CHAPTER 21

SENTENCING

21.1 Sentencing in Solomon Islands, Kiribati and Tuvalu is governed by several sources: the provisions setting penal liability in the legislation creating each offence; some general provisions of the Penal Codes (mainly dealing with non-custodial options); some provisions of the Criminal Procedure Codes (dealing mainly with the sentencing powers of Magistrates Courts); and in certain important respects by common law. This chapter outlines the general process of sentencing and the general principles and methodology that shape sentencing in particular cases: these are matters governed mainly by common law. The chapter focuses on sentencing for the more serious offences that commonly lead to sentences of imprisonment.

Sentencing process and options

21.2 Following a conviction, a court must determine a sentence. This involves a separate proceeding from that of the trial. New arguments are made by counsel. The range of matters in issue is broader than for a trial and the rules for the admissibility of evidence are much looser. The Criminal Procedure Codes SI s 282; Ki/Tu s 269 simply provide: 'The court may, before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the sentence proper to be passed.' At common law, the prosecution is required to prove allegations of fact beyond reasonable doubt: see, for example*, Anderson v R* (1993) CLR 177, [1993] HCA 69. However, this standard does not apply to sentencing matters in Solomon Islands: Evidence Act SI s 12(3).

21.3 A sentence can be imposed only for an offence of which the person has been convicted. Therefore, where one offence is an aggravated form of another and the prosecutor wishes to argue that the aggravating factor was present, the aggravated offence must be charged. If it is not charged, the aggravating factor cannot be used to increase the severity of the sentence. For example, following a conviction for manslaughter, intent to kill cannot be treated as an aggravating factor in sentencing: murder should have been charged and proved at trial. In *Vakalalabure v The State* [2006] FJSC 8 at [55], the Fiji Supreme Court said:

> [I]t is a fundamental principle of our criminal law, inherited from England, that a person must not be punished except for offences for which he has been tried and convicted. It is a necessary corollary of this principle that a convicted person must not be sentenced for uncharged offences or matters of aggravation.

21.4 The purposes for which a sentence may be imposed are generally understood to be: just punishment; protection of the community; general and specific deterrence; rehabilitation of the offender; denunciation of the conduct; or a combination of these. Any sentence must be justifiable by reference to these recognised purposes. They are reflected in the statement in *Tii v R* [2017] SBCA 6 at [21]: 'A sentence should be crafted to attain the goals of punishment, deterrence and rehabilitation.'

21.5 Penal liability for each offence is determined either by the provisions creating that offence or, for some offences outside the Penal Codes, by general penalty provisions of the particular legislation. There are a few instances of mandatory penalties: for example, murder under the Penal Codes SI s 200; Ki/Tu s 193 carries a mandatory sentence of life imprisonment. Ordinarily, however, the prescribed penal liability is a maximum and a judge has discretion to impose a lesser sentence. The discretionary nature of sentencing is made clear through the formula: '*shall be liable to imprisonment for x years (or to a fine of y dollars)*'.

21.6 The sentencing options which may be available to a court include: a term of imprisonment to be served in custody; a term of imprisonment that is wholly or partly suspended; an order to pay a fine; a probation or supervision order; a compensation order; and discharge without punishment. Non-custodial sentences may be used even where an offence makes an offender liable to a term of imprisonment: SI s 24(3); Ki/Tu s 26 provide that a person liable to imprisonment may be sentenced to pay a fine. Terms of imprisonment for multiple offences are to be served consecutively unless a court directs otherwise: Penal Codes SI s 24(4); Ki/Tu s 27. However, in most instances, an order will be made for the sentences to be served concurrently: see **21.25**.

21.7 The severity of a sentence of imprisonment is a function of not only the sentence actually imposed (the 'head' sentence) but also the minimum period which must be served before the offender is eligible for release on parole.

- The Solomon Islands make an offender serving a life sentence is eligible for parole after 10 years, and for other sentences after 8 years: Correctional Services (Parole) Regulations 2014 s 5.
- In Kiribati, an offender serving a life sentence is eligible for parole after 10 years or after such other period as in fixed by the sentencing court, and for other sentences after one half of the sentence has been served: Parole Board Act 1986 s 11 as am. by Parole Board (Amendment) Act 2005 s 3.
- Tuvalu does not have a parole scheme.

