CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

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CHAPTER 11

ACTIVE LEARNING QUESTIONS

1. In what ways are the sentencing principles in Queensland and Western Australia a blend of statute and the common law?

Sentencing principles in Queensland and Western Australia are a blend of the common law and statute. The principal pieces of legislation dealing with sentencing are the *Penalties and Sentences Act 1992* (Qld), and the *Sentencing Act 1995* (WA). The governing sentencing principles are set out in each Act: ss 9-14 of the *Penalties and Sentences Act 1992* (Qld), and ss 6-8 of the *Sentencing Act 1995* (WA).

One common law sentencing principle is that of proportionality between community protection and criminal responsibility. The leading High Court authority on the proportionality principle is *Veen v The Queen (No 2)* (1988) 164 CLR 465. The principle of proportionality is also reflected in statute. Subsection 9(11) of the *Penalties and Sentences Act 1992* (Qld) states: 'Despite subsection (10), the sentence imposed must not be disproportionate to the gravity of the current offence.' Section 6(1) of the *Sentencing Act 1995* (WA) states: 'A sentence imposed on an offender must be commensurate with the seriousness of the offence.'

Another example is the sentencing of Indigenous defendants. Under s 9(2)(o) of the *Penalties and Sentences Act 1992* (Qld) in sentencing an offender, a court must have regard to—

> (o) if the offender is an Aboriginal or Torres Strait Islander person — any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example —

> (i) the offender's relationship to the offender's community; or
>
> (ii) any cultural considerations; or
>
> (iii) any considerations relating to programs and services established for offenders in which the community justice group participates.

In Western Australia there is no specific reference in the *Sentencing Act 1995* (WA) to the treatment of Indigenous people, and consequently common law principles are applicable in sentencing Indigenous defendants. A leading case is *R v Fernando* (1992) 76 A Crim R 58 at 62 where Wood J set out a series of principles relevant to sentencing disadvantaged Indigenous offenders. These principles were reviewed and affirmed by the High Court in *Bugmy v The Queen* (2013) 249 CLR 571.

2. Is it fair to say that the final sentence arrived at by the court is a balancing act between the competing purposes in sentencing?

Determining the appropriate sentence is a subjective balancing act of a number of different purposes served by the imposition of a criminal sentence, such as deterrence and rehabilitation.

In *R v Bojovic* [1999] QCA 206 the Queensland Court of Appeal explained the sentencing process in these terms.

> [32] In the absence of positive guidance in the legislation, the courts should act according to principles which they have traditionally followed in imposing sentences. Sentencing is a practical exercise. Courts have traditionally fashioned sentences to meet circumstances of the particular offence, having regard to the needs of punishment, rehabilitation, deterrence, community vindication and community protection. They did so before legislative expression was given to such factors in s 9.

An examination of s 9(1) of the *Penalties and Sentences Act 1992* (Qld) and s 6 Principles of sentencing of the *Sentencing Act 1995* (WA), reinforce the accuracy of McHugh J's observation in *AB v The Queen* (1999) 198 CLR 111 at 120 [14] that '[m]any, probably the large bulk of, sentences reflect compromises between conflicting objectives of sentencing'. McHugh J continued by pointing out at 121 [14] that these objectives have to be achieved within a conceptual framework that requires adherence to the principles of parity, proportionality and totality.

3. Outline the main factors in sentencing. What range of sentence deduction may be open for (a) a guilty plea; (b) assisting law enforcement authorities?

In Queensland, s 9(2)(a) to (q) of the *Penalties and Sentences Act 1992* (Qld) lists myriad factors which a court must have regard to in sentencing an offender. These factors *inter alia* include the

maximum and minimum penalty prescribed; the seriousness of the offence; the offender's character, age and intellectual capacity; the presence of any aggravating or mitigating factor concerning the offender; and the amount of assistance given to law enforcement agencies.

