
ETHEL BENJAMIN ADDRESS NOVEMBER 2015
The role of the Judge in sentencing:
from port-soaked reactionary to latte liberal

Introduction

I often wonder what Ethel Benjamin would make of it all, of her iconic status – a prestigious scholarship and a street named after her, as well as this annual event. She might be surprised but proud and rightly so. The first woman to graduate with a law degree in New Zealand, the first to be admitted to the Bar and, in the same year as her admission in 1897, aged 22 the first woman in the entire British Empire to appear in court as counsel, setting up practice on her own account. What courage and strength of character it must have taken to overcome all the obstacles that stood in the path of those achievements.

I think that what stands out for me is that Ethel defies all the stereotypes. She was scholarly and a feminist. She talked about the legal profession providing “a noble opportunity for service by women whose hearts are touched by the weak and helpless” and was true to that.¹ She was the solicitor for the Society for the Protection of Women and Children and acted in many cases on behalf of abused and destitute women. But she also acted for the liquor industry, owned and managed hotels herself, dabbled in property speculation and later ran a bank.² Just to show how far ahead of her time Ethel was, the Southland District Law Society did not have any female members until the 1970s. And for the mathematicians among you, that was not me.

Acutely conscious of the importance of this occasion, I agonised over the choice of topic. In Ethel’s graduation speech she said “I knew little would be expected of me and even if I succeeded in talking nonsense the charitable verdict would be oh well it

¹ Kate Sheppard “New Zealand’s First Lady Lawyer” *White Ribbon* (New Zealand, August 1897) at 2.

² J November *In the Footsteps of Ethel Benjamin* (Victoria University Press, Wellington, 2009).

is all that can be expected of a woman”.³ In 2015, perhaps fortunately, I do not have that comfort.

Finally, after seeking wise counsel from Professor Henaghan, I decided to talk about the role of the judge in sentencing. As Mark pointed out to me, sentencing is the most publicly visible part of a judge’s role. It is the function most people think of when they think about the work of a judge.

Mark was diplomatic enough not to add “and it is the one that attracts the most public criticism”.

For, there is, I believe, a reasonably widespread perception in the community that sentencing judges enjoy too much discretion, are too soft, and pander to criminals at the expense of victims. This is not unique to New Zealand. Opinion polls in Australia and the UK consistently show as many as 70 to 80 percent of respondents believe that sentences imposed by judges are too lenient.⁴

In a 2011 speech about the influences of the media, a retired English judge observed that:⁵

Any judge who started life in the law, as I did, as a barrister in the early 1960s, was appointed in the late 1980s, and has only recently retired, will have seen the stereotype of the ... judge transformed in certain organs of the press from that of a port-soaked reactionary, still secretly resentful of the abolition of the birch and hostile to liberal influences of any kind, to that of an unashamedly progressive member of the chattering classes...out of touch with ordinary people.

³ Otago Daily Times, 10 July 1897, p 6; J November, above n 2, at 58.

⁴ Virginia Bell, Judge of the High Court of Australia “The Role of a Judicial Officer – Sentencing, Victims and the Media” (Magistrates’ Court of Victoria Professional Development Conference, 22 July 2015) at 5, citing Karen Gelb *More Myths and Misconceptions* (Sentencing Advisory Council, Melbourne, September 2008) at 4, Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield, Rachel Vermey *Jury Sentencing Survey* (Criminology Research Council, April 2010) at 1 and 11, Geraldine Mackenzie, Caroline Spiranovic, Kate Warner, Nigel Stobbs, Karen Gelb, David Indermaur, Lynne Roberts, Rod Broadhurst and Thierry Bouhours “Sentencing and public confidence: Results from a national Australian survey on public opinions towards sentencing” 1 Australian and New Zealand Journal of Criminology 45 at 56, and Sir Igor Judge, President of the Queen’s Bench Division “The Sentencing Decision” (The Atkin Lecture, London, 2 November 2005).

⁵ Sir Mark Potter *Courts and the Making of Public Policy: Do the Media Influence the Judiciary?* (The Foundation for Law, Justice and Society, 2011) at 2.

Hence the subtitle of this address — “The role of the Judge in Sentencing: From port-soaked reactionary to latte liberal.”

In the address I trace the history of sentencing practice in New Zealand, ask whether and to what extent sentencers should be responsive to public opinion, whether sentencing Judges do have an image problem and if so what if anything can or should be done about it.

Sentencing is undoubtedly one of the most difficult and challenging aspects of the job, if not *the* most. McArdle J once said, “trying a case is as easy as falling off a log. The difficulty comes in knowing what to do with an accused once they have been found guilty”.⁶ My very first murder sentencing, the Crown thought the non parole period should be 10 years, the Judge thought it should be 17 while the defendant wanted capital punishment!

Most people agree that ideally the punishment should fit the crime and the circumstances of the offender. But putting that into practice is not so easy.

I think sentencing is inherently challenging for two main reasons. First, because it can be so emotionally charged. The facts are often harrowing, involving as they so often do stories of brutal or depraved behaviour, misery, suffering and hopelessness.

Second, challenging because sometimes it requires the judge to reconcile the seemingly irreconcilable. As has been said:⁷

Sentencing ... is founded upon two premises that are in perennial conflict: individualised justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.

⁶ As cited in Geoffrey Hall and Timothy Vaughan-Sanders (eds) *Hall's Sentencing* (online looseleaf ed, LexisNexis) at [I].

⁷ Sarah Krasnostein and Arie Freiberg “Pursuing Consistency in an Individual Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There?” (2013) 76 *Law & Contemp. Probs.* 265 at 265.

There is tension between consistency and individualised justice. Tension between the purposes of sentencing – between, for example, general deterrence and rehabilitation. Tension where a factor may be both mitigating and aggravating — an offender who suffers some mental health issue, for example, may be less blameworthy, but it may be their mental health issue that makes them more of a risk to public safety.

A brief history of sentencing practice

At the time Ethel Benjamin was practising law in Dunedin, the Criminal Code Act 1893 was in force. Offences were defined in very specific ways. There were, for example, 34 different offences of forgery, with various maximum penalties.⁸ The maximum penalties were not mandatory but, presumably because the offences were defined in such a specific way, they may have come close. And, of course, there was one notable truly mandatory penalty – the death penalty. Once a person was convicted of murder the Judge had no choice but to impose the death penalty.⁹ The first of a total of 85 executions in New Zealand was in 1842 and the last in 1957. Seeing a black cap tends to send shivers down the spine. But, as Lord Phillips has mused extra judicially, the reaction of people in a hundred years time to the punishments we impose today may also be one of shock.¹⁰

As a gentler further aside, a quick snapshot of sentencing in Dunedin in July 1902 (when Ethel was still actively practising) shows by far the most common offence was drunkenness, for which the usual penalty was conviction and discharge or for a repeat offender a fine of 5 shillings.¹¹ An offence called “associating with thieves” also appears to have been prevalent in Dunedin. It is not clear from the reports whether the thieves came from the north or the south.

⁸ Criminal Code Act 1893, s 270.

⁹ Criminal Code Act 1893, s 167.

¹⁰ Lord Phillips, Lord Chief Justice of England and Wales “Crime and Punishment” (High Sheriff’s Law Lecture, Oxford, 10 October 2006) at 12.

¹¹ This information based on a survey of the Otago Daily Times from 1 July 1902 to 31 July 1902. Online edition found at <paperspast.natlib.govt.nz>.

As the 20th century progressed, there was a movement away from multiple specific offences to broadly defined offences carrying a single but relatively high maximum penalty, which provided little guidance in day to day sentencing.

And so, as one commentator puts it, as a result of that change in the way offences were defined, law makers handed over the reins of the detail of sentencing policy to the courts.¹²

The emphasis came to be very much on the individual judge's discretion, so much so that sentences were seldom overturned on appeal and in a 1950 decision the Court of Appeal actually rebuked counsel for bringing other cases to its attention, observing that the Court did not consider:¹³

...much assistance [could] be gained from a comparison of sentences; facts vary so much in all cases that it is only by looking at the particular circumstances of the particular case that a true appreciation of the degree of seriousness of the case is obtained. It is on this appreciation that the sentence should be based.

To modern ears, that sounds like indefensible heresy. We take it as a given that like cases should be treated in like manner and that outcomes should turn as little as possible on the identity of the judge.