Eligibility for parole does not necessarily mean that it will be granted. Release on parole is at the discretion of the Parole Board, which will take account of not only the circumstances of the offence but also factors such as the offender's behaviour in

prison.

21.8 In calculating the time to be served in prison, time spent in custody prior to trial is often treated as a period of imprisonment already served. This is a matter for the discretion of the court but substantial periods of pre-trial custody will generally be treated as time served: see *Roni v R* [2008] SBCA 8.

21.8 It is sometimes said that a court must choose the least severe option which will meet the recognised purposes of sentencing and that imprisonment is an option of last resort. Making imprisonment an option of last resort simply means that other options must be considered and rejected before a sentence of imprisonment is imposed. It does not mean that an offender must have a prior record involving other sanctions and that a first offender cannot be sentenced to imprisonment.

21.9 A sentence of imprisonment may sometimes be suspended, meaning that the sentence is served without the offender being held in custody. In Solomon Islands, the sentence may be suspended in whole or in part, whereas in Kiribati and Tuvalu provision is made only for the whole sentence to be suspended: SI/Ki s 44(1); Tu s 28A(2).

- The sentence must be for imprisonment for no more than two years: SI/Ki s 44(1); Tu s 28A(2).
- In Solomon Islands, sentences for offences involving the use or illegal possession of weapons are excluded from suspension: SI s 44(2).

The case must be one in which a term of imprisonment would be appropriate in the absence of a power of suspension: SI s 44(3); Ki s 44(2); Tu s 28A(3). In other words, a suspended sentence must be considered as an alternative to a term of imprisonment, not as an alternative to another non-custodial sanction such as a fine or a probation order.

21.10 A sentence is suspended for what in the Kiribati and Tuvalu Codes is called an 'operational period'. If the offender commits another offence punishable by imprisonment during the time of the operational period, the court has several alternatives under SI s 45; Ki s 44(3); Tu s 28A(5): order the original sentence of imprisonment to be served; impose a lesser term of imprisonment; extend the operational period; or make no order. An order to serve the original term of imprisonment Is the default option. It is provided in SI s 45; Ki s 44(3); Tu s 28A(5) that an order to serve the original term must be made unless it would be '*unjust to do so in view of all the circumstances*'.

Sentencing discretion and appeals

21.11 The type and magnitude of a sentence is usually a matter for the discretion of the judge. In *David Ironimo v R* (Solomons Unrep. Criminal Case No. 3 of 1998) at 3, Kabui J said:

> There are no hard and fast rules about the process of sentencing. There are many relevant factors involved. The position was nicely put by Ward CJ in *Joel Likilia & Allen Kokolabu v R* [1998/89] SILR at page 149 and I quote, 'Sentencing is not a process that follows exact mathematical rules. Circumstances and people vary and it is undesirable to consider such comparisons as more than a very imprecise guide.'

21.12 A judge therefore can, and usually will, choose a sentence below the maximum. The maximum sentence is reserved for cases of the worst sort of their type and is rarely imposed. For example, in *Tekaei v Republic* [2016] KICA 11, the Kiribati Court of Appeal said;

> [11] Sentencing for manslaughter is a difficult exercise because there is such a multiplicity of circumstances in which someone may cause the death of another by acting or omitting to do something unlawfully. There are consequently great differences in levels of culpability. Sentences therefore can vary considerably.
>
> [12] … It must be borne in mind that the maximum sentence for manslaughter is life imprisonment, although, as in other jurisdictions, that is rarely imposed for this offence.

In *Bae v State* [1999] FJCA 21, the Fiji Court of Appeal made the following comments about sentencing in manslaughter cases, despite the offence carrying liability to life imprisonment in Fiji at the time the case was decided:

> The cases demonstrate that the penalty imposed for manslaughter ranges from a suspended sentence where there may have been grave provocation to 12 years imprisonment where the degree of violence is high and provocation is minimal. It is important to bear in mind that this range covers a very wide set of varying circumstances which attract different sentences in different manslaughter cases. Each case will attract the appropriate sentence within the range depending on its own facts.

21.13 The discretion available to a sentencing judge does not, however, convey carte blanche for the expression of personal opinions about an appropriate sentence. Sentencing, like the exercise of any statutory discretion, is subject to various constraints. In *R v Melano* [1995] 2 Qd R 186 at 189, the Queensland Court of Appeal

said:

> [T]he court's discretion … is subject to inherent limitations; it cannot be exercised for a purpose other than that for which it is given, or by reference to extraneous considerations, and material considerations must be taken into account. And, of course, sentencing principles must be applied…

The principles that guide the exercise of sentencing discretion are derived mainly from the common law. See below, **21.16-21.27**.

21.14 Both the offender and the prosecution can appeal against a sentence: see **20.13**-**20.15**. No statutory criteria for allowing an appeal are specified. However, appellate courts have insisted that they should ordinarily interfere with the exercise of the trial judge's discretion only where the sentence is based on an error of principle or reasoning. As was noted at **20.24**, the Solomon Islands Court of Appeal in *R v Su'umania* [2005] SBCA 3 at [12], expressed principles that have been accepted throughout common law jurisdictions:

> It is well settled that this court will not interfere with the sentence imposed by the trial judge in the exercise of his discretion unless it is shown to be manifestly excessive or manifestly inadequate either because the judge has acted on wrong principle or has clearly overlooked or understated or overstated or misunderstood some salient feature of the evidence.

In *Lowndes v R* (1999) 195 CLR 665; 163 ALR 483, the High Court of Australia said in a joint judgment, at 672:

> [A] court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. This is basic. The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.

21.15 Some error of principle or reasoning might be disclosed in the sentencing judge's stated reasons. Alternatively, error might be inferred from the sentence itself. In order to be reviewable on the latter ground, the sentence must be 'manifestly inadequate' or 'manifestly excessive'. In *Skinner v. The King* [2013] HCA 32, (1913) 16 CLR 336 at 340, the High Court of Australia said:

> [A] Court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in apportioning the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. If

> the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not.

Sentencing principles

21.16 The exercise of sentencing discretion is structured by set of entrenched principles: the principles of individualisation, proportionality, consistency, and totality. In Solomon Islands, Kiribati and Tuvalu, these operate as common law principles.

21.17 A fundamental principle of sentencing is what might be termed *the principle of individualisation*. This is the principle that a sentence should be appropriate for all the features of the particular case, including not only the circumstances of and background to the offence but also the history and prospects of the offender. The sentencing process can involve a broad-ranging inquiry. This is quite unlike the trial process with its narrow concentration on whether the elements of the offence occurred and whether the elements of any defence were present.

21.18 The individualisation principle is an entrenched feature of the common law of sentencing. It is also reflected in the Fiji Sentencing and Penalties Act s 4(2), in an extensive list of factors which are to be taken into account in sentencing an offender in that jurisdiction:

> In sentencing offenders a court must have regard to —
> (a) the maximum penalty prescribed for the offence;
> (b) current sentencing practice and the terms of any applicable guideline judgment;
> (c) the nature and gravity of the particular offence;
> (d) the offender's culpability and degree of responsibility for the offence;
> (e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;
> (f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;
> (g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;
> (h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply

with any order for restitution that a court may consider under this Act;
(i) the offender's previous character;
(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and
(k) any matter stated in this Act as being grounds for applying a particular sentencing option.

The various factors fall into two broad groups. Characteristics of the offence are dealt with in paragraphs (a)-(e). Characteristics of the offender are covered by paragraphs (f)-(j). Although Solomon Islands, Kiribati and Tuvalu have no statutory counterparts to the Fiji list, similar considerations are taken into account as a matter of common law.

21.19 The individualisation principle does not mean that all factors have equal weight. In general, 'offence' factors are more important than 'offender' factors. Nevertheless, the offender's character is an important factor. In determining the character of an offender, a court may consider various aggravating or mitigating factors such as prior criminal record, contributions to the community and future prospects. 'General reputation', however, is not a matter for consideration in most jurisdictions. Ordinarily, 'character' is determined by reference to more reliable indicators.

21.20 A sentence should be proportionate to the gravity of the offence. This is generally called *the principle of proportionality*. The proportionality principle is often called the 'retributive' principle in works on the philosophy of punishment. This does not mean retribution in the sense of 'an eye for an eye'. The point is not that the punishment should mirror the crime but rather that the scale of punishment should be aligned to the scale of gravity for offences. The severest punishments should be imposed for the worst offences and so on down the scale. In the leading case of *Veen v R (No 2)* (1988) 164 CLR 465 at 478; [1988] HCA 14, it was said that 'the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed'. See the citations of *Veen* (No. 2) in *Gerea v R* [2005] SBCA 2 and *Angitalo v R* [2005] SBCA 5. Proportionality therefore is a principle that can limit as well as justify punishment.

21.21 The proportionality principle is central to discretionary sentencing. Proportionality as a principle of discretionary sentencing has long been recognised at common law. The principle is also reflected in the design of penal liability for offences. Differences in the maximum penalties prescribed for offences express the legislature's assessment of differences in the seriousness of the offences. Compare, for example, the different maximum penalties for assault and its various compounds: see **6.2**.

21.22 *Veen (No 2)* (1988) 164 CLR 465; [1988] HCA 14 is particularly important because it asserted the paramountcy of proportionality over considerations of social protection. In essence, the offence is more important than the offender's record or prospects. With respect to the past, it was said that 'the antecedent criminal history of an offender is a factor which may be taken into account … 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': CLR at 477. With respect to predictions of future dangerousness, it was said that 'a sentence should not be extended 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'. It was, however, also acknowledged that a court may have regard to 'the protection of society as a factor in determining a proportionate sentence'.

21.23 Proportionality may be a difficult issue when a person is to be sentenced for more than one connected offence, such as several offences arising from the same transaction (for example, assaults on a group of persons) or a series of offences of a similar type (for example, a spree of burglaries). Imposing a number of separate, cumulative sentences could create a crushing burden, disproportionate to the criminality involved. *The principle of totality* has been developed to avoid this outcome. The totality principle holds that a court sentencing an offender for several connected offences should not simply impose a number of separate, cumulative sentences. It should instead consider what would be an appropriate *aggregate* sentence. In *Talifai v R* [2011] SBHC 16, Palmer CJ said:

> Where two or more offences have been committed but are being considered together after the court has fixed what is the appropriate sentence for each offence, it needs to stand back and look at the total. It needs to consider whether it is substantially over the normal sentence appropriate to the most serious offence for which he is being sentenced. If it is, then it should be reduced to a level that is "just and appropriate". As well, if the total sentence would amount to a crushing penalty the court should also consider a reduction of the total.

21.24 *The principle of concurrency* is a sub-principle to the principle of totality. The Penal Codes SI s 24(4); Ki/Tu s 27 provide that terms of imprisonment for multiple offences are to be served consecutively unless a court directs otherwise. The principle of concurrency prescribes when a court should direct otherwise. Whether concurrent or consecutive sentences should be imposed has been said to be 'a discretionary judgment': *Gerea v R* [2005] SBCA 2. However, the principle is that multiple sentences are to be served concurrently rather than consecutively in the circumstances covered by the broader principle of totality: that is, sentences for several offences occurring in

a single transaction or sentences for a series of similar offences.

21.25 The principles relating to sentencing for multiple offences were summarised by the Solomon Islands Court of Appeal in *Angitalo v R* [2005] SBCA 5:

> The relevant principles were succinctly stated by Ward CJ in *Bade -v- The Queen* ([1988] SBHC 10; [1988-1989] SILR 121; 21 December 1988) as follows –
>
> > "When considering sentence for a number of offences, the general rule *must be* that separate and consecutive sentences should be passed for the separate offences. However, there are two modifications, namely –
> >
> > > (a) where a number of offences arises out of the same single transaction and cause harm to the same person there *may be* grounds for concurrent sentences; and
> > > (b) where the aggregate of the sentences would, if they are consecutive, amount to a total that is inappropriate in the particular case." [Emphasis added.]
>
> …
>
> Where the arithmetical total of consecutive sentences results in an effective sentence that is inappropriately harsh, the sentencing court can properly make the necessary adjustment by reducing one or more of the accumulated sentences so that the total term is not excessive.
>
> In some cases, for example, thefts that occur over an extended period of time, where each theft is a distinct crime (so that they do not form part of a single transaction) but where giving a consecutive sentence for each offence would lead to an aggregate sentence that is too harsh having regard to the total criminality, the Court might well think it appropriate to pass a number of consecutive sentences but order that the sentences imposed for the remainder should be served concurrently. Again, the crucial question will be whether, looking at the criminality of the offender as a whole, the overall sentence that is imposed is not inappropriately heavy or lenient.

21.26 In some instances where multiple offences are alleged, the prosecution will choose a limited number of 'representative counts' for prosecution. The cases selected will usually be those on which the evidence is strongest. A sufficient number will be charged to provide an adequate basis for sentencing. The remaining cases, however, will not be pursued in order to save time and resources. When this happens, a sentencing court is not entitled to impose a sentence in respect of the uncharged offences: *Mataunitoga v State* [2015] FJCA 70 at [24].

21.27 *The principle of consistency* is a fundamental common law principle of sentencing. The consistency principle is the principle that similar cases should be treated alike. In *R v Kada* [2008] SBCA 9 at [14], the Solomon Islands Court of Appeal said:

> It is important that, whilst acknowledging the independent discretion that must be exercised by each judge (or magistrate) in each case, the courts must strive for coherence and similarity of outcome in similar cases. Due allowance must be made for differences, both in objective circumstances and subjective features. At the same time, each judge or magistrate needs to consider what their judicial colleagues have done in other cases with a view to attempting to achieve a collegiate and coherent system of sentencing. Otherwise, the goal of equal justice will be frustrated and the administration of criminal justice tarnished by the perception that it represents the purely personal opinions of individual judges and magistrates and offenders whose offences are similar and personal situations much the same will suffer sentences that differ for no apparent rational cause, whilst similar sentences may be imposed where offences vary significantly in gravity and subjective features are very different. Of course, uniformity is not the goal: the circumstances of particular offences more often than not will vary greatly, as will subjective factors. The object is to achieve a coherent system of sentencing in so far as that can be achieved, whilst recognising and respecting the obligation of each judicial officer to exercise his or her independent discretion and judgment. Accordingly, it is not only proper but desirable that judges and magistrates should be informed of sentences that have been imposed by their colleagues and bear those outcomes in mind in considering his or her particular case. Over time, a pattern will emerge as the number of cases increases and, hopefully, a range of sentences can be discerned.

Perfect consistency is unattainable in a system of discretionary sentencing. Nevertheless, it can be increased by attention to precedents or by the use of sentencing guidelines: see **21.42-21.45**.

21.28 Parity between co-offenders is particularly important. A marked disparity will generate a 'justifiable sense of grievance': see *R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175. To avoid this, a higher sentence may have to be reduced on appeal, even if it is within the permissible range of options and would be acceptable if considered in isolation: *Green v R* (2011) 242 CLR 462; [2011] HCA 49. In that case French CJ, Crennan and Kiefel JJ said at [40]: '[I]n appeals against severity of sentence by sentenced persons, the parity principle may support reduction of an otherwise appropriate sentence to one which, save for the application of that principle, would be erroneously lenient.' The same principle was endorsed for prosecution appeals but subject to a

qualification for an appeal against a sentence so inadequate 'that it amounts to "an affront to the administration of justice" which risks undermining public confidence in the criminal justice system'. It was said at [42]: 'In such a case the Court would be justified in interfering with the sentence notwithstanding the resultant disparity with an unchallenged sentence imposed on a co-offender.'

Guilty pleas

21.29 Discounting sentences for guilty pleas is common in many jurisdictions. In *Siganto v R* (1998) 194 CLR 656; [1998] HCA 74 at [22], the High Court of Australia acknowledged and approved the general practice:

> [A] plea of guilty is ordinarily a matter to be taken into account in mitigation; first because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial.

In *Republic v Arawaia* [2013] KICA 11, [19], the Kiribati Court of Appeal endorsed what it called the practice in other jurisdictions of allowing a discount on a sentence of imprisonment for guilty plea 'in the range of 25% to 30% if made at the earliest opportunity'. In *Soni v R* [2013] SBCA 6, [17], the Solomon Islands Court of Appeal said: 'A maximum discount of one third may well be considered appropriate in some circumstances.'

