

## SENTENCING LAW

### EXAMINATION AIDE MEMOIRE

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1. *Which court? Magistrates, County?* Important because jurisdictional limits.
2. *What is the actual offence?* Look at the maximum – Statutory maximum is important for proportionality
3. *Order of the offending?* Risk of priors and subsequent offences
4. *Pleaded guilty or not guilty?*
5. *Objective gravity of the offending/seriousness of the offending?* General deterrence, specific deterrence
6. *Who is the offender?* How old are they? How bad is the offence?

**- As a judge, do not:**

- o impermissibly rely on matters external to the charged conduct;
- o inappropriately reject psychological evidence;
- o make remarks that stray beyond the permissible parameters discussed in sentencing the appellant;
- o treat matters extraneous to the offending conduct as aggravating circumstances – where a judge conducts undue focus on matters extraneous to the proper exercise of a sentencing discretion it will result in that discretion miscarrying; or
- o where there is no more than a ‘relatively low’ risk of the appellant reoffending against the complainant, there should not be too much weight given to specific deterrence.

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**[1] Understand the facts of the offence and identify the relevant facts for sentencing purposes;**

“Your counsel says...  
Mr x you pleaded guilty to....  
Circumstances of your offence are as follows..  
Your counsel says..  
The prosecution says...”

**Appeal case of sentence:**

Section 276(1)(a) of the *Criminal Procedure Act 2009* requires this Court to allow an appeal against conviction if the appellant satisfies the Court that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence. The principles governing an appeal on this basis were recently addressed by the High Court in *R v Baden-Clay*: “Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury’s verdict on the ground that it is ‘unreasonable’ ... is a serious step...”

**[2] Identify the objective seriousness of the offence;**

- “We do not accept that the absence of a finding that the applicant was a principal required the imposition of a less severe sentence. The sentence imposed properly reflects the objective gravity of his ‘significant’, ‘critical’ and ‘ongoing’ role in the criminal enterprise.” *Nguyen v The Queen*

**COURT IS DIRECTED TO SPECIFICALLY CONSIDER THE PRESENCE OF ANY AGG OR MITIGATING FACTORS CONCERNING THE OFFENDER: S 5(2)(g)**

**[3] Identify aggravating factors;**

"I have taken into account the following facts \_\_\_, I am satisfied or not satisfied beyond reasonable doubt about these aggravating factors"

**Note:** Statute does not contain an exhaustive list of aggravating factors: Common law is still relevant in this area.

The Act specifies:

- nature and circumstances of the offence;
- personal circumstances of any victim; and
- any injury, loss or damage resulting from the offence and other offences.

Exception: provisions for offenders who commit the offence of escape, or commit offences while on bail/parole = presumption of an accumulation of any sentence of imprisonment in respect of new offences.

Common law: [Not closed]

- Range of factors that point to a greater sanction of severity
  - o Circumstances of the offence;
  - o Offender has particular facts and circumstances that place it beyond the ordinary kind of criminal behaviour for the offence; and
  - o Comparison between those factors of the offence vs those which attach to the offender.

**Aggravating factors, which might be relevant to sentencing, include, amongst others, the following:**

Beyond reasonable doubt.

- Level of **planning** and premeditation by an offender: **R v Yildiz**
  - o **DPP v Bulfin:** eg. drug trafficking, white collar offences, insurance fraud, revenue offences and social security fraud.
- **Interference with the body** of a victim after the commission of an offence
- **Breach of trust**
  - o **De Rosa v WA** – pre existing relationship with the victim then breaching their trust = aggravating. (Basic societal values harmed).
  - o **DPP v Truong:** Misappropriating money from their employer
- **Motive – moral culpability**
  - o Must reach a level that goes beyond the mere decision to be involved in criminal behavior
  - o Revenge: **R v Harkin**
  - o Racial motive: **Aslett v The Queen**
- **Prevalence of the offence**
  - o General deterrence assumes greater weight – **Braslin v Tasmania**
- Particular **vulnerability** of the victim
- Infliction of **permanent injury** upon the victim
- Use of **weapons** by an offender
- Offence committed in **company**
- Offence committed with **others/gangs**
  - o **R v Quinn:** Gang violence aggravates
- Offence committed by an offender whilst on **parole** release order
  - o **R v AD** – can aggravate heavily
  - o **R v Moffitt:** *should suffer a significant punishment to mark the gravity of their conduct in abusing their parole*
- Offence committed while on **bail**
  - o **R v Gray** and s 16(3C) – offender has breached a promise to the court
- Offence committed by an offender whilst subject to a **court order – Specific deterrence**
  - o **Aitkin v The Queen:** "It is also of significance that prior to the offending the appellant had breached an earlier Personal Safety Intervention Order and had served