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"The Relevance of Prior Convictions in Sentencing"

by

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The Relevance of Prior Convictions in Sentencing

The significance of prior convictions is of fundamental and practical importance in sentencing, but is so much an every day aspect that it may well be thought not worthy of Conference discussion. Some recent expositions, however, may suggest that the proper role and function of a prior record in sentencing is not without controversy.

General

The discretionary nature of sentencing before recent statutory provisions such as s5 of the *Sentencing Act* (NT) sought, inter alia, to make the process more transparent by specifying the sole purposes of sentencing and matters to which a court must have regard, meant that the significance of prior offending in sentencing was often somewhat obscure. Sometimes it appears to have been a primary factor in determining the sentence; for example, where the objective was seen to be incapacitation. Sometimes it was treated as a secondary factor, with sentence being determined mainly by the need that it reflect the seriousness of the present offence. The latter was, I think, the dominant paradigm; in *DPP v Ottewell* (1968) 52 Crim App. R. 679 at 681, Lord Reid quoted Lord Parker CJ:

> "In one sense every prisoner is sentenced on his record, if by that one means having regard to his background. One is not sentencing afresh for earlier offences, but one sentences him to the particular sentence in question against the background of his criminal record."

One view was that the existence of a prior record should not be a factor in sentencing at all, on the basis that punishment for the earlier offences had already been

meted out, and to take them into account amounted to double punishment, sentencing for the record. This view does not take account of the fact that if some aspect of an offender's previous sentencing affects the basis upon which he is presently to be sentenced, taking account of it is not double punishment. For example, if an offender received a sentencing discount because it was his first offence, the removal of that discount when he re-offends is not a double punishment. Again, a failure by an offender to respond to an earlier rehabilitative disposition is relevant in deciding the appropriate disposition on a later offence.

The position before *Veen [No.2] v The Queen* (1987-88) 164 CLR 465

Nevertheless, until quite recently, the assessment of the significance of a prior record in Australia appeared to be straightforward. Whether an offender was sentenced on what has come to be called a "tariff" basis, or to an individualized sentence, his previous convictions militated against him. The more serious his criminal record - measured by the number and frequency of his priors and the degree of seriousness of those offences - the heavier the sentence for his present offence was likely to be.

It was at the same time regarded as fundamental that a person be sentenced for the offence for which he is presently convicted, and *not* for his previous offences, since he has already been punished for them. It was also recognised that justice required that the sentence for an offence must always be proportionate to the gravity of the particular offence for which it is imposed, understood in the sense that a sentence must not be more severe than that which is warranted by the particular facts of the

offence.[1] By way of illustration, in *R v Clarke* [1975] 61 Cr. App. R. 320 a sentence of 18 months imprisonment on a mentally disturbed woman who had a lengthy record, was reduced on appeal to a fine of £2; her offence was damaging a flower pot valued at £1. The sentence of imprisonment was said to be imposed "to protect the public and herself".

The general approach to sentencing was stated by Thomas [2] in a classic exposition, as follows:

> "The task of the sentencer... in the more typical case, *assuming that a tariff sentence is to be imposed*, is to relate the facts of the incident with which he is dealing to the established pattern [of sentencing for the offence charged], determine what sentence would be appropriate for that particular set of facts considered in the abstract [in relation to that pattern of sentencing] and then turn his attention to the question of mitigating circumstances peculiar to the offender.[1] *The governing principle is that the gravity of the particular incident in the abstract - the relationship of the facts to the established scale of ranges - determines the upper limit of permissible sentences in that case*. The tariff fixes the ceiling; it does not indicate what the final sentence will be. *The sentencer may reduce the sentence below the level indicated by the gravity of the facts* to reflect the presence of mitigating factors in the offender's character or personal circumstances, *but no penal objective* - general deterrence, preventive custody of a potentially dangerous offender, the protection of society from a persistent recidivist or the treatment of an offender in prison for his own good - *justifies the imposition of a sentence which is disproportionate to the facts of the case* in the sense that it exceeds the bracket or range appropriate to that variety of the offence concerned.
>
> [1] See *Lister* 5.10.72, 787/B/72 ('the proper way of sentencing is to look first at the offence itself and the circumstances in which it was committed, then to assess the proper sentence for the offence on the basis that there are no mitigating circumstances; and finally to look to see what the mitigating circumstances are, if any, to reduce the assessed sentence to give effect to the mitigating circumstances')." (emphasis added)

It can be seen that in this approach to sentencing the pattern of sentencing for the offence charged is first determined, a sentence within that range based on the

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[1] See generally D.A. Thomas "Principles of Sentencing" (2nd ed., 1979) at pp41-44.
[2] op.cit., p35.

particular facts and circumstances of the offence itself is provisionally assessed, and finally allowance is made for mitigating factors. On this approach the 'gravity of the facts' of the particular offence determines the upper *limit* of the sentence which may be imposed therefor; while mitigating factors may reduce the sentence imposed below that limit, neither a record of prior offending nor anything else can warrant the imposition of a sentence higher than the limit. To do so would be to breach the fundamental principle that the sentence must be proportional to the gravity of the particular offence. The result is that while an offender with a bad record may receive the highest sentence that the pattern of sentencing for that offence warrants, it is only if the 'gravity of the facts' of his particular case warrants it, and all mitigating factors have been negated.

When the task of the sentencer sentencing on a "tariff" basis and the significance of priors is approached in this way, previous convictions are seen to militate against the effect of mitigating factors which could otherwise reduce the sentence for the offence below that warranted by 'the gravity of the facts'. In other words, a prior record does not constitute an aggravating factor warranting a sentence disproportionate to the 'gravity of the facts' of the offence; it militates against the effect of submissions in mitigation based on remorse and contrition, and tends to negate submissions based on an unblemished good character or on the basis that the offence was 'out of character'.

On this approach a prior record becomes significant when the weight of mitigating factors is being assessed. These 'mitigating factors' are *not* matters relating

to the immediate circumstances of the particular offence, which bear on the 'gravity of the facts', but -

> "such matters as the character and history of the offender, the pressures which led to the commission of the offence, and the consequences of the conviction and sentence for him."[3]

That is why Thomas discusses the significance of a prior record, when discussing the effect of mitigating factors[4]. In accordance with this view that a prior record operates in a negativing way, Thomas states:

> "The imposition of longer sentences, as a criminal record is extended, reflects a progressive loss of credit until the offender has exhausted all the mitigating effect of good character and arrived at the point where he is exposed to the full length of the sentence appropriate to his offence."[5]

As Thomas points out[6], this approach to assessing the significance of prior record has 3 practical consequences, viz:

1) Assuming that the nature of an offender's offending does not change, as the prior record becomes more serious the gradual increase in the severity of sentences which may result, is finite. That is because when the gradually eroded credit for good character is finally expended by repeated offending, sentencing will become stable at a level which fully reflects the 'gravity of the facts' of the particular offence.

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[3] Thomas, op.cit., p194; and see a non-exhaustive list in ALRC Report No.44 'Sentencing' at pp88-89.
[4] op.cit., pp197-205.
[5] op.cit., p197.
[6] op.cit., pp197-199.

2) When two co-offenders have significantly different prior records, the difference in their records is usually reflected in a difference in the sentences they receive. This will not occur if *both* co-offenders have passed beyond the point where the effect of their priors is to exhaust all the mitigating effects of good character - that is, when their respective credit for good character is finally expended. To maintain a difference in their respective sentencing *after* that point, would be to sentence them for their records, and not for their present offence.

3) An offender has no entitlement to have his sentence mitigated; mitigating factors are not necessarily given weight in sentencing. For example, a perceived need for general deterrence may overwhelm the existence of mitigating factors which are present. In such a case, as far as prior record is concerned, there will be no distinction in sentence between an offender with priors and his co-offender of previous good character, since the former's prior record cannot increase his sentence above the level which the 'gravity of the facts' of the particular offence warrant.

In sum, the significance of a prior record in sentencing was the effect it had on the mitigation which a person of otherwise good character might seek. 'Good character', in this context, is not simply a matter of having no priors, but embraces positive good character; thus previous war service, for example, is a mitigating factor. The existence of a prior record does not necessarily mean that the offender is not to be

treated as a person of good character; that depends on an analysis of his record. A recent and significant gap in offending may, for example, lead to the priors being disregarded, or not given much weight, on the basis that there is now a current pattern of law-abiding behaviour.

The conception that as the prior record becomes progressively worse so the credit (and mitigation) for good character becomes progressively diminished, leads to the concept of the "jump". In general, assuming that an offender's offending remains of the same general character, his sentences should increase gradually rather than by sudden large 'jumps'. This 'jump' principle does not apply where the subject offence is of a much more serious character than the previous offending.

The facts of *Veen [No. 1] v The Queen* (1978-79) 143 CLR 458 are well known; in imposing on a 20-year old man for manslaughter (on the basis of diminished responsibility) a sentence of life imprisonment without a nonparole period, Rath J said that by reason of incurable brain damage the accused if ever released was likely to kill or seriously injure someone, and hence the sentence imposed was necessary to protect the community "from his uncontrollable urges". In the majority, Jacobs J with whom Stephens J agreed, rejected the principle which had developed in England that a sentence of life imprisonment could be imposed, even where the whole of the circumstances of the offence did not warrant it, if the prisoner was a proved danger to the community, such a sentence being for the community's protection. His Honour affirmed at p478:

> "... the fundamental principle that a man must be given the sentence appropriate to his crime and no more."

At p490 his Honour said:

> "... I do not think that the applicant's history is such that any punishment should be awarded which is not strictly proportionate to the gravity of the offence."

Murphy J took the same view at p494, citing Cicero's De Officio: "Take care that the punishment does not exceed the guilt".

In the minority, Mason J with whom Aickin J agreed, said at p468:

> "The court must, in sentencing a person who has been convicted of a very serious offence involving violence, if his record and the expert evidence plainly demonstrate that there is a real likelihood of his committing that kind of offence again if he is restored to liberty, ensure by the order which it makes that he will not be released whilst that likelihood continues. If it should appear that the propensities or predilections of the person convicted are such that the imposition of life imprisonment is necessary to protect the community from violent harm, then the court should impose that penalty. In the case of a very serious offence involving violence, it will rarely transpire, if at all, that a sentence of life imprisonment is disproportionate to the offence of which the prisoner has been convicted, given that he has a prior record of conviction for that class of offence and that he has a propensity, because he is unstable or disordered, to commit violent crime.
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> In saying this it is not my intention to deny, or derogate from, the principle that the punishment to be inflicted must be proportionate to the crime. Rather it is my purpose to say that the conflict between that principle and the object of protecting the community arises in relation to less serious offences where the proportionality principle inhibits the imposition of a long term sentence which might otherwise be thought necessary to protect the community."

Having cited with approval what Gibbs J said in *R v Pedder* (unreported, Court of Criminal Appeal, Q'land, 29 May 1964) his Honour said at p469:

> "In my opinion, his Honour's observations express the principle which is to be applied to cases of this kind. They demonstrate that in such a case there is no opposition between the imposition of a sentence of life imprisonment with the object of protecting the community and the proportionality principle. The court imposes a sentence of life imprisonment on taking account of the offender's record, his propensity to commit violent crime, the need to protect the community and the very serious offence of which he stands convicted,

imprisonment for life being a penalty appropriate to very serious manslaughter when it is attended by the additional factors to which I have referred."

It may be that in this paragraph his Honour was adopting the same approach as in *R v Hodgson* (1967) 52 Cr App R 113, the approach in England which had been rejected by Jacobs J. At p471 his Honour said:

> "... I am of opinion that life imprisonment should be imposed when it is necessary to protect the community from an offender who has a disposition to commit violent crimes and that the conditions for the imposition of that sentence are as stated in *Reg v Hodgson.*"

In the passage which his Honour quoted at p469 from the judgment in *R v Pedder* (supra), also a case of manslaughter by reason of diminished responsibility, Gibbs J said:

> "In some cases in which it appears that there is no likelihood that the convicted person would be a danger to the public if set at liberty, and that there were mitigating circumstances, a light term of imprisonment or no imprisonment at all may be appropriate. On the other hand there are cases in which the mental condition of the convicted person would make him a danger if he were at large and in some such cases sentences of life imprisonment may have to be imposed to ensure that society is protected.
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> ...
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> Even in cases where it is hoped that mental treatment may so ameliorate the condition of the offender that it would eventually be safe to discharge him, although it is not known how long it would take to achieve this result, it may still be necessary, in the present state of the law, for the Court to impose a sentence of life imprisonment, *if that is not otherwise inappropriate to the circumstances of the crime,* rather than let loose a man whose abnormality of mind may lead him to commit further killings." (emphasis added)

We come next to the decision which is the source of the controversy as to the significance of prior record when sentencing.

Veen [No.2] v The Queen (1987-88) 164 CLR 465

The accused in *Veen [No.1]* (supra) killed his (second) victim 9 months after he was released on licence. His plea to manslaughter (on the ground of diminished responsibility), was accepted. In sentencing him to life imprisonment Hunt J said that the accused was a continuing danger to society and likely to kill again upon release, by reason of his brain damage. The majority in the High Court - Mason CJ, Brennan, Dawson and Toohey JJ - held that no error of principle had affected the sentence. Their Honours said at p472 that in *Veen [No.1]* (supra) "the principle of proportionality was not the point of divergence between the majority and minority", and that:

> "The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen [No.1]* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender: ((1979) 143 C.L.R., at p.467, 468, 482-483, 495)."

At p473 their Honours said:

> "It is one thing to say that the principle of proportionality precludes the imposition of sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible."

Having referred at p473 to an article by Mr C. S. Lewis in which he pleaded for the retributive theory of punishment - punishing an offender "because he deserves it" - their Honours said at p474:

> "The plea has been heard by the courts of this country, by adopting the principle of proportionality and by having regard to the protection of society as a factor in determining a proportionate sentence. It must be acknowledged, however, that the practical observance of a distinction between extending a

sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment.

The basic difference between the majority and the minority in *Veen [No. 1]* lay in the different assessments of what was the appropriate proportionate sentence. No judgment would have given support to a sentence exceeding what was truly proportionate."

Their Honours continued at p474, to comment on *Veen [No. 1]* (supra) saying that:

"... all justices other than Murphy J. accepted that, in a case where a verdict of manslaughter is returned on the ground of diminished responsibility, the risk that the offender's mental abnormality may lead him to kill again is a material factor in determining the sentence to be imposed."

At pp477-8 their Honours said:

"There are two subsidiary principles which should be mentioned. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v Ottewell* ((1979) 143 C.L.R., at p.495). The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties."

The meaning and effect of this passage is of critical importance for the purposes of this paper. The majority considered that no error of principle had affected the sentence. The dissenting minority consisted of Wilson, Deane and Gaudron JJ. Wilson J said at pp485-6:

> "In my opinion, the majority judgments in *Veen [No. 1]* do not reveal any support for the principle of preventive detention or for its introduction into Australia. *The decision in the case stands as authority for the proposition that a sentence should not exceed that which is appropriate to the gravity of the crime considered in the light of its objective circumstances.* In other words, the punishment must fit the crime." (emphasis added)

At p487 his Honour said:

> "The difficulty arises in determining the effect that the element of protection of the community may properly have in arriving at a particular sentence. In my view, *it should not have the effect of increasing a sentence beyond the longest sentence that the actual offence charged, when viewed objectively, would justify.* In the case of a mentally deranged offender whose release would represent a potential danger to the community, the necessity to protect the community would be likely to outweigh any other considerations personal to the offender which may have led to a reduction in the sentence, with the consequence that the maximum sentence appropriate to the offence would be imposed. What is not permissible, in my opinion, is that the maximum appropriate sentence be increased to some longer sentence solely because of the imperative to protect the community. To do that is to punish the offender, not for the offence of which he has been convicted but for the potential offences which he may commit in the future." (emphasis added)

After citing what Deane J said in *Channon v The Queen* (1978) 20 ALR 1 at 18,

his Honour said at p488:

> "A sentence cannot represent appropriate punishment for the particular *offence* if by reason of a concern to protect the community it exceeds that sentence which is the maximum the circumstances of the offence, viewed objectively, will bear." (emphasis in original)

His Honour continued at p488, in a passage which is again of importance to this paper:

> "It remains now to apply the principles which I have expressed to the present case. I cannot support the approach of the trial judge in so far as his Honour treated the applicant's previous convictions as matters of aggravation justifying a longer sentence than the maximum sentence which the circumstances of the offence, viewed objectively, would warrant. In my view the proper benchmark of an appropriate sentence is determined by reference to the objective features of the crime; matters personal to an offender, including any record of previous convictions and also the likelihood of any potential threat to the community, are relevant only to the question whether the case admits of leniency being shown to the offender."

Deane J, who agreed with Wilson J's discussion of the applicable principles, said at pp490-1:

> "While the sentencing process must take account of many factors other than punishment, the basis of justification of the imposition of a sentence of imprisonment upon a convicted person lies in punishment in the sense that the outer limit of the appropriate sentence for a particular offence (in a case where a range of sentence is available) is that which is proportionate to the gravity of the actual crime when viewed in the context of relevant social standards and circumstances. Put differently, the power of a person in the exercise of judicial office to order the imprisonment of another person who has been convicted of a crime is limited to what is justified as punishment for the crime itself: it does not extend to imprisoning that other person beyond that proportionate punishment for the reason that the judge thinks that it is to the benefit either of the other person himself or of the community generally that he be further incarcerated. *It is only within the outer limit of what represents proportionate punishment for the actual crime that the interplay of other relevant favourable and unfavourable factors - such as good character, previous offences, repentance, restitution, possible rehabilitation and intransigence - will point to what is the appropriate sentence in all the circumstances of the particular case.* A propensity to commit serious offences in the future and the protection of the public are among those factors which might militate against factors favouring some more lenient sentence than the punishment which the crime itself would otherwise support. At worst from the convicted person's point of view, they may preclude any reduction of the full sentence which is proportionate to the facts of the actual crime. They cannot increase that sentence either to an unlimited (or life) sentence or to a heavier determinate sentence. Otherwise, the sentence imposed would conceal two elements: the sentence appropriate to the crime if unmitigated by other factors and a further sentence which, while worded in the language of punishment, is not justified by reference to the gravity of the actual offence but is in fact imposed to procure the protection of the public by the preventive detention of the offender." (emphasis added)

At p493 his Honour said:

> "The question arises whether the applicant's crime in the present case was so extraordinarily grave a crime of manslaughter that the sentence proportionate to the actual facts of that crime is life imprisonment notwithstanding that that represents the maximum sentence which could have been imposed if the plea of diminished responsibility had been rejected and the applicant had been convicted of murder. In my view, it obviously was not."

At p494 his Honour referred to the applicant's previous convictions and said:

> "He has, however, been sentenced for those earlier offences and their relevance in relation to the sentence appropriate to the circumstances of the present case is restricted to their effect in militating against any mitigation of the sentence which the gravity of the present offence itself could support."

Gaudron J said at p496:

> "I also agree with Wilson J that neither considerations of community protection nor the repetitive nature of the offence should have the effect of increasing a sentence beyond that appropriate to the offence when the offence is viewed objectively. In practical terms this means that *the fact that the prisoner has previously offended* or that he is likely to re-offend in like manner *should be considered by the sentencing judge only as a matter militating against leniency which might otherwise be afforded by reason of consideration personal to the prisoner.*" (emphasis added)

Later discussions

In *Baumer v The Queen* (1988) 166 CLR 51 the High Court (Mason CJ, Wilson, Deane, Dawson and Gaudron JJ), referring to an observation by the learned trial judge that "the literally appalling record" of the applicant increased the seriousness of the offence, said at pp57-58:

> "If this means no more than that such a record would make it difficult to view the circumstances of the offence or of the offender with any degree of leniency then, of course, such a remark would be understandable and unobjectionable. *It would clearly be wrong if, because of the record, his Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence.* Similarly, his Honour's observation that people with the propensity of the applicant to continue to commit driving offences must be "kept away" for the protection of the public is open to misunderstanding. *Propensity may inhibit mitigation but in the absence of statutory authority it cannot do more.* In applying a section like s154, the sole criterion relevant to a determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, *it is the circumstances of the offence alone that must be the determinant of an appropriate sentence.*" (emphasis added)

The relevance of the prior record in sentencing has been raised in various cases in the Northern Territory; differing views have been expressed. Most of the cases are conveniently collected by Mr Philip Eatwell[7], viz:

> *Sultan v Svikart* (1989) 96 FLR 457 at 462, *R v Mulholland* (1991) 1 NTLR 1 at 13-14, *R v Babui; Babui v The Queen* (1991) 1 NTLR 139 at 143, *Nabanardi v Minner* (1992) 62 A Crim R 325 at 331-332, *R v Spicer* (unreported, C.C.A. (NT), 7 April 1994) at 16 and 33-35, *Braham v R* (1994) 73 A Crim R 353 at 365, *R v Gill* (SC No.127 of 1994, transcript 22 December 1994 at 59-62 and 97, *R v Grimley,* SC No.63 of 1994, transcript 20 December 1994 at 441, *Marshall v Llewellyn* (unreported, Supreme Court (NT), Kearney J, 3 May 1995) at 4-10, *Tyday v Maley* (unreported, Supreme Court (NT), Angel J, 29 May 1995) at 6-8, and *Noble v The Queen* (unreported, CCA (NT), 21 July 1995) at 8-9, 11 and 17-18.

See also *Dixon v Pryce* (unreported, Supreme Court (NT), Mildren J, 26 September 1996. In general terms, the question is whether a prior record is relevant only in the context of its effect on mitigating factors, as the minority in *Veen [No.2]* (supra) contended; or whether it may be treated as a "circumstance of the instant offence which bears upon the gravity of the instant offence", as Angel J put it in *R v Mulholland* (1991) 1 NTLR 1 at 13. If the former, it is irrelevant to the determination of the (limiting) sentence which is proportionate to the gravity of the offence; if the latter, it is a factor in the determination of that sentence, and would tend to increase it.

In a recent article on the topic[8], the learned authors favour the latter view. They said at p58:

> "In *R v Dodd* ((1991) 57 A Crim R 349 at 354 the Court of Criminal Appeal (with appropriate references to authority) said:

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[7] P.Eatwell: "The Relevance of the Prior Criminal History in Sentencing", unpublished thesis, 1995, NTU., at p3. I gratefully acknowledge my indebtedness to Mr Eatwell's work.

[8] Mr Justice Hunt CJ at CL and Mr Hugh Donnelly: "The Objective Circumstances of the Case and Prior Record" (1995) 7 Judicial Officers Bulletin 57.

> "... making due allowance for all relevant considerations, there ought to be a reasonable proportionality between a sentence and the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place. Each crime ... has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary .... Even so, there is sometimes a risk that attention to persuasive subjective considerations may cause inadequate weight to be given to the objective circumstances of the case."

The expressions "the gravity of the offence viewed objectively", "objective gravity", "objective facts" and "the objective circumstances of the case" appear to have been understood by some sentencing officers as being limited to the physical facts of the offence without reference to the offender's state of mind, which is then relegated to be considered only as part of the "subjective features of the case". This is a misconception."

They proceed to explain this 'misconception' by referring to the passage earlier cited from *Hoare v The Queen* (supra) and then proceed at p58:

> "It is therefore the sentence which is proportionate to the objective circumstances which fixes the outer boundary of that which is appropriate to the particular case. The offender's state of mind may be relevant as an ingredient of the offence - the *mens rea* as opposed to the *actus reus*. More often, the state of mind with which the offender commits the offence will aggravate its seriousness. For example, a large measure of premeditation is usually regarded as making the offence more serious than where it is committed on the spur of the moment. (cf *R v Morabito* (1992) 62 A Crim R 82 at 86.) Similarly, an offender's motive for a murder in order to cover up the commission of another crime is an aggravating feature which may be taken into account in aggravation. (*R v Hungerford* (unrep) 15 December 1993 CCA 16 9; *R v Garforth* (unrep) 23 May 1994 CCA at 8-9 [special leave to appeal refused by the High Court (unrep) 7 December 1994]; *R v Lett* (unrep) 27 March 1995 CCA at 8.). If such state of mind aggravating the seriousness of the offence is not taken into account when considering the objective circumstances of the case (which fix the outer boundary of what is appropriate to that case) there is no room for that state of mind to be taken into account at all. That is not the law.