21.30 The amount of any discount is determined by a number of factors including the stage when the defendant indicated that there would be a guilty plea. An early indication of a guilty plea should attract a bigger discount than one which is entered late in the proceedings, such as at the commencement of the trial when the prosecution has had to expend resources in preparation and witnesses have had to suffer the prospect of testifying.

21.31 There are two different views of the rationale for discounting sentences for guilty pleas, leading to potentially divergent views as to criteria for awarding discounts. These might be called 'the utilitarian view' and 'the moral view':

- *The utilitarian view*. On this view, the focus is on the beneficial consequences of a guilty plea. Discounts are given primarily to save the time and expense of trials and relieve witnesses from the stress and inconvenience of testifying, particularly victims of sexual abuse. The subjective state of mind of the offender (for example, the presence or absence of remorse) is immaterial; so, too, is whether a conviction would have been inevitable if the plea had been not guilty. This is the view which has generally been taken by appellate courts. See also the description of discounting as a 'purely utilitarian' exercise by Kirby

J in *Cameron v R* (2002) 209 CLR 339; [2002] HCA 6 at [66].

- *The moral view*. On this view, discounts are reserved for persons who deserve them. Discounting reflects a moral distinction between some persons making guilty pleas and other defendants. The focus is on the subjective state of mind of the defendant, particularly the reasons for pleading guilty. This view found favour with the majority of the High Court of Australia in *Cameron*.

21.32 The difference between these two approaches is perhaps clearest in the treatment of cases where the offender pleads guilty knowing that conviction is inevitable anyway. On the moral view, the offender may not deserve a discount. See *AG v Langston* [2019] KICA 9 at [17}:

> The plea of guilty was simply an acknowledgement of the inevitable having regard to the situation when the police arrived. The early plea was entitled to minimal weight in this case.

On this approach, special leniency may be thought appropriate only for an accused who is willing to facilitate the course of justice in more positive ways, such as by cooperating in the pursuit of co-offenders, or who shows remorse and acceptance of responsibility or concern about the impact on witnesses of having to testify. On the utilitarian view, however, the offender can still qualify for a discount because pleading guilty has saved the State the time, effort and cost of conducting a trial and saved witnesses from stress and inconvenience.

21.33 Pacific jurisdictions have often referred to both utilitarian and moral considerations, without taking a firm position in support of one or the other of the competing general approaches. For example, see *Roni v R* [2008] SBCA 8:

> While the principal basis on which a plea of guilty can be prayed in aid by way of mitigation [is] as demonstrating in some cases true remorse on the part of the offender, the extent to which it is taken into account is a matter for the court to determine and dependent on the facts of each case. For instance, if the accused had indicated that he would be entering a guilty plea at the committal proceedings, or well before commencement of the trial. There are other factors too which a court has to take into account, such as the interests of society and striking a balance when considering how much discount to consider. In some instances it may be difficult to see how a defence can be run successfully on a not guilty plea. In such situations he cannot expect much by way of a discount.

Sentencing methodology

21.34 Sentencing principles are not considered and applied afresh in every case. The principles underlie patterns of decisions in which they are largely taken for granted. They are articulated mainly in difficult cases where their application is troublesome and in cases where sentences are reversed on appeal for departure from principle. Other methodologies are used to resolve the mass of cases.

21.35 Pacific courts generally adopt an approach to sentencing involving several stages. It is commonly called a 'two-stage' approach, although additional stages may sometimes be involved. The term 'staged sentencing' may more accurately describe the method.

- At the first stage, the focus is on the seriousness of the offence that has been committed. A 'starting point' sentence for the offence is established in light of what happened and the maximum penalty for the offence. This reflects the proportionality principle.
- At the second stage, the focus switches from the offence to the offender. Aggravating and mitigating factors relating to the offender, considered apart from the offence itself, are considered in order to fine-tune the sentence in light of the individualisation principle.

Further adjustments may be made for any other relevant factors, such as a guilty plea and time spent in custody awaiting trial.

