



Sentencing: An overview

You will be sentencing a defendant if they have pleaded guilty to a crime or they have been convicted of a crime after a trial.

General remarks

The first thing you must have (if there has been a guilty plea) is a summary of the facts on which the prosecution say you should sentence the defendant. If the sentencing comes after a trial you have conducted, then you will know the facts on which the defendant is to be sentenced.

Before you begin sentencing, consult with the prosecution and defence to make sure you have all the reports, if any, you should have. You will then need to hear submissions about sentencing from the prosecution and defence.

In most countries the prosecution make the first submission. They should tell you what they say the sentence or the range of sentence should be and why.

Next, the defence will make their submission as to sentence and why. If the defendant does not have a lawyer, you will need to ask him/her what he/she wants to say and how the defendant responds to the prosecution submissions.

Sometimes, if the defendant raises a new point, you may need to go back to the prosecution and ask their view. The key is fairness – have both sides had a chance to give submissions about sentencing?

There are a wide variety of purposes of sentencing:

- Punishment
- Deterrence
- Prevention
- Rehabilitation
- Restoration

When considering the appropriate sentence, you will have one or more of these purposes in mind. Ask yourself which of the sentencing purposes apply in each particular case.

If you are convinced rehabilitation is called for then your sentence should reflect that – often giving a defendant another chance coupled with a sentence designed to help, for example, probation. As to deterrence, don't place too much weight on deterrence. Generally the threat of a prison sentence does not stop most people from offending, simply because they do not think of or do not think there will be any consequences for what they

do. A stiff sentence may be justified on the basis that this is a sentence which matches the seriousness of the crime.

Reasons – The audience

Who is the audience for your sentencing remarks? First and foremost, the defendant. The defendant is entitled to know why you are imposing the sentence you are. Secondly, the victim(s) (if any) and the public. The courts are public institutions. Telling the wider public what you are doing and why will help boost public confidence in courts, especially in the criminal courts. Lastly, an Appellate Court is also your audience. If you give clear concise reasons for your sentence, then the Appellate Court can do their job – which is to assess whether you got it right.

Sentencing template: An explanation

Charges

You must be clear exactly what charges the defendant is to be sentenced on. When you have the court file check the charges, the section in the relevant statute (Crimes Act, Criminal Code or other criminal statute) and check the maximum penalty for each charge. Make sure you have jurisdiction to sentence the defendant.

Your sentencing remarks should begin with you recounting each charge and the maximum penalty for each.

Has the defendant pleaded guilty or been convicted after trial?

Your sentencing remarks must say whether the defendant pleaded guilty, (and when in relation to when the charges were filed), or whether the defendant was convicted after trial.

You will know which charges the defendant was convicted on after trial you have presided over. Make sure the charges you are sentencing on are the same charges on which you convicted the defendant.

If there is a guilty plea, again check each guilty plea has been recorded in writing by a judicial officer and you are sentencing only on those charges the defendant has pleaded guilty to.

Summary of facts

Three aspects are important here:

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1. Make a note of the legal ingredients of each charge, that is, what the prosecution must prove. Check that the summary of facts details each ingredient of each charge.
2. Identify and note the aggravating factors (making the offence worse) relating to the offending. Examples of aggravating factors are:
 - Violence
 - Hostility to victim because disability/race/religion etc.
 - Multiple defendants
 - Use of a weapon
 - Abuse of power/trust
 - Planning
 - Invasion of home.
3. Identify and note mitigating factors (reducing the seriousness of the offence) relating to the offending: Examples of mitigating factors:
 - Provocation
 - Defendant played a minor role
 - Voluntary consumption of alcohol is **not** a mitigating factor.

The summary in your remarks should be **brief** and **to the point** while also covering aggravating and mitigating factors relating to the offending.

Official reports

Some of you will have access to organisations which can provide you with reports about the defendant, for example, Probation Officer reports. These will typically include information about the defendant's background and, of particular importance, information about needs the defendant may have which, if addressed, may avoid re-offending. This is very important and may well significantly affect your sentencing decision. If it is possible to impose a sentence that is designed to stop offending in the future it is in everyone's interests that you do so.

