

## Sentence Appeals in New South Wales: success rates and recent law

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### Introduction

Appeals against sentence for matters dealt with on indictment are not re-hearings. As McMurdo J put it in *R v Hughes*<sup>2</sup> “A sentencing hearing is not a rehearsal for another sentence hearing in this Court.” The law in this area is a curious mixture of common law and statute. Appeals are themselves a creature of statute<sup>3</sup> and “...the terms of the statutory grant of a right of appeal ...determine its nature.”<sup>4</sup>

Firstly, I will present an overall picture of appeals in New South Wales for the period 2000-2007. I then discuss the statute and common law which governs appeals against sentence for matters dealt with on indictment. The nature and ambit of the appellate jurisdiction has been a contentious and live issue in New South Wales of late. It is surprising that after nearly 100 years of severity appeals and over 85 years of Crown appeals that there are areas requiring judicial clarification. Finally, I propose to comment on the degree to which appeals can assist in achieving the object of consistency.

### Overview of appeals in New South Wales

#### *The overall appeal rate in New South Wales 2000-2007*

Judicial Commission sentencing statistics<sup>5</sup> for the period January 2000 to June 2007 reveal that 13.2% of all first instance sentencing cases dealt with on indictment were appealed.<sup>6</sup> 2.6% or 536 of all first instance cases were Crown appeals asserting that the sentence imposed was manifestly inadequate. 10.7% of all first instance cases were appeals against the severity of the sentence imposed. The success rates for each type of appeals is dealt with in turn below.

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<sup>2</sup> [2003] QCA 460 at [15]

<sup>3</sup> *Dinsdale v The Queen* (2001) 202 CLR 321 per Kirby J at [57] citing *Fleming v The Queen* (1998) 197 CLR 250 at 258-260 [17]-[21]

<sup>4</sup> *B v The Queen* [2007] HCA 51 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ at [7].

<sup>5</sup> The Principal Research Officer (Statistics), Judicial Commission calculated that there were 20,474 first instance cases and also took into account those appeals removed from JIRS following a successful conviction appeal (333 cases) or where the Court of Criminal Appeal refrained from intervening and remitted a sentencing matter to be dealt with again at first instance (18 cases).

<sup>6</sup> The total amount of appeals for the period was 2755. This figure includes 30 cases where both the Crown and the defence appealed. The overall figure falls slightly to 13.1% when the 30 cases are taken out.

## *Severity appeals*

**Table 1**

**Severity appeals (January 2000 to June 2007)**

Year	Severity appeals	Allowed	
	N	N	%
2000	305	124	40.7
2001	340	138	40.6
2002	330	150	45.5
2003	268	107	39.9
2004	280	123	43.9
2005	313	140	44.7
2006	255	105	41.2
2007 (to June)	128	46	35.9
	<b>2219</b>	<b>933</b>	<b>42.0</b>

(Source: Judicial Commission Court of Criminal Appeal database)

Table 1 shows that the success rate for severity appeals in New South Wales has hovered around the 40% mark for the period 2000-2007 with an overall success rate of 42% for the relevant period. An earlier study of the Judicial Commission for appeals for the period 1996-2000 found “Just over one-third (34.9%) of sentence severity appeals were successful”<sup>7</sup>

<sup>7</sup> *Conviction and Sentence Appeals in the New South Wales Court of Criminal Appeal 1996—2000* P Poletti, L Barnes *Sentencing Trends* No 22 February 2002 see conclusions. The study is accessible at <http://jirs.jc.nsw.gov.au/publish/sentrends/st22/index.html>

**Table 2****Severity appeals allowed for SNPP offences (to June 2007)**

Year	Severity appeals	Allowed	
	N	n	%
2004	6	5	83.3
2005	40	23	57.5
2006	56	32	57.1
2007 (to June)	27	11	40.7
	<b>129</b>	<b>71</b>	<b>55.0</b>

(Source Judicial Commission Court of Criminal Appeal database)

Table 2 shows the number and success rates for severity appeals where the principal offence was subject to a standard non-parole period in the Table found in s 54B of the *Crimes (Sentencing Procedure) Act*.<sup>8</sup> Generally speaking the effect of the legislation is to increase sentences for the offences listed in the Table. Although the numbers are relatively small the success rate in these appeals is higher.

