

Agreed Facts & Other Evidence

Guilty pleas are a large part of any criminal law practice. No guilty plea should ever be entered until after the best possible set of facts has been negotiated and agreed with the police. However, police will sometimes seek to go behind those Agreed Facts by tendering evidence that is inconsistent with them. Every defence lawyer needs to know how to respond to this situation. This article seeks to assist legal practitioners appearing in the Local Court of NSW.

s191 Evidence Act

Section 191 provides that a fact which is agreed in writing and signed by the parties cannot be contradicted or disputed unless the court grants leave. This sounds like a winner until you learn that s4(2) provides that the Evidence Act does not apply to sentencing proceeding unless the court orders.¹ So we have to rely on the common law.

Court of Criminal Appeal

The CCA has handed down three relevant decisions. The first is R v Palu [2002] NSWCCA 381 where they held at [21]:

...

If it purports to be an agreed statement of facts so that it is intended to provide the factual basis upon which the parties wish the court to sentence the offender, the facts should be sufficient to permit the court to exercise its discretion and the Crown should not tender other material which might supplement or contradict the facts set out in the agreed statement.

...

All too frequently, or so it seems to me, uncertainty, confusion and, sometimes, error arises because of the failure of the parties, and in particular the Crown, to clearly identify the material upon which the facts of the matter are to be gleaned by the sentencing court. So it was in the present case.

The second case was R v Barri [2004] NSWCCA 221 where and Greg James J stated in obiter:

[57] I add for myself, that the practice that was adopted in this case before the sentencing judge of tendering an agreed statement of facts by consent and the Crown then tendering volumes of miscellaneous statements and other material, which material on an analysis may well contain material additional to or contradictory of that in the agreed statement of facts, is likely to lead, as here, to challenges.

[58] The practice is entirely inconvenient. It is not to be expected that a busy sentencing judge with a busy list will have any opportunity to read through that material and reconcile it with the agreed statement of facts, nor, as here and in many other cases, are submissions made on the volumes of material such as to assist the trial

¹ FV v Regina [2006] NSWCCA 237 at [39]-[41]

judge to detect and draw to the attention of the parties any conflict. If the material is not to be read and used to ascertain the facts, it should not be tendered. If it is, it should accord with the agreed facts or if not, the judge assisted with an explanation as to how the difference might be reconciled. This is not to say that the Crown should not responsibly agree to succinct statements of facts encompassing the matters that could have been proved in evidence illustrating the offender's criminality. But it is to say that the tender of volumes of primary material can operate to inconvenience a proper sentencing process, embarrass the result, or subvert appropriate admissions and a plea. It is to be hoped this practice will not be followed in future.

The third case was R v Michael Arthur Falls [2004] NSWCCA 335 where Howie J affirmed his previous ratio from Palu:

[39] I have previously in Palu, above, expressed my views about the unsatisfactory situation where the Crown tenders material that either supplements or contradicts the agreed statement of facts. Greg James J expressed similar concerns in Barri. I also believe it to be unsatisfactory for an offender to give evidence as to the facts and circumstances of the offence where the Crown, with the consent of the defence, has tendered what purports to be an agreed statement of facts. Either the document tendered is an agreed factual basis upon which the court is to sentence the offender or it is not. If there is some area of the facts not covered in the statement and that is in dispute, then this should be made clear to the sentencing judge and the matter determined appropriately by evidence and submissions.

Submissions

Counsel should refer to these three authorities and submit that:

1. The Agreed Facts are sufficient to permit the court to exercise its sentencing discretion.
2. The extra material is inconsistent with the Agreed Facts and, rather than assisting the court, is likely to inconvenience a proper sentencing process, embarrass the result, or subvert appropriate admissions and a plea.
3. Either the document tendered is an agreed factual basis upon which the court is to sentence the offender or it is not.
4. If there is some area in dispute then the matter should proceed to a disputed facts hearing.
5. Public policy should be directed to the just, quick and cheap administration of justice and the prosecutor should not be allowed to go behind the Agreed Facts.

If you have any interesting issues, I'm available everyday.

Chris Nowlan
Barrister-at-Law
Phone: (02) 8251 0066
chris@chrisnowlan.com