FACT FINDING ON SENTENCE

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INTRODUCTION

"There are many cases involving either a plea of guilty, or a conviction following a plea of not guilty, where the task of assessing an offender's culpability is more difficult than that of determining his or her guilt." [1]

1. It is trite to observe that sentencing is the bread and butter of a criminal lawyer's practice. Crucial to any sentencing exercise is the court's obligation to "find the facts." But how does the court "find the facts"? We hope that this paper may help to answer that question.

2. The paper is separated into two parts. The first part is a summary of the general principles that govern fact-finding in sentence proceedings. The second part is an analysis of seven issues that commonly arise when a court is required to make findings of fact.

PART ONE – FACT-FINDING: THE OVERARCHING PRINCIPLES

The Plea of Guilty

What does the plea of guilty mean and what is the role of the sentencing judge?

3. Where an accused person has pleaded guilty, he or she is thereby taken to have admitted to guilt of the offence as charged and nothing more: see *R v Riley* [1896] 1 QB 309.

4. The plea is to be taken as an admission of the essential legal ingredients of the offence see *GAS v The Queen* (2004) 217 CLR 198; [2004] HCA 22 at 211 [30]. However, any facts which go beyond those necessarily involved as an element of the offence must be proved by evidence or be admitted formally or informally: *GAS v The Queen* at 211 [30].

5. It remains a matter for the Judge at sentence to make findings of fact by reference to evidence adduced by the parties at the sentencing hearing.

[1] Cheung v R [2001] HCA 67 at [8]

Can the court reject a plea of guilty?

6. In *R v Busby* [2018] NSWCCA 136 the Court, without the application of either party and of its own motion, rejected Mr Busby's pleas of guilty having found that he traversed his pleas when giving evidence at first instance. The Court quashed the convictions and remitted the matter to the trial list of the District Court on the basis that Mr Busby had pleaded guilty on a misapprehension as to the law.

7. That misapprehension concerned the mental element applicable to an offence aggravated by the quantity of the drug. Button J (Hoeben CJ at CL & Walton J agreeing) held that where an accused believes that a prohibited drug in his or her possession is drug A, but in reality the drug is actually drug B, in order for the mental element to be satisfied on a supply large commercial quantity of drug B, the accused must believe that he or she has a large commercial quantity of drug A. Mr Busby was in possession of large commercial quantities of cocaine and MDMA. However, he believed that he was in possession of cannabis leaf yet the quantity of the drugs in his possession did not amount to a large commercial quantity of cannabis leaf had the drug indeed been cannabis (100kgs under the Schedule to the *Drug (Misuse and Trafficking) Act 1986*).

8. In rejecting Mr Busby's pleas of guilty, Button J said at [61]:

> That is because, to state my approach succinctly, I respectfully apply what was said in *Jidah:* for the respondent to be guilty of the offence in question, he needed to believe that the suitcase contained a prohibited drug, and for him to believe that it contained not less than the large commercial quantity applicable to the drug that he believed it to be.

Agreed Facts

9. In dealing with this topic there are three areas that will be explored:
   i. What should be included in agreed facts and who is responsible for preparing them?
   ii. Plea agreements.

iii. Practitioner's responsibilities.

What should be included in agreed facts and who is responsible for preparing them?

10. It is important that any facts that are being proposed by the Crown are carefully checked by the offender's legal representative. This should not be perfunctory: see *R v Crowley* [2004] NSWCCA 256 at [46] per Smart AJ.

11. It is the Crown who bears the statutory obligation to ensure that the statement of facts presented are comprehensible. The facts should outline the circumstances and basis of the relevant offence for which the court is dealing in ample detail: see R v *Della-Vedova v R* [2009] NSWCCA 107 at [14]. The facts should not merely summarise the evidence in the brief: *Ellis v R* [2015] NSWCCA 262 at [10].

12. Further, the facts must be drafted in such a way so the Court is able to determine what constitutes an agreed fact and what is merely an assertion. If there is a dispute on the facts, it would be desirable for that dispute to be recorded on the statement of facts so that it is properly identified before the Court.

13. The Court was critical of the parties in *O'Neill-Shaw v R* [2010] NSWCCA 42 at [48], where there was no agreed statement of facts and the sentencing judge was expected to resolve disputed issues in the absence of cross-examination. The Court said that the parties in that case did not properly discharge their duty to the court and imposed "a significant procedural irregularity" on the sentence.

14. In *R v Della-Vedova v R* [2009] NSWCCA 107 at [14]:

> In a case which, as will appear, is of considerable significance, the presentation of a statement of facts in this way is, to say the least, unsatisfactory, and indicative of something considerably less than the adequate discharge of their functions on the part of those representing the DPP. It is the DPP who undertakes the statutory responsibility of prosecuting offences and presenting, in a comprehensible fashion, the facts and circumstances of the offences on the basis of which the court is asked to sentence. It is not sufficient merely to rely upon documentation prepared by the

> investigating arm of the prosecution team. It is plain that on this occasion the preparation of the statement of facts was left to those whose function and expertise is in investigation, and not in litigation. There is no apparent contribution to the statement by anybody representing the DPP, or anybody trained, skilled or experienced in the presentation of evidence in a court. This was a serious dereliction of their duty (as professional lawyers, to the DPP, and to the court) on the part of those who represented the DPP. It is particularly disturbing as senior counsel was briefed. The result was that the sentencing judge was, and this Court is, largely in the dark about the essential factual substratum.
>
> (Underlining added)

15. The above extract serves as an important reminder to not simply agree to the facts that have been prepared by investigators. Most investigators, and indeed most prosecuting solicitors, will not aver to the need to include matters in the statement of facts that may mitigate the sentence or reduce your client's moral culpability.

16. For example, you may wish to include in the agreed facts extracts from your client's police interview: your client may have expressed his or her remorse to investigating police; disclosed his or her qualified role in a joint criminal enterprise, or; provided a motive for the commission of an offence (such as homelessness, drug addiction, non-exculpatory duress, or provocation).

17. It is also common for the sentencing court to receive additional material which may fall outside the agreed facts. An example is a psychological report tendered on behalf of the offender. In situations where the additional material departs from the agreed facts it is for the parties to raise it with the Court and indicate which should prevail. If the parties cannot agree, then the Court may need to resolve the dispute. However, if neither party raises the discrepancy between the material and the facts with the Judge, then as a matter of procedural fairness the Judge should raise the discrepancy with the parties and refrain from proceeding to sentence until the matter is resolved by the parties or by the Court. If the judge subsequently acts on the disparity in the facts without the parties being afforded the opportunity to respond, it may result in procedural unfairness: see *R v Crowley* at [46] *Zammit v R* at [26]; *R v Falls* [2004]

NSWCCA 335 per Howie J at [37]; but contrast *Shajeel Khanwaiz v R* [2012] NSWCCA 168 at [96] which is discussed below at [123].

Plea agreements

18. In *GAS v The Queen* (2004) 217 CLR 198 at [27]–[32], the High Court said that plea agreements are affected by five fundamental principles:[2]

    1. It is the prosecutor, alone, who has the responsibility of deciding the charges to be preferred against an accused person.
    2. It is the accused person, alone, who must decide whether to plead guilty to the charge preferred.
    3. It is for the sentencing judge, alone, to decide the sentence to be imposed.
    4. There may be an understanding, between the prosecution and the defence, as to evidence that will be led, or admissions that will be made, but that does not bind the judge, except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions. In deciding the sentence, the judge must apply to the facts as found, the relevant law and sentencing principles.
    5. An erroneous submission of law may lead a judge into error and, if that occurs, the usual means of correcting the error is through the appeal process. It is the responsibility of the appeal court to apply the law.

19. In relation to the fourth principle the Court said in *GAS v R* at [31]:

> Fourthly, as a corollary to the third principle, there may be an understanding, between the prosecution and the defence, as to evidence that will be led, or admissions that will be made, but that does not bind the judge, except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions. In deciding the sentence, the judge must apply to the facts as found the relevant law and sentencing principles. It is for the judge, assisted by the submissions of counsel, to decide and apply the law. There may be an understanding between counsel as to the submissions of law that they will make, but that does not bind the judge in any sense. The judge's responsibility to find and apply the law is not circumscribed by the conduct of counsel.

[2] Judcom: Sentencing Bench Book at [1-400]

(Underlining added)

20. The effect of the fourth principle is that Crown concessions do not bind the sentencing court; it is for the court to make a reasoned determination on the evidence before it. The plea agreement in *GAS v R* was set out at [33]:

> The "plea agreement" alleged in the ground of appeal of each appellant in this Court was particularised as follows:
>
> a. that each appellant would plead guilty to manslaughter by an unlawful and dangerous act;
> b. that as the evidence did not permit the role of each appellant to be determined
>
> (i) each appellant was to be sentenced at "the lowest common denominator" as an aider and abettor; and
>
> (ii) accordingly, each appellant should receive a lesser sentence than a principal (which was said to accord with *Bannon and Calder*);
>
> c. neither of the appellants would attribute blame to the other; and
> d. neither appellant would submit that a youth training centre sentence was appropriate.

21. The Court said at [35], that the subject matter of (b)(ii) was a question of sentencing principle. It was <u>not</u> within the capacity of the parties to agree that each accused would receive a lesser sentence than a principal, whatever exactly that might mean.

22. The Court also made some general observations in *GAS v R* concerning plea negotiations at [42] – [44]. The effect of those observations are; if there are discussions between counsel that lead to the accused pleading guilty then those discussions should be recorded by placing them on the 'record' or in a document confirming the same between the defence and prosecution. This also extends to any substantial matters that are agreed between the parties on subjects which may later be said to have been relevant to the decision of an accused person to plead guilty.

23. By doing this in writing it will reduce the scope for any misunderstanding and provide for far less room for subsequent debate about the basis on which an accused person chose to enter a plea of guilty.

Practitioner's responsibilities

24. It is the practitioner's duty to go through the agreed facts with the client before a plea is entered: see *R v Crowley* at [46].

25. *Loury v R* [2010] NSWCCA 158, acts as a reminder to practitioners that before a client pleads guilty to an offence, practitioners should:

- Read the agreed facts to your client.
- Once you have read them have the client sign a copy.
- Ensure that you have explained the facts to the client and record in your written instructions that you have done the same.
- Record that, in accordance with instructions, you had entered into plea negotiations with the Crown and the outcome of those negotiations.
- Where there is a conflict between the agreed facts and another document (for example, a psychological report) take instructions from the client regarding which document should prevail. If consent from the Crown is not obtained, the scope of any dispute at sentence should also be recorded in the instructions. For example, conflict may arise in what your client said to the author of a pre-sentence report. It may be a case where you request that the author be made available for cross examination.
- Advise the client that he or she will be bound by the way in which his or her lawyers run the sentence in any subsequent appeal. So, for example, applying the scenario in the fifth bullet point, if the client does not seek to rely on the assertions outside of the agreed facts (which if accepted would reduce his or her culpability) then it is important you take instructions to that effect.

26. Mr Loury's complaint on appeal was that his pleas were not attributable to a genuine consciousness of guilt but were entered by reason of the imprudent and inappropriate advice from his counsel and solicitor, causing a miscarriage of justice (ground one on the appeal).

27. The Agreed Statement of Facts were, in a number of respects, entirely inconsistent with the instructions the appellant had given to his solicitor. There were important inconsistencies between the appellant's statements to the police in the ERISP and the

appellant's position as reflected in the statement of facts. The appellant had always maintained that the bat had been placed in the bushes as a safety precaution. He had always asserted that he had no indication from his brother that the bat would be seized and the men attacked as they left the hotel. He had always denied any involvement in the attack on Mr McAdam. Yet the Agreed Statement of Facts that went before the sentence Court had him as a party to a joint criminal enterprise. It had him "providing" the bat. It had him as one of the two men holding McAdam while the latter was assaulted with the bat by Nathan. The appellant said in his evidence that he had agreed to none of these things, and that he had not been informed that they were included in the document provided to the sentencing judge. The Court said that if the Agreed Statement of Facts were intended to spell out the lesser role he played in the assaults outside the hotel, it singularly failed to do so: see [108].

28. As a result of the fresh evidence on the appeal, the Court found that there was a miscarriage of justice stemming from the conduct of the solicitor and counsel at sentence. The following matters led the Court to set aside the appellant's conviction and remit the matter back to the District Court:

- On the day of sentence Mr Loury (without any knowledge) was informed that he would be required on that day to plead to new charges. The Court was satisfied that he did not understand the new charges; they had not been explained to him in any meaningful way, and; he was unaware of the details of the negotiations between his solicitor and the Crown: [105]
- The court said that his evidence that he was "overwhelmed" by the circumstances and the atmosphere in the court was not difficult to accept. The appellant was persuaded to plead to the new charges relying, as he did, on the solicitor's advice that that was the best thing to do: [106]
- The appellant had no idea at that stage what the detailed facts were that were to be put to the court to support the plea.
- The Court came the clear view that, at no time, had the appellant been shown the Agreed Statement of Facts.
- At no time were they ever explained to him.
- Whilst the solicitor insisted that they were, the solicitor was unable to produce any notes of any conference that he had ever had with the appellant or his brother. He was unable to produce any written statement made by the

appellant. Indeed, the appellant claimed that he had never provided any written statement either to his solicitor or his barrister.

- There were no written instructions to plead and there was no suggestion that the Agreed Statement of Facts had ever been read over or signed by either the appellant or his brother: at [107].
- In relation to Counsel's duties the court also said that as counsel retained on behalf of the appellant, it was his duty to take the time to listen carefully to the appellant's instructions and to satisfy himself, upon careful reflection, as to the true situation so far as the appellant was concerned. It was also counsel's professional duty to determine whether the appellant should be advised to seek different representation in an endeavour to resile from the plea he had entered: at [109].

Finding the Facts – Proof

Onus and Standard of Proof

29. In *Filippou v The Queen* (2015) 256 CLR 47 at 69-71; [2015] HCA 29 at [64]-[66], the Court said that:

- A sentencing judge can only make a finding of fact *adverse* to an offender if he or she is satisfied *beyond reasonable doubt of that fact*.
- In a case where an offender seeks to rely upon a matter to *reduce the penalty* that otherwise would have been imposed (whether by raising matters in mitigation or for the purposes of reducing the offender's culpability), then the Court needs to be satisfied of that matter *on the balance of probabilities*.

30. In *R v Alameddine (No. 3)* [2018] NSWSC 681, Johnson J at [11]-[14] summarised the general principles that govern matters of proof in sentencing proceedings:

> [11] In resolving disputed facts, the Court may only make a finding of fact adverse to the Offender if satisfied beyond reasonable doubt of that fact. On the other hand, if there are matters which the Offender seeks to rely upon to reduce penalty, it is enough if those matters are proved by the Offender on the balance of probabilities: *Filippou v The Queen* (2015) 256 CLR 47; [2015] HCA 29 at 69-71 [64]-[66].

[12] It is appropriate to observe, however, that some disputed issues of fact may not be capable of resolution in a way that goes either to increase or decrease the sentence that is to be imposed. There may be issues which the material available to the Court will not allow to be resolved in that way: *Weininger v The Queen* (2003) 212 CLR 629; [2003] HCA 14 at 636 [19]. The Court will seek to make findings by reference to material which is relevant and known to the Court: s.16A(2) *Crimes Act 1914 (Cth)*; s.21A(2) and (3) *Crimes (Sentencing Procedure) Act 1999 (NSW)*; *Weininger v The Queen* at 635-637 [17]-[21]; *Filippou v The Queen* at 69-73 [61]-[72].

[13] A sentencing Judge must do his or her best to find the facts which determine the nature and gravity of the offending, including the facts which inform an offender's moral culpability. However, it may not be possible for the Judge to ascertain everything which is relevant, especially where an offender (as here) chooses not to offer any evidence on the plea: *Filippou v The Queen* at 72 [70].

[14] Further, it must be recognised that not every matter urged on a sentencing Judge has to be, or can be, fitted into categories of aggravating or mitigating circumstances. The Court may be unpersuaded of matters urged in mitigation or in aggravation. Of course, the absence of persuasion about a fact in mitigation is not the equivalent of persuasion of the opposite fact in aggravation: *Weininger v The Queen* at 638 [24].

What if the Judge cannot decide one way or the other?

31. Historically, there is authority for the proposition that any disputed fact must be established by the accusatorial process; proved by sworn evidence, and; any doubt about the disputed fact must be resolved in favour of the prisoner: see *R v O'Neill* [1979] 2 NSWLR 582 at 590.

32. However, in *Weininger v The Queen* (2003) 212 CLR 629 at 636; [2003] HCA 14 at [19], the Court said that some disputed issues of fact may not be capable of resolution in a way that goes either to increase or decrease the sentence that is to be imposed. It may also not be possible for the Judge to ascertain everything which is relevant: see also *Filippou v The Queen* at 72 [70].

33. Not every matter has to be, or can be, fitted into categories of aggravating or mitigating circumstances. The Court may be unpersuaded of matters urged in mitigation or in aggravation.

34. Ultimately a sentencing judge must do his or her best to find the facts which determine the nature and gravity of the offending, including the facts which inform an offender's moral culpability. If the judge is simply unable to make a specific factual finding, the judge must proceed on the basis of what is proved and leave to one side what is not proved to the requisite standard: *Filippou v The Queen* at 72 [70].

35. Crucially, the absence of persuasion about a fact in mitigation is <u>not</u> the equivalent of persuasion of the opposite fact in aggravation: *Weininger v The Queen* at 638 [24]. So just because the sentencing judge is not satisfied on the balance of probabilities about a fact in mitigation, that does not mean that the court should aggravate the offence.

36. The prosecution do not need to disprove an assertion made by the offender which is relied on to reduce his or her moral culpability to the threshold of beyond reasonable doubt. It was urged by the defence in *R v Olbrich* [1999] HCA 54 that because the Crown could not prove beyond reasonable doubt that the offender was a principal in an offence and disprove the assertion that the offender was no more than a courier in an importation offence, that therefore the Court was bound to accept the favourable version put by the offender, namely, that he was a courier. The High Court said at [24]:

> [W]e reject the contention that a judge who is not satisfied of some matter urged in a plea on behalf of an offender must, nevertheless, sentence the offender on a basis that accepts the accuracy of that contention unless the prosecution proves the contrary beyond reasonable doubt. The incongruities that would result if this submission were accepted are well illustrated by the present case. The respondent swore that he was a courier but the judge disbelieved him. To require the judge to sentence the respondent on the basis that he *was* a courier is incongruous."

37. Further in *Weininger v The Queen,* the Court said at [20] :

> The sentencing judge may not be able to make findings about all matters that may go to describe [the] circumstances. In particular, an offender may urge a particular view of the nature and circumstances of the offence, favourable to the offender. The sentencing judge may be unpersuaded that the view urged is, more probably than not, an accurate view of the circumstances. In such a case, it is not correct that the judge is bound to sentence the offender on that favourable basis, unless the prosecution proves the contrary beyond reasonable doubt.

38. Finally in *Filippou v The Queen,* the Court said at [69]*:*

> In a case like this, the choice is not between absence of proof beyond reasonable doubt of an aggravating circumstance and proof on the balance of probabilities of a mitigating circumstance, but rather between absence of proof beyond reasonable doubt of an aggravating circumstance and absence of proof on the balance of probabilities of a mitigating circumstance.

Evidentiary matters in sentence hearings

39. In practice, a degree of informality permeates sentence hearings: *R v Bourchas* [2002] NSWCCA 373 at [61]. It is uncommon for either the parties or the courts to insist upon the strict application of the rules of evidence to matters of proof. For example, agreed facts circumvent the necessity to call prosecution witnesses on sentence. Hearsay representations contained in documents such as pre-sentence or expert reports are generally admissible: *Imbornone v R* [2017] NSWCCA 144 at [55]; *Devaney v R* [2012] NSWCCA 285 at [88]. The relatively informal approach to matters of proof generally extends to the resolution of contested or disputed facts.

40. The relative informality of sentence proceedings is facilitated by s 4(2) of the *Evidence Act 1995 (NSW)* which provides that in sentence proceedings:

> (a) this Act only applies if the court directs that the law of evidence applies in the proceeding, and
> (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters – the direction has effect accordingly.

41. Circumstances may arise where a party objects to the tender of oral or documentary evidence. Where an objection is taken, the sentencing court must determine the admissibility of the evidence. Generally, the court will direct that the *Evidence Act 1995 (NSW)* applies in relation to that specific evidentiary issue: see s 4(2)(b); *R v Natasha Youkhana* [2011] NSWDC 204 at [3] and *Natasha Youkhana v R* [2013] NSWCCA 85 at [35]-[63].

42. An unusual case may arise where a party objects to the tender of evidence yet the sentencing court neglects to direct that the *Evidence Act 1995* applies. This is what occurred in *Bourchas v R* [2002] NSWCCA 373, where the applicant objected to discrete portions of the agreed facts; part of a letter of assistance tendered by the Crown, and; to the tender of his induced statement to police. The sentencing judge ruled on the admissibility of this evidence without directing the application of the Act: at [41].

43. The Court of Criminal Appeal considered what, if any, evidentiary regime applied at first instance: at [39]-[62]. After carefully and comprehensively considering a litany of authorities, Giles JA (Levine and Sperling JJ agreeing) concluded that, in the absence of a direction under s 4, the common law rules of evidence applied: at [59] and [61]; see also *Farkas v R* [2014] NSWCCA 141 at [14] per Basten JA.

Fact finding after a guilty verdict

44. Where there has been a trial by jury, the trial judge is required to find facts in accordance with the jury verdict and consistent with the offence for which the accused has been convicted. Apart from these limitations, the trial judge is completely at liberty to find all facts in accordance with the evidence and to the relevant standard of proof.

45. The court may also be left unable to decide certain facts, one way or the other (see the discussion about the onus and standard of proof above). For example, the question of motive is for the sentencing judge; in some trials no finding as to motive will be implicit in the jury's verdict.

46. *In Cheung v The Queen* (2001) 209 CLR 1 the High Court (the joint judgment at [14]; Callinan J at [169]) cited the decision of *R v Isaacs* (1997) 41 NSWLR 374 with

approval on the question of fact finding following a jury verdict. The joint judgment summarised *Isaacs* at [14]:

1. Where, following a trial by jury, a person has been convicted of a criminal offence, the power and responsibility of determining the punishment to be inflicted upon the offender rest with the judge, and not with the jury …
2. Subject to certain constraints, it is the duty of the judge to determine the facts relevant to sentencing. Some of these facts will have emerged in evidence at the trial; others may only emerge in the course of the sentencing proceedings. …
3. The primary constraint upon the power and duty of decision-making referred to above is that the view of the facts adopted by the judge for purposes of sentencing must be consistent with the verdict of the jury. …
4. A second constraint is that findings of fact made against an offender by a sentencing judge must be arrived at beyond reasonable doubt.
5. There is no general requirement that a sentencing judge must sentence an offender upon the basis of the view of the facts, consistent with the verdict, which is most favourable to the offender. … However, the practical effect of 4 above, in a given case, may be that, because the judge is required to resolve any reasonable doubt in favour of the accused, then the judge will be obliged, for that reason, to sentence upon a view of the facts which is most favourable to the offender. … "

[Underlining added]

47. In relation to the third principle, that the view of the facts must be consistent with the jury's verdict, the Court in *R v Isaacs* said at [17] – [19]:

[17] As to proposition 3, the required consistency is with the verdict, ie the decision of the jury upon the issue or issues joined for trial. It is at this point that the distinction between issues, facts relevant to an issue, and evidence, is important. Failure to observe that distinction is apt to cause confusion and error. If, as in the present case, a jury returns a general verdict upon a single count in an indictment, the resolution of issues which is express, or necessarily implied, in that verdict, is binding upon the sentencing judge. But the judge does not know the approach taken by the jury, or individual members of the jury, to particular facts relevant to the issues, or to the evidence of particular witnesses, except to the extent to which, by necessary implication, that is revealed by the verdict.

> [18] In the course of oral argument, there was discussion about whether the trial judge could or should have questioned the jury about the process of reasoning by which they came to their verdict. For the reasons given in *Isaacs* there will be very few cases in which it is appropriate or useful to do that. Counsel for the present appellant disclaimed any suggestion that Badgery-Parker J should have done that in the present case. The judge was not asked to do so by trial counsel. Indeed, Badgery-Parker J was requested by trial counsel to undertake the task of finding the facts relevant to sentencing, including, in particular, the facts relating to the appellant's role in the importation, and the motives with which he was acting.
>
> [19] Reference was also made in the course of oral argument to the possibility of taking a special verdict from the jury. Again it was not submitted on appeal, or at trial, that this should have been done in this matter. It is, therefore, not necessary to consider whether a jury can be required, as distinct from invited, to return such a verdict or what it must contain

48. The facts in *Cheung v The Queen* involved a major importation of heroin, originating from Hong Kong, and trans-shipped in Vanuatu, which occurred on 9 May 1989. The fact that Mr Cheung engaged in some activity in connection with that importation was clearly established by irrefutable evidence. But there was an issue as to whether the appellant was knowingly concerned in the importation, and in particular, whether he acted with an intention to advance the purposes of others who were acting in Vanuatu and Sydney.

49. The issue on appeal was the finding made by Badgery-Parker J in relation to the facts on sentence concerning the role played by Mr Cheung in the importation. His Honour rejected Mr Cheung's assertion that "even if he had intended to advance the importation, it was only in a technical sense, and in a possibly misguided pursuit of his official duties." Counsel's complaint on appeal was that Badgery-Parker J was acting outside his proper role.

50. In dealing with the complaint, the Court drew an analogy with the decision of *Savvas v The Queen* at [12]:

> [12] An example of the practical application of the division of functions between judge and jury at a criminal trial, in a context not far removed from the present, is to be found in the decision of this Court in *Savvas v The Queen.* In that case, the appellant had been convicted of conspiracy to import heroin, contrary to the *Customs Act*. He was also convicted of conspiracy to supply; a State offence. In sentencing for both offences, the trial judge made detailed findings as to the overt acts alleged by the prosecution, including the fact that heroin was imported and distributed pursuant to the conspiracy. This was for the purpose of assessing the degree of criminality involved in the appellant's participation in the conspiracy. The findings were not necessarily implicit in the jury's verdict. Nevertheless, the Court held that it was proper to make them, and take them into account on sentencing in accordance with "the … principle that a sentencing judge may form his or her own view of the facts, so long as it does not conflict with the jury's verdict.

51. The majority pointed to *Olbrich v R*, noting that difficulties often exist in determining, for sentencing purposes, the exact role of a participant in an importation of prohibited drugs. The majority went on to refer to the principles governing the fact-finding role of the sentencing judge. A contention that a judge who is not satisfied of some matter urged in a plea in mitigation, must, nevertheless, sentence the offender on a basis that accepts that matter unless the prosecution proves to the contrary was rejected.

PART TWO - THE MAGNIFICENT SEVEN: SEVEN QUESTIONS THAT OFTEN ARISE WHEN A JUDGE HAS TO FIND THE FACTS

52. It is beyond both the scope of the paper and the (admittedly limited) collective intellect of the writers to address every scenario that may confront a practitioner appearing in a sentence hearing. We have focussed on seven areas which, in our experience, are more likely to arise when a sentencing judge is asked to “find the facts”.

One – Disputing the Facts: how do I do it and should I do it?

53. In *R v MacDonell* (unrep, 8/12/95, NSWCCA) at 1, Hunt CJ at CL stated:

> The sentencing procedures in the criminal justice system depend upon sentencers making findings as to what the relevant facts are, accepting the principles of law laid

down by the Legislature and by the courts, and exercising a discretion as to what sentence should be imposed by applying those principles to the facts found.

54. It is for the sentencing judge alone to decide the sentence to be imposed and for that purpose, the judge must find the relevant facts: *GAS v The Queen* (2004) 217 CLR 198 at [30]. The majority of the High Court acknowledged the significance of fact finding at sentence in *The Queen v Olbrich* (1999) 199 CLR 270; [1999] HCA 54 at [1]:

> Unless the legislature has limited the sentencing discretion, a judge passing sentence on an offender must decide not only what type of penalty will be exacted but also how large that penalty should be. Those decisions will be very much affected by the factual basis from which the judge proceeds. In particular, the judge's conclusions about what the offender did and about the history and other personal circumstances of the offender will be very important.

55. Findings of fact about matters such as motive or the degree of an offender's involvement have a significant effect on the assessment of an offender's moral culpability. There are many cases involving either a plea of guilty, or a conviction following a plea of not guilty, where the task of assessing an offender's culpability is more difficult than that of determining his or her guilt: *Cheung v The Queen* (2001) HCA 67 per Gleeson CJ, Gummow and Hayne JJ at [8].

56. In *R v Alameddine (No. 3)* [2018] NSWSC 681, Johnson J said at [142]:

> What was said in the past concerning the need for proof of contested facts by admissible evidence (cf *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 605) must now be considered in the context where s.4(1)(d) and (2) *Evidence Act 1995* state that that statute does not apply to sentencing proceedings without a direction being given to that effect. That said, it must be kept in mind that the requirements of proof laid down in *The Queen v Olbrich* (1999) 199 CLR 270; [1999] HCA 54 are informed by principles of fairness: *Filippou v The Queen* at 73 [72]. Where objection is taken to the tender of material adverse to an offender, a sentencing court should only act upon it if it is cogent evidence which may be tested by the offender before any weight could be given to it to found a finding adverse to an offender.

How do you do dispute the facts?

57. From a practical perspective it is best to identify the areas in dispute in the statement of facts before the court. It is also best practice to take the court to the various areas in dispute at the commencement of the matter so the court is on 'notice.'

58. Evidence can be adduced in documentary form or orally. Section 4(1)(d) and s 4(2) of the *Evidence Act 1995* state that the Act does not apply to sentencing proceedings without a direction being given to that effect.

59. Practitioners will need to determine whether a direction ought to be sought. If you are relying on material which would ordinarily be excluded (for example, because it is hearsay) you may not wish to ask for such a direction. Conversely, where the Crown, for example, intends to adduce evidence of a statement of a witness who is not (and may never be) available for cross examination, there may be tactical advantages in requesting a direction. In such a scenario, the Crown may need to make that person available to give evidence in Court, or rely on section 65 or other provisions of the *Evidence Act*.

60. Any dispute as to matters beyond such "essential ingredients" admitted by the plea, must be resolved by the application of ordinary legal principles appropriate to a criminal trial: *Chow v DPP* (1992) 28 NSWLR 593 at 605.

61. Disputed facts should be resolved by the accusatorial process and upon the evidence before the court applying the respective onus and standards of proof: *O'Neill-Shaw v R* [2010] NSWCCA 42 at [26]. However, if evidence is unchallenged by the prosecution, and it is not inherently implausible, the sentencing judge is not entitled to reject it or fail to act on it without giving proper notice to the offender of that intended course: *O'Neill-Shaw v R* at [26], citing *R v Palu* (2002) 134 A Crim R 174 at [21] (discussed in more detail below).

Disputing the Facts – is it worth it?

62. It is important to bear in mind the potential consequences should an offender dispute a fact only for the sentencing court to resolve the dispute in a manner adverse to the offender.

63. The most significant consequence in losing a disputed facts hearing is the erosion of the offender's discount on sentence: see *R v AB* [2011] NSWCCA 229 at 363-364 at [2] – [3] per Bathurst J; at [30] – [33] per Johnson J; see also s 25F(4) of the *Crimes (Sentencing Procedure) Act 1999*.

64. *R v AB* [2011] NSWCCA 229 was a Crown appeal under s.5D Criminal Appeal Act 1912 with respect to sentences passed upon the Respondent, AB, at the Goulburn District Court on 9 March 2011 arising from a devastating motor vehicle collision. The Respondent's children, MB (then aged 15 years) and JB (then aged 18 years) were injured in the collision as was DW (then aged 15 years), a friend of MB.

65. The background of this matter and the manner in which the sentence proceeded is summarised at [18] to [22]. In short, on 28 May 2010, the Respondent adhered to his pleas of guilty before Judge Toner SC. His Honour was informed about a dispute on the facts which concerned the speed at which the vehicle was travelling shortly before it left the road. The Respondent also disputed DW's account that DW had warned the Respondent to slow down shortly before the vehicle left the road. DW was rendered a C2 tetraplegic as a result of injuries sustained in this collision. It was not possible to accommodate the taking of evidence from DW on that day. The Judge was not able to remain part heard and the matter commenced de novo before Judge Murrell SC on 8 March 2011. DW gave evidence by audio-visual link and was cross-examined.

66. In response to an enquiry from the sentencing Judge, the Crown maintained the position that there was no issue about the 25% discount in the circumstances of the case. Johnson J said that this was a generous concession by the Crown. His Honour said at [25] – [26], [29], [30] – [32]:

> [25] The Crown accepted in this Court that the present appeal should go forward upon the basis that the Respondent retains the benefit of the Crown concession in the

District Court which saw him receive a substantial discount for the suggested utilitarian value of his pleas. However, by that time, the sentencing hearing had proceeded before three different Judges of the District Court over a period exceeding nine months between 28 May 2010 and 9 March 2011. It had been necessary, because of the Respondent's dispute as to facts, for DW, a young man who had suffered profound injuries as a result of the Respondent's criminal conduct, to give evidence and be cross-examined by audio-visual link. No doubt this process required DW to recall and relive the horrific events which gave rise to his injuries.

[26] The proceedings before the District Court occupied more than 115 transcript pages over six sitting days between May 2010 and March 2011. There was, in reality, a substantial erosion of the utilitarian value flowing from the Respondent's pleas of guilty.

[29] Further, DW was required to give evidence. The utilitarian discount for pleas of guilty does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence, but this is relevant to remorse: R v Borkowski [2009] NSWCCA 102; 195 A Crim R 1 at 10 [32]. It might be thought that the Respondent's insistence that DW give evidence at the contested sentencing hearing would operate against the Respondent on the question of remorse.

[32] Likewise, a person who pleads guilty but puts the Crown to proof on certain factual issues and who loses that dispute, is not entitled to the same discount for a plea of guilty, on utilitarian grounds, as a person who does not require such a contested hearing.

[33] These observations will have no application to the determination of the present Crown appeal. However, as a matter of general principle, this Court should state that the utilitarian value flowing from a plea of guilty is not a fixed element, and is capable of erosion as a result of the manner in which the sentencing hearing is conducted. This involves no more than an acknowledgment of the fact that what may be gained in utilitarian terms as a result of the avoidance of a trial may be lost, also in utilitarian terms, by way of a protracted sentencing hearing involving the adducing of evidence and the consumption of public resources for a purpose ultimately determined adversely to an offender.

[Underlining added]

67. *R v Alou No 4* [2018] NSWSC 221 involved a sentencing hearing that extended over five days. Part of that time was occupied for the purpose of resolving factual issues in dispute, including the giving of evidence by one witness. The evidence of that witness occupied some 95 pages of the 277-page transcript.

68. Johnson J said at [245]: "that the features of the sentencing hearing do call for reduction in discount in accordance with the principles in *R v AB* given that I have resolved some of these contested issues adversely to the Offender and, in particular, the issue which involved a substantial evidentiary hearing."

69. Before the application of any discount his Honour indicated a notional starting point of 52 years imprisonment. As a result of resolving some of the factual matters adversely to the offender his Honour applied a discount of 15% instead of 25%. The offender received a head sentence of 44 years' imprisonment with a non-parole period of 33 years.

70. If he had received the full 25% discount for his early plea of guilty, the head sentence would have been 39 years imprisonment with a non-parole period of 29 years. That is, unsuccessfully disputing the facts meant that the offender received 5 years, or about 1,826 days, more gaol time

Two – Can the court reject an agreed fact?

71. A sentencing Judge "may go behind" the agreed facts presented by the Crown and the defence: *Chow v Director of Public Prosecutions & Another* (1992) 28 NSWLR 593 at 607 and 608. At 606, Kirby P said that the sentencing judge is not obliged:

> "…passively, and unquestioningly, to accept facts as the basis for sentencing which are presented by the prosecution and/or the accused…A statement of agreed facts may appear to the sentencing judge to be inadequate for sentencing purposes. The judge may feel the need for further material, for example, by way of pre-sentence report to assist in the performance of the sentencing function…"

72. For example, in *Duc Thain Nguyen v R* [2015] NSWCCA 268 at [44]-[47], the Court of Criminal Appeal observed that it was open to the sentencing judge to reject an agreed fact that the appellant was a "mere courier."

73. However, a sentencing judge who intends to reject an agreed fact is subject to several constraints.

74. First, procedural fairness: the Judge must warn the offender of his or her intention to make findings of fact inconsistent with the agreed facts. A failure to warn the parties of that intention and provide the parties with an opportunity to respond to the judge's view may constitute error: see *R v Uzabega* [2000] NSWCCA 381 at [35]-[38]. In *Nguyen* at [44]-[47], the primary judge properly communicated his intention to reject the agreed fact and granted the appellant an adjournment to meet his concerns.

75. Second, the sentencing judge must avoid adopting an "excessively inquisitorial role" in the sentence hearing: *Chow* at 606; see also *Blake Geoffrey Ellis v R* [2015] NSWCCA 262 generally and at [66]-[70]. At 608, Kirby P in *Chow* said that the primary judge "crossed the line which divides permissible judicial questioning from prosecutorial accusation and criminal inquisition" by:

    - challenging the prosecutor's acceptance of a lesser charge;
    - doubting the existence of a defence to the more serious charge;
    - suggesting that the parties were concealing important matters from the court (for example, during an exchange with counsel for the Crown and the defence in the sentence proceedings the primary judge said that "(t)here is an aroma about this matter and I want to know what it is about"), and;
    - insisting upon the tender of committal depositions over the offender's objection.

76. Third, the sentencing judge must not sentence a person who has pleaded guilty to a lesser charge upon a version of the facts which would constitute a more serious offence: *Chow* at 607; *The Queen v De Simoni* (1981) 147 CLR 383 at 389 per Gibbs CJ.

Three – How does *De Simoni* apply to fact-finding on sentence?

77. In *The Queen v De Simoni* (1981) 147 CLR 383 at 389, Gibbs CJ said:

> the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted … The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.

78. The *De Simoni* principle constrains the capacity of a sentencing court to take into account s 21A(2) aggravating factors pursuant to the *Crimes (Sentencing Procedure) Act 1999 (NSW)*: see 21A(4) and *Cassidy v R* [2012] NSWCCA 68 at [1] per Basten JA.

79. The *De Simoni* principle operates for the benefit of the offender: *Nguyen v R* [2016] HCA 17 at [29] per Bell and Keane JJ. It prohibits a judge from taking into account a circumstance or factor which may render the offender liable to a more serious offence: *Nguyen v R* at [60] per Gageler, Nettle and Gordon JJ.

80. A sentencing court does not breach the *De Simoni* principle by referring to the *absence* of a circumstance or factor when assessing the objective seriousness of the offence, the presence of which may have otherwise established a more serious offence: *Nguyen v R* at [60]. However, such an observation is likely erroneous because it is simply irrelevant to the assessment of objective gravity: *Nguyen v R* at [29]-[30] per Bell and Keane JJ; [60] per Gageler, Nettle and Gordon JJ.

81. The practical application of the *De Simoni* principle is often fraught with difficulties: see the comments of Basten JA in *Cassidy v R* [2012] NSWCCA 68 at [1]-[3].

82. For example, it is well-established that a “more serious offence” for the purpose of the *De Simoni* principle will include an offence that attracts a greater maximum penalty than the charged offence: see, for example, *Hector v Regina* [2003] NSWCCA 196 at

[21]. However, can the *De Simoni* principle extend beyond consideration of the maximum penalty?

83. There is authority for the proposition that *De Simoni* will also apply to an uncharged offence that carries the same maximum penalty as the charged offence but where the former attracts a standard non-parole period yet the latter does not. In *Cassidy v R,* the appellant was sentenced for intentionally destroying property by fire with intent to endanger life under s 198 of the *Crimes Act 1900*. The offence carried a maximum penalty of 25 years imprisonment but did not carry a standard non-parole period. The Agreed Facts contained the appellant's contemporaneous assertions that he intended to kill the people inside. The appellant's specific intention to kill informed the primary judge's assessment of the objective seriousness of the offending.

84. Blanch J concluded that the primary judge had contravened the *De Simoni* principle. His Honour observed that an intention to kill was an element of the attempt murder offences encompassed in sections 27 to 30 (the ss 27-30 offences). Those offences carried the same maximum penalty as the s 198 offence. However, the ss 27-30 offences were "more serious" offences because they triggered a standard non-parole period of 10 years: at [23]-[27].

85. Basten JA and Beech-Jones J agreed with the Blanch's J reasons and orders. Interestingly, Basten JA suggested an additional basis in support of the conclusion that the ss 27-30 offences were "more serious" at [7]:

> Secondly, despite carrying a liability to the same maximum penalty, in terms of moral culpability, an intention to kill is more serious than an intention to endanger life. Accordingly, the former intent would warrant a more severe sentence than the latter.

86. His Honour's comments are almost certainly obiter; they were not adopted by either Blanch or Beech-Jones JJ. Yet his Honour's observations may offer the potential to broaden the definitional ambit of "more serious offence" to include a comparison of the moral culpability which attaches to the charged and uncharged offence.

87. However, if the court only takes into account the relevant circumstance for a purpose disconnected to the assessment of objective seriousness then this may not infringe

the *De Simoni* principle. For example, in *Cassidy,* the Court held that the Judge was entitled to have regard to the appellant's statements of intention to kill in assessing his remorse: see Blanch at [21]; Basten JA at [6].

88. Furthermore, the *De Simoni* principle may not always require the *complete* disregard of the relevant circumstance when assessing objective seriousness. For example in *Issa v R* [2017] NSWCCA 188, the primary judge found that the objective seriousness of damage property by fire offences contrary to s 195 were aggravated because the applicant was reckless to the harm to potential occupants. The mere finding of "recklessness" did not breach *De Simoni* because the mental element that attached to more serious offences contrary to ss 196 and 198 required proof of a *specific intention* to endanger the occupants: at [61]-[84] per Adamson J.

89. Similarly, in *Bonnett v R* [2013] NSWCCA 234, the applicant appealed against a sentence imposed for an offence of aggravated robbery contrary to s 95. The victim had suffered extensive injuries which the primary judge found amounted to grievous bodily harm.[3] However, Adamson J (Gleeson JA and R A Hulme J agreeing) held that the sentencing judge did not err in taking into account the victim's injuries. It was said that the primary judge had appreciated that *De Simoni* obliged him to disregard injuries that went beyond actual bodily harm, and had sentenced on the basis that the injuries were "certainly significant" but did not amount to really serious injury: at [43]-[44].

Four – untested self-serving representations

90. It is well-established that, in the absence of oral evidence, courts ought to approach evidence of out of court statements made to third parties with circumspection: *R v Qutami* [2001] NSWCCA 353 at [58] – [59].

91. The *Qutami* principle is most commonly evoked when an offender relies upon an out of court statements to establish remorse (e.g. *Imbornone v R* [2017] NSWCCA 144 at [58]). But its application arguably extends to <u>any</u> out of court statement which an offender submits ought to be taken into account in mitigation – for example, an

[3] On a separate issue, the primary judge had regard to the actual bodily harm inflicted although the circumstance of aggravation was particularised as deprivation of liberty. The primary judge was entitled to adopt that approach: see at [24] and [40]; see also *Josefski v R* [2010] NSWCCA 41.

offender's attempts to reduce his or her moral culpability (e.g. *R v McGourty* [2002] NSWCCA 335 at [23]-[25]) or a self-reported history of childhood dysfunction (e.g. *Colville v R* [2015] NSWCCA 149 at [45]-[47]). An out of court statement may be adduced in a myriad of forms such as in a psychologist report (e.g. *Anae v R* [2018] NSWCCA 73 at [63]-[69]), a letter to the court (e.g. *R v Elfar* [2003] NSWCCA 358 at [25]), or a pre-sentence report (e.g. *R v Palu* [2002] NSWCCA 381 at [40]).

92. The *Qutami* principle was recently affirmed in *Imbornone v R.* Wilson J (Hoeben CJ at CL and R A Hulme J agreeing) summarised the position at [55]:

> This Court has frequently said that untested out of court statements made to third parties should be treated with caution. Although it should be a principle that is well known and understood it seems necessary to restate it. The following statements are derived from the authorities:
>
> - Although statements made to third parties are generally admissible in sentence proceedings (subject to objection and the application of the rules of evidence) courts should exercise very considerable caution in relying upon them where there is no evidence given by the offender. In many cases such statements can be given little or no weight: *R v Qutami* [2001] NSWCCA 353 at [58] – [59].
> - Statements to doctors, psychologists, psychiatrists, the authors of pre-sentence reports and others, or assertions contained in letters written by an offender and tendered to the court, should all be treated with considerable circumspection. Such evidence is untested, and may be deserving of little or no weight: *R v Palu* [2002] NSWCCA 381; (2002) 134 A Crim R 174 at 185, [40]-[41]; *R v Elfar* [2003] NSWCCA 358 at [25]; *R v McGourty* [2002] NSWCCA 335 at [24] – [25].
> - It is open to a court in assessing the weight to be given to such statements to have regard to the fact that an offender did not give evidence and was not subject to cross-examination: *Butters v R* [2010] NSWCCA 1 at [18]. It is one matter for an offender to express remorse to a psychologist or other third party and quite another to give sworn evidence and be cross-examined on the issue: *Pfitzner v R* [2010] NSWCCA 314 at [33].
> - If an offender appearing for sentence wishes to place evidence before the court which is designed to minimise his or her criminality, or otherwise mitigate penalty, then it should be done directly and in a form which can be tested: *Munro v R* [2006] NSWCCA 350 at [17]–[19].

- Whilst evidence in an affidavit from an offender which is admitted into evidence without objection may be accepted by a sentencing judge (see *Van Zwam v R* [2017] NSWCCA 127), generally the circumstances in which regard should be had to such untested evidence is limited. Affidavits relied upon in the absence of oral evidence on oath frequently contain self-interested assertions of a character which makes them almost impossible to verify or test (particularly when served on the Crown in close proximity to, or on, the date of hearing). In the absence of any independent verification of the asserted behaviour, or state of mind, or of a tangible expression of contrition, "to treat this evidence with anything but scepticism represents a triumph of hope over experience": *R v Harrison* [2001] NSWCCA 79; (2002) 121 A Crim R 380 at [44].

93. The obvious remedy to the guarded weight attributed to hearsay representations is to call the offender to give evidence. It is trite to observe, however, that there may be very good reasons for a practitioner to not call their client. Where the offender is not called to give sworn evidence, overcoming the application of *Qutami* may appear herculean. Yet it is important to highlight several matters.

94. First, *Imbornone v R,* and the cases cited therein, are *not* authority for the proposition that a court is *obliged* to reject the substance of an out of court statement if it is not supported by oral evidence. For example, the Court of Criminal Appeal in *Butters v R* [2010] NSWCCA 1 at [16]-[18] noted that there is no statutory requirement that an offender give evidence before remorse can be taken into account as a matter of mitigation.

95. Second, there is arguably some tension between Wilson's J approach in *Imbornone v R* to sworn affidavits admitted without objection (supported by the additional observations of R A Hulme at [3]-[9]), and the ratio in *Van Zwam v R* [2017] NSWCCA 127. By majority, the Court of Criminal Appeal in *Van Zwam* found that the primary judge had erred in disregarding the offender's sworn affidavit which had been admitted without objection. MacFarlan JA observed that although the affidavit might have attracted less weight than evidence given orally, it should not have been disregarded altogether: at [6]. At [110]-[111], Campbell J agreed having applied the principles in *O'Neil-Shaw v R* [2010] NSWCCA 42 (see below at [118]).

96. Third, the circumspection which a sentencing court may treat out of court statements made by an offender to an expert witness ought not necessarily equate to a devaluation of either the expert's opinion or to the psychiatric history provided to the expert: see *Luque v R* [2017] NSWCCA 226 at [116] per Hamill J; *Devaney v R* [2012] NSWCCA 285 at [87]-[88] per Allsop P (Price J agreeing); see the discussion below at [115]-[116].

97. Finally, notwithstanding *Qutami,* it is always open to the court in the proper exercise of its sentencing discretion to accept, and attribute significant weight to, out of court statements made to third parties in the absence of sworn evidence from the offender. Practitioners should always consider how they might strengthen the persuasive force of an out of court statement. This may involve marshalling both arguments and corroborative material in an attempt to alleviate the concerns that underpin the statements of principle in cases such as *R v Qutami* and *Imbornone v R*. For example:

- Is the previous representation truly "self-serving"? (Contrary to, for example, *R v Qutami* at [79] per Spigelman CJ and *Imbornone v R* at [58] per Wilson J).
- Is the offender's conduct consistent with the substance of the representation? For example, are assertions of remorse in a psychologist report accompanied by observations of demeanour consistent with remorse?
- Does independent material corroborate the substance of the representation? (See, for example, *Luque v R* [2017] NSWCCA where there was a substantial body of documentary evidence supporting the self-reported psychiatric history).
- Was the representation made for the purpose of the sentence proceeding? (Contrary to, for example, *Imbornone v R* at [58]).
- Was the representation subject to some testing or challenge? For example, did the representation arise from a police interview?
- Does the offender, and/or the account proffered, appear credible and reliable? (Contrary to, for example, *Imbornone v R* at [58] and *Colville v R* at [50]).

Five – Can the court reject parts of a psychological or psychiatric report tendered without objection?

98. The intersection between expert evidence and sentencing principles that apply to mentally unwell offenders warrants its own extensive dissertation. However, our discussion is designed to be illustrative rather than comprehensive.

99. The focus of this section of the paper is upon the most common form of expert evidence adduced in sentence proceedings: psychiatric or psychological reports tendered without objection. Is the court bound to accept the opinion expressed in such a report? This question often surfaces in three contexts.

100. First, it may be open to a sentencing judge to reject an expert's opinion that a mental illness, condition or developmental disability contributed to the commission of an offence even if that opinion was admitted without objection or otherwise challenged. Price J in *Toman v R* [2018] NSWCCA 51 observed at [26] that:

> An assessment of whether a person's mental illness contributes to the commission of an offence and the extent of that contribution is a discretionary decision to be made by a sentencing judge in light of the particular facts and circumstances of the case. Such a decision is only reviewable by this Court in accordance with the principles of *House v R* (1936) 55 CLR 499; [1936] HCA 40 at 505.

101. In *Toman v R*, two eminent forensic psychiatrists (Dr Nielssen and Dr Furst) provided reports which opined that Mr Toman's schizophrenic illness contributed to the commission of the offence because it adversely affected his decision making and long term consequential thinking: at [19]-[21]. The reports were tendered without objection. The primary judge nonetheless rejected the opinions regarding causation. His Honour highlighted the tension between the assertion that the offender's mental illness impaired his capacity to "make logical decisions" and the agreed facts which, inter alia, exhibited significant planning in the commission of the offence and the means to dispose of the stolen property: at [21]. Price J (Bathurst CJ and Johnson J) held that the primary judges' finding was open on the material before him: at [27]-[32].