***Crown appeals*****Table 3****Crown appeals (January 2000 to June 2007)**

Year	Crown appeals	Allowed	
	N	n	%
2000	84	42	50.0
2001	54	33	61.1
2002	78	48	61.5
2003	65	32	49.2
2004	101	52	51.5
2005	56	33	58.9
2006	75	46	61.3
2007 (to June)	23	15	65.2
	<b>536</b>	<b>301</b>	<b>56.2</b>

(Source Judicial Commission Court of Criminal Appeal database)

Table 3 show the number and success rate of Crown appeals for the period 2000-2007. The success rate for Crown appeals is consistently higher than the success rate for severity appeals. The data reveals an overall success rate for the period of 56%.

<sup>8</sup> For a commentary of this sentencing legislation see the *Sentencing Bench Book* at Standard Non-Parole Period Offences — Part 4 Division 1A at [7-900]. The publication is found at <http://jirs.jc.nsw.gov.au/benchbks/sentencing>

**Table 4****Crown appeals allowed for SNPP offences (to June 2007)**

Year	Crown appeals	Allowed	
	N	n	%
2004	8	6	75.0
2005	5	4	80.0
2006	24	17	70.8
2007 (to June)	9	8	88.9
	<b>46</b>	<b>35</b>	<b>76.1</b>

(Source Judicial Commission Court of Criminal Appeal database)

Table 4 shows the number and success rates for Crown appeals where the principal offence was subject to a standard non-parole period (described above). The overall success rate figure of 76% may partly explain the increased success rate in the years 2006-7 in Table 3.

### Common law and statute law on the subject

#### *Early statements about appeals*

The common law is the starting point of any discussion of sentencing appeals even though they are creatures of statute. Any historical discussion of sentence appeals in Australia must begin with Barton ACJ's statement in the 1913 case of *Skinner v The Queen*<sup>9</sup> made one year after the enactment of the *Criminal Appeal Act 1912* and over 20 years before the much quoted decision of *House v The King*.<sup>10</sup> Barton ACJ said with reference to English authority:

“...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.”

In the same case Isaacs J quoted Lord Chief Justice Alverston in *R v Sidlow* (1908) 1 Cr App R 28 “...if there was evidence that the Judge in passing sentence had proceeded on a wrong principle or given undue weight to some of the facts proved in evidence the Court would interfere; but it was not possible to allow appeals because members of this Court might have inflicted a different sentence more or less severe”.

*Skinner's* case represents only part of the current law on the subject. However the common law concepts of a manifestly excessive or manifestly inadequate sentence remain central to sentencing law.

<sup>9</sup> (1913) 16 CLR 336 at 337

<sup>10</sup> (1936) 55 CLR 499

*The House v The King (1936) 55 CLR 499 brake upon undue appellate disturbance*

In the case of appeals for matters dealt with on indictment it is well settled that the initial focus of the appeal court must be upon whether the judge committed an error of the type referred to in *House v The King*<sup>11</sup>. The High Court described this initial appellate inquiry in *Markarian v The Queen* [2005] HCA 25 at [25] in the following terms:

“As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* [(1936) 55 CLR 499], itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".”

*Markarian's* case made clear that the principles in *House* apply to severity and Crown appeals. Well before *Markarian's* case the High Court had repeatedly affirmed the importance of the authority of *House v The King* in sentencing appeals: *Cranssen v The King*<sup>12</sup>, *Harris v The Queen*<sup>13</sup>, *Power v The Queen*,<sup>14</sup> *Griffiths v The Queen*,<sup>15</sup> *Pearce v The Queen*,<sup>16</sup> *Lowndes v The Queen*,<sup>17</sup> *AB v The Queen*,<sup>18</sup> *Ryan v The Queen*,<sup>19</sup> *Wong v The Queen*<sup>20</sup> and *Dinsdale v The Queen*.<sup>21</sup>

Kirby J explained in *Dinsdale v The Queen*<sup>22</sup> that the principles in *House* are designed to operate to restrain appellate courts. Sentencing appeals are not re-hearings. His Honour said:

“...a brake is imposed upon undue appellate disturbance of primary decisions (and unwarranted appeals seeking that relief) by the necessity to identify an error that justifies and authorises appellate intervention.”

The rationale for this restrained approach was also adverted to by the Full Court of the High Court in *Lowndes v The Queen*<sup>23</sup> There, in a rare single judgment of the Court, the Court declared:

“...[t]he discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.”

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<sup>11</sup> (1936) 55 CLR 499

<sup>12</sup> (1936) 55 CLR 509 at 519-520

<sup>13</sup> (1954) 90 CLR 652 at 655

<sup>14</sup> (1974) 131 CLR 623 McTiernan J at 631

<sup>15</sup> (1977) 137 CLR 293 Jacobs J at 327

<sup>16</sup> (1998) 194 CLR 610 McHugh, Hayne and Callinan JJ at [46]

<sup>17</sup> *Lowndes v The Queen* (1999) 195 CLR 665 all members of the Court at [15].