21.36 In *Tii v R* [2017] SBCA 6, the Solomon Islands Court of Appeal described the approach in this way:

> [22] The starting point should be consideration of the facts of the offence and of the appropriate range of penalty for the offence constituted by those facts. Then any aggravating circumstances should be identified.
>
> [23] The sentencing judge's attention should then turn to facts relating to the offender – his antecedents (including personal circumstances and criminal history, if any) and mitigating factors such as youth, remorse, or plea of guilty (including the circumstances in which the plea was entered…
>
> [27] There may be other matters to be taken into account in arriving at the sentence ultimately imposed. For example, if an offender has been in pre-sentence custody, the sentencing judge should consider making an appropriate allowance for that.

In this description of the process, a guilty plea is treated as a factor to be taken into account at the second stage. However, consideration of a guilty plea is sometimes treated as a separate stage.

21.37 In *Tekaei v Republic* [2016] KICA 11, the Kiribati Court of Appeal described the approach in a similar way but treated the consideration of aggravating and mitigating factors respecting the offender as separate stages:

> [9] …Sentencing judges will better guide themselves and assist this Court in the event of an appeal if they proceed by stages and so spell out how their sentences are constructed.
>
> [10] An appropriate way of doing this is as follows:
>
> > (a) First, assess the starting point that reflects the relative seriousness of the offending in the particular case and has regard to the maximum sentence. This would involve taking account of any aggravating and mitigating features relating to the actual events of the offending.
> >
> > (b) Secondly, adjust that starting point upwards if there are any aggravating factors external to the actual events of the offending, such as the convicted person's relevant previous criminal record. Relevance for this purpose includes recent offending of the same or similar nature which suggests the need for a sentence protective of the public.
> >
> > (c) Thirdly, allow a reduction for any mitigating factors, such as a guilty plea (taking account of when it was made), any genuine expression of remorse, prior good character, any co-operation with the police or the youth of the person being sentenced.
> >
> > (d) Fourthly, make a reduction for time spent in custody if the sentence is to run from the date of sentencing.
> >
> > (e) Fifthly, where the sentence is for a term of not more than two years' imprisonment, consider whether any suspension should be ordered in terms of s.44 of the Penal Code.

21.38 The starting point is the primary determinant of a sentence. Substantial additions to or deductions from the starting point can be made at the second stage. However, the starting point sets a framework which it can be hard to escape. In the Vanuatu case of *Gigina v Public Prosecutor* [2017] VUCA 15 at [32], it was observed: 'Overall it will be rare for mitigation deductions including guilty pleas to total 50% and even rarer for them to exceed 50%.'

21.39 The selection of a starting point was described as a 'value-judgment' in *R v Tiko* [2010] SBCA 7 at [23]:

> It is a value-judgment to be made on all the circumstances. It is, as has so often been said, an art rather than a science.

Two different approaches can be discerned in sentencing judgments.

21.40 In some cases, the judge simply identifies a starting point by making an overall assessment of the seriousness of the offence, taking account of the maximum penalty, any precedent sentences for offences of a comparable type and seriousness, and any aggravating or mitigating factors relating to the particular case. For cases where the offence has no clearly identifiable sentencing pattern or tariff, the Solomon Islands Court of Appeal said in *R v Kada* [2008] SBCA 9 at [15] that the starting point would have to be determined as a matter of 'first principles':

> It was necessary for the sentencing judge to consider the sentence from first principles, bearing in mind the maximum sentence applicable to cases in the worst category of case and the objective seriousness of the offence in respect of each victim, the level of responsibility of each offender and their subjective circumstances.

21.41 For offences with a clearly identifiable sentencing pattern or tariff, a starting point is sometimes determined in two steps. An initial starting point is derived from an analysis of sentences in previous cases that are comparable in type and seriousness. This reflects the consistency principle. The initial starting point is then adjusted to take account of any aggravating or mitigating factors relating to the events of the particular offence, reflecting the individualisation principle. This has been called 'the adjusted starting point' by the New Zealand Court of Appeal: see *Moses v R* [2020] NZCA 296 at [46].

