

SENTENCING ADDRESS

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DOES ONE SIZE FIT ALL?

The age-old conundrum of whether one size fits all raises its head in this arena as well as so many others. For me, the answer is a resounding ‘no,’ there is no universal fit; but at the same time a fundamental requirement is consistency in approach. Those of us in the law should never forget that people sitting in prisons spend great periods of time brooding over whether they have been fairly treated by the system. Too often they don’t compare like with like, but we have an obligation to ensure that, as a matter of principle, we are treating people in a consistent way.

Some simple issues which require attention in any sentencing exercise.

The starting point must always be the charge which has been laid and which was either admitted or proved. This is of fundamental importance because the factors which make up the elements of the offence do not become additional aggravating factors but must be calmly weighed and considered.

Secondly, one has to assess the degree of culpability which is involved. Compare, for example, a person with a couple of tabs of heroin, who hands one to his mate at a party and a major criminal who has heroin worth millions of dollars, which he distributes for enormous profit internationally. Each of those people will be guilty of peddling a class A drug, but just looking at the facts demonstrates how different their degree of culpability will be. There must, therefore, be a sensible and realistic assessment of what actually occurred and the factual circumstances within which it took place.

Before determining the starting point of a sentence, all who are involved must check to ensure that mandatory considerations do not apply. There are, in many of our legal systems, requirements for terms of imprisonment to be imposed in certain serious matters or for minimum penalties to have application and these cannot be ignored as part of the overall exercise. Equally, there may be guide line judgments which are binding.

One of the difficult factors which has to be weighed whenever there has been a plea of guilty is the extent to which this will attract a discount from what otherwise would be an appropriate penalty. Some are supportive of such a discount on the basis that it saves time and money for the system. So long as we have the presumption of innocence, I don’t find that a very compelling argument. But the overwhelming rationale in my view, particularly in offences which involve any sort of violation or attack, is that a plea of guilty enables the victim to put the offending behind them and to get on with moving forward.

In those countries where trials do not take place for months or even years after the event, requiring a victim to keep alive in their minds the circumstances of the crime can be as damaging as the original offending. When that is avoided, proper recognition should be given to it.

As well as weighing the degree of culpability—in other words the exact nature of the offence—sentencing requires that the personal circumstances of the offender are also taken into account so that youth, disability, advancing years, no previous record, general good character should be considered and given an appropriate allowance.

In all of this, however, it is to be remembered that this is a weighing exercise with priority being given to a number of conflicting factors and each being accorded a sensible and robust response.

When dealing with a sentencing, I warn of the danger of trying to laboriously refer to previous cases. In some cases, there will be guideline judgments which of course must be taken into account; but most sentencing exercises involve an assessment of individual circumstances in a particular case and not a lot of high-level principle can be extracted from them. The danger is that the sentence will become mesmerised by something which happened in the past, but which in truth was in circumstances quite different from the current case.

In reaching a final assessment, concepts which will require attention include deterrence, accountability, condemnation, rehabilitation and protection. Too often, there are unrealistic expectations, particularly about the notion of deterrence. Although it is no excuse, it needs to be remembered that the overwhelming majority of crime is committed quite spontaneously and often by people who are affected by alcohol or drugs and who too often are unemployed and uneducated. It is plain silly to imagine that people sit and weigh the consequences before they commit criminal activity. The most telling exception, in my view, is in the distribution of drugs, which is often well-planned and executed and where there is an opportunity for reconsideration, but that is not the norm.

None of that create reasons why people should not be held to account for their antisocial and criminal behaviour, or to be condemned for it, but it is naïve to believe that if you just lock people up for longer and longer, the offending problem will suddenly vanish in our societies. It is important to remember that except in a tiny minority of cases, people sentenced to imprisonment will one day return to the community. If they have not been rehabilitated and assisted in reformation, the community will continue to be at risk from them.

Finally, in making submissions, or in imposing a sentence, it is essential that it is transparently clear as to what is being done and why it is being done. An unambiguous statement of intention and clear and simple reasoning is in the interests of all participants and will enable a meaningful appellate process to take place.