Chapter 13: Pleas of Guilty and Sentencing

This chapter is divided into two parts. The first is an examination of the roles and responsibilities of prosecutors, defence lawyers, magistrates and judges up to the time when the word 'guilty' is said by the accused in court in answer to the question from a judicial officer or court official 'how do you plead - guilty or not guilty', as well as, charge bargaining, disputed facts, restricting facts to the charge and reversal of a plea of guilty. The second part considers the application of the *Evidence Act 2009*, sentencing principles, procedures and sentencing options.

Part 1: Pleas of Guilty, and the Role of the Prosecution, Defence and Judicial Officers

Role of the Prosecution

It is necessary for the prosecution to ensure that the charge is made out by the alleged facts. That is, the elements of the offence must be able to be derived from the facts. For example, if the charge is assault the facts must show that the following elements are made out:

1. That there was an act by the accused which intentionally, or recklessly, caused another person (the complainant) to apprehend immediate and unlawful violence.

2. That such conduct of the accused was without the consent of the complainant.

3. That such conduct was intentional or reckless in the sense that the accused realised that the complainant might fear that the complainant would then and there be subject to immediate and unlawful violence and none the less went on and took that risk.

4. That such conduct was without lawful excuse.

It should always be remembered that a plea of guilty is to the essential elements of the offence: *Medcraft*.[1]

The responsibility for preparing the facts that are presented to a court rests with the prosecution. The Office of the Director of Public Prosecution's 'Prosecution Policy' sets out the requirements in terms of presentation of facts in the following way:

> 12.2 In pursuing these [see 12.1] requirements, a prosecutor should:
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> a) adequately present the facts;
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> ...

[1] (1992) 60 A Crim R 181.

c) ensure that the Court is not proceeding upon any error of law or fact;

d) provide assistance on the facts or law as required.

...

It is also appropriate, when preparing the facts, for the prosecution to include any relevant mitigating factors that became apparent to the police during the arrest and charging process. For example, at the time of arrest the accused may have said, 'I am sorry for what happened'. These words may be accepted as a confession, but they may also show remorse and they should be included in the agreed facts.

The role of the prosecution in presenting relevant facts was emphasised by Kabui J in *Regina v Dennie* when he said:

> The Court believes it is upon the Prosecution to produce all the relevant facts to the Court as Officers of the Court. This burden is heavier when the accused persons are not represented by Counsel and are pleading guilty to serious offences under the Penal Code. Justice requires that this be done.[2]

There are additional functions carried out by the prosecution both before and after a plea of guilty has been entered. These duties are discussed hereunder and throughout this chapter: they all involve some fact gathering, analysis and application of the law. The functions are described in the Office of the Director of Public Prosecution's 'Prosecution Policy'.

Clause 12 of the policy states:

12.1 The prosecution has an active role to play in the sentencing process. A prosecutor must not seek to persuade the Court to impose a vindictive sentence or a sentence of a particular magnitude, but:

a) must correct any error made by the opponent in address on sentence;

b) must inform the Court of any relevant authority or legislation bearing on the appropriate sentence;

c) must assist the Court to avoid appellable error on the issue of sentence;

d) may submit that a custodial or non-custodial sentence is appropriate; and

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2 [1998] SBHC 90.

e) may inform the Court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority.

12.2 In pursuing these requirements, a prosecutor should:

a) adequately present the facts;

b) inform the Court of the impact of the crime upon the victim;

c) ensure that the Court is not proceeding upon any error of law or fact;

d) provide assistance on the facts or law as required;

e) fairly test the opposing case as required;

f) refer to relevant official statistics and comparable cases and the sentencing options available; and

g) if it appears there is a real possibility that the Court may make a sentencing order that would be inappropriate and not within a proper exercise of the sentencing discretion, make submissions on that issue - particularly if, where a custodial sentence is appropriate, the court is contemplating a non-custodial penalty.

12.3 A prosecutor should not in any way fetter the discretion of the Director to appeal against the inadequacy of a sentence (including by informing the Court or an opponent whether or not the Director would, or would be likely to, appeal, or whether or not a sentence imposed is regarded as appropriate and adequate). The Director's instructions may be sought in advance in exceptional cases.

12.4 Co-operation by convicted persons with law enforcement agencies should be appropriately acknowledged and, if necessary, tested at the time of sentencing.

12.5 The prosecutor must be aware of any legal limitations on sentence, the maximum sentence, whether the Court has jurisdiction to impose any particular sentence, and any regular “tariffs” or guideline cases prior to sentencing. This must be brought to the attention of the sentencing Court to help it to arrive at a just and proper sentence.

Mitigation

12.6 The prosecutor has a duty to do all that reasonably can be done to ensure that the Court acts only on truthful information. Vigilance is required not just in the presentation of the Crown case but also in the approach taken to the defence case. Opinions, their underlying assumptions and factual allegations, should be scrutinised for reliability and relevance.

12.7 When matters advanced in mitigation can be proven wrong, it is the duty of the prosecutor to inform the defence accordingly. If the

> defence persists it becomes the responsibility of the prosecutor to invite the Court to put the defence to proof of the disputed material and if necessary to hear rebutting evidence.
>
> **Criminal Histories**
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> 12.8 The prosecutor must ensure that any criminal history is current as at the date of sentence and must inform the Court of the accused's criminal history and any facts which may affect the assessment of sentence, whether mitigating or aggravating in character. [3]

Clause 12.5 restates case law requiring the prosecution to know what the maximum sentence that can be imposed by the court: *R v Clarke*.[4] The defence should also be aware of the penalties that can be imposed.

The part of clause 12.8 that requires the prosecution to provide a court with an accused's criminal history is a very relevant part of the sentencing process. There is no obligation on the defence practitioner to provide a court with a client's criminal history, however there is a duty to the client to ensure that the record is accurate, and also a duty not to mislead the court.

When a criminal history is provided the defence practitioner should check with the client to ensure the record is accurate. It is not unusual for a criminal record to include offences that the client did not commit. It is also not unusual for a client to instruct that they have never been convicted of a criminal offence when they have. The failure, by the client, to mention that there are convictions may be because it has been forgotten, or because there is a desire to gain an advantage. Where the practitioner submits to the court that the client does not have a criminal record, and it is later revealed they do, the practitioner may appear to be incompetent, and worse the impression may be given that there is an attempt being made to mislead the court: it also does no favour for the client. Where the client advises that he or she does have a criminal record but the prosecution supplied criminal history does not show any convictions, the defence practitioner is not ethically bound to advise the court that the client has in fact been convicted of offences. However, in such a circumstance the practitioner must not submit to the court that the client does not have any convictions. Practitioners have a duty not to mislead the court, so nothing should be said that would tend to indicate that the client was a first offender.

The prosecution is also required to bring to the attention of the court any aggravating factors, however, if a defendant is unrepresented a prosecutor is expected to bring to the court's notice both mitigating and aggravating factors: *R v Van Pelz*.[5] This requirement is reflected throughout the prosecutorial guidelines.

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3 Sections 75, 77 (1) and 179 of the *Evidence Act* 2009, and section 125 of the *Criminal Procedure Code* provide the statutory power for proof of a criminal record. The form of the record can be found at Chapter 7 of the *Criminal Procedure Code*.

4 (1974) 59 Cr App R 298.

5 (1942) 29 Cr App R 10; [1943] 1 All ER 36; [1943] KB 157.

The proposition that the prosecution has a duty to assist the Court in its sentencing tasks was endorsed in Papua New Guinea by Kapi J in *Acting Public Prosecutor v Uname Aumane & others.*[6]

Role of the Defence

The defence lawyer's initial duties to a client include providing legal advice and taking detailed instructions. It is not a good idea to start by simply asking a client whether they committed an offence or not. Before doing this it is appropriate to know what the charge is and what facts the prosecution are relying on to prove the elements of the offence. The degree of disclosure that is necessary may depend on the seriousness of the charge. Even before receiving sufficient disclosure it is best to provide the client with advice about their fundamental legal rights. Chapter 1 examines some of the issues that need to be addressed when advising a client, and the care that should be taken to ensure that a miscarriage of justice does not occur.

When sufficient disclosure is provided, which for a minor offence may simply be the provision of a facts sheet, it is then appropriate to advise a client about the benefits of a plea of guilty. This should be done even if the client says that they want to plead not guilty. In the case of murder, where mandatory life is the sentence upon conviction, there are only very limited benefits for the client if they decide to plead guilty; these are examined at the end of Part 2 of this chapter.

In all cases, the client needs to be told what facts the prosecution is relying upon and the elements of the offence. The defence lawyer must advise the client whether the alleged facts fit the elements of the offence charged: if they do not the client probably does not have a case to answer. The client also needs to be told that the prosecution can be made to prove its case beyond reasonable doubt.

In order to ensure that the client has the necessary understanding of the process that will occur when they plead guilty, and also what they are agreeing to by pleading guilty; written instructions should be taken and the client should endorse those instructions by signing them.

An example of such written instructions is:

> *I John Smith instruct my lawyer [name of lawyer] that I wish to plead guilty to the charge of actual bodily harm in the Magistrates' Court on [date].*
>
> *My lawyer has explained to me the elements of the offence. I agree with the facts that the prosecution has presented.*

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6 [1980] PNGLR 510, 544.

> *I know that I could make the prosecution prove its case beyond reasonable doubt. I accept that I committed the offence charged.*
>
> *My lawyer has explained to me that I could be sentenced to gaol. My lawyer has placed no pressure on me to plead guilty.*

If the defence lawyer has not properly understood the facts and applied the law to them then a client could be mislead into pleading guilty to something that they either did not do or to which they had a good defence. Miscarriages of justice can result from such incompetence.

Magistrates and Judges - Duties When Considering a Plea of Guilty

The prosecution and the defence have a duty to ensure that the elements of an offence fit with the facts. This is also the case for magistrates and judges: they do not have to accept a plea of guilty. The court should be assisted by the prosecution and defence to avoid allowing a miscarriage of justice to occur.

There are numerous cases requiring judges to ensure the truth of a plea of guilty: some of them are referred to below. The *Criminal Procedure Code* also requires truthful guilty pleas. Section 195 of the *Criminal Procedure Code* (Ch. 7) states, *inter alia*:

> **195.** (1) The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
>
> (2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary.
>
> (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.
>
> (4) If the accused person refuses to plead, the court shall order a plea of not guilty to be entered for him.

The Papua New Guinea Magistrates' Manual is a useful guide and it places emphasis on the need for magistrates to be careful before they accept a plea of guilty. It also provides some cogent reasons for the need for care. It states, *inter alia*:

12.4.2 The Magistrate's duty

The court is not obliged to accept a plea of guilty. It is the duty of the Magistrate to make absolutely sure that the defendant understands the elements of the charges to which he or she pleads: Moses Aikabi v Ephraim Tami [1971] PNGLR 1550. Whenever the Magistrate is in any doubt as to whether or not the defendant is pleading guilty, the Magistrate should enter a plea of not guilty and proceed to hear the evidence against the defendant.

Appearances can be deceiving. Magistrates should take considerable care when a defendant appears to plead guilty to a charge. Magistrates have a discretion as to whether or not they accept what appears to be a guilty plea. They should check by questioning the defendant. For instance, if the defendant says, when asked to plead to a charge of assault, "Yes, I hit him, but I did it to stop him hitting me", the Magistrate should enter a plea of not guilty, because a defence of self-defence has been raised.

After the charge has been read through once, the best way is for the Magistrate then to put the elements of the offence to the defendant one at a time and note his or her replies. This may mean reading the relevant facts that relate to each element and asking the defendant whether he or she accepts those facts. This is so particularly if a question, when translated into Pisin or a local language, sounds like an accusation or a statement. It may be better to put the words into some form such as "The police say 'xxx', have they told it correctly?" and "What do you say about what the police have said?": see Eliza v Mandina [1971-1972] PNGLR 422.
The Magistrate should also remember that the circumstances of aggravation surrounding the alleged offence have to be proved by the prosecution, and these facts also should be put carefully to the defendant.

When dealing with an unrepresented defendant, a Magistrate should use simple language and avoid the use of words and phrases which, though well understood by Magistrates, police and lawyers, may confuse people not familiar with the courts.

Taking of Plea

The Papua New Guinea Magistrates' Manual even outlines the procedure steps designed to avoid a false guilty plea. It states:

The steps may be summarised as follows:

- The charge is read to the defendant.
- If the defendant pleads guilty to the charge, the Magistrate should note the plea provisionally.
- The prosecutor reads a brief statement of the facts.
- The Magistrate asks the defendant if he or she wishes to say anything in answer to the charge.
- If not, the Magistrate may enter a plea of guilty.

- If the defendant makes a statement which raises a possible defence, the Magistrate should change the plea to not guilty and proceed to trial. An adjournment may be necessary.

- If the plea of guilty is accepted, the Magistrate proceeds to hear what the prosecution and defence have to say on the question of penalty.

In the Solomon Islands, the courts have taken a similar position to that adopted in Papua New Guinea. In *Regina v Maenu'u,*[7] Lung Ole-a Wich J discussed the historical approach to arraigning an accused, and emphasised that a plea of guilty would be void unless entered by the accused. He stated:

> The technical meaning of arraignment being, 1. calling the prisoner produced, by the name in the charge, to confirm his identity, 2. reading and explaining the charge to him and asking him to plead, and 3. recording the plea of the accused. For some time the consequence of failing to have accused's plea taken was that all the proceedings that followed from the point when arraignment would have taken place was regarded as mistrial and void. It was required that the plea was to come from the accused himself except in a few instances such as when accused was deaf and dumb, insane or refused to plead. That was the rule in Ellis v R (1973) 57 Cr App Rep 571. In the case, the clerk in court informed the accused that he was charged with the offence of burglary and theft, and explained the particulars including theft of £1,600. The clerk then said, "Ellis, how do you plead, guilty or not guilty?" Defence counsel intervened at that point saying, "May I assist here, he wishes to plead guilty to the theft of £380, but not as charged". He also added that accused would plead guilty to burglary. The proceeding then continued and accused was convicted on a plea of guilty. The Court of Appeal quashed the conviction because the plea of guilty did not come from the accused himself so there was no plea. The law in Ellis v R has been modified. The correct position is now in Williams (Roy) v R [1977] 1 All ER 874. A plea of guilty must still come from the accused himself otherwise what follows is void. A plea of not guilty must also come from the accused, but when a trial has proceeded as if accused had pleaded not guilty, and he in fact had intended to plead not guilty, failure to take the plea will not vitiate the trial if the plea of not guilty was vicariously offered, tacitly conveyed or waived or a formal arraignment was implied.[8]

In *Tobo v Commissioner of Police,*[9] Muria ACJ stressed that courts should proceed to pass sentence after a plea of guilty has been entered unless there is sufficient reason to do otherwise, such as the accused raising a possible defence during the plea in mitigation. He also highlighted the right of an accused to have legal assistance. He found:

> The law requires that when an accused person is brought before the court charged with an offence, the substance of the charge must be put to the accused person and that the accused person must be asked whether he

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7 [1998] SBHC 80.
8 Ibid.
9 [1993] SBHC 45.

