The failed art of sentencing offenders

By John Nader QC

This should be understood to be a sincere criticism of the Court of Criminal Appeal of NSW (the CCA). It implies no disrespect or discourtesy to any members of that court.

Disagreements about what the law ought to be should be an exercise of reason, a dialectic, where contending views should be clear of hostile emotion. My request therefore is not that others agree with my contentions but that they make an effort to understand them as I will, theirs.

Since the mid 1970s, certain sentencing practices have become entrenched: at first by judicial action and more recently by legislation.

My present purpose is to persuade the CCA that those practices are inappropriate and that that court's traditional role should be reinstated. It should return to being a truly appellate court. Sadly, many of the judges who sit on the CCA, by reason of their relative youth, have no personal recollection of those older traditions.

The CCA, in quite a short time, has developed practices which involve treating trial judges almost as if they were clerks whose task it is to follow check lists and to take into account matters that are laid down therein by the parliament and by the CCA. I submit that this is demeaning for sentencing judges whose independence has, in effect, been taken away over time both by the CCA and the parliament. A monster has been created that makes judicial life extremely difficult in just covering the prescribed matters, and takes the judges' minds away from the main game.

The CCA should be jealous of appellate traditions because it has power which is easily, even if inadvertently, misused without sufficient reflection on its consequences. The CCA has only to treat a rule of judicial practice as a rule of law in a particular case after which judges must apply it or fall into appellable error.

In this way the CCA can create a legal regimen that goes beyond what appellate courts were intended for. It is a dangerous process, even when applied in good faith. It is not possible to emphasise enough how our basic judicial processes, in the most important forensic jurisdiction, depend for their value and respect on a profound knowledge of our traditions and the reasons that gave rise to them. No court would make exceptions to the rule of law, but it may not be in breach of any promulgated law if it did so. Powerful tradition saves the rule of law and many other embedded legal values.

In the belief that it is all right to interfere with the traditionally broad discretion of trial judges, the CCA, by a process like acquisitive prescription, has taken from them the right to exercise the authority for which they were appointed to judicial office.

Of course, judicial independence does not extend to significant errors of law, nor should it. There are cases where judges run off the rails of legal correctness and where the error can truly be said to be an error of law requiring correction. It should be for those cases that the CCA exists.

This process of eroding judicial discretion has not been gradual and subtle. It started shortly after September 1974 when Reginald Marr became solicitor general for NSW – the second law officer of the state – and has continued unabated.

Marr succeeded Harold Snelling, an outstanding QC considered for appointment to the High Court.

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The chief reason why I protest against this tendency is that it betrays a lack of understanding of the judicial role. It seems to have been overlooked that judges have, by right of their office, independence in their judicial functions, extending to independence from other judges: we know it as judicial independence. One might well ask how much judicial independence a judge possesses whose role has been reduced to little more than checking and complying with lists of matters prepared by others.

He had been solicitor general from 1953. He ceased to hold that office in 1974 when Marr became solicitor general. Marr held office as solicitor general until March 1978.

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Marr was succeeded by Gregory Sullivan from February 1979 to February 1981 and Mary Gaudron February 1981 to February 1987. The taking of Crown appeals then passed to the director of public prosecutions,

appointed in July 1987.

The enactment of the *Crimes (Sentencing Procedure) Act 1999* formally removed the direct responsibility of the CCA for diminishing the status of trial judges and passed it to the New South Wales Parliament. But, the criteria set forth in that Act largely follow the matters that had previously been defined by the CCA, and one can safely assume that the influence of the CCA on the parliament, whether direct or indirect, was significant. No improper motive is suggested. However, whether undue supervision of judges comes from legislation or the CCA does not lessen its unacceptable effects.

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It is presently accepted as non-contentious that the raison d'etre of all criminal penalties is, either directly or indirectly, to provide peace, order and protection to the general community by minimising the incidence of crime: at least to the extent that it is within the power of the criminal law to do so.

Another generally accepted principle of criminal sentencing is that the form and severity of penalties should not at all be motivated by vengeance or retribution.