There are further factors listed in s 9(3), which deals with violent offenders, and in s 9(6) which covers sexual offences in relation to a child who is under 16 years of age. These types of offences constitute the 'appropriate circumstances' in s 3(b) above, which states that 'protection of the Queensland community is a paramount consideration'. Another significant factor is contained in s 13(1) which requires a court to take a guilty plea into account.

In Western Australia, sentencing factors are less extensive and are summarily listed in s 6(2)(a)–(d) of the *Sentencing Act 1995* (WA), discussed in the previous section. The main focus is upon aggravating factors in s (7) and mitigating factors in s (8), which are both left open under the rubric 'in the court's opinion'. Importantly, s 9AA gives the court the discretion to reduce the sentence upon a plea of guilty, with a maximum discount of 25% set under s 9AA(4).

(a) A guilty plea

A guilty plea will leave open the possibility of a reduction in the sentence handed down, with the size of any sentence 'discount' being related to whether the offender indicated a plea of guilty would be made at the first reasonable opportunity or waited until late in the trial process: s 13(2) of the *Penalties and Sentences Act 1992* (Qld), and s 9AA(4)(b) of the *Sentencing Act 1995* (WA).

The discount range of 10% to 30% in Queensland identified by Fryberg J in *R v Houghton* [2002] QCA 159, at [31] is supported by case law in Western Australia. In *Moody v French* [2008] WASCA 67 at [37], Steytler P, Wheeler, McLure, and Buss JJA observed that '[o]rdinarily, in this State, fast-track pleas of guilty attract a reduction in sentence of somewhere between 20% and 35%, depending on the circumstances', citing *H v The State of Western Australia* [2006] WASCA 53 at [9] per Steytler P in support.

(b) Assisting law enforcement authorities

Under s 9(2)(h) of the *Penalties and Sentences Act 1992* (Qld) and s 8(5) of the *Sentencing Act 1995* (WA), assistance given to law enforcement authorities is treated as a mitigating factor. The operational sentencing implications of assistance to law enforcement authorities and the degree of assistance involved was discussed in *TLM v The State of Western Australia* [2009] WASCA 106.

In *TLM*, reference is made at [17] below to a number of case authorities that have held substantial sentence discounts, which may be as high as two-thirds deducted from the head sentence, can be given to offenders who co-operate with law enforcement authorities. The highest discounts are given where valuable assistance is combined with genuine remorse or contrition. However, irrespective of remorse, there is a clear public interest that crime should be detected and successfully prosecuted.

> [17] In *The State of Western Australia v Wynne* [2008] WASCA 195 Miller JA, with whom Steytler P and Murray J agreed, referred at [90] - [94] to a number of authorities dealing with this topic. They make it plain that discounts given to offenders should not be laid down as a standard percentage because it will depend upon the circumstances of each case. However, his Honour referred to cases in which there had been discounts of up to two-thirds on sentences of imprisonment.

4. Does the sentencing of Aboriginal or Torres Strait Islander defendants differ from other ethnic groups in Australia?

Under s 9(2)(o) of the *Penalties and Sentences Act 1992* (Qld) in sentencing an offender, a court must have regard to—

> (o) if the offender is an Aboriginal or Torres Strait Islander person — any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example —
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> (i) the offender's relationship to the offender's community; or
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> (ii) any cultural considerations; or
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> (iii) any considerations relating to programs and services established for offenders in which the community justice group participates.

In Western Australia there is no specific reference in the *Sentencing Act 1995* (WA) to the treatment of Indigenous people, and consequently common law principles are applicable in sentencing Indigenous defendants. A leading case is *R v Fernando* (1992) 76 A Crim R 58 at 62 where Wood J set out a series of principles relevant to sentencing disadvantaged Indigenous offenders. These principles were reviewed and affirmed by the High Court in *Bugmy v The Queen* (2013) 249 CLR 571 below. *Bugmy* was a New South Wales case, but the sentencing principles in relation to Indigenous offenders from a deprived background affirmed by the High Court are equally applicable to Queensland and Western Australia. The High Court stressed the need to apply a similar method of analysis to non-Indigenous offenders, and that to take extraneous matters into account would undermine the principle of individualised justice.

In *Bugmy v The Queen* (2013) 249 CLR 571, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ stated at 592–595:

> [36] There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.

> [37] An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.

In *Munda v The State of Western Australia* (2013) 249 CLR 600, the High Court affirmed it would be contrary to principle to accept that Aboriginal offending is to be viewed systematically as less serious than offending by other ethnicities, applying *Neal v The Queen* (1982) 149 CLR 305 at 326 per Brennan J. In *Munda*, the appellant who was intoxicated had brutally killed his de facto spouse, and a majority of the High Court held at 620 [55]: 'A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.'

5. Is 'two-stage' sentencing or 'instinctive synthesis' sentencing a better description of the sentencing methodology in Queensland and Western Australia?

At common law, two alternative sentencing methodologies have been identified: (1) 'two-stage' sentencing; and (2) 'instinctive synthesis' sentencing. As the titles suggest, the former involves (a) the identification of a general standard or range of sentence for the type of offence which (b) is then adjusted for the specific circumstances of the case, while the latter synthesises all the relevant sentencing factors in one instinctive, global step.

In *Markarian v The Queen* (2005) 228 CLR 357 at 375 [39] the High Court appeared to support the 'instinctive synthesis' approach to sentencing provided it was transparent and the reasoning accessible, while deriding two-stage sentencing in holding 'that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison'.

The most recent High Court authority on the sentencing task is contained in *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 below. The High Court reaffirmed its dislike for the treatment of sentencing as a mathematical exercise. The reference to 'addition and subtraction' in [34] below is an implied criticism of the second stage in two-stage sentencing, while the reference to '*all* of the circumstances' appears to support a species of instinctive synthesis sentencing.

In *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 at [34] French CJ, Hayne, Kiefel and Bell JJ criticised the notion that sentencing is a mathematical exercise.

> [34] Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen wrongly suggests that sentencing is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each

> offence and must do so by balancing (*Wong v The Queen* (2001) 207 CLR 584 at 611 [75]) many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts. As the plurality said in *Wong v The Queen* at 612 [76], '[s]o long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform' (original emphasis).

In any event, common law sentencing methodologies are of limited application in Queensland and Western Australia given the governing sentencing principles set out in ss 9–14 of the *Penalties and Sentences Act 1992* (Qld), and ss 6–8 of the *Sentencing Act 1995* (WA). As the High Court pointed out in *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 at [25] 'when sentencing offenders for offences against the laws of the Commonwealth, a sentencing judge is bound to apply those provisions of Pt IB of the *Crimes Act* 1914 (Cth) which govern the sentencing of federal offenders'. Statute is the starting point.

PROBLEM QUESTION

ASSUME THE FOLLOWING FACTS

Angus is 25 years of age and out on bail pending trial for defrauding his employer of $25,000. Angus has a heroin addiction and in order to feed his habit, Angus embarks on a series of burglaries over a long weekend. At the end of his burglary spree, Angus is confronted by a householder in the premises he has illegally entered. In the struggle that ensues, the householder is badly injured. Angus is charged with robbery and inflicting grievous bodily harm. After waiting until his trial commenced, Angus pleads guilty to defrauding his employer and to the burglary charges. Angus pleads not guilty to the robbery and grievous bodily harm charges on the grounds of self-defence. The Crown is put to proof and the jury finds Angus guilty of both charges. Angus has previous convictions for possession of cannabis and stealing, but had stayed out of trouble for five years prior to his present convictions.

Assuming the trial judge is determining the final aggregate sentence to be passed on Angus for all his current offending, discuss the relevant sentencing factors and identify the likely range of sentence to be fixed by the trial judge.

THE ISSUES

This question raises three issues: (1) final aggregate sentencing for a number of convictions; (2) the effect of a guilty plea on the sentencing outcome; and (3) the effect of Angus's age and previous convictions on the sentencing outcome.