> admits or denies the truth of the charge. If the accused person admits the charge, the court shall convict him and pass sentence on him *"unless there shall appear to it sufficient cause to the contrary."* Where the accused person denies the charge the court must proceed and hear the evidence. That basically is what section 194, Criminal Procedure Code requires.
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> While the courts must be mindful of the rights of an unrepresented accused person brought before it, charge with an offence, the court's duty as envisaged under section 194, Criminal Procedure Code and section 10 of the Constitution is to afford the accused person a fair hearing. It is not the court's duty to ensure that an accused person is accorded legal aid. The function of providing legal aid, advice and assistance is to be performed by the Public Solicitor as provided under section 92(4) of the Constitution. The court must not, however, deny the accused person the opportunity to have access to legal aid, advice or assistance.
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> The court has the power under section 194(2), Criminal Procedure Code to not pass sentence upon an accused person who pleaded guilty to a charge. That power may be exercised by the court where *"there shall appear to it sufficient cause to the contrary."* One such sufficient cause must be where the accused person pleaded guilty but the accused raised a possible defence in law during mitigation.[10]

In *Donga v Regina*,[11] Palmer J stated that magistrates should be cautious to ensure that there were sufficient particulars in the information and if there was insufficient information the prosecution should be required to provide the necessary details so the offence can be properly understood by the accused. He also stressed the need for an unrepresented accused to be given assistance to understand what was being alleged. He stated:

> Magistrates should be cautious in ensuring that there are sufficient particulars in the information to enable him to put the charge to the accused, and if necessary, to explain it to the accused. Where the particulars are inadequate, then the prosecutor should be required to amend the information and insert the necessary details. It is good practice too to ask the accused if he understood the charge before taking his plea.
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> If the accused says that he does not understand, then he/she should be asked what part or aspect of the offence as read out to him/her was not understood.
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> There is no indication in the record of proceedings of the Magistrates' Court to show that the accused understood the charge before he pleaded to it.
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> The records then continue: "Written facts produced and read by the prosecutor." The relevant part of the written facts stated that the collision was caused by a lack of concentration on the part of the accused in his driving. On one hand, had the accused been represented, then such a scant account of the facts may be acceptable. On the other, where he was

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10 Ibid.

11 [1994] SBHC 55.

> unrepresented, it is my view that the learned magistrate should then enquire further as to how the lapse in concentration was caused, if there was a reason or cause for it. The accused may have experienced loss of concentration due to improper sleep, or tiredness, or he may have been busy listening to the radio, or was distracted by someone on the road, or was travelling too fast and therefore could not stop in time.
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> Normally, after the facts are read out, the accused should be asked if he agreed with the facts. If he does not agree, then he/she should be further asked as to what part of the facts he/she did not agree with. By doing this the court should be placed in a better position to decide if the plea of the accused was equivocal. This sort of inquiry would not be necessary where the accused is represented, as it would be safe for the court to rely on the skill of the accused's advocate to advice the accused as to the contents of the information.
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> There is no record in this case to show that the accused was asked if he agreed with the facts or not.
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> I have had the opportunity of reading the statement of the Accused as made to the Police on the 19th of January 1994. Usually, the Court should ask for a copy of the statement of the Accused in the case where the accused is unrepresented.
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> The usefulness of this practice in the case of an unrepresented accused is that it helps the Court to cross-check with the facts as produced by the prosecution, and to check if there may be a possible defence or matters of mitigation which the accused may have omitted to mention, either when he was asked if he agreed with the facts or when giving his mitigation.[12]

The importance of ensuring the facts of the case were clearly understood by an accused and appropriate procedures followed when the facts are disputed was also emphasised by Palmer J in *Regina v Takopi.*[13] In this case it was unclear from the Magistrate's Court record why the charge had been dismissed. The decision reached by Palmer J was that the facts revealed an offence had been committed but that the accused disputed the facts so a plea of not guilty should have been entered and the case listed for hearing. Palmer J stated:

> The records then showed the Court dismissing the charge on the basis that the facts did not properly constitute an offence.
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> It is not clear what is meant by this, whether the facts as read by the prosecutor did not constitute an offence or whether the learned Magistrate formed the above opinion only after hearing the accused's version of events.
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> What is important to note is that the opinion of a magistrate as to whether the facts as read by the prosecutor constitute an offence or not should be formed when the facts have been read out by the prosecutor. The crown's

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12 Ibid.

13 [1994] SBHC 66.

> case against the accused is as summarised in the facts read out by the prosecutor. If, after hearing the facts a magistrate is not satisfied that an offence has been made out as contained in the charge, then he should raise the matter with the prosecutor straight-away.
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> The reason why an accused is asked if he agrees with the facts is two-fold. First, it is to enable the court to ascertain if the accused does in fact understand the charge made against him. Secondly, it is to assist the court in the case where the accused is unrepresented by a lawyer, to ascertain whether there may be a possible defence, and thereby to change the plea from a guilty plea to a not guilty plea. Most of the accused who come before the courts are unrepresented and un-schooled in the law, and therefore may not be aware of their legal rights, and whether there exist a defence to the charge made against them. By giving them an opportunity to indicate to the court whether they agree with the facts or not, the court may be assisted by what they may say in response. For instance, if the accused says that he does not agree with the facts, then he should specifically be asked to point out what part of the facts were not agreed to.
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> In this particular case there is a denial by the accused that he assaulted the victim. His version was quite different to the facts as read by the prosecutor. His version was that he acted as a peace-maker between the victim and other people around that time whom the victim was wanting to fight. He stated that he *'only tried to help and advise the victim'*. Once it is clear that there is conflict in what the facts say and what the accused says, and that there is a possible defence in what the accused says, then the magistrate should change the plea to a not guilty plea and adjourn the case for a trial to be held. At other times, there may not be a defence but simply a difference in the facts which would be material for sentencing purposes; that is, if the version given by the accused is to be accepted by the court then it would be material in mitigation in favour of the accused. In such instances, the plea of guilty should be maintained, but a trial be held on the facts or matters in dispute. The sentence can then be passed after the issues of fact that are in dispute have been ruled upon by the court.
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> In this case, the facts as read by the prosecutor clearly amounted to an offence. The comments of the accused however, in response to the question whether he agreed with the facts showed a possible defence to the charge. A plea of not guilty therefore should have been entered and the case adjourned for trial. The orders of the learned magistrate accordingly are set a side; the guilty plea of the accused is changed to a not guilty plea, and the matter to be listed for trial by the Eastern Magistrate Court.[14]

See also: *Fanasia v Director of Public Prosecutions.*[15]

The High Court of Australia in *Gas v R* sets out four principles relevant to the role of judicial officers in the plea process.[16] First, the charge is a matter for the prosecutor; second, the accused alone decides whether to plead guilty without foreknowledge of the sentence, and must do so freely; third,

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14 Ibid.
15 [1985 – 86] SILR 84.
16 [2004] HCA 22.

it is for the sentencing judge alone to decide the sentence to be imposed and for this purpose the judge must find the relevant facts; and fourth, the judge is not bound by the submissions of counsel, the judge must apply to the facts as found the relevant law and sentencing principles. The court stated:

> 28. First, it is the prosecutor, alone, who has the responsibility of deciding the charges to be preferred against an accused person[9]. The judge has no role to play in that decision. There is no suggestion, in the present case, that the judge was in any way a party to the "plea agreement" referred to. The appellants, through their counsel, evidently indicated to the prosecutor that, if a charge of manslaughter were to be substituted for the charge of murder, they would plead guilty, and the prosecutor filed a new presentment on that understanding. However, the charging of the appellants was a matter for the prosecutor.
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> 29. Secondly, it is the accused person, alone, who must decide whether to plead guilty to the charge preferred. That decision must be made freely and, in this case, it was made with the benefit of legal advice. Once again, the judge is not, and in this case was not, involved in the decision. Such a decision is not made with any foreknowledge of the sentence that will be imposed. No doubt it will often be made in the light of professional advice as to what might reasonably be expected to happen, but that advice is the responsibility of the accused's legal representatives.
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> 30. Thirdly, it is for the sentencing judge, alone, to decide the sentence to be imposed[10]. For that purpose, the judge must find the relevant facts[11]. In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge's capacity to find potentially relevant facts in a given case[12]. The present appeal provides an example. The limitation arose from the absence of evidence as to who killed the victim, and the absence of any admission from either appellant that his involvement was more than that of an aider and abettor.
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> 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.

In a case where a magistrate or judge intends to sentence an accused on a different basis to that in the agreed facts, then the accused must be given the opportunity to bring evidence or otherwise address the different facts being considered: *Uzabeaga*.[17]

Charge Bargaining between Prosecution and Defence

It is an acceptable approach for the prosecution and defence to discuss what charge is to be preferred. Negotiations can sometimes result in the prosecution accepting a lesser charge for a plea of guilty. In *R v Turner* comments were made in respect of '*plea bargaining*'.[18] Parker LCJ, delivering the judgment of the Court of Appeal, stated:

> Counsel must be completely free to do what is his duty, namely to give the accused the best advice he can and if need be, advice in strong terms. This will often include advice that a plea of Guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence that would otherwise be the case. Counsel, of course, will emphasise that the accused must not plead Guilty unless he has committed the acts constituting the offence charged.
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> The accused, having considered counsel's advice, must have a complete freedom of choice whether to plead Guilty or Not Guilty.
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> There must be freedom of access between counsel and judge. Any discussion, however, which takes place must be between the judge and both counsel for the defence and counsel for the prosecution. If a solicitor representing the accused is in the court, he should be allowed to attend the discussion, if he so desires.[19]

It is usual for the prosecution and defence to also discuss the facts and try and overcome any disagreement that may exist about them.

Dispute About Facts

It is appropriate for the prosecution and defence to try to agree on the facts where an accused may want to plead guilty. It is not unusual for the prosecution to amend facts and lower charges, or for the defence to request an amendment to the facts to better reflect the circumstances of the offending. During the process of negotiation there may be a dispute between the parties about the facts that should be tendered that cannot be resolved. In these circumstances the accused may still want to plead guilty. Where there is such an unresolved dispute, and the accused still wants to plead guilty, the magistrate or judge will need to decide what facts to accept.

It is for the defence to raise with the court any disputed facts, and where the person is unrepresented for the court and prosecution to be of assistance.

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17 (2000) 119 A Crim R 452.

18 (1970) 54 Cr App R 352, 360, 361. See also: *R v Atkinson* [1978] 2 All ER 460.

19 Ibid.

These points are made in *R v Tolera* where Lord Bingham CJ, delivering the judgment of the Court of Appeal, found:

> If the defendant wishes to ask the court to pass sentence on any other basis than that disclosed in the Crown Case, it is necessary for the defendant to make that quite clear. If the Crown does not accept the defence account, and if the discrepancy between the two accounts is such as to have a potentially significant effect on the level of sentence, then consideration must be given to the holding of a *Newton* hearing to resolve the issue. The initiative rests with the defence which is asking the court to sentence on a basis other than that disclosed by the Crown case.[20]
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> ...
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> [W]here the defendant, having pleaded guilty, advances an account of the offence which the prosecution does not, or feels it cannot, challenge, but which the court feels unable to accept, whether because it conflicts with the facts disclosed in the Crown case or because it is inherently incredible and defies common sense. In this situation it is desirable that the court should make it clear that it does not accept the defence account and why. There is an obvious risk of injustice if the defendant does not learn until sentence is passed that his version of the facts is rejected, because he cannot then seek to persuade the court to adopt a different view. The court should therefore make its views known and, failing any other resolution, a hearing can be held and evidence called to resolve the matter. That will ordinarily involve calling the defendant and the prosecutor should ask appropriate questions to test the defendant's evidence, adopting for this purpose the role of an *amicus* [i.e.. 'friend of the court'] exploring matters which the court wishes to be explored. It is not generally desirable that the prosecutor, on the ground that he has no evidence to contradict that of the defendant, should simply fold his hands and leave the questioning to the judge.

In determining the facts, the magistrate or judge should hear evidence in the usual way and determine the facts on the accepted basis that the prosecution must prove the facts of a case on the standard of beyond reasonable doubt, and the defence on the balance of probabilities. The onus and standard of proof for the prosecution and accused is referred to by the majority of the court in *R v Olbrich*:

> … we would adopt what was said by the majority in *R v Storey* ([1998] 1 VR 359 at 369 per Winneke P, Brooking and Hayne JJA and Southwell AJA) — that a sentencing judge
>
> 'may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account *in favour* of the accused, it is enough if those circumstances are proved on the balance of probabilities.'[21]

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20 [1999] 1 Cr App R 29, 32; [1998] Crim LR 425.

21 [1999] HCA 54; 199 CLR 270; 166 ALR 330; 73 ALJR 1550, 27.