102. However, sentencing courts must not adopt an overly restrictive approach to causation. In *Luque v R* [2017] NSWCCA 226, the applicant was sentenced for an offence of making a false accusation knowing that the other person was innocent contrary to s 314 of the *Crimes Act 1900 (NSW).* Dr Furst opined that the applicant's constellation of mental health conditions contributed to her "poor judgement at the time of making false allegations…": at [44]. The primary judge rejected Dr Furst's opinion regarding causation because, inter alia, the mental illness did not deprive the applicant of: control of her actions, independent capability of exercising discretion, or understanding of what she was doing. His Honour said that the applicant *"…certainly had some depression around that time, but this went far beyond something which could be excused on the basis she had no idea what she was doing"*: at [63].

103. Button J (MacFarlan JA and Hamill J agreeing) held that the primary judge had erred by applying too "restrictive an approach" to the applicant's mental condition: at [84]. His Honour said that the primary judge had set "too high a bar" before the applicant's mental condition could appropriately be taken into account: at [81]. The law of sentencing only required *"…that a mental illness or condition played a role of some significance to her offending":* at [82].

104. Hamill J agreed with Button's J reasons and proposed orders but sought to make some additional observations which included the following at [114] and [115]:

> [114] The first is that a sentencing Judge dealing with evidence of an offender's mental condition or intellectual impairment ought not approach the task in an unduly technical or restrictive way. The issue to be determined is not the same as deciding causation in a civil case. The issue is whether the fact of the disorder mitigates the punishment that ought to be visited upon the offender…
>
> [115] The second matter is that an offender who relies on evidence of a psychiatric issue as a matter of mitigation is not setting out to establish a defence of mental illness or substantial impairment and is not required to prove that they did not understand what they were doing, or that they did not know that what they were doing was wrong. The part of the sentencing judgment cited by Button J at [63] comes perilously close to imposing such a burden on the applicant.

105. It is important to note that neither MacFarlan JA nor Button J referred to his Honours remarks. Notwithstanding their limited precedential value, Hamill's J additional observations are both apposite and compelling.

106. The second scenario is where, notwithstanding the tender of the report without objection, a challenge is articulated to an opinion in the body of the report on the ground that it does not arise from the expert's specialised knowledge. The most obvious example of this scenario is where a forensic psychologist either purports to diagnose a mental illness or comment upon the nexus between the offence and the illness.

107. The Court of Criminal Appeal has, on occasion, expressed some concern about a psychologist, and not a psychiatrist, purporting to diagnose the existence of a mental illness: see *Lam v R* at [2015] NSWCCA 143 [74]-[82] per Hoeben CJ at CL*; Jung v R* [2017] NSWCCA 2 at [41] per Johnson J; *Zuffo v R* [2017] NSWCCA 187 at [73] per Price J. Nevertheless, a psychological report tendered without objection will form part of the evidence before the sentencing judge; it will be given as much weight as it deserves: *Jung v R* at [42]. The sentencing judge may attribute less weight to conclusions in a psychological report which are not based upon the expert's specialised knowledge: *Lam v R* at [82].

108. However, the expressed concerns in the cited authorities have not always received enthusiastic support. For example, in *Ryan v R* [2017] NSWCCA 209, the Crown during the hearing of the appeal referred to the authorities cited above in support of the contention that "this Court has previously expressed concern where a psychologist, and not a psychiatrist, purports to diagnose the existence of a mental illness". Hamill J (Leeming JA and Button J agreeing) said it would not be appropriate to "gainsay the diagnosis" of the psychological report because the prosecution at first instance did not object to its tender nor challenge the diagnosis. His Honour went on to state that *"(i)t is, therefore, unnecessary to consider whether the earlier observations made by the Judges of this Court accurately reflect the law in this area. In any event it was abundantly clear that the applicant suffered from a serious mental disorder and the learned sentencing judge so found:"* at [9]-[10].

109. Furthermore, the observations of the Court of Criminal Appeal in cases such as *Lam v R* appear to sit uncomfortably with Hamill's J comments in *Luque v R,* that sentencing mentally unwell offenders ought not be undertaken "in an unduly technical or restrictive way". Indeed, in an earlier decision of *R v Arnold* [2004] NSWWCA 294, the Court of Criminal Appeal adopted an approach diametrically opposed to the position articulated by Hoeben CJ at CL in *Lam v R.*

110. In *R v Arnold* a forensic psychologist provisionally diagnosed the appellant with severe borderline personality disorder. The primary judge did not accept the diagnosis on the basis that a psychologist had *"…no entitlement to express opinions about mental disorders…"*: at [62]. Adams J (Wood CJ at CL and Kirby J agreeing) forcefully concluded that the primary judge had erred at [63]-[64]. It is worth setting out what his Honour said in full:

> [63] In my view, the learned trial judge's refusal to give any weight to Dr Lennings' report because it is not that of a psychiatrist is a serious error. There was no objection by the Crown to the tender of the report or to the admissibility of any opinion expressed in it, nor did the Crown contend that only qualified weight should be given to Dr Lennings' conclusion, though it was (in some respects only) expressed to be provisional. The attitude of the Crown is not surprising, having regard to the obvious care with which the report is compiled and Dr Lennings' *curriculum vitae*, which indicates, amongst other things, that he is a clinical psychologist with a Masters Degree in Clinical Psychology, he has a Doctorate in a relevant field (personality), and he has had extensive experience over many years both for Government and private clients in making assessments of the kind he made in this case. <u>This is not to say that the court is obliged to accept his opinions, but to reject them because he is a psychologist rather than a psychiatrist, especially when no such objection is made by the other party, strikes me as arbitrary and unreasonable.</u>
>
> [64] All the evidence about Arnold's mental and emotional condition demonstrated that, at the very least, he had been a very disturbed individual for a considerable time, almost certainly since well before he was ten years of age. It seems to me that the view of this matter expressed by the sentencing judge in the above passages not only wrongly fails to take Dr Lennings' opinion into account but also substantially and unfairly understates the considerable psychological and behavioural problems exhibited by Arnold from a relatively early age and the significant impact on his mental

functioning of his early introduction – long before adulthood – to amphetamines and other addictive illicit drugs…

(Underlining added)

111. The capacity of a forensic psychologist to comment upon matters that might strictly fall within psychiatric expertise appears unsettled. It is perhaps a question which cannot be answered definitively; it may fall to be assessed on a case-by-case basis. Nonetheless, the different approaches in the superior courts may serve to highlight the importance of:

- Briefing an appropriately qualified expert for the purpose of sentencing.
- Speaking to the expert if you anticipate a challenge to the diagnosis (or indeed, any other opinion expressed in the report). For example, carefully consider the expert's curriculum vitae - is the opinion expressed properly based upon the expert's specialised knowledge? Does the opinion address inconsistent evidence or competing inferences? Are the reasons proffered in support of the opinion sufficient?
- If necessary, ensuring that the expert is available to give evidence (including adjourning the sentence hearing to secure the expert's attendance).
- If necessary, adjourning the sentencing hearing to address weaknesses in the report or to obtain an opinion from a more suitably qualified expert.

112. Three, it may be open to a sentencing court to reject an expert's opinion if the opinion is based upon the offender's account and the sentencing court rejects that account: see for example *Lam v R* at [58] citing *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305.

113. In *Lam v R,* the applicant was sentenced for an offence of importing a commercial quantity of heroin. The primary judge rejected opinions expressed in a psychological report that the applicant was suffering from a major depressive disorder at the time of the offence and that the mental disorder contributed to the commission of the offence. His Honour found that the opinions were "in part based on a false history" provided by the appellant to the psychologist: at [31].

114. Hoeben CJ at CL (Johnson and Beech-Jones JJ agreeing) held that the primary judge was entitled to reject the psychologist's opinions. His Honour said that:

- Fundamental to the psychologists' opinion was an acceptance of the applicant's account regarding the applicant's motive for coming to Australia and how he became involved in the importation of heroin: at [60].
- Yet the applicant's account amounted to "a sequence of deliberate falsehoods": at [61].
- A rejection of the applicant's account deprived the opinions of their foundation: at [62]-[63].
- Furthermore, the sentencing judge's failure to warn the applicant of his intention to reject the psychologist's opinion was not procedurally unfair (see *O'Neil-Shaw v R* [2010] NSWCCA 42 which is explored below). Hoeben CJ at CL held that "…it must have been apparent to counsel appearing for the applicant that if his Honour rejected the applicant's submissions as to the part he played in the importation, that this would have a knock-on effect in relation to the conclusions of Dr Jacmon": at [63]-[65].

115. In *Lam v R*, the very foundation of the experts' opinion was the appellant's account; an account that the Crown contested and the primary judge ultimately rejected. Conversely, sentencing courts should tread carefully before devaluing an expert witness's professional opinion merely because that opinion is based upon out of court statements made to the expert which are not supported by oral evidence: see the additional observations of Hamill J in *Luque v R* at [116] citing *Devaney v R* [2012] NSWCC 285 at [87]-[88] per Allsop P (Price J agreeing).