THE RELEVANT LAW

(1) Final aggregate sentencing for a number of convictions.

The question to be addressed is how to combine the 'tariff' for each offence so that the cumulative total sentence properly reflects the overall criminality, without being so crushing as to leave the offender without any hope of a meaningful life after prison. This is known as the totality principle, which was discussed by McLure JA in *Roffey v The State of Western Australia* [2007] WASCA 246 at [24] to [26].

> [24] The appellant relies on the totality principle which comprises two limbs. The first limb is that the total effective sentence must bear a proper relationship to the overall criminality involved in all the offences, viewed in their entirety and having regard to the circumstances of the case, including those referable to the offender personally: *Woods v The Queen* (1994) 14 WAR 341.
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> [25] The second limb is that the court should not impose a 'crushing' sentence. The word crushing in this context connotes the destruction of any reasonable expectation of a useful life after release: *Martino v The State of Western Australia* [2006] WASCA 78 [16]. An aggregate sentence may be inappropriately long under the first limb even if it cannot be described as crushing: *Jarvis v The Queen* (1998) 20 WAR 201, 216 (Anderson J).
>
> [26] The practical effect of the totality principle is ordinarily to arrive at an aggregate sentence that is less than that which would be arrived at by simply adding up all the terms appropriate for the individual offences: *R v Holder* [1983] 3 NSWLR 245, 260 (Street CJ). A rationale for the totality principle is that there is assumed rehabilitation and reduced demand for retribution after the initial sentences have been served. Where the principle of totality comes into effect, it is of little importance how the ultimate aggregate is made up: *R v Holder* (260).

It follows from the above passage that the aggregate sentence is not arrived at by totalling all the terms of imprisonment appropriate to each offence. The process of determining an appropriate aggregate sentence was discussed in *R v Nagy* [2003] QCA 175 at [39] by Williams JA.

> [39] Where a judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are a number of options open. One of those options is to fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. But that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole, or where the imposition of such a sentence would give rise to an artificial claim of disparity between co-offenders. That list is not necessarily exhaustive. Such considerations may mean that the other option of utilising cumulative sentences should be adopted.

The issue of the relationship between the totality principle and questions of cumulation or concurrence was considered in *Pearce v The Queen* (1998) 194 CLR 610 in the joint judgment of McHugh, Hayne and Callinan JJ at 623- 624 [45].

> To an offender, the only relevant question may be 'how long', and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality (*Mill v The Queen* (1988) 166 CLR 59).

It follows that the greater the concurrency, the lower the aggregate sentence. The sentencing regimes in both Queensland and Western Australia express a preference for concurrent sentencing: s 155 of the *Penalties and Sentences Act 1992* (Qld), and s 88 of the *Sentencing Act 1995* (WA).

A case on point with the factual matrix here is *Royer v The State of Western Australia* [2009] WASCA 139, in which the Court of Appeal discussed the 'one transaction' or 'continuing episode' rule where a number of offences arise out of the one transaction. In *Royer*, the appellant pleaded guilty to numerous serious offences arising out of a home invasion in the course of which he attacked and sexually assaulted an elderly woman. He was sentenced to imprisonment for a total of 16 years and appealed against his sentence. Buss JA at [153] observed:

> The 'one transaction' or 'continuing episode' rule is not a principle of law. It is merely a working rule that where multiple offences arise out of the one transaction or continuing episode, any terms of imprisonment for the offences will usually be made concurrent. However, in a particular case, the sentencing judge must consider whether the application of the rule would result in an appropriate measure of the total criminality involved in the offender's conduct.

The Court of Appeal upheld the original sentence on the grounds that the 'one transaction' rule would have inadequately punished the serious offending, and another primary sentencing consideration of deterrence would not have been satisfied.

(2) The effect of a guilty plea on the sentencing outcome.

A guilty plea will leave open the possibility of a reduction in the sentence handed down, with the size of any sentence 'discount' being related to whether the offender indicated a plea of guilty would be made at the first reasonable opportunity or waited until late in the trial process: s 13(2) of the *Penalties and Sentences Act 1992* (Qld), and s 9AA(4)(b) of the *Sentencing Act 1995* (WA).