Whilst a magistrate or judge should attempt to resolve a dispute about the facts using the appropriate standard, in *Weininger v R* it was acknowledged that it may not always be possible to resolve a sentencing issue in this way, and that all the facts of the case may not be able to be found.[22] The case also provides a helpful description of some of the indeterminate factors such as human behaviour that a sentencer needs to be aware of and try to factor into consideration when deciding on a sentence. The court stated:

> 19. For present purposes, however, attention to questions of onus and standard of proof may distract attention from another important aspect of the decision in Olbrich. Framing the question in terms of the onus and standard of proof may suggest that all disputed issues of fact related to sentencing must be resolved for or against the offender. That is not so. As was recognised in Olbrich, some disputed issues of fact cannot be resolved in a way that goes either to increase or to decrease the sentence that is to be imposed. There may be issues which the material available to the sentencing judge will not permit the judge to resolve in that way.
>
> 20. It had been submitted in Olbrich that, in sentencing a person knowingly concerned in the importation of narcotic drugs into Australia, it was necessary to classify that person's participation in the importation as that of a principal or a courier, and it was further submitted that, if it was not established beyond reasonable doubt that the offender was a principal, the offender should be sentenced as a courier. As the majority pointed out in Olbrich[13], prosecuting authorities and a sentencing judge will often have only the most limited and imperfect information about how it was that the accused came to commit the offence for which he or she is to be sentenced. Although s 16A(2)(a) requires a sentencing judge to take account of the nature and circumstances of the offence, that requirement is not absolute. They are to be taken into account only to the extent that they are relevant and known to the court. The sentencing judge may not be able to make findings about all matters that may go to describe those 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[14]. Accordingly, in the particular facts of Olbrich, where the offender asserted that he was no more than a courier of the drugs, but the sentencing judge disbelieved him, it was neither necessary nor appropriate to sentence him on the basis that he was a courier.
>
> 21. To frame the relevant question in terms of the onus and standard of proof may also suggest that the only material which may be treated as being "known to the court", and on which the judge may act in sentencing an offender, is material revealed by the plea or verdict of guilty, admission by the offender, or evidence received on the

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22 [2003] HCA 14, 19,22; 212 CLR 629; 196 ALR 451; 77 ALJR 872.

> sentencing hearing. The use of the phrase "known to the court", rather than "proved in evidence", or some equivalent expression, suggests strongly that s 16A was not intended to require the formal proof of matters before they could be taken into account in sentencing. Rather, having been enacted against a background of well-known and long-established procedures in sentencing hearings, in which much of the material placed before a sentencing judge is not proved by admissible evidence, the phrase "known to the court" should not be construed as imposing a universal requirement that matters urged in sentencing hearings be either formally proved or admitted.
>
> 22. In addition to the points just made about what is known to the sentencing judge, there is another important feature of fact finding in sentencing which must be recognised. Many matters that must be taken into account in fixing a sentence are matters whose proper characterisation may lie somewhere along a line between two extremes. That is inevitably so. The matters that must be taken into account in sentencing an offender include many matters of and concerning human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.
>
> 23. Further, a sentencing hearing is not an inquisition into all that may bear upon the circumstances of the offence or matters personal to the offender. Some matters may be fixed by the plea or verdict of guilty although, even there, there may be ambiguities (as for example, in some homicide cases where a verdict of manslaughter is returned). Many of the matters relevant to fixing a sentence are matters which either the prosecution or the offender will draw to the attention of the sentencing judge. Some matters will remain unknown to the sentencing judge. The question then becomes, what use is the sentencing judge to make of what is known, and of the matters urged by the parties? This is not just a series of choices for the judge between alternatives. Not only may some things be unknown, some will concern matters in which a range of answers may be open.[23]

If the court determines pursuant to s 4(2) of the *Evidence Act 2009* that the *Act* shall apply in the sentencing proceedings, the court will determine any disputed fact situation on the balance of probabilities. The application of the *Evidence Act* is considered further at the beginning of Part 2 of this chapter.

Facts to be Restricted to Charge

An important principle that is sometimes overlooked by the prosecution and the defence is that the facts should not contain information that indicates the commission of a more serious offence than that which the accused is to be convicted: *R v De Simoni.*[24] In this case, the court stated:

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[23] Ibid.

[24] [1981] HCA 31; (1981) 147 CLR 383.

> 9. At common law the principle that circumstances of aggravation not alleged in the indictment could not be relied upon for purposes of sentence if those circumstances could have been made the subject of a distinct charge appears to have been recognised as early as the eighteenth century: Dominus Rex v. Turner (1718) 1 Str 140 (93 ER 435) ; and see Chitty, Criminal Law, 2nd ed. (1826), vol. 1, p. 231b. However, the modern authorities on the point normally commence with R. v. Bright (1916) 2 KB 441 . In that case the prisoner pleaded guilty to a charge of attempting to elicit information with regard to the manufacture of war material contrary to the Defence of the Realm (Consolidation) Regulations 1914 (U.K.). The trial judge took the view that it was the intention of the prisoner in doing the acts charged to assist the enemy. If such an intention had been charged and proved the prisoner was liable to the death penalty. He was sentenced to penal servitude for life. The Court of Criminal Appeal held that it was wrong of the trial judge to take this circumstance of aggravation into account when it had not been charged in the indictment. Darling J., who delivered the judgment of the Court, said (1916) 2 KB, at pp 444-445 that the judge "must not attribute to the prisoner that he is guilty of an offence with which he has not been charged - nor must he assume that the prisoner is guilty of some statutory aggravation of the offence which might, and should, have been charged in the indictment if it had been intended that the prisoner was to be dealt with on the footing that he had been guilty of that statutory aggravation".[25]

An example, perhaps more relevant to the Solomon Islands than outlined in *De Simoni's* case, would be where the charge is indecent assault but the facts reveal a rape. In such circumstances the facts should be amended to exclude the allegation of rape.

Change of Plea

A plea of guilty can be changed to one of not guilty before conviction. However, this is not a simple matter and prosecution as well as defence lawyers should focus on ensuring the guilty plea is properly entered. It should be kept in mind by practitioners that a sentencing magistrate or judge normally relies on assistance from both the prosecution and defence when considering a plea of guilty.

In *Liberti* the Court of Appeal in New South Wales held that an appellate court has the power to quash a conviction based on a guilty verdict, where the appellant did not appreciate the nature of the charges or did not intend to admit that he was guilty of them, or where the appellant, on the admitted facts, could not in law have been convicted of the offence charged.[26] Kirby P commented:

> An accused person will not always know the legal consequences of the facts to which he pleads guilty. He or she is normally entitled, where represented, to look to lawyers to explain those facts for their legal

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[25] (1981) 147 CLR 383, 390.

[26] (1991) A Crim R 120.

> significance. Ultimately, the accused is entitled to look to the court before which he or she comes to offer protection from a conviction which is not, in law, sustained by the facts.[27]

The proposition that a conviction, which cannot be sustained by the facts, should be set aside is based on a long line of cases: see *R v Forde.*[28] The fact that an appellate court has jurisdiction to entertain an appeal against conviction even after a plea of guilty was found in *Lars, Da Silva and Kalanderian.*[29]

The leading Australian High Court case of *Maxwell v R* sets out the legal principles that the court needs to consider where an application is made to reverse a plea of guilty.[30] Dawson and McHugh JJ stated:

> 19. An accused is entitled to plead guilty to an offence with which he is charged and, if he does so, the plea will constitute an admission of all the essential elements of the offence. Of course, if the trial judge forms the view that the evidence does not support the charge or that for any other reason the charge is not supportable, he should advise the accused to withdraw his plea and plead not guilty. But he cannot compel an accused to do so and if the accused refuses, the plea must be considered final, subject only to the discretion of the judge to grant leave to change the plea to one of not guilty at any time before the matter is disposed of by sentence or otherwise.
>
> 20. The plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered. But otherwise an accused may insist upon pleading guilty.[31]

In summary the law requires judges to accept guilty pleas except where:

1. The evidence does not support the charge;

2. The plea of guilty is not a true admission of guilt: some factors that may go to showing this is that the accused is acting out of:

   (a) ignorance;

   (b) fear;

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27 Ibid.
28 [1923] All ER 477.
29 (1994) 73 A Crim R 91.
30 [1996] HCA 46.
31 Ibid.

(c) duress

(d) mistake; and/or

(e) desire for technical advantage. or

3. It is not a genuine plea of guilty, for whatever reason.

Part 2: Sentencing Principles and Procedures

This Part deals with sentencing principles, the procedures that courts and practitioners should follow once a plea of guilty has been entered, and the application of the *Evidence Act 2009*. Section 257 of the *Criminal Procedure Code* gives the statutory formality to the plea. It states:

> **Plea of "guilty"**
>
> **257**. If the accused pleads "guilty" the plea shall be recorded and he may be convicted thereon.

When the plea of guilty has been made both the prosecution and the defence should be ready to proceed with sentencing submissions. In most cases the submissions on sentence will not be made immediately because both the prosecution and defence will need time to gather information that may be of assistance to the court, and to write sentencing submissions. In the Solomon Islands the usual requirement is that written submissions are prepared and presented in the High Court when it is time for the court to consider sentencing submissions. In the Magistrates' Court, written submissions are reserved for the more serious cases.

When appearing in court for the purpose of sentencing submissions in the High Court, it is best practice for the prosecution to begin, after the plea is taken, by tendering the agreed facts, or other relevant documents where it has been decided to go beyond a statement of agreed facts, and the criminal history. The facts can be read to the accused, but the defence lawyer can acknowledge from the bar table that the facts have been read to the accused and they are agreed. It is then for the defence to provide a plea in mitigation. This commences by handing up written submissions, references, relevant case law, and then providing oral submissions. It may also be appropriate in serious indictable cases to call character witnesses. In a case where the facts are disputed it may be necessary to call witnesses before commencing the plea in mitigation. When the defence completes its submissions, the prosecution can either make submissions on sentence or not. When the prosecution does make submissions the defence can respond.

In the Magistrates' Court the procedure usually involves the steps previously outlined from the Papua New Guinea Magistrates' Court Manual: 'the charge is read to the defendant; if the defendant pleads guilty

to the charge, the magistrate should note the plea provisionally; the prosecutor reads a brief statement of the facts; the magistrate asks the defendant if he or she wishes to say anything in answer to the charge; if not, the magistrate may enter a plea of guilty; . . . and the magistrate proceeds to hear what the prosecution and defence have to say on the question of penalty'. In the Solomon Islands the defence then makes oral submissions in mitigation, and the prosecution may, but usually does not, make submissions.

Application of the Evidence Act 2009

Section 4(2) of the *Evidence Act 2009* provides that a court can direct that the law of evidence applies to the whole of the sentencing proceedings or only part of it. Section 4(2) states:

> **4.** (2) If such a proceeding relates to sentencing –
>
> (a) this Act applies only 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.

Section 12 of the *Act* is also relevant in that it indicates that the standard of proof of beyond reasonable doubt does not apply in sentencing proceedings. It states:

> **12.** (1) In a criminal proceeding the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
>
> (2) In a criminal proceeding where the onus of proof is on the accused, the court is to find the case of an accused proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (3) Subsection (1) does not apply to proceedings relating to sentencing, bail, amnesty or where the standard of proof is set out in any other written law.

The standard of proof, as with bail proceedings is therefore on the balance of probabilities. Section 13 of the *Act* specifies the standard of proof for the admission of evidence and also some of the matters to be taken into account when determining if the required standard has been reached. It states:

> **13.** (1) In any proceeding, the court is to find that the facts necessary for deciding –
>
> (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or

(b) any other question arising under this Act;

have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) In determining whether it is so satisfied, without limiting the matters that the court can consider, the matters that the court must take into account include –

(a) the importance of the evidence in the proceeding; and

(b) the gravity of the matters alleged in relation to the question.

Presumably the decision to direct that the laws of evidence apply would be based on an application from one of the parties or where the magistrate or judge decided that the provisions in the *Act* were needed to assist with the resolution of a matter. However, practitioners should remember that the *Act* does not apply unless a ruling activating its provisions is given.

Fundamental Sentencing Principles

The guiding sentencing principles are retribution, deterrence, prevention and rehabilitation. The need for these to be considered in every case where sentence is being imposed is highlighted by Palmer CJ in *Farsy v Reginam* where he states:

> When considering what sentence to impose or would be appropriate, the courts have developed four guiding principles. These were referred to by Lawton LJ in R v. Sargeant[21] as the classical principles of sentencing:
>
> > *"Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing*."
>
> See also comments of Sir Mari Kapi JA in the Court of Appeal of Solomon Islands in Johnson v. Tariani[22]:
>
> > "*Where the law simply provides a maximum sentence, the Courts are given a very wide discretion to determine the appropriate penalty in each case. The courts have developed principles of sentence which guide the exercise in this discretion. The Courts have developed theories of sentence which may be described as deterrence, separation, rehabilitation and retribution. I have described these theories in the Papua New Guinea case of Acting Public Prosecutor v. Uname and Others [1980] PNGLR 510 at 537 - 538. At p. 538 I said:-*
> >
> > *The agonising task for the sentencing judge is to evaluate which of these theories of sentencing should be achieved if he chooses one theory of sentencing he is likely to frustrate the other theories. In some cases, a judge will need to give balanced consideration to all theories of sentencing. In others, a judge will want to emphasise or*

> *achieve one theory of sentencing more than the other in certain classes of offences.*
>
> *Even if a judge applies the proper sentencing principles, how is he to arrive at the appropriate term of imprisonment? There is no mathematical or scientific method of arriving at the appropriate term. It is therefore important to bear in mind that a sentencing tribunal should aim to achieve consistency in the approach or principles of sentence, rather than to achieve consistency in the actual term of imprisonment (or the use of any other sentencing option). See Bibi (1980) 71 Cr App R 360. However, sentencing in a particular class of offences over a number of years will lead to a range of sentences which may be a guide in determining appropriate terms of imprisonment [or other sentencing options]. "*[32]

In *Muldrock v The Queen,*[33] the High Court of Australia approved the remarks of McHugh J in *Markarian v The Queen* about how a judge should approach determining a sentence.[34] In that case, McHugh J stated:

> [T]he judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case.[35]

In determining the appropriate sentence for an offence, the court should take into account the mitigating factors and aggravating factors.

Mitigating Factors

It is the role of the defence practitioner to identify and submit to the court all relevant mitigating factors on behalf of the client. The mitigating factors are usually found in the brief of evidence, from the client's instructions, and from relatives and friends of the offender. The first and most obvious mitigating factor is the fact that the offender is pleading guilty.

Plea of Guilty

The mitigating factors that can be used will vary with each case. The first one usually considered is the plea of guilty, for its indication of remorse and its utilitarian value.[36] In *Gerea v Regina* Palmer CJ lists a number of guidelines regarding guilty pleas, and states that the plea of guilty can attract a discount of a quarter to a third of the sentence that would otherwise be imposed.[37] He stated:

> One of those guidelines provides, that a defendant who has pleaded guilty may be granted some reduction in what would otherwise have been the proper sentence for the offence – see *R. v. Meade* (1982) 4 Cr App R (S) 193 per Lord Lane CJ and Skinner J.

