The changing nature of sentencing in NSW

By Chris O'Donnell

Changing times

In recent years sentence hearings in New South Wales have become increasingly demanding and formal exercises. They impose great burdens on both courts and practitioners.

Sentence hearings were simpler when I first began practising in the criminal jurisdiction over two decades ago. The crown case usually comprised a statement of facts (prepared by police) and a criminal history (if one existed). The prisoner, as offenders were then called, often did not give sworn evidence. Comparative authorities were few. Written submissions for either party were the exception rather than the norm. The crown made fewer, if any, oral submissions. Guideline judgments did not exist. Legislated lists of factors to be taken into account by sentencing judges did not exist. Sentencing judges' remarks were brief and mostly delivered ex cathedra on the day of the sentence hearing.

Much has changed in New South Wales since then. During the last twenty-five years there has been a steady legislative and judicial drive towards accountability and transparency in sentencing. This is not to say that judges or practitioners of a quarter of a century ago were unaccountable. Rather, there has been an increasing recognition of the complexity of sentencing and its vital role in society in underpinning the rule of law. This article considers some of those changes.

Transparency and accountability

Public perceptions of the criminal justice system are largely filtered through what happens in sentencing courts. This was recognised in recent comments about the purpose of remarks on sentence in *R v Lesi*.[1] In that decision the NSW Court of Criminal Appeal (NSWCCA) was critical of a sentencing judge's failure adequately to reveal his reasoning processes in his remarks on sentence.[2] The court stated that the primary purpose of remarks on sentence is to 'provide an oral explanation to the offender, the victim(s) and persons in court at the time when sentence is being passed', and to inform 'the community and an appellate court of the reason for the imposition of the sentence'.

The drive to transparency in sentencing is nowhere more apparent that in the mandated and very detailed lists of factors judges must take into account when sentencing NSW and Commonwealth offenders in s 21A[3] of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) and s 16A[4] of the *Crimes Act 1914* (Cth). Both provisions reflect the pre-existing common law but list in elaborate detail – particularly the NSW provision – the aggravating, mitigating and other objective and subjective factors courts must take into account, where relevant, when sentencing offenders. Neither provision excludes common law principles, adding to the challenge of the task. So, well-established features of sentencing such as the importance of general deterrence must also be taken into account by judges.[5]

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Anyone unfamiliar with the complexity of modern sentencing need only read s 21A of the CSPA to see that complexity. Factors as disparate as the victim being a parking officer, inhalation of a narcotic drug, hatred of a particular disability, a breach of trust, the presence of a child, the victim being a bus driver, financial gain, emotional harm, duress, provocation, prospects of rehabilitation, a guilty plea and prior convictions must, if relevant to the offence in question, be taken into account.

More recently there have been moves by the NSW and Commonwealth legislatures to rein in sentencing judges and limit their discretion through mandatory minimum sentencing provisions and restrictions on the ability of courts to impose non-parole periods below a certain ratio of the head sentence. These moves are at odds with the legislative commands to judges in s 21A of the CSPA and s 16A of the *Crimes Act 1914* to take a multiplicity of complex and competing factors into account when sentencing offenders in order to arrive at a just result in all the circumstances. Some of the deficiencies of restrictive minimum sentence and non-parole period provisions are highlighted elsewhere in this issue in the contributions of Nicholas Cowdery QC and Dina Yehia SC. By overly limiting judicial discretion in sentencing such provisions, ironically, tend to undermine what has otherwise been the prevailing legislative and judicial trend towards transparency in sentencing and the recognition of the complexity of sentencing over the past 25 years.

Fact finding

The efficient administration of justice requires considerable scope for informality in the fact-finding task facing sentencing judges given the large number and wide range of relevant factors in each case and the large caseload of the criminal courts. This is recognised in s 16A of the *Crimes Act 1914*, for example, which uses the phrase 'known to the court' rather than 'proved in evidence'. This, it was stated by a majority of the High Court in *Weininger v The Queen*[6],

> suggests strongly that s 16A was not intended to require the formal proof of matters before they could be taken into account in sentencing. Rather, having been enacted against a background of well-known and long-established procedures in sentencing hearings, in which much of the material placed before a sentencing judge is not proved by admissible evidence, the phrase ``known to the court'' should not be construed as imposing a universal requirement that matters urged in sentencing hearings be either formally proved or admitted.