116. In *Devaney v R,* the applicant appealed against a sentence imposed for the attempted murder of his former partner. Allsop P at [88] said that the sentencing judge should not have diminished the weight of the psychiatric evidence because the appellant did not give evidence. His Honour drew a clear distinction between the reduced weight that may attach to an out of court statement in the absence of oral evidence from the offender (that is, the *Qutami* principle*)* and the weight of a psychiatric opinion based upon history. In the latter scenario, the very nature of the psychiatrist's professional expertise will involve assessing the self-reported history and forming a diagnosis from what the offender has said: at [88].

117. Furthermore, documentary evidence may corroborate the offender's self-reported history to an expert. For example, in *Luque v R,* the primary judge approached the history recorded in Dr Furst's psychiatric report with "the utmost caution": at [62]. Button J at [71] and [73] empathised with the need for circumspection; the applicant stood to be sentenced for making a serious false allegation and her criminal antecedents demonstrated a pattern of dishonesty. However, his Honour noted that the evidence of the applicant's mental state was not confined to the applicant's self-report. It derived from multiple sources including letters from the applicant's father and treating psychotherapist. Furthermore, Dr Furst's diagnosis was not based solely upon the applicant's self-report; it arose from the applicant's presentation, an analysis of her medical records, and her past diagnosis.[4]

Six – Can the court reject unchallenged sworn evidence?

118. In *O'Neil-Shaw v R* [2010] NSWCCA 42, the appellant was sentenced for an offence of wound with intent. At the sentence hearing, the appellant tendered (without objection) a substantial body of evidence suggesting that the victim (his step-father) was, in the words of the primary judge, a "controlling, violent and nasty individual": at [7]. The appellant gave evidence and was cross-examined. The Crown did not cross-examine the appellant in respect of his description of his step-father but did tender extensive material favourable to the victim's character.

119. The sentencing judge rejected the appellants' evidence on which he was not cross-examined; rejected some of the corroborative defence evidence which was not the subject of cross-examination, and; failed to consider expert evidence admitted without objection which supported the appellant's account.

120. The Court of Criminal found that the primary judge had erred. Basten JA delivered the leading judgment. After discussing *Chow* and *Palu,* his Honour said at [26]-[27]:

> [26] Statements of general principle must be understood in their context. Nothing in the statement set out above from *Chow* should be understood as inconsistent with the obligation of the sentencing judge to impose the appropriate sentence, based on the

[4] See also Hamill's J additional observations in *Luque v R* at [116].

evidence properly before the court. As explained by Howie J in *Palu*, the factual basis should be identified with particularity and disputed facts resolved by the accusatorial process upon the evidence before the court. Where the evidence was not challenged or disputed by the prosecution, and was not inherently implausible, his Honour was not entitled to reject it or fail to act on it, or at least was not entitled to do so without proper notice to the applicant that he intended to take that course.

[27] It is a basic rule of procedural fairness that a party who does not accept the evidence of a witness should put the alternative view in cross-examination, both so that the witness may respond and so that the court has the benefit of assessing the response: *R v SWC* [2007] VSCA 201; 175 A Crim R 71 at [12]-[15] (Maxwell P, Kellam JA and Kaye AJA). Where there has been no cross-examination of witnesses to contest their evidence, "judges should in general abstain from making adverse findings about parties and witnesses": *MWJ v The Queen* [2005] HCA 74; 80 ALJR 329 at [39] (Gummow, Kirby and Callinan JJ).

(Underlining added)

121. Curiously, the apparent effect of the last part of paragraph [26] is that the sentencing court can reject plausible and unchallenged sworn evidence *if* proper notice is provided. Arguably, this illuminates the true nature of the principle in *O'Neil v Shaw*; it is concerned with procedural fairness. As Simpson J (as her Honour then was) explained in *Cherdchoochatri v R* [2013] NSWCCA 118 at [52], proper notice "would give the party an opportunity to attempt to marshall additional evidence or argument" to meet the sentencing Judges' concerns.

122. Indeed, the remedy to the identified error in both *O'Neil-Shaw v R* and *Cherdchoochatri v R* reflected procedural rather substantive irregularity. In neither case did the Court proceed to re-sentence the appellant on the basis of the appellant's unchallenged and plausible account. Instead, each matter was remitted to the District Court for further hearing and determination.

123. However, a sentencing court need not always signal an intention to reject an offender's unchallenged evidence. In *Shajeel Khanwaiz v R* [2012] NSWCCA 168, the offender gave evidence regarding his participation in the offending which was inconsistent with the Agreed Facts. The Crown did not cross-examine the offender on

that inconsistency. The primary did not indicate to the offender that he would reject his sworn evidence.

124. On appeal, Beech-Jones J (with Basten JA and Harrison J agreeing) rejected a complaint that the primary judge had failed to adhere to the principle in *O'Neil-Shaw.* His Honour stated that the content of the agreed facts rendered the offender's account "inherently implausible": [99]; applying *O'Neil-Shaw v R* at [26]. Furthermore, there was no requirement for the sentencing judge to advise the parties that he proposed to act on the agreed facts even though they were inconsistent with other material including evidence from the offender: at [96].

Seven – Can the court take judicial notice?

125. It is not uncommon for sentencing courts to take judicial notice of matters that arise during the sentence hearing. Indeed, such a course is often to the benefit of the offender. However, caution ought to be exercised where the sentencing judge, at the invitation of the Crown or of his or her own volition, proposes to take judicial notice of a matter adverse to the offender.

126. In *Farkas v R* [2014] NSWCCA 141 the question of "judicial notice" arose in the context of "normal street level purity". The appellant pleaded guilty to one count of ongoing supply with additional matters on a Form 1. He had supplied methylamphetamine to an undercover officer on four occasions within a 30 day period. The drugs seized had a purity ranging between 9% and 12.5%: at [6].

127. During the course of his sentencing remarks, the primary judge asserted that the purity of the drugs seized exceeded the "normal street purity" which he suggested was between 3% and 5%. His Honour referred to two NSWCCA decisions (*R v Parkinson* [2001] NSWCCA 244 and *Shaaban v R* [2007] NSWCCA 115) in support of this nominated range. However, the primary judge had not indicated to the parties that he was inclined to make such a finding; he did not disclose to the parties his intended reliance upon the two NSWCCA decisions, and; it would appear that drug purity had attracted little more than a cursory reference throughout oral submissions.

128. The appellant challenged the sentence in a number of respects. Relevantly, the appellant contended that the primary Judge had erred by:

- Finding that the normal street level purity of methylampthetamine was between 3% to 5% (the judicial notice ground), and;
- Making such a finding without warning the parties and without providing counsel with an opportunity to respond (the procedural fairness ground).

129. The Court unanimously held that the primary judge had failed to afford the appellant procedural fairness. By majority (Basten JA with R A Hulme J agreeing; Campbell J dissenting) the Court also held that it was not open to the primary judge to take judicial notice of the "normal street purity".

130. In relation to the judicial notice ground Basten JA said that *"…the very concept of "normal street purity" should have led to caution in giving it any weight as a relevant consideration"*: at [9]. At [9]-[10], his Honour observed that the primary judge's reliance upon the two NSWCCA decisions was misguided because the judgment of a court with respect to a finding of fact is not authority for the "fact"; the two NSWCCA decisions did not purport to make such a relevant factual finding, and; the sources of information which formed the basis for the statements in the two NSWCCA decisions were undisclosed.

131. His Honour said that a sentencing court may be able to take judicial notice of "notorious facts" yet sounded a cautionary note: see at [13] and [15]. Basten JA said that some facts may be so notorious that they may be judicially noticed without inquiry whereas other notorious facts may require inquiry: at [15]. His Honour said that "normal street purity" fell into the latter category yet the primary judge had not identified an appropriate source of information to establish the notorious fact. Even if such a source of information existed, the primary judge was obliged to signal to the parties his intention to rely on that information (the procedural fairness ground).

132. On the appeal the appellant's counsel tendered material which cast doubt upon a range of "normal street purity": see [17]-[19]. His Honour said that *"(t)o the extent that this was a fact which had not been agreed, it was adverse to the interests of the applicant and could only be taken into account if proved beyond reasonable doubt.*

The applicant has established in this court that, quite apart from the procedural complaints, the facts had not been established beyond reasonable doubt and should have been disregarded": at [20]. See also R A Hulme's J comments at [36]-[38].

Conclusion

133. Please note that we have endeavoured to state the law as at 1 August 2018. Where opinions have been expressed, these are the opinions of the authors alone. Please feel free to contact us should you wish to discuss a matter that arises in the paper.

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