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32 [2004] SBHC 120.
33 [2011] HCA 39.
34 [2005] HCA 25; (2005) 228 CLR 357, 378.
35 Ibid.
36 Utilitarian value is the savings in terms of money and time for the courts.
37 [2005] SBHC 34.

> . . . .
> A second useful sentencing guideline states that where a defendant is granted a reduction of sentence on account of a plea of guilty, the extent of the reduction may be between one quarter and one third of what would otherwise have been the sentence, at the discretion of the sentencer.[38]

In *Qoloni v Regina* Palmer CJ endorsed the reasoning contained in a number of English and Australian authorities that highlights the need for a plea of guilty to attract a discount for remorse, sparing the victim the need to give evidence, and its utilitarian value.[39] He stated:

> In *Siganto v. The Queen* [1998] HCA 74, Gleeson CJ, Gummow, Hayne and Callinan JJ said at 663-g664; 99; 189; that mitigation is:
>
> > *... usually evidence of some remorse on the part of the offender, and secondly, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case. It is also something relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence."*
>
> A plea of guilty carries its own weight. In *R v Hall* (1994) 76 A Crim R 454, Crockett and Southwell JJ said at 470:
>
> > A court may (although such a case would be rare) elect to give no weight to such a plea. For instance a plea which is no evidence of remorse, is entered at the 'eleventh hour' and is made in a case of overwhelming strength may attract no reduction in sentence. But it will not fail to do so because it is cancelled or outweighed by other considerations of an aggravating nature. A plea of guilty is a mitigating factor. It cannot cease to be so because there are aggravating features. A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is concerned is what weight should be given to it in the circumstances. It is not a question as to whether the weight it has is to be cancelled out by other factors.
>
> In the New South Wales case of *R v Thompson* (2000) 49 NSWLR 383; 115 A Crim R 104, Spigelman CJ, with whom the other judges agreed, said at 419; 138:
>
> > (i) A sentencing judge should explicitly state that a guilty plea has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.
> >
> > (ii) Sentencing judges are encouraged to quantify the effect of the plea on the sentence in so far as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant - contrition, witness vulnerability and utilitarian value - but particular encouragement is given to the quantification of the last mentioned matter. Where other matters

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38 Ibid.
39 [2005] SBHC 73.

> are regarded as appropriate to be quantified in a particular case, for example, assistance to the authorities, a single combined quantification will often be appropriate.
>
> (iii) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 percent discount on sentence. The primary consideration determining where in the range a particular case should fall is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.
>
> (iv) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases, a plea will not lead to any discount.[40]

In *R v Funabana* under the sub-heading 'Plea without remorse still mitigates', the court said:

> By way of common law (*R -v- Doyle* (1994) 71 A Crim R 360 WA CCA) is authority for that proposition and that common law precept applies in the Solomon Islands. The effect of the plea of guilty calls for a reduction from the maximum sentence available in this cases and is certainly to be expected and will given here. The principle in this case relates to the pragmatic ground that the community will avoid the expense of a trial for those costs will be considerable with the complainant out of the country.[41]

In *Roni v Regina* the Court of Appeal found that a guilty plea without remorse does warrant a reduction in sentence because of its utilitarian value:

> We are satisfied the learned judge was entitled to give some credit for the guilty plea in any event for saving state resources.[42]

In *Pitamama v Regina* the Chief Justice observed that a guilty plea ought to be 'taken into account even in the worst of cases'.[43] His Lordship said:

> It is trite to point out that a defendant who has pleaded guilty may be granted some reduction in what would otherwise have been the proper sentence for the offence . The extent of the reduction may be between one quarter and one third of what would otherwise have been the sentence, at the discretion of the sentencer.[44]

In *Cameron v R* a case of the High Court of Australia, Kirby J noted that a discount is ordinarily warranted for a late guilty plea:

> A plea of guilty at the last moment (as on the day set down for the trial) will ordinarily attract a smaller discount in sentence than one that is

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40 Ibid.
41 [2004] SBHC 47.
42 [2008] SBCA 8.
43 [2005] SBHC 45.
44 Ibid.

> entered at the first reasonable opportunity. But even a belated plea will normally attract a discount.[45]

Kirby J discussed the underlying public interest in providing discounts for pleas of guilty. The same factors are common to the English and Solomon Island authorities. His Honour also articulated the various factors that can influence the timing of a guilty plea. His Honour stated:

> There are many factors that can affect the fixing of that time when it is reasonable to expect that the accused person who intends to plead guilty will do so. They include any delay on the part of the prosecution in finalising its charges; any delay in reasonable negotiations for a plea to a lesser charge; any difficulties that arise in securing adequate instructions from the accused, especially if the accused is in custody; any limitations on the resources of Legal Aid and its lawyers representing the accused; and the absence of a clearly stated and consistently applied discount for a plea on the part of sentencing judges.[46]

These factors are often beyond the control of the accused. To punish an accused who has lacked timely legal advice for a late guilty plea risks what Kirby J describes as a '*double injustice*' upon him. He stated:

> To penalise the appellant in sentencing for this lack of provision of alternative legal advice whilst in custody would work a double injustice upon him. Sentencing judges, and appellate courts, should be alert to the realities that govern the access by indigent prisoners to legal advice when determining a question such as that presented by these proceedings.[47]

In *Regina v Ludawane,* Palmer CJ took into account a plea of guilty on the second day of trial for both its utilitarian value and as evidence of remorse:

> By this change of plea you have saved us unnecessary court time for a trial which had been listed for five days. We have been able to use those times to attend to other important matters. By this course of action you have also positively demonstrated remorse; that you are sorry for your actions.[48]

In *R v Thomson,*[49] an authority followed in *Qoloni v Regina*,[50] the Court of Criminal Appeal of New South Wales, comprising five judges, noted a study which found 60% of all guilty pleas in New South Wales occurred on the day of trial.[51] Whilst a late guilty plea is not ideal, there is nothing unusual or exceptional about a guilty plea several days before trial or on the day of trial.

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45 [2002] HCA 6, [65](4); (2002) 209 CLR 39, 65-67,79.
46 Ibid 80.
47 Ibid.
48 [2010] SBHC 106.
49 (2000) 115 A Crim R 104.
50 [2005] SBHC 73
51 (2000) 115 A Crim R 104.

These authorities clearly support the principle that a guilty plea has two components. First, it can be an indication of remorse. Second, it may have a utilitarian value in terms of saving resources. In a particular case, a discount may be warranted for either one or both of these components. These authorities also support the principle that a discount is still applicable in cases of a late guilty plea. In rare and exceptional cases a guilty plea will not give rise to any discount. However, the English authorities generally confine this situation to cases requiring the protection of the community or cases of severe criminality.

The Rationale for Providing a Discount for a Guilty Plea

The rationale behind the discount for the utilitarian component of a guilty plea is that a reduction in sentence should act as an encouragement or incentive for accused persons in future cases to plead guilty. This incentive can be regarded as critical to the efficient operation of the court system. A defence lawyer should be able to advise his or her client to a expect reduction in sentence in the event of a guilty plea.

In the event that no reduction is given for a guilty plea, there is no longer any incentive for a person to plead guilty. Accused persons could simply 'chance their luck' and proceed to trial.

There is a broad public interest, shared by courts, victims, witnesses, police, defence lawyers and the prosecution, for accused persons to plead guilty and for trials to be avoided. This is especially so in Solomon Islands, where court lists are very busy, and police and prosecution resources are limited. Bringing witnesses to court, in particular from the provinces, is expensive and time consuming. Guilty pleas also bring the guilty to account for their actions, which preserves the integrity of the rule of law. Therefore there are strong policy reasons for the courts to recognise the utilitarian value of a guilty plea, even a late guilty plea, and afford some discount in sentence.

Other Mitigating Factors

Apart from the plea of guilty that can show remorse and have utilitarian value there are numerous other matters that the court can take into account when sentencing. These include:

- the offender was a person of good character: this can be shown by the lack of prior convictions or the lack of a significant number of previous convictions,[52] and by demonstrating that the offender has been a good member of the community;
- the offender is unlikely to re-offend: this can be shown by the previous behaviour of the offender and the remorse shown by the plea of guilty;
- the offender has good prospects of rehabilitation: this can be show by the past behaviour of the offender and any efforts the offender has

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[52] For example, the fact that a person has some minor offences committed years before should not diminish their good character.

made to improve his behaviour. It is particularly relevant for a young offender;
- the offender was provoked by the victim;
- the injury, emotional harm, loss or damage caused by the offence was not substantial;
- the offence was not part of a planned or organised criminal activity;
- the offender was acting under duress;
- the offender was not fully aware of the consequences of his or her actions because of the offender's age or mental or intellectual disability;
- the degree of pre-trial disclosure by the offender: this may be shown by a confession to the police;
- assistance by the offender to law enforcement authorities: this is relevant where the offender has provided the police with information they might not otherwise have been able to obtain to solve the crime;
- imprisonment would cause hardship to others, such as the offender's children;
- imprisonment would cause greater hardship for the offender than to other offenders: this may be the case where the offender has a disability or health problem which cannot be adequately addressed in prison;
- the prosecution case was not strong but the accused decided to plead guilty.

The mitigating factors will depend on the background of the offender and the circumstances of each case. It is necessary to assist the court in determining whether a mitigating factor should be accepted by providing detail about the offender including: age, marital status, children, employment, community activity and the like. Apart from the mitigating factors listed above reconciliation plays a big part in mitigating offences in the Solomon Islands.

Reconciliation

Reconciliation in Solomon Islands culture, in large part, involves the payment of compensation by the party at fault to the aggrieved party. It usually involves the giving of items which are considered, in custom, as appropriate for compensation. In Melanesian societies reconciliation can include the payment of traditional money, food and pigs; although in practice traditional money is being largely replaced by cash. Once payment is accepted the dispute is deemed to be over and, normally, the parties move on with their lives as if the dispute did not occur. Reconciliation is a part of customary law that is recognised in the *Constitution*.[53]

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[53] See section 76 and Schedule 3 of the Constitution. Paragraph 2 of Schedule 3 states:

2. (1) Subject to this paragraph, the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands, save in so far as:-

(a) they are inconsistent with this Constitution or any Act of Parliament;

(b) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time; or

(c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.

The courts in the Solomon Islands take account of reconciliation on a regular basis. The effect of any reconciliation takes two forms: first, in the High Court as a significant factor in mitigation, and second in the Magistrates' Court to terminate proceedings or as a mitigating factor.

Section 35(1) of the *Magistrates' Court Act* allows a magistrate to promote reconciliation in proceedings involving common assault or other minor criminal cases where payment of compensation is made or other terms are approved by the court. In such cases the court can decide to terminate or stay proceedings. Section 35(1) states:

> **Reconciliation**
>
> **35.** (1) In criminal cases a Magistrate's Court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any offence of a personal or private nature not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated.

The approach a magistrate should adopt when considering reconciliation is referred to by Palmer CJ in *Sosopu v Regina* where he states:

> It is important to bear in mind that when a Magistrate considers '*reconciliation'*, he/she should comply with *Practice Direction No 1 of 1989* issued by Ward CJ as follows:
>
> *'When a magistrate is considering reconciliation of a criminal case under section 38(1)* [now section 35] *of the Magistrates' Courts Act, it is essential that he satisfies himself the reconciliation is genuine and has been freely accepted by the complainant. In order to do this, it will usually be necessary for the complainant to attend and to be questioned by the court. It is only in the most exceptional circumstances that reconciliation should be accepted without the attendance of the complainant and then only when there is clear evidence from the complainant of his agreement.*
>
> *The scope of reconciliation is limited by the section to cases of common assault and "any offence of a personal or private nature not amounting to felony and not aggravated in degree." The practice of allowing reconciliation in aggravated case must stop. Example of cases where reconciliation should not be accepted include assault causing actual bodily harm by more than one person or involving the use of weapons. Criminal trespass by night should not be reconciled when there is any evidence of an intention to steal and simple larceny is, of course, excluded because it is a felony.*
>
> *Reconciliation should never be allowed automatically in the application of the complainant or prosecution and should only follow a consideration of the relevant facts.*

> *In cases where compensation is requested or offered, the decision is entirely one for the court. Thus it must hear sufficient facts to decide whether it is a suitable case and, if so, the sum that would be appropriate. Equally, when a sum has already been paid, the court must still decide whether it is sufficient or proper and act accordingly.*
>
> *It should not agree to reconciliation until it has clear evidence of the payment. The fact compensation has been paid and accepted by the complainant does not make that case suitable for reconciliation if it was otherwise unsuitable although it may, of course, still be a matter of mitigation.*
>
> *In cases where compensation is ordered, payment should be made to the complainant in open court or there should be clear evidence of payment and receipt. No order of reconciliation should be made until this is done and this may frequently require a short adjournment. The fact of payment in court must be recorded in the court file and no receipt is then necessary.*
>
> *In every case where reconciliation is allowed, the court must state whether the proceedings are terminated or stayed. Where it is satisfied that reconciliation has finally settled the matter, the case should be terminated but, if there is any concern that bad feeling may continue, it may be wise to consider ordering a stay only. In this case, a period must be set (usually a period of up to 12 months would be appropriate) and it must be explained to the defendant that he is liable to arrest and trial for the offence should be continued or repeat his misconduct within that period.*
>
> *Whilst many cases of matrimonial violence are suitable for reconciliation, the court should be especially careful before it is satisfied the victim has really agreed. In the majority of such cases the appropriate order would be to stay proceedings. The court may also consider in such cases whether to bind over one or both parties under section 32(2) of the Penal Code subject, of course, to the complainants right to be heard first.*
> *All the matters referred to in this discretion must be noted in the record of proceedings.'*
>
> In this instance, the learned Magistrate was entitled to disregard the application of section 35(1) of the Magistrate's Court Act on the grounds that as far as the facts of the case were concerned the offence pertained to an assault that was committed in public and that a weapon was involved. In spite of this, reconciliation does play a role in so far as it demonstrates genuine contrition and remorse on the part of a defendant and that it can assist the defendant in so far as mitigation goes with the possibility of reduction in a sentence imposed.[54]