The majority in Weininger recognised the diversity of circumstances to be taken into account when sentencing, many concerning aspects of human behaviour to be judged along a line between two extremes rather than as a choice between polar opposites. Failure to prove one matter does not amount to proof of its opposite. Sentencing is a synthetic rather than a mathematical process which involves:[7]

> a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money.

Applying a purely mathematical approach to sentencing would fail to take into account the many often conflicting and contradictory elements relevant to sentencing an offender.[8] The sentencer's task is to take account of all the relevant factors and arrive at a single result that embraces them all. The result thus achieved is said to be arrived at through an 'instinctive synthesis'.[9]

However, there may still be some need from time to time for the sentencing judge to articulate components of a sentencing calculation such as the discount for a plea of guilty or for assistance to the authorities in an arithmetic way: see the judgment of Kirby J in *Markarian v The Queen*.[10]

The legislatures in the Uniform Evidence Law jurisdictions also presume informality in sentence proceedings in s 4(2) of the UEL, which provides that the rules of evidence only apply to sentencing proceedings if the court makes a direction to that effect.

An increasing shift towards formality of sentencing proceedings is nevertheless evident in other recent High Court and NSWCCA authorities on the nature of the sentencing task and the correct approach to that task such as *The Queen v Olbrich*[11], *GAS v The Queen*[12] and *Alvares & Farache v R*[13]). Practitioners acting for both the Crown and the offender need to weigh the principles in these authorities carefully when determining case presentation at sentence hearings.

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In *Alvares & Farache* the applicants, who were both Commonwealth offenders, submitted that the sentencing judge had erred by giving the evidence of the remorse of the applicants only limited weight. Neither applicant gave sworn evidence at the sentence hearing. Each, however, tendered a psychologist's report which contained some hearsay evidence of expressions of remorse by the applicants without objection from the Crown. Remorse is a factor relevant to sentencing for Commonwealth offenders in s 16A(2)(f) of the *Crimes Act 1914* (Cth), although in that provision it is referred to as 'contrition'. In each case the sentencing judge gave only limited weight to the evidence of remorse because neither applicant gave evidence on sentence. The evidence of remorse could not, therefore, be tested and this meant that the sentencing judge could not make his own assessment of the extent of that remorse.

Buddin J, with whom McClellan CJ at CL and Schmidt J agreed, held that the reasoning of the sentencing judge was:[14]

> unimpeachable for the very reasons which he identified, namely that it was very difficult for him to assess the extent to which the applicants were genuinely remorseful for their conduct when they had not expressed it to him directly and thereby exposed themselves to being tested upon the issue.

It did not matter that the Crown had not objected to the hearsay material about remorse at the sentence hearing. Earlier authorities[15] suggesting that untested statements in psychologists' reports should be treated with circumspection on sentence did not stand for the proposition that in the absence of objection to hearsay material adduced on behalf of an offender evidence of remorse in a psychologist's report must be afforded substantial weight.[16]

Alvares & Farache highlights in a practical way the increasing formality of sentencing proceedings since the High Court's decision in *The Queen v Olbrich*. Olbrich established the following essential propositions:[17]

1. A sentencing judge who is not satisfied of some matter urged in a plea on behalf of an offender is not required to sentence the offender on a basis that accepts the accuracy of that contention even if the prosecution does not prove the contrary beyond reasonable doubt;
2. There is no general joinder of issue between the prosecution and the defence in sentencing proceedings;
3. Nevertheless, if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence it will be for the prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it and prove it beyond reasonable doubt;
4. Furthermore, if the offender seeks to have the sentencing judge take a matter into account in passing sentence it will be for the offender to bring that matter to the attention of the judge and, if necessary, call evidence about it and prove it on the balance of probabilities;

The calling of evidence as referred to in 3 and 4 above would be required only if the asserted fact was controverted or if the judge was not prepared to act on the assertion.

The NSWCCA in its decision in *Alvares & Farache* did not state that an offender cannot get a meaningful benefit for remorse unless he or she gives sworn evidence of that remorse. However, a careful reading of the decision suggests that hearsay evidence of remorse is more likely to be accorded appropriate weight if supported by sworn evidence from the offender. This is so even where there may be a common understanding between counsel for the Crown and counsel for the defence about the weight hearsay evidence about remorse should be given. As the High Court pointed out in *GAS v The Queen*[18] such agreements between counsel do not bind the sentencing judge or circumscribe the judge's responsibility to find and apply the law.

Practitioners will, therefore, need to give careful consideration to whether to call sworn evidence from the offender to establish remorse even where hearsay expressions of remorse are not objected to by the Crown. The same consideration will undoubtedly need to be given to whether to call sworn evidence in relation to other areas of possible contention. An example arose in Olbrich itself, where the High Court held that an offender seeking to be sentenced on the basis of being a person low in the hierarchy of a drug enterprise must establish that fact as a mitigating factor on the balance of probabilities.[19]

Statements of facts

In recent years a number of sentencing and appellate courts have expressed concern over the contents of statements of facts in NSW sentencing matters. As a plea of guilty only amounts to an admission of the essential elements of the offence and does not admit matters of aggravation or deny matters of mitigation, one of the key functions of the sentencing judge is to find the facts upon which the sentence is to be passed. The statement of facts is, therefore, of the first importance. It is essential for the statement of facts to state with certainty what facts are agreed between the parties and the essential factual substratum of the offender's criminal conduct: *R v Della-Vedova*[20]; *R v Golubovic*[21].

The decision of the NSWCCA in *R v Della-Vedova*, in particular, makes it clear that it is the duty of the prosecuting authorities to refine statements of facts so that that they are not merely the product of authorities

involved in investigating crime but become the product of those who are trained, skilled and experienced in presenting evidence in court. In that case the NSWCCA was critical of the statement of facts tendered on sentence because it made extensive reference to assertions of co-offenders without distinguishing between those assertions and facts accepted as true by both the offender and the prosecution. As such, the statement of facts did not identify or make any attempt to identify the facts upon which the applicant Della-Vedova was to be sentenced.

Where there is a statement of facts which is agreed in its entirety the prosecution should not tender and rely upon additional evidence going to the objective features of the offence that could supplement or contradict the agreed facts. The NSWCCA's decision in *R v Palu*[22] is authority for the proposition that if the prosecution does adduce such additional evidence, the sentencing judge is not restricted to the agreed facts. The following description by Howie J of the sentence proceedings in *Palu* highlights the logistic difficulties confronting sentencing judges in the Sydney District Court on a Friday, the busiest sentencing day in that court, and the utility of formality in the sentencing process:

> [19] It should be observed at this point that the proceedings before his Honour were conducted in a manner that was a long way short of satisfactory. I appreciate that a Friday in the District Court can present a judge hearing, what are euphemistically called, 'short matters' with pressures to deal with those cases expeditiously and unnecessary procedural formality can result in an undue waste of valuable court time. But the matter with which the respondent was charged was clearly very serious and even his legal representative acknowledged that some type of custodial sentence had to be imposed. Yet the proceedings were constantly interrupted, the representatives of both parties were often not available when the matter was called on leaving persons with apparently little knowledge of the matter standing in their stead, and ultimately the sentencing judge had an unreasonable time constraint imposed upon him when the matter recommenced after lunch because the Crown representative was not available after 3pm as she had to interview a witness for a trial the following week.
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> [20] A particular defect in the proceedings, which is now of significance, is that it was never made clear by the parties with any particularity at all the extent of the factual disputes that had to be resolved by his Honour. This was largely because there was a degree of procedural informality that was inappropriate once it was clear that the parties were not ad idem as to the factual basis upon which the respondent was to be sentenced or the appropriate sentencing disposition. Disputes and issues that arose were determined in an ad hoc fashion, if at all. The prosecutor, who finally had carriage of the matter, complained at one stage that she had not had access to the presentence report and was not aware of what had been said earlier in the proceedings when she was not present. Ultimately the order under s 11 was made without his Honour ever ascertaining the extent of the factual matters in dispute between the parties or attempting to resolve them.

The NSWCCA in *Palu* held that those proceedings had miscarried, upheld the appeal, quashed the sentencing orders made in the District Court and ordered that the matter be relisted before that court for redetermination.

Ideally, statements of agreed facts:

- should not be 'badged' with the logos of the police or other investigating authorities;
- should avoid expressing facts as allegations;
- should refine the evidence from witness statements and other sources into clearly articulated propositions of fact;
- should clearly indicate which of those propositions are agreed or not;
- should be as succinct as possible and not contain lengthy recitations of evidence which might appropriately be reduced into a more abbreviated and clearer narrative; and
- should, nevertheless, contain all the facts essential to setting out the factual substratum of the offender's criminal conduct.

The fact-finding task can be more challenging where there are multiple offences and multiple offenders. Offenders, not infrequently, come before sentencing courts having pleaded guilty to half a dozen or more offences and having acknowledged their guilt in respect of even more offences to be dealt with on a schedule and taken into account under NSW or Commonwealth provisions permitting that procedure.[23] In such cases sentencing courts have recently found the following format for statements of agreed facts to be convenient:

- an introduction which identifies in sub-paragraphs

each offence the offender has pleaded guilty to, the dates of the offence, the offence-creating provision and the maximum available penalty;

- the introduction could also identify in sub-paragraphs each offence which is to be taken into account on a schedule, the dates of the offence, the offence-creating provision and the maximum available penalty and the offence the offender has pleaded guilty to for which the scheduled offences are to be taken into account;
- a brief overview of the entirety of the offender's criminal conduct including a description of the offender's role and position in any hierarchy of co-offenders that exists;
- a narrative description of the facts relevant to each offence in turn, which is succinct and to the point but which, nevertheless, contains all the facts essential to setting out the factual substratum of the offender's criminal conduct with respect to each offence and which clearly identifies which of those facts are agreed and which are disputed;
- a brief chronology of the arrest and interview of the offender, if relevant; and
- a brief statement of the antecedents of the offender including whether or not the offender has a prior criminal history.

Multiple offenders

The sentencing exercise is, of course, more complicated where there are multiple offenders and parity of sentencing is a key consideration. The High Court and the NSWCCA in many decisions, such as *Lowe v The Queen*[24] and *R v Nguyen & Pham*[25], have emphasised the strong desirability of co-offenders being sentenced by the same judge and, preferably, at the same time. To this end the NSWCCA in *Dwayhi & Bechara v R*[26] has indicated the necessity for prosecuting authorities, offenders' representatives and sentencing courts alike to be more proactive in this regard:

> [44] It is necessary for sentencing Courts and prosecutorial bodies to take steps to ensure, so far as it is reasonably possible, that related offenders are sentenced by the same Judge, and preferably at the same time following a single sentencing hearing. To reinforce this message, creation of relevant Practice Notes (by the Courts) and amendment to prosecution guidelines (by the Commonwealth and New South Wales Directors of Public Prosecutions) may be considered appropriate to give effect to the statements of Courts referred to above.
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> [45] It ought be appropriate, as well, for sentencing and appellate courts to enquire of counsel for an offender, who seeks to rely upon the parity principle, as to the steps taken by that offender or his legal representatives to ensure that he or she was sentenced by the same Judge, and at the same time, as any related offender, if the case is one where there were different sentencing judges.
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> [46] In my view, procedures of this type will serve the public interest in consistent and transparent sentencing of related offenders which forms, after all, part of the rationale for the parity principle itself.

These remarks have broad application in light of the NSWCCA's decision in *Jimmy v R*[27] that the principle of parity can also (subject to some limitations) apply to offenders who are not co-offenders in the strict sense but, although charged with different offences, were involved in the same criminal enterprise.

Parole, ratios and guidelines

Legislative provisions motivated by the political response to calls to be 'tougher on crime' have sometimes been justified with the argument that they are designed to make sentencing more transparent. While the achievement of that objective through such provisions is debatable, they certainly make the sentencing task more complicated. An example of such a provision is s 44 of the CSPA which requires a judge sentencing a NSW offender to a term of imprisonment first to fix the non-parole period and then to fix a parole period which is not to exceed one third of the non-parole period unless special circumstances exist. However, what amounts to 'special circumstances' warranting departure from the 75/25 ratio in s 44 is not defined in the CSPA, and it has fallen to the courts to provide that definition in decisions such as *R v Way*[28].

