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Aggregate sentencing 12 years on

The Honourable Peter Johnson SC*

It is almost 12 years since NSW sentencing law was amended to allow for aggregate sentencing in s 53A *Crimes (Sentencing Procedure) Act* 1999. The following article canvasses some of the issues that have arisen concerning the operation of the aggregate sentencing regime.

The position before aggregate sentencing

Section 53A was introduced[1] to ameliorate the difficulties of applying the decision in *Pearce v The Queen*.[2] As a result of this reform, sentencing courts did not have to go through "the sometimes complex and error-prone process" of accumulating individual sentences by staggering commencement dates or allowing for partial concurrency or accumulation of sentences.[3] In *JM v R*,[4] the leading case concerning aggregate sentencing, RA Hulme J stated that s 53A obviated the need, when sentencing for multiple offences, "to engage in the laborious and sometimes complicated task of creating a 'cascading or stairway' sentencing structure when the principle of totality requires some accumulation of sentences". Aggregate sentencing has been enacted in other Australian States for similar reasons.[5]

Cases which illustrated the problem in compliance with the *Pearce* principles included *R v Knight*[6] (where identical concurrent sentences were passed on each of 27 counts of break, enter and steal) and *Porter v R*[7] (where identical concurrent sentences were passed on each of two counts of break, enter and steal and five counts of maliciously damaging property by fire). Apart from non-compliance with the *Pearce* principles, it was observed in *Porter* that the adoption of a "one size fits all" approach to sentence served to distort sentencing statistics compiled by the Judicial Commission of NSW and made available to assist sentencing courts.[8]

The aggregate sentencing scheme has largely met its statutory purpose and simplified the process when sentencing for multiple offences. A number of issues have arisen concerning the operation of the aggregate sentencing regime.

The regime for aggregate sentencing

A court may impose an aggregate sentence for several offences under s 53A, thereby being relieved of the obligation to set a non-parole period for each offence under s 44(1) *Crimes (Sentencing Procedure) Act* 1999 (CSPA). When

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passing an aggregate sentence, the court must indicate to the offender the sentence that would have been imposed for each offence had separate sentences being imposed.[9] The term "indicative sentence" has been used to describe these "notional sentence indications" although it has been emphasised that the indications have no practical operation.[10]

An important feature of the statutory scheme is that, in identifying each indicative sentence, the court must record the indicative sentence "after taking into account such matters as are relevant under Part 3 or any other provision of this Act" had separate sentences been imposed instead of an aggregate sentence.[11] Part 3 of the CSPA (ss 21–43) encompasses s 21A (aggravating and mitigating factors), s 21B (having regard to sentencing patterns and practices at the time of sentencing), s 22 (discount for a guilty plea), s 22A (reduction of sentence for facilitating the course of justice), s 23 (reduction of sentence for assistance to authorities), ss 25A–25F (the statutory scheme for discounts for guilty pleas) and a range of other matters relevant to the determination of sentence. Accordingly, there is a statutory obligation to take these matters into account in stating indicative sentences. This aspect has been emphasised on more than one occasion in the NSW Court of Criminal Appeal (NSWCCA) when the suggestion has been made that the discount for a guilty plea should be applied to the aggregate sentence.[12] Applying the discount for a guilty plea to the aggregate sentence rather than the indicative sentences is an error requiring the NSWCCA to intervene and re-sentence.[13]

In identifying indicative sentences, it is still necessary to assess the criminality involved in each offence with the adoption of a "blanket assessment" of each offence being erroneous.[14] In this way, the "one-size fits all" approach condemned prior to the introduction of aggregate sentencing continues to be erroneous.

In *JM v R*,[15] RA Hulme J emphasised that the assessment of individual indicative sentences assists in the application of the totality principle and also allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence. This is a matter of particular importance when there are several victims of the offences. In such a case, it is necessary that an aggregate sentence reflects the fact that harm has been done to several victims.[16] In imposing an aggregate sentence, it is important to avoid the impression that a discount for multiple offending is being given in cases where an offender has committed multiple offences.[17]

There is no actual accumulation of indicative sentences for the purpose of reaching an aggregate sentence. The court simply determines the aggregate sentence by assessing what is appropriate to reflect the totality of criminality in all of the offending.[18] There can be no expectation when an aggregate sentence is imposed that an offender will be able to arithmetically align that aggregate sentence with the indicative sentences as can be done when an offender is sentenced in the traditional way.[19] In so far as a number of cases have referred to the concept of "notional accumulation" in the context of aggregate sentencing, RA Hulme J has noted[20] that the cases remain faithful to the principles collected in *JM v R*[21] particularly as to the centrality of the totality principle as described in *Cahyadi v R*[22] both in determination of an aggregate sentence at first instance and in appellate consideration when erroneous inadequacy or excessiveness is contended.

When determining an aggregate sentence for offences to which a standard non-parole period applies, the court is to state as part of the indicative sentence the non-parole period which it would have set for the offence had a separate sentence been passed for the offence.[23]

The use of aggregate sentencing extends to the Local Court where any aggregate sentence cannot exceed 5 years.[24]

Aggregate sentencing for Commonwealth offences

In 2017,[25] the NSWCCA held that an aggregate sentence under s 53A could be set for several Commonwealth offences. That decision has been followed on a number of occasions[26] and there has been no application made that the NSWCCA should not follow the decision. It has been held that an aggregate sentence cannot be imposed for a combination of Commonwealth and State offences.[27] A question has been raised as to whether s 53A can be applied to Commonwealth offences.[28] The NSWCCA has emphasised that it is entitled to act on what was found in *Beattie* until the contrary is held, either by the High Court or the NSWCCA acting in accordance with established principles concerning departure from its earlier decisions.[29]

Appeals from aggregate sentences

It is well recognised that, on an application for leave to appeal against sentence under the *Criminal Appeal Act* 1912, indicative sentences are not amenable to appeal with the challenge to be directed to the aggregate sentence as the operative and effective sentencing order.[30] The indicative sentences may be a guide as to whether error is established in the aggregate sentence.[31] Although it is not possible to ascertain the degree of concurrence and accumulation in an aggregate sentence by reference to the indicative sentences, it is not impermissible to have regard to the indicative sentences when looking at whether error is disclosed in the aggregate sentence.[32] However, any analysis that seeks to reconstruct some precise starting and end point for the indicative sentences in order to show error in the fixing of the aggregate sentence is misconceived as aggregate sentences were intended to avoid sentencing judges undertaking that very process.[33] The NSWCCA can compare the indicative sentences to the aggregate sentence for the purpose of determining whether and, to an extent, how the totality principle was applied.[34] A consideration of "notional accumulation" has its limits as ultimately what is considered is what is appropriate to

reflect the totality of criminality in all of the offending.[35] In *Stevenson v R*,[36] it was held there was error in the nomination of an indicative sentence which "served to infect the aggregate sentence" so that the appeal should be allowed and the applicant re-sentenced.

Conclusion

The aggregate sentencing regime has simplified the task of sentencing, an important consideration in the busy Local and District Courts where the very great bulk of sentencing is undertaken. The reform has effectively removed the technicalities that beset sentencing for multiple offences prior to 2011.

Endnotes

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1 Amended by *Crimes (Sentencing Procedure) Amendment Act* 2010, commenced 14 March 2011.

2 (1998) 194 CLR 610.

3 NSW Law Reform Commission, "Sentencing", Report 139, 2013, at [6.14].

4 *JM v R* [2014] NSWCCA 297 at [39]; *Sharma v R* [2022] NSWCCA 190 at [4].

5 In *Fitzpatrick v R* [2016] VSCA 63 at [45] Weinberg AP observed that aggregate sentences were "originally introduced in order to simplify the task of sentencing for multiple offences, especially where orders for concurrency, partial concurrency, and cumulation could become complex and productive of error". See also *R v Copeland (No 2)* [2010] SASCFC 61 at [15]–[30].

6 [2005] NSWCCA 253.

7 [2008] NSWCCA 145.

8 ibid at [74].

9 Section 53A(2)(b) *Crimes (Sentencing Procedure) Act* 1999 (CSPA).

10 *Vaughan v R* [2020] NSWCCA 3 at [90]–[91]; *Weiss v R* [2020] NSWCCA 188 at [69]; *Aryal v R* [2021] NSWCCA 2 at [46]; *Stevenson v R* [2022] NSWCCA 133 at [109]; *Harper v R* [2022] NSWCCA 211 at [171].

11 Section 53A(2)(b) CSPA.

12 *JM v R*, above n 4 at [39]; *Glare v R* [2015] NSWCCA 194 at [12]; *Bao v R* [2016] NSWCCA 16 at [44]; *PG v R* [2017] NSWCCA 179 at [71]–[92]; *Elsaj v R* [2017] NSWCCA 124 at [56]; *Berryman v R* [2017] NSWCCA 297 at [29]; *Ibbotson (a pseudonym) v R* [2020] NSWCCA 92 at [138]; *Weiss v R*, above n 10 at [69]–[71]; *BB v R* [2021] NSWCCA 283 at [64]–[66]; *Sharma v R*, above n 4 at [72]; *TS v R* [2022] NSWCCA 222 at [306]–[307].

13 *Weiss v R*, above n 10 at [70].

14 *R v Brown* [2012] NSWCCA 199 at [17], [26]; *JM v R* , above n 4 at [39]; *Vaughan v R* , above n 10 at [94]–[95].

15 *JM v R,* above n 4, at [39].

16 *R v Amati* [2019] NSWCCA 193 at [113]–[115]; *Thornton v R* [2020] NSWCCA 257 at [43]–[44]; *Mohindra v R* [2020] NSWCCA 340 at [64]; *R v Russell* [2022] NSWCCA 294 at [101].

17 *R v Knight*, above n 6 at [112]; *R v McKenzie* [2022] NSWCCA 119 at [107].

18 *Vaughan v R*, above n 10 at [94]–[95], [117]; *Aryal v R*, above n 10 at [46]–[47].

19 *Kliendienst v R* [2020] NSWCCA 98 at [100]; *R v McKenzie*, above n 17 at [102].

20 *Hall v R* [2021] NSWCCA 220 at [71].

21 Above n 4 at [39]–[40].

22 [2007] NSWCCA 1.

23 Section 54B(4) CSPA.

24 Section 53B CSPA.

25 *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [28], [141]–[146] applying *Putland v The Queen* (2004) 218 CLR 174; Commonwealth Director of Public Prosecutions, "Sentencing of federal offenders in Australia: a guide for practitioners", 5th edn, 2022, at [7.10.7]–[7.10.8].

26 *Waterstone v R* [2020] NSWCCA 117 at [126]; *Watson v R* [2020] NSWCCA 215 at [25]; *Woods v R* [2020] NSWCCA 219 at [87]; *Ilic v R* [2020] NSWCCA 300 at [30]; *Holt v R (Cth)* [2021] NSWCCA 14 at [119]; *Hayward v R (Cth)* [2021] NSWCCA 63 at [98]; *Ensor v R (Cth)* [2022] NSWCCA 278 at [51].

27 *Fasciale v R* [2010] 30 VR 643 at [27]; *Ilic v R*, above n 26 at [38], [41].

28 *Patel v R* [2022] NSWCCA 93 at [72]–[74], [83]–[86].

29 *R v Delzotto* [2022] NSWCCA 117 at [2]; *Ibrahim v R* [2022] NSWCCA 161 at [121].

30 *JM v R*, above n 4 at [40]; *Maxwell v R* [2020] NSWCCA 94 at [102]–[103]; *Noonan v R* [2021] NSWCCA 35 at [33]–[37].

31 *JM v R*, above n 4 at [40]; *Maxwell v R*, above n 30 at [103]; *Lee v R* [2020] NSWCCA 244 at [32]; *Noonan v R*, above n 30 at [41]; *Burke v R* [2022] NSWCCA 6 at [32]– [33]; *Stevenson v R*, above n 10 at [123]–[124]; *Ibrahim v R*, above n 29 at [108]–[116].

32 *Kliendienst v R*, above n 19 at [103].

33 *Noonan v R*, above n 30 at [33].

34 *Hraichie v R* [2022] NSWCCA 155 at [61].

35 ibid at [67].

36 *Stevenson v R*, above n 10 at [124].

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