There are no statutory provisions specifically promoting reconciliation in the High Court but there are a number of cases that endorse it as a mitigating factor. In *Timo v Regina,*[55] Chief Justice Palmer described the

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[54] [2005] SBHC 112.
[55] [2004] SBHC 44.

role of reconciliation and linked it to a section of the *Criminal Procedure Code* relating to the payment of compensation.[56] He stated:

> Reconciliation is provided for under our laws – see section 35(1) of the Magistrates Courts Act. However, its scope is limited to cases of common assault and any offence of a personal nature or private nature not amounting to felony and not aggravated in degree. The purpose of section 35(1) is that it gives the Magistrates Court power to determine on the facts and circumstances before it whether it can order the proceedings to be stayed or terminated.
>
> Where the offence is a felony as is the case with the Applicant, the Magistrates Court do not have power in any event, even if the Complainant or the Prosecution were to bring this to the attention of the Court, the Court would not be able to consider whether to stay or terminate the proceedings. The decision whether to proceed or not with the charge on demanding with menaces is taken out of the responsibility of the Complainant, the Prosecution or the Applicant. Any attempts therefore to seek or get Prosecution to withdraw charges against the Applicant have been fruitless attempts in any event. Prosecution or the Police do not have power to facilitate any withdrawals of the charge and in so far they have affirmed refusal to withdraw charges through reconciliation they are correct. However, that does not mean that reconciliation does not have a place in Solomon Islands jurisprudence. Whether a matter is a felony or not, it is not unlawful for parties to a dispute to arrange and make a customary settlement or reconciliation ceremony between themselves and or their families or tribes. Reconciliation ceremonies before, during and after the ethnic troubles have been taking place throughout the country. Reconciliation ceremonies are entrenched in our culture but also within the context of our civil society whose laws are based on Christian principles. Reconciliation does have a place in our society. It looks to the future so that even after an accused had been punished by the courts under the law, it enables that accused to be able to re-settle back into a community after serving his/her time in prison.
>
> In the case of a felony, whether Prosecution mentions that fact to the Magistrate or court or not, it is always open to the Defence to raise it as a mitigating factor. How much reliance and what weight a court will place on it is a matter for the court to decide in its discretion. It can place much weight and reduce sentence etc. or it may completely ignore it and deal with the accused on the facts before it.
>
> Our laws also allow for the payment of compensation to be made to a victim of an offence – section 27 of the Criminal Procedure Code ("CPC"):
>
> > *"Any person convicted of an offence may be ordered to make compensation to any person injured by his offence and such compensation may be either in addition to or in substitution for any other punishment."*[57]

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56 [2004] SBHC 44.

57 Ibid.

Aggravating Factors

It should be remembered that an aggravating factor is not an element of the offence. Some aggravating factors could include:

- the offence involved the actual or threatened use of a weapon (this is not an aggravating factor if actual or threatened use of a weapon forms part of the elements of the offence charged);
- the offence was committed in company (except where this forms part of the offence);
- the offence was committed in the home of the victim or any other person;
- the offence involved gratuitous cruelty;
- the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence;
- the offender abused a position of trust or authority in relation to the victim;
- the offender was a police officer;
- the victim was vulnerable, for example, because the victim was very young or very old or had a disability;
- the offence involved multiple victims or a series of criminal acts;
- the offence was part of a planned or organised criminal activity.

Where the offender has prior convictions these do not aggravate the offending but may deprive the person of leniency. This point was made by the New South Wales Court of Criminal Appeal when it highlighted the position at common law in *R v Blair:*

> It is the common law that prior conviction does not operate to aggravate an offence but may deprive an offender of leniency or indicate that it is appropriate to give more weight to factors such as retribution, deterrence or community protection Veen v The Queen (No 2) [1988] HCA 14; 1998 164 CLR 465; R v Wickham [2004] NSWCCA 193.[58]

The Court of Appeal in *Kaboa v R* made the point that if a previous conviction was taken into account it had the effect of punishing the offender twice.[59] The Court stated:

> Some mention need also be made of the reliance placed on the appellant's previous convictions. The proper scope for such consideration was discussed by this Court in Peter Rimae v. Reginam, Criminal Appeal No. 62 of 1974, Judgment of the Court delivered by Gould V.P. on 17th March 1975. Reference was made to Betteridge 1942 28 Cr. App. R. 171 and to Casey 1931 NZ GLR.289 - The Court should be careful to see that a sentence of a prisoner previously convicted is not increased beyond what would be appropriate to the facts merely because of previous convictions. Previous convictions are relevant to establish a prisoner's character - but here we think his character is adequately established by the circumstances

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58 [2005] NSWCCA 78, 53.

59 [1980-1981] SILR 43. The Fiji Court of Appeal (Marsack, Speight and Spring JJA) sitting as Court of Appeal for Solomon Islands Criminal Appeal No. 42 of 1979.

> of the case, including the material found in his possession and his conduct that night. The references made give rise to the implication that part of this very heavy sentence was attributable to his previous record - which in effect is sentencing twice over.[60]

Principles Involved in Backdating a Sentence

Section 24(5) of the *Penal Code* gives the court discretion to backdate a sentence to the time when the accused entered custody, or where there has been a break in custody to a time that takes into account the custodial period. It states:

> **24.** (5) A warrant under the hand of the Judge or Magistrate by whom any person is sentenced to imprisonment, ordering that the sentence be carried out in any prison within Solomon Islands, shall be issued by the sentencing Judge or Magistrate, and shall be full authority to the officer in charge of such prison and to all other persons for carrying into effect the sentence described in such warrant. Subject to the provisions of this section every sentence shall be deemed to commence from and to include the whole of the day on which it was pronounced except where otherwise provided in this Code or otherwise ordered by the court.

Unless there are exceptional circumstances an accused can normally expect to have their sentence backdated when there has been a period of time in custody referable to the offence committed. In *Lusibaea v Regina* the Court of Appeal approved the principle of backdating and noted the difficulty a court can confront when the accused has served a period of time in custody for a number of offences.[61] The Court stated:

> Section 24(5) of the Penal Code clearly gives the sentencing court a discretion to backdate the sentence. The learned judge explained that, whilst he accepted the sentence should have been backdated, he felt that, as the overall sentence fell to be reconsidered on appeal, he could not accept that a total sentence of five years without any backdating was excessive.
>
> Counsel for the respondent points out correctly that, whilst the principle of allowing for the time already spent in custody, either by a reduction of the total sentence ordered or by backdating the effective time it commences, should always be considered by the sentencing court, in cases where the period of custody relates to a number of offences, the discount cannot be repeatedly applied to each one.
>
> In the case of *R v Mc Hugh* [1985] NSWLR 588, 590 Street CJ confirmed the desirability of backdating and the limitation on its use:
>
> > *"It is desirable sentencing practice that, where there has been a period of pre-sentence custody exclusively referable to the offences*

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60 Ibid.

61 [2007] SBCA 7.

> *for which sentence is being passed, the commencement of the sentence should be back-dated for an equivalent period."*

Both the principle and the qualification were succinctly stated in the later English case of *R v Governor of Brockhill Prison, ex P Evans* [1977] QB 443,461:

> *"Time spent in custody in relation to the offences for which sentence is passed should serve to reduce the term to be served subject always to the condition that time can never be counted more than once."*

The learned judge in this appeal clearly had that in mind when he referred to the backdating of the sentence previously appealed. He was correct to do so.

However, as this was an appeal from the Magistrates' Court, the judge was limited to the sentencing power of the magistrate of five years imprisonment. Whilst his order complied with that restriction, we consider that the overall effect deserves further examination. The learned judge considered the sentence of sixty months for a robbery of this nature was not manifestly excessive but, by declining to backdate its commencement, the additional nine months spent in custody (for which there is no remission) makes this the equivalent of an order of seventy three and a half months imprisonment – a little over six years.

The other difficulty with an unswerving application of the passage quoted above from Evans case is that, where a man is arrested for a number of offences and sentenced for them all at the same time, any order that they be backdated will almost invariably apply to them all. We consider that, had the judge been sentencing both these offences together, and decided it was proper to backdate the starting date, it is probable that he would not have distinguished between them on that ground. In such a case, the five year term would have been reduced.[62]

Where an accused has spent time in custody for a number of offences and all but one involved the withdrawing of charges or acquittals the correct approach is to provide a full backdating for the total period of time in custody for the offence that resulted in a conviction.[63]

Cumulative and Concurrent Sentences and the Totality of Sentence

Section 9(3) of the *Criminal Procedure Code* allows for sentences to be served consecutively. It states:

> **9.** (3) For the purposes of appeal or confirmation the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

In cases where there is more than one offence and those offences have been committed during different periods of time a court needs to consider

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62 Ibid.

63 See *R v Lusibaea* HCSI CRC No 291 of 2007, Decision 30 November 2010.

whether the sentences should be served concurrently or consecutively. Concurrent sentences run at the same time as each other, while consecutive sentences run one after another. A sentence may be partly concurrent and partly consecutive.

In *Lauta v Regina* Brown J held:

> (1) In deciding whether to make sentences concurrent or cumulative, the courts should be guided by the following principles.
>
> (i) where two or more offences are committed in the course of a single transaction all sentences in respect of the offences should be concurrent.
>
> (ii) where the offences are different in character or in relation to different victims, the sentences should normally be cumulative.
>
> (iii) when a court has arrived at appropriate sentences and decided whether they should be concurrent or cumulative, it must then look at the total sentence to see if it is just and appropriate. If it is not, it must vary one or more sentences to get a just total.
>
> (Rationale in Public Prosecutor -v- Sidney Keruo and Billy Keruo (1985) PNGLR 85 adopted and followed.[64]

The Court of Appeal in *Angitalo v Regina* refers to Brown J's decision in *Lautu* and states:

> The Accumulation of the Sentences
>
> The first ground of appeal is that the learned Judge erred in law in ruling that the imposition of consecutive rather than concurrent sentences was the correct application of sentencing principles.
>
> The relevant principles were succinctly stated by Ward CJ in Bade -v- The Queen ([1988] SBHC 10; [1988-1989] SILR 121; 21 December 1988) as follows –
>
> "When considering sentence for a number of offences, the general rule *must be* that separate and consecutive sentences should be passed for the separate offences. However, there are two modifications, namely –
>
> (a) where a number of offences arises out of the same single transaction and cause harm to the same person there *may be* grounds for concurrent sentences; and
>
> (b) where the aggregate of the sentences would, if they are consecutive, amount to a total that is inappropriate in the particular case." (Emphasis added.)
>
> . . . .

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64 [2004] SBHC 100.

> Brown J referred to *Bade*, his Lordship's judgment in *R -v- Lauta* (unreported [2004] SBHC 100; HC-CRC 384 of 2004), *Public Prosecutor -v- Kerua* (1985) PNGLR 85 and Thomas, *Principles of Sentencing* (2nd ed) 53-6 and concluded –
>
> > "..... while the Court must follow the principle or rule [that concurrent sentences are appropriate where the offences arise out of a single transaction], the second rule allows a court discretion to sentence cumulatively when the offences are different in character or in relation to different victims."
>
> His Lordship referred also to *R -v- Dillion* (1983) 5 Cr App R 439. We do not see any error in this statement of the relevant rule.[65]

The requirements for a sentencing judge are:

1. After considering relevant sentencing factors (including mitigation) the sentencing judge is to impose a sentence for each offence.

2. The judge then needs to determine if the sentences are to run concurrently or are to be cumulative.

3. In deciding point 2, the judge needs to take into account the totality principle.

Whether or not the decision is taken to serve concurrently or consecutively the Court needs to be mindful of the principle of totality.

In *Fa'afanua v Regina* his Lordship the Chief Justice discussed various English and Australian cases.[66] His Lordship also referred to the Solomon Islands case of *Stanley Bade v Regina*, where Ward CJ stated:

> Thus, once the court has decided what is the appropriate sentence for each offence, it should stand back and look at the total. If that is substantially over the normal of sentence appropriate to the most serious offence for which the accused is being sentenced, the total should be reduced to a level that is "just and appropriate" to use the test suggested in *Smith v. R.* [1972] Crim. L. R. 124. Equally, if the total sentence, although not offending that test, would still in the particular circumstance of the person being sentenced, be a crushing penalty, the court also consider a reduction of the total.[67]

The requirement to stand back and look at the total sentence involves a separate and distinct step in the sentencing process. This stage can only be undertaken once the appropriate individual sentences are determined. After calculation of the appropriate individual sentences, the court should assess

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65 [2005] SBCA 5.
66 [2004] SBHC 47.
67 1988/1989 SILR 121, 125.

whether any adjustment is required to account for totality. This distinct and separate step was also discussed in *Laui v DPP*.[68]

In *Angitalo v Regina* the Solomon Islands Court of Appeal reinforced the need for courts to explain exactly how the totality principle has been considered:

> Where the arithmetical total of consecutive sentences results in an effective sentence that is inappropriately harsh, the sentencing court can properly make the necessary adjustment by reducing one or more of the accumulated sentences so that the total term is not excessive…
>
> When either of these courses is followed, it is essential that the sentencing Court explain what has occurred, so that there will be no misunderstanding about the way in which the sentences have been arrived at.[69]

The totality principle involves consideration of whether the sentence to be imposed would be crushing, in that the sentence should not leave an offender with a sense of hopelessness that destroys any expectation of a useful life after release.[70] A clear statement on the totality principle and the potential for a sentence to be crushing can be found in *Regina v MAK and MSK* where the court stated:

> The principle of totality
>
> 15 The Court noted the importance of the principle of totality to the task that was before Hidden J in relation to the sentencing of MMK. It was the application of that principle that required that the Crown appeal be dismissed in his case. It is a fundamental sentencing principle that Hidden J was, and this Court is, legally obliged to apply. Whenever the Court sentences an offender for multiple offences, including when there are different victims, or sentences an offender who is already serving a sentence after conviction for other offences, it is necessary for the judge to ensure that the aggregation of all of the sentences is a 'just and appropriate measure of the total criminality involved': Postiglione v The Queen (1997) 189 CLR 295 at 307-308 per McHugh J. The need to maintain an appropriate relationship between the totality of the criminality involved in a series of offences and the totality of the sentences to be imposed for those offences arises for at least two reasons.
>
> 16 The severity of a sentence is not simply the product of a linear relationship. That is to say severity may increase at a greater rate than an increase in the length of a sentence. As Malcolm CJ said in R v Clinch (1994) 72 A Crim R 301 at 306:
>
> > … the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus, a sentence of five years is more than five times as severe as a sentence of one year.

