

13:

SENTENCING

6 Sentencing Checklist

Sentencing is one of the most difficult areas of judicial discretion, so it is important to develop a systematic method of working. The following checklist provides a working guide and is not exhaustive:

- Ensure that you have the fullest information:
 - ⊖ full summary of facts;
 - ⊖ latest record of previous convictions;
 - ⊖ any special reports if applicable (welfare/medical/psychiatrist).
- Do not sentence on important disputed facts:
 - ⊖ if the dispute is over material issues, arrange a hearing of facts for sentencing purposes;
 - ⊖ if the offender declines to have such a hearing, record this before proceeding further.
- Analyse the information relating to the offence:
 - ⊖ the nature of the charge including the maximum penalty;
 - ⊖ the gravity of the particular facts of the case;
 - ⊖ aggravating factors;
 - ⊖ mitigating factors.
- Consider the views of the victims and any public concerns as a reflection of the final decision taken:
 - ⊖ “Courts should take public opinion into account but not pander to it because it may be wrong or sentimental”: *R v Sergeant (1975)Crim LR 173*;
 - ⊖ “bulubulu”/full recovery of complainant/compensation paid.
- Account for any specific provisions relevant to the offender (juvenile/elderly/handicapped).
- Account for principles or guidelines issued by superior Courts:
 - ⊖ guideline judgments;
 - ⊖ circular memoranda issued by the C.J.
- Determine which sentencing principle(s) apply/ies:
 - ⊖ deterrence/prevention/rehabilitation/punishment/restoration.
- Account for any mitigating or aggravating factors in respect of the offender and the offending.
- Consider the totality of sentence imposed.
- Deliver the sentence, with reasons. Using the Sentencing Format below will ensure adequate justification for the sentence.

1 Introduction

At the end of a trial, after you have heard and considered all the relevant evidence, you must sentence the offender to an appropriate sentence without delay.

A person charged and found guilty of an offence has the right not to be sentenced to a more severe punishment than was applicable when the offence was committed: *s28(1)(j) Constitution*.

2 Jurisdiction

Resident Magistrates

A Resident Magistrate has jurisdiction to pass sentence up to:

- a maximum 10 years imprisonment on one charge and a maximum 20 years imprisonment on two or more charges; or
- a fine not exceeding \$15,000; or
- both: *s7 CPC, as amended by s3 of the CPC (Amendment) Act 13 of 2003*.

Second Class Magistrates

Second Class Magistrates have jurisdiction to pass sentence up to:

- a maximum one year imprisonment; or
- a fine of \$200; or
- both: *s8 CPC*.

Third Class Magistrates

Third Class Magistrates have jurisdiction to pass sentence up to:

- a maximum six-months imprisonment; or
- a fine not exceeding \$100; or
- both: *s9 CPC*.

3 Sentencing Principles

There are five basic sentencing principles to be considered by the Court. These are:

- Deterrence;
- Prevention;
- Rehabilitation;
- Punishment; and
- Restoration.

Deterrence

The sentence is designed to deter the offender from breaking the law again and act as a warning to others not to do the same.

Prevention

The sentence is to prevent the offender from doing the same thing again.

Rehabilitation

The sentence is to assist an offender to reform and not offend again.

Punishment

The sentence is to punish the offender for his or her criminal behaviour.

Restoration

The sentence serves to restore or repair the damage done to others by the offender.

4 Sentencing Discretion

While limits of sentence are imposed upon the Court by legislation, the level of sentence in each case is a matter for you to decide. The level of sentence in a particular case must be just and correct in principle and requires the application of judicial discretion.

The judicial act of sentencing needs you to balance:

- the gravity of the offence; and
- the needs of the society; and
- an expedient and just disposal of the case.

Although, there is no set or fixed formula in applying the principles, you may have to consider and assess the following factors when selecting the most appropriate penalty or sentence:

- the purpose of the legislation;
- the circumstances of the offence;
- the personal circumstances of the offender; and
- the welfare of the community.

On sentencing, either the defendant or counsel may make submissions, but not both. See *R v Wati* (1993) 3 NZLR 475; *Suren Singh & Ors v State* Crim App No. 79 of 2000; *Inoke Cumutanavanua* Crim App HAA086 of 2001.

One of the most common criticisms of the Court is that sentences are inconsistent. Failure to achieve consistency leads to individual injustice.

A means of ensuring consistency is to seek continuity in the approach to sentencing.

5 A Structured Approach to Sentencing

5.1 The Tariff

The first step in sentencing is to identify the tariff for the offence.

The tariff is the range within which sentences have been imposed for that offence.

The statutory maximum sentence is usually specified in the *Penal Code* or the relevant legislation.

You may be assisted in finding the suitable tariff by referring to:

- guideline judgments from superior Courts;
- sentences from other Magistrates' Courts for the same offence;
- sentences for similar offences from overseas jurisdictions.

5.2 The Starting Point

Once the tariff has been identified, then choose a starting point.

The starting point is decided according to the seriousness of the offending.

5.3 Aggravating and Mitigating Factors

Next, the sentence is mapped out according to aggravating and mitigating factors.

Aggravating factors include:

- the use of violence;
- persistent offending;
- damage to property;
- age and vulnerability of victim;
- value of property stolen;
- premeditated acts;
- danger to the public; and
- prevalence.

Mitigating factors include:

- guilty plea;
- remorse;
- reparation;
- reconciliation;
- young offender;
- first offender;
- provocation; and
- no harm or minimal harm to person or property.

There are also a number of factors that float between these two categories, depending on the circumstances.

In these cases, you need to evaluate the weight to be given to each of them in terms of the appropriate sentence to be considered by the Court.

These include the following:

- previous good character;
- victim acquiescence;
- political instability; and
- responsible position.

5.4 Scaling to the Appropriate Sentence

Scaling means increasing the sentence to reflect aggravating circumstances, and decreasing it to reflect mitigating circumstances. This involves your own moral judgement and you may use your own knowledge and experience of affairs in deciding the issue.

Any discounts you give for certain factors are at your discretion, but must be reasonable and justifiable. You may consider reasonable reductions for:

- time spent in custody;
- punishment meted out by other tribunals;
- traditional or customary penalties; and
- guilty plea.

5.5 Totality Principle

This is the final analysis stage of sentencing. When you impose a sentence, you must review the aggregate to ensure that the overall effect is just.

The totality principle requires you to look at the overall sentence and ask yourself whether the total sentence reflects the totality of the offending. Some obvious considerations include:

- multiple counts;
- serving prisoner;
- concurrent /consecutive terms;
- avoiding excessive lengths; and
- suspending the sentence.

Having considered all the relevant mitigating and aggravating factors of the offending and the offender, and after determining the overall sentencing principles that you wish to apply, you will then arrive at what can be considered the proper sentence for both the offence and the offender.

It is good practice to give reasons for all decisions, and this is particularly important if the sentence you arrive at is substantially more or less than the normal sentence.

7 Consideration of Other Offences

When deciding the sentence to be imposed, you may, with the consent of the offender and the prosecution, take into consideration any other **untried** offence of a like character which the defendant admits in writing to have committed: *s216(1) CPC*.

Once sentence is passed in consideration of these other offences, it shall be a bar to subsequent proceedings: *s216(3) CPC*.

8 Sentencing Format

It is suggested that you use the format on the following page when delivering sentence:

Sentencing Format

The charge

The facts of the particular offending:

- If there was a defended hearing, refer to the evidence.
- If there was a guilty plea, refer to the prosecution summary of facts.

The defence submissions or comments on the facts of the offending

Comment on the offence, if relevant:

- The seriousness of the particular type of offending.
- Whether it is a prevalent offence.
- Its impact upon the victim.

Note any statutory indications as to the type of penalty to be imposed

Identify the tariff and pick the starting point

The personal circumstances of the offender

Note any prior offending if relevant

- How many offences?
- How serious?
- When committed?
- Of the same kind?
- Is there a current suspended sentence?