Antecedent criminal history

The element which appears to cause the most confusion is the offender's antecedent criminal history. In *Veen [No.2]*, the majority held that such criminal history may be relevant to the objective circumstances of the offence where it shows that the offence was but a manifestation of the offender's continuing attitude of disobedience to the law, or where it illuminates his moral culpability, or his dangerous propensity or a need to impost condign punishment in order to deter him from committing further like offences (at 477).

That there is perhaps room for the misconception to which we have referred is understandable. As Wilson J said in his dissenting judgment in *Veen [No.2]* (at 486-487), the obscurity of meaning can easily infect this area of discourse. (In *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 152, Windeyer J expressed a similar sentiment (in a different context) when he suggested that we sometimes find ourselves dealing more in words than in ideas.) There are many statements to be found in the cases and elsewhere which, if not considered carefully, could wrongly be interpreted as expressing a different conclusion."

They then considered what was said in *Baumer v The Queen* (supra) and considered that if the Court there -

> "... had intended to qualify the reasoning of the majority in *[Veen [No.2]* (supra)], it would be expected that they would have said so expressly."

They quote at p59 from an article by Mr Fox[9], viz:

> ""The objective circumstances of the offence do not include the antecedent criminal history of the offender except where legislation prescribes prior criminality as an aggravating component of the offence ...""

They consider that this does not reflect the law and comment that in so far as it may be based on the judgment of Deane J in *Veen [No.2]* (supra) at 491, "that judgment ... is inconsistent with the majority judgment at 477-478."

[9] R. Fox: "The Meaning of Proportionality in Sentencing" (1994) 19 MULR 489 at 500.

The analysis in this interesting paper clearly owes much to the pathbreaking analysis by Angel J in *R v Mulholland* (supra); a copy of pp13 and 14 of his Honour's judgment is attached to this paper.

In the *Sentencing Act* (NT), amongst the specified matters to which the sentencing court must have regard when sentencing is "(e) the offender's character ...". The only explicit reference in the Act to prior conviction is in s6 which provides that:

> "In determining the character of an offender, a court may consider, among other things -
>
> (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender;"

Comment

If the sentence which constitutes the upper sentencing limit - the sentence proportionate to the gravity of the offence - is to be calculated by reference to the 'objective features' of the offence, it is somewhat difficult to see how a prior record can be a relevant factor in that calculation. Prior record is one of many matters personal to an offender. The effect of what was said in *Baumer v The Queen* (supra) on the majority view in *Veen [No.2]* (supra) needs to be assessed; on its face it appears to be more consistent with the views of the minority in that case.

> "Secondly, a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.",

the court citing *Veen [No 2]* (supra) at 472 485-486, 490-491, 496. Counsel also relied upon the comments of Kearney J in relation to recidivism in *Sultan v Svikart* (1989) 96 FLR 457 at 462; 42 A Crim R 15 at 19, 20.

In *R v Jabaltjari* (1989) NTR 1 at 20, 21, 32, members of this court expressed difficulty with the concept of a tariff for rape cases, but I do not think the question of a tariff is relevant to the present submission.

I think counsel for the respondent's submission as to the use to be made of the respondent's prior criminal record is wrong. I think it is wrong in principle and contrary to authority binding on this court. I shall endeavour to say why I think it is contrary to principle. I say 'endeavour' because of "...the ease with which obscurity of meaning can infect this area of discourse": *Veen v The Queen [No 2]* (supra) per Wilson J at 486, 487.

I think there is an error in the submission and I think it is this: it overlooks that the previous offence of the respondent is a circumstance of the instant offence which bears upon the gravity of the instance offence.

