NATIONAL JUDICIAL COLLEGE OF AUSTRALIA CONFERENCE

"SENTENCING: NEW CHALLENGES"

THE JURISPRUDENCE OF THE HIGH COURT OF AUSTRALIA ON SENTENCING

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Until the latter part of the last century, the High Court displayed relatively limited interest in the development of sentencing principle. By and large the Court took the view that sentencing was something better left to State and Territory courts of criminal appeal who had contemporary knowledge of the sentences imposed in comparable cases and of other local factors affecting sentencing[1]. The Court's usual response to an application for special leave to appeal against sentence was to reject it as not involving either a question of law or principle of general importance or a gross violation of the principles which ought to govern the exercise of the judicial discretion in imposing sentence[2]. The Court almost invariably refused to countenance excessiveness of sentence as a sufficient ground of appeal[3].

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1 See for example *Neal v The Queen* (1982) 149 CLR 305 at 323 per Brennan J; *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Gibbs CJ.

2 See *Whittaker v The King* (1928) 41 CLR 230 at 235 per Knox CJ and Powers J, 253-254 per Gavan Duffy and Starke JJ (Isaacs J and Higgins J dissenting at 239, 253); *White v The Queen* (1962) 107 CLR 174 at 176 per Dixon CJ, McTiernan, Kitto, Windeyer and Owen JJ; *Veen v The Queen* (1979) 143 CLR 458 at 461 per Stephen J, 467 per Mason J, 473 per Jacobs J, 492 per Murphy J, 497 per Aickin J; *Neal v The Queen* (1982) 149 CLR 305 at 309 per Gibbs CJ, 320-321 per Wilson J, 322-323 per Brennan J.

3 See *Colefax v The Queen* [1962] ALR 399. See also *Neal v The Queen* (1982) 149 CLR 305 at 320-321 per Wilson J.

Change began in the early 1980's with the reform of the High Court's jurisdiction and the introduction of the statutory criteria for the grant of special leave prescribed by s 35A of the *Judiciary Act* 1903 (Cth). As Mason J observed in *Lowe v The Queen*[4], albeit in that case in dissent, the reform of the Court's jurisdiction and introduction of the criterion for the grant of special leave specified in s 35A(b) (of whether the interests of justice, either generally or in the circumstances of the particular case, require consideration by the Court of the judgment to which the application relates) meant that the discretion to grant or refuse special leave could no longer be reduced to a formula or rigid categories. It requires the Court to make allowance for exceptional cases of manifest injustice or manifest public importance, whether or not falling into previously recognised categories. And as Mason J stated[5], in terms echoing earlier observations of Jacobs J in *Griffiths v The Queen*[6], just as consistency in punishment reflects a notion of equal justice which is fundamental to any rational and fair system of criminal justice, inconsistency in punishment bespeaks unfairness and unequal treatment which is productive of an erosion of public confidence in the integrity of the administration of justice[7].

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4 (1984) 154 CLR 606 at 611.

5 *Lowe v The Queen* (1984) 154 CLR 606 at 610-611.

6 (1977) 137 CLR 293 at 327.

7 See and compare *Wong v The Queen* (2001) 207 CLR 584 at 591 [6] per Gleeson CJ.

As Kirby P (as his Honour then was) later observed in *R v Hayes*[8], the subsequent renewed emphasis on consistency in sentencing impelled Australian criminal courts towards a more careful examination of analogous sentences in apparently like cases, and, thereby, more firmly to the view that the proper role of sentencing appeals is to enable appellate courts to establish and maintain adequate standards of punishment for crime; to enable the idiosyncratic views of individual judges as to particular crimes to be corrected; and, occasionally, to correct a sentence so disproportionate to the seriousness of the crime as to shock the public conscience. In turn, that burgeoned into a developing body of sentencing law which the High Court could hardly ignore[9].

Jurisprudential developments in the era of the Mason and Brennan High Courts

Over the next 20 years or so, the Mason High Court and then the Brennan High Court handed down a succession of judgments which defined and developed a range of previously unarticulated sentencing considerations. They included, in particular, a more refined understanding of the interplay between proportionality and community protection; a systematic approach to the resolution of

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8 (1987) 29 A Crim R 452 at 467.

9 See generally The Hon Justice Michael Kirby AC CMG, "Why has the High Court become more involved in criminal appeals?", (2002) 23 *Australian Bar Review* 4.

the competing demands of cumulation and totality; an expanded conception of the importance and breadth of the parity principle; a principled approach to the setting of non-parole periods; and a more developed sense of the need to avoid double punishment and its implications. But, as might be expected with the development of discretionary criteria, progress in those respects was not always consistent or necessarily always in the same direction.

(i) Proportionality and community protection

One example is the difference in approach between *Veen v The Queen*[10] ("*Veen [No 1]*") and *Veen v The Queen [No 2]*[11] ("*Veen [No 2]*") as to the balance to be struck between proportionality and the need for community protection.

As may be recalled, in *Veen [No 1]*, the High Court placed community protection very much second to the idea that a sentence should be proportionate to the crime. Veen was aged 20 at the time of his offending and had brain damage due to alcohol abuse. He was picked up by a man as a prostitute and, when that man refused to pay Veen for his services, Veen stabbed him to death. Veen was convicted of manslaughter, on the ground of diminished responsibility, and sentenced to life imprisonment for the protection

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10 (1979) 143 CLR 458.

11 (1988) 164 CLR 465.

of the community. Following an unsuccessful appeal to the New South Wales Court of Criminal Appeal, he appealed against sentence to the High Court[12], who were unanimous in the view that the protection of society against the risk of recidivism did not justify imposing a sentence of greater length than was proportionate to the crime. The Court allowed the appeal and resentenced Veen to 12 years' imprisonment, with the result that he was released on parole, four years later, in 1983.

In the year that he was released, Veen stabbed another man, repeatedly, to death; and, on that occasion, without any apparent provocation. Once again, he was convicted of manslaughter, on the ground of diminished responsibility, and sentenced to life imprisonment on the basis that he was a continuing danger to society.

Having failed in an appeal to the New South Wales Court of Criminal Appeal, Veen once again appealed against sentence to the High Court, on the ground that the length of sentence was disproportionate to the gravity of his crime. This time, however, the majority dismissed the appeal. All members of the Court reiterated[13]

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12 *Veen v The Queen* (1979) 143 CLR 458 at 467 per Stephen J, 468 per Mason J, 482-483 per Jacobs J, 495 per Murphy J.

13 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473 per Mason CJ, Brennan, Dawson and Toohey JJ; 486-488 per Wilson J (Deane J and Gaudron J agreeing at 490-491, 496).

the point made in Veen's earlier appeal that the principle of proportionality precludes the imposition of a disproportionate sentence extending beyond what is appropriate to the nature and gravity of the crime. But, in contrast to *Veen [No 1]*, the Court reasoned[14] that, although a longer than proportionate sentence cannot be justified solely on the basis community protection (unless there is statutory authority to do so), proportionality does not preclude a sentencing judge having regard to community protection as a material factor in fixing an appropriate sentence.

(ii) Cumulation and totality

The competing claims of cumulation and totality were, for a time, also productive of some uncertainty and inconsistency. The *locus classicus* is *Mill v The Queen*[15]. Mill had committed three armed robberies, two in Victoria and one in Queensland, within a period of six weeks. He was sentenced in Victoria for the Victorian offences to 10 years' imprisonment with a non-parole period of eight years. On his release, he was arrested and returned to Queensland to be tried for the Queensland offence, to which he pleaded guilty. After noting that Mill had served eight years in

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14 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473-475 per Mason CJ, Brennan, Dawson and Toohey JJ; 486-488 per Wilson J (Gaudron J agreeing at 496), 491-492, 495 per Deane J.

15 (1988) 166 CLR 59.

Victoria for the Victorian offences, the sentencing judge sentenced Mill for the Queensland offence to eight years' imprisonment with a non-parole period of three years. Mill's application for leave to appeal to the Queensland Court of Criminal Appeal, on the ground that the sentence was manifestly excessive, was refused. But, on appeal to the High Court, Mill succeeded on the basis that, taken in conjunction with the Victorian sentence, the Queensland sentence breached the totality principle.

The High Court characterised[16] the totality principle in orthodox terms, as requiring a sentencing judge first to calculate correct individual sentences for each offence and then to mitigate the effects of cumulation where necessary to achieve a total effective sentence that accords to the total criminality of the offending. But the Court then went on to hold[17] that, where an offender comes to be sentenced years after the commission of an offence, and where during the intervening period he or she has served a sentence imposed in another State in respect of an offence of the same nature committed at or about the time of the subject offence, the totality principle requires the sentencing judge also to have regard to what would have been the total effective head sentence if the offender had committed all of the offences in the one

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16 *Mill v The Queen* (1988) 166 CLR 59 at 62-63.

17 *Mill v The Queen* (1988) 166 CLR 59 at 66-67.

jurisdiction and been sentenced for them there at the one time. It followed that the Queensland sentence was manifestly excessive.

Today, *Mill* remains the touchstone of cumulation and totality although, more recently, in *Johnson v The Queen*[18], Gummow, Callinan and Heydon JJ observed that, while the High Court's description of the totality principle in *Mill* was essentially orthodox, it was not necessarily exhaustive. Thus, it was said, while a sentencing judge may adopt the practice of fixing an appropriate individual sentence for each offence before taking the next step of determining concurrency, there is residual flexibility in the methodology which includes lowering each individual sentence before aggregation.

It is to be observed, however, that lowering individual sentences can be a fraught exercise. It has the capacity to suggest – particularly to victims – that the sentencing judge has underestimated the gravity of the offences on which the individual sentences are so reduced. That can be problematic, for example, in sexual offence cases involving multiple complainants and serial burglary and theft cases involving multiple premises.

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18 (2004) 205 ALR 346 at 356 [26].

(iii) Parity

The parity principle is another aspect of the High Court's sentencing jurisprudence which has undergone some change over time, particularly in relation to the extent to which a sentencing judge must take into account sentences being served by co-offenders who stand to be sentenced. The Brennan Court's decision in *Postiglione v The Queen*[19] demonstrates the point. Postiglione and Savvas were convicted of conspiracy offences committed while in custody. Postiglione pleaded guilty and was sentenced to 18 years' imprisonment with a non-parole period of 13 years and 10 months. It was likely that, on the completion of his sentence, he would be deported to Italy to serve more than five further years of imprisonment for offences committed before to coming to Australia. He gave evidence for the Crown against Savvas, who stood trial and was found guilty and sentenced to the relatively higher sentence of 25 years' imprisonment with a non-parole period of 18 years. Savvas was the principal organiser of the conspiracies. At the time of sentence, each of the offenders was serving a sentence for prior unrelated drug offences. Those sentences were of different durations. The effect of the new sentences was, therefore, to extend Postiglione's period of imprisonment by 11 years but to extend Savvas' period of imprisonment by only five years and 10 months. Consequently, although Postiglione received what

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19 (1997) 189 CLR 295.

should have been and was nominally a more merciful sentence, Postiglione's effective sentence was almost twice as long as Savvas'.

Postiglione appealed against sentence to the New South Wales Court of Criminal Appeal, complaining of the marked disparity between his effective sentence and the sentence imposed on Savvas. The appeal was dismissed. The Court of Criminal Appeal held that the "unusual outcome" was the consequence of sentencing in accordance with the principle of totality, and hence that any sense of grievance was not justified. As matters then stood, that appeared to accord with the High Court's holding in *Lowe*[20]. But on appeal to the High Court, the majority held otherwise. All members of the Court acknowledged[21] the holding in *Lowe*[22] that the parity principle recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to "a justifiable sense of grievance" or an appearance that justice has not been done; and that, if there is such a grievance or appearance of injustice, the sentence should be reduced despite being otherwise appropriate and within the permissible range of sentencing options.

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20 (1984) 145 CLR 606.

21 *Postiglione v The Queen* (1997) 189 CLR 295 at 301 per Dawson and Gaudron JJ, 309 per McHugh J, 322 per Gummow J, 327, 338, 342 per Kirby J.

22 (1984) 145 CLR 606 at 610 per Gibbs CJ, 611-613 per Mason J, 618 per Brennan J, 623 per Dawson J.

Dawson and Gaudron JJ reasoned[23], however, that whether there is such a disparity is a question of due proportion between sentences which requires taking into account both the offenders' different degrees of criminality and their different circumstances, and, in turn, that involves consideration of not only each co-offender's head sentence and non-parole period but also, if relevant, the extra period which each co-offender will spend in prison. Their Honours held[24] accordingly that the difference between the extra period which each co-offender would spend in prison did not properly recognise Savvas' greater criminality and Postiglione's guilty plea and assistance to police and prosecuting authorities, and, therefore, gave rise to a "justifiable sense of grievance".

Kirby J reasoned[25] to similar effect that the parity principle in relation to co-offenders sits, as it were, on top of the totality principle as it applies to one offender. His Honour stated[26] that a sentencing judge must first reach a conclusion as to what seems to be the appropriate sentence for each co-offender, then adjust that sentence, where appropriate, for factors personal or special to the offender, and then further adjust the sentence, if necessary, to

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23 *Postiglione v The Queen* (1997) 189 CLR 295 at 302-303.

24 *Postiglione v The Queen* (1997) 189 CLR 295 at 303-304.

25 *Postiglione v The Queen* (1997) 189 CLR 295 at 342-343.

26 *Postiglione v The Queen* (1997) 189 CLR 295 at 340-341.

accord with both parity and totality principles. Kirby J concluded[27] that, having regard to those principles, a justifiable sense of grievance had arisen. In reaching that conclusion, his Honour emphasised the fact that Postiglione would probably be deported to Italy on the expiry of his Australian sentence as a factor contributing to the sense of injustice.

Today, the majority's approach in *Postiglione* remains the law. But, in principle, it might be thought that there was something to be said for McHugh J's dissenting view: that no breach of the parity principle occurs where the application of the totality principle requires a different sentence for each co-offender (due to differences in, for example, culpability or antecedents), and therefore that the Court of Criminal Appeal were correct[28].

Also in dissent, Gummow J emphasised[29] the point in effect made by Gibbs CJ in *Lowe*[30] that the disparity principle applies only where a genuine comparison can be made between two sentences. Thus, as Gummow J reasoned[31], in Postiglione's case, the principle did not apply, as any comparison between total custodial sentences

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27 *Postiglione v The Queen* (1997) 189 CLR 295 at 342-343.

28 *Postiglione v The Queen* (1997) 189 CLR 295 at 306, 313-314.

29 *Postiglione v The Queen* (1997) 189 CLR 295 at 325.

30 (1984) 145 CLR 606 at 609.

31 *Postiglione v The Queen* (1997) 189 CLR 295 at 324-326.

would involve a comparison between sentences in which Postiglione and Savvas were not co-offenders; and that would not be a comparison of like with like.

(iv) Parole

Arguably, there was a time in living memory when it might accurately have been said that more sentencing appeals were wrought by arguments about parole than this world dreams of[32]. If so, the decision of the Mason Court in *Bugmy v The Queen*[33] surely had much to do with it.

Bugmy was convicted of murder and sentenced to life imprisonment. He sought an order pursuant to then recently enacted Victorian sentencing legislation fixing a minimum term of imprisonment after which he could apply for parole. The sentencing judge set a minimum term of imprisonment of 18 years and six months and stated in effect that a significant factor in imposing that term was the need to protect the community against future similar attacks by Bugmy. The Victorian Court of Criminal Appeal upheld the sentencing judge's determination. But a majority of the High Court took a different view. They acknowledged[34] that the

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32 With apologies to Alfred Tennyson.

33 (1990) 169 CLR 525.

34 *Bugmy v The Queen* (1990) 169 CLR 525 at 537, 539 per Dawson, Toohey and Gaudron JJ.

sentencing judge had adhered to what had been stated in *Veen [No 2]* about community protection being a material consideration in the fixing of head sentences. They also accepted[35] that community protection can be as relevant in fixing a minimum term as it is in fixing a head sentence. But, in contrast to the sentencing judge and the Court of Criminal Appeal, the majority of the High Court reasoned[36] that the longer a minimum term, the less the significance of community protection: because of what their Honours perceived to be the impossibility of making a forecast of future behaviour so far ahead. The majority thus concluded[37] that, because a minimum term of 18 years and six months' imprisonment was "of such length as to take the prospects of re-offending in this case beyond even speculation", the sentencing judge had been unduly influenced by the desire to protect the community. Accordingly, the appeal was allowed and the matter was remitted for redetermination.

As with the application of the parity principle, however, it might be thought that there was something to be said for the opposing minority view. Mason CJ and McHugh J in dissent held[38]

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35 *Bugmy v The Queen* (1990) 169 CLR 525 at 537 per Dawson, Toohey and Gaudron JJ.

36 *Bugmy v The Queen* (1990) 169 CLR 525 at 537 per Dawson, Toohey and Gaudron JJ.

37 *Bugmy v The Queen* (1990) 169 CLR 525 at 537, 539 per Dawson, Toohey and Gaudron JJ.

38 *Bugmy v The Queen* (1990) 169 CLR 525 at 531.

that the considerations that a sentencing judge is required to take into account when fixing a minimum term are the same as those which apply to the setting of a head sentence, albeit that the weight to be attached to them may differ because of the different purposes of each function. Their Honours rejected[39] the notion that such considerations are of distinctly less significance in the case of a long minimum term. In their Honours' view, a sentencing judge fixing a minimum term is bound to give close attention to the danger which the offender presents to the community and the difficulty of making satisfactory long-term predictions about the future progress of the offender and the danger that he or she would present to the community upon release does not relieve the judge of the responsibility of making that assessment[40]. Consequently, once a sentencing judge has assessed an offender's prospects of rