The Future Of Guideline Judgments

Practitioners of criminal law will be aware of guideline judgments that are being promulgated by the NSW Court of Criminal Appeal (CCA) with respect to offences both State and Federal. These constitute offences of dangerous driving causing death (*Jurisic*), armed robbery (*Henry & Ors*), break enter and steal (*Ponfield & Ors*) in the State sphere, and the importation of heroin (*Wong & Leung*) in the Federal sphere. To these judgments has been added one for discount for early pleas of guilt (*Thomson*).

The Hon Justice Brian Sully remarked that 'guideline judgments ... have not appeared by the curial equivalent of spontaneous combustion'(Sully 2001:250). Undoubtedly their initiation is contingent on a number of factors, not least being to alleviate community concerns as to the leniency shown in dealing with certain offences. Additionally these concerns stem from legal and political exigencies bound up with the consequent increase in Crown appeals. Other factors include the need to assuage insistent demands from pressure groups who request mandatory minimum terms or a grid system of sentencing with prescriptive penalties for specified offences. The intention of the courts has been to attenuate the discrepancy often manifest between public perception and the reality of sentencing practice.

The emergence of guideline judgments viewed by Justice Sully as 'a natural application of the traditional technique of the common law'(Sully 2001:250) was a pragmatic median to achieve consistency in sentencing without obliterating the essential anchor of discretion. The aim has been to entrench the exercise of judgment and to strive for both consistency and individualised justice, rather than have recourse to arithmetical precision. The necessity for the adoption of this course by judicial officers at first instance was reinforced by the very different principles contingent on 'double jeopardy,' which constitute the standard for sentences subject of appeal. Unless there is manifest inadequacy, an appeal court will not interfere with a determination made by a judge at first instance unless that determination is vitiated by error.

If the objective is to achieve consistency in 'outcome', the starting point has to be a consistency in 'approach'. However, the guidelines emanate from different standpoints. The *Jurisic* judgment is premised on penalties that are 'not less than' those determinative for dangerous driving with a starting point of 3 years imprisonment for causing death, and 2 years for grievous bodily harm. The elements of the offence under *Crimes Act* 1900 (NSW) s52A encompass variants of dangerous driving, excessive speed, and driving under the influence of drugs or alcohol.

The *Henry* judgment is postulated only for a variant of the one offence pursuant to *Crimes Act* 1900 (NSW) s97(1), namely armed robbery, without encapsulating within its ambit the alternate charge of robbery in company. As distinct from postulating a minimum starting point like *Jurisic*, the *Henry* judgment affords a range of penalty that in totality is 4–5 years imprisonment. This range is founded on the basis of a particular profile pertinent to the offender. The guidelines enunciate indicia both in aggravation and mitigation that would justify a sentence above or below the range. These indicia are not exhaustive of the many factors to be taken into account on sentencing. *Jurisic* is also premised on indicia that focus on the occurrence, as well as the conduct, of the offender with additional aggravating factors once the threshold of 'abandonment of responsibility' is reached. Both judgments

stipulate a non-custodial sentence being an exceptional option conditional on a guilty plea. A discount is afforded by *Thomson's* case of 10–25% depending on the utilitarian effect of the plea.

In the judgment pertaining to break enter and steal (*Ponfield & Ors*), the premise was not that of a starting point or a range of penalty, but rather the formulation of features of the offence instrumental in guiding the imposition of penalty. Owing to the diversity of circumstances in which the offence can be committed, expressing the guideline in quantitative terms was thought inappropriate. Here a generic category of offence is manifest with the court unable to isolate a typical case or standard of general applicability, particularly given that a majority of such offences under *Crimes Act* 1900 (NSW) s112 are heard in the Local Court, with a maximum penalty of 2 years imprisonment available.

The approach was otherwise in the Commonwealth judgment of *Wong & Leung*, where the intent of the CCA was to promulgate a quantitative judgment, the intent being to clearly enunciate likely actual sentences that would be instrumental in achieving general deterrence. As such, the quantum of the drug and the role and position of the offender in the hierarchic chain structures the penalty.

