

Pleas in Mitigation

ss3A,21,22 Crimes (Sentencing Procedure) Act (NSW) 1999

During fifteen years as a barrister, I have heard many lawyers enter pleas of guilty and make submissions on sentence. Most of them could have been greatly improved if the practitioners understood the principles and procedures that apply to sentencing. This article seeks to assist legal practitioners appearing in the Local Court of NSW.

Submissions on sentence are a large part of any criminal law practice and yet many practitioners seem to be unaware of what is expected of them. There is a clear procedure that magistrates follow during the sentencing exercise. They expect the following in this order:

1. A properly amended Facts Sheet
2. The offender's explanation for the offending
3. A list of statutory mitigating factors
4. The subjective educational, employment and social features of the offender
5. Character references to show good character
6. Proof of remorse and rehabilitation
7. Submissions on how the purposes of sentencing apply to this particular offender

1. The Facts Sheet

The first step in the sentencing exercise is to determine the circumstances of the offence. If the accused pleads not guilty, then these facts are established by evidence at the trial. But if the defendant pleads guilty, then there is no trial and no evidence. Instead, the defendant is required to allocute – that is, to say what he did. This is done by way of a police 'Facts Sheet'.

No guilty plea should ever be entered until after the best possible set of facts has been negotiated and agreed with the police. There are clear rules as to what can go into the Facts and what material should be excluded. Every word in the Facts should be parsed to see if it complies with the rules. For instructions on how to negotiate the Facts click [here](#).

If the Facts contain objectionable material, this will reflect poorly on the legal practitioner. While reading the Facts, the bench will make an assessment of whether the lawyer is competent or otherwise. An amended Facts sheet with no objectionable material will increase the advocate's credibility with the bench.

2. The Offender's Explanation

After reading the Facts Sheet and Criminal History, the bench will invite Defence counsel to make submissions. Those submissions should always start by addressing the Facts and giving the client's explanation. The court wants to hear how he was provoked into a fight, where he was driving to while drunk or how and why he started to use illicit drugs. This is always assisted by medical evidence regarding the client's mental health.

3. Mitigating Factors

This should be followed by listing all the mitigating factors that apply. The list of statutory aggravating and mitigating factors is found in section 21 Crimes (Sentencing Procedure) Act 1999. I have attached the list at the end of this article.

4. Subjective Features

After hearing about the Facts, the bench will expect to hear the subjective features of the offender - age, education, family and social background. This will include what he does for work, what he does in his spare time and what he does to benefit society. This can be anything from assistance to his family to coaching children's football.

Do not assume the magistrate knows anything about your client. If the client has a job, say so. If they need their driver licence for work, say so. If you don't say it, the bench doesn't necessarily know it.

5. Character References

The absence of character references looks extremely bad. It suggests that no-one will vouch for your client – not even his own family. Always obtain references and get them ahead of time so you can get them amended if necessary. The referee must state that they are aware of the offending and must not dispute the Facts. By all means, say the offending is out of character, but do not say it didn't happen.

6. Remorse & Rehabilitation

This should always start with a statement that the client feels ashamed, has apologized to the victim and paid for any damage.¹ His or her remorse is shown by his early plea of guilty for which he deserves a reduction in sentence.² This should be followed by an explanation of what he has done and is doing to rehabilitate himself.³ For example, traffic offenders do the Traffic Offender's Intervention Program, drug offenders attend rehabilitation, violent offenders undergo anger management training.

7. Purposes of Sentencing

The purposes of sentencing are found in section 3A Crimes (Sentencing Procedure) Act. They can be summarized as punishment, deterrence (general and specific) and rehabilitation. The bench will expect clear reasons why your client does not deserve further punishment. They will expect clear reasons why specific deterrence is not required for this particular offender. Finally, they will want to hear that your client is engaged in rehabilitation and is co-operating with it enthusiastically.

1 s21 (3)(i) Crimes (Sentencing Procedure) Act 1999

2 s22 Crimes (Sentencing Procedure) Act 1999

3 s21(3)(h) Crimes (Sentencing Procedure) Act 1999

Magic Words

It is tempting to use other people's submissions in your case. Only do this if you are 100% certain that they apply to your case. Too many lawyers quote barristers and make submissions that sound good but have no relevance to or, even worse, are at odds with, the Facts of the case. Seasoned barristers make it look easy because they have put in hours of work on submissions that take only a few minutes to deliver.

Put it in Writing

Sentencing submissions should have a clear structure and should be prepared ahead of time. If you have put in the time to properly prepare your submissions then it should be easy to print extra copies for the police and the magistrate. Written submissions impress everyone – the client, the police and the magistrate.

The client can see what he is paying for and can correct any errors. He also avoids the humiliation of having a humiliating experience recounted to a courtroom full of strangers. The police can raise any issues with you before the hearing. Most importantly, the magistrate will infer that you know what you are doing and have put in the time and effort to do the job right.

I'm available every day if you have any interesting issues.

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21A Crimes (Sentencing Procedure) Act (NSW) 1999

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(3) Mitigating factors

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- (a) the injury, emotional harm, loss or damage caused by the offence was not substantial,
- (b) the offence was not part of a planned or organised criminal activity,
- (c) the offender was provoked by the victim,
- (d) the offender was acting under duress,
- (e) the offender does not have any record (or any significant record) of previous convictions,
- (f) the offender was a person of good character,
- (g) the offender is unlikely to re-offend,
- (h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,
- (i) the remorse shown by the offender for the offence, but only if:
 - i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
 - ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),
- (j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,
- (k) a plea of guilty by the offender (as provided by section 22),
- (l) the degree of pre-trial disclosure by the defence (as provided by section 22A),
- (m) assistance by the offender to law enforcement authorities (as provided by section 23).