It was not until the 1970s that, following the approach of the English Court of Appeal, our Court of Appeal started to pay less deference to the views of the sentencing judge and to exercise greater control over sentencing in the interests of consistency. Commencing in 1978, and continuing in the 1980s, it issued a series of tariff judgments detailing ranges of sentences for various offences.¹⁴

If the Court of Appeal was becoming more active, legislative intervention remained relatively limited and the judges largely left to their own devices.¹⁵

¹² Saul Holt "Appellate Sentencing Guidance in New Zealand" (2006) 3 NZPGLJ 1 at 3.

¹³ *R v Brooks* [1950] NZLR 658 (CA) at 659.

¹⁴ See for example *R v Pui* [1978] 2 NZLR 193 (CA) (sexual violation by rape) and *R v Urlich* [1981] 1 NZLR 310 (CA) dealing in Class B drugs).

¹⁵ There was the occasional adjustment to maximum penalties. The Criminal Justice Act 1985 also added new sentencing options, and provided a custodial sentence should be the norm for serious violent offences and a non-custodial sentence for property offences: ss 5 and 6.

All of that was to change in the next decade, principally because of widespread public concern about crime rates and sentencing practice. This culminated in a Citizens Initiated Referendum in 1999.

The question asked was:

Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

91.75 percent voted “yes”. It is easy to downplay the significance of this result because of the mangled wording and the fact it contained multiple propositions, so one cannot be certain that the 92 percent were all affirming the same thing. But I believe that is a mistake. I think it is fair to say that, rightly or wrongly, the referendum revealed a high level of dissatisfaction in the community with sentencing practice and to that extent a failure on the part of the authorities, including the judiciary, to meet community expectations.

One response to the referendum might have been to remove judicial discretion altogether and introduce a mandatory sentencing regime such as prevails in some parts of the US, where sentences are imposed under a grid system.¹⁶ The judge considers the case by reference to statutorily defined factors — the number and type of factor — then generates a numerical sentencing outcome. With limited exceptions, such as the three strikes legislation, there has, however, never been strong support in New Zealand for mandatory sentencing. That is principally because of concerns that it can generate grossly disproportionate penalties due to the fact that at the legislative level it is impossible to provide for the infinite variety of circumstances that may arise.

The Sentencing Act 2002

The Government’s response to the referendum was to retain judicial discretion but make its exercise subject to statutory guidance. And so the Sentencing Act 2002 came into force. The Act has been described as the most comprehensive attempt to

¹⁶ For example, in North Carolina. See, in respect of felonies: NC Gen Stat § 15A-1340.17.

influence sentencing practice through legislation,¹⁷ and as representing a significant change to the traditional approach to sentencing.¹⁸ The Act contains a statement of the purposes for which a court may sentence an offender.¹⁹ These are expressed at a high level of generality — for example, to hold the offender accountable, to protect the community, to deter others, to assist in the offender’s rehabilitation, to provide for the interests of the victim. As well as a statement of the purposes of sentencing, the Act also contains a statement of mandatory principles (such as the principle to impose the least restrictive outcome appropriate),²⁰ together with a non-exhaustive list of aggravating and mitigating factors that the sentencer is also required to take into account.²¹ These include the vulnerability of the victim, abuse of trust, premeditation, previous convictions, age of the offender, remorse, previous good character, and guilty plea.

In *Hessell*, the Supreme Court pointed out that the purposes, principles and factors were not new — they were largely, although not entirely, already recognised by the courts.²² The significance of the provisions was said to lie in the clarity with which they were expressed to the courts and the public. Others have been less charitable, one commentator saying the Act is of little practical assistance to sentencing judges because the principles are a statement of the self evident, and the purposes equally weighted, leaving the judge free to select which purpose to adopt according to his or her pre-existing views on penal philosophy.²³ Professor Hall has expressed the view that the Act represents a missed opportunity to develop a coherent sentencing policy.²⁴

One of the most debated principles is the principle that the court must take into account “the offender’s personal, family, whanau, community, and cultural

¹⁷ Justice Graham Panckhurst “A Sentencing Council: Enlightened or Folly?” (2008) 14 *Canterbury L. Rev.* 191 at 197.

¹⁸ Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at 17.

¹⁹ Sentencing Act 2002, s 7.

²⁰ Sentencing Act 2002, s 8.

²¹ Sentencing Act 2002, s 9.

²² *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [39].

²³ Julian V Roberts “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) 36 *The Australian and New Zealand Journal of Criminology* 249 at 256.

²⁴ Hall, above n 6, at [I.3].

background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose”.²⁵

The existence of this provision has prompted some commentators to advocate that New Zealand judges should follow a Canadian approach to sentencing of indigenous offenders known as “cultural background methodology”.²⁶

Under this approach, sentencing courts are required to recognise that the circumstances of Aboriginal people differ from the broader population because of the history of colonialism and must take judicial notice of how that history continues to translate into such matters as lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher rates of incarceration.²⁷ When sentencing an indigenous offender, sentencers are required to consider these unique systemic or background factors that may have played a part in bringing the particular Aboriginal offender before the courts.²⁸ It is not necessary for the particular offender to prove a causal link between their cultural heritage and the commission of the index offence

The sentencer must also take into account the types of sentencing procedures and sanctions that may be appropriate for the offender because of his cultural heritage, recognising that not all communities share the same values and that different sanctions may more effectively achieve the objectives of sentencing in a particular community.²⁹

To fail to take into account the above is to breach the fundamental principle of sentencing that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.³⁰

²⁵ Sentencing Act 2002, s 8(i). See also ss 26(2)(a) and 27.

²⁶ *R v Gladue* [1999] 1 SCR 688; *R v Ipeelee* [2012] SCC 13, [2012] 1 SCR 433. See: Thomas Clark “Sentencing Indigenous Offenders” (2014) 20 AULR 245. See also: David Green “Interweaving the Status and Minority Rights of Māori Within Criminal Justice” (2015) 21 AULR 15; *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695.

²⁷ *R v Ipeelee*, above n 26, at [60].

²⁸ *R v Gladue*, above n 26, at 724, affirmed in *R v Ipeelee*, above n 26. See also: Criminal Code RSC 1985 c C-46, s 718.2(e).

²⁹ *R v Gladue*, above n 26, at 724, affirmed in *R v Ipeelee*, above n 26.

³⁰ *R v Ipeelee*, above n 26, at [87].

Cultural consideration may lead to a different sanction or a reduction in the prison term that would have been imposed for a non-indigenous offender committing the same offence.

The argument has already come before a divisional Court of the New Zealand Court of Appeal in *Mika*.³¹ The appellant, who had pleaded guilty to motor manslaughter, contended his sentence of six years nine months' imprisonment was manifestly excessive because the sentencing Judge had failed to discount the appropriate sentence by 10 percent to reflect the appellant's Māori heritage and its associated social disadvantages.

The appeal did not succeed but the application of the Canadian approach may be raised again and I will not therefore express any personal views. The issues arising from the Canadian authorities are fundamental and important ones, bringing the tension between consistency and individualised justice into sharp focus — is this race-based sentencing and an affront to consistency and equality before the law, or, correctly analysed, is it differentiating in order to equalise, to avoid gross injustice and to reduce disproportionate rates of imprisonment?³² What effect does it have on the interests of victims? Is this mandated by the Sentencing Act and, if not, is it in the policy realm outside the remit of a non-elected judiciary? I leave those questions for you to ponder.

Guideline judgments

After the enactment of the Sentencing Act, the Court of Appeal continued to issue tariff or “guideline judgments” as they became known. Since 1978, the guideline judgments have become increasingly sophisticated, evolving from the purely descriptive — ie setting ranges by reference to existing sentencing patterns — to the prescriptive — setting norms.³³

³¹ *Mika v R* [2013] NZCA 648.

³² In New Zealand, Māori make up 15 percent of the general population, but 50 percent of the prison population. Whereas the average imprisonment rate in New Zealand is 190 per 100,000 people, for Māori it is 625 per 100,000. See Department of Corrections *Prison facts and statistics – December 2014* (Corrections, 26 March 2015).

³³ *R v Taueki* [2005] 3 NZLR 372 (wounding with intent); *R v Fatu* [2006] 2 NZLR 72 (methamphetamine dealing); *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 (rape and unlawful sexual connection).