In considering the decision in *Wong & Leung* on appeal, the High Court has put under the microscope the concept of whether numerical guidelines are contrary to established sentencing principles, and incompatible with their role under the Constitution of the Commonwealth. How is such a notion to be weighed against Justice Sully's pronouncement that the guideline judgments emanate as a corollary of the Common Law tradition? To accommodate both does not constitute a contradiction. In fact guideline judgments cannot be premised on anything other than sentencing principles, albeit that these are attenuated by a framework that stipulates a minimum threshold or range of penalty. There is every distinction to be made between a guideline judgment like *Wong & Leung*, which focuses on proposed results based on the quantum of the drug imported, and those like *Jurisic & Henry*, which afford 'a sounding board' or 'check' against the exercise of a sentencing discretion, which brings greater consistency to that exercise. In *Whyte* (at paras 139–140), the CCA differentiated the case of *Kable* and upheld the NSW practice of promulgating numerical guideline judgments for State offences. The CCA thereby reformulated the *Jurisic* guideline and stated that there was no incompatibility between the court issuing guideline judgments and maintaining its role as a repository of Commonwealth judicial power, as long as any such guideline is not unduly prescriptive.

Guideline judgments can be perceived as communicating the collective experience of the judiciary 'in a manner which enables idiosyncratic views of individual judges ... to be corrected and even at times to correct a sentence ... so disproportionate to the seriousness of the crime as to shock the public conscience' (*Osenkowski*). The intent is to provide a transparency in the judicial process of reasoning. This has to be balanced against the approach by way of 'instinctive synthesis' endorsed by the High Court joint judgment in *Wong & Leung,* which though manifesting an impression of the application of the total circumstances of the offence and the offender, might appear intuitive and afford little accountability. The CCA has shelved this critical impasse by providing a broad range of factors to be taken into account on sentence and that is appropriate to all the circumstances of the case (*Crimes (Sentencing Procedure) Act* 1999 NSW s21A). This is to ensure that the inclusion of such factors similar to that in *Crimes Act* 1914 (Cth) s16A does not give rise to the objections raised in the High Court judgment in *Wong & Leung* of incompatibility between such a provision and guideline judgments (NSW Hansard 23/10/2002 Attorney General's Second Reading Speech p 5, 817). The existing s21A is replaced by a new s21A,

which is principally a restatement of the common law. The section contains a list of clearly identifiable aggravating features (s21A(2)) and mitigating factors (s21A(3)) that the Court must take into account, being particular matters 'relevant and known to the Court'.

A quantitative measure is not always appropriate if wide variations have to be accommodated in the circumstances of an offence, an example being manslaughter. This is particularly so where, as in the guideline judgment of *Wong & Leung*, the process of reasoning was directed more towards the articulation of proposed results than the principles that should inform the adjudicator's thinking when sentencing an offender. It is ironic that the Court of Criminal Appeal embarked on a guideline judgment in *Wong & Leung* when the enunciation of the guideline was contingent on the weight of the drug carried by drug couriers lower in the hierarchic chain than the appellants. The Court of Criminal Appeal would have been better advised, as Simpson J suggested, to await a more apposite case instead of undergoing such lengths to formulate guidelines that in these cases did not call for their application. Yet as Justice Kirby stated in the High Court judgment:

> since the guidelines were included in the reasons of the Court of Criminal Appeal they could not be totally irrelevant ... and that to read the reasons of the Court of Criminal Appeal without the guidelines is like reading Hamlet without the Prince (at para 108).

It is not that the Judiciary is called upon, as the Chief Justice states, to 'devise a simple table in which indicative penalties are linked to a quantitative measure of the offence' (*Jurisic*:35–36). The guidelines so far enunciated are diffuse in their application. There are generic guidelines, relative to a category of offence with multiple permutations (break enter steal); to a specific offence but with divisible elements to constitute the charge (dangerous driving causing death — *Crimes Act* 1900 (NSW) s52A); to an elective component of a singular offence (as in armed robbery — *Crimes Act* 1900 (NSW) s97(1) — this being contiguous with a charge under the same section of robbery in company); and as a vehicle for validating a quantitative guideline, which reinforces what is manifest in existing sentencing practice (*Customs Act* 1901 (Cth) s233 B(1) — importation of heroin). How then can a particular kind or level of sentence be ascertained with any degree of consistency, when the parameters of an offence encompass a wide range of conduct, and the standpoints adopted by the guideline judgments are so different?

To attenuate any purported hiatus between Federal and State jurisdictions, the NSW Government and the CCA have endeavoured to consolidate their position through recourse to the statutory enunciation of common law principles. This has taken the following forms:

a. **The modification of existing legislation**. The NSW Government has accomplished this by force of ss21A, 37A & 42A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW). S37A was added so as to provide the court with a statutory power to give a guideline judgement on its own motion and thereby reformulate the *Jurisic* guideline, which previously had been only at the behest of the Attorney General. S37A was clearly directed to give efficacy to the promulgation of guideline judgements, and s42A was designed to deal with any professed incompatibility with dicta enunciated in the High Court judgement of *Wong & Leung,* requiring courts to take into account a statutory list of factors. The new s21A(1), for more abundant caution, provides that factors to be taken into account under the section are in addition to any other matter required or permitted to be taken under the Act or any other law.

b. **The formulation of a new Act to appease public concerns about leniency of penalty.** In response to a preponderance of publicity about gang rapes in Sydney, the *Crimes Amendment (Aggravated Sexual Assault in Company) Act* (NSW) came into force on 1/10/2001. This created a new offence of aggravated sexual assault in company with a penalty of life imprisonment. This category of offence was elevated to a more serious level than the offences of sexual intercourse without consent and aggravated sexual assault, which attract penalties of 14 and 20 years, respectively. The legislation was a reaction to the leniency accorded to the principals in the cases of *AEM, KEM & MM.* The requirement for a guideline judgement for gang rape was shelved as a procedural issue arose as to whether adequate notice had been given in line with the requirement to notify the Attorneys-General of the Commonwealth and States of a case involving a constitutional matter.

c. **The promulgation of even more comprehensive statutory enactments to include minimum standards for prescribed offences, and for a Sentencing Council to advise the Attorney General as to sentence matters.** *The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW) was assented to on 22 November 2002 to establish minimum benchmarks for a series of serious offences to be inserted by a new Division 1A (ss54A–54D) into Part 4 of the Principal Act. The objective was to stipulate standard non-parole periods for such offences. A record is to be made of reasons for increasing or decreasing the non-parole period (s54B(4)), and again, the discretionary element is expressly preserved (s54B(2)). The Act has been operative since 1 February 2003.

The CCA has in turn sought to bridge anomalies by not only invoking statutory authority, but by differentiating cases by endeavouring to resolve perceived incompatibilities in the nature of the discounts afforded for guilty pleas (*Sharma* 142 cf *Cameron* 382 at para 14 & *Hayes* at 358). The prescriptions are attendant on numerical ratios with the requirements of individualised justice (*Wong & Leung* HCA 64 cf *Whyte* 343 & *Cook* 140), the amelioration of the 'instinctive synthesis', and 'two stage approach' to sentencing (*Cameron* at para 41 cf *Wong & Leung* HCA at para 102 & *Cameron* at para 71).

With guideline judgments, it is significant to differentiate those factors surrounding an offence that are said to aggravate the offence and those that cannot take account of circumstances of aggravation, dictating a conviction for a more serious offence (*De Simoni*). The NSW *Crimes Act* is replete with generic offences like robbery, dangerous driving, and break enter and steal, with prescriptions of penalties for the offences simpliciter as well as for 'aggravated offences' with higher penalty. The decision by the Crown in electing to proceed on the lesser or more serious charge is determinative of the benchmark, whether that be a minimum starting point, a range, or an upward calibration with respect to penalty. In the case of armed robbery (*NSW Crimes Act* 1900 (NSW) s97(1)), at times the Crown is open to charge the corresponding offence within the same section of a robbery in company, the penalty in each case being the same, namely 20 years imprisonment. The new s21A (4) provides that a sentencing court does not have regard to any aggravating or mitigating factor stated in the section if this is contrary to any Act or rule of law. This is an explicit endorsement that the rule in *De Simoni* is not affected. However, can there be a transmutation of the indicia characteristic of the profile for armed robbery to a charge of robbery in company? The Court of Criminal Appeal was silent on this issue. This can lead to an anomaly as to whether the rule in *De Simoni* is breached or whether the matters of aggravation are merely variations of the same offence. The latter is more readily subscribed to with regard to the offence of dangerous driving causing death, where the variations extend not only to the manner of such driving but also to speed and the influence of

intoxicating liquor or drugs, with separate provision made for the more aggravated form of the offence constituting a different section of the *Crimes Act* with higher penalty (*Crimes Act* 1900 (NSW) s52A(1) and s52A(2)).

This in turn leads to further problems as to appropriate sentences and the calibration of penalty when an offender commits not one but a series of offences not necessarily confined to a continuous course of conduct; or where other unrelated offences also need to be accounted for with the offences subject of a particular guideline judgment. In these instances, to aggregate the individual sentences to produce a very high head sentence is a mechanistic approach disproportionately reflecting the criminality (*Wheeler*). Instead, recourse should be to the principle of totality as enunciated in *Pearce*, the aim being to deliver an effective sentence reflecting the criminality while simultaneously not affording a community perception that there is little to choose between an offender who commits one or a number of offences. In like manner, those offences that are taken into account by way of a Form 1 Schedule (*Crimes Sentencing Procedure Act* (NSW) s33) should be reflective of the criminality by way of addition to the penalty imposed.