<sup>18</sup> (1999) 198 CLR 111 McHugh J at [20] Kirby J at [104] Hayne J at [129]

<sup>19</sup> (2001) 206 CLR 267 Kirby at [90] and Hayne J at [136].

<sup>20</sup> (2001) 207 CLR 584 Gaudron, Gummow and Hayne JJ at [59] Kirby J at [105]

<sup>21</sup> (2001) 202 CLR 321 Gleeson CJ and Hayne at [4], Gaudron and Gummow JJ at [21], Kirby at [60].

<sup>22</sup> (2001) 202 CLR 321 at [58]

<sup>23</sup> (1999) 195 CLR 665 at [15]

The Court reiterated the “basic” principle “...that 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.”<sup>24</sup> The common law requires the appeal court to pay deference to the presiding sentencing judge. Sir Frederick Jordan’s “perusal of cold print” quote in *R v Geddes*<sup>25</sup> is apposite:

“...[the appeal court] should make the fullest allowance for the consideration that the trial judge has had an advantage denied to it, namely, that he has seen the witnesses, and, therefore, that he has had an opportunity of forming impressions which no perusal of cold print can afford. Unless some error in principle, or some such unreasonable disproportion, appears, I think that the case is not made out for revision of the sentence.”

Another policy reason behind the necessity for appellants’ to establish error is that opinions about sentencing differ. The High Court has always accepted that opinions about sentencing vary and that there is no such thing as a “correct sentence”. McHugh, Hayne and Callinan JJ put it this way in *Pearce v The Queen*:<sup>26</sup>

“Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision. [cf *House v The King* (1936) 55 CLR 499]. It is then, all the more important that proper principle be applied throughout the process.”

Kirby J said in *Dinsdale v The Queen* that “...a sentence involves the exercise of judgment and evaluation upon which minds can differ.”<sup>27</sup> As Maxwell P of the Victorian Court of Appeal has said extra-judicially, the word “sentence” is derived from the Latin *sententia* meaning mental feeling, opinion, judgment (See also The Shorter Oxford English Dictionary Vol II Oxford University Press 1973 at 1941). In Roman Law the word sentence meant, amongst other things, the opinion of a jurist on a given question or the decision of the judging organ in a criminal or civil trial. From the beginning the word “sentence” was linked to the notion of an opinion. The Shorter Oxford Dictionary records that the term “sentence” evolved to mean “[t]he judicial determination of the punishment to be inflicted on a convicted criminal. Hence, the punishment to which a criminal is sentenced.”

If a recent appellate statement be needed, Harrison J said in the Crown appeal of *R v Burns*:<sup>28</sup>

“Views on sentencing outcomes will almost always vary, depending significantly, although not exclusively, upon the perspective of the commentator.”

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<sup>24</sup> (1999) 195 CLR 665 at [15]

<sup>25</sup> (1936) 36 SR (NSW) 554 at 556

<sup>26</sup> (1998) 194 CLR 610 quoted with approval in *Markarian v The Queen* [2005] HCA 25 at [25]

<sup>27</sup> (2001) 202 CLR 321 at [58]

<sup>28</sup> [2007] NSWCCA 228 at [36]

### *Some comments about the application of House's case to sentencing appeals*

The appellate inquiry described by the Court in *Markarian* is a broad one. So far as specific error is concerned it can take the form of:

- an error in sentencing principle,
- a finding that cannot be supported by the evidence,
- a failure to take into account a relevant matter, or
- the taking into account of an irrelevant matter

Some have commented to me that the oft quoted passage in *House's* case<sup>29</sup> is elliptical and elusive and impenetrable. Most sentencing appeals simply proceed on the basis that the sentencer incorrectly applied sentencing principles to the case at hand.

### *Material error*

The concept of a material error is important in the application of the principles in *House*. The mistake must materially affected the sentence. Latham J elaborated upon on the concept of material error in *Baxter v R*:<sup>30</sup>

“An error is a "material error" if it has the capacity to infect the exercise of the sentencing discretion, regardless of whether it can be demonstrated that the error has in fact influenced the sentencing outcome. It is an error in the *House v The King* sense because the sentencing judge has taken into account an erroneous or irrelevant consideration. However, the error must be more than "trivial or immaterial" : *R v Jeremy Paul Price* [2005] NSWCCA 285 at [56] ; see also *Phillip Edward Smith v R* [2007] NSWCCA 138 at [30] to [34].

There may be errors in the sentencing process that are of such a technical nature that the error could not have affected the sentencing discretion, for example, where the error relates solely to an individual sentence which is wholly subsumed by sentences imposed for a number of offences : *Regina v Tadrosse* (2005) 65 NSWLR 740 ; [2005] NSWCCA 145 at [30]. Similarly, where an incorrect maximum penalty is applied in respect of only one offence among many offences carrying significantly higher maximum penalties, it is unlikely that such an error could be regarded as material.”

Thus it is said that if a sentencer is “...influenced by an irrelevancy to the extent that [their] reasoning process was infected” that is enough for the Court to consider if another sentence is warranted in law.<sup>31</sup>

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<sup>29</sup> (1936) 55 CLR 499 at 505 Dixon Evatt and McTiernan JJ said “It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.”

<sup>30</sup> [2007] NSWCCA 237 at [83]ff

### ***Failure to give proper weight to a factor***

A common submission of appellants is that the judge did not attribute sufficient weight to an issue at sentence. It is a submission that Spigelman CJ has not found to be particular appealing. In *R v Baker*<sup>32</sup>, Spigelman CJ said:

“The use of terminology such as "sufficient weight" highlights the difficulty for the Crown case. Questions of weight in the exercise of discretion are matters for the first instance judge. The circumstances in which matters of weight will justify intervention by an appellate court are narrowly confined.”

The Chief Justice returned to the topic in *Commissioner of Taxation v Baffsky*:<sup>33</sup>

“Submissions asserting that insufficient weight have been accorded to particular factors must always be treated with reserve by appellate courts, so as not to interfere impermissibly with the exercise of a discretion reposed in a first instance judge.”

### ***The continued role of the specific statute***

The errors referred to in *House* are only part of the appeal picture – specifically what can be termed loosely as the common law “error” part. Error alone is not enough to allow an appeal.<sup>34</sup> The second stage in the process is for the Court to apply the particular appeal provision which confers jurisdiction. The precise terms of the statute define the jurisdictional limits of a court of criminal appeal. In New South Wales that is s 5D for Crown appeals and s 6(3) for severity appeals of the *Criminal Appeal Act* 1912.

It is difficult in a federation of States to give a paper about sentencing appeals. Appeal provisions across the States were not created at the same time. For example Crown appeals against sentence were created in the States at different times and the statutory language employed by the respective Parliament’s differs across the States and territories. The statutory right for the Crown to appeal was conferred in New South Wales in 1924 for State offences and in 1932 for Commonwealth offences dealt with in New South Wales Courts<sup>35</sup> - decades ahead of Victoria (1971),<sup>36</sup> Western Australia (1975)<sup>37</sup> South Australia (1980)<sup>38</sup> and of course ACT and Northern Territory (1977).<sup>39</sup> Queensland (1939)<sup>40</sup> and Tasmania (1924)<sup>41</sup> were however closer to New South Wales.

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<sup>31</sup> *Diesing v R* [2007] NSWCCA 326 at [55]

<sup>32</sup> [2000] NSWCCA 85 at [11] referred to in *R v Davies* [2007] NSWCCA 178 at [29] and *Chung v R* [2007] NSWCCA 146 at [36].

<sup>33</sup> (2001) 122 A Crim R 568 at [9]

<sup>34</sup> *MRN v R* [2006] NSWCCA 155 at [147]

<sup>35</sup> For appeals against Commonwealth offences under s 5D of the *Criminal Appeal Act* 1986 see *Williams v The King* [No 2] (1934) 50 CLR 551 following the amendment to s 68(2) of the *Judiciary Act* 1903 (Cth) and *Peel v The Queen* (1971) 125 CLR 447.

<sup>36</sup> *Crimes Act* 1958 (Vic) s 567A.

<sup>37</sup> *The Criminal Code* 1913 (WA) s 688(2)(d).

<sup>38</sup> *Criminal Law Consolidation Act* 1935 (SA) s 352(2).

<sup>39</sup> *Federal Court of Australia Act* 1976 (Cth) ss 24(1)(b) and 28(5).

<sup>40</sup> *The Criminal Code* 1899 (Qld) s 669A.

<sup>41</sup> *Criminal Code* 1924 (Tas) s 401(2).

To take one example of the different language employed between States, in Western Australia the task of the Court in Crown appeals once error is established is described as follows: "...the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law ...(whether more or less severe) in substitution therefor as they think ought to have been passed..."<sup>42</sup> In New South Wales the equivalent Crown appeal provision provides *inter alia* the Crown may appeal and "...the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper." The wording of the Western Australian Crown appeal provision is very close to the severity appeal provision found in s 6(3) of the *Criminal Appeal Act* 1912 (NSW).

The essential point is that these statutes have a real and decisive role to play in sentence appeals. In New South Wales establishing error in the sentencing process is not, alone, a sufficient basis for allowing a severity appeal. Under s 6(3) of the *Criminal Appeal Act*, before the Court can proceed to set aside a sentence, it must form the opinion that "... some other sentence, whether more or less severe, is warranted in law and should have been passed ..." (see further discussion below)

***Is it a pre-condition of appellate intervention that the sentence is shown to be "manifestly excessive" or "manifestly inadequate"?***

The concepts "manifestly excessive" and "manifestly inadequate" referred to by Barton ACJ in *Skinner* (quoted earlier) have always been key concepts in sentencing appeals. But both constitute only the last form of error referred to in *House* - i.e the result embodied in the order is plainly unjust.<sup>43</sup> Is it a pre-condition for intervention by a court of criminal appeal in a sentence appeal that the sentence is shown to be manifestly inadequate or manifestly excessive? The answer to that question is not as straightforward as it appears.

### ***Crown appeals***

The New South Wales Director of Public Prosecutions Nicholas Cowdery QC has posed the question whether the High Court in the above passage in *Markarian* at [25] (quoted earlier) by the use of the disjunctive "*or*" ("Or if specific error is not shown...") suggested that it is enough for the appellate court to interfere with the original sentence in a Crown appeal if the Crown establishes a specific error. That is, in a Crown appeal under s 5D the Crown can either establish that a sentence is manifestly inadequate *or* the judge has committed a specific error (referred to in *Markarian* at [25]). In other words the Court's jurisdiction to intervene is enlivened without showing the sentence itself is manifestly inadequate. This interpretation of the Crown appeal jurisdiction has been rejected twice by the NSW Court of Criminal Appeal both before and after *Markarian's* case. Simpson J expressly rejected the proposition in the case of *R v Reynolds*:<sup>44</sup>

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<sup>42</sup> *Criminal Code* (WA), s 689(3) *Dinsdale v The Queen* (2001) 202 CLR 321 Kirby J at [52].

<sup>43</sup> *Markarian v The Queen* [2005] HCA 25 at [25]

<sup>44</sup> [2004] NSWCCA 51 at [26] cited in *R v Hoskins* [2004] NSWCCA 236 at [45]

“Identification of specific error alone is not sufficient to warrant upholding a Crown appeal; the Crown must go further and show that (possibly in the light of, or as a result of, the error) a manifestly inadequate sentence was imposed.”

After *Markarian* in *R v Janceski*<sup>45</sup> Hunt AJA said:

“The mere demonstration by the Crown of legal error by the sentencing judge in this case does not throw the sentence open for redetermination unless the sentence he imposed is itself objectively manifestly inadequate.”

Added to these cases is the statement of Rothman J in *R v AA*:<sup>46</sup>

“Manifest inadequacy of a sentence is a necessary, but not always sufficient, condition for a successful appeal by the Crown.”

The terms of s 5D(1) do not require that the Crown specifically establish in every case that the sentence is manifestly inadequate.<sup>47</sup> The High Court decision of *Dinsdale v The Queen*<sup>48</sup> was itself a Crown appeal to the Western Australian Court of Criminal Appeal. The High Court appears to envisage that the Crown is not restricted to an assertion of manifest inadequacy.<sup>49</sup> Some may find this surprising. However the leniency or otherwise of the sentence imposed at first instance is certainly a matter that can be taken into account by the appeal court in the exercise of its residual discretion not to intervene in cases where the Crown has established a specific error other than manifest inadequacy.

### ***Severity appeals - the application of s6(3) of the Criminal Appeal Act 1912***

Section 6(3) of the *Criminal Appeal Act* (NSW) provides:

“On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefore, and in any other case shall dismiss the appeal.”

The Court of Criminal Appeal held in the five judge bench case of *R v Simpson*<sup>50</sup> that s 6(3) requires the Court to form a positive opinion that “some other sentence ... is warranted in law and should have been passed.” Spigelman CJ said the formation of this opinion is an “...essential pre-condition for the exercise of the power to 'quash the sentence and pass such other sentence in substitution...”<sup>51</sup>

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<sup>45</sup> [2005] NSWCCA 288 at [25] Spigelman CJ and Howie J agreeing

<sup>46</sup> [2006] NSWCCA 55 at [29]

<sup>47</sup> Section 5D(1) of *Criminal Appeal Act* 1912 provides: "The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper."

<sup>48</sup> (2001) 202 CLR 321 Gleeson CJ and Hayne at [5], Gaudron and Gummow JJ at [24] and Kirby J at [58].

<sup>49</sup> Gleeson CJ and Hayne at [5], Gaudron and Gummow JJ at [24] and Kirby J at [58]. See also the approach taken in *Baxter v The Queen* [2007] NSWCCA 237 at [14].

<sup>50</sup> (2001) 53 NSWLR 704 at [79]

<sup>51</sup> *R v Simpson* (2001) 53 NSWLR 704 at [79]

The question at hand is whether the court can form such an opinion without finding that the original sentence is manifestly excessive. Hunt AJA in *R v Johnson*<sup>52</sup> said *Simpson's* case did *not* hold that the Court would refuse to intervene under s 6(3) unless it formed the view that the sentence imposed was manifestly excessive. *Johnson's* case was subsequently quoted with approval by Simpson J in *R v Price*.<sup>53</sup>

“...in *Johnson*, at [29], this Court rejected a submission that the consequence of the decision in *Simpson* is that the court will never intervene unless the sentence imposed at first instance is shown to have been manifestly excessive (or manifestly inadequate).

That leaves open the question of precisely what it is necessary for an applicant for leave to appeal against sentence to establish before this Court can form the s6(3) opinion. Something less than manifest excess or manifest inadequacy will suffice; but the demonstration of error in the sentencing process, is not, of itself, sufficient.”

This aspect of *Johnson's* case was affirmed in recently in *Baxter v R*.<sup>54</sup> However Hunt AJA went on in *Johnson's* case to say of s 6(3) :

“In cases where the error is apparent [ie a specific error as referred to in *House*], the Court must first consider whether the sentence imposed is outside the appropriate range for the circumstances of the particular case unaffected by that error and, if it is, determine for itself what sentence is warranted in law in substitution for that sentence.”

In *R v Baxter*<sup>55</sup> the Court disapproved of this approach. The Court held that it is not a pre-condition to the formation of the opinion in s 6(3) for the Court to determine whether the sentence is "outside the appropriate range".<sup>56</sup> Once error is established s 6(3) requires the Court to re-exercise the sentencing discretion. In forming the opinion referred to s6(3) the Court of Criminal Appeal “...must do so by reference to the facts as they exist at that time, insofar as the Court permits evidence of those facts to be placed before the Court.”<sup>57</sup> The Court can take into account post-sentence conduct of the applicant once error has been established.<sup>58</sup> Spigelman CJ made clear in *Baxter* that it is wrong for the Court to:

“...proceed as if the identification of error created an entitlement on the part of an Applicant to a new sentence, for example, by merely adjusting the sentence actually passed to allow for the error identified. That would be to proceed on the assumption that the sentencing judge was presumptively correct, when the Court has determined that the exercise of the discretion had miscarried. Section 6(3) is directed to ensuring that the Court of Criminal Appeal does not proceed in that manner, but re-exercises the sentencing discretion taking into account all relevant statutory requirements and sentencing principles with a view to formulating the positive opinion for which the subsection provides.”<sup>59</sup>

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<sup>52</sup> [2005] NSWCCA 186 at [29]

<sup>53</sup> [2005] NSWCCA 285 at [52]

<sup>54</sup> [2007] NSWCCA 237; (2007) 173 A Crim R 284 at [19]

<sup>55</sup> [2007] NSWCCA 237; (2007) 173 A Crim R 284 at [16]

<sup>56</sup> [2007] NSWCCA 237; (2007) 173 A Crim R 284 at [16]

<sup>57</sup> [2007] NSWCCA 237; (2007) 173 A Crim R 284 at [10]

<sup>58</sup> *Douar v R* [2005] NSWCCA 455; (2005) 159 A Crim R 154

<sup>59</sup> [2007] NSWCCA 237; (2007) 173 A Crim R 284 at [19]

The appellate court itself must judge whether or not the sentence actually passed was "warranted in law" – it is not "answered from the perspective of the original sentencing judge alone".<sup>60</sup> The question is whether the Court, after re-exercising the sentencing discretion, "*taking into account all relevant statutory requirements and sentencing principles*", is of the view that some lesser sentence is warranted in law.<sup>61</sup>

The High Court in *B v The Queen*<sup>62</sup> said the phrase "is warranted in law" suggests a focus on the law at the time the sentence was passed:

"The terms of s 6(3) of the *Criminal Appeal Act* indicate that the Court of Criminal Appeal is to look to the sentence that should have been passed having regard to what the law warranted. The better view is that the phrase "is warranted in law" which appears in s 6(3) assumes no change in the relevant law between the imposition of the sentence and the determination of the appeal against it. The provision in the *Criminal Appeal Act* with respect to the method and time for the making of appeals (s 10) establishes a system for the timely institution and prosecution of appeals. Section 6(3) is to be read in that context."

