CASE NOTES

R. v. SHANNON:[1] WHAT EVERY DEFENDANT SHOULD KNOW[2]

Very few lawyers are unaware that defendants who plead guilty are often treated more leniently. In *Shannon* the Full Supreme Court of South Australia considered why this is so. The decision is of considerable significance given that most defendants plead guilty, especially on the advice of their lawyers, and may be rewarded with "discounts" of as much as 25 to 30 per cent from the notional appropriate sentence.[3] The Full Court (King C.J., Zelling, Wells and Mohr JJ.; Cox J. dissenting) held that a guilty plea may (in the discretion of the judge) be a mitigating factor in sentencing if it results from genuine remorse, repentance or contrition, or from some other consideration which is in the public interest; that a self-interested motive of the defendant does not prevent mitigation; and that all the other circumstances of the case should be weighed up by the judge in calculating the sentence.

Background

Shannon was convicted on two counts: armed robbery and pharmacy breaking with intent to steal. He appealed against his sentence on the basis that his plea of guilty was not considered as a possible mitigating factor. Faced with apparently conflicting authority on this issue, the Full Court hearing the appeal (King C.J., Zelling and Cox JJ.) referred the question to a Full Court consisting of five judges: King C.J., Zelling, Wells, Cox and Mohr JJ.

Three lines of authority had developed:

1. A plea of guilty could only be a mitigating factor if it proceeded from contrition, repentance or remorse.[4]
2. A plea of guilty should always be considered a mitigating factor.

[1] (1979) 21 S.A.S.R. 442. Noted, F. Rinaldi (1979) 3 *Crim.L.J.* 307.

[2] "It was trite to say that a plea of guilty would generally attract a lighter sentence. Every defendant should know that": *Cain* [1976] *Crim.L.R.* 464, 465.

[3] This is now the situation in England: D. A. Thomas: *Principles of Sentencing* (London, Heinemann, 2nd ed. 1979) 52; *Davis* [1979] *Crim.L.R.* 327; *Tilbrook and Sivalingam* [1978] *Crim.L.R.* 172; *Ng and Dhalai* [1978] *Crim.L.R.* 176; *Cain* [1976] *Crim.L.R.* 464; J. Baldwin and M. McConville, "The Influence of the Sentencing Discount in Inducing Guilty Pleas" in J. Baldwin and A. K. Bottomley, *Criminal Justice: Selected Readings* (London, Martin Robertson, 1978); A. K. Bottomley, *Decisions in the Penal Process* (London, Martin Robertson, 1973), 103-25; A. E. Bottoms and J. D. McClean, *Defendants in the Criminal Process* (London, Routledge and Kegan Paul, 1976).

[4] *Harris* [1967] S.A.S.R. 316, 328; *Tiddy* [1969] S.A.S.R. 575, 579; *Rowland* [1971] S.A.S.R. 392; *Perry* [1969] Q.W.N. 17; *Cox* [1972] Q.W.N. 54; *Webb* [1971] V.R. 147, 150; *Page* (unreported, Vic. C.C.A., 1/6/77); *Rosieur* (unreported, Vic. C.C.A., 1/3/78); *Nolan* (unreported, Vic. C.C.A., 4/10/78); *McGaw* (1980) 4 *Crim.L.J.* 51.

3. A plea of guilty was only a mitigating factor if it proceeded from either remorse or some other motive which was in the public interest.[5]

The basis of the first line of authority is that a guilty plea may reinforce other indications of remorse, repentance or contrition; for example a defendant may co-operate with the police or support his assertion of genuine concern for the victim of a sex offence by pleading guilty so as to spare the ordeal of testifying. Remorse has traditionally been regarded as a mitigating factor because it shows that the defendant "has the stuff that portends future improvement"[6] and therefore needs less punishment.[7] A suggested criticism of the first approach is that it is "too restrictive"[8] especially as repentance is rarely a motive for pleading guilty:

> "One may doubt whether many of the defendants who 'cop a plea' on any given day are motivated by this sort of spiritual awakening. In many courts, the guilty-plea process looks more like the purchase of a rug in a Lebanese bazaar than like the confrontation between a man and his soul."[9]

The second line of authority, it is submitted, is suspect in both origin and rationale, although it appears that at least in England[10] a policy of automatic discounting prevails. There are two explanations of automatic discounting:

(a) A guilty plea supplies a presumption of remorse. This is plainly spurious: "the very fact that a defendant realizes a guilty plea may mitigate punishment impairs the value of the plea as a gauge of character."[11] Furthermore, a recidivist offender familiar with the sentence differential is more likely to take advantage of it although he may be a poor prospect for reform.[12]

(b) Guilty pleas are to be encouraged as they are socially expedient in two ways: they spare the resources of the criminal justice system and minimize the ordeal for victims of crime.

It is submitted that the rule of automatic discounting is attributable to misinterpretation of two cases which came before the English Court of Appeal within three days of each other in 1968. In *De Haan*,[13] the Court of Appeal (Edmund Davies L.J., John Stevenson and James JJ.) reduced the defendant's sentence on the basis that he pleaded guilty and showed some hope of reform. Edmund Davies L.J. said:

5 *Gray* [1977] V.R. 225.
6 *Scott* v. *United States* 419 F. 2d 264, 282 (1969) (per Leventhal J.).
7 R. Cross, *The English Sentencing System* (London, Butterworths, 1971) 152.
8 *Gray* [1977] V.R. 225, 232.
9 A. Rosett, "The Negotiated Guilty Plea" (1974) 374 *Annals of the American Academy of Political and Social Science* 75.
10 See the authorities cited in fn. 3. The Australian position is not so clear: P. A. Sallman, "The Guilty Plea as an Element in Sentencing" (1980) 54 *L.I.J.* 105 and 185, 108 ff.
11 Comment, "The Influence of the Defendant's Plea on Judicial Determination of Sentence" (1956) 66 *Yale L.J.* 204, 210.
12 Ibid. 211.
13 [1968] 2 Q.B. 108.

> "A confession of guilt should tell in favour of an accused person for that is clearly in the public interest."[14]

His Lordship did not elaborate on this statement nor make it clear whether it was a general proposition. *Harper*,[15] which was reported with *De Haan*, was a case where the defendant may have been dealt with more severely for pleading not guilty and asserting a vigorous defence. Near the end of his judgment, Lord Parker C.J. observed, obiter dicta:

> "It is, however, of course proper to give a man a lesser sentence if he has shown genuine remorse, amongst other things by pleading guilty."[16]

This comment was reported in the All England Reports (the version relied upon by several later courts) as

> "It is, however, proper to give an accused a lesser sentence if he has shown genuine remorse, amongst other things by pleading guilty."[17]

The authorized passage was itself ambiguous. It could mean either that a guilty plea may only indicate remorse in combination with other circumstances, or that a guilty plea supplies a presumption of remorse (and indeed other things as well). The former interpretation, it is submitted, makes better sense, and is clearer from the authorized version in which Lord Parker C.J. used the words "of course", indicating that he was stating the obvious, that is, the more common sense view. Courts relying on the All England Reports version were more likely to have formed the impression that a new principle was being devised, that a guilty plea supplied a presumption of remorse. This mistaken view seems to have been adopted by the Supreme Court of Queensland in *Perry*[18] which was later explained in *Cox*[19] with reference to the difference between the reports of *Harper*. Ironically, in *Cox* the court in pointing out the difference between the two versions misquoted the Queen's Bench report, but the gist of its decision is clear: "it is the indication of remorse which is the substance of the matter" (per Hanger C.J.). *Cox*, in other words, falls into the first line of authority mentioned above.

The same confusion, it is submitted, also affected later interpretations of Edmund Davies L.J.'s statement in *De Haan*:

> "A confession of guilt should tell in favour of an accused person, for that is clearly in the public interest."[20]

This is not necessarily inconsistent with the better interpretation of *Harper*: although a guilty plea *may* be a mitigating factor, it must be accompanied by other signs of remorse. However, in several cases where the All England Reports were relied upon, a broad view of *De Haan* was adopted. For example, in *Johnson and Tramayne*,[21] the Ontario Court of Appeal

14 Ibid. 111.
15 [1968] 2 Q.B. 108.
16 Ibid. 110.
17 [1967] 3 All E.R. 618, 619 (note).
18 [1969] Q.W.N. 17.
19 [1972] Q.W.N. 54.
20 [1968] 2 Q.B. 108, 111.
21 (1970) 4 C.C.C. 64, 67; followed in *Tanguay-Dupere* (1971) 13 C.L.Q. 436 (Quebec Court of Appeal).

construed *De Haan* as meaning that defendants were entitled to lighter sentences because they "pleaded guilty and thus saved the community a great deal of expense". Similarly in *Taylor*[22] the New Zealand Court of Appeal relied on *De Haan* and held that "it was appropriate to make some reduction in what would otherwise be the correct sentence because a person had pleaded guilty". This broad view of *De Haan* was criticised in *Spiller*,[23] *Gray*[24] and *Shannon*.[25]

The third line of authority was *Gray*, which was adopted in *Shannon*. The reasoning behind *Gray* is discussed below.

The Decision in Shannon

King C.J. (with whom Mohr J. concurred) began by acknowledging that where a guilty plea was in truth evidence of remorse, contrition or repentance it had long been regarded as a matter proper for leniency; as Wells J. (with whom Zelling J. concurred)[26] expressed it:

> "If the prisoner has become—even reluctantly—reconciled to the authority of the criminal law, the reconciliation is likely to have an important bearing on such purposes as reformation and prevention."[27]

However the South Australian Supreme Court had observed in *Harris*,[28] "It may be doubted how many pleas of guilty really proceed from such motives." King C.J. considered that there were strong policy reasons for providing, through sentence leniency, "moderate encouragement" to plead guilty in other circumstances. Guilty pleas were expedient in saving the time and expense involved in trials, and in sparing victims and witnesses the ordeal of testifying; these considerations had gained strength in recent times through growing public and legislative concern for the victims of sexual crimes and through the increasing pressures on the legal aid system. It was not improper for the courts to use sentence discounts for practical ends; for example, leniency had long been extended to defendants who informed on co-defendants, or offered to make restitution, notwithstanding self-interested motives. His Honour therefore concluded:

> "In most cases, if the offender has nothing to gain by admitting his guilt, he will see no reason for doing so. I am impressed by the strong practical reasons for recognising a willingness to co-operate in the administration of justice by pleading guilty as conduct possessing a degree of merit, quite apart from remorse, which can be taken into account in assessing the sentence."[29]

However Cox J. (dissenting) went so far as to say that

[22] [1968] N.Z.L.R. 981, 987.
[23] (1969) 4 C.C.C. 211, 214-5 (British Columbia Court of Appeal).
[24] [1977] V.R. 225, 231-2. However see also *Hill* (unreported, Vic. C.C.A., 15/2/78).
[25] At 447.
[26] Wells J. also agreed with the judgment of King C.J.
[27] At 454.
[28] [1967] S.A.S.R. 316, 328.
[29] At 451. For the authority regarding sentence mitigation to informers, see *James and Sharman* (1913) 9 Cr.App.Rep. 142; *Davies and Gorman* (1978) 68 Cr.App. Rep. 319; *Golding and Golding* (unreported, South Australian Supreme Court, 2/5/80, Wells J.). On mitigation for making restitution, see *Wirth* (1976) 14 S.A.S.R. 291.