The judgments now typically identify aggravating factors of the offence or offences under review and then set out sentencing bands with a range of starting points for each. Which band any particular case will fall into depends on the number and nature of the aggravating factors present. For example, in grievous bodily harm offending, band 2, which has a starting point of five to 10 years' in prison, is for offending that features two or three of the listed aggravating features, which include extreme violence, premeditation, serious injury, use of a weapon, attacking the head, vulnerability of the victim, and multiple attackers.³⁴ To assist sentencers, the judgments give examples of how the bands might be applied in given fact situations, such as a street attack. At the same time, the judgments also stress that the placing of any particular case within a band is an evaluative exercise and that judges still enjoy a reasonable degree of latitude because there is overlap in the margins of the bands.

The issuing of guideline judgments has sometimes been in response to legislative change (for example a reclassification of a drug,³⁵ or an increase in a maximum penalty³⁶), changes in societal values,³⁷ or concerns about consistency or other particular difficulties in relation to a specific offence.³⁸

Discerning the intention behind a legislative change is not always straightforward.

For example, the Sentencing Act was amended in 2008 to provide that in cases involving neglect or violence towards children sentencers must take into account various specified matters.³⁹ The matters specified were all matters judges were already taking into account, so in one appeal I heard, the appellant argued it was wrong to infer any Parliamentary message to get tougher.⁴⁰

Consideration of whether to issue a guidelines judgment is ongoing and, for example, last year the Court consulted with the profession as well as the District and High Courts to identify any areas that might be suitable.

³⁴ *R v Taueki*, above n 33, at [31] and [38].

³⁵ *R v Fatu*, above n 33.

³⁶ *R v A* [1994] 2 NZLR 129 (CA).

³⁷ *R v AM (CA27/2009)*, above n 33.

³⁸ *R v Mako* [2000] 2 NZLR 170 (CA).

³⁹ Sentencing Act 2002, s 9A. The section was inserted on 17 December 2008 by s 4 of the Sentencing (Offences Against Children) Amendment Act 2008.

⁴⁰ *Waitohi v R* [2014] NZCA 614.

Currently, the coverage of the guideline judgments is essentially limited to serious crime, where the primary question is the length of the prison term. Some commentators suggest that as a result there can still be unjustifiable disparity in relation to lower level offending.⁴¹

In 2013, a research study found that whether an offender was sentenced in a metropolitan area or a provincial area significantly affected the likelihood of a prison sentence for burglary and drink driving and, in relation to burglary, the length of the prison term.⁴² This was so even when controlling for the core sentencing factors that judges need to weigh up in order to achieve individualised justice.

Such findings have prompted renewed calls in some quarters for the reactivation of the Sentencing Council Act 2007. The Act, which was a Labour Government initiative, has languished on the statute books since the National Party came to power. As will be recalled, the Act established a statutory body comprised of judges and experts tasked with the job of issuing presumptively binding sentencing guidelines in respect of all offences. The Government however last month announced that the Act is one of 120 redundant statutes to be repealed next year.⁴³

The pros and cons of a Sentencing Council have been extensively debated elsewhere and I have no useful insights to add, other than to note that a recent critique of the English Sentencing Council in the 2015 Criminal Law Review suggests that it has not met all expectations.⁴⁴

On the other hand, just last month, Scotland launched its brand new Sentencing Council. Its chief aims are said to be to tackle the problem of inconsistent sentencing, and to raise public awareness and understanding of sentencing practice.⁴⁵

⁴¹ Law Commission, above n 18, at 20.

⁴² Wayne Goodall “Sentencing Consistency in the District Courts” (PhD Thesis, Victoria University of Wellington, 2014); Law Commission “Variations in District Court Sentencing: Regional Analysis” (NZLC MP 0, 2006).

⁴³ Steven Joyce “120 redundant laws to be repealed” (press release, 13 October 2015).

⁴⁴ Andrew Ashworth and Nicola Padfield “Five Years of the Sentencing Council” (2015) 9 Crim. L. R. 657.

⁴⁵ Criminal Justice and Licensing (Scotland) Act 2010, s 2.

In addition to issuing guideline judgments, the Court of Appeal has also mandated, in reliance on the Sentencing Act, a more structured approach to sentencing. In *Taueki*, the Court of Appeal held that in every case sentencers were required to follow a two stage approach.⁴⁶ In the first stage, the judge must identify a starting point sentence that reflects the inherent seriousness of the offending. If there is an applicable guidelines judgment then the task will be to slot the case into one of the bands. Otherwise, the judge may need to look at a series of previous decisions. Once the appropriate starting point is identified, then the second stage is to individualise the sentence by adjusting the starting point upwards or downwards by reference to mitigating and aggravating factors personal to the individual, such as previous convictions, remorse, and guilty plea, before arriving at an end sentence. Following this methodology forces the sentencer to quantify the various discounts and increases.

