

LAW315 CRIMINAL SENTENCING NOTES

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WK 2 – PROCEDURAL AND EVIDENTIAL MATTERS _____ ERROR! BOOKMARK NOT DEFINED.

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WK 9 – THE VICTIM AND RESTORATIVE JUSTICE _____ ERROR! BOOKMARK NOT DEFINED.

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KEY CASES _____ ERROR! BOOKMARK NOT DEFINED.

MARKARIAN V THE QUEEN (2005) _____ ERROR! BOOKMARK NOT DEFINED.

R V ENGERT (1995) _____ ERROR! BOOKMARK NOT DEFINED.

VEEN V THE QUEEN (NO2) (1998) _____ ERROR! BOOKMARK NOT DEFINED.

BUGMY V THE QUEEN (2013) _____ ERROR! BOOKMARK NOT DEFINED.

R V WHYTE (2002) _____ ERROR! BOOKMARK NOT DEFINED.

R V PREVITERA (1997) _____ ERROR! BOOKMARK NOT DEFINED.

R V BERG (2004) _____ ERROR! BOOKMARK NOT DEFINED.

THE QUEEN V DE SIMONI (1981) _____ ERROR! BOOKMARK NOT DEFINED.

WK 1 - Theories of Punishment

- Lex Talionis – The law of retaliation
 - Eye for an eye, a tooth for a tooth type concept.
 - Ancient way of punishment.
- Retributive Justice
 - Takes a view that offenders deserve to suffer and that punishing wrongdoers is just in itself.
 - Theories are that criminals deserve to suffer and legal punishment should inflict the suffering.
- Utilitarianism
 - Seeks to achieve something further with punishment such as
 - Incapacitation
 - Deterrence
 - Rehabilitation
 - Punishment should be limited to what it is designed to achieve - proportionate to the offence committed.
- Restorative Justice
 - Kind of utilitarian but more concerned about the process of punishment than punishment itself.
 - Outcome aims towards compensation, reconciliation and integration.

Hybrid theory

- Our system is between Retribution and Utilitarianism.
- Refer to s3A of the Crimes (Sentencing Procedure) Act 1999
 - To ensure the offender is adequately punished (R)
 - To prevent crime by deterring the offender (U)
 - To protect the community (U)
 - To promote rehabilitation (U)
 - To make the offender accountable for their actions (R)
 - To denounce the conduct of the offender (R)
 - To recognise harm done to the community and victim (R/R)

Recap

Retribution	Utilitarianism
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Deontological	Teleological
Backward- looking toward the offence	Forward- looking towards the effects of punishment
A punishment's action is justified solely by the crime. The crime deserves punishment.	A punishment's action is justified based on the outcome of the punishment. The punishment has a purpose.
Limitations on the quanta of punishment based on the crime committed (lex talionis/ just deserts)	Limitations on the quanta of punishment is based on the effects of the system of punishment thus created.
Punishment is virtuous when it is committed in response to a criminal act.	Punishment is an evil inflicted to prevent some greater evil.
Fire and brimstone	More in sorrow than anger.

WK 1 – Judicial Reasoning

Sentencing Principles

Crimes (Sentencing Procedure) Act 1999

3A Purpose of sentencing

- The purposes for which a court may impose a sentence on an offender are as follows –
 - (a) to ensure that the offender is adequately punished for the offence
 - (b) to prevent crime by deterring the offender and other persons from committing similar offences,
 - (c) to protect the community for the offender,
 - (d) to promote the rehabilitation of the offender,
 - (e) to make the offender accountable for his or her actions,
 - (f) to denounce the conduct of the offender,
 - (g) to recognise the harm done to the victim of the crime and the community.

Maximum Penalty

- Now legislatively bound - Murder is life for example.
- Most offences carry a maximum penalty which limits jurisdictions of the court.
- Subjective and objective factors involved.
 - Subjective is relevant to the offender,
 - Objective is relevant to the offence.
- Sentencing range – min to max comparison.
 - Worst case of sexual assault should get 14 years,
 - Least serious case of sexual assault would get less.
 - Serves as a “yardstick”.

Proportionality

- The sentence imposed must reflect the objective seriousness of the offence committed and there must be reasonable proportionality between the sentence passed and the circumstances of the crime committed.

Factors Considered by the Court

- **Objective factors** – factors relevant to the offence,
- **Subjective factors** – factors relevant to the offender,
- **Aggravating factors** – factors that make the offence seem worse,
- **Mitigating factors** – factors that make an offence seem less bad.

Judicial Decision Making

- Two- tier sentencing v Instinctive Synthesis

Two Tier Sentencing	Instinctive Synthesis
A mathematical approach. Consider objective and subjective circumstances one by one and moderate the appropriate sentence with consideration of each until the ultimate sentence is discovered.	A discretionary approach. Consider the whole of the relevant offending together and synthesis the factors together into the ultimate sentence.
Is very transparent. Shows the judge's reasoning clearly, leaves a sentence more open to appeal as it reveals the judges stepwise reasoning any one of which may reveal an error.	Is very discretionary. Occludes the actual weight the judges pay to the relevant factors, sentence less go to appeal.