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68 HCSI-CRAC N11-87 (unreported), cited in *Fa'afanua v R.*

69 [2005] SBCA 5.

70 *Regina v WC* [2008] NSWCCA 268.

> Similarly, while a sentence of seven years may be appropriate for one set of offences and a sentence of eight years may be appropriate for another set of offences, each looked at in isolation. Where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences.

17 The second matter that is considered under the totality principle is the proposition that an extremely long total sentence may be 'crushing' upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint.

18 A sentencing court must, however, take care when applying the totality principle. Public confidence in the administration of justice requires the Court to avoid any suggestion that what is in effect being offered is some kind of a discount for multiple offending: *R v Knight* (2005) 155 A Crim R 252 at [112]. For similar reasons in a case such as the present where an offender who is already serving other sentences comes to be sentenced for additional offences, the impression must not be given that no, or little, penalty is imposed for the additional offences.[71]

Parity

In cases involving co-offenders their sentencing should also take into account the parity principle. In *Lowe v R*, Mason J considers the authorities and notes that 'legitimate sense of grievance' may give rise to appellate court intervention where co-offenders are given sentences that have a disparity.[72] He stated:

> 6. In England it has been held that a court should not interfere in such a case on the ground of disparity unless there is "such a glaring difference between the treatment of one man as compared with another that a real sense of grievance would be engendered in the case of the man suffering the more serious penalty" (Stroud (1977) 65 Cr. App. R. 150, at p.153). In New South Wales different approaches were pursued by the members of the Court of Criminal Appeal in Reg. v. Tisalandis (1982) 2 NSWLR 430. Street C.J. observed (at pp 431-432) that in the interests of justice it had been thought necessary at times in eliminating or diminishing disparity to "reduce a sentence to a level which could probably be criticised as inadequate." But he considered that, though disparity was not itself a ground of

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71 167 A Crim R 159.

72 [1984] HCA 46; (1984) 154 CLR 606. See also *Salcedo* [2004] NSWCCA; *Tisalandis* (1982) 2 NSWLR 430; Jones (1993) 67 ALJR 376; *Postiglione* (1995-6) 189 CLR 295, (1997) 71 ALJR 875.

> intervention, it was indicative of the presence of error in the sentencing process. Nagle C.J. at C.L. adopted a similar approach (p.441). On the other hand, Moffitt P. concluded that it was not permissible in a case of disparity to reduce a proper sentence to an improper sentence, though it might be that "in special circumstances some reduction in an otherwise proper sentence by an amount which would leave the substituted sentence a proper one would be warranted" (p.440). And in Victoria the Court of Criminal Appeal has stated that "an applicant who contends that a difference between two sentences is excessive must show that the difference is manifestly not merely arguably excessive" (Pecora v. The Queen [1980] VicRp 47; (1980) VR 499, at p 504).
>
> 7. This brief review of the authorities raises two questions. The first is: Is discrepancy a ground for intervention in itself or is it merely indicative of undisclosed error in the sentencing process? Logic and reality combine to compel an answer in favour of the first alternative. The undisclosed error, as we have seen, may have occurred in the sentencing process as it affected the co-offender. The sentence under appeal may be free from error except in so far as discrepancy itself constitutes or causes error. And the justification which the courts assign for intervention in the case of disparity is that disparity engenders a justifiable sense of grievance in the applicant and an appearance of injustice to that impassive representative of the community, the objective bystander.
>
> 8. What I have already said provides an answer to the second question: What is the correct principle to be applied in cases of discrepancy? It is that a court of appeal is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance, by reducing a sentence, which is not excessive or inappropriate considered apart from the discrepancy, to the point where it might be regarded as inadequate.[73]

Where co-offenders are being sentenced by a different magistrate or judge, the sentencing remarks of the first sentencer should be obtained.

Sentencing Range

Both the prosecution and the defence take the approach of providing the sentencer with a list of cases for the type of offence being considered. Reference is then often made to the offender under consideration being at the 'lower', 'middle' or 'higher' end of the range. This approach is designed to be of assistance by giving the magistrate or judge some precedents to consider. However, it should be remembered that each case needs to be considered by taking into account its own circumstances. In *Arthur Kemahaku v Regina* the Court of Appeal noted:

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[73] Ibid.

> The nature and circumstances of assaults are so varied that most cases turn on their particular facts with the result that earlier cases are therefore, unlikely to give much assistance.[74]

Sentencing Powers

The sentencing power of a magistrate is governed by section 27 of the *Magistrates' Court Act,* and sections 4(b), 7, 8 and 9 of the *Criminal Procedure Code*. Section 27 of the *Magistrates' Court Act* allows a Principal Magistrate to sentence for offences that carry a maximum sentence not exceeding 14 years. It also provides that a Principal Magistrate cannot impose a sentence exceeding 5 years. First and Second Class Magistrates are restricted to sentencing for offences where the maximum sentence does not exceed 12 months. Section 27(3) vests the Chief Justice or a judge of the High Court with the power to extend the jurisdiction of a Magistrate's Court although not the punishment that can be imposed. Section 27(4) allows consecutive sentences to be imposed: for a Principal Magistrate the maximum penalty that can be imposed is 10 years imprisonment, and for other magistrates the maximum is 2 years. Section 27 states:

> **Criminal jurisdiction**
>
> **27.** (1) Subject to the provisions of any other law for the time being in force, a Principal Magistrate's Court shall have jurisdiction to try summarily any criminal offence—
>
> (a) for which the maximum punishment prescribed by law for such offence does not exceed—
>
> (i) fourteen years' imprisonment; or
>
> (ii) a fine; or
>
> (iii) both such imprisonment and such fine; or
>
> (b) in respect of which jurisdiction is by any law expressly conferred upon a Principal Magistrate's Court or it is expressly provided that such offence may be tried summarily:
>
> Provided that the maximum punishment which a Principal Magistrate's Court may impose shall not exceed—
>
> (i) a term of imprisonment for five years; or
>
> (ii) a fine of one thousand dollars; or
>
> (iii) both such imprisonment and such fine.

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74 Criminal Appeal case No. CA 16 of 2011, [15].

(2) Subject to the provisions of any other law for the time being in force, a Magistrate's Court of the First Class or of the Second Class shall have jurisdiction to try summarily any criminal offence—

(a) for which the maximum punishment prescribed by law for such offence does not exceed—

(i) imprisonment for a term of one year; or

(ii) a fine of two hundred dollars; or

(iii) both such imprisonment and such fine; or

(b) in respect of which jurisdiction is by any law expressly conferred upon a Magistrate's Court of the First Class or of the Second Class or it is expressly provided that such offence may be tried summarily; or

(c) for which any penalty is expressly provided in respect of a conviction by a Magistrate's Court of the First Class or of the Second Class.

(3) Notwithstanding the provisions of the preceding subsections, the Chief Justice in respect of a particular class of offence, or a Judge in respect of a particular case, may by order under his hand and the seal of the High Court invest a Magistrate's Court with jurisdiction to try an offence which would otherwise be beyond its jurisdiction:

Provided that in no case shall the sentence imposed exceed, in the case of a Principal Magistrate's Court, the maximum punishment specified in the proviso to subsection (1) or, in the case of any other Magistrate's Court, the maximum punishment specified in paragraph (a) of subsection (2).

(4) In the case of consecutive sentences imposed by a Magistrate's Court in respect of two or more distinct offences arising out of the same facts it shall not be necessary for such Magistrate's Court to send the offender for trial before a Principal Magistrate's Court or the High Court, as the case may be, by reason only that the aggregate punishment for the several offences in respect of which such sentences are imposed is in excess of the punishment which it is competent to impose on conviction for a single offence:

Provided that the aggregate punishment imposed in the form of consecutive sentences shall not exceed twice the amount of the punishment which such Magistrate's Court is competent to impose in respect of one offence in exercise of its ordinary jurisdiction.

Section 4(b) of the *Criminal Procedure Code* sets the jurisdictional limit for hearing cases at not exceeding 14 years for a Principal Magistrate's Court

and 12 months for other magistrates. Section 7 of the *Criminal Procedure Code* also mirrors the *Magistrates' Court Act* provision as to penalties that can be imposed: it gives a Principal Magistrate the power to impose a sentence not exceeding 5 years, and other magistrates the power to impose a sentence not exceeding 12 months. It states:

> **Sentences which the Magistrates' Court may pass**
>
> **7.** (1) A Principal Magistrate's Court may, in cases in which such sentences are authorised by law, pass the following sentences-
>
> (a) imprisonment for a term not exceeding five years;
>
> (b) a fine not exceeding one thousand dollars.
>
> (2) A Magistrate's Court of the First Class or of the Second Class may, in cases in which such sentences are authorised by law, pass the following sentences:-
>
> (a) imprisonment for a term not exceeding one year;
>
> (b) a fine not exceeding two hundred dollars.

Section 8 of the *Criminal Procedure Code* gives courts the power to impose a sentence of imprisonment for failure to pay a fine, costs or compensation. It states:

> **8.** (1) Any court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.
>
> (2) In determining the extent of the court's jurisdiction under section 7 to pass a sentence of imprisonment the court shall be deemed to have jurisdiction to pass the full sentence of imprisonment provided in the said section in addition to any term of imprisonment which may be awarded in default of payment of a fine, costs or compensation.

Section 9(1)(2) of the *Criminal Procedure Code* allows for a magistrate to impose consecutive sentences not in excess of twice the ordinary jurisdiction. The ordinary jurisdiction is 5 years therefore the maximum period for consecutive sentences that can be imposed is 10 years. Section 9 states:

> **Sentences in cases of conviction of several offences at one trial**
>
> **9.** (1) When a person is convicted at one trial of two or more distinct offences the court may sentence him, for such offences, to the several punishments prescribed therefore which such court is competent to impose; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences it shall not be necessary for a Magistrate's Court, by reason only of the punishment for the several offences being in excess punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court:

Provided that the aggregate punishment shall not exceed twice the amount of punishment which such Magistrate's Court is competent to impose in the exercise of its ordinary jurisdiction.

High Court

Section 6 of the *Criminal Procedure Code* gives the High Court the jurisdiction to pass the full range of sentences allowable at law. It states:

Sentences which the High Court may pass

6. The High Court may pass any sentence authorised by law.

In certain circumstances sentencing magistrates and judges can decide not to enter a conviction even if an offence has be proved against an accused.

Sentencing Options

Sentencing of Children and Juveniles

Section 12 of the *Juvenile Offenders Act* recognises the special status of young people in sentencing decisions. It excludes imprisonment for fines, damages and costs; provides for alternatives to imprisonment; and tries to limit the association between adults and young people who are imprisoned. It states:

Restriction on punishment of children and young persons

12. (1) No child shall be sentenced to imprisonment or be committed to prison in default of payment of a fine, damages or costs.

(2) No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other way specified in section 16.

(3) A young person sentenced to imprisonment shall not, so far as is practicable, be allowed to associate with prisoners not being children or young persons.

Section 16 provides the alternatives to imprisonment. It states:

Methods of dealing with children or young persons charged with offences

16. Where a child or young person charged with any offence is tried by any court, and the court is satisfied of his guilt the court shall take into consideration the manner in which, under the provisions of this

> or any other Act or law enabling the court to deal with the case, the case should be dealt with, and, subject to such provisions, may deal with the case in any of the following manners or combination thereof, namely—
>
> (a) by dismissing the case; or
>
> (b) by discharging the offender on his entering into a recognisance, with or without sureties; or
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> (c) by dealing with the offender under the provisions of the Probation of Offenders Act; or
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> (d) by committing the offender to the care of a relative or other fit person; or
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> (e) by ordering the offender to pay a fine, damages or costs; or
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> (f) by ordering the parent or guardian of the offender to pay a fine, damages or costs; or
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> (g) by ordering the parent or guardian of the offender to give security for his good behaviour; or
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> (h) by directing that he be released on his entering into a bond to appear and receive sentence when called upon; or
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> (i) by committing the offender to custody in a place of detention; or
>
> (j) where the offender is a young person, by sentencing him to imprisonment; or
>
> (k) by dealing with the case in any other manner in which it may be legally dealt with:
>
> Provided that nothing in this section shall be construed as authorising the court to deal with any case in any manner in which it could not deal with the case apart from this section.

Whilst the principles may be reasonably clearly stated, difficulties have arisen when young people have been sentenced for murder while a juvenile; or have been sentenced for murder as an adult, for a crime committed when the person was a juvenile. Section 200 of the *Penal Code* imposes a mandatory life sentence for those convicted of the offence of murder. It states:

> **200**. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and shall be sentenced to imprisonment for life.

The law in respect of the sentencing of persons who committed the offence of murder while they were still under the age of 18 as juveniles was

considered by the Court of Appeal of Solomon Islands in *Kelly v Regina,*[75] and in *Pese v Regina*.[76] In these cases, the Court of Appeal held that a young person under eighteen years old convicted of murder is not subject to be sentenced to the mandatory life imprisonment.

In the case of *Kelly*, the accused was seventeen years of age when convicted for murder.[77] In the case of *Pese*, the accused was over eighteen years of age when convicted but about fifteen years of age when the offence occurred.[78] The Court of Appeal used section 13 of the *Juvenile Offenders Act* to qualify the mandatory terms provided for in section 200 of the *Penal Code*. Section 13 states:

> **Detention in case of grave crimes committed by children or young persons**
>
> **13.** Notwithstanding anything in this Act to the contrary, when a child or young person is convicted of a grave crime, the court may sentence the offender to be detained for such period as may be specified in the sentence; and where such a sentence is passed the child or young person shall, during that period, notwithstanding anything in the provisions of this Act, be liable to be detained in such place and on such conditions as the Minister may in his discretion direct, and whilst so detained shall be deemed to be in legal custody.

In the case of *R v Pese*, after considering all the aggravating and mitigating factors, the accused was sentenced on 6 February 2009 to 7 years imprisonment.[79] This sentence was however reduced by a year to reflect the time he had already spent in custody. He was in custody as of 26 August 2005 for approximately 3 years and 6 months. He was then released on 6 February 2009, and required to serve the balance of the sentence in the care of a relative.

