

**13:**

**SENTENCING**



# 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.

Remember that 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.

# 2 Jurisdiction

Although you may hear and determine offences carrying a maximum sentence of 14 years, you cannot exceed your sentencing jurisdiction. Therefore, while you may decide that an accused is guilty of an offence for which the maximum sentence is 14 years, you will not be able to sentence the offender to 14 years imprisonment because the sentence exceeds your jurisdiction.

## Principal Magistrates

A Principal Magistrate has jurisdiction to impose a sentence of up to:

- 5 years imprisonment; or
- \$1,000 fine; or
- both: *s27(1) MCA; ss7 and 8 CPC.*

## First and Second Class Magistrates

Both First and Second Class Magistrates have jurisdiction to impose a sentence of up to:

- one year imprisonment; or
- \$200; or
- both: *s27(2) MCA; ss7 and 8 CPC.*

## Two or more offences arising out of the same facts

Any Magistrate may impose consecutive sentences for two or more offences arising out of the same facts, up to a total of twice their normal sentencing jurisdiction, that is:

- in the case of a Principal Magistrate, 10 years imprisonment, or \$2,000, or both; and
- in the case of First and Second Class Magistrates, two years imprisonment, or \$400, or both: *s27(4) MCA; s9(2) CPC.*

| <b>Court</b>                              | <b>Maximum imprisonment and/or fine</b> | <b>Maximum - 2 or more offences</b> |
|---|---|-------------------------------------|
| Principal Magistrate's Court              | 5 yrs and/or \$1,000                    | 10 yrs and/or \$2,000               |
| First and Second Class Magistrate's Court | 1 yr and/or \$200                       | 2 yrs and/or \$400                  |

Maximum default periods

The term of imprisonment to be imposed in default of payment of a fine shall not exceed the maximum period provided below. *See s26 Penal Code – Cap 26.*

**Imprisonment in default of payment:**

| <b>Amount of fine</b>                  | <b>Maximum period of imprisonment in default</b> |
|--|--|
| Not exceeding \$2                      | 7 days   |
| Exceeding \$2 but not exceeding \$4    | 14 days  |
| Exceeding \$4 but not exceeding \$20   | 6 weeks  |
| Exceeding \$20 but not exceeding \$80  | 2 months   |
| Exceeding \$80 but not exceeding \$200 | 3 months   |
| Exceeding \$200                        | 6 months   |

### **3 Sentencing Principles**

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

- Deterrence;
- Prevention;
- Rehabilitation; and/or
- Retribution.

**Deterrence**

The punishment is designed to deter the offender from breaking the law again and be a warning to others not to do the same.

**Prevention**

Prevention relates to dealing with an offender so that he or she is strictly limited in the opportunity to offend during the period of punishment.

**Rehabilitation**

The penalty is selected so as to aid an offender to reform and not offend again.

**Retribution**

The punishment is for wrong-doing imposed on behalf of the community, to mark it's disapproval of the offence committed.

## 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.

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.

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 accused or counsel may make submissions, but not both.

## **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 the following:

- time spent in custody; and
- 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.

## 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.
  - ⇒ 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 Chief Justice.
- Determine which sentencing principle(s) apply/ies:
  - ⇒ deterrence/prevention/rehabilitation/retribution/other.
- 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.

## **7 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**

**Explain right to appeal**

## 8 Types of Sentences

### 8.1 Imprisonment

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: *s24 Penal Code*.

An offender liable to imprisonment maybe sentenced to pay a fine in addition to or instead of imprisonment: *s24(3) Penal Code*.

Sentences of imprisonment should be served consecutive to existing sentences unless the Court orders the sentences to be concurrent: *s24(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).

### 8.2 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, but such fine cannot be more than the stipulated maximum. Of course, lesser fines than the maximum may be imposed: *s25 Penal Code*.

You may find there are some offences which impose a fine but do not state expressly the exact amount of that fine. In these situations, you are able to impose an unlimited fine, but the fine should not be excessive (*s25(a) Penal Code*) and must be within your sentencing jurisdiction.

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: *s25(d)(ii) Penal Code*.

You may impose a term of imprisonment if an offender defaults on payment of a fine but you cannot exceed the maximum imprisonment period stipulated in the offence: *s26(1) Penal Code*.

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: *s30 Penal Code*.

### **8.3 Compensation**

Any person convicted of an offence may be ordered to make compensation to any person injured by his or her offence. Payment of compensation can be either in addition to or in substitution for any other punishment: *s27 Penal Code*.

### **8.4 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 two years: *s44(1) Penal Code*. However this rule does not apply to any offence which involved the use or the illegal possession of a weapon: *s44(2) 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 may become effective and the Court has power to intervene, reassess and change the suspended sentence: *s45(1) Penal Code*.

Although a non-custodial option, the suspended sentence is technically speaking a custodial sentence. Philosophically, you have already decided that the offender deserves a custodial sentence and then suspend 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.

### **8.5 Suspended Sentence Supervision Order**

After convicting the offender on a suspended sentence, you may place a suspended supervision order which puts the offender under the supervision of an officer appointed for that purpose by the Court. Usually this is a probation officer. The time period of supervision must be stated in the order but cannot exceed the period of the suspended sentence: *s47 Penal Code*.

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

Once a suspended sentence supervision 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.

## **8.6 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: *s32(1) Penal Code*.

In cases such as assault, 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: *s32(2) Penal Code*.

## **8.7 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;
- if the offence charged does not have a sentence fixed by law;
- if the circumstances of the offence are of a minor nature;
- if it is inexpedient to inflict punishment; and
- having regard to the character of the offender: *s35 Penal Code*.

## **8.8 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 if the conviction is set aside on appeal.

The Chief Justice may make rules for carrying out the provisions of this section: *s40(5) Penal Code*.

## **8.9 General Punishment for Misdemeanours**

Where the *Penal Code* does not specify any punishment for misdemeanours, they shall be punishable with a term not exceeding two years or with a fine or both: *s41 Penal Code*.

## **8.10 Obligation to Inform of Right of Appeal**

You must inform the offender of the right to appeal at the time you pass sentence: *s283(2) CPC*.

## **8.11 Further Sentencing Information**

Further information on sentencing and procedure for sentencing can be found at *Part VI Penal Code*, *ss187-209 CPC* and *s27 MCA*.