> "the considerations relevant to the question of the proper punishment of an offender do not include matters which have nothing to do with the nature or effect of his offence, or the character or antecedents or disposition of the offender, but relate solely to the machinery by which his offence is tried."[30]

It is submitted that this may not explain encouragement long given for example to informers who intend purely to save their own skin. Nevertheless, his Honour argued that discounting for guilty pleas undermined the freedom of defendants to plead not guilty. It was difficult to reconcile the rules that on the one hand discounting was permissible for guilty pleas, while on the other hand accretion was impermissible for not guilty pleas.[31] If two otherwise identical defendants are given different sentences because of different pleas, the defendant who pleaded not guilty

> "will need a very subtle mind, unusually sympathetic to the ways of the law, if he is to understand that he is going to prison for a longer term, not because he pleaded not guilty, but because he failed to plead guilty."[32]

Although King C.J. saw this as a "real distinction",[32a] it was described by the South Australian Supreme Court in *Harris*[33] as "more apparent in logic than in practical application" and by a United States District Court judge as a "startling incongruity".[34]

A second objection to discounting discussed by King C.J. is that innocent defendants may be induced to plead guilty. Obviously this risk is proportionate to the size of the notional reduction; King C.J. stressed that while there was only a "moderate encouragement", the fear was unrealistic. Nevertheless it is submitted that the circumstances surrounding a plea must be borne in mind: first, the outcome of any trial is uncertain; secondly, a defendant's resistance to inducements to plead guilty may have been broken down by anxiety, time in custody, cynicism and alienation from his normal environment; and thirdly, since the question may well resolve itself into a matter of odds, the defendant will lean heavily on his lawyers for advice, and that advice will inevitably be coloured by

30 At 457.

31 As authority for the proposition that a defendant may not be dealt with more severely for pleading not guilty or conducting a vigorous defence, see for example *Richmond* [1920] V.L.R. 9, 12 (per Cussen J.); *Flynn* [1967] *Crim.L.R.* 489; *Harper* [1968] 2 Q.B. 108; *Taylor* [1968] N.Z.L.R. 981, 987; *Hryczszyn* [1976] Tas. S.R. 10 and *Gray* [1977] V.R. 225, 231.

32 At 458-9; cf. Baldwin and McConville, op. cit. fn. 3, 119.

32a At 449.

33 [1967] S.A.S.R. 316, 328.

34 *Scott* v. *U.S.* 419 F. 2d 264, 269 (1969) (per Bazelon C.J.). It has been held in the United States that discounting violates the Fifth Amendment to the Constitution: *U.S.* v. *Laca* 499 F. 2d 922 (1974). For American literature of wider application, see: Comment in the *Yale Law Journal*, op. cit. fn. 11: American Bar Association, *Standards for Criminal Justice Relating to Pleas of Guilty* (New York, A.B.A., 1967); "Pilot Institute on Sentencing" (1959) 26 F.R.D. 231, 285-9; R. O. Dawson, *Sentencing: The Decision as to Type Length and Conditions of Sentence* (Boston, Little Brown, 1969) Ch. 6; James E. Bond, *Plea Bargaining and Guilty Pleas* (New York, Clark Boardman, 1975) 40-4; A. Rosett and D. R. Cressey, *Justice by Consent* (Philadelphia, Lippincott, 1976) 145-59.

knowledge of the sentence differential. English empirical evidence[35] indicates a possibility that at least a few innocent defendants plead guilty; Baldwin and McConville argued that even if the number of such defendants is very small,

> "the fact that it happens at all should cause us to reflect upon the justification for awarding some considerable reduction in sentence to those who plead guilty . . . A system of justice that is crudely based upon rewards and disincentives cannot accurately distinguish between the guilty and the innocent."[36]

It is submitted that King C.J. may well be right that this fear is "unrealistic", but this is an area which cries out for research in Australia before such an assertion can be safely made.