The discount range of 10% to 30% in Queensland identified by Fryberg J in *R v Houghton* [2002] QCA 159, at [31] is supported by case law in Western Australia. In *Moody v French* [2008] WASCA 67 at [37], Steytler P, Wheeler, McLure, and Buss JJA observed that '[o]rdinarily, in this State, fast-track pleas of guilty attract a reduction in sentence of somewhere between 20% and 35%, depending on the circumstances', citing *H v The State of Western Australia* [2006] WASCA 53 at [9] per Steytler P in support.

(3) The effect of Paul's age and previous convictions on the sentencing outcome.

In Queensland, under s 9(2)(e) of the *Penalties and Sentences Act 1992* (Qld), in sentencing an offender, a court must have regard to the offender's character, age and intellectual capacity.

Angus is 25 years of age and has a heroin addiction. 'Youth remains a material consideration; for the rehabilitation of youthful, even violent, offenders, especially those without prior, relevant convictions, also serves to protect the community': *R v Lovell* [1999] 2 Qd R 79, at 83, per Byrne J. In *R v Lovell*, the Queensland Court of Appeal held that the amendments made to s 9 of the *Penalties and Sentences Act 1992* (Qld) by the 1997 Act had the consequence that the youth of an offender (here 18 years of age), whilst still relevant, did not have the weight which it previously had, especially where violence was used or physical harm was caused to another person (here threatened a shop keeper with a pool cue), in considering whether a term of actual imprisonment should be served.

In *R v Hammond* [1997] 2 Qd R 195, the applicant had pleaded guilty to three charges of armed robbery. The applicant, who was 25 years of age and a heroin addict, appealed against his sentence. The Queensland Court of Appeal observed at 211:

> The youth of the offender may be a factor which diminishes in its mitigatory effect as the number of previous offences increases. This is understandable as the reason for dealing more leniently with young offenders is the expectation that such persons have a greater chance of rehabilitation.

The Court also commented at 199 on the relevance of a drug addiction in sentencing:

> The drug addiction is not an excuse; but it is a factor that may tell the court that the real weakness of character is that of a drug addict rather than that of a robber. That may be by no means inconsequential. It is however a two-edged factor; it may also tell the court that rehabilitation is going to be difficult.

As to previous convictions, s 9(10) of the *Penalties and Sentences Act 1992* (Qld) requires the court to treat each previous conviction as an aggravating factor where relevant.

> (10) In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to—
>
> (a) the nature of the previous conviction and its relevance to the current offence; and
>
> (b) the time that has elapsed since the conviction.

Section 11(a) specifies that any previous convictions of the offender are to be considered in determining the offender's character for the purposes of s 9(2)(e) of the *Penalties and Sentences Act 1992* (Qld) above.

In determining the character of an offender, a court may consider—

(a) the number, seriousness, date, relevance and nature of any previous convictions of the offender.

The *Sentencing Act 1995* (WA) is silent on the age of the offender, but under s 7(2)(b) an offence is not aggravated by the fact that the offender has criminal record.

(2) An offence is not aggravated by the fact that —

(a) the offender pleaded not guilty to it; or

(b) the offender has a criminal record; or

(c) a previous sentence has not achieved the purpose for which it was imposed.

PUTTING THE FACTS INTO THE LAW

The trial judge is determining Angus's final aggregate sentence for the following convictions: defrauding his employer of $25,000; a series of burglaries; robbery; and inflicting grievous bodily harm.

The fraud had taken place previously, while the other offences occurred over a long weekend. These other offences took place while Angus was out on bail. Angus waited until his trial commenced to plead guilty to the fraud and the burglary charges. Angus has previous convictions for possession of cannabis and stealing, but no convictions in the past five years and none for assault or offences against the person.

The maximum sentences for these offences are as follows:

<u>Queensland</u>

408C Fraud

(2) An offender guilty of the crime of fraud is liable to imprisonment for 5 years save in any of the following cases when the offender is liable to imprisonment for 12 years, that is to say—

(b) if the offender is an employee of another person, and the victim is the other person.

419 Burglary

(1) Any person who enters or is in the dwelling of another with intent to commit an indictable offence in the dwelling commits a crime.

Maximum penalty—14 years imprisonment.

(3) If—

(b) the offender—

(i) uses or threatens to use actual violence

the offender is liable to imprisonment for life.

320 Grievous bodily harm

(1) Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 14 years.

411 Punishment of robbery

(1) Any person who commits the crime of robbery is liable to imprisonment for 14 years.

(2) If the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with 1 or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, the offender wounds or uses any other personal violence to any person, the offender is liable to imprisonment for life.

Western Australia

409 Fraud

(g) if the person deceived is of or over the age of 60 years, to imprisonment for 10 years; or

(h) in any other case, to imprisonment for 7 years.

401 Burglary

(1) A person who enters or is in the place of another person, without that other person's consent, with intent to commit an offence in that place is guilty of a crime and is liable —

(a) if the offence is committed in circumstances of aggravation, to imprisonment for 20 years

400 Terms used

(1) In this Chapter —

circumstances of aggravation means circumstances in which —

(a) immediately before or during or immediately after the commission of the offence the offender —

(iv) does bodily harm to any person.

297 Grievous bodily harm

(1) Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 10 years.

(3) If the offence is committed in circumstances of aggravation, the offender is liable to imprisonment for 14 years.

221 Term used: circumstances of aggravation

(1) In this Part —

circumstances of aggravation means circumstances in which —

(b) a child was present when the offence was committed; or

(d) the victim is of or over the age of 60 years.

392 Robbery

A person who steals a thing and, immediately before or at the time of or immediately after doing so, uses or threatens to use violence to any person or property in order —

(a) to obtain the thing stolen; or

(b) to prevent or overcome resistance to its being stolen,

is guilty of a crime and is liable —

(d) if the offence is committed in circumstances of aggravation, to imprisonment for 20 years.

391 Term used: circumstances of aggravation

In sections 392 and 393 —

circumstances of aggravation means circumstances in which —

(a) immediately before or at or immediately after the commission of the offence —

(ii) the offender does bodily harm to any person.

It can be seen that in both Queensland and Western Australia these offences each carry a lengthy maximum term of imprisonment. We are not told either the age of Angus's employer or the age of the householder who suffered grievous bodily harm, or whether a child was present when the assault of the householder occurred. If either person is over 60 years of age or a child was present during the assault, then in Western Australia this brings Angus within circumstances of aggravation for fraud and grievous bodily harm. Neither are we told how many burglaries Angus committed

over the long weekend, although the clear implication from the use of the word 'series' is that a number of burglaries were involved.

The maximum sentence for the most serious offence in Queensland is life imprisonment: either for burglary under s 419(3)(b)(i) or for robbery under s 411(2). The maximum sentence for the most serious offence in Western Australia is imprisonment for 20 years: either for burglary under s 401(1)(a) or for robbery under s 392(d).

If the trial judge was to adopt a cumulative approach, the resulting sentence would be crushing. One option discussed in *R v Nagy* [2003] QCA 175 at [39] by Williams JA is to fix a sentence for the most serious offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. However, this would overlook the 'one transaction' or 'continuing episode' rule, given that apart from the fraud conviction the other offences took place over one weekend to feed a heroin addiction. Under this rule any terms of imprisonment for the offences will usually be made concurrent. The greater the concurrency, the lower the aggregate sentence. The sentencing regimes in both Queensland and Western Australia express a preference for concurrent sentencing: s 155 of the *Penalties and Sentences Act 1992* (Qld), and s 88 of the *Sentencing Act 1995* (WA).