The relevant principle was encapsulated by the Court of Appeal of Solomon Islands in *Kelly v Regina* when it said:

> The Juvenile Offenders Act introduced a special regime for dealing with offenders defined in s.2 as those under the age of 18 years ("a young person") and those under 14 years of age ("a child"). This statutory regime is plainly designed to ensure that in dealing with them for offences such child and young offender are treated differently from and more sensitively than adult offenders would be and are in similar circumstances. In this way the Act gives effect to the obligations of Solomon Islands under international treaties and conventions, as well as to the provisions of the

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75 [2006] SNCA 21; CA-CRAC 019 of 2006 (unreported judgment dated 25th October 2006).

76 [2008] SBCA 10; CA-CRAC 4 of 2008 (unreported judgment dated 18th July 2008).

77 [2006] SNCA 21; CA-CRAC 019 of 2006 (unreported judgment dated 25th October 2006).

78 Difficulties can be experienced when trying to determine the age of a young person. Section 19 of the Juvenile Offender Act acknowledges this a potential problem: 'Order not to be invalidated by subsequent proof of age'.

79 [2009] SBHC 6.

> Constitution in s.5 (1) that a person is not to be deprived of his personal liberty save:
> …
> (g) in the case of a young person who has not attained the age of eighteen years, under the order of a Court ... for the purpose of his … welfare.[80]

In the case of *Regina v SK* the defendant was only 16 years old at the time of offending on 31 March 2005.[81] He was in pre-trial custody as of 1 April 2005. He pleaded guilty to a charge of murder. His Lordship Palmer CJ in passing the sentence reiterated the important principle to be considered in sentencing young persons. He said:

> Whilst punishment for the offence must be imposed, the elements of protection and rehabilitation must play a prominent part in this defendant's case. There must be a balancing exercise between protection and rehabilitation. While the public need to be protected there is a good prospect of rehabilitation with the right type of treatment, supervision and counseling.[82]

Palmer CJ also said '[l]eaving him to spend the rest of his time in jail may have a downside that he becomes so institutionalised that when he does get released eventually he may never be able to readjust to society and may become more a liability to his family than anything else.'[83] The defendant was sentenced to 7 years imprisonment. He was in pre-trial and sentencing custody for a period of around 2 years 7 months. At the time of sentencing he was ordered to be released conditionally to serve the rest of his sentence with his grandparents. He therefore spent a period of two and half years in custody.

The *Juvenile Offenders Act*, the *Constitution* and the *Convention of the Rights of the Child* which was ratified by Solomon Islands on 9 May 1995, contemplate that generally youth murderers can be sentenced as youths and not as adults.

The sentencing principles that could guide those creating relevant sentencing legislation can be found in a number of cases in the Solomon Islands, England and Australia. The first principle that can be accepted is that youth as a mitigating factor. The Court of Appeal of the Solomon Islands in *Bati v DPP* recognised youth as a mitigating factor:

> [A]s one of the most effective mitigating factors. As has been shown the court strongly favours the *use of individualised measures* for offenders under 21.
> . . . .

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80 [2006] SBCA 21, 5.
81 [2007] SBHC 141.
82 Ibid at [17].
83 Ibid.

> Where a [juvenile] offender….. is sentenced to imprisonment, the sentence will normally be considerably shorter than would be awarded to a man of mature years for the same offence.[84] (Emphasis added.)

In the Australian case of *R v Hearne* his Honour Hume J said that '[w]here the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the offence was committed by an adult.'[85]

Rehabilitation is also a factor that is given greater weight in the sentencing of young people than it is for adults. In *R v Mills*, Batt JA stated:

> In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may lead to further offending. Thus for example, *individualised treatment focusing on rehabilitation is to be preferred*. (Rehabilitation benefits the community as well as the offender).[86] (Emphasis added.)

This statement of principle is acknowledged in *KT v The Queen* by McClellan CJ at CL but qualified:

> The emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders, *may be moderated when the young person has conducted himself or herself in the way an adult might conduct him or herself* and has committed a crime of violence or considerable gravity. ... [T]he court will look to various matters including the use of weapons, planning or pre-meditation, the existence of extensive criminal history and the nature and circumstances of the offence. Where some or all of these factors are present the need for rehabilitation of the offender may be diminished by the need to protect society.[87]

Latham J, in *IE v The Queen*,[88] makes similar qualifications as those made by McCellan CJ at CL in *KT v The Queen.*

Since the *Children Act* 1908 there has been legislation in England requiring child offenders to be dealt with on a different basis to adults. Section 44(1) of the *Children and Young Persons Act* 1933 provides that '[e]very court in dealing with a child or young person who is brought before it, either as … an offender or otherwise shall have regard to the welfare of the child or young person.' Thus in England when it comes to sentencing young offenders generally, it is important to avoid, where possible, lengthy periods in detention for offenders under 18 years old. The philosophy behind this as stated recently by Lord Dyson LJ in *R v Ghafoor (Imran Hussain)* is that '(a) society's acceptance that young offenders are less responsible for their actions and therefore less culpable than adults, and (b) the recognition that,

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84 *Bati v DPP* [1985-1986] SILR 268.
85 (2001) 124 A Crim R 451, 40.
86 [1998] 4 V.R 235; [1998] VSC 241.
87 (2008) 182 A Crim R 571.
88 (2008) 183 A Crim R 150.

in consequence, sentencing them should place greater emphasis on rehabilitation, and less on retribution and deterrence than in the case of adults.' [89]

Lord Lowry, in his speech in *C. (A. Minor) v Director of Public Prosecutions*,[90] reiterated the above principle, quoting Harper J of the Supreme Court of Victoria (Australia).[91]

Similar to the approach in Australia, in England, the welfare or best interest of the child/young person calls for more weight to be given to the rehabilitation of a young person. In appropriate cases, general deterrence and retribution should be subordinated to the rehabilitation of the young person. Society does not always deem it essential that the notion of rehabilitation trump all other concerns in the administration of justice. Lord Bingham CJ (as he then was) in *Attorney General's References Nos 59, 60 and 63 of 1998 (Goodwin and Others)* stressed the same consideration when he said:

> In sentencing young offenders the court will of course have regard to the welfare principle expressed in section 44 of the Children and Young Persons Act 1933: the younger the offender the less the justification in any ordinary case for treating the offender exactly as if he or she was an adult. It must be recognised that an effective means of protecting the public in the future is to ***reform*** a criminal whether young or old. Sentences must, however, always bear in mind that the welfare of the young offender is never the only consideration to be taken into account. When an offender, however young, ***deliberately*** inflicts serious injury on another there is a legitimate public expectation that such an offender will be severely punished to bring home to him the gravity of the offence and to warn others of the risk of behaving in the same way. If such punishment does not follow, public confidence in the administration of the criminal law is weakened and the temptation arises to give the offenders extra-judicially the punishment that the formal process of the law have not given. *When we speak of the public we do not forget the victim, the party who has actually suffered the injury, and those close to him. If punishment of the offender does little to heal the victim's wounds, there can be little doubt that inadequate punishment adds insult to injury*.[92] (Emphasis added.)

In *R v Secretary of State for the Home Department Ex parte Venables,* the applicants were 10 years old in 1993 when they committed the murder of a young child.[93] They were convicted and sentenced to be detained during her Majesty's pleasure pursuant to section 53(1) of the *Children and Young Persons Act* 1933. They subsequently challenged, by way of judicial review, the Home Secretary's decision to impose a minimum tariff period of 15 years. The case went on appeal from the Queen's Bench Division to

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89 [2003] 1 Cr.App.R.(S.) 84 (428).
90 [1996] AC 1, 40.
91 *R. (A Child) v Whitty* (1993) 66 A. Crim R. 462.
92 [1999] 2 Cr. App. R. S. 128, 131.
93 [1997] 3 All ER 97.

the Court of Appeal and to the House of Lords. The Law Lords held, *inter alia,* that a child's development must be taken into account throughout his or her sentence.[94] Relevantly, Lord Hope said:

> [I]t is a discretion to continue custody for as long, *but only for as long, as this is appropriate*. This means that the child's progress and development while in custody, as well as the requirements of punishment, must be kept under review throughout the sentence. A policy which ignores at any stage the child's development and progress while in custody as a factor relevant to his eventual release date is an unlawful policy. (Emphasis added.)
>
> Secondly, it was expressly stated that section 44(1) of the Children and Young Persons Act 1933, which requires that the Children's welfare be taken into account in all decisions concerning them, was applicable to decisions on tariff and specifically on those taken by the Home Secretary.[95] **Lord Brown Wilkinson** in reference to the said section said "[t]hat subsection is still in force and is *one of the basic principles applicable to dealing with child offenders [and] [i]t is clear from the statutory direction that in dealing with children* [young persons] ***(whether by sentencing or otherwise)*** *a court is bound to take into account the welfare of the child* [young person]."[96] (Emphasis added.)

After referring to the United Nations Convention on the Rights of the Child, Lord Hope said, '[c]hildren who are convicted of crimes are entitled to be treated in a way which is consistent with their age when the crime was committed [and] *[t]he sentence must be approached from the outset with a view to their rehabilitation and reintegration into society, once they have served the requirements of punishment and it is safe for them to be released*.'[97] (Emphasis added.)

Discharge of Offender Without Conviction

Section 35 of the *Penal Code* allows a court to dismiss a charge conditionally or unconditionally where an accused is of good character or for other reasons including the trivial nature of the offence. It states:

> **Discharge of offender without punishment**
>
> **35.** Where, in any trial, the court thinks that the charge against the accused person is proved but is of opinion that, having regard to the character, antecedents, health or mental condition of the accused. or to the trivial nature of the offence or to the extenuating circumstances in which the offence was committed, it is not expedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge either absolutely or conditionally.

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94 Ibid 121, 153.
95 Ibid 120, 150-151.
96 Ibid, 120, 153.
97 Ibid, 151.

Punishments Under the Penal Code

Sections 24 to 47 of the *Penal Code* deal with the punishments that can be imposed by the courts. Other statutes also contain criminal punishments for a variety of offences created by the statutes.

Section 24(1) allows for imprisonment without hard labour. Section 24(2) allows for imprisonment for life that can be served by a lesser term. Section 24(3) allows for the imposition of fines as well as imprisonment. Section 24(4) allows for concurrent and consecutive sentences, and section 24(5) allows sentences to be backdated or be commenced on the day the sentence is pronounced. Section 24 states:

> **Imprisonment**
>
> **24.** (1) All imprisonment for an offence shall be without hard labour.
>
> (2) A person liable to imprisonment for life or any other period may be sentenced for any shorter term.
>
> (3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or instead of imprisonment.
>
> (4) Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:
>
> Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence.
>
> (5) A warrant under the hand of the Judge or Magistrate by whom any person is sentenced to imprisonment, ordering that the sentence be carried out in any prison within Solomon Islands, shall be issued by the sentencing Judge or Magistrate, and shall be full authority to the officer in charge of such prison and to all other persons for carrying into effect the sentence described in such warrant. Subject to the provisions of this section every sentence shall be deemed to commence from and to include the whole of the day on which it was pronounced except where otherwise provided in this Code or otherwise ordered by the court.

In most case an offence carries a specified maximum penalty. However, where no punishment is specifically provided section 41 allows for a term of imprisonment not exceeding two years with or without a fine. It states:

General punishment for misdemeanours

41. When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both.

Section 25 allows for the imposition of fines and section 26 for imprisonment in default of the payment of a fine.

Section 27 allows a court to order the payment of compensation and section 28 allows for the sale of movable property for the payment of fines, compensation, costs, expenses and otherwise.

Section 29 deals with the execution of imprisonment where a person has been sentenced to a fine only with imprisonment in default. It states:

Suspension execution of sentence of imprisonment

29. (1) When a convicted person has been sentenced to a fine only and to imprisonment in default of payment of a fine, execution of sentence of and whether or not a warrant of distress has been issued under imprisonment in default of a fine section 28, the court may make an order directing the fine to be paid on or before a specified date, not being more than thirty days from the date of the order, and in the event of the fine not being paid on or before that date may, subject to the other provisions of this section, forthwith issue a warrant of committal. The court may, before making such order, require the convicted person to execute a bond, with or without sureties, conditioned for his appearance before the court on the specified date if the fine be not in the meantime paid. Upon the making of an order under this subsection the sentence of imprisonment shall be deemed to be suspended and the convicted person shall be released from custody.

(2) In any case in which an order for the payment of money has been made, on non-recovery of which imprisonment may be awarded, and the money is not paid forthwith, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (1) of this section, and in default of his so doing may at once pass sentence of imprisonment as if the money had not been recovered.

(3) The court may in its discretion direct that any money to which this section applies may be paid by instalments at such times and in such amounts as the court may deem fit; but so nevertheless that in default of payment of any such instalment as aforesaid the whole of the amount outstanding shall become and be immediately due and payable, and all the provisions of this Code applicable to a sentence of fine and to imprisonment in default of payment thereof shall apply to the same accordingly.

(4) A warrant of commitment to prison in respect of the non-payment of any sum of money by a person to whom time has been allowed for payment under the provisions of subsection (1) of this section, or who has been allowed to pay by instalments under the provisions of subsection (3) of this section, shall not be issued unless the court shall first make inquiry as to his means in his presence:

Provided that a court may issue such a warrant of commitment without any further inquiry as to means if it shall have made such inquiry in the presence of the convicted person at the time when the fine was imposed or at any subsequent time and the convicted person shall not before the expiration of the time for payment have notified fled the court of any change in his means or applied to the court for an extension of time to pay the fine.

(5) After making inquiry in accordance with the provisions of subsection (4) of this section, the court may, if it thinks fit, instead of issuing a warrant of commitment to prison, make an order extending the time allowed for payment or varying the amount of the instalments or the times at which the instalments were, by the previous order of the court, directed to be paid, as the case may be.

(6) For the purpose of enabling inquiry to be made under the provisions of subsection (4) of this section, the court may issue a summons to the person ordered to pay the money to appear before it and, if he does not appear in obedience to the summons, may issue a warrant for his arrest or, without issuing a summons, issue in the first instance a warrant for his arrest.