The offender's response to sentences in the past

Defence submission and any evidence called by the defence

The contents of any reports submitted to the Court

Your views summarising the mitigating and aggravating features

Scale, then consider the totality of the sentence

Pronounce sentence

9 Types of Sentences

9.1 Corporal Punishment

A number of offences in the *Penal Code* stipulate corporal punishment as a sentence. Most of the offences are offences against morality under Chapter XVII and include among others:

- rape: *ss149, 150*;
- abduction: *s152*;
- defilement: *s155, 156*;
- detention in a brothel: *s161*;
- selling minors for immoral purposes: *s162*;
- buying minors for immoral purposes: *s163*;
- male person living on earnings of prostitution: *s166*;
- conspiracy to defile: *s171*; and
- unnatural offences: *ss175, 176*.

This punishment is provided for under *s34 Penal Code* and has not been repealed from the statute, but the High Court has ruled that it is unconstitutional: *Naushad Ali v State* Crim App No. CCCP0001 of 2000L.

9.2 Imprisonment

Except for murder, a Court must impose a definite term of imprisonment that must not be more than the maximum term provided for in the statute which creates the offence and not more than the maximum you are empowered to pass: *s28 Penal Code*.

The term actually served is reduced by a third upon entry into prison and may be reduced further by remission for good behaviour (EMP system); and for longer sentences, on parole on the recommendation of the Prisons Parole Board.

An offender liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment: *s28(3) Penal Code*.

Sentences of imprisonment should be served consecutive to existing sentences unless the Court orders the sentences to be concurrent: *s28(4) Penal Code*.

Ideally, imprisonment should only be considered when no other sentence is appropriate. However, given the limited sentencing options that exist, perhaps it is best to be guided by the following questions:

- Is it necessary to impose a custodial sentence?

- Is there a viable sentencing alternative available?
- Can a shorter sentence be imposed? (remand the offender to consider appropriate sentence).

9.3 Suspended Sentences

Any term of imprisonment for a term of not more than 2 years for an offence may be suspended for a period of not less than one year nor more than three years: *s29(1) Penal Code*.

The period for which the sentence is suspended is called the “operational period” and you are obliged to warn the offender that should he or she re-offend with an offence punishable with imprisonment during the operational period, then the suspended term becomes effective: *s29(4) Penal Code*.

Although a non-custodial option, the suspended sentence is technically speaking a custodial sentence. Philosophically, the sentencer has already decided that the offender deserves a custodial sentence and then suspends the term to avoid sending him or her to prison.

You should not deliberately scale your sentence to result in one less than 2 years in order to suspend it.

When dealing with possible activation of a suspended sentence, an offender must be given the opportunity, under oath, to show why it would be unjust to activate a suspended term. See *Saimoni Tucila v State Crim App No. HAA009 of 1996*; *Binesh Pillay v State Crim App No. 0023 of 1997*.

9.4 Probation of Offenders

After convicting the offender, you may, instead of sentencing him or her, place him or her on probation for a period of not less than one year or more than three years.

When considering whether probation is suitable, you must consider:

- the nature of the offence;
- the character of the offender;
- the offender’s home surroundings; and
- the expedient disposal of the case.

The probation order is usually used against young offenders, although there are no such restrictions specified in the relevant legislation: *Probation of Offenders Act Cap 22*.

A conviction of an offence for which a probation order is made is not a conviction for any purpose other than the purpose of the proceedings: *s7(1) Probation of Offenders Act*.

9.5 Supervision

As part of the probation order, name the area in which the offender is to reside and the probation officer who is to supervise the offender's probation programme.

Probation orders made in respect of young offenders who are aged 14 years or less must be with the child's consent.

Once a probation order is issued, you must fully explain the order to the offender and specify to him or her that any breach of the order entitles the Court to deal with him or her in any manner which he or she could have been dealt with if the offence had been committed anew.

9.6 Fines

As a penalty, fines are sometimes regarded as:

- a sufficient or convenient punishment for less serious offences; or
- an appropriate penalty for offences that are criminal more in form than in nature.

The Court has discretion to fix a fine that is not more than the maximum, except for offences where a minimum fine must be imposed: *s35 Penal Code*.