The approach taken in *Baxter* is the same as that taken by the Victorian Court of Appeal to that State's similarly worded severity appeal provision.<sup>63</sup> Callaway JA explained the position in *DPP (Cth) v Gaw*<sup>64</sup>

"In re-exercising the discretion, which might involve determining that no different sentence should be passed, the Court of Appeal takes account of the law in force now and the facts that are now established. That rule is important if the law changes between the time of sentence and the disposition of the appeal. It also permits the reception of evidence, on re-sentencing, that would not otherwise be admissible. As the Court of Criminal Appeal explained in *R. v. Carroll* [1991] 2 V.R. 509 at 511]:

"The language of s.567A(4) is almost exactly the language of s.568(4) which deals with the duty of the court on an appeal against sentence by a person convicted. If a sentencing judge has fallen into error according to the law at the time when he passed sentence, this court has always regarded it as its duty to intervene. When it does so, it regards it as its duty to pass such sentence as it thinks fit in accordance with the law at the time when it substitutes its sentence for the sentence originally passed. This has been the invariable practice of the court. It is a practice which enables the court to substitute a different sentence when some event occurs between the original sentencing date and the date when this court has to decide an appeal which demands some alteration in the sentence imposed. In such a case there may be no

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<sup>60</sup> [2007] NSWCCA 237; (2007) 173 A Crim R 284 at [17]

<sup>61</sup> *Baxter v R* [2007] NSWCCA 237; (2007) 173 A Crim R 284 at [19].

<sup>62</sup> *B v The Queen* [2007] HCA 51 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ at [36]

<sup>63</sup> Section 568(4) of the Crimes Act 1958 (Vic) provides: "On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed or a different order made, quash the sentence passed at the trial and pass such other sentence or make such other order warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed or made, and in any other case shall dismiss the appeal."

<sup>64</sup> [2006] VSCA 51. *Gaw's* case was cited with approval in the severity appeal of *R v Ahmed* [2006] VSCA 200 at [24]

change in the law, but simply a change in the relevant facts. The principle however is the same.”

The Queensland Court of Appeal applies the law as it stood at the time the appellant was sentenced. The severity appeal provision in that State is found in s 668E(3) of the *Criminal Code*<sup>65</sup>. It is worded similarly to the New South Wales and Victorian provisions. In *R v Cornale*<sup>66</sup> the Court of Appeal held that the terms of s. 668E(3) restricted the Court to the law as it stood at the time of sentence. The more recent decision of *R v Hughes*<sup>67</sup> affirmed the holding in *Cornale*: “...that this Court's power under s 668E(3) was limited to the powers of a sentencing court according to the law at the time of the sentence.”

### **Miscarriage of justice as a basis of intervention on appeal**

At common law an appeal court may intervene and re-sentence even though error has not been established in order to avoid a miscarriage of justice occurring. These are exceptional cases. Generally events occurring after sentence are a matter for the Executive, not the appellate court. In Victoria Kellam JA expressed the position in that State recently in *R v Males*<sup>68</sup> with reference to previous authority:

“...the law is that evidence of an event occurring after sentence is admissible in the court's discretion in order to avoid a miscarriage of justice if it shows the true significance of a relevant circumstance that existed at the time of sentence, even though its existence was not then known [*R v Eliassen* (1991) 53 A Crim R 391; *R v Babic* [1998] 2 VR 79 at 81; *R v WEF* [1998] 2 VR 385 at 388-9]”

Many of these cases have involved the prisoner's health.<sup>69</sup> Barr J said in *Springer v R*:<sup>70</sup>

“...where an offender has been sentenced on the basis of a crude or imperfect understanding of an acknowledged illness then suffered, appellate courts have received evidence which refines or perfects knowledge of that illness and of its effect on the appellant so as to show that the sentencing court ought to have imposed a more lenient sentence...”

McClellan CJ at CL summarised the New South Wales position in *Springer v R*<sup>71</sup> [extensive references to authority excluded]

“...there are exceptional cases where, although error in the original sentence cannot be demonstrated, evidence of post sentencing events will be received. ... Examples include:

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<sup>65</sup> “On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.”

<sup>66</sup> (1993) 2 Qd R 294 at 296

<sup>67</sup> *R v Hughes* [2003] QCA 460 at [16]

<sup>68</sup> [2007] VSCA 302 at [38]. The issue is also discussed in *R v Wilshaw & Lowe* [2001] VSCA 35

<sup>69</sup> *Springer v R* [2007] NSWCCA 289 at [30]

<sup>70</sup> [2007] NSWCCA 289 at [30]

<sup>71</sup> [2007] NSWCCA 289 at [2]ff. See also Latham J's discussion in *Stumbles v R* [2006] NSWCCA 418 at [7]ff

- Evidence which shows that the applicant's treatment in custody has been quite different to the expectation from the evidence led before the sentencing judge.... That evidence may demonstrate that the basis upon which the sentencing discretion was exercised has been thwarted.
- Evidence which shows that the sentencing judge has been unwittingly misled as to some material fact or significant aspect of the evidence at the time of sentencing. For example fresh evidence which shows that the applicant had, as at the time of sentencing, given more assistance than the police evidence had revealed to the sentencing judge....
- Evidence of circumstances relevant to the sentence which, although in existence at the time of sentencing, were not discovered until after the sentence had been imposed. For example, where the offender was only found to be suffering from AIDS after sentence but was obviously infected at the time of sentence ... A similar approach may be taken when, although symptoms may have been present their significance may not have been appreciated at the time of sentencing ....
- Evidence of facts or events occurring after sentencing, which show the true significance or provide the basis for a full appreciation of facts in existence at the time of sentencing....
- Evidence which demonstrates that the sentencing judge has drawn inferences on a misunderstanding of tendered medical evidence...
- Evidence indicating that the offender knew of the existence of facts, but did not realise their significance at the time of sentencing and could not inform the legal advisers of them..."

### **Appeals and ensuring consistency of sentencing outcomes**

Appeals are the formal method to correct sentencing errors including manifestly inadequate or excessive sentences. It is instructive to begin this topic with a quote from McHugh J in *Everett v The Queen*<sup>72</sup>

“Uniformity of sentencing is a matter of great importance in maintaining confidence in the administration of justice in any jurisdiction. Sentences that are higher than usual create justifiable grievances in those who receive them. But inadequate sentences also give rise to a sense of injustice, not only in those who are the victims of the crimes in question but also in the general public. Inadequate sentences are also likely to undermine public confidence in the ability of the courts to play their part in deterring the commission of crimes.”

In the case of Crown appeals they are a blunt device to correct inadequate sentences and to achieve consistency in imposing sentences. In *R v Whyte*<sup>73</sup> Spigelman CJ said:

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<sup>72</sup> (1994) 181 CLR 295 at 306

<sup>73</sup> (2002) 55 NSWLR 252 at [185]–[186].

“If the frequently stated assertion of the importance of consistency is to rise above the level of empty rhetoric, something more than the system of Crown appeals has been shown to be required.”

In *R v Jurisic*<sup>74</sup> Spigelman CJ had said guideline judgments were needed in appropriate cases because of the inherent limitations of Crown Appeals:<sup>75</sup>

" Public criticism of particular sentences for inconsistency or excessive leniency is sometimes justified. Courts of criminal appeal operate under constraints which do not ensure that such criticism is necessarily allayed by the usual case by case appellate process. Appeals must be initiated by the Crown. If initiated they are regarded as exceptional and require identification of an error in the exercise of discretion. If upheld, the appellate court is constrained in the sentence it can impose by the principle of double jeopardy.”

In an extra-curial address<sup>76</sup> a year after *Jurisic* Spigelman CJ elaborated:<sup>77</sup>

“There is one significant impediment to the ability of our traditional system of appeals achieving the objective of consistency. Our system of appeals operates in a distinctly different way with respect to appeals against severity, from the way it operates with respect to Crown appeals against leniency. Wherever a trial judge sentences in a manner that can be described as inconsistent with that of other trial judges by being too harsh, the appellate court will correct the error without any restraint on its doing so. In the case of Crown appeals however, there are significant restraints which do not operate in the case of severity appeals.”

Severity appeals are, on the other hand, a more effective device to achieve the object of consistency. Ordinarily in those appeals the Court re-exercises the sentencing discretion once error is established unrestrained by the double jeopardy principles.

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<sup>74</sup> (1998) 45 NSWLR 209.

<sup>75</sup> (1998) 45 NSWLR 209 at 221.

<sup>76</sup> The National Conference of District and County Court Judges 1999.

<sup>77</sup> JJ Spigelman CJ, "Sentencing Guideline Judgments" (1999) 73 *The Australian Law Journal* 876 at 878.