FACT FINDING ON SENTENCE:

A TRIAL JUDGE'S PERSPECTIVE

A paper by Justice KGW Mackenzie, Supreme Court of Queensland.

International Society for the Reform of Criminal Law Conference, "Justice for All – Victims, Defendants, Prisoners and the Community", Brisbane 4 July 2006.

Fact finding for the purpose of sentencing an offender is often complex because of the infinite factual variations for which offenders have to be sentenced. Frequently the facts from which the degree of culpability must be decided are contentious. Since fact finding is not inquisitorial but driven by the facts the prosecution and defence choose to rely on, a sentencing judge in Queensland must exercise the sentencing discretion within those limitations.

This approach to sentencing is well entrenched. The question for an Australian sentencing judge is really not how much information is needed for sentence but how to sentence appropriately and in accordance with principle on whatever information is provided. A number of fundamental issues have been examined in recent Australian authorities. That there are dissenting views on some of them demonstrates the difficulty a trial judge and appellate judges must face.

In this paper, a number of those issues will be identified. Because an attempt to state absolute propositions in an area where there are so many variables is likely to be futile and perhaps counter-productive, the approach adopted in the paper is to identify some of the issues and show how they have been resolved in the cases especially in the High Court of Australia with a view to providing a basis for discussion.

The following is a list of issues, no doubt far from exhaustive:

1. How are matters relevant to sentencing raised?
2. Is strict proof by admissible evidence of those matters necessary or is a less formal procedure permissible?
3. Where does the onus of proof lie when facts relevant to sentencing are raised?
4. What is the standard of proof of sentencing facts?
5. On what basis is a sentence to be imposed where the trial judge is not satisfied that a version of the degree of culpability has been

proved? This involves the relationship between rejection of a version and proof of the opposite proposition.

6. Limitations inherent in a system where parties raise issues to be considered.
7. How should a sentencing judge approach a case where a plea of guilty has been negotiated between the parties, without judicial input, on the basis of a "plea arrangement"?
8. Accepting that not all facts relevant to sentencing can practically be the subject of a jury verdict, what limits are there on the judge determining the basis for sentencing?
9. Where does the boundary lie between permissible fact finding by a trial judge who has heard the evidence at trial with the opportunity to assess credibility and sentencing on a basis inconsistent with the jury's verdict?
10. To what extent is asking the jury questions to elicit the basis of a verdict, eg, by questioning the jury or by special verdict, permissible and, if so, practical?
11. Where the evidence suggests that the offender has engaged in criminal conduct other than that specifically charged, can such conduct be taken into account in sentencing in the absence of a finding of guilt of the conduct not charged?
12. To what extent should the indictment be drafted so that counts accommodating variants of the Crown case are precisely before the jury and therefore the subject of a jury verdict?

Issues of onus of proof interact with those relating to the fact finding process itself. The fact finding process is influenced by issues 9 to 12. At the practical level, issues may be isolated as ones that are important. But stating them as abstract propositions of universal application is fraught with risk because of the many qualifications that would have to be made. Because the degree of the interaction in an individual case is dependent on its particular circumstances, it is instructive to set out in summary form the process of reasoning in the relevant High Court authorities to show how the High Court has resolved the particular issues in the situations presented to it for the purpose of providing a structure for further discussion.

Background

The substantive criminal law of Queensland has been codified since 1 January 1901 when the *Criminal Code ("Code")*, contained in Schedule 1 to the *Criminal Code Act* 1899, came into force. The date 1 January 1901 is the same date as the Constitution of the Commonwealth of Australia came into force, completing the tortuous political process of

effecting federation of the six Australian colonies into the Commonwealth of Australia. Because of the distribution of powers inherent in a federal nation, the States and the Commonwealth exercise concurrent legislative power over the criminal law. State legislation covers the traditional kinds of crimes and misdemeanours. Some offences affecting the interests of the Commonwealth and its instrumentalities are subject to Commonwealth legislation.

The High Court of Australia has appellate jurisdiction from State Courts in criminal matters (s 73 *Commonwealth Constitution*). However, since the High Court regulates whether it will hear an appeal in an individual case in consequence of the requirement that criminal appeals are subject to special leave granted by the Court (s 35(1)(b) *Judiciary Act 1903* (Cth)), intermediate appellate courts of the States and Territories are effectively the final courts of appeal in most criminal matters.

In Queensland, the Court of Appeal hears and determines appeals relating to indictable offences heard in the Trial Division of the Supreme Court and the District Court, both under State and Commonwealth legislation. Until the High Court has otherwise determined a matter of principle, trial judges of the Supreme and District Courts are bound by the decisions of the Court of Appeal (eg, *Gilbert v R* (2000) 201 CLR 414).

In the Queensland system, an appeal against conviction instituted within the prescribed period involving a question of law is an appeal as of right (s 668D(1)(a) *Code*). When a convicted person wishes to appeal against sentence, leave of the Court of Appeal is required, (s 668D(1)(c) *Code*), but in practice, when the application has been instituted within the prescribed time, there is a hearing on the merits, with the final order being refusal of the application for leave to appeal if the application is unsuccessful.

Statutory sentencing regime

In Queensland, the principles governing State offences are to be found principally in the *Penalties and Sentences Act* 1992 and the *Juvenile Justice Act* 1992. The level of sentence imposed is almost exclusively discretionary, subject to the statutory maximum penalty for a particular offence, except in the case of murder for which mandatory imprisonment for life applies. Attempts to establish statutory minimum penalties have been rare and unsuccessful. There has been no enthusiasm for a sentencing grid system.

Commonwealth sentencing principles are contained principally in the *Crimes Act* 1914.

Commencement of the sentencing process

An accused person's trial is deemed to begin when the accused person is called upon to plead to the indictment (s 597C(3) *Code*). If there is a plea of not guilty the matter proceeds to trial. If there is a plea of guilty, the plea, when accepted and acted upon by the court (*Griffiths v The Queen* (1977) 137 CLR 293; *Maxwell v The Queen* (1996) 184 CLR 501; *R v Collins ex parte Attorney-General* (1996) 1 QdR 631) constitutes an admission of the legal elements of the offence and the matter proceeds to sentence.

It is often the case that a plea of guilty is merely recognition that the evidence establishes the elements of the offence, without necessarily accepting that the seriousness of the offence is as the prosecution would contend. In other words, there may be acceptance that the prosecution can establish facts that prove the elements of the offence, but not acceptance that it can successfully maintain an interpretation of the proven facts that cast a more serious complexion on the case than the defence contends for. Taking advantage of the benefit available for a plea of guilty, especially a timely plea, may be attractive (*Penalties & Sentences Act 1992 (Qld)*, s 13; *R v Bulger* (1990) 2 QdR 559), since it is ordinarily reflected by amelioration of the effect of the sentence.

A frequently occurring example in the Supreme Court of Queensland where an issue arises concerning the nature of the offence is where a person is found in possession of dangerous drugs but there is a contest between the prosecution and the defence as to whether the offender had them in his possession for personal use or commercial purposes. Section 9 of the *Drugs Misuse Act* 1986 (Qld) does not differentiate between possession for personal use and possession for commercial purposes. It is not a case where a higher penalty is prescribed for possession for a commercial purpose. There is no need, or basis, to include an allegation of possession for a commercial purpose as a circumstance of aggravation in the indictment (see definition of "circumstance of aggravation" in s 1 *Code* and s 564(2) *Code*). The relative seriousness of offences of possession of a dangerous drug is governed by two criteria, the Schedule in which the drug is included, and whether the amount of the drug exceeds a quantity prescribed with regard to the individual drug in the Schedule. The maximum penalty is prescribed by reference to those factors. Yet, factually, it is a circumstance that makes the offence more

serious if it is committed with a commercial motive than if it is committed for personal use.

Frequently, the drugs will have been found in proximity to the paraphernalia of drug dealing such as large quantities of clipseal bags, scales and other items used in preparing drugs for sale, as well as in quantities well in excess what would be normally considered sufficient for personal use over a reasonable period into the future. Nevertheless, the claim that the drugs are for personal use is frequently made. A high degree of suspension of disbelief is needed not to infer that the explanation is false.

The Queensland approach may be influenced by the standard of proof applicable, on the balance of probabilities, which applies for reasons to be explained later. The issue raised is whether, if the claim and any explanation given to the police or in submissions from the Bar table for the quantity of the drug and innocent possession of the other paraphernalia is inherently improbable, an inference adverse to him might not be drawn on a circumstantial basis that the drugs were for a commercial purpose, especially if the offender does not give evidence on sentence to support the explanations.

Does the existence of an extended definition of "supply" which encompasses both attempts and preparatory acts to supply drugs preclude such an approach because the person might have been charged with supply rather than possession and the issue of commerciality determined by a jury?

Recent cases in the High Court, referred to below, in which there have been extensive discussions of principle concerning the sentencing process have also involved drug offenders, the question focussed on being what role the offender played in importing drugs into Australia.

Circumstances of aggravation

The definition of "circumstance of aggravation" in s 1 of the *Code* is as follows:

> "***circumstance of aggravation*** means any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance."

It focuses on "liability" to a greater punishment. In using that concept, it reflects the terminology used in sections fixing a maximum penalty for individual offences, which is that an offender who commits the offence "is liable to imprisonment for" whatever is the maximum penalty for the offence. So far as the requirement in Queensland to allege a circumstance of aggravation is concerned, it is the fact that a higher penalty than for the basic offence is prescribed by the *Code* itself if a particular additional fact rendering the offence more serious accompanies the commission of the basic offence that makes it necessary to allege it as a circumstance of aggravation in the indictment. That is what s 564(2) of the *Code* requires; it simply provides that:

> "If any circumstance of aggravation is intended to be relied on, it must be charged in the indictment"

If a circumstance of aggravation is charged but the jury convicts of an offence that does not include it as an element, as it may by virtue of s575 *Code*, it must be ignored for sentencing purposes. *R v Geary* [2002] QCA 33, is a case involving an application of the principle. Geary was charged with trafficking in drugs, a Schedule 1 drug, LSD, and other drugs which were Schedule 2 drugs. The maximum penalty for trafficking in Schedule 1 drugs was higher than for trafficking in Schedule 2 drugs. It was conceded by the prosecution that the allegation that he had trafficked in LSD was a circumstance of aggravation for that reason. He was also charged with specific offences of supplying individual drugs in separate counts. He was convicted of trafficking and also of supplying Schedule 2 drugs but for reasons concerning the quality of the evidence, was acquitted of supplying LSD. On appeal against sentence, it was held that although the verdict of trafficking related to unspecified drugs, the reality was that the jury must have had a reasonable doubt whether he trafficked in LSD and he should be sentenced only on the basis of trafficking in Schedule 2 drugs.

Kingswell v R (1985) 159 CLR 264 shows a division of opinion in the High Court, in relation to a non-Code jurisdiction, whether it was necessary, or at least desirable in the interests of uniformity of approach in Commonwealth matters, to allege matters that would need to be alleged, in Code jurisdictions, in the indictment.

Sentencing process in Queensland

In Queensland courts the sentencing process is relatively informal. In the vast majority of cases, it follows immediately on the plea of guilty being entered or a verdict of guilty being returned. In the case of a plea of

guilty the Crown Prosecutor states the facts upon which he or she relies as the basis for sentence. Sometimes this is done by means of an oral summary of the evidence contained in statements of witnesses, oral evidence, if any, given at the committal proceedings and the contents of a record of interview if one is conducted between the police and the accused. Sometimes a written summary of facts is tendered, especially in cases where there are multiple counts on the indictment. In some cases, there is a statement of facts agreed between the prosecution and the defence. In others, such a statement is merely one prepared by the prosecution to conveniently summarise the prosecution's allegations.

After the prosecution has made its submissions about the basis of sentence, the defence makes submissions on the facts, including identification of any allegations of fact that are not accepted or any inferences relied on by the prosecution that are disputed. Matters in mitigation are stated orally and often supported by written material relating to the character, reputation, physical and mental health and other personal circumstances of the accused. Sometimes, but uncommonly, evidence is called with a view to establishing or rebutting a fact or inference in dispute.

It is also the practice in Queensland for both counsel to make submissions on the appropriate penalty, often by reference to schedules of sentences for like offences, and to individual cases for the purpose of illustrating similarities or differences relevant to penalty.

Where the matter has gone to trial and the accused is to be sentenced as a result of a jury's verdict, there is commonly little more said during the sentencing process about the facts. Generally, where further analysis occurs it will be where there is more than one route by which the verdict may have been reached.

Section 561 *Code* allows an *ex officio* indictment to be presented, without committal proceedings being held. In practice, this procedure is used, in relation to sentence, when an offender notifies the Director of Public Prosecutions before committal proceedings have begun that he wishes to plead guilty without the need to hold committal proceedings. Some perceive that such a course is an additional reason over and above early notification of a plea of guilty for leniency upon sentence because resources have not been expended in holding a committal proceeding. Subject to what is said below, sentencing on an *ex officio* indictment proceeds in essentially the same way as for a plea of guilty.

The fundamental importance of committal proceedings was emphasised in *Barton v The Queen* (1980) 147 CLR 75. Examples of the hazards of dispensing with them can be found in *R v Webb* (1960) Qd R 443 and *R v Judge Grant-Taylor ex parte Johnson* (1980) Qd R 387. With a view to minimising the risks, a practice direction was issued by the Supreme Court requiring that no matter be listed for sentence by way of *ex officio* indictment unless a draft indictment and certificate, signed on behalf of the DPP and the legal representatives of the accused confirming the factual basis of the plea of guilty, have been agreed upon. The Queensland Director of Public Prosecutions' guidelines issued on 18 November 2003 state that the Office of the Director of Public Prosecutions may decline to proceed by way of *ex officio* indictment where there is any relevant dispute about the acceptance of all of the material allegations set out in the police documents summarising the offence. Rarely, matters reach court without compliance with the need for agreed facts under this procedure. *R v Cay, Gersch* & *Schell ex parte Attorney-General (Qld)* [2005] QCA 467 is an example of the complications that may result.

Subject to the issue of standard of proof, about which something will be said below, the following, from the judgment of Williams J in *R v Morrison* (1999) 1 Qd R 397 is a succinct overview of the Queensland approach to sentencing:

> "In practice in most cases no evidence will be called as part of the sentencing procedure. Often any dispute will be treated informally; the judge will be left to decide between conflicting statements made from the Bar table. There will in general be no problem if the sentencing judge imposes sentence on a particular basis provided that proof beyond reasonable doubt is required of any disputed factual issue which, if proved, is likely to result in a heavier sentence.
>
> Given the foregoing analysis it is clear that upon conviction, whether in consequence of a jury verdict or a plea, it is for the judge to determine the facts material to the exercise of the sentencing discretion. The facts as determined by the judge for sentencing purposes must be consistent with the jury verdict or plea of guilty; facts implicit in the conviction cannot be controverted. Where a fact is admitted or not challenged, the sentencing judge may act on that fact without making any formal finding in relation thereto. But where it is sought to prove an issue which is adverse to an offender in the sense that, if proved, it would be likely to result in a heavier sentence, and that issue is

> disputed, it must be proved beyond reasonable doubt. Where, on the other hand, a disputed factual issue, if proved, would favour the accused in the sense that it would be likely to result in a less heavy sentence, the sentencing judge need be satisfied of that proof only on the balance of probability. It is not for the prosecution, in such circumstances, to disprove the matter beyond reasonable doubt. Where a jury verdict may be supported on more than one basis, it is for the sentencing judge to find the facts relevant to sentence, consistent with the jury's verdict, and applying those principles."

Principles to be taken into account – State
(a) Governing principles

In relation to adult offenders, Part 2 of the *Penalties and Sentences Act 1992(Qld)* sets out "governing principles" for sentencing State offenders. Sections 9 sets out sentencing guidelines which provide different criteria for violent offenders, sex offenders and offenders who fit into neither of those categories. Sections 10 – 13A respectively require reasons for sentencing to imprisonment to be stated, matters relevant to determining the offender's character, matters relevant to recording a conviction or not, requiring a guilty plea to be taken into account, and requiring cooperation with law enforcement authorities to be taken into account.

For the purpose of fact finding, s15(1) prescribes that:

> "In imposing a sentence on an offender, a court may receive any information …… that it considers appropriate to enable it to impose an appropriate sentence."

That provision superseded a provision then in s 650 of the *Code* which said:

> "The court may receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed or order to be made."

The sentencing process did not, in practice, differ from that described above, even under s 650. Substitution of the concept of "information" for "evidence" is a clear affirmation that the court may receive any information it considers appropriate for the purpose of imposing sentence without the need to observe strict rules of admissibility (*R v Miller* [2003] QCA 404). Section 132C of the *Evidence Act 1977*, the history of which is referred to in the next section, is also relevant in that connexion.

(b) Standard of proof - a Queensland difference

In a series of cases (*R v Welsh* (1983) 1 Qd R 592; *R v Boney ex parte Attorney General* (1986) 1 Qd R 190; *R v Jobson* (1989) 2 Qd R 464; and *R v Nardozzi* (1995) 2 Qd R 87) the principle that proof on the balance of probabilities, commensurate with the importance and gravity of the issue and the consequences, was developed. In *R v Morrison* (1999) 1 Qd R 397, a specially convened court of five judges reconsidered the issue in light of a decision of the High Court in *Anderson v R* (1993) CLR 520) and appellate court decisions in other States (*Langridge v R* (1996) 17 WAR 346; *R v Isaacs* (1997) 41 NSWLR 374; *R v Storey* (1998) 1 VR 359) in which proof beyond reasonable doubt had been held to be the appropriate standard. By a 3-2 majority, it was held in *Morrison* that the earlier Queensland authority should be overruled. The majority (Fitzgerald P, Davies JA and Williams J) emphasised the desirability of uniformity throughout Australia. Fitzgerald P and Davies JA endorsed the notion that, unless otherwise required by statute, the content of the fundamental common law right of an accused to a fair trial, up to and including sentencing, should be uniform throughout Australia.

The principle expounded in *Morrison* survived for less than two years. The legislative intervention in the form of the Evidence Amendment Act 2000 essentially restored the pre-existing position. Following a minor amendment in 2001, s 132C of the *Evidence Act* 1977, which now governs fact finding on sentencing in Queensland, is as follows:

"**132C Fact finding on sentencing**

(1) This section applies to any sentencing procedure in a criminal proceeding.

(2) The sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.

(3) If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true.

(4) For subsection (3), the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.

(5) In this section—

allegation of fact includes the following—

(a) information under the *Penalties and Sentences Act 1992*, section 15 or evidence given at a hearing in relation to an order under part 3A of that Act;
(b) information under the *Juvenile Justice Act 1992*, section 150(3) or in a presentence report under section 151 of that Act;
(c) information under the *Criminal Offence Victims Act 1995*, section 14;
(d) other information or evidence.

Although there is no authority on the point of which I am aware, the practical consequence of this seems to be that if a person is to be sentenced in Queensland for an offence against a Commonwealth law, in the absence of any inconsistent provision in Commonwealth law the offender would be subject to being sentenced under a different standard of proof of facts from that applicable if sentenced in States and Territories where proof of sentencing facts beyond reasonable doubt is required.

Principles to be taken into account – Commonwealth

Division 2 of Part 1B of the *Crimes Act 1914* (*Cth*) sets out "general sentencing principles". In s 16A(2), there is a list of matters that the court must take into account. There is an important qualification, reflected in the wording of the commencement of the subsection:

> "In addition to any other matters, the court must take into account such of the following matters **as are relevant and known to the court:**" (emphasis added).

The words emphasised are important in defining the function of a sentencing judge, for reasons that are elaborated on in decisions analysed below.

Fact Finding after Trial

The High Court recently examined this issue in detail in *Cheung v The Queen* (2001) 209 CLR 1. Gleeson CJ, Gummow and Hayne JJ delivered joint reasons and Kirby J and Callinan J delivered separate concurring reasons. Gaudron J dissented.

The case was left to the jury to two bases, the first of which relied on the evidence of an informer and showed that the offender was involved in organising the importation of drugs. The second, which was independent of the informer's evidence, showed that he was actively involved as a

principal, although the precise nature and extent of his involvement was not clear. The jury did not specify on what basis they returned their verdict. The trial judge accepted a substantial part of the informer's evidence. The point in issue was whether the appellant may have been sentenced on a basis upon which he had not been convicted, since the evidentiary basis on which the jury convicted was not known.

The joint judgment contains a large number of important propositions. The starting point is that determining the degree of culpability for sentencing purposes is for the judge. If a fact is an element of the charge, the judge will be bound by the way the jury decided that element. However, if issues decided by the jury's verdict do not include a matter of potential importance in assessing the degree of culpability, the judge may make an assessment of the degree of culpability which would not be supported by all, or perhaps any, of the jury, provided the facts found are not inconsistent with the jury's verdict.

Evidence may have been heard by the jury on matters relevant to the degree of culpability, but if they are not matters on which issue was joined, they may not have been of significance to some or all of the jurors in the process by which they reasoned as to the guilt of the offender. Although of potential significance to the degree of culpability, they were not questions the jury had to decide to determine guilt. Further, some facts relevant to sentence may not emerge until the sentencing proceedings.

While all elements of the offence must be found beyond reasonable doubt, provided the jury reasons in a way consistent with properly framed directions, the process of reasoning to reach a verdict of guilty does not have to be unanimous. Unless a particular piece of evidence is logically crucial to the prosecution case, jurors do not have to accept beyond reasonable doubt any particular witness or any particular evidence.

Where the judge has to decide an issue relevant to sentence, his evaluation of the evidence may or may not coincide with that of the jury. There is no general requirement that the sentencing judge must sentence on the basis of a view of the facts, consistent with the verdict, which is most favourable to the offender. Provided the facts found are not inconsistent with the jury's verdict, the judge may make an assessment not supported by some or any of the members of the jury.

If the judge is not able to be satisfied as to a fact relevant to sentence, the accused is sentenced on the more favourable basis. But this is not

because the judge is obliged to sentence on a view of the facts most favourable to the accused; it is because he is not satisfied of the prosecution's allegation that facts making the offence more serious has been proved.

Gaudron J's dissent focussed on the different bases upon which a verdict of guilty may have been returned and the argument that the criminal law should be developed in a way suggested by the English cases of *Stosiek* (1982) 4 Cr App R (S) 205 and *Efionayi* (1994) 16 Cr App R (S) 380. As she framed the question it was whether, if the law permits of charges upon which factual issues relevant to sentencing can be found by a jury, the trial judges can find in his or her sentencing options. More precisely, is he or she entitled to sentence on the basis of a level of criminality as to which the jury might have been but was not necessarily satisfied? The conclusion she reached is reflected in the following paragraphs from her judgment:

> "[86] So long as an indictment charges an offence, it is open to the prosecution to frame the indictment in any way it chooses. However, the efficient administration of justice depends on the prosecution charging offences which reflect the real criminality of the conduct involved. So, too, does confidence in the administration of criminal justice. And where the prosecution alleges guilt on alternative bases, the efficiency of and confidence in the administration of justice also depend on the charging of alternative counts, so long as the law permits of that course.
>
> …
>
> [88] In my view, the course taken by the United Kingdom Court of Appeal in *Stosiek* and *Efionayi* is one that should be followed in this country. That course ensures a real measure of consistency with the jury's findings. Further, any other course undermines the role of the jury, and, thereby, lessens confidence in the administration of criminal justice."

On the other hand the majority said that that proposition did not represent the law in Australia.

Fact finding on plea of guilty

In *R v Olbrich* (1999) 166 CLR 330 the High Court considered aspects of the problems of fact finding when a plea of guilty is entered. Gleeson CJ, Gaudron, Hayne and Callinan JJ delivered joint reasons. Kirby J delivered dissenting reasons. The offence under consideration was drug importation and the issue in dispute was whether the offender should be classified as a "courier" and not a "principal".

The starting point was that a plea of guilty is an admission of all elements of the offence. The sentencing judge had put the onus on the offender to prove his responsibility was less than the objective facts would otherwise indicate. Having disbelieved the offender's evidence that he was a courier, the sentencing judge had said that he should treat him as if he had said nothing about the circumstances of the event. He then applied ordinary sentencing principles, taking into account the nature of the offence, the maximum penalty and matters relevant to assessment of the objective features of the offence.

The New South Wales Court of Appeal, on the other hand, concluded that the Crown had the onus of proving the degree of involvement beyond reasonable doubt. In the absence of relevant evidence, the offender was entitled to be sentenced on the basis most favourable to him. It also held that identification of the precise nature of the offender's involvement was an essential aspect of the sentencing process.

The joint High Court majority judgment disagreed with the Court of Appeal's analysis. The judgment says that the utility of categorising the offender's role is often limited by reason of the extent of the facts known in a particular case. Categorising roles should not be elevated to an essential task to be undertaken in every case. In a case where it was known that the offender had imported drugs but little was known apart from that, except for what he had said in evidence, the issues were whether the sentencing judge was obliged to inquire about other facts and obliged to make assumptions favourable to the accused person.
It was said that there were practical reasons for not inquiring as to events before and after the importation. They included the fact that there may be limited or imperfect information; that the judge is only required to take into account facts "so far as they are known" (s 16A(2) *Crimes Act*); and that acts to be done with respect to the drugs after importation are not always relevant to the sentence for importation.

It was, however, observed that classification of the offender's role may be useful in ranking the culpability of co-offenders. Also, if a single offender can be fitted into the hierarchy of an organisation, that would be a relevant finding. If a person is a courier, however, what others intended to do is irrelevant to his sentence (assuming there is evidence of what they intended to do).

The joint judgment rejected the contention that if the judge is not satisfied of some matter urged in the plea on the offender's behalf, the sentence

must proceed on the basis that the judge has accepted the offender's contention unless the Crown proves to the contrary. It would be incongruous to act on the basis, as this case exemplified, because the explanation given by the offender had been disbelieved.

The joint judgment also makes the point that there is no joinder of the general issue in sentencing proceedings. However, if the Crown seeks to have a matter taken into account, it must bring it to the judge's attention and, if necessary, call evidence. Those obligations also apply to the defence. In that context, the phrase "if necessary" is intended to encompass cases where an asserted fact is controverted by the other side or if the judge is not prepared to act upon an assertion made. Since the defence asserted that the offender should be sentenced as a courier, it had the onus in this case.

With regard to standard of proof, the majority said that facts adverse to the accused must be proved beyond reasonable doubt; facts in favour of the offender may be proved on the balance of probabilities. It was held that the learned sentencing judge had not taken facts adverse to the offender into account other than those established by the plea of guilty and the statement of facts. He had not been persuaded of the matters relied upon by the applicant and did not act upon them. Nor did the prosecution seek a higher sentence than the facts bore.

Kirby J appears to extrapolate the rule that circumstances of aggravation should be the subject of a jury finding (*De Simoni v R* (1981) 35 ALR 265) to this kind of case where the role of the offender is not a circumstance of aggravation in the sense that it became an element of the offence, but is merely a factual finding that, as a matter of logic and commonsense, makes the example of the offence more serious. He said that, for a single offence, where the Crown asserts that the case is an aggravated example, it must prove that the facts demand that conclusion. His dissent rested to an extent on the notion that, on the facts of the case, whether or not the Crown had explicitly stated the circumstance of aggravation, the prosecution had secured the benefit of that conclusion, not by proof, but by the fact that the sentencing judge had rejected the attempt to prove a mitigating circumstance, that the offender was merely a courier.

In *Weininger v R* (2003) 212 CLR 629 the appellant pleaded guilty to being knowingly concerned in the importation of cocaine. At the sentencing hearing, the prosecution, without objection, relied on a statement of facts recording that the offender had told an informant that

he was involved in a continuing cocaine importation syndicate. The appellant gave no evidence at the sentencing hearing but relied on evidence of statements that he made after his arrest to a woman with whom he was living and to a psychologist, the effect of which was the commission of the charged offences was a "one off thing" occasioned by "pressing financial difficulties". He had denied, in those statements, any prior involvement in drug importation.

The issues were said to be firstly whether the sentencing judge was entitled to take into account the offender's commission of other offences which had neither been charged nor admitted and secondly if they could be taken into account, who had the onus and what was the standard of proof.

The majority judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ said that the statement of facts had been tendered without objection and the sentencing judge was therefore entitled to act on the facts in it. Incorporated by reference into the statement were transcripts of conversations between the offender and the informant in which the offender asserted he was part of a cocaine importing syndicate, the method of importation and difficulties encountered in doing so. There had been no suggestion that the transcripts were inaccurate but a distinction was sought to be drawn between the fact that he had said those things and their truthfulness.

The sentencing judge had said that the statement of facts placed him in a relatively senior position in an extensive organisation experienced in importing quantities of cocaine on a large scale. He had rejected the evidence of denials of prior involvement as inconsistent with that evidence. The judge said that the prisoner's prior good character, in the sense that he came before the court without any prior convictions, was a matter that must receive some recognition. However, in the face of strong evidence establishing his participation in cocaine importation by the same syndicate for some period of time before the commission of the instant offences, he could not be treated as a first offender with the attendant leniency that that status usually attracts. The offender's submission on appeal was that this passage of the sentencing remarks revealed an error in that the judge had sentenced the appellant for offences with which he had not been charged and for which he had not been convicted. Further there was an error in the judge's fact finding because, if prior discreditable conduct was to be taken into account, it was for the prosecution to assert it and prove it beyond reasonable doubt.

The Court of Criminal Appeal of New South Wales, by a majority, dismissed the appeal. The point that divided the court was whether, in order to deny leniency to which the offender had a legitimate claim, the prosecution had to assert and prove the acts relied on beyond reasonable doubt.

The joint judgment in the High Court said that the starting point was s 16A(2) of the *Crimes Act*. The obligation to take into account such matters "as are relevant and known to the court", which qualifies the list of matters which must be taken into account, presented the evidentiary and other procedural questions upon which the appeal turned. Those were:

(a) by what means and at whose instigation are the "matters" to be made known?;
(b) are issues of fact to be tendered for resolution by the judicial officer who constitutes the court for that purpose?;
(c) if so, do questions of onus of "proof" arise?;
(d) are there any distinctions found elsewhere between ultimate and evidentiary burdens?; and
(e) to what degree if at all, is the procedure inquisitorial rather than adversarial?

Referring to *R v Olbrich*, it was said that references to onus of proof in the context of sentencing would mislead if they were understood as suggesting that some general issue is joined between prosecution and offender in the sentencing proceedings. Reference was made to a passage from *R v Storey* to the effect that a sentencing judge may not take facts into account that are adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account in favour of the accused it is enough if those circumstances are proved on the balance of probabilities.

However, framing the question in terms of onus and standard of proof may be a distraction in that it may suggest that all disputed issues of fact relating to sentencing must be resolved for or against the offender. As was recognised in *Olbrich*, some disputed issues of fact cannot be resolved in a way that goes to either increase or to decrease the sentence that is to be imposed. There may be issues which the material available to the sentencing judge will not permit the judge to resolve in that way.

Under s 16A(2), the obligation to take into account the nature and circumstances of the offence is not absolute. They are only to be taken

into account to the extent "known to the court". Where something about the nature or circumstances of the offence favourable to the offender is urged but the learned sentencing judge is not persuaded on the balance of probabilities that it is established, it is not necessary for the sentencing judge to sentence on that favourable basis. Use of the phrase "known to the court" rather than "proved in evidence" or some equivalent expression suggests that s 16A was not intended to require formal proof of matters before they could be taken into account in sentencing. The provision had been enacted against the 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 should not be therefore construed as imposing a universal requirement that matters urged in sentencing hearings be either formally proved or admitted.

Since many matters that must be taken into account in fixing sentencing lie along the line between two extremes, it invites error to present every question for sentence as a choice between two extremes, one aggravating the other mitigating.

Sentencing is not an inquisition into everything that may bear on the circumstances of the offence or matters personal to the offender. The question is what is the judge to make of what is known and of matters urged by the parties. Some will concern matters to which a range of answers may be given.

The court said it was important to avoid introducing "excessive subtlety and refinement" to the task of sentencing, as was pointed out in *R v Storey*. The objective is advanced if attention is paid to identifying matters taken into account adverse to the offender and those taken into account in his favour. Not every matter has to be or can be fitted into one or other category. The absence of persuasion about a fact in mitigation is not equivalent to persuasion of the opposite fact in aggravation.

From the fact that he had no previous convictions, the offender tried to have a wider conclusion drawn that he was of good character. Without being exhaustive, "character" includes the absence of previous convictions and whether a person has previously engaged in other criminal activity. The issue of whether the offender had not previously engaged in drug importation was not to be resolved by choosing between satisfaction on the balance of probabilities that he had not, or been satisfied beyond reasonable doubt that he had. Different standards of proof leave open the possibility that a judge might be satisfied of neither

conclusion to the required standard. The state of material before him may work neither for nor against the offender.

The majority reasons concluded that the sentencing judge had reached the conclusion that on the facts known to her, absence of previous convictions did not, as ordinarily would be the case, demonstrate the absence of prior criminal behaviour. It was not erroneous to not be satisfied that he was a person who had probably not previously engaged in similar criminal conduct.

With regard to the proposition that the sentencing judge had sentenced the offender for crimes for which he was not charged, it was said that the sentencing judge had not done so. It was said that a person who has been convicted of or admits to the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence again for offences of which he was earlier convicted or to sentence the offender for offences admitted but not charged. What had been done was no more than to give effect to the well established principle that character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed.

The court also observed that principles of the kind within *R v De Simoni* were not engaged in this case. *De Simoni* was a case in which the offender had been sentenced for an aggravated form of offence when the offence charged was the simple rather than the aggravated offence. That was not this case.

The essence of Kirby J's dissent is to be found in the following passage at 657-658:

> "[94] Whatever different views may be taken of complex sentencing facts known to a court on sentencing a federal offender convicted on the basis of a plea or verdict, when it is suggested that other and different *offences* are relevant to sentencing, beyond those contained in the indictment giving rise to such plea or verdict, such other and different *offences* must either be added to the indictment so that the accused can decide how to plead to them; or they must be openly acknowledged by the accused as relevant to the sentencing process to be taken into account in the sentence; or they must be disregarded in imposing the sentence. If such facts are advanced by the prosecution in a purely defensive way to rebut

> suggestions of good character, two rules must be strictly observed. If the facts are adverse to the interests of the accused they must not be taken into account by the sentencing judge unless they have been established beyond reasonable doubt. In considering any such rebuttal, the sentencing judge must be careful not to allow the evidence tendered for the purpose of rebuttal effectively to assume a role that increases the criminal punishment of the person standing for sentence, including by depriving that person of any established legal rights to leniency…"

Special verdict

Section 624 of the *Code* makes provision for special verdicts to be taken. It is as follows:

> "In any case in which it appears to the Court that the question whether an accused person ought or ought not to be convicted of an offence may depend on some specific fact, or that the proper punishment to be awarded on conviction may depend on some specific fact, the court may require the jury to find that fact specially."

In the Supreme Court at least, this power is sparingly used for sentencing purposes. The trial judge has a discretion to seek a special verdict but is not obliged to do so merely because the prosecution or defence request that a special verdict be taken (*R v Organ* [1994] QCA 194). In *Geary*, the facts of which are summarised above, the Court of Appeal said the following:

> "…it is important to know what drugs were involved in the trafficking when it comes to sentence; as noted above the maximum penalty varies according to the specific dangerous drug involved. It is thus obvious that problems can arise where it is alleged that a variety of drugs were involved, some specified in Schedule 1, and some in Schedule 2. The problem is not an unfamiliar one to judges presiding at criminal trials; a similar problem arises, for example, where a jury returns a verdict of manslaughter which could be based either on an absence of intent to kill or on proven provocation. The difficulty confronting a judge in that situation and the ways the problem may be overcome are discussed in *R v Morrison* [1999] 1 Qd R 397."

In theory, it may be thought that, in the fact finding process for sentencing purposes after a trial, it may be of assistance if the trial judge were to seek guidance from the jury as to the basis upon which it reached

its verdict. However, it may also be thought that doing so may, at least in some cases, create more practical problems than it solves.

For example, in a case where members of the jury can be satisfied as to all elements of an offence without necessarily accepting all of the details of the evidence that some of the other jurors accept, or the verdict has not been reached on precisely the same legal basis, (without the added complications of which those in *KBT v R* (1997) 191 CLR 417 are an example), any attempt to elicit a common basis would often be futile. The issue of circumstances where unanimity may or may not be achieved by a jury where more than one basis of liability is relied on by the prosecution is beyond the scope of this paper. *R v Leivers & Ballinger* (1999) 1 Qd R 649 contains an exhaustive analysis of it, with reference to Australian and overseas authority as it stood at the time. (*Thatcher v the Queen* (1987) 32 CCC (3d) 481, 518; *R v Brown* (1983) 79 Cr App R 115; *R v Phillips* (1987) 86 Cr App R 18; *R v Gaughan* [1990] Crim LR 880; *R v Chignell* [1991] 2 NZLR 257; *R v Beach* (1904) 75 A Crim R 447; *R v Ryder* [1995] 2 NZLR 271; *R v Giannetto* [1997] 1 Cr App R 1.)

Plea agreements

GAS v R (2004) 217 CLR 198 was concerned with an allegation that, in a Crown appeal against sentence, the Crown had made submissions contrary to a plea agreement reached with the offenders as a result of which they had pleaded guilty to manslaughter. Particular elements of the plea agreement contended for were that neither accused would blame the other for the killing; each would be sentenced as an aider and abettor; and therefore each would receive a lesser sentence than a principal.

The unanimous judgment of the High Court said that it was not within the capacity of the parties to agree that each accused would receive a lesser sentence than a principal. At the most, there could be an agreement as to a submission of law to be made to the sentencing judge, but, to the extent that it relied on authority, it was for the sentencing judge to read and interpret any relevant decision. That raised the question of the significance the sentencing judge was entitled or bound to attach to the fact that the offenders were aiders and abettors rather than a principal in the first degree.

The Court of Appeal of Victoria had answered that question by saying it depended on the circumstances of the case. While it may be correct as a generalisation that aiders and abettors are less culpable than a principal offender, it is not an absolute rule. In the particular case under consideration, the differential was not sufficiently substantial to explain

or justify the sentences imposed by the sentencing judge, which, it was said, had not given sufficient weight to the objective circumstances and had overemphasised subjective circumstances.

The case is instructive as to the prosecution's responsibility to decide the charge to be preferred, the responsibility of offenders and their advisers to decide whether a plea of guilty should be entered and the trial judge's duty to find facts within the limitations of the material before him. Importantly, the point is also made that there may be an understanding between the prosecution and the defence as to the evidence to be led or admissions to be made, but that does not bind the sentencing judge. Those factors may constrain a sentencing judge's capacity to find facts, but the judge must apply, to the facts found, the relevant law and sentencing principles. The responsibility of the sentencing judge to find and apply the law is not circumscribed by the conduct of counsel.

Finally, the importance of recording in writing or, failing that, stating in open court the terms of the agreement between counsel was stressed. It was said that it is preferable to record it in writing before it is acted upon, although it was recognised that there may be cases where neither course is desirable or possible. However they would be expected to be rare.

Conclusion

As a trial judge who occasionally sits by rotation on the Queensland Court of Appeal, it is easy to agree with Kirby J's comments in *Weininger*, at 645:

> " …… sentencing is a complex judicial function. It is not a mechanical task. Nor is it capable of being reduced to a mathematical process. Appellate courts, including this court, should approach judicial reasons for sentence with realism, avoiding an overpernickity attention to particular words or phrases deployed in such reasons. They should remember that, in explaining a partly intuitive judgment that depends upon multiple considerations, a sentencing judge can only ever express the main considerations that have influenced his or her sentence"

There remain a number of issues with regard to sentencing where there is room for legitimate differences of opinion, even at the highest levels of the judicial system. It is hoped that exposure of some of them stimulates informed and constructive debate in the interests of all participants, voluntary and involuntary, in the criminal justice system.