Royer v The State of Western Australia [2009] WASCA 139 is a case on point with the factual matrix, where the appellant's sentence to a term of imprisonment for a total of 16 years was upheld. *R v Hammond* [1997] 2 Qd R 195 is also a case on point, where the Queensland Court of Appeal noted (1) the youth of the offender may be a factor which diminishes in its mitigatory effect as the number of previous offences increases, and (2) drug addiction is a two-edged factor as it may also tell the court that rehabilitation is going to be difficult.

As to a discount for pleading guilty, Angus pleaded guilty to the fraud and the burglary charges but not at the first opportunity. Angus waited until his trial commenced. Angus pleaded not guilty to the robbery and grievous bodily harm charges on the grounds on self-defence. Hence, the Crown was put to proof on those charges.

The rationale for discounting sentences upon a plea of guilty and the fine distinction with not penalising a person for insisting the Crown prove its case, was discussed in *Cameron v The Queen* (2002) 209 CLR 339. A majority of the High Court reconciled the reduction in sentence following an early guilty plea with not discriminating against a person insisting on a trial, by expressing the rationale for a discount on the moral ground of a willingness to facilitate the course of justice rather than the pragmatic ground of saving the taxpayer the expense of a contested trial. However, in Western Australia, the justification for such a discount is stated more prosaically in terms of the benefits to the State and to any victim or witness: s 9AA(2) of the *Sentencing Act 1995* (WA).

On the facts, the discount suggested by Fryberg J in *R v Houghton* [2002] QCA 159, at [31], that '[n]ormally the sentence will be reduced by 10 per cent to 30 per cent for such a plea' will be

heavily diluted in Angus's case. The guilty plea was late in coming and only partially applied to the charges Angus faced.

While Angus is still a relatively young man, at 25 years of age he is no longer a teenager. The level of mitigation for his age will be further limited by virtue of the grievous bodily harm conviction: *R v Lovell* [1999] 2 Qd R 79.

As to the previous convictions for possession of cannabis and stealing, these had occurred five years previously and there was no prior history of offences against the person. Assessment of Angus's character under s 9(2)(e) of the *Penalties and Sentences Act 1992* (Qld) requires consideration of any previous convictions as regards the number, seriousness, date, relevance and nature: s 11(a). Under s 7(2)(b) of the *Sentencing Act 1995* (WA), an offence is not aggravated by the fact that the offender has criminal record. Thus, in both jurisdictions, Angus's previous convictions are unlikely to be a significant factor in sentencing.

The sentence handed down in *R v Hammond* [1997] 2 Qd R 195 provides a guide as to the possible range of sentence Angus may receive. Hammond, who was also 25 years old and a heroin addict, pleaded guilty to three charges of armed robbery, one charge of attempted armed robbery, and two charges of unlawful use of a motor vehicle with circumstances of aggravation. At trial, a term of imprisonment of 7 years was imposed in respect of each offence of armed robbery, 3 years' imprisonment in respect of the attempted armed robbery and 2 years' imprisonment for each offence of unlawful use of a motor vehicle all to be served concurrently. The Queensland Court of Appeal reduced the sentence for the armed robberies to 5 years, and characterised the offences as 'a short period of criminal conduct'. The Court of Appeal identified the following factors in coming to its decision: 'the early plea, the restitution, the lack of personal violence to the victims, the past good work history, the prospects of rehabilitation, the absence of previous relevant convictions and the relative youth of the applicant.'

On the facts here, Angus's plea of guilty was not early, there was personal violence and the fraud conviction eliminates a claim to a past good work history. There is no information on restitution. Assuming Angus is assessed as having good prospects of rehabilitation, then as the remaining factors of previous convictions and relative youth are on a par with Hammond, the question is: by how much should the benchmark sentence of 5 years' imprisonment imposed on Hammond be increased?

CONCLUSION

The likely concurrent sentence for all of Angus's offending will be in the range of 7 to 9 years' imprisonment. In *Hammond* there was a recommendation for release on parole after serving 2 years. Here, Angus is probably looking at serving 4 years before being eligible for parole.