There may also be medical reports including psychological or psychiatric reports:

- In your sentencing remarks, you do not need to refer extensively to these reports. A very brief summary of the essential points and support for any sentences you will impose is sufficient.
- Some probation reports may make a recommendation as to the sentence. While of some value, you do not need to impose this sentence. It is for you, and you alone, to decide on what sentence to impose.

Summary of prosecution and defence submissions

This is a **summary** of the main points. You should briefly state the main parts of the submissions which are either aggravating (make the case worse), or mitigating (reduce the seriousness of the case). Both sides should be equally covered.

If a particular sentence is suggested by either side, include this suggestion in your summary. If the defence want, for example, a respected person from the defendant's village to speak about the defendant personally (not about the offending) then welcome this.

Victim impact

You may have a written victim impact report before sentencing or perhaps a victim will come to court and want to speak personally or through the prosecution. You should always allow the victim to speak **but** you should make it clear:

- (a) The victim is there to speak about the effect of the crime on them personally.
- (b) It is not an opportunity to abuse the defendant or the defendant's family.

You will then need to include a brief comment in your sentencing remarks about the effect on the victim.

Start sentence

This is the sentence you would impose based on the facts alone – for the start sentence, ignore the defendant's personal circumstances. Go to the list of aggravating and mitigating factors and see which (if any) are present in this case. Given these conclusions, where do the facts of this case fall, from the least serious to the most serious offence of this type. The maximum sentence could be the start sentence.

A brief summary of the facts focusing on the aggravating and mitigation features is required at this stage. Then you should say – "Therefore the start sentence is..."

Personal circumstances

First, identify in your remarks if there are any aggravating personal circumstances, for example, offending while on bail or when subject to another sentence. Those circumstances might justify a small increase to the start sentence.

Second, identify if there are any mitigating personal circumstances, for example, good character. These circumstances are likely to justify a deduction from the start sentence.

In your remarks you must specify the increase and/or deduction made from the start sentence and express this in months.

Guilty plea

You now have a start sentence, plus or minus personal aggravating or mitigating factors. If the defendant has pleaded guilty they will be entitled to a deduction. The deduction is typically a maximum of 25% to 33% of the above sentence. The maximum is only given where the guilty plea is at the earliest reasonable opportunity. The later it is before trial, the lower the percentage, for example, if guilty pleas one to two days before trial then perhaps only 10% to 15%.

In your remarks you must specify the percentage and the actual deduction made in months.

Is the sentence appropriate?

You will then have a final sentence. Stand back and think about whether this is a fair sentence overall for this offence and this offender.

Be cautious about too many aggravating add-ons and/or mitigating deductions, for example, a total of 50% deduction from start sentence would be at the very top of the range for mitigating factors including guilty plea.

Final statement

At the end of your sentence, tell the defendant explicitly what the sentence is:

“Mr X on the charge of you are sentenced to”

Add on here any specific conditions, e.g. terms of probation, time to pay, fine, amount of compensation, and so on.

Miscellaneous matters

Court conduct

- Have the defendant stand throughout sentencing unless the defendant cannot do so, or the sentencing is very long.
- Always refer to the defendant their full name or as Mr..... or Ms – never just by their surname.
- Never use abusive language no matter what the defendant has done.
- Keep the emotion in court to a minimum.

- Refer to yourself in the first person, for example, “I am satisfied...” not “The Court is satisfied...”

Other comments

You are not encouraged to mention appellate court sentencing decisions in your sentencing remarks to a defendant. Most defendants will not have a clue what you are talking about. If you are concerned to let the appellate court know you have followed their decision at sentencing, you could say:

“I have taken into account relevant appellate sentencing decisions.”

In your written remarks, you could include in brackets or at the bottom of the page a reference to the actual decision.

Establishing the facts

You must be clear before sentencing that you are sentencing on an agreed set of facts of the offending. If the sentencing comes after a trial, then it is your view of the facts from that trial on which you should sentence.