The combined effect of the guidelines and the two stage approach has been said to strike a balance between consistency and individualised justice.⁴⁷

Critics of the two stage approach include judges of the High Court of Australia. They contend it reduces sentencing to a mathematical exercise and is wrong in principle. Justice McHugh has been particularly scathing, describing the two stage approach as pseudo science, and belief in it a fairy tale.⁴⁸ There is, he graphically observed, no Aladdin's Cave of accurate sentencing methodology, the door to which can be opened by chanting the magic words "two tier sentencing".⁴⁹ The High Court of Australia prefers an approach known as "instinctive synthesis". Under this approach the sentencing judge must still identify all the relevant factors but, rather than ascribe weighting to them, simply arrives at an end sentence that represents the judge's intuitive synthesis of them all.

Critics of the two stage approach also contend it makes sentencing a time consuming exercise without a clear gain. Certainly there is a dramatic contrast between the length of today's sentencing notes and those of yester year. One of my older

⁴⁶ *R v Taueki*, above n 33.

⁴⁷ John Ip "Sentencing guidelines post-Sentencing Act" [2005] NZLJ 397.

⁴⁸ *Markarian v R* [2005] HCA 25, (2005) 228 CLR 357 at [84].

⁴⁹ *Markarian v R*, above n 48, at [71].

colleagues told me as counsel he would commonly hear sentencings that went along the following lines —

Bloggs, you have been convicted of rape. You and I both know that is a serious offence. You and I both know ten years' imprisonment is the appropriate sentence and you are sentenced accordingly.

While some may yearn for these simpler days, I consider there is a clear gain from the two stage approach in terms of transparency and also consistency because of the ability to compare one case with another in a meaningful way. That is simply not possible unless the culpability of the offending is assessed separately from the personal circumstances of the offender. Sentencing remains an evaluative process — although I have to confess I did use to take my calculator into court and we have had the occasional appeal where the judge simply got the maths wrong. But the Court of Appeal has never subscribed to the view there is a single correct sentence, only a range, and that so long as the sentence is within range, how the Judge got there will not usually warrant appellate intervention.⁵⁰

As this potted history demonstrates, the role of the judge in sentencing has changed dramatically since the 1950s. There is a far greater emphasis on consistency and transparency. Sentencing hearings are longer, with victims also having the opportunity to be heard. While the sentencer retains discretion, the exercise of the discretion is regulated by legislation and appellate review. Today, appeals against sentence account for over 50 percent of our criminal work, which in turn is over 50 percent of the total work, civil and criminal.

Public opinion

The further question is — in addition to legislation and appellate review, should sentencing discretion also be influenced by public opinion?

With the exception of the length of the non parole period for murder,⁵¹ the Sentencing Act did not prescribe sentencing levels. However, it was the expectation of some politicians that judges would get tougher. And so it proved. When the

⁵⁰ *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482.

⁵¹ Sentencing Act 2002, s 104.

Sentencing Act was passed, the prison muster stood at 6,000. By 2008, it was 8000 or 180 per 100,000 and, in terms of other common law countries and major Western nations, we were second only to the USA. Prison overcrowding became an issue. The latest figures as at December 2014 show we have maintained second position with a figure of 190 per 100,000 or a total muster of 8,641.⁵²

If the Sentencing Act did not contain anything new and if there was not a significant upsurge in crime, then there must be an argument that the main reason for the unprecedented increase in the prison population after 2002 was that the judiciary responded to popular demand. Certainly that was the view of one of our most experienced criminal trial judges, Sir Graham Panckhurst. Speaking in 2008, he said that the referendum, the media focus on crime, the rhetoric of lobby groups and the political climate all combined to influence the judiciary to impose more severe sentences.⁵³

Whether you think that is a good thing or a bad thing is likely to depend on your view of penal policy, whether you think public opinion is well informed, and also whether you consider as a matter of principle that sentencing judges should take public opinion into account, or should remain aloof and rely solely on Parliament to reflect public opinion through legislative change. Conversely, you may believe that rather than respond to public opinion, sentencing judges should attempt to lead it?