In a similar vein the CSPA provisions requiring the imposition of a standard non-parole period (SNPP) for certain NSW offences 'unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period' have added another level of complexity to NSW sentencing and generated much appellate authority. The reasons for departing from the SNPP 'are only those referred to in s 21A' of the CSPA. However,

the NSWCCA has held that the prescription of a SNPP does not displace the principle that the fact that the offence was one that could have been dealt with in the Local Court continues to be a relevant factor when the matter is dealt with indictably and sentencing for the offence occurs in the District Court.[29] The court is required to make a record of its reasons for departing from the SNPP and to identify each factor it took into account in doing so. Yet the legislation does not state what degree of offending should attract the SNPP. This was also interpreted in Way as being intended for a middle range case where the offender is convicted after a trial.[30] So a plea of guilty might in itself justify departure from the SNPP.

A full consideration of the interpretation of these provisions is beyond the scope of this paper. They both provide fertile grounds for appeals.

Guideline judgments have been recognised by the NSWCCA as playing a useful role in sentencing in NSW since the 1998 decision in *R v Jurisic*.[31] In that decision Spigelman CJ said:

> guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.

Since 2001 the NSWCCA has had the power under the CSPA to give guideline judgments in sentence appeals for NSW offences on the application of the Attorney General[32] and of its own motion.[33] The NSWCCA has given guideline judgments for offences as diverse as armed robbery[34], breaking entering and stealing[35], dangerous driving[36] and driving with the high range prescribed content of alcohol[37]. Guideline judgments have also been issued with respect to the appropriate discount for a guilty plea[38] and taking additional offences into account on a 'Form 1' pursuant to s 32 and s 33 of the CSPA.[39] These decisions add another dimension to the sentencing process where applicable, although the NSWCCA has stressed that they should not fetter a sentencing judge's discretion.[40] They amount to a check or a guide, not a rule or a presumption.

However, since the High Court's decision in *Wong & Leung v The Queen*[41] it has been clear that the NSWCCA lacks the power to issue a guideline judgment for a Commonwealth offence as this would be inconsistent with s 16A of the *Crimes Act 1914*. This adds a layer of complexity to the sentencing of Commonwealth offenders in NSW.

For example, the guideline judgment in *R v Thomson; R v Houlton* with respect to guilty pleas does not apply to Commonwealth offences.[42] But the general principles stated in that case are generally applicable to sentencing for Commonwealth offences and the range of discount of 10 – 25 per cent is reasonable to adopt.[43] In Commonwealth matters the guilty plea is taken into account as a mitigating factor as it demonstrates a willingness to facilitate the course of justice. [44] Unlike the position for NSW offences, a plea of guilty to a Commonwealth offence must not, when sentencing for that offence, be taken into account as a mitigating factor for its objective 'utilitarian value' or on the basis that it saves the community the expense of a contested trial.[45]

Identifying the appropriate range of available penalties is also more difficult in Commonwealth matters in the absence of guideline judgments, as a recent series of decisions indicates.

In *DPP (Cth) v De la Rosa*[46] the NSWCCA identified a need for assistance from comparative sentencing authorities from jurisdictions other than NSW in response to the submission that the sentence imposed on the respondent for a drug importation offence was manifestly inadequate. The court conducted its own research and identified and reviewed a number of decisions of sentencing courts throughout Australia in relation to drug importation offences which were additional to those referred to by counsel.

However, in the recent decision of *Hili & Jones v The Queen*[47] a majority of the High Court stated that consistency in Commonwealth sentencing:[48]

> is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical charts, bar charts or graphs are not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number

> of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical anaylsis or graphical depiction of the results. The consistency that is sought is consistency in the application of the relevant legal principles. [at 48 and 49].

The High Court majority went on to say that in her judgment in *De la Rosa* Simpson J accurately identified the proper use of information about sentences that have been passed in other cases, namely that:[49]

> a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range or that the upper or lower limits to the range are the correct upper or lower limits'. Past sentences 'are no more than historical statements of what has happened in the past. They can, and should provide guidance to a sentencing judge … and stand as a yardstick against which to examine a proposed sentence. [at 54].

