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Understanding what judges consider in sentencing

The increased community interest in sentencing cases is welcome, and should be accompanied by a better understanding of the principles that guide sentencing decisions

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For The Straits Times

There appears to be a marked increase in interest recently in local sentencing cases among the public in Singapore. As sentencing scholars Julian Roberts and Jan de Keijser, from the University of Oxford and Leiden University respectively, have pointed out, sentencing is a process where a court imposes a legal punishment on behalf of the community in which the crime is committed. Therefore, in my view, it can be a positive and encouraging development when members of a community become more interested in the sentencing system. To this end, it might be useful to take this opportunity to elaborate on three broad aspects of sentencing.

The first is that sentencing is a very fact-sensitive exercise. Courts around the world have observed that in sentencing, no two cases are ever exactly alike.

There will be factors that necessitate the imposing of a harsher sentence, and others that justify a less harsh punishment. The former factors are known as aggravating factors, and the latter are mitigating factors. The exact relevant aggravating and mitigating factors would almost always differ from one individual case to the next.

Take, for example, two offenders, A and B, who each committed the same offence in identical circumstances, but A has a criminal record while B is a first-time offender. Generally and intuitively, we would accept that A should be given a harsher punishment compared to B. Indeed, a criminal record is an accepted aggravating factor in law.

But the sentencing process does not end there – how much harsher should the sentence for A be? Suppose the appropriate punishment for B is one month's jail, how much longer should A's jail term be? Put another way, what would be a fair punishment for A?

The answer is far from straightforward. It depends on a range of other sub-factors. For example, how long ago was A's previous conviction? Was his previous offence a similar offence or a very different one? What steps has A taken to reduce the risk of reoffending since then? What punishment did A receive for his previous offence?

So what at first glance seems to be an easy question, turns out to be a lot more complicated. This applies to virtually every sentencing case and every aggravating and mitigating factor, because as highlighted above, no two cases are ever exactly alike. On occasion, the relevant sentencing factors may also pull in different directions.

In this regard, the Court of Appeal, our apex court in Singapore, explained in 2016 that "sentencing is an intensely difficult exercise, and that reasonable persons can, and often do, disagree as to what the appropriate sentence ought to be. That is why a wide margin of appreciation is given to sentencing judges called on to exercise their discretion".

The second broad point, which should not come as a surprise considering the above, is how much of relevant information we have about a case, as well as how close the context we are to an actual sentencing judge, can significantly affect what we feel should be the fair punishment in any given case.

There is empirical evidence on this. The Melbourne Criminology Sentencing Study, which was completed in 2007, involved four actual judges each presenting a real-life case to about 100 participants. The 400 or so participants were selected so that there was good representation in terms of age, gender, occupational status and so on. The judges spent around 40 to 55 minutes explaining the details of the case to the participants, which included the facts of the offence, the circumstances of the offender as well as the relevance of the different sentencing factors.

The judges then informed participants that they were consulting the community and asked each participant to individually and anonymously indicate what sentence the participant would impose. The participants were also told that each case involved a real offender who had to serve the sentence imposed and a real victim who had been harmed.

Taking into account previous studies done elsewhere, the results of the Melbourne study suggested that the amount of relevant information a person has about a case, and how close a context he or she is in compared with an actual sentencing judge, makes a difference to what one thinks would be a fair and just punishment. Moreover, the study also found that the punishment the participants said they would impose turned out to be generally less harsh than what the judges in the cases in fact meted out.

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All this segues very nicely to the third and final aspect, which relates to how much we know about the court's reasoning in passing a particular sentence on an offender in Singapore.

Our Criminal Procedure Code provides that when our courts deliver judgment, and this includes a judgment on sentence, the court can do so either orally or by written grounds of decision. In practice, written grounds of decision would set out the court's reasoning in its full detail. Oral judgments are by and large briefer, and may not touch on every single relevant point.

However, as a matter of practice as well, the State Courts will generally issue written grounds in a case only when either the prosecution or the accused has filed an appeal against the judgment. This is rightly so, given the heavy caseload that the State Courts have to manage every year.

As the Court of Appeal alluded to in a 2011 case, requiring courts to issue detailed written judgments in every case may increase costs and lead to delays. Only in a relatively small number of cases do either party see a need to appeal. Additionally, in many cases, the court's reasoning would already be obvious from the exchanges between the court and the parties. All this means that very understandably, the majority of sentencing decisions would be rendered by our courts only orally.

And each year, thousands of accused persons are sentenced by our courts. The media can report on only a small fraction of them. Furthermore, if rendered as a written judgment, a court's reasoning for why it passed a particular sentence would frequently run up to dozens of pages, sometimes hundreds.

But the space that any media can dedicate to reporting on a sentencing case is necessarily far more limited, so what is reported would invariably be nothing more than a snapshot of the court's reasoning, and what it took or did not take into account.

Importantly as well, just because a fact about the offence or the offender was mentioned by the prosecution or the defence in the case does not mean that the court took it into account or gave it much weight in its decision on sentencing. Very often, parties highlight certain facts merely to provide the court with a more complete picture of the case and the offender.

For example, defence counsel regularly point out on behalf of the client the hardships that the client's family might experience if the client is sentenced to a jail term. This is often picked up in news reports.

But, for better or for worse, a court will almost never actually factor that into its sentencing decision because it is established law since the 1990s that hardships to an offender's next-of-kin is a mitigating factor only in very exceptional cases.

That said, there is much helpful general information on sentencing available, such as that on common aggravating and mitigating factors, and what different sentencing options entail. These information can be found on the websites of our courts and the Attorney-General's Chambers.

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