Having decided in principle that encouragement ought to be given to guilty pleas even where no remorse was evident, King C.J. turned to consider the authorities. Two South Australian cases fell into the first stream of authority mentioned above: *Harris*, which concerned a not guilty plea, contained dicta on the effect of a guilty plea; and *Rowland*[37] which followed *Harris*. King C.J.'s explanation of *Rowland* was that the court needed to posit only two situations for the purposes of that case, namely, where there was remorse on the one hand or a mere acceptance of the inevitable on the other; a third possibility was not excluded, and if it was the decision was wrong.[38] The third possibility was that suggested by the Victorian Supreme Court in *Gray*:[39] a self-interested defendant may enter a guilty plea which is "calculated to serve the public interest"; such a defendant could be given a lighter sentence. The trial judge in *Gray* had shown indecision about whether a guilty plea justified leniency; although on the particular facts the Full Court held that no discount was appropriate, the majority (McInerney and Crockett JJ.)[40] envisaged the following situation as mitigatory:

> "There may be cases in which the only sorrow felt by him [the defendant] is in the fact that he has been detected. But, having been detected, he has had to do the best he can for himself. Weighing the strength of a possible defence against the likely penalty upon conviction he may elect deliberately to adopt a course which involves a measure of public utility in the belief that his own ultimate interest is best served by doing so."[41]

On the other hand, no discount would be given to defendants who pleaded guilty predominantly from self-interest, which might be evident from a lack of remorse or from plea bargaining or from some other circumstance.[42]

[35] Bottoms and McClean, op. cit. fn. 3, 120; J. Baldwin and M. McConville, *Negotiated Justice* (London, Martin Robertson, 1977) 62-6.
[36] Baldwin and McConville, op. cit. 122-3.
[37] [1971] S.A.S.R. 392.
[38] At 452.
[39] [1977] V.R. 225. See comments by M. W. Daunton-Fear, "Sentencing in South Australia: Emerging Principles" (1980) 1 *Adel. L.R.* 41, 62-3.
[40] Gillard J. was the third judge. His Honour agreed in the result but for different reasons, which he declined to publish.
[41] [1977] V.R. 225, 232.
[42] E.g. *Spiller* (1969) 4 C.C.C. 211; *Wisniewski* (1975) 29 C.R.N.S. 342, 349.

It is submitted that the *Gray* test adopted in *Shannon* is difficult to apply and that the *Harris/Rowland* test is preferable. All pleas of guilty serve the public interest by saving time and money; in sexual cases they also serve the public interest in protecting the victim. If an intention to further these objectives is to be presumed from the fact of achieving them, then all guilty-plea defendants would be prima facie entitled to sentence reductions. In both *Gray* and *Shannon* this view was rejected. Therefore, as with remorse, the defendant must point to circumstances other than the fact of pleading guilty in order to show his laudable motives. If a court, by the nature of its operation, is unlikely to recognize even genuine remorse,[43] how could a defendant point to circumstances showing his public-spiritedness or altruism when he cannot show that he is repentant or reformed?

Conclusion

In a number of decisions since *Gray* the Victorian Supreme Court has implied dissatisfaction with the decision.[44] For example, in *Page*[45] Young C.J. said:

> "The only real relevance in my view of a plea of guilty is if it is indicative of remorse, although I am aware that the Court has from time to time said that there may also be taken into account that it may save the community substantial time and money by avoiding a lengthy trial. But the Court has also made it clear that a plea of guilty cannot be taken into account by a sentencing court in such a way as to induce persons charged with serious offences to plead guilty in the hope that they will as a result be less severely punished."

Nevertheless, *Shannon* remains the leading authority, at least for South Australia and Victoria, and the principles may therefore be summarized as follows:

1. Assessment of all factors in sentencing lies in the judge's discretion, and he may or may not give weight to the fact that the defendant pleaded guilty.
2. A plea of guilty may be a mitigatory factor if it results from
   (a) genuine remorse repentance or contrition, or
   (b) a "willingness to co-operate in the administration of justice" by doing something which is in the public interest, such as saving the expense and inconvenience of a trial or the necessity of witnesses giving evidence, or
   (c) some other consideration which is in the public interest.
3. It will not be presumed merely from the fact of pleading guilty that the defendant was motivated by concern for the public interest; therefore the defendant must point to some circumstance showing such a motive.

[43] See *Scott* v. *U.S.* 419 F. 2d 264, 270-1 (1969).
[44] *Page* (unreported 1/6/77); *Hill* (unreported 15/2/78); *Rosieur* (unreported 1/3/78); *Nolan* (unreported 4/10/78); *McCaw* (1980) 4 *Crim.L.J.* 51; *Friels* (unreported 30/5/80). See Rinaldi, op. cit. fn. 1, 309; Sallman, op. cit. fn. 10, 111-12.
[45] Quoted in Rinaldi, op. cit. fn. 1, 309.

4. (a) A defendant may be given a sentence concession even if one of his motives is self-interest, but a plea over-tainted with self-interest will gain no special consideration.
   (b) In particular, a guilty plea from mere recognition of the inevitable will not bring a discount.
5. If the defendant pleads guilty as part of a bargain with the prosecution involving the withdrawal of other charges, there will be no mitigation.
6. It remains a paramount principle that there may be no accretion to a defendant's sentence for contesting a charge.

DESMOND LANE*

THE UNIVERSITY VISITOR IN AUSTRALIA: MURDOCH UNIVERSITY v. BLOOM[1]

In the last decade much has been written about legal relationships between universities and students and the role of the courts in reviewing university decisions.[2] But relatively little attention has been given to the office of the university visitor: to the extent of his jurisdiction and to the question of how far the existence of that jurisdiction affects the availability of judicial remedies to members of a university who have grievances in respect of the conduct of university affairs.[3]

The visitorial office is of ancient origin. Its jurisdictional parameters remain entrenched in concepts suitable only to its alma mater: the ancient Oxbridge colleges.[4] In Australia all but six[5] of the University Acts provide for the visitorial office as follows:

> "The Governor shall be the Visitor of the University and shall have authority to do all things which appertain to Visitors as often as to him seems meet."[6]

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1 Unreported, 16 April 1980, No. 2294 of 1979, W.A.S.C. F.C.

2 See especially G. H. L. Fridman, "Judicial Intervention Into University Affairs" (1973) 21 *Chitty's L.J.* 181; A. Samuels, "The Student and the Law" (1972-1973) 12 *J.S.P.T.L.* 252.

3 See generally J. W. Bridge, "Keeping Peace in the Universities: The Role of the Visitor" (1970) 86 *L.Q.R.* 531; W. Ricquier, "The University Visitor" (1977-1978) 4 *Dalh. L.J.* 647; P. Willis, Case Note, (1979) 12 *M.U.L.R.* 291.

4 Visitorial history is discussed by Bridge, ibid.; Ricquier, ibid.; W. H. McConnell, "The Errant Professoriate: An Enquiry into Academic Due Process" (1972) 37 *Sask. L.R.* 250; R. Pound, "Visitatorial Jurisdiction Over Corporations in Equity" (1936) 49 *Harv. L.R.* 369. See also *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200; *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488 (Ch.D.), aff'd [1979] 2 All E.R. 582 (C.A.).

5 I.e. University of Queensland, James Cook University of North Queensland, Griffith University, University of New England, University of New South Wales and the Australian National University. Visitorial jurisdiction in these universities probably remains in the relevant Parliaments to be delegated when occasion arises. For a contrary argument see T. G. Matthews, in an article forthcoming in *U.Qld.L.J.*

6 There are slight variations in the relevant provisions of the various University Acts. See Willis, op. cit. 294 fn. 21.