On a guilty plea, unless all the important facts raised by the prosecution are accepted by the defence, then you may have to have a hearing to establish disputed facts. You should only do this if the disputed facts are vital to the sentencing.

If the fact in dispute is aggravating, then ordinarily the prosecution must prove that fact beyond reasonable doubt.

If the disputed fact is mitigating, then generally the defence must prove that fact on the balance of probabilities (more likely than not).

Fines

One of the most common sentences you will impose will be a fine. How do you know how much the fine should be? You should adopt a “normal” sentencing approach to the problem. First, what is the maximum fine for the offence? That gives you an idea about how seriously Parliament views the offence. Secondly, what are the facts? Is this a serious offence of its type or at the bottom end of seriousness? This will help you quantify the fine. The more serious the offence of its type, the greater the fine amount.

Of particular importance here is the ability to pay. There is not much point in giving a fine to someone who cannot pay. They will just be back in front of you again in a few months. You can order weekly or monthly payments. But be careful about these payments extending beyond 12 months. Generally, defendants do not pay for longer than 12 months.

Often you can be faced with a fine and a claim for reparation. A reparation order should be preferred over a fine. It is better the victim be recompensed than paying the State a fine.

Cumulative and concurrent sentences

This is definitely a tricky area. It applies whenever a defendant faces sentence for more than one offence. Should the sentences for each crime be cumulative (served one after the other) or concurrent (served at the same time)?

The fundamental point to keep in mind is that when you consider the total sentence to be served for all of the offending ask yourself – is it a fair sentence? Sometimes you will get to a fair sentence by cumulative sentences, sometimes by concurrent sentences.

Drunkenness and drug use

Generally, drunkenness resulting in an inability to remember the offending or a claim that a defendant was too drunk to have malicious intent and so is a reason to reduce a sentence, is rarely available. The general proposition is that the defendant has voluntarily drunk alcohol and the defendant must accept the consequences from their decision to drink.

This same rationale applies to voluntarily taking drugs.

Previous convictions

Whether or not a defendant has previous criminal convictions can be relevant in sentencing.

If a defendant has no previous convictions and is otherwise of good character, then this may be a personal mitigating factor which reduces the start sentence.

The situation with a defendant with previous convictions is more difficult. If a defendant has recent past convictions for similar offending to the current charges, then that can be a reason for a very modest increase in sentence – typically a few months' increase in prison for serious offending. **But** be cautious that it does not seem that you are punishing the defendant twice for the same crime as this amounts to double punishment.

Age

If a defendant is young or very old, that may be relevant to sentencing. As to youth, every effort should be made to keep young people out of prison if that is possible given the crime. There are a number of good reasons for this. If a young person can be kept away from prison, they are much less likely to commit crimes as an adult. Young people are less culpable and generally less responsible than mature adults for their offending. Their brains are still

developing towards adult maturity. They are less able than adults to understand the consequences of what they are doing. Do everything you reasonably can to keep young people out of prison. But if it must be prison, make the period as short as possible.

It is reasonable to discount sentences for very old defendants. It will be much more difficult for them to serve a sentence. **But** old age should not prevent defendants from escaping responsibility.

Disabilities

When considering a sentence, you will need to take into account whether the defendant has any physical or mental disabilities. Such disabilities can be a reason to reduce an otherwise appropriate sentence.

However, before a disability might reduce a sentence it must be significant. Minor physical or mental disabilities do not qualify. As to mental disabilities, this can be relevant in two ways. First, depending on the disability, it may mean the defendant is less responsible (culpable) than a defendant without that disability. For example, such a defendant may be less able to understand what they have done was wrong or less able to make a logical decision about their action. Secondly, if the sentence proposed is prison, then a mentally unwell person is likely to find prison especially hard. These can be reasons to reduce a sentence length.

As to physical disability, a reduction here mostly relates to the added difficulty such a person may have in prison. An example is a person in a wheelchair. Each day of a prison sentence for such a person will be much harder than that for an able-bodied person.