

2011

What is Sentencing?

Elizabeth Greene

Bond University, Elizabeth_Greene@bond.edu.au

Follow this and additional works at: <http://epublications.bond.edu.au/nle>

Recommended Citation

Greene, Elizabeth (2011) "What is Sentencing?," *The National Legal Eagle*: Vol. 17: Iss. 1, Article 7.
Available at: <http://epublications.bond.edu.au/nle/vol17/iss1/7>

This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in The National Legal Eagle by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

What is Sentencing?

Senior Teaching Fellow Elizabeth Greene Faculty of Law Bond University

Sentencing in legal terms means ‘any penalty or imprisonment ordered to be paid or served, or any other order made by a court after an offender is convicted, whether or not a conviction has been recorded.’¹ That is, in slightly more straightforward terms, imposing a punishment or penalty for an offence of which an accused person has been convicted following a trial, or has pleaded guilty.

Criminal law is a field of law that many people feel familiar with – it is the subject of numerous TV shows (ranging from the serious *Law and Order* to the ridiculous *Ally McBeal* or the slightly odd *Drop Dead Diva*) and it seems no matter which is your preference, the message is the same. Criminal Law is about psychopaths committing atrocities and being brought to court, or about clever lawyers finding loopholes within the legal system to help their ‘innocent’ clients.

What is rarely focused on is the next step after the trial is over, and the person charged has been found guilty. Even less attention is given to the situation where someone pleads guilty at the outset, saving the court from running a trial at all. This is probably because it is not as exciting when the guilt of the accused is already known, or because there is no need for a jury once a conviction is recorded, and the chance of legal theatrics is virtually nil.

But in actual fact the process of sentencing a convicted person is an integral, often highly debated, and life-altering activity.

Let’s look at the reasons why. Firstly, we all know that the law upholds the presumption of innocence² – so every person charged with an offence is deemed to be innocent, until proven guilty. Once a jury returns a verdict of guilty then the presumption of innocence has been effectively rebutted. The presumption can also be dispelled when an accused person stands in court and officially pleads guilty to a charge they are facing. At this point the only legal question remaining is what punishment to impose for the wrongdoing, and that is ultimately determined by the Judge alone. Both the prosecutor and the defence counsel make submissions on the issue of the appropriate punishment or penalty, but the final decision is that of the Judge.

Therefore, a sentence hearing is, for a convicted person, a defining moment of their life – which sounds melodramatic, I know, but it is true. Whether it is a first time offender hoping to have no conviction recorded, or a seasoned ‘crim’ wondering how long he or she has to serve this time, the sentence imposed will carry a long term impact on the recipient. There are many factors therefore that lead the court to the appropriate penalty in each case. Let’s look at these in a little more detail.

It is probably prudent at this point to clarify what is meant

by a conviction. As soon as a finding or plea of guilt has been entered, then a conviction has been entered against the accused person. This does not mean that the conviction has been recorded however. The recording of a conviction is a separate step within the sentencing process, and is seen as a part of the punishment of the offender. This is because, should an offender be ‘lucky’ enough to have an order made of ‘no conviction recorded’, they generally do not have to disclose the conviction to anyone else. It is a sign of faith in the offender that this was an aberration in an otherwise law abiding life, or recognition that the offence committed was very minor. Courts are likely to enter an order of ‘no conviction recorded’ for first time offenders, and other offenders whose prospects for rehabilitation are high.³

In terms of procedure, the sequence of events follows a set formula for each sentence hearing. The Prosecution always speak first. Whether the sentence is following a trial or a plea, the Prosecutor must place before the court all of the material (or relevant) facts relating to the offence. This includes the details of the offending behavior, such as the legal definition of the offence and the facts that are relied upon to prove the accused person actually committed the offence. For example, let’s say that Robert Pattinson was charged with sexual assault under s352 of the Criminal Code. He has pleaded guilty to that charge, and the Prosecution are now making their submissions to the court.

They would say to the Judge something like this :

Your Honour, Robert Pattinson has pleaded guilty to 12 charges of sexual assault. As Your Honour would be aware, this offence is committed when a person unlawfully and indecently assaults another. The facts relating to these offences are as follows – on 12 separate occasions, Pattinson was observed at the local nightclub Twilight to approach a female patron and put his arms around her. He would rest one hand on her buttocks and the other would be around her neck, and he would then lean in and kiss and suck her neck. On every occasion the female would cry out in surprise and/or pain, and push him away. Often there would be blood on the neck of the victim. It is the Crown’s submission that such deliberate and frequent offending shows a lack of respect for others, and the Crown believes that Pattinson is a continuing threat to the community. It is clear that such actions are indecent, in the Crown’s submission, as there is a clear sexual element to the acts, which is the current definition of indecent.⁴ It is submitted that he be sentenced to a short term of imprisonment to convey to both Pattinson himself, and the community, that such actions will not be tolerated. The Crown also contends that, should Your Honour feel that imprisonment is not warranted, a conviction should be recorded to reflect the seriousness of these offences.

The Judge would then ask any questions he or she may have, including asking for any case authority to support the recommendation for imprisonment.

It is next the task of Defence counsel to argue for a lesser penalty, and the way to do this would go something like this:

Your Honour, my client has pleaded guilty today to these 12 offences, and he is truly remorseful for the actions that have brought him here before you. Robert is a young man of 23, with a bright and enriching future before him. He is single, and is employed as a janitor at the local theatre, but he has ambitions of actually performing on the stage.

Robert accepts that his actions are the sole reason he is facing the risk of imprisonment here today, but Your Honour, there are some mitigating factors that we would like to present to the court. Firstly Your Honour, Robert has no criminal history of any kind. He has never been in trouble with the law in any way, and has not even received a traffic infringement. So he presents to the court as a young, first time offender. Secondly, there was no violence involved in the assaults before the court. As Your Honour heard, Robert was actually guilty of little more than uninvited kissing (and to be frank, Your Honour, many of these 'victims' responded positively to the kisses!). We accept that there was some blood on the necks of the victims, indicating an injury of some kind had been inflicted, but as Your Honour can see my client has unusually sharp teeth, and these injuries were, in fact, accidental.

Robert has seen the consequence of such actions and wishes to assure the court that he will not embark on such activity again. He is certainly not a threat to the community, and is not a person from whom others require or need to be protected. In this case it was not the victims who raised the complaint initially, but their boyfriends and partners. None of the victims have tendered any impact statements to detail any trauma or suffering inflicted by Robert. It is for these reasons that the defence suggests a period of community service together with a term of probation, as an appropriate penalty in the circumstances. Given his guilty plea, and his lack of criminal history, it is also requested that no conviction be recorded.⁵

So that is a little insight (albeit tongue-in-cheek in places) as to how sentencing submissions would be made to the Judge. It is clear that the focus for the Prosecution is the circumstances of the offence itself, together with any aggravating factors such as a criminal history, or lack of co-operation. Defence counsel on the other hand introduce any mitigating factors regarding the offender or the offence, such as remorse, prospects for rehabilitation, and family circumstances.

The final step, and obviously the most important one, is then the imposition of the sentence by the Judge. There is a piece of legislation devoted to setting out the guidelines and considerations that need to be addressed when imposing a sentence on an offender, and that is the Penalties and Sentences Act 1992 (Qld). Within this legislation can be found the available options for a Queensland court when sentencing a convicted person. This ranges from a minor penalty of a Good Behaviour Bond, to the more serious imposition of periods of imprisonment accompanied by a declaration that offences are Serious Violent Offences. The Act covers community service, fines, probation, suspended sentences, combined orders, imprisonment, compensation – indeed, all forms of punishment are included.

Equally as important are the sections of the Act which detail the factors that the court must take into account when sentencing, as these form the basis for the submissions that both the Prosecution and Defence eventually make. Together with the facts of the case, the sentencing guidelines outline the issues and concerns which can increase or decrease the sentence for an offender.