Most people, I think, would agree it would be totally wrong were judges to be swayed by popular clamour over a particular case, or appear to be swayed, which is why, in my view, it was so wrong for the New Zealand Herald to publish a poll canvassing readers' opinions about what sentence should be imposed on a high profile defendant before the sentencing took place. Conversely, I think most would agree that sentencing should reflect societal values — as indeed the Court of Appeal expressly stated was a reason for adjusting the sentences for rape⁵⁴ — and that it is also, for example, appropriate that sentencing judges should take into account public concerns in their region about the prevalence of a particular crime.

⁵² Department of Corrections, above n 32. Of those, 1,865 were on remand.

⁵³ Justice Panckhurst, above n 17, at 199.

⁵⁴ *R v AM (CA27/2009)*, above n 33, at [1].

Arguing that courts must reflect legitimate public attitudes and concerns in sentencing offenders, Thomas J in *Leuta* contended this was a necessary concomitant of the fact that it is the community that has delegated the sentencing function to the judiciary.⁵⁵ The community's norms and expectations must therefore be permitted to inform the sentencing process. He also pointed out that if sentences do not have general acceptance, then confidence in the administration of justice will diminish. Thirdly, he considered that lay people can and do make a valuable contribution. Standing outside the sentencing process, they are frequently able to discern shortcomings that may escape those involved in it.

Similar sentiments were expressed in an Australian case by a senior Australian judge, McHugh J, when he said:⁵⁶

Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion.

Which, it might be said, is exactly what happened in this country in 2002.

The irony, however, is, of course, that 13 years later, although crime rates are reducing,⁵⁷ and our rates of incarceration high, the image of the out of touch latte liberal persists in the public imagination.

That was starkly illustrated this year by the outcry over a Judge's decision not to impose preventive detention on a young offender who later went on to commit a most horrific murder. There were calls from some media for the Judge in question to be held accountable like everyone else for wrong decision making and even sacked. It appears many of the critics either do not believe judges should act on evidence or could not have troubled themselves to read the sentencing notes because had they done so they would have realised that the independent medical evidence about risk was ambivalent, with a psychiatrist advising that the offender was actually at low

⁵⁵ *R v Leuta* [2002] 1 NZLR 215 (CA) at [114].

⁵⁶ *Markarian v R*, above n 48, at [82].

⁵⁷ Statistics New Zealand *The Numbers of Justice* (Statistics New Zealand, Snapshots of NZ, 2012); New Zealand Police *New Zealand Crime Statistics 2014* (Police National Headquarters, April 2015) at 13.

risk of re-offending. But never let an inconvenient detail get in the way of a good story.

Even a respected senior journalist writing an opinion piece in the mainstream media had this to say about the case:⁵⁸

I'd like to see judges held to account for their decisions. I want to hear them talk openly, and publicly, about the verdicts they deliver and why. Surely the power to take away someone's liberty should come with some semblance of accountability? Yet judges have always hidden away behind high office and protocols. The reality is our justice system has been broken for too long.

Obviously, court decisions should not be immune from criticism but with respect, those comments are simply ill informed. They overlook that in cases of serious crime judges do explain in depth the reasons for their sentences both orally in the highly public forum of the courtroom and in detailed written sentencing notes, which are also publicly available. Judges are accountable because their work is so public and, of course, there is appellate review. Significantly too, there is no mention in the article of the Sentencing Act and the provisions relating to preventive detention, creating the misleading impression that the Judge had open ended discretion. It might also be suggested that if the writer were to experience living in a country where the rule of law does not prevail, then he might really know what a broken justice system looks like.

The opinion piece attracted a lot of comment on Stuff – comments such as:

We pay these judges very generous salaries to protect us from filth ... and they fail us time and time again. The calls for proper sentencing began decades ago, we even gave them a clear mandate in a referendum and still they ignored us.

And:

It is ... obvious to most of us that our judicial system is now failing the victims of crime on a regular basis. Our judges are so far removed from the real world that we all live in. They may be lawyers but lack any form of common sense and continually side with the offenders in court. ... The whole judicial system is failing its people in New Zealand and needs to be radically changed.