In its recent decision in *R v Holland*, the NSWCCA was careful to state its earlier decision in *De La Rosa*, while providing a useful tool in the nature of a yardstick for a sentencing judge faced with a similar type of offence, was not a guideline judgment and that:[50]

> it would be wrong to sentence an offender by seeking out the 'category' into which they fit and imposing a sentence which is thought to be appropriate for an offence which happens to have the characteristics found in that category.

Conclusion

These remarks in Holland highlight the importance of the sentencing judge's discretion in each case. Undoubtedly there will be further changes affecting sentencing in future years. It is to be hoped that those changes will respect the vital importance of judicial discretion in the sentencing process and the complex range of factors – both objective and subjective – relevant to that process.

Endnotes

1. [2010] NSWCCA 240.
2. Ibid at [36]-[37].
3. Introduced in 2002.
4. Introduced in 1990.
5. See *R v Way* (2004) 60 NSWLR 168; *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370.
6. (2002) 212 CLR 629 at [22]–[24].
7. Ibid at [24].
8. *Markarian v R* (2005) 228 CLR 357.
9. *Wong & Leung v The Queen* (2001) 207 CLR 584.
10. [2005] 228 CLR 357 at [138].
11. (1999) 199 CLR 270.
12. (2004) 217 CLR 198.
13. [2011] NSWCCA 33.
14. Ibid, at [47].
15. *R v Qutami* (2001) 127 A Crim R 369; *R v McGourty* [2002] NSWCCA 335; *R v Elfar* [2003] NSWCCA 358.
16. *R v Alvares & Farache* (supra) at [58].
17. (1999) 199 CLR 270 at [25]-[27].
18. *GAS v The Queen* (supra) at [30]-[31].
19. *The Queen v Olbrich* (supra) at pp 280-282.
20. [2009] NSWCCA 107.
21. [2010] NSWCCA 39.
22. (2002) 134 A Crim R 174 at [21].
23. s 32 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and s 16BA *Crimes Act 1914* (Cth).
24. (1984) 154 CLR 606 per Brennan J at 617.
25. [2010] NSWCCA 238 at [13].
26. [2011] NSWCCA 67 at [44]-[46], per Johnson J, Whealy JA and Hidden J agreeing.
27. [2010] NSWCCA 60; 240 FLR 27.
28. (2004) 60 NSWLR 168.
29. *Bonwick v R* [2010] NSWCCA 177.
30. *R v Way* (supra) at [68].
31. (1998) 45 NSWLR 209.
32. CSPA s 37.
33. CSPA s 37A.
34. *R v Henry* (1999) 46 NSWLR 346.
35. *R v Ponfield* (1999) 48 NSWLR 327.
36. *R v Jurisic* (supra).
37. Attorney General's Application under s 37 of the CSPA (No 3 of 2002) (2004) 61 NSWLR 305.
38. *R v Thomson & Houlton* (2000) 49 NSWLR 383.
39. Attorney General's Application under s 37 of the CSPA (No 1 of 2002) (2002) 56 NSWLR 146.
40. *R v Whyte* (2002) 55 NSWLR 252.
41. *Wong & Leung v The Queen* (supra) (2001) 207 CLR 584.
42. *Tyler v R; R v Chalmers* (2007) 173 A Crim R 458 at 476.
43. *R v Bugeja* [2001] NSWCCA 196 at [24] – [28]; *R v Otto* (2005) 157 A Crim R 540 at [69], per Hall J (Hidden J agreeing).
44. *Cameron v The Queen* (2002) 209 CLR 339 at 343; [11]–[14]; *Tyler v R; R v Chalmers* at 476. Nb. A guilty plea may also be some evidence of remorse and an acceptance of responsibility.
45. *Cameron v The Queen* at 343; *Tyler v R; R v Chalmers* at 476. This is contrary to the position under *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 and the *Crimes (Sentencing Procedure) Act 1999* (NSW).
46. [2010] NSWCCA 194.
47. [2010] HCA 45.
48. Ibid at [48]-[49].
49. Ibid at [54].
50. *DPP (Cth) v De La Rosa* (supra) per McClellan CJ at CL at [3].