Bonds

Section 32 of the *Penal Code* allows for a court to put an offender on a good behaviour bond. It states:

Security for keeping the peace

32. (1) A person convicted of an offence may, instead of or in addition to any punishment to which he is liable, be ordered to enter into his own recognisance, with or without sureties, in such amount as the court thinks fit, conditioned that he shall keep the peace and be of good behaviour for a time to be fixed by the court, not exceeding two years, and may be ordered to be imprisoned until such recognisance, with sureties if so directed, is entered into; but so that the imprisonment for not entering into the recognisance shall not extend for a term longer than six months:

Provided that no order shall be made under this section where the person convicted has been sentenced to a term of imprisonment of more than six months.

(2) In addition to the powers conferred by subsection (1) of this section any Judge or Magistrate shall have power in any trial before him, whether or not the complaint be dismissed, to bind

> both the complainant and defendant with or without sureties, to keep the peace and be of good behaviour for a period not exceeding one year and may order any person so bound, in default of compliance with the order, to be imprisoned for three months or until such earlier time as he so complies:
>
> Provided that a defendant who has been sentenced to more than six months' imprisonment shall not be bound over under this subsection:
>
> And provided further that a complainant shall not be bound over under the powers contained in this subsection unless he shall have been given an opportunity to address the court personally or by an advocate as to why he should not be bound over.

The *Criminal Procedure Code* also provides magistrates with the power to impose bonds to ensure an offender is of good behaviour while on conditional liberty. Section 30 provides for security for keeping the peace; section 31 provides for good behaviour from persons disseminating seditious matters; section 32 provides for security for good behaviour from vagrants and suspected persons; and section 33 provides security for good behaviour for good habitual offenders.

Other sections relevant to punishment that are not detailed in this chapter are contained in the list hereunder, taken from the index to the *Penal Code*:

30. Commitment in lieu of distress

31. Payment after commitment

33. Security for coming up for judgement

34. Provisions of Criminal Procedure Code relating to recognisance to apply

35. Discharge of offender without punishment

36. Committal of offenders under the age of sixteen to care of fit persons; binding over parent or guardian to exercise proper care

37. Interpretation of "care, protection or control" and "fit person"

38. Payment of fine or compensation by parent or guardian of offender under sixteen years of age

39. Issue of warrants and errors in orders or warrants

40. Police supervision

42. Escaped convicts to serve unexpired sentences when recaptured

43. Forfeiture

Suspended Sentences

Suspended sentences are governed by sections 44, 45, 46 and 47 of the *Penal Code*. Section 44 allows a court to pass a suspended sentence where the sentence of imprisonment imposed is not more than two years. A suspended sentence should not be imposed unless the offence warrants a term of imprisonment, and a probation order cannot be imposed at the same time. Where a term of imprisonment is imposed on another offence at the same time as the suspended sentence, the sentences need to be concurrent. A suspended sentence cannot be imposed for an offence where a weapon has been used, this fact is sometimes overlooked by practitioners and magistrates. Section 44 states:

Suspended sentences

44. (1) Subject to the provisions of subsections (2) and (3) of this section, a court which passes a sentence of imprisonment on any offender for a term not more than two years for any offence, may order-

(a) that the sentence shall not take effect during a period specified in the order; or

(b) that after the offender has served part of the sentence in prison, the remainder of the sentence shall not take effect during a period specified in the order,

unless during the period specified in the order, the offender commits another offence punishable with imprisonment and a court thereafter orders under section 45 that the original sentence shall take effect:

Provided, that the period specified in the order shall not be less than one year or more than two years.

(2) The provisions of subsection (1) of this section shall not apply where the offence involved the use or the illegal possession of a weapon.

(3) A court shall not deal with an offender by means of a suspended sentence unless the case appears to the court to be one in respect of which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence by an order under subsection (1) of this section.

(4) A court which passes a suspended sentence on any offender for an offence shall not make a probation order in respect of another offence of which he is convicted before the court or for which he is dealt with by the court on the same occasion.

(5) Where a court passes a suspended sentence on an offender in respect of an offence and a term of imprisonment in respect or another offence the court shall direct that the suspended sentence be concurrent with the term of imprisonment.

> (6) On passing a suspended sentence the court shall explain to the offender in ordinary language his liability under section 45, if during the period of suspension he commits a subsequent offence punishable with imprisonment.

Section 44(6) requires the court to explain to the offender that the commission of a subsequent offence can lead to imprisonment for the period of the sentence that has been suspended.

The courts have taken the view that a suspended sentence is the equivalent of a sentence of imprisonment. In *R v Foster* the court made the following comments:

> Obviously, the imposition of a sentence of imprisonment which is then suspended for the whole of its term is a significantly more lenient sentencing order than the imposition of the like sentence not so suspended. Nevertheless, Australian courts have rejected the idea that a suspended sentence is really no punishment at all. In ***Elliot v Harris*** (1976) 13 SASR 516 at 527, Bray CJ commented upon that view –
>
> > *" It reveals an entirely mistaken and wrong headed approach to the question of suspended sentences. So far from being no punishment at all, a suspended sentence is a sentence to imprisonment with all the consequences such as sentence involved on the defendant's record and his future, and it is one which can be called dramatically into effect on the slightest breach of the terms of the bond during it currency".*
>
> Those remarks were cited with approval by a full bench of the Federal Court in *Regina v P* (1992) 64 A.Crim. R 381; by Winneke P in ***Regina v Carter*** (1997) 91 A.Crim.R 222 at 229; and again by a full bench of the Federal Court in ***Regina v Gillan*** (1991) 54 A.Crim.R 475 at 480.[98]

Section 45 gives the courts the power to deal with an offender who commits a subsequent offence. It allows the court to impose the original sentence, vary the original sentence, or do nothing with the original sentence. Practitioners should be prepared to make submissions on behalf of their clients when they are brought before the court to deal with a breach of a suspended sentence. The submissions are basically a plea in mitigation designed to assist the client to avoid having the period of the suspension served in custody. Section 45 states:

> **Subsequent offence during period sentence is suspended**
>
> **45.** (1) Subject to subsection (3) of this section, where an offender is convicted of a subsequent offence punishable with imprisonment committed during the period of suspension, the court before which he is convicted for the subsequent offence

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[98] [2001] NSWCCA 215, 36.

shall, unless the sentence has already taken effect, consider his case and deal with him by one of the following methods -

(a) order that the suspended sentence shall take effect with the original term unaltered;

(b) order that the sentence shall take effect with the substitution of a lesser term for the original term;

(c) by order vary the original order made under section 44 by substituting for the period specified therein a period expiring not later than two years from the date of the expiring variation; or

(d) make no order with respect to the suspended sentence, and a court shall make an order under paragraph (a) of this subsection unless the court is of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence, and where it is of that opinion the court shall state its reasons.

(2) Where a court deals with an offender in respect of a suspended sentence passed by another court, the court dealing with the offender shall notify the court which passed the suspended sentence of the manner in which the offender was dealt with.

(3) Where a Magistrate's Court deals with an offender during the period of suspension of a sentence passed by the High Court, the Magistrate shall, after conviction of the offender and before passing to sentence, commit him in custody to the High Court for sentencing.

Section 45 allows the court to issue a summons or warrant for the arrest of an offender on a suspended sentence where the person commits a further offence. It states:

Discovery of further offence

46. (1) Where during the period of suspension, a person is convicted by a court for a subsequent offence, but such court had no information of the suspended sentence, any court may, on receipt of information relating to such suspended sentence and the conviction for the subsequent offence, issue a summons requiring such person to appear at the place and time specified therein or may issue a warrant for his arrest.

(2) A summons or warrant issued under subsection (1) of this section shall direct the person to appear or be brought before the court by which he was convicted in respect of the subsequent offence and upon such person appearing or being brought, the court shall deal with him under section 45 in respect of the suspended sentence.

Section 47 allows the court to order that the suspended sentence be served under supervision. It states:

> **Suspended sentence supervision order**
>
> **47.** (1) Where a court passes on an offender a suspended sentence, the court may make a suspended sentence supervision order placing the offender under the supervision of an officer appointed for the purpose by the court, for such period as may be specified in the order not exceeding the period during which the sentence is suspended and subject to such conditions as to residence as the court shall consider necessary.
>
> (2) An offender in respect of whom a suspended sentence supervision order is in force shall keep in touch with the officer in accordance with such instructions as may from time to time be given to him by that officer and the offender shall notify the officer of any change of address.
>
> (3) If, at any time while a suspended sentence supervision order is in force in respect of an offender, it appears on information provided by the officer to the court of the area in which the offender resides that the offender has failed to comply with any of the requirements of subsections (1) and (2) of this section, the court may issue a summons requiring the offender to appear before the court at a time specified in such summons, or may, if the information is in writing and on oath, issue a warrant for his arrest.
>
> (4) If it is proved to the satisfaction of the court before which the offender appears or is brought under this section that he has failed without reasonable cause to comply with any of the requirements of the suspended sentence supervision order, the court may, without prejudice to the continuance of the order, impose on him a fine not exceeding three hundred dollars.
>
> (5) In this section "officer" means the probation officer or any other suitable person the court seems fit to appoint under subsection (1) of this section.

Effective Sentence

The *Correctional Services Act* 2007 defines 'effective sentence' as meaning the term of imprisonment that a prisoner is to serve, after taking into account remission granted under the *Act*. Section 37 allows for a one-third reduction in sentences exceeding one month, and section 38 provides that the remission is subject to the good behaviour of the prisoner. The sections state:

37. (1) All prisoners shall be classified

(2) Except for prisoners sentenced to life imprisonment and those detained at Her Majesty's pleasure, for the purposes of the initial classification, the date of release for each prisoner is calculated on the basis of a remission of one-third of the sentence for any term of imprisonment exceeding one month: Correctional Services Act 2007.

38. (1) The remission of sentence that is applied at the initial classification is dependent on the good behaviour of the prisoner, and it may be forfeited in the manner set out in the regulations and Commissioners Orders. Correctional Services Act 2007.

Although there is a potential remission this is not a factor for the courts to take into account when imposing a sentence.

Mandatory Life Sentence

The *Penal Code* provides that a person convicted of murder shall be sentenced to life imprisonment. Section 200 states:

Murder

200. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and shall be sentenced to imprisonment for life.

As a consequence no sentencing submissions are made when a person is convicted of murder.

The Court of Appeal in *Gerea v Director of Public Prosecutions* confirmed that a mandatory life sentence was imposed on a conviction for murder, with White P and Connolly JA applying English precedent and stating:

> In *Hinds v. The Queen* [1977] A.C. 195; [1976] 1 All E.R. 353, in a judgment which is notable for its insistence on the independence of the judiciary in a constitution framed on the Westminster model, Lord Diplock, delivering the judgment of the majority of the Board, affirmed the power of the Parliament to prescribe a fixed punishment. His Lordship was in the course of considering how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the defendant is distributed under the three heads of power, legislative, executive and judicial, which are implied in a constitution on the Westminster model. While affirming that the Parliament cannot, consistently with the basic principle of separation of powers, transfer the sentencing discretion from the judiciary to an executive body, his Lordship at p. 226 stated the powers of the Parliament in the following language which in my judgment is relevant to the present appeal:-
>
> > "In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all offenders found guilty of the defined offence, as, for example, capital punishment for

> the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
>
> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits on the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case."[99]

This position has been somewhat modified. In *Regina v Mostyn Ludawane*, Chief Justice Palmer held that a trial judge could make a recommendation as to a minimum term to be served before parole could be granted:

> The court in any event my view would not be acting contrary to the requirements of section 200 of the Penal Code if it would in appropriate cases state what could be a minimum period or length of the tariff in a sentence of life imprisonment. . . . By establishing a Parole Board, the Court is given the discretion to consider whether it may wish to make any comments regarding any minimum period of time that should be served because if it does so elect to do so those comments will be taken into account by the Parole Board."[100]

The relevant sections of the *Correctional Services Regulations 2008* state:

> **205.** Notwithstanding any other provision in these regulations, the Minister may only release a prisoner serving a life sentence or detention at Her Majesty's pleasure after consultation with the Chief Justice and trial judge. If the trial judge is unavailable, consultation with the Chief Justice is sufficient.
>
> **208.** When making inquiries and providing the report and recommendations, the Parole Board must consider the following matters:
>
> (a) the prisoner's criminal history and likelihood of re- offending;
>
> (b) the nature and circumstances of the offence and any sentencing remarks made by the trial judge;
>
> (c) the conduct and character displayed by the prisoner when in custody;
>
> (d) the physical and mental health of the prisoner;
>
> (e) the prisoner's family and community contacts, employment prospects and the likelihood of successful re-integration;

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99 [1984] SBCA 2.
100 [2010] SBHC 106.

(f) the attitude of any victim and the nature or prospects of reconciliation; and

(g) any special circumstances that apply to the prisoner.

Before parole can be granted, the Minister is obliged to seek the opinion, where possible, of the trial judge. This may not be possible if the opinion is sought many years after the sentence was imposed. It is therefore prudent for the trial judge to make appropriate recommendations at the conclusion of the trial. The philosophical basis for recommending a minimum term was also discussed by the Chief Justice in *R v Ludawane*:

> In his submissions Mr. Hou referred to the conclusions of the Committee on the Penalty for Homicide, chaired by Lord Lane in 1993, which noted some important conclusions about mandatory life imprisonment sentences. The Committee noted that there is a basic assumption that the imposition of a life sentence for murder is that it is a crime of such unique heinousness that an offender forfeits his right to be set free for the rest of his life. Such assumption however it noted is a fallacy. They noted that the common law definition of murder embraces a wide range of offences, some of which are truly heinous, some of which are not. It noted that it is logically and jurisprudentially wrong to require judges to sentence all categories of murderer in the same way, regardless of the particular circumstances of the case before them.[101]

In *R v Ludawane,* the Chief Justice also determined that a starting point of 14 to15 years applied in the case.[102] His Lordship outlined a number of factors, both aggravating and mitigating, that should be considered in determining the length of the recommended minimum term. The aggravating factors were a significant degree of planning or premeditation; victim vulnerable due to age of disability; mental or physical suffering inflicted on victim before death; abuse of position of trust, use of duress or threats against another person to facilitate the commission of the offence; victim performing a public service or public duty; and concealment, destruction or dismemberment of the body.

The next chapter deals with reviews and appeals.

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[101] Ibid.
[102] Ibid.