PROOF OF FACTS: A NEW ZEALAND PERSPECTIVE

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I. INTRODUCTION

The Court must be able to determine as fully and precisely as possible the factual basis for sentence. The fundamental issue (ie, whether the offender is guilty of the offence) has been resolved either by plea or by process of trial. To sentence effectively, the Court needs to be able to assess accurately the gravity of the offending and the culpability of the offender. This requires the Court to ascertain the facts which constitute the offence, how the offence came to be committed, what part the offender played, what the impact of the offence was on any victim, and information pertinent to the appropriate manner of dealing with the offender.

The sentencing hearing in New Zealand is perhaps best described as being partly inquisitorial and partly adversarial. The extent to which it is one or the other depends on whether and how far the facts about the offence, the offender, and the victim are accepted or are in dispute. The prosecutor's duty at trial to act impartially and neutrally, and to assist the Court to a just result is even more pronounced at sentencing. The Judge has a *right* to inquire into any issue relevant to sentence and to seek further information, and he or she is under a *duty* to do so if the offender challenges any fact significant to the prosecution's submissions as to the sentence to be imposed.

The strict rules of evidence, as they apply at trial, do not prevail at the sentencing hearing. The Judge has a wide latitude as to the sources and types of evidence upon which to base the sentence to be imposed and is likely to have before him or her a wide and diverse range of materials relating to the offence, to the offender, and to any victim. In New Zealand these will normally include:

- a summary of facts, depositions, or trial evidence;
- a victim impact statement and perhaps an emotional harm report;
- a list of any previous convictions;
- a pre-sentence report and perhaps a reparation report;
- other reports: for example, a psychiatric report, a psychological report, or an alcohol and drug assessment;
- letters from the offender or his or her family or friends; and
- testimonials from employers or school.

The facts obtained from these sources, whether about the offence, the offender, or the victim, are likely to range in cogency from direct, admissible, and neutral evidence to multiple hearsay or expressions of opinion, some of which might be highly emotive. Usually, on sentence, this diversity does not cause any great difficulty. Counsel may either by agreement dispose of doubtful or disputed assertions or attack them directly in their submissions. The Judge remains the ultimate arbiter. Sometimes a clearly defined procedure may be necessary. Assertions about the offence, the offender, or the victim, can arise from any of the materials in the Judge's hands or from submissions, and can be so central to sentence that the dispute has to be resolved by the taking of evidence.

How full a picture the Judge will have of the facts of the offence will depend in the first instance on how the offender's responsibility for the offence came to be established formally.

Where an offender is convicted of a summary offence, the position is relatively straight

forward. If the offender has pleaded guilty, the Judge will have a summary of facts, prepared by the prosecution, which summarises the evidence to have been called. If the Judge has found the offender guilty of the offence after a defended hearing, he or she will have heard the evidence.

Where an offender is convicted of an indictable offence or one in respect of which there is an election for trial, there are further possibilities. If the offender pleads guilty prior to, or during, depositions, the Judge will have, as in a summary case, a summary of facts, supplemented by any statements received, or evidence taken, at depositions. If the offender pleads guilty after depositions but before trial, or on arraignment at trial, the Judge will have the depositions. If the offender pleads guilty during trial, the Judge will have whatever evidence has been adduced; and, if the offender is found guilty at trial, the Judge will have all the Crown's evidence and any evidence given by or for the offender.

Thus, when sentencing, the Judge may have at one extreme a summary of facts, usually relatively brief and expressed in general terms, and, at the other, a formidable body of sworn evidence. Even in the latter case, significant disputes of fact are not unknown and may require the hearing of evidence.

When a fact that is relevant to the sentence to be imposed is disputed, and this dispute cannot be resolved by submissions, either because counsel cannot agree or because the Judge is left unpersuaded, the formality of the trial should be reasserted. The rights of the offender and the victim, and the interests of procedural fairness come again to the fore.

II. PROOF OF FACTS: THE PROBLEM

The Court may not impose a more severe sentence than that that is justified by facts proved by admissible evidence or not disputed by the accused. In many cases a formal determination of guilt, whether it be by plea or by verdict, does not establish an adequate factual basis on which the sentencing Judge may assess the culpability of an offender. The fault often lies in substantive law, with offences being so broadly defined that they cover a wide variety of situations with varying degrees of seriousness and culpability.[1]

While the prosecution should endeavour to draw the indictment in terms likely to lead to pleas or verdicts that avoid difficulties of this kind, this may not always be possible. A verdict or plea of guilty establishes all the essential elements to prove the offence charged. The sentencing Judge will often require further information to determine facts which do not comprise elements of the offence but are nevertheless relevant for the purpose of determining the appropriate sentence. Problems may also arise in determining facts relevant to the character and personal history of the offender.

Types of trials where disputed facts hearings are likely to be required, some perhaps lengthy, include:

> "(a) Trials involving numerous accused where the exact participation of each accused in confused factual situations is not established by evidence. This can particularly apply to pleas of guilty where no summaries of facts have been agreed by all counsel before the pleas are accepted.

[1] Take, for example, a verdict of manslaughter: this may be the consequence of a finding by the jury of lack of intent; or that an intentional killing was done under provocation, while intoxicated, or in excessive self-defence; or simply that the jury was reluctant to convict of murder, or that some wished to convict of murder, others to acquit entirely, and a compromise was reached.

(b) Trials where the case against the accused is presented on a dual basis such as whether the accused was involved as principal or party.
(c) Trials involving representative charges where it is unclear from the finding of guilty whether the jury is satisfied the offence was committed on one particular occasion during the period alleged in the indictment or on a number of occasions.
(d) Cases . . . where the jury's finding of guilt may have been based on any one or more of a large number of pieces of evidence, any one of which might fulfil the elements of the offence or at least be relevant to sentencing."[2]

At the turn of this century the New Zealand Government determined to codify the law relating to sentencing and parole. The mandatory sentence of imprisonment for murder was earmarked for removal as was the partial defence to a charge of murder of provocation. The New Zealand Law Commission was called upon to assist. The dilemma facing this body was whether or not to recommend codification of the law as to proof of disputed facts on sentence, and if so, on what basis. Arguments against codification included: the present law is effective and flexible; codification could encourage disputes and lead to an increase in the number of hearings; codification could lead to more protracted hearings; and codification would diminish the value of a guilty plea.[3]

Most commentators on the draft report, including this presenter, saw a need for the law to be stated definitively if the Sentencing and Parole Reform Bill was enacted, including as it did the proposed change in the sentence for murder, if only to clarify the burden of proof in that one instance.[4] [5]

The Law Commission favoured a comprehensive regime, like the Canadian Code, which governs explicitly, by rules, the hearing of any evidence necessary before the Judge considers and imposes sentence, but differed as to the variant of proof that ought to apply. The Commission's reasoning included:

• At present, sentencing hearings are prevalent overseas and do take place in New Zealand; and the issue in New Zealand, as overseas, can be significant. There is no defined procedure for proof of disputed facts.
• The Bill lists, non-exclusively, aggravating and mitigating facts,[6] but does not allow for the ambiguities latent in that distinction or prescribe burdens and standards of proof.
• If, as we have recommended, provocation becomes a mitigating factor at sentence rather than a partial defence to murder, the need for legislation to clarify the law relating to the onus of proof for disputed facts, aggravating as well as mitigating, will become more pressing.[7]

The question identified by the Commission, was "how best, in principle and practice, to strike

[2] *R v Allison (No 35)* (HC, Auckland T 002481, 29 July 2003, Williams J) [2003] BCL 843.
[3] Law Commission Report No 76, *Proof of Disputed Facts on Sentence* (November 2001). Tabled in the House of Representatives on 5 December 2001, the report was a supplementary report to *Some Criminal Defences with particular reference to Battered Defendants* (Law Commission Report No 73) (2001). Report No 76 acknowledges reliance upon *Hall's Sentencing* (LexisNexis, 1998-). The 'shoe is on the other foot' this time. The presenter wishes to acknowledge his reliance upon the Law Commission report in preparing this paper.
[4] The Bill was enacted as the Sentencing Act 2002 and the Parole Act 2002. The former Act contains a strong presumption in favour of a life sentence for murder: see s 102.
[5] The Crown commentators thought the Canadian legislation was fair and balanced in respect of proof of both aggravating and mitigating facts, thus agreeing that the offender should prove, to the balance of probabilities, any mitigating facts on which he or she wished to rely. Defence Bar and academic commentators considered that if the Canadian model were followed, and the partial defence of provocation became a mitigating factor only, there would be a significant increase in the severity of the law for murder. Their consensus was, more generally, that the offender should only ever carry an evidential burden.
[6] These factors are now to be found in s 9 of the Sentencing Act 2002.
[7] Note 3, para 79. Provocation remains a defence to the crime of murder: Crimes Act, s 169.

a proper balance between the State and the offender, the public interest and the liberty of the individual."[8]

III. PROOF OF FACTS: NEW ZEALAND'S ANSWER

The resolution in New Zealand of disputed facts relevant to sentencing can be broken down into three components:

• First, the Judge accepts all facts essential to the plea or finding of guilt and has a discretion to accept the facts disclosed in evidence, although agreed by the parties.

• Secondly, if facts remain in dispute, the Judge indicates to the parties the likely weight and significance to sentencing if those facts are found to exist.

• Thirdly, if the parties wish to urge that a particular fact be taken into account for the purpose of sentencing, a disputed facts hearing may be held unless the Judge takes the view that sufficient evidence was adduced in relation to that matter at trial. [9]

The Sentencing Act 2002 (NZ) provides the statutory framework for establishing a factual

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[8] The choices made in England, Canada, and Australia were viewed by the Law Commission to lie between the extremes of adversarial or inquisitorial hearings. The report states at paras [83 to 87]:

"83 In the first and most extreme of the adversarial variants, the prosecution must prove beyond reasonable doubt any disputed aggravating fact that it asserts about the offence, the offender's part in the offence, or the offender, and must rebut any contrary, less aggravating or mitigating fact which the offender asserts. The offender need do no more than discharge an evidential burden: assert a fact which is credible – that is, worthy of belief. None of the jurisdictions discussed has adopted this "continuation of trial" approach absolutely. (Some cases were noted to have appeared to conform with it quite closely: see *Law v Deed* [1970] SASR 374, 377–378 and *Weaver v Samuels* [1971] SASR 116, 120; *R v Kerrigan* (1993) 14 Cr App R (S) 179, 181–182 (CA), *R v Tolera* [1999] 1 Cr App R 29.)

84 In the second variant, the prosecution retains the overall burden of proof just described, but the offender assumes a reverse onus to prove on the balance of probabilities any mitigating fact "extraneous" to the offence or the offender's part in it. (This approach is most clearly articulated by Callaway JA in *R v Storey*, [1998] 1 VR 359, 379–380. See also *R v Guppy* 16 Cr App R (S) 25 (CA); *R v Broderick* (1994) 15 Cr App R (S) 476 (CA); *R v Palmer* (1994) 15 Cr App R (S) 123 (CA); *R v Holder* 84 OTC 161.) This variant recognises that normally only the offender knows such facts. The prosecutor does not know them and so does not have the ability to refute them.

85 In the third variant, the prosecution must prove any aggravating disputed fact beyond reasonable doubt, but the offender must prove any disputed mitigating fact to the balance of probabilities. This variant abandons the distinction between disputed mitigating facts, which relate to the offence, or to the offender's part in it, and those which are "extraneous".

86 In this final variant neither prosecution nor offender has a burden of proof as such, but the Judge has to be "satisfied" of all facts he or she takes into account on sentence. (The Australian cases of *Olbrich* (1999) 108 A Crim R 464 and *R v Storey* [1998] 1 VR 359 come closest to this model in philosophy; the focus being on the Judge taking into account facts adverse to or in favour of the interests of the offender. The Australian Law Reform Commission tentatively favoured an inquisitorial approach to sentencing in its *Sentencing Procedure* (Discussion Paper 29, Australian Government Publishing Services, Canberra, 1987) 40. The Australian Law Reform Commission Report *Sentencing* (Report No 44, Australian Government Publishing Services, Canberra, 1988), para 188, recommended that legislation governing the standard of proof should do no more than require that the Court be "satisfied" of the relevant fact. This was to allow flexibility. Compare the South African Law Commission, *Simplification of Criminal Procedure* (Discussion Paper 96, Project 73 Pretoria 2001).)

87 This approach allows the sentencing Judge the most discretion. He or she need only "reach a clear conclusion" that a substantial ground exists to support the contention at issue. Thus, the procedural protection of the offender's rights lies with the Judge. We prefer the second variant, first, because it is one of the three variants that recognises that when a dispute of fact erupts on sentence, that issue must be resolved adversarially. Secondly, of the three variants in which that is recognised, it strikes, we consider, the best balance between the public interest and the values inherent in the trial process: the liberty interests of the offender and procedural protections."

[9] See eg, *Allison (No 35)*, at note 2.

basis for sentencing. The relevant provision, s 24, is based on the Law Commission Report[10], and is modelled on ss 723 and 724 of the Canadian Criminal Code.[11]

This section, which sets out, inter alia, the onus and standard of proof on the prosecution and defence when facts are disputed at sentencing, was not intended to make a major change to current practice but to clarify the law (as to burden of proof) for what the Select Committee perceived to be "the small number of cases where facts relevant to sentencing are disputed and this dispute cannot be resolved by the Judge on the basis of submissions or by agreement between counsel".[12]

Where a fact is disputed, the Court is required to indicate to the parties the weight that it would be likely to attach to a particular disputed fact if it were found to be proved, and its significance to the sentence or other disposition of the case: s 24(2)(a). If a party wishes the Court to rely on that fact, the parties may adduce evidence as to its existence unless the Court is satisfied that sufficient evidence was adduced at the hearing or trial: s 24(2)(b). Any witness may be cross-examined: s 24(2)(e).

Where a disputed fact is *aggravating* the prosecutor must prove that fact beyond a reasonable doubt.[13] There is no evidential onus on the offender.

The prosecutor must negate any disputed mitigating fact raised by the defence that is related to the nature of or to the offender's part in the offence, that is not wholly implausible or manifestly false (eg where the assertion is inconsistent with the plea of guilty or the finding of the jury). There is thus an evidential onus on the defence to put the fact in issue.[14]

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[10] Above, at note 3. The full text of s 24 is reproduced as an addendum to this paper.

[11] RS 1985, C-46.

[12] Justice and Electoral Committee, Sentencing and Parole Reform Bill 2001.

[13] These matters are dealt with in subss (2)(c) and (2)(d) of s 24. A distinction is drawn between disputed aggravating and mitigating facts. "Aggravating fact" and "mitigating fact" are defined in s 24(3). Stated simply, an aggravating fact is a fact that justifies a greater penalty than might otherwise be appropriate and a mitigating fact is a fact that justifies a lesser penalty. See further Part IV.5.

14 The Law Commission's reasoning proceeded thus (at paras [95] to [103]):

Common to all but the inquisitorial variant (see note 8) was the principle that it was for the prosecution to prove beyond reasonable doubt any disputed aggravating fact which it asserts, whether that relates to the offence, the offender's part in it, or the offender. This was the present law in New Zealand. It was appropriate to impose upon the prosecution, as did the English, a duty to rebut any contrary fact advanced by the offender, as long as that fact was proximate to that asserted by the prosecution, credible, and not inconsistent with any verdict.

The reasons for the Australian variant were not ignored. These were described as:

- the offender's guilt has been established by process of trial or plea and the presumption of innocence no longer applies;
- there is no general joinder of issue in respect of which the prosecution must bear a corresponding onus;
- on sentence many facts may be undisputed and those in dispute relatively confined.

The Commission stated that when there was a significant dispute of fact on sentence, the need to achieve a just result was to be accorded the highest priority. The sentencing process, like the process of trial had to be ordered to the fullest extent possible so as to avoid any risk of injustice.

A just result on sentence was one in which the sentence imposed was proportionate to the seriousness of the offence and the offender's part in it, and was appropriate to the offender. Any sanction which was in excess of what was commensurate with the offence was, to that extent, arbitrary and unjustifiable. This is especially so where the offender was by sentence deprived of his or her liberty.

Disputes of fact relating to the offence, the offender's part in it, or the offender, arise precisely because they bear intimately on what sentence was proportionate and just. Who then was to carry the risk of any error?

At trial, the offender was seen to be protected from the risk of error by the breadth and height of the onus of proof imposed on the prosecution and by the presumption of innocence. The accused mostly carries no more than an evidential onus. On sentence, the offender should be protected equally, where the existence of any aggravating fact relating to the offence, or the offender's part, is in dispute. This logic should continue to hold

The offender must prove to the balance of probabilities any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in it (eg matters relating to the character, history, or personal circumstances of the offender).[15]

The standard to which the prosecution is required to negate any disputed mitigating fact raised by the defence (other than a mitigating fact relating to the nature of the offence or the offender's part in it) was not stated in s 24 as originally drafted. This unfortunate oversight was remedied by the Sentencing Amendment Act 2004, s 3, which provides that negation must be *beyond a reasonable doubt*.

Essentially s 24 provides:
• The Court *must* accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt (s 24(1)(b)).
• The Court *may* accept as proved any fact that was disclosed by evidence at the hearing or trial (s 24(1)(a)).
• The Court *may* accept as proved any facts agreed on by the prosecutor and the offender (s 24(1)(a)).
• The Court *may* accept as proved any disputed facts that are proved to the standard required by s 24(2)(c) and (2)(d).

IV. SECTION 24 OF THE SENTENCING ACT 2002 IN PRACTICE

1. Judge to indicate significance of disputed fact — s 24(2)(a)

If a fact that is relevant to the determination of sentence or other disposition of the case is asserted by one party and disputed by the other, the Court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its

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when the offender, instead of just denying any fact asserted by the prosecution, typically aggravating, countered it with a less aggravating or actually mitigating fact. Where there is an outright collision, the prosecution had to rebut the offender's fact if only to prove the aggravating fact it asserts. Even where the prosecution only disputed the offender's mitigating fact, it should still have to sustain, beyond reasonable doubt, the version of facts on which it relied, shorn of the mitigating fact.

As at trial, however, there was a limit to what the prosecution could be expected to prove. Where there was such a conflict, the prosecution should be required only to negate proximate, credible, contrary facts not inconsistent with any jury verdict. To that extent, the offender should carry an evidential onus. The offender should carry a reverse onus as to facts about himself or herself, which only he or she can be expected to know reliably, and which the prosecution is likely to be incapable of refuting. The consequence of this variant was that there was no general minimum standard to which a fact must be proved before the Judge may or must rely on it on sentence. There is the possibility that a sentencing Judge might have to rely on a less aggravating or actually mitigating fact, asserted by the offender, merely because the prosecution had been unable to exclude it beyond reasonable doubt. This difficulty was not fatal.

Where the less aggravating or mitigating fact goes to the offence, or the offender's part in it, and contradicts a fact asserted by the prosecution, the prosecution is already obliged to exclude it in order to prove the fact, or version of facts, which it asserts. Where the fact is "extraneous" and peculiarly within the knowledge of the offender, the offender would carry a reverse onus.

The ambiguities latent in the distinction between aggravating and mitigating facts, it was observed by the Commission, should not cause difficulty in practice if the Australian approach were adopted. That approach recognised that whether a fact is aggravating or mitigating, neutral or irrelevant, would depend on the context and how the prosecution or defence, and finally the Judge, wished to use it.

The ultimate issue was viewed as being practical: "Does the fact, if it exists, justify in the mind of the Judge a more severe sentence than might otherwise be appropriate; or, conversely, might it justify a lesser sentence? This test, we consider, has a place in the regime we recommend."

[15] See Part IV.5.

significance to the sentence or other disposition of the case: s 24(2)(a).

The significance of this provision was recently emphasised in *R v Wilson* where the Court of Appeal said of subs (2)(a):[16]

> "That is an important provision because some facts, while disputed, may have little bearing on the likely sentence. The defence needs to know what significance is likely to be attached to the disputed fact so that a sensible decision can be made as to whether the expense of a disputed fact hearing is warranted."[17]

A written record should be taken of the indication that is given as to the likely consequence of the disputed fact.[18] Frequently the Judge will give an indication of the weight that is to be attached to a particular fact and its significance to sentence at a status hearing.

A failure to follow the s 24(2)(a) procedure led ultimately to a failure to establish the factual basis in *R v Gatenby*.[19] G maintained that his cultivation of cannabis was for personal use, and this was disputed by the Crown. The weight to be attached to this fact was never articulated by the Court, with the consequence that the sentencing Court made a finding adverse to G without following the process prescribed by s 24.[20]

2. Facts disclosed by evidence or agreed upon; facts essential to guilt — s 24(1)

The Court may accept as proved any fact that was disclosed by evidence at the hearing or trial and any facts agreed on by the prosecutor and the offender: s 24(1)(a).

The Court must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt: s 24(1)(b). This is statutory confirmation of the principle in *R v Bryant*[21] that facts cannot be alleged which conflict with the wording of the charge to which the offender has pleaded guilty.

A plea of guilty is simply an admission of the essential legal ingredients of the offence and is not an admission of any aggravating facts that may be alleged by the prosecution in the summary of facts. Similarly, a plea of guilty after the taking of depositions is not an admission of the truth of all the facts stated in the depositions. The offender "admits simply that he is guilty of the offence charged in the indictment, and nothing more."[22]

Where a plea of guilty is entered and the prosecutor puts before the Court a summary of facts,

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[16] (CA 273/04, 13 December 2004, Chambers, Baragwanath and Goddard JJ), at para [7].

[17] In this case a three day factual inquiry into the value of the appellant's cannabis crop appeared to be justified. There were 1,200 seedlings which the police had estimated on oath to have a value of $1.3 to $3.66 million. As a result of the inquiry the Court was satisfied the cannabis yield could have been sold for between $900,000 and $1.2 million. The six month or 8% discount for the guilty plea which the sentencer indicated was tempered by W's "non-acceptance of responsibility for growing with a commercial purpose" was held to be too parsimonious where W had successfully disputed the police's estimate of the value of the crop. He was not to be deprived of the credit that would normally be given for an early guilty plea. A one and a half year or 27% discount was appropriate from the starting point of five and a half years. Sentence was reduced from five to four years' imprisonment.

[18] Ibid. The Court said at para [7] that "it is preferable for the sentencing Judge to make a record of the dispute and of his or her indication to the parties under s 24(2)(a)."

[19] (CA 511/04, 28 April 2005, McGrath, Williams and Panckhurst JJ) [2005] BCL 495

[20] The Court of Appeal reduced the sentence: see Part IV.5.

[21] [1980] 1 NZLR 264 (CA).

[22] See eg *R v Riley* [1896] 1 QB 309, 318 (per Hawkins J); *R v Bryant*, ibid; *R v Winton* (CA 142/92, 9 July 1992, Eichelbaum CJ, Casey and Holland JJ).

or the sworn depositions or an oral summary thereof, which is not controverted by the offender, the Judge is entitled to form his or her own view of the facts within the limits of the guilty plea and the evidence. The Judge, when forming his or her own assessment of the circumstances of the offence, is not bound to sentence on a view of the facts most favourable to the offender[23].

3. Guilty plea

Summary of facts

A summary of facts is to be made available in all cases resolved by a guilty plea, whether before or after committal.[24] On a plea of guilty, unless evidence is called, this summary together with the information, charge sheet, or complaint, forms the sole basis on which the Judge can assess the gravity of the charge.[25] This material is forwarded to the High Court when there is an appeal against sentence.[26] The offender is entitled to a copy of the summary and the evidence.[27] [28]

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[23] *R v Accused (CA 125/87)* [1988] 1 NZLR 422.

[24] The *Sentencing Practice Note 2003* [2003] 2 NZLR 575, requires at para 2.1 that if the summary of facts has not been read after the offender has pleaded guilty it must be read to the Court by Crown counsel before submissions are made on sentence.

[25] The summary of facts typically includes an outline of the circumstances surrounding the commission of the offence, the degree of participation by the offender, the extent of violence used, injury suffered, or loss of or damage to property involved, and the reaction of the offender upon apprehension. Where there is a direct conflict between the evidence of witnesses and that of the offender, this should be brought out in the summary. Only facts which can subsequently be proved in evidence should be included. Both mitigating and aggravating factors should be made known to the Court. The summary of facts typically concludes with a statement as to the offender's age, marital status, family, type of employment and whether he or she has been previously convicted. Where the prosecution desires the imposition of any order (eg forfeiture, reparation, restitution, return of property, witnesses' expenses, doctors' fees), this is usually incorporated into the summary. A list of the offender's previous convictions is usually attached to the summary. A victim impact statement may also be attached to or incorporated into the summary.

[26] Summary Proceedings Act 1957, s 117(2)(b) and (e). Where a person is committed to the High Court for sentence pursuant to s 153A of the Summary Proceedings Act 1957 or s 28G of the District Courts Act 1947, after pleading guilty before or during the preliminary hearing of an indictable offence, the information, the summary of facts and any evidence upon which that person has pleaded are to be forwarded to the Court: Summary Proceedings Act, s 182(2).

[27] Ibid, s 183(2).

[28] Five key features concerning the role of summaries of fact were identified in *R v McGaw* (2000) 18 CRNZ 236, per Fisher J:

(1) In the summary of facts the Crown must summarise the facts for which the Crown contends — they represent the Crown's position as to the ultimate facts upon which the sentencing ought to be based. It is proper for the Crown to draw reasonable inferences as to the facts and to recite these as an unqualified sequence of events without reference to evidentiary sources. Once the defence sees the Crown's propositions it can accept or contest them. If contested, and the dispute is unable to be resolved by agreement, the Court hears evidence and reaches its own conclusions.

(2) The Court only wants to know the ultimate facts, not the process by which they were ascertained. The ultimate facts are what the person actually did, the consequences of their actions, any explanation given, and any other facts which bear upon the seriousness of the offending and the sentence warranted for it. The summary should thus be a concise account of the person's alleged course of conduct expressed as a chronological sequence.

(3) In drug cases the core facts the Court requires for sentencing are the types, quantities and values of the drugs concerned, the specific occasions upon which the offences were committed, the overall periods of dealing or offending, the role played by the person, the profit the person made, and that person's relationship to any others in the drugs hierarchy.

(4) The summary of facts must be made available to the Judge before sentencing since all preparation and research by the Judge is based on it. An amended summary may be filed incorporating matters arising from continuing investigations and negotiations with the defence.

Disputing the summary of facts

A plea of guilty is normally entered with reference to the police summary of facts. The offender admits the essential legal ingredients of the offence itself, and assumes an onus to identify any allegations of fact in the summary capable of affecting the sentencing outcome which he or she disputes. Such issues require identification so that they might become the subject of agreed amendment to the summary or of evidence to resolve the conflict.[29]

It is up to the offender to initiate the challenge to the summary of facts.[30] The Court is thereby alerted to any point of conflict. At this point the Court is required by s 24(2)(a) to indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case.[31] If a party wishes the Court to rely on that fact, evidence should be called by the party on whom the evidentiary burden rests to resolve the matter unless the Court is satisfied that sufficient evidence was adduced at the hearing or trial.

If the disputed fact is not one that will materially affect the sentence imposed there is no need for the Court to require evidence be called to resolve it. As the Court of Appeal said prior to the Sentencing Act:[32] "To require a Court in every case to conduct a hearing whenever it is minded not to accept an offender's explanation for admitted criminal conduct is both unnecessary and undesirable".

Offender committed for sentence may dispute finding of fact

Where an offender is committed to the High Court for sentence after a finding of fact in the District Court, the High Court is not bound by the finding in the lower Court.[33]

Summary of facts not to be augmented by prosecuting counsel without consent of defence or in response to disputed fact

Excerpts from witness statements should not be introduced into prosecuting counsel's submissions by way of amplification, unless their inclusion is a direct response to a challenge by the defence to the content of the summary of facts. The appropriate course of action is to call evidence. Unprovoked additions to the summary are likely to meet with judicial disapproval. The Court of Appeal in *R v Grant* identified the risk as being that "counsel for the prisoner is potentially faced with two versions, being the summary (upon the basis of

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(5) Although the summary of facts is nearly always prepared in the first instance by the police, the ultimate responsibility for the summary rests with counsel and the Crown Solicitor to ensure that these requirements are met.

[29] *Bryant*, at note 22, *Curtis v Police* (1993) 10 CRNZ 28 (CA), *R v Grant* (CA 240/02, 11 December 2002, Blanchard, Panckhurst and Salmon JJ).

[30] In deciding to challenge evidence contained in the police summary of facts or the victim impact statement, counsel should inform the offender that, should the disputed matters be established by the prosecution, then the mitigating effect of the plea of guilty may be significantly reduced. This loss will be further accentuated where the complainant is required to undergo the trauma of giving evidence, particularly where that person is a child and/or the offending is of a sexual nature. See eg *R v Te Pou* [1985] 2 NZLR 508 (CA), *X v Police* (1991) 10 CRNZ 385, *Curtis v P*olice (1993) 10 CRNZ 28 (CA), *Walters v Police* (1993) 10 CRNZ 421.

[31] See Part IV.1.

[32] *R v Haronga* (CA 43/95, 1 June 1995, Casey, Thorp and Henry JJ) [1993-1995] BCLD 2003. The offence was cultivation of cannabis and unlawful possession of a firearm and the only fact in question was H's purpose in retaining the weapon.

[33] *R v K* [2005] DCR 706 (HC). Heath J held that K could dispute findings of fact with respect to the potential yield of the cannabis crop and the level of sophistication of the operation and the Court would review these findings if it was satisfied that demonstrable error could be found.

which the plea was entered) and additional material subsequently selected by the prosecutor from witness statements. Where the latter materially adds to the available facts, counsel faces a difficulty in knowing the basis upon which the prisoner is to be sentenced".[34]

If possible, a common single source of facts should be agreed on by the prosecutor and the offender. Otherwise the sentencer may be placed in an invidious position, particularly when pursuant to s 24(2), if facts are asserted by either side which might affect the sentencing outcome, the Judge must indicate the weight likely to be attached to the disputed fact were it found to exist. The Court of Appeal in *Grant* concluded with reference to s 24:

> "All of this . . .. emphasises the need for care in relation to the material placed before the sentencer. In general the prosecutor should ensure that the summary of facts sets out those matters essential to the establishment of the criminality of the offending. Supplementing the summary by resort to selected excerpts from witness statements is apt to cause confusion."[35]

4. Verdict of guilty — s 24(1)(a) and (1)(b)

Difficulties also arise in establishing a factual basis for sentence where a verdict of guilty is returned by the jury. The Judge is not required to adopt the version of the facts most favourable to the offender and may form his or her own view of the facts to determine the seriousness of the offence that has been committed and the appropriate penalty; but the Judge must not adopt any view that is clearly inconsistent with the verdict of the jury.[36]

Section 24(l)(a) was considered by Williams J in *R v Allison (No 35*) who held that, for the purposes of sentencing, it is open to the Court to reach a conclusion on facts appearing in the evidence. He said: [37]

> "There was no reason to assume that power does not extend to taking a view for sentencing purposes as to which facts disclosed in the evidence may have been more likely to have been accepted by the jury as underpinning a verdict of guilty. The fact that those matters were given in sworn evidence and that they may or were likely to underpin the jury's verdicts could, in any case, be accepted as amounting to proof beyond reasonable doubt. Secondly, in the second phase of the regime for which s 24 provides, it is clear that the power to adduce additional evidence is discretionary 'unless the Court is satisfied that sufficient evidence was adduced at the hearing or trial' (s 24(2)(b)). That subsection would appear to give the Court power, if a party wishes to rely on a particular fact, to conclude that sufficient evidence on the topic was adduced at trial and to indicate the significance and weight of that fact for sentencing purposes. . . . It would appear that it is only if a party particularly wishes to rely on a fact as an aggravating or mitigating factor, and the Court concludes that sufficient evidence on the topic was not adduced at trial, the third stage of the disputed facts process in s 24, namely the calling of evidence, then ensues."

Basis of jury's verdict clear — s 24(1)(b)
Where the facts implied by the verdict of guilty are clear the Judge must accept the necessary

[34] (CA 240/02, 11 December 2002, Blanchard, Panckhurst and Salmon JJ), at para [26].
[35] Ibid, para [27].
[36] *R v Accused (CA 125/87)* [1988] 1 NZLR 422, *R v Norris* (CA 42/87, 19 April 1988, Casey, Bisson and Gallen JJ) 11 TCL 16/7, *R v Allison* (CA 54/91, 7 August 1991, Cooke P, Hardie Boys and Gault JJ) [1991] BCL 1791, *R v Heti* (1992) 8 CRNZ 554 (CA), *R v Ralm* (CA 32/93, 5 October 1993, Casey, Holland and Henry JJ) [1993] BCL 1980, *R v Persico* (CA 453/95, 12 February 1996, Eichelbaum CJ, McKay and Thorp JJ), *R v Hopa* (CA 302 and 320/01, 18 December 2001, Blanchard, Robertson and Hammond JJ).
[37] Above, at note 2, at para [18]. Williams J was of the view that sufficient evidence had been adduced on various matters at the trial and in a careful judgment indicated the weight and significance he attached to those facts for sentencing purposes.

implications and sentence the offender accordingly. Specifically, s 24(1)(b) requires that the sentencer must accept as proved all facts, express or implied, that are essential to a finding of guilt.

Where a case has been put to the jury on a specific factual basis and a verdict of guilty returned, it is not open to the trial Judge to sentence on any other factual basis.[38] If the offender has been acquitted of a graver charge and convicted of a lesser offence, that determination must be accepted as the starting point for the Judge's consideration of the appropriate sentence and the allegations relating solely to the charges of which he or she has been acquitted must be disregarded.[39]

Where the basis on which the sentencing Judge has acted is more favourable to an offender than the real basis of the jury's verdict there is no need for an appellate Court to interfere.[40]

Ambiguous verdict

Where the jury's verdict is ambiguous in relation to a fact that is critical to sentence, the Judge may exercise his or her own judgement on the evidence, so long as he or she does not assume the existence of a fact that has been negated, expressly or by implication, by the formal finding of guilt.[41] The defence in the murder trial in *R v Edwards*[42] was run on the basis of provocation and absence of murderous intent. In these circumstances, the Court of Appeal observed, it was for the trial Judge to determine, with reasons, which was the more likely explanation for the jury's verdict of manslaughter.

It is the responsibility of the prosecution to draft indictments in such a way as to avoid potential ambiguity, but the Judge, nonetheless, is to find facts for sentencing purposes in accordance with s 24. The Court accepted in *R v Booth*[43] that the sentencer had been satisfied that B had possession of both quantities of cannabis that were specified in the single count of

[38] For example, in *R v Nuku* (CA 26/74, 28 June 1974) the appellant was convicted by a jury of breaking and entering a dwelling house with intent to commit a crime under s 241 of the Crimes Act 1961. The Crown alleged merely an intent to steal; it was consequently not open to the Judge, having regard to previous convictions, to sentence on the basis that the intent was a "sinister sexual one", particularly where that conclusion was unsupported by the evidence. Similarly in *R v Beukman* (CA 221/83, 4 October 1983) both the Crown Prosecutor and the trial Judge in his summing up to the jury alleged that an assault had been committed only by means of spitting. It was therefore not open to the Judge, upon conviction on this charge, to sentence on the basis that both a spitting upon and a punching of the victim had occurred.

[39] *Dunn v R* [1954] NZLR 1009 (CA); *R v B* (CA 105/94, 14 June 1994, Gault, Thorp and Henry JJ).

[40] *R v Borlase* (CA 403/90, 7 June 1991, Cooke P, Hardie Boys and Bisson JJ) [1989-1992] BCLD 958.

[41] *R v Accused* (*CA 125/87*) above, at note 36; *R v Norris* above, at note 36; *R v Heti* (CA) above, at note 36 (case put to jury on the basis that in the Crown's contention the victim did not have a knife when confronting the offender, or alternatively that if there was a knife, the offender's response in self defence was excessive — as the jury's verdict was consistent with either contention, the Judge was entitled to sentence on the basis that there was no knife); *R v Ralm* above, at note 36 (Judge entitled to find from the evidence that the offender was wearing steel-capped gumboots when he kicked his victim). The jury's verdict of guilty of injuring with intent to injure in *R v Solomon* (CA 422/97, 24 February 1998, Richardson P, Tipping and Anderson JJ) could have been reached on the basis that the appellant had assaulted the victim with his fists or by using scissors which he was allegedly holding at the time. The sentencer found not only that the appellant had the scissors in his hand at the time of the assault, but he inferred that he deliberately used them as a weapon. The Court of Appeal said there was an appreciable difference in terms of seriousness between the two ways in which the scissors could have been used, and found on the evidence and the fact that the jury had acquitted on a count of injuring with intent to cause grievous bodily harm, that the less serious interpretation was indicated. While observing that an attack with mindless disregard of the risk of causing cutting type injuries warranted an appreciable term of imprisonment, the term was reduced from 18 to 12 months.

[42] (CA 371/04, 13 April 2005, Chambers, Williams and Salmon JJ).

[43] [2005] 2 NZLR 709.

possession of cannabis for supply. He was entitled, in accordance with s 24(1), to determine this issue based on the evidence at trial. While the Judge had not indicated in advance the factual basis on which he intended to sentence, counsel acknowledged there was no additional evidence which could have been led, and the appellate Court was satisfied that the determination was made to the criminal standard as the sentencer had said he had "no hesitation" in reaching his conclusion on this point.

Ambiguous verdict — no finding as to factual basis by sentencer; appellate Court to sentence on basis consistent with verdict and most favourable to offender

Where the jury's verdict is ambiguous and the sentencing Judge has made no finding as to the factual basis, the correct course for an appellate Court is to view the facts in a manner consistent with the verdict and most favourable to the offender.[44]

English practice of questioning jury is not adopted in New Zealand

The English Court of Appeal has stated that it is permissible for the Judge to put questions to the jury for the purposes of ascertaining the basis of their verdict.[45] It would appear such an approach could raise more difficulties than it solves, in that the jury may not, and indeed need not, be unanimous on the evidential basis of the verdict. It may only result in confusion and doubt as to the verdict of the jury. In any event the practice is not followed in New Zealand.[46]

5. Standard and onus of proof — aggravating and mitigating facts

The prosecutor is required to prove beyond a reasonable doubt any disputed aggravating fact, and must negate any disputed mitigating fact raised by the defence that is related to the nature of or to the offender's part in the offence that is not wholly implausible or manifestly false.[47]).

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[44] *R v Vowell* (CA 264/89, 6 April 1990, Somers, Bisson and Heron JJ) [1990] BCL 797. This was also the approach adopted in *R v Hauia* (CA 163/94, 9 August 1994, Eichelbaum CJ, Gault and Holland JJ) where the jury's guilty verdict on four counts of indecent assault could have been reached on the basis that there was attempted penile penetration of the complainant's vagina or that there was simply continuous touching of her body, including her vagina. As the sentencer had failed in his duty to determine and state the facts on which he was sentencing, the Court concluded sentence had to proceed on the basis that there were indecent assaults by touching and not by attempted penetration. On this factual basis a sentence of four years' imprisonment was too high, and a three year term was substituted.

[45] *R v Matheson* [1958] 1 WLR 474; [1958] 2 All ER 87; *R v Warner* [1967] 1 WLR 1209; [1967] 3 All ER 93. Present practice appears to be to put questions only in exceptional cases, usually manslaughter, where there is a possibility that the same verdict may be returned on entirely different bases of facts: *R v Frankum* (1983) 5 Cr App R (S) 259; *R v Solomon* (1984) 6 Cr App R (S) 120; *R v Cawthorne* [1996] 2 Cr App R (S) 445.

[46] The matter was considered recently in *Allison (No 35)* at note 2, where Williams J observed at para [5] that "questioning would transgress the traditional secrecy of jury deliberations and the inviolability of their verdicts. When even the verdict 'guilty/not guilty' has no statutory foundation, questioning juries as to the basis for their verdicts would seem unjustifiable".

[47] The leading authority in New Zealand prior to the passage of the Sentencing Act was *Bryant*, above at note 22, where the Court of Appeal stated that the onus of establishing by proper legal proof any disputed allegation relevant to sentence rested on the Crown. The relevant standard of proof was less clearly stated. Indeed, as that Court in *R v Hopa*, above, at note 36, observed, it had not been usual in this country to do so. While the standard of proof to the usual criminal standard of beyond reasonable doubt was never specifically identified in *Bryant*, it would appear implicit that this was the standard to which the Court was referring when Richmond P, in delivering the judgment of the Court of Appeal, said (at 270) (there was a dispute as to whether Bryant hit his victim with a hammer): "[W]e are satisfied, both in principle and on the authorities which we are about to discuss, that the Court, when sentencing Bryant, was bound to disregard the disputed allegation about the hammer unless the Crown established its truth by evidence admissible against Bryant *in accordance with ordinary legal principles.*" [Emphasis added.]

B pleaded guilty in the (now) District Court to charges of rendering by violent means two police constables incapable of resistance, in order to avoid arrest. One constable suffered a fractured skull from a blow with a hammer during the incident. After the plea of guilty was entered pursuant to the provisions of s 153A of the

By way of contrast, however, where the disputed mitigating fact is not related to the nature of the offence or to the offender's part in it (eg matters relating to the character, history, or personal circumstances of the offender) the offender must prove that fact on *the balance of probabilities*.[48] [49] The reason for the reverse onus was identified in the Law Commission Report to be that normally only the offender knows such facts. The prosecutor does not know them and so does not have the ability to refute them.[50]

An example may speak volumes. It was said prior to the Sentencing Act that a sentencing Judge faced with an exculpatory statement (eg, the common and easily made claim that a weapon used in a robbery was not loaded) is not bound to accept an unsworn assertion by the offender to that effect.[51] While the circumstances of cases will vary, a Judge will often be entitled to draw the inference intended by the conduct of the offender at the time of the offence (eg, that the weapon used in a robbery was loaded) unless the offender or some other witness gives evidence to the contrary. In terms of s 24, this would be a disputed mitigating fact relating to the offence, the onus would be on the defence to establish an evidential basis for the claim that the gun was not loaded which would then need to be disproved by the prosecution beyond reasonable doubt.

The issue of whether cultivation of cannabis is for commercial purposes is an "aggravating fact" for the purpose of s 24; commercial activity is therefore to be proved by the Crown

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Summary Proceedings Act 1957 the police summary of facts was read to the Court. It contained the allegation based on statements by other co-accused that B had struck the blow. The actual charges to which B pleaded guilty gave no particulars of the violent means used. B and his co-offenders were committed to the (now) High Court for sentence. Before the sentencing hearing, counsel for B submitted a memorandum to the Judge stating that B denied responsibility and that a co-accused was prepared to give evidence that he himself had used the hammer. No evidence was called by the Judge who sentenced B to the maximum sentence of seven years' imprisonment on the ground that B had struck the blow. The Court of Appeal emphasised that the police summary of facts had no evidential value as it had not been admitted by B. The disputed allegation of fact had not been established by admissible evidence, despite the Court having had the opportunity of assessing the credibility of B and his co-offenders. Consequently it was not open to the Court to reject B's denial of responsibility, and sentence was reduced to five years' imprisonment.

Other Court of Appeal cases supporting the standard of beyond reasonable doubt were:

• *R v Moananui* [1983] NZLR 537, 543 where the Court of Appeal said, but apparently without hearing submissions from counsel on the matter, that "[i]f there is conflicting evidence the Judge will have to make his own assessment of the facts, giving the benefit of any reasonable doubt to the accused".

• *Cronin & Co Ltd v Ministry of Transport; Cambridge Transport Ltd v Ministry of Transport* (CA 145-146/85, 10 April 1986, Richardson, Somers and Casey JJ) [1986] BCL 579 — "[a]s often as facts are in dispute in sentencing they must be proved against the person to be sentenced to the normal criminal standard. *R v Bryant* [1980] 1 NZLR 264 is an instance of this".

• *R v Waling* (CA 182/88, 26 July 1988, McMullin, Casey and Bisson JJ) [1988] BCL 1350 and *Allison* above, at note 36 — in both cases with respect to ascertaining the number of cannabis plants that had been cultivated.

[48] That the onus of proof was on the defendant where matters of mitigation were being considered had been accepted by the Court of Appeal in *R v White* [1988] 1 NZLR 264, 267. In a judgment that determined the phrase "is satisfied" in the context of the then s 75 of the Criminal Justice Act 1985 means simply "makes up its mind" and is indicative of a state where the Court on the evidence comes to a judicial decision, the Court of Appeal as part of its reasoning stated: "the materials upon which a Judge acts in the sentencing process are not all susceptible to proof beyond reasonable doubt. In that process a Judge acts not only on sworn testimony and admitted facts but also on pre-sentence and psychiatric reports, counsel's submissions and, not least of all, his own experience and judgment" [emphasis added]. There was no express reference in this dictum to establishing the factual basis for sentence. The reference to pre-sentence and psychiatric reports would indicate that matters other than the facts of the offence, such as the characteristics of the offender, were within the Court's contemplation.

[49] "Aggravating fact" and "mitigating fact" are defined in s 24(3).

[50] Above, at note 14.

[51] See *Moananui* above, at note 47.

beyond reasonable doubt.[52]

Section 24(2)(c) only applies where facts are disputed. Thus an attempt by counsel to rely on the section was unsuccessful where the sentencer had indicated his intention to rely on a "shopping list" of items which the offender convicted of receiving allegedly wished to be obtained on a burglary spree, by her co-offender the authorship of which was not expressly disputed. The sentencer was entitled to proceed on the basis that authorship was established. It was said in the High Court: "Were the position otherwise, enormous difficulties could arise in sentencing carried out in the District Court where matters which were neither expressly accepted nor disputed could then be raised on appeal on the grounds that they were not proved as aggravating facts beyond reasonable doubt. I do not accept that that was the intention of the Legislature".[53]

"Wholly implausible or manifestly false" — s 24(2)(c)
This qualification upon the acceptance of the offender's version of mitigating facts may be explained by reference to a number of decisions of the English Court of Appeal.[54] It was held in these cases that where the offender's version as presented to the Court in the plea of mitigation is manifestly false or wholly implausible the Judge may reject it without requiring the prosecution to call witnesses to establish their version.[55]

Determining whether mitigating fact is related to the nature of the offence
Whether a mitigating fact is or is not related to the nature of the offence or to the offender's part in the offence will be able to be determined quite as simply in practice as s 24 suggests is a matter for conjecture. Clearly facts relating to the gravity of an offence, an offender's degree of participation, the presence or absence of provocation, will fall within the expression "related to the nature of the offence or to the offender's part in the offence", but issues as to motivation for the offending, for example, are not so easily categorised.

One of the first cases to deal with this difficult issue was *R v Marks*.[56] The sole question in that case was whether the disputed mitigating fact of M's knowledge as to whether it was heroin he was producing was a fact "related to the nature of the offence".[57] Chambers J

[52] *R v Davis* (HC, Rotorua T 02/3456, 28 March 2003, Heath J) (onus not satisfied where value of crop was consistent with personal use or commercial activity on a very low scale — growing was sophisticated but no evidence of rotating of crops or actual sales); *Gatenby* (above at note 20), (summary of facts did not assert cultivation was for a commercial purpose — guilty plea did not establish whether cultivation was for this purpose or personal use — G's assertion was not wholly implausible or manifestly false — proof beyond reasonable doubt was not present — Court of Appeal concluded G had to be sentenced on basis cultivation was for personal use — sentence reduced).
[53] *Corbett v Police* (HC, Rotorua AP 105/02, 1 April 2003, Heath J), at para [25].
[54] see eg *R v Hawkins* (1985) 7 Cr App R (S) 351; *R v Walton* (1987) 9 Cr App R (S) 107; *R v Bilinski* (1987) 9 Cr App R (S) 360; *R v Mudd* (1988) 10 Cr App R (S) 22; *R v Broderick* (1994) 15 Cr App R (S) 476; *Attorney-General's References (Nos 3 and 4 of 1996)* [1997] 1 Cr App R (S) 29; *R v Underwood* [2005] 1 Cr App R (S) 478.
[55] The submission by the Crown in *R v Marks* (HC, Auckland S 38/02, 7 May 2003, Chambers J) [2003] BCL 618 that adding acetic anhydride to morphine sulphate over heat turned morphine into heroin was so well known that the Court could take judicial notice of it and declare the defendant's statement that he did not know that heroin was the product of this "turning a misty" process "wholly implausible or manifestly false" for the purpose of s 24(2)(c) was rejected. Chambers J stated he was unaware of the process and it stood to reason that others might also not know this.
[56] Ibid.
[57] The offence of producing a controlled drug did not require proof that the offender knew what drug was being produced.

observed:[58]

> "It is clear that the meaning of a mitigatory fact 'related to the nature of the offence' must be wider than essential facts going to liability: otherwise there would be no mitigatory facts within the class, as every sentencing must proceed on the basis that all facts, express or implied, essential to a plea of guilty or a finding of guilt are accepted: see the Sentencing Act, s 24(l)(b)".

In concluding that the disputed fact was related to the nature of the offence, Chambers J had regard not only to the words themselves but also to the reason why Parliament drew a distinction between two types of mitigating facts, and in so doing he analysed the legislative history of s 24. He held that a drug offender's knowledge of the particular drug with which he or she is dealing was an offence fact, and that M's assertion that he did not know that the process he had undertaken produced heroin was a disputed mitigating fact falling within subs (2)(c). Accordingly, it had to be negated by the prosecutor (to the standard of beyond reasonable doubt).

Resolving aggravating or mitigating facts contained in the pre-sentence report

Facts relevant to sentence are frequently found in pre-sentence reports, the preparation of which has been directed by the Court.[59] The issue of the procedure by which disputed facts contained in such reports is to be resolved was addressed recently in *R v Dunsmuir*.[60] The Court of Appeal held that the resolution processes established in ss 24 and 28 of the Sentencing Act could each apply.[61] It proffered the following guidance:[62]

> "In broad terms, the facts to which s 24 is directed will be those relating to the circumstances of the offence whereas the facts and opinions in a pre-sentence report will relate to the circumstances of the offender. There will often be overlap however. Matters disclosed in a pre-sentence report may well be aggravating facts or mitigating facts as defined in s 24. When they are, to the extent that they are facts asserted by one party and disputed by the other, the processes set out in s 24(2) are to be used. On the other hand, matters of information and assessment provided to the Court by a probation officer, if challenged, may be the subject of evidence in accordance with s 28(3). That will be the appropriate process when issues arise concerning the accuracy of what is reported as having been told to the probation officer by the offender and of any opinion proffered on the basis of it."

A statement in *R v Chicoine* in the probation report prepared for sentencing to the effect that C, who had been convicted of manufacturing methamphetamine, indicated that he would share some of the finished product with his mates, was disputed.[63] The Court of Appeal referred to *Dunsmuir* and concluded that there were three ways of dealing with the matter: to adjourn the appeal for a hearing under s 24(2); to refer the matter back to the High Court for a disputed fact hearing in relation to both the reported statement and the Crown's contention that the offending was in the commercial category;[64] or for the appeal to proceed on the basis that G's reported statement could not be relied upon and a decision made on the remaining

[58] Above, at note 55 at para [22].
[59] It is becoming an increasingly common practice for the writer of a pre-sentence report to ask the offender whether there is anything contained in the summary of facts that he or she wishes to challenge, and recording that response in the report.
[60] (CA 439/02, 23 July 2003, Gault P, Baragwanath and Panckhurst JJ).
[61] Section 28(3) provides: "The offender or his or her counsel may tender evidence on any matter referred to in any report, whether written or oral, that is submitted to a court …."
[62] Above, at note 60, at para [15].
[63] (CA 220/04, 21 March 2005, McGrath, Goddard and Salmon JJ).
[64] But see, now, the Court's rejection of this approach in *Gatenby*, below.

evidence. The Court received affidavits from C and the probation officer and, there being a clear conflict, it determined that the proper course was to convene a hearing under s 24(2) to enable cross-examination of the deponents.[65]

That the Court has the power to send the matter back to a District Court or the High Court, as the case may be, for a disputed fact hearing was reconsidered in *R v Gatenby.*[66] After examining s 385(3) of the Crimes Act 1961, the Court concluded there was no power to quash a sentence and remit a case back for a disputed fact hearing, followed by a re-sentencing of the offender. Responsibility rested with the Court of Appeal. The inevitability of delay in *Gatenby* meant that if a disputed fact hearing was held in the Court of Appeal (as in *Chicoine*), and if the matter was resolved in G's favour, there was scope for him to serve a longer term of imprisonment than was appropriate for personal use. The issue was determined as matters stood. The onus of proof was not met. G's actual criminality was never established. Sentence was reduced to that appropriate to the factual basis accepted by G.

V. CONCLUSION

In the great majority of sentencings since the passage of the Sentencing Act there have been no disputed facts relevant to sentencing, or at least no such disputes which have required resort to the procedure in s 24(2)(b) to (2)(d). Nonetheless, there have been a number of cases where disputed facts hearings have been required, with some of these being lengthy. The relatively small number of cases, at High Court level at least[67], where disputes as to the factual basis for sentence have arisen, can arguably be said to be proof that the legislative prescription in s 24 is working well in practice. The proliferation of factual basis hearings, as feared by commentators to the draft report of the Law Commission, has not eventuated.

[65] After so doing the Court concluded that the only available inference was that C had sufficient knowledge to set up a rudimentary laboratory and to carry out the manufacturing process, and intended to supply at least part of the methamphetamine he was manufacturing to friends, although this intended supply may not have been for financial reward. The starting point of four years adopted by the sentencer was too high for a small operation with intended supply of part of the manufactured product to associates. A starting point of three years was taken and, with a reduction for the guilty plea, a sentence of two years three months' imprisonment was imposed.

[66] Above, at note 20.

[67] The frequency with which such hearings take place in a District Court is difficult to ascertain, but a local Judge estimated to the presenter that he would preside over three or four a month.

ADDENDUM

Sentencing Act 2002 (NZ)

Proof of facts

24 (1) In determining a sentence or other disposition of the case, a court—

(a) may accept as proved any fact that was disclosed by evidence at the hearing or trial and any facts agreed on by the prosecutor and the offender; and

(b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.

(2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—

(a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:

(b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the hearing or trial:

(c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:

(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:

(e) either party may cross-examine any witness called by the other party.

(3) For the purposes of this section,—

aggravating fact means any fact that—

(a) the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case

mitigating fact means any fact that—

(a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.