CASE NOTE

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Cameron v The Queen: A Consideration of Sentencing Principles Applicable to Pleas of Guilty

I INTRODUCTION

In *Cameron v The Queen*,[1] all five members of the High Court embraced an opportunity to address a number of sentencing principles relevant to pleas of guilty. Although the case itself was concerned with an issue relatively narrow in scope, it seemed important for each judge to promulgate their own agenda for the development of sentencing law in Australia. This article will examine each judgment and the sentencing principles to which they relate. It will also briefly consider the indifferent reception of *Cameron* in the various state jurisdictions and speculate on the prospect of its continued application.

II GENERAL SENTENCING PRINCIPLES

A *Discrimination and the Rationale for Mitigation*

In their joint judgment, Gaudron, Gummow and Callinan JJ concerned themselves primarily with the discrimination generated by two fundamental notions of sentencing. Their Honours began by observing, 'it is well established that the fact that an accused person has pleaded guilty is a matter properly to be taken into account in mitigation of his or her sentence'.[2] However, it was later noted that this principle was qualified by the notion that a convicted person cannot be penalised for having insisted on his or her right to contest the charges. Their Honours continued:

> The distinction between allowing a reduction in sentence for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties but it is, nonetheless, a real distinction, albeit the rationale for which may need some refinement in expression if the distinction is to be seen as non-discriminatory.[3]

The rationale usually relied upon to justify mitigation was repeated by the High Court in *Siganto v The Queen*[4] where Gleeson CJ, Gummow, Hayne and Callinan JJ said a plea of guilty would ordinarily be something to be taken into account in mitigation firstly because it represented remorse on the part of the offender, and secondly, 'on the pragmatic ground that the community is spared the expense of a contested trial'.[5]

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1 *Cameron v The Queen* (2002) 76 ALJR 382.

2 Ibid 384.

3 Ibid.

4 *Siganto v The Queen* (1998) 194 CLR 656.

5 Ibid 663-664.

However, in *Cameron*, the majority elaborated on what was said by the Court in *Siganto,* immediately noting that remorse was not the lone subjective matter revealed by a plea of guilty. According to their Honours, a plea may also indicate, on the part of the offender, acceptance of responsibility and a willingness to facilitate the course of justice. Attention then returned to whether mitigation of sentence justified solely on the pragmatic ground referred to in *Siganto* could amount to discrimination against those who contest their charges. As to their refined rationale for mitigation, their Honours observed:

> Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for the rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of a willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.[6]

The proper rationale for mitigating sentence in recognition of a plea of guilty was also explored in some depth by Kirby J. In contrast to the views expressed in the joint judgment, his Honour considered that a discount for remorse may be made independent from (and in some respects, in addition to) a discount for a plea of guilty. However, his Honour viewed remorse with some scepticism, prudently pointing out that in many instances a prisoner's plea may indicate little more than regret at being caught and charged as opposed to regret for their involvement in the crime. In respect of the rationale for mitigation his Honour observed:

> [T]he true foundation for the discount for a plea of guilty is not reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount. [7]

According to his Honour, remorse was not the starting point for, nor a precondition to, a reduction in sentence for a plea of guilty. Instead, it represented the 'icing on the cake'.[8] In preferring considerations of the public interest, his Honour was in fact endorsing the pragmatic grounds previously denounced in the majority judgment. His Honour stated:

> The main features of the public interest, relevant to the discount for a plea of guilty, are 'purely utilitarian'. They include the fact that a plea of guilty saves the community the cost and inconvenience of the trial of the prisoner which must otherwise be undertaken. [9]

The result from the foregoing discussion is that, by virtue of the majority judgment, a discount for a plea of guilty independent of any question of remorse and acceptance of responsibility, must now be viewed from the perspective of the offender as opposed to the perspective of the community. Regardless of its well supported acceptance and in spite of Kirby J's resolute insistence, pragmatic benefits generated by a plea of guilty may no longer be exclusively relied upon as the basis by which mitigation may be made.

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6 Above n 1, 385.
7 Ibid 394.
8 Ibid 397.
9 Ibid 394.

This aspect of the case in particular has already received a great deal of attention. Indeed, the pragmatic value afforded by a plea of guilty is held in high regard, so much so that at least two state superior courts have sought to distinguish *Cameron* in so far as it seeks to remove pragmatic considerations from the sentencing discretion.

In *R v Sharma*[10] the New South Wales Court of Criminal Appeal held that the majority decision in *Cameron* was not applicable in the State of New South Wales. The court distinguished the Western Australian legislation with which *Cameron* was concerned from the New South Wales statutory equivalent. The Western Australian statute was construed to simply restate the common law. Specifically, it contained a provision allowing the court to consider a plea of guilty as a mitigating factor and another section directing the court not to regard a plea of not guilty as an aggravating circumstance.[11] However, the relevant New South Wales provision was construed by the Court of Criminal Appeal to amend the common law. The New South Wales statute required to be taken into account both 'the fact' of the plea and 'when' it was made. The Court held:

> The statutory reference to 'the fact' of the plea, as the matter required to be considered, does not direct attention to the subjective intention of the person pleading guilty. Nor … is the element of timing, reflected in the reference to 'when' a plea was made a reference only to subjective elements.
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> …
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> [T]he New South Wales Act does not expressly contain 'any direction as to the purposes for which or the circumstances in which a plea of guilty may be taken into account'. However, there is no warrant for limiting such 'purposes' or 'circumstances' so as to restrict the court's attention to a subjective intention to assist the administration of justice, to the exclusion of the objective value of the plea. [12]

Thus, upon the proper construction of the New South Wales Act, the Court of Criminal Appeal concluded that the objective, utilitarian value of a plea of guilty remained an operative consideration in the State of New South Wales.

In *R v Place*[13] the South Australian Court of Criminal Appeal intimated, without needing to finally decide the issue, that the principle enunciated by the majority in *Cameron* also did not apply under the legislation in that State. The Court considered it relevant that prior to the enactment of the South Australian sentencing legislation, it was the preferred practice of South Australian judges to have regard to the pragmatic value of a guilty plea when passing sentence. And it was safe to assume that, when the *Sentencing Act 1988* (SA) was passed, the legislature was aware of this approach. Accordingly, the court was indicating that, without providing any further guidelines as to how the fact of a guilty plea should be considered, Parliament was actually endorsing the existing practice. Finally, the court concluded:

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10 *R v Sharma* [2002] NSWCCA 142 (Spigelman CJ, Mason P, Bar, Bell and McClellan JJ, 24 April 2002).

11 This essentially restates what was said in *Siganto v The Queen* (1998) 194 CLR 656 at 663.

12 Above n 10, [51],[53].

13 *R v Place* [2002] SASC 101 (Doyle CJ, Prior, Lander, Martin and Gray JJ, 26 March 2002).

> We tend to favour the views expressed by Kirby J … that, in the absence of subjective criteria such as contrition, a sufficient rationale is found in the public interest based upon 'purely utilitarian' considerations.[14]

Clearly, in both of the above cases, the respective Courts of Appeal were disappointed with the reasons of the majority in *Cameron*. Indeed, both courts undertook an extreme and convoluted process of statutory interpretation in order to happily restore their much favoured pragmatic considerations back into the sentencing discretion. And while it is evident that the reasoning of the majority in *Cameron* will not be applicable in either New South Wales or South Australia, it is not so clear in the remaining jurisdictions. Obviously the majority judgment will continue to be applied in full force in Western Australia (and also Tasmania),[15] however it remains to be seen whether other state courts will apply the new, refined rationale at the expense of utilitarian benefits. It is suggested that the approaches taken in *Sharma* and *Place* may be open to other state courts. In any event, the matter is far from resolved.