21.42 Whichever way the starting point is derived, care needs to be taken to ensure that a particular factor is not taken into account more than once. 'Double-counting' must be avoided. For example, consider sentencing for an offence of robbery contrary to the Penal Codes SI s 293; Ki/Tu s 286 where a weapon was used. If the use of a weapon was taken into account in determining that there was liability to life imprisonment under sub-s (1) rather than 14 years under sub-s (2), it should not be treated additionally as an aggravating factor in the particular case. Similarly, if resulting injury was taken into account in identifying sentences for comparable cases, it should not be treated additionally as an aggravating factor. In Fiji, where reference to sentencing tariffs is common practice, concerns about double-counting have often been expressed by appellate courts: see, for example, *Senilolokula v State* [2018] FJSC 5 at [22]; *Kumar v State* [2018] 30 at [57]; *Nadan v State* [2019] FJSC 29 at [38]-[40].

21.43 In *Moses v R* [2020] NZCA 296, the New Zealand Court of Appeal examined different methods of calculating proportional discounts for guilty pleas within staged sentencing. The discount has often been calculated as a proportion of the sentence that would be imposed at the end of the second stage, after aggravating and mitigating factors relating the offender have been taken into account. However, this will make the size of the discount dependent on what adjustments have been made relating to the offender: in particular, the amount of the discount would be reduced by personal mitigating factors of the offender. The court in *Moses* could see no justification for reducing a discount because of such mitigating factors. The court therefore concluded at [46] that the discount should be applied to 'the adjusted starting point', that is, to the sentence calculated at the end of the first stage taking account of the nature of the offence and any aggravating or mitigating features associated with it.

21.44 The terms 'aggravating' and 'mitigating' factors can be ambiguous in the context of sentencing methodology:

- The terms can be used to refer to characteristics of the offence. For example, assessments of the gravity of an offender's conduct may take account of whether the person was a leader or a follower, how much injury was caused, and what was the person's state of mind and motivation. In this sense, aggravating and mitigating factors are taken into account at the first stage when the focus is on the offence.
- The terms can also be used to refer to characteristics of the offender, such has their age, prior record and prospects. In this sense, aggravating and mitigating factors are taken into account at the second stage when the focus is on the offender.

Both usages can be found in the cases.

21.45 An alternative approach to sentencing methodology is called 'instinctive synthesis'. This approach rejects separate stages and anything akin to mathematical calculations. Instead, according to the joint judgment of the High Court of Australia in *Markarian v R* (2005) 215 ALR 213; [2005] HCA 25 at [39], the correct methodology for sentencing is 'instinctive synthesis', in which a single intuitive judgment is made about how all the relevant factors bear upon an appropriate sentence. Although this approach has been favoured by the High Court of Australia, staged sentencing has been preferred in the Pacific.

21.46 Sentencing guidelines offer another way to structure sentencing discretion. Sentencing guidelines are general directions, usually issued by appellate courts, as to the type of sentences which may be appropriate in particular types of cases. In most jurisdictions where they are issued, trial judges are expected to take them into account but retain discretion over the final result in the individual case.

21.47 Sentencing guidelines can take different forms. Loose guidelines simply specify a range of sentencing purposes and/or a range of specific factors to be taken into account, or they rank or otherwise assign weights to the various purposes and factors. See, for example, the discussion of the proportionality principle by the High Court of Australia in *Veen (No 2)* above, **21.20**-**21.22**.

21.48 Tighter structure can be imposed by numerical guidelines which signify expectations about actual sentences for cases with certain features, usually objective features of the offence. For example, the Solomon Islands courts have adopted certain numerical guidelines for rape sentences which were developed by the English Court of Appeal in *R v Billiam* [1986] 1 WLR 349, 351. [1986] 1 All ER 985, 987-988:

> For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years. At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime on a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate. Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

See the endorsement of the 'five, eight and fifteen starting points' in *Soni v R* [2013] SBCA 6 at [10].

21.49 On the other hand, the court in *Soni* also cautioned against treating guidelines as binding rules. It approved the following passage from *R v Millberry* [2003] 1 WLR 546; [2003] 2 All ER 939 at [34]:

> It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.

This passage highlights the ultimate supremacy of judicial discretion in sentencing matters.