Maximum penalty

Everyone is aware that each offence carries a maximum penalty, but what is lesser known is that these maximums are rarely (if ever) imposed. To start with, the court has been told that the maximum penalty should only be imposed for the worst example of that kind of offence,⁶ which means that most cases can justify a substantially lower penalty than the prescribed maximum. Let me give you an example. The offence of assault occasioning bodily harm, found in s339 of the Criminal Code, carries a maximum of 7 years imprisonment.⁷ An offender comes before the court and pleads guilty to this offence, having punched his mate in the course of a pub fight. His mate suffered a black eye. The definition of 'bodily harm' found in section 1 of the Code states that it includes 'any bodily injury which interferes with health of comfort', so a black eye certainly qualifies.



However, a broken arm, a broken eye socket, broken ribs or internal bruising also satisfy the definition, and are without doubt more serious examples of the offence under s339. So the court might impose a sentence of community service on the offender who delivered a black eye, bearing in mind how many worse examples of the offence there could be. That is all fine, until the next offender comes, and he inflicted a black eye and a broken toe on his victim. He may well be closer to the maximum penalty of 7 years, but he will use the first case to argue that he did not do anything much worse than the guy who caused a black eye, so his penalty should only be a little bit worse than community service...and so on, until there are a whole stack of case precedents which support fairly low penalties for certain offences! The maximum stated in the Code becomes meaningless to an extent.

Considerations from the Penalties and Sentences Act

Maximum penalties are not the only guide for the court however, and the *Penalties and Sentences Act 1992* (Qld) contains many sections devoted to these considerations. The most important are sections 9, 11, 12 and 13. Within section 9 are many factors that must be taken into account when sentencing, and these considerations are essential issues in every case. The sorts of things listed within section 9 are the age, background, and criminal history of the accused. The type of offence that has been committed, and the potential risk or threat to the community of the offender re-offending; the question of whether the offender poses an actual threat of violent or sexual offending, and the need to protect the community; any efforts that the offender has made to rehabilitate themselves prior to the sentence date; their prospect of rehabilitation generally, any mental or cultural concerns that should be addressed, their family circumstances, and any dependents of the offender (including spouse, children, or employees), whether any compensation has already been made or offered, and the realistic ability to pay such compensation, and the impact of the offence on the victim, victim's family, and community.

Case precedents

As you can see, the decision as to what sentence to impose is not one to be made lightly, or with any haste. Luckily, there are a plethora of previous cases (precedents) that can be utilised to provide an appropriate range of penalties for the type of offence that has been committed, and it is then a balancing act by the Judge to weigh the competing aggravating and mitigating circumstances of the particular case before the court, in order to reach the ultimate penalty.

Both the Prosecution and the Defence have a legal right to appeal a sentence imposed, on the basis that it is either manifestly excessive (the Defence argument, of course) or manifestly inadequate (the Prosecution's position)⁸, and the Court of Appeal would then review all of the facts and circumstances of the case and decide whether the penalty fell within the appropriate range or not.

So, what is sentencing?

Sentencing is a detailed, thorough, and exhaustive analysis of the facts surrounding an offence, together with a breakdown of all of the personal factors (both aggravating and mitigating) of the offender. The end result is a penalty or punishment that is fitting in all of the circumstances. And who says all the interesting stuff happens in a trial?!

References

- ¹ s1 *Penalties and Sentences Act 1992* (Qld).
- ² s26 *Criminal Code Act 1899* (Qld).
- ³ s12 *Penalties and Sentences Act 1992* (Qld).
- ⁴ *R v BAS* [2005] QCA 97.
- ⁵ ss12 and 13 *Penalties and Sentences Act 1992* (Qld).
- ⁶ *Veen v Queen* (no 2) (1998) 164 CLR 465.
- ⁷ *Criminal Code Act 1899* (Qld).
- ⁸ s668-9 *Criminal Code Act 1899* (Qld).

How long...

- *What sentence should result from the offence of glassing?*
- *What is a serious violent offence?*
- *What sentence would you give Mr Pattinson?*