Where the offender has been ordered to pay money, that money may be levied on his or her real and personal property by distress or sale under warrant: *s36 Penal Code*.

You may issue a committal warrant where the offender has defaulted on payment of a fine, on or before the specified date: *s37(1) Penal Code*.

Fines may be paid by instalments at such times and in such amounts that Court deems fit. However, if the offender defaults, the whole of the amount shall be due and payable immediately: *s37(3) Penal Code*.

You must inquire into the offender's means before issuing a committal warrant and may order extension of time for payment if the situation warrants it: *s37(4) Penal Code, s23(2) Constitution*.

You may commit an offender to prison in lieu of distress where the offender:

- has no property whereon to levy the money; or
- the property is insufficient to cover the fine: *s38 Penal Code*.

9.7 Security for Keeping the Peace

An offender may, instead of or in addition to any punishment, be ordered to enter into his own recognisance, with or without sureties, to keep the peace and be of good behaviour for a period not exceeding two years: *s41(1) Penal Code*.

In cases, such as assaults, you may bind over both the complainant and the offender, with or without sureties, to keep the peace and be of good behaviour for a period not exceeding one year: *s41(2) Penal Code*.

You may order that the offender enter into a bond, with or without sureties, for a period not exceeding two years and to appear and receive sentence, and in the meantime to keep the peace and be of good behaviour: *s42(1) Penal Code*.

9.8 Absolute and Conditional Discharges

You may use your discretion and discharge the offender, either absolutely or with conditions, if:

- the person has been found guilty of an offence;
- the offence charged does not have a sentence fixed by law;
- the circumstances of the offence are of a minor nature;
- it is inexpedient to inflict punishment;
- the character of the offender warrants it;
- the circumstances of the offending warrant it and
- an order under the *Probation of Offenders Act* is inappropriate: *s44(1) Penal Code*.

The offender may be liable for the whole or any part of costs incidental to the prosecution, and any compensation: *s44(3) Penal Code*.

9.9 Police Supervision

Police supervision may be ordered against the offender where he or she:

- is convicted of an offence punishable for an imprisonment term of three years or more; and
- is again convicted of offence punishable with an imprisonment term of three years or more.

Police supervision should not exceed five years and ceases when:

- the offender is sentenced to a term of imprisonment;
- the offender is released from prison to serve a term under a compulsory supervision order and until expiry of the compulsory supervision order: *s46 Penal Code*.

9.10 General Punishment for Misdemeanours

Where the *Penal Code* does not specify any punishment for misdemeanours, it shall be punishable with a term not exceeding two years or with a fine or both: *s47 Penal Code*.

9.11 Community Work Orders

Where a person is convicted of an offence punishable by imprisonment, you may, with the consent of the offender, sentence him or her to community work: *s3(1) Community Work Act 1994*.

The prescribed number of hours is as follows:

- not exceeding 6 months between 20 – 50 hours
- 6 – 12 months between 20 – 100 hours
- 12 months – 2 years between 20 – 200 hours
- exceeding 2 years between 20 – 400 hours.

9.12 Costs

Whenever an offender is convicted or discharged, but not in a stay of proceedings, he or she may be ordered to pay Court costs in addition to any other penalty: *s158(1) CPC*. See *State v Ramesh Patel* FCA Crim App No. AAU002 of 2002S.

Likewise, you have a discretion to order costs against the prosecution: *s158(2) CPC*.

The order to pay costs is appealable to the High Court: *s159 CPC*.

9.13 Compensation

You may order the complainant to pay compensation to the defendant after dismissal of proceedings on the grounds that the charge was frivolous and vexatious: *s160(1) CPC*.

An offender convicted of a charge may be ordered to pay compensation to any person who suffers damage to his or her property or loss as a result of the offence: *s160(2) CPC*.

9.14 Restitution

You have powers to make the following restitution orders:

- for the preservation and disposal of property: *s164 CPC*;
- the restoration of stolen property to its owner: *s165 CPC*;
- the restoration of possession of real property: *s167 CPC*; and
- the preservation and/or restoration of property whose ownership is in doubt in the possession of Police: *s168 CPC*.