Had a hypothetical disinterested bystander witnessed the respondent's actions, his actus reus, he might have observed little different to the actus reus of the previous offence of the respondent. However, to say the hypothetical disinterested bystander observing only the actus reus, observes the circumstances of the offence is to ignore circumstances relevant to the criminal intent, the mens rea, of the respondent. The fact that the respondent was a convicted rapist at the time of the instant offence demonstrates, prima facie, an increased animus and culpability for the instance offence which ipso facto is deserving of greater punishment - and this is so quite apart from any question of a general propensity to re-offend after the time of sentencing. To impose a higher punishment a second time round is not a matter of adding anything to a so-called objective sentence: it is not a matter of punishing twice for the earlier offence: it is merely recognising that the prior offence is a circumstance relevant to the mens rea of the offender in committing the instance offence and that there is prima facie increased criminal culpability pertaining to the instant offence. The instant offence demonstrates an added disregard for the law, an added disregard for society in general and a further disregard for a particular member of society (the new victim) in particular. These matters reflect, in the absence of particular exculpatory facts, a more calculated animus in the case of the instant offence, and as I have said, this is so quite apart from any question of propensity to re-offend yet again. When courts speak of the circumstances of the offence they do not mean what the hypothetical disinterested bystander sees and hears at the scene. That is not exhaustive of the circumstances of the offence. The offence is constituted by the actus reus and the mens rea of the offender. So far as consideration of the mens rea of the offender is concerned, the hypothetical disinterested bystander is confined to what is said and done in his presence. There can be many factors relevant to the mens rea that are not disclosed to the hypothetical disinterested bystander. The offender's mental state at the time of the actus reus is not only to be inferred from the actus reus itself. It can be inferred as much from a proven pre-existing propensity to commit the offence as from a previously stated intention, made elsewhere, to commit the offence. When

it is said the punishment must fit the crime, the punishment must fit both the actus reus and the mens rea constituting the crime. A pre-existing propensity to commit a like offence is relevant to the issue of mens rea of the instant offence. A propensity to re-offend in like manner yet again, attracts additional but different considerations apropos the protection of the public.

I think the submission is contrary to both the decision and reasons of the majority in *Veen v The Queen [No 2]* (supra). Mason CJ, Brennan, Dawson and Toohey JJ said (at 477-8):

> "The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take into account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties."

I do not think the High Court in either *Baumer* (supra), or *Hoare v R; Easton v R* (supra) in the passages relied upon was saying anything contrary to this. *Veen [No 2]* (supra) was cited in each case and if the members of the High Court had intended to qualify the decision or reasons of the majority in *Veen [No 2]* (supra) they would surely have said so. If Kearney J in *Sultan v Svikart* (supra) was saying anything contrary to what I have said, then I, with respect, disagree with him. I think the argument misconceives what the High Court in *Baumer* (supra) meant when it referred to the "circumstances of the offence" and what the High Court in *Hoare v R; Easton v R* (supra) meant when it referred to "the gravity of the crime considered in the light of its objective circumstances."

In *Bugmy v The Queen* (1990) 92 ALR 552 at 559, Dawson, Toohey and Gaudron JJ said:

> "Counsel suggested that, since *Veen [No 2]*, [(1988) 164 CLR 465] a method of sentencing, described as a two-step approach, has developed in the courts. This approach, it was said, involves first determining the outer limit of the sentence and then applying mitigating factors, if any, so as to arrive at an appropriate sentence. It was further suggested that had his Honour adopted such an approach he would have been less likely to fall into error. *Such an approach was firmly rejected* by the Victorian Court of Criminal Appeal in *R v Young, Dickenson and West*. In the view of that court, this court in *Veen [No 2]* 'did not have in mind that a sentencer might, let alone should, proceed to arrive at the sentence to be imposed by a staged or structured approach'...
>
> "Whatever the merits of this debate..." (my emphasis).

As Kearney J said in *R v Raggett, Douglas and Miller* (unreported, Court of Criminal Appeal, NT, 28 September 1990), their Honours in the High Court were noncommittal about the condemnation of a two stage approach