In the Attorney General's application for a guideline judgment with respect to Form 1 offences, the CCA gave qualified support in that it was a matter for the Crown to strike an appropriate balance between overloading an indictment and determining whether other charges could be 'taken into account' on a Form 1. The words 'taken into account' are salient in that the sentencing Judge does not impose sentences for Form 1 offences. The CCA was aware that to circumscribe the Crown and the utilitarian efficacy in the resolution of matters made it impracticable to prescribe a procedure or formula for determination. A qualification was that the Crown not take account on a Form 1 matters of an entirely different kind or those disproportionate to the primary offence, as this would make the sentencing exercise rather artificial. As Justice Spigelman states:

> the ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice — do not generally point in the same direction. Specifically, the requirements of justice, in the sense of just desserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy (1999).

Will guideline judgments survive an appeal to the High Court? It is apparent that in *Wong & Leung*, the CCA was exercising federal jurisdiction. The decision would appear not to impact substantively for state guideline judgments. The New South Wales Parliament has endeavoured to make impregnable not only the promulgation of future guideline judgments, but to retrospectively validate the guideline judgments already in existence (*Crimes [Sentencing Procedure] Act* 1999 (NSW) Pt3 Div3). This has been reinforced by their separate operation being confirmed by the Attorney General in his Second Reading Speech on the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW) for those offences that do not fall within the scheme of Division 1A.

In applying the guideline judgment, the objective is not to achieve uniformity by a mechanistic calibration between the available maximum penalty for what might be termed the basic offence and the aggravated form of that offence (*Bicheno*). Whilst acknowledging that there will always be exceptional cases (*Blackman & Walters*), what is necessary is that the Judiciary provide a proper structure for the exercise of discretion. The exercise of that discretion requires a consistency in approach to properly reflect consistent outcomes. If guideline judgments initiate from different standpoints, their underlying purpose may be

deflected so that a proper foundation for the application of principles is confounded, and there is imprecise knowledge transmitted to potential offenders and the community about actual sentencing practice.

What is the future of guideline judgments? Will the practice of promulgating guideline judgments encompass broader categories of offence than the cases referred to above? What has transpired is that the grafting of a statutory framework onto what previously constituted common law precedent has taken on hybrid proportions. There is now an amalgam of sentencing structures including guideline judgments. The promulgation of the *(Standard Minimum Sentencing) Amendment Act* 2002 (NSW) and the modification of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) by virtue of ss21A, 37A & 42A now operative, has enabled the NSW State Government to adapt pragmatically by sealing the fissures manifest in the High Court judgment of *Wong & Leung* thereby consolidating the authoritative standing of its Courts.

The CCA has recently given only qualified support to the need for further guideline judgments in view of affording the statutory enactments a necessary time period to assess the efficacy of adherence to the benchmark of penalty. It was on this basis that the application for a guideline in respect to assault of police was dismissed. The sentencing process has been made even more complex in that the new s54A provides standard non-parole periods for certain offences in the new Division 1A that include inter alia, offences of assault involving injury to police, robbery with arms and wounding, certain offences of break and enter, and drug offences involving commercial quantities.

A scrutiny of the cases of *Whyte, Sharma* and *Cook* has reinforced the CCA's disposition not to deflect from the course of endeavouring to attain consistency and transparency in the sentencing process without impacting on judicial discretion by the stipulation that judges are obliged to 'take into account' a guideline judgment given by the Court, and that such judgments are meant to be indicative and not prescriptive. In his Second Reading Speech on the *(Standard Minimum Sentencing) Amendment Act* 2002 (NSW), the Attorney General stated that 'the scheme being introduced by the Government ... provides further guidance and structure to judicial discretion' (Legislative Assembly 23/10/02 Hansard). Despite the Bar Association and Law Society's objections to the draft Bill and the Opposition's even more draconian proposals, it is highly probable that the provisions in the new Division 1A 'will be interpreted as a statutory presumption which significantly fetters the sentencing court's discretion' (Loukas 2002/2003:53).

As the renowned Justice Oliver Wendell Holmes stated 'the life of the law has not been logic, it has been experience' (*The Common Law* 1887). Whether such an amalgam of sentencing structures will achieve a synthesis or be dismissed as a miscellany of variegated enactments perpetrated by political opportunism is a live issue for deliberation, and will impact on the adjudication of future cases.

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