It also remains to be seen whether there is any practical relevance associated with the different approaches. Whether the rationale for mitigation is viewed subjectively, from the perspective of the offender, or objectively from that of the community, in either case the point in time when the plea is entered will remain the operative consideration. Accordingly, the subjective formulation will ordinarily demand the same discount to what was previously considered appropriate for the utilitarian value of the plea prior to the decision in *Cameron*.[16] Indeed, the question may be one of semantics rather than form.

B *Discrimination in the Federal Jurisdiction*

Unlike the majority, Kirby and McHugh JJ, in their respective judgments, considered the issue of discrimination separately and in the context of the federal jurisdiction. After observing that courts exercising federal jurisdiction cannot act in a way that is 'relevantly discriminatory', McHugh J said:

> And it is at least arguable that it is relevantly discriminatory to treat convicted persons differently when the *only* difference in their circumstances is that the group has been convicted on pleas of guilty and the other group has been convicted on pleas of not guilty. (emphasis in original)[17]

His Honour continued by saying that the principle of 'equal justice' required identical outcomes in cases where the facts and circumstances of the crimes and the subjective factors of those who commit them are the same. His Honour observed that the fact that the state may be advantaged by a plea of guilty was 'arguably not a relevant difference in cases where the plea of guilty throws no light on the contrition, remorse or future behaviour of the defendant'.[18] However, his Honour declined to finally decide the

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14 Ibid [78].

15 There is no legislation governing the principles of sentencing in the State of Tasmania. Thus, the principle enunciated by the majority in *Cameron* will be applied, in so far as it amends the existing common law.

16 Such was indicated in *R v Curry* [2002] NSWCCA 109 (Heydon JA, Studdert and Buddin JJ, 2 April 2002), [26].

17 Above n 1, 390.

18 Ibid.

issue, leaving its determination for an appeal where a person has been sentenced in the federal jurisdiction after being convicted by his own plea of guilty. However, his Honour concluded, 'if such a person has been denied the discount received by those pleading guilty, the sentence may be arguably discriminatory in a relevant sense'.[19]

Justice Kirby made similar observations in the context of the federal jurisdiction. Specifically, his Honour considered whether it was contrary to the implied constitutional principle of 'legal equality' to treat persons who plead guilty to an offence differently from those who plead not guilty. His Honour suggested that it would be 'at least arguable' that a person who acknowledged their guilt, and thereby received a sentencing discount, would be treated more advantageously than those who did not plead guilty. However, like McHugh J, his Honour considered it was not the proper occasion to explore this question further.

It is suggested that there is no reason, in fact or principle, to confine the discussion of discrimination to the federal jurisdiction. Certainly the majority found no reason to do so. Rather, it appears that McHugh and Kirby JJ were simply not prepared to disturb the uniformly accepted practice of allowing sentencing discounts based purely on pragmatic considerations.

C *Two Tier v Instinctive Synthesis*

In *Cameron*, McHugh J referred to earlier decisions in which his Honour criticised the approach to sentencing which requires the judge to formulate a sentence by reference to objective factors and then arithmetically reduce that sentence to take into account other factors relevant to the accused, such as a plea of guilty. According to his Honour in *AB v The Queen*,[20] this 'two-tiered' approach compromises the discretionary nature of the sentencing process and is, in most cases, not only unsuitable but one that cannot realistically be followed in practice. Instead, McHugh J favoured an approach where judges 'instinctively synthesise' the various elements of the case to reach a single appropriate sentence.

This latter view has also been supported on a number of occasions in the High Court by Hayne J. In *AB*, his Honour was of the view that a two-tiered approach to sentencing presupposed that the sentencing process was some mechanical or mathematic exercise. Rather, it is, according to his Honour, a balancing process in which the sentencing judge is to weigh all competing factors and express the result in terms of the punishment to be served.

In *AB*, McHugh and Hayne JJ were in dissent. However, subsequently, the majority of the High Court in *Wong v The Queen*[21] endorsed those reasons arguing the two-tiered approach to sentencing was 'wrong in principle'.[22]

In Victoria, the courts have traditionally condemned the two-tiered approach and advocated instinctive synthesis as the correct approach to be adopted .[23] More recently,

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19 Ibid.
20 (1999) 198 CLR 111.
21 (2001) 76 ALJR 79.
22 Ibid 94.
23 see, for example, *R v Willscroft* [1975] VR 292 and *R v O'Brien* (1991) 55 A Crim 410.

similar sentiments have been expressed in Queensland,[24] Tasmania[25] and Western Australia.[26]

In both *AB* and *Wong*, Kirby J criticised instinctive synthesis and preferred the two-tiered approach to sentencing. However, on both occasions, his Honour did not make any significant contribution to the debate and simply reserved the issue for an appeal where the answer was essential. Surprisingly, in *Cameron*, despite neither party making submissions on the matter, Kirby J considered the controversy at length. In an effort to arrest its momentum in both the High Court and the various intermediate appellate courts across the country, his Honour identified two dangers posed by an acceptance of the instinctive synthesis approach. Firstly, there would be the danger that the lack of transparency, concealed by judicial instinct, would render it impossible to know whether the proper sentencing principles had been applied. Secondly, 'if the prisoner … [does] not know the measure of the discount, it cannot be expected that the pleas of guilty will be encouraged in proper cases'[27] despite this being in the public interest.

Moreover, Kirby J considered the case of *Cameron* itself substantiated the need for two stages and transparency in the judicial reasons for sentence. His Honour observed:

> [T]his appeal would not have been possible (and a miscarriage of justice might have been irreparably masked) had the sentencing judge contented himself with stating generally that he had taken the plea of guilty into account and simply announced his "instinctive synthesis" represented by the sentence of nine years imprisonment. This appeal would have been without redress. [28]

The debate has since continued in the cases of *Sharma* and *Place*. In *Sharma*, the New South Wales Court of Criminal Appeal simply upheld its guideline judgement in *Thompson*.[29] In that case, the same court considered that the instinctive synthesis approach was the correct general approach to sentencing. However, this remark was then qualified so that, in certain circumstances it would be permissible (and sometimes necessary) to take out an element of the sentencing process and treat it separately from other concerns. A discount to sentence for assistance with authorities and for pleas of guilty were identified as two such circumstances. In *Place* the South Australian Court of Criminal Appeal also condoned a two-tier approach to sentencing. After observing that such an approach had been the practice of the state for a number of years, the court concluded, '[t]he system is fair and practical. … in our opinion it would be a retrograde step to discourage sentencers from continuing with the current practice'.[30]

Thus, in light of these two decisions, the majority's reference in *Wong* to the weight of authority in intermediate appellate courts being 'against adopting two stage sentencing and [favouring] the instinctive synthesis approach'[31] may have been premature. However, in the absence of statutory intervention, it will always be a question dependant on the particular predispositions of individual judges across the various

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24 *R v Corrigan* [1994] 2 Qd R 415.
25 *Pavlic v The Queen* (1995) 5 Tas R 186, 204 (Slicer J).
26 *Verschuren v The Queen* (1996) 17 WAR 467, 483 (Murray J).
27 Above n 1, 395.
28 Ibid 396.
29 *R v Thompson and Houlton* (2000) 115 A Crim R 104.
30 Above n 13, [82].
31 Above n 10, [76].

jurisdictions. Indeed, it is a matter that can only be conclusively resolved by the legislature.

III CONCLUSION

In *Cameron*, the High Court of Australia took time to re-examine a number of sentencing principles applicable to pleas of guilty. Arguably, however, in light of recent decisions in New South Wales and South Australia, it need not have bothered. Indeed, in those subsequent decisions, the respective Courts of Appeal simply ignored what was binding upon them in preference to their own established practices. It remains to be seen whether other courts will apply the principles enunciated in *Cameron*. But perhaps the most significant principle gleaned from the above discussion is that the promulgation of general sentencing principles is best left to judges in the individual state jurisdictions.