⁵⁸ Duncan Garner "Duncan Garner: Judging the judges and ensuring evil predators die in prison" *The Dominion Post* (online ed, Wellington, 1 August 2015).

Should judges just take this sort of thing on the chin and accept it goes with the territory? If it were only an issue of wounded pride and annoyance about incorrect facts, then yes, maybe. However, the problem is that these sorts of attacks are corrosive and can undermine public confidence in the administration of justice. If you say something often enough, people tend to believe it. The legitimacy of the criminal justice system has been said to hinge on public confidence. Maintaining it is therefore essential. In some ways, as pointed out by an Australian judge, the problem has got worse because of the phenomenon of social media and the reporting of court proceedings by those not subject to the same ethical constraints as professional journalists.⁵⁹ When was the last time you heard or read an in-depth discussion of the reasons for a sentence as opposed to the reaction — often adverse — to it?

What then if anything can be done?

Enhancing public understanding and knowledge of sentencing seems pivotal. One New Zealand survey in 2003, for example, showed a strong co-relation between support for tougher penalties and a lack of knowledge about existing tariffs and crime rates.⁶⁰ Further, according to some, over-reporting of sensational crime has so imprinted itself on the public consciousness that, although like the rest of the Western world we have a falling crime rate,⁶¹ few really believe it.⁶² There are also fundamental misconceptions about the nature of a criminal prosecution, for example, the erroneous belief that the prosecution is brought on behalf of the victim, rather than the state.

Conversely, when people are better informed, the outcomes of surveys paint a different picture. An Australian survey of jurors showed that 90 percent of jurors surveyed at the end of the trial thought the sentence imposed by the judge was

⁵⁹ Bell, above n 4, at 11, citing Jonathan Barrett “Open Justice or Open Season? Developments in Judicial Engagement with New Media” (2011) 11 *Queensland University of Technology Law and Justice Journal* 1 at 13.

⁶⁰ Judy Paulin, Wendy Searle and Trish Knaggs *Attitudes to Crime and Punishment: A New Zealand Study* (Ministry of Justice, December 2003).

⁶¹ See above n 57.

⁶² In 2013 60 percent of New Zealanders surveyed thought total national crime had increased over the past year: Colmar Brunton *Public Perceptions of Crime – Survey Report* (Ministry of Justice, October 2013) at 32. In 2003 83 percent of survey respondents incorrectly believed crime had been increasing over the two years prior: Paulin, above n 60, at 8.

appropriate and, in fact, a majority would have personally proposed a more lenient sentence.⁶³

In recent years, concerted judicial efforts have been made to demystify sentencing in New Zealand by making decisions more transparent and also by making them more readily available to the public. High Court sentencing notes are routinely put online on the Judicial Decisions of Public Interest. The Supreme Court and the Court of Appeal issue press releases about judgments, and the Courts have even recently opened a twitter account — although that is not without its critics, a similar suggestion in Australia drawing the comment from a senior judge that it is not the function of the courts to market their judgments with racy teasers.⁶⁴

Traditionally, in the face of unjustified personal attacks judges have let their decisions speak for themselves and remained out of the fray. But if the decisions are not being read, can the judiciary afford to just sit back, to maintain a dignified silence and hope the Law Society or the Attorney-General will say something or rely on the off chance that a well-informed individual like Jonathan Eaton QC will feel moved to write, as he did, an excellent letter to the editor in defence of the Judge.

In the age of the Internet, has the time not come for the judiciary to pushback and to engage more, or would that risk undermining the appearance of impartiality?

I don't know the answer to that question but it is certainly a debate worth having, along with the continuing debate about the need for comprehensive civics courses in schools.

Conclusion

[1] As stated at the beginning of this address, sentencing is a challenging and difficult task. I hope this address has highlighted some of those difficulties with a view to better understanding of the role of the judge in sentencing. That way, legitimate public opinion to which in my view judges should be responsive will be well informed. Section 3 of the Sentencing Act provides that one of the key

⁶³ Warner, above n 4, at 48–50.

⁶⁴ Bell, above n 4, at 15.

purposes of the Act is to aid in the public's understanding of sentencing practices.⁶⁵ That aim does not yet appear to have been fully realised. There is more work to be done.

⁶⁵ Sentencing Act 2002, s 3(b).