These propositions are ultimately matters of fashion but they are accepted in these times as axiomatic. It was not always so and what may be the received opinion in times to come we cannot now know. It would be unjustified to think that our present opinions are objectively speaking any better – or more right – than past opinions, or that in time to come our present opinions will not be seen as other than inappropriate.

But, I think that a third factor, not now openly accepted, should be frankly considered by the courts: namely, punishment, as such. Punishment was once recognised as the chief reason for sending offenders to prison. The failure to accept it presents an hindrance to developing a more complete rationale for criminal punishments.

Should criminal courts be able to factor into sentences, where appropriate, a finding that the crime in all of its circumstances warrants a punishment component with no other justification than that the offender should be punished? I am referring to punishment, per se. There is a tendency for us, modern, enlightened people, to think of punishment as in itself cruel and something that we have moved beyond. This should be a matter for serious debate.

Of the reasons for imprisoning offenders, the chief one remaining that is countenanced by the courts is deterrence from committing crime directed either to the general community or to the offender at bar himself.

It is an ongoing debate whether the commission of even a few kinds of crimes might be deterred by the prospect of imprisonment. I am inclined to agree with those criminologists who say that prison sentences have little if any effect on the incidence of crime.

The basis of prison sentences should not be locked in legislative concrete but left to the wisdom of experienced judges to determine in the light of their perception of general community standards. If juries can be asked to apply community standards from time to time, why not judges?

The CCA frames its appeal reasons so as to give the sentencing process the look of being scientific. It has been fashionable for sociologists to do just that (think of Lombroso whose ideas were accepted by intelligent judges not so long ago), and the sentencing process is part of the broad world of sociology. The process of sentencing offenders is not only not scientific, but it is incapable of its nature of being truly scientific. But, in an age in which science and technology are seen as life's sine qua non, it seems to be accepted that the sentencing process should be scientific – that if we fail to make it so, the very process of sentencing offenders may fall into general disrepute. But the sentencing process has none of the marks of a truly scientific process, such as experimental verification or measurable objective criteria.

I have not lost sight of the fact that there are some offenders whose history is such that they must be imprisoned for the protection of the public from their crimes; offenders who on their history, are very likely to offend again with severe effects on the community. This is not imprisonment as punishment of the offender but as direct protection of the public. It is a highly contentious matter.

However, these are complex questions to which there are no simple answers and my broad propositions are not without exceptions, but I think not many.

As the sentencing process now operates it has a superficial

appearance of being scientific and therefore of getting correct answers. But on a closer look at the process it can be seen that it is utterly non-scientific. It is for that reason that there can never be justification for nit-picking through remarks on sentence for technical errors that invalidate the sentence passed.

No matter what technique is devised the sentencing process must follow a process that begins with a starting point selected by the sentencing judge. The starting point must be a number that cannot be fixed by reference to any exact criteria. It must be the estimate of a judge made by reference to very imprecise criteria. In order to make this estimate he or she may have regard to a range of sentences imposed in the past for similar crimes passed on persons in like circumstances. That is always problematical in any event because past sentences themselves have been determined by earlier cases and so on: older cases propping up those that follow.

Having arrived at a starting number, the judge must then adjust it by taking into account the many factors dictated by the parliament and the CCA. The judge must say specifically that he or she has taken the factors into account, or he or she will be deemed not to have done so. Some of the directives are precise, such as a percentage of a number used in the sentencing process to be discounted for pleas of guilty in varying circumstances. There is no lack of precision in the arithmetic. But still, the concluding number, arrived at after applying all of the mandatory criteria, is still no more scientifically determined than the number the judge first decided on. It follows that even after all of the taking into account of specified factors, aggravating and mitigating, and applying any of the prescribed arithmetic, the end of the process is still as unscientific as its beginning.

So why perpetuate what is objectively speaking a farce? Why not concede that it is not possible to devise a scientifically precise sentencing process? Should the courts not now look for a different one – one that is admittedly not scientific but which is most likely to produce a fair result and that will reinstate the sentencing judges to their proper status. Sentencing judges should apply their common sense and experience in the light of all relevant matters that impinge on them, including the impressions made by the offender in the sentencing hearing and by witnesses who may testify and by the numerous other factors that may operate on the judge to create an impression on his or her mind in an almost inexpressible way.

Why not concede that it is not possible to devise a scientifically precise sentencing process?

On a related issue, the CCA frequently fails to recognise that judges while summing up to a jury can, from experience, detect and understand the body language and expressions on the jurors' faces and are able to see whether a point made in the summing up is fully understood. This is something that an appeal judge does not detect having only the written transcript of the judge's address to the jury.

But heads of jurisdiction should understand that, if sentencing judges are restored to their proper status, they will have to appoint men and women with experience of criminal law and practice, and whose opinions in matters of sentence would command respect. There were once many such and I am sure that there are still a considerable number. The chairmen of Quarter Sessions and later the chief judge of the District Court understood well what I am saying. The criminal courts should not continue to be a jurisdiction where any judge at all is regarded as good enough to preside. Judges can be educated into the jurisdiction gradually by the careful grading of the difficulty of cases allocated to them. A chief judge should take an active role in this. A wise judge is much more valuable than a clever one.

This also applies to the judges rostered to sit on the CCA. It is not helpful to the matters raised here to appoint a person who from admission to practice has been almost exclusively in jurisdictions quite unrelated to the criminal jurisdiction and then to be called upon to pass judgment on the sentencing opinions of an experienced sentencing judge. That is true no matter how brilliant the appeal judge may be.

What I have so far said leads to my ultimate proposition: namely, that judges should be relied upon to pass sentences on the basis of the impression of a case on them, and their knowledge of what is sometimes called 'the tariff, for a class of offence, without being required to analyse with particularity how they reached

their conclusion. If they cannot be relied on to reach a reasonable conclusion in that way they ought not to be sitting in the criminal jurisdiction.

For an experienced sentencing judge, it should be enough to make general comments explaining why he or she reached certain conclusions determinative of the sentence passed. Such comments should not be subjected to critical textual analysis by the CCA. Prison sentences should be appealed only if they are so grossly out of kilter with the generality of sentences for similar matters as to bespeak error; or if the magnitude (or lack thereof) of the sentence would shock an ordinary member of the public; or perhaps if the judge's reasons are manifestly inconsistent with the sentence passed.

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Judges may, but should never be compelled to quantify how much of a prison sentence is due to any particular factor taken into account. It should be assumed that an experienced judge will have taken into account all relevant matters such, for example, as a plea of guilty in all of its circumstances or the amount of pre-meditaion leading to the crime. Not mentioning any significant and relevant matter in remarks on sentence should not, as it can now, lead to a finding by the CCA that the judge failed to take the matter into account. A judge may not quantify even in his or her own mind precisely what quantum (added to or subtracted from a sentence) was attributable to a particular factor.

I suggest that the CCA should rely upon criminal judges (who should generally have considerable experience as criminal law practitioners) to use their wisdom and instinct to reach their conclusions Some may remember that in the 1960s, 1970s and 1980s, there were a number of judges who had been police officers and who became barristers and then judges. In general they were highly respected as outstanding judges in the criminal courts. Notwithstanding that their careers started as policemen, they showed as much appropriate compassion in their work as any judges did. I repeat in this context that experience and wisdom are of greater value in that kind of work than intellectual achievement of a more abstract kind.

I suggest reading Shimon Shetreet's *Judges on Trial* (1976). It was said of this book in a biographical note:

> Prof. Shetreet's book *Judges on Trial: A Study of the Appointment and the Accountability of the English Judiciary* (1976) was relied upon by the House of Lords in the Pinochet Case in January 1999 and this and other works have also been relied upon as well in numerous highest court cases in other Countries Canada, Australia, New Zealand and India.

I think that we should remember that the sentencing of offenders is an art rather than a science. If this seems to be a radical proposition, I remind you, that it was in fact the very process that had continued for many years at least until the mid 1970s when the present appeal practices had their origin with the appointment of a new solicitor general and a chief justice who, understandably, relied on him for guidance.

Finally, I suggest that the very large number of Crown appeals should itself send a warning that all is not well. Crown appeals should be exceptional and few.