non-parole period or if there are a plethora of charges what is the appropriate aggregate sentence.

32 The court receives no help where offender's representatives ignore the obvious objective seriousness of an offence and plump for a clearly inadequate penalty.

33 Indeed as a Judge I welcome it when, for instance, an offender on giving evidence in court says that they know they deserve to go to goal rather than attempting to minimise the objective seriousness.

34 Your input is required by the court to look at each charge and make your own assessment of where it finds itself on the spectrum of objective seriousness.

35 As mentioned careful attention to maximum penalties will almost always be required: firstly, because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because they remain relevant as a yardstick. (See ***Markarian v The Queen*** (2005) 79 AR 1048.) As I say in every sentence, I will keep the maximum penalties in mind as set out in Markarian.

36 You should not shrink from dissecting the Agreed Facts and giving your opinion as to the objective seriousness. For instance, in sex cases it is incumbent on the court to look at the actual circumstances of the crime and note where it falls on the spectrum of objective seriousness. This of course applies to home invasions, other matters of violence and drug charges, both Commonwealth and State. There is no getting around it, it is the elephant in the room and it must be faced appropriately by defence lawyers.

37 Look carefully at the aggravated circumstances as alleged by the Crown and see whether you agree or disagree with them.

38 Use the District Court sentencing Bench Book and go to the appropriate charges. You can then approach the sentencing submissions in an ordered way by dealing with the charges and their objective seriousness before moving on to the offender's subjective case. You will also need to be aware of the various guideline judgments in matters such as robbery, break enter and steal, dangerous driving causing death or grievous bodily harm.

39 For example, if your client is pleading guilty to drug supply charges you should consider the maximum penalty, the amount of drugs and point out that it is the offender's role and level of participation that is even more important. In doing so you can acknowledge that the amount remains relevant but, for instance, your client although above the indictable threshold for the drug is very much below the next threshold of commercial supply.

40 You can then point to whether there was any sophisticated organization and planning and try to accurately describe the role in the supply taken by your client. This is immensely useful to the court and is often an area of disagreement with the Crown. This approach can be adapted for the myriad types of charges faced by offenders in the District Court.

41 Having dealt with the objective seriousness of the matter you should then turn to the offender's subjective case. How you approach this will depend on whether or not your client has decided to give evidence on sentence.

42 By this time you should also have tendered any documentary evidence or reports upon which you rely.

43 You should carefully consider your client's criminal antecedents. This will determine whether you submit that his record, or lack thereof, is one that allows leniency or disentitles the offender to leniency or indeed, falls into the Veen [2] area where his criminal record can be seen to be an aggravating factor in the sense that a more severe sentence is warranted because of it. This is an important consideration. If your client has no relevant criminal antecedents and/or you are putting forward that he/she is a person of good character then this is a powerful submission on sentence.

44 You need to have checked your client's background to see if he is of Aboriginal descent or also comes from an under-privileged upbringing with early introduction to drugs, alcohol and sexual or domestic violence. This is very common in sentencing matters and you must be alive as to whether this

enlivens consideration of the principles identified in cases such as Bugmy and Fernando which can lead to a lesser penalty.

45 You should ascertain whether or not your client is literate. There are so many offenders coming before the court with a similar background of family disruption, poor attendance at school often leaving by age 13 or 14, and then a descent into alcohol and drug use.

46 In addition you need to cover the mental health of your client by obtaining an appropriate and pertinent report if you feel it is warranted. Sometimes an expert will say there is a causal link between your client's mental condition and the commission of the offence and this can be most helpful. In other cases it will be a juggling act between whether or not your client's mental condition poses a threat to community safety. There are also authorities that allow lesser accent on general and specific deterrence as a result of an offender's mental health issues.

47 In addition you need to be aware of matters such as extra curial punishment, delay between arrest and sentencing, including long periods on remand and any hardship of detention.

48 Especially for young first time prisoners there can be the significant suspense or uncertainty of not knowing ones fate for many months or even years.

49 If your client is relatively young then you should point out that youth requires a heavy accent on rehabilitation and if there has been a period of non-offending since arrest and sentencing then you can argue that rehabilitation has begun.

50 It is important to point out whether your client has spent time in rehabilitation or been subject to very strict bail conditions or both.

51 It is necessary to deal with remorse, rehabilitation and re-offending and to carefully check reports such as sentence assessment reports, Justice Health and psychiatric or psychological reports in this regard. They will usually

determine whether an offender is of low, medium or high risk of re-offending. This should be addressed by you on sentence particularly if you do not agree with the category.

52 Sometimes matters could have been dealt with in the Local Court where a much lower maximum penalty due to jurisdictional limits applies. This can be noted on sentence.

53 If appropriate you should tender statistics and note that although they can be a blunt tool they can provide assistance to the court.

54 If there are co-offenders then you must keep parity in mind.

55 In addition in many cases an offender asks other matters to be taken into account on a Form 1 attaching to one of or more of the Indictable offences. At the commencement of sentencing proceedings you should indicate that your client wants the court to take these additional offences into account when dealing with the principal offence to which they are attached. The court will consider whether it is appropriate to do so. There is a guideline judgment for Form 1 sentencing which is ***Attorney General's Application under s.37 of the Crimes (Sentencing Procedure) Act 1999 No. 1 of 2002*** there it held the court would take into account the Form 1 matters for which guilt has been admitted with a view to increasing the penalty that would otherwise be appropriate for the particular offence on the Indictment. The court gives greater weight to two elements, namely, personal deterrence and the community's entitlement to extract retribution for serious offences. The focus throughout should be on the primary offence.

56 You should note principles of sentencing set out in the CSPA at s.3A and s.5(1).

57 The court must consider all possible alternatives to prison. If it is satisfied that no penalty other than imprisonment is appropriate then you should press, if appropriate, for a finding of special circumstances. This is important as it can significantly reduce the amount of time your client will spend in prison prior to

release to parole. Matters such as first time in custody, health and mental health issues can help determine whether or not there is a finding of special circumstances.

58 If there is more than one offence then you must consider totality principles. You need to submit whether or not sentences should be concurrent, cumulated or partially cumulated. This is an important feature of any sentence involving multiple charges. Further if there are a number of offences you should be well aware of the aggregate sentence provisions pursuant to s.44(2a) of the CSPA.

59 Given time constraints I cannot go through the various penalties open to the court in sentencing matters. You must be aware of course of the various options available to the court and press for the option most suitable for your client given the circumstances of the case. It is utterly useless to ignore obvious objective seriousness and press for an unrealistic outcome. If gaol is essential then press for the lowest reasonable head sentence taking into account discounts for the plea of guilty and/or any assistance rendered to authorities in addition, and ask for the earliest possible start date. This is an area that can involve a Judge's discretion when there are periods of prior custody, residential rehabilitation and very strict bail.

60 Additionally you should seek the lowest non-parole period commensurate with your client's criminality. This can include a sizeable deduction following a finding of special circumstances.

61 You need to make yourself aware of the provisions governing Intensive Correction Orders, conditional release orders, either with or without conditions, and the various changed conditions whereby s.12 suspended sentences are no longer available.

62 Remember in deciding on submissions in regard to the appropriate penalty you should not be afraid to have discussed matters fully with the Crown. Sometimes a Judge's life can be made considerably easier by experienced legal practitioners reaching mutual ground. The Crown has limits in this regard,

particularly on putting forward figures, but a court can quickly discern when the parties are not far apart.

63 Always note the sentence carefully and make sure the court has dealt with all matters, such as matters on s.166 Certificate, forfeiture, compensation and the correct dates for any sentence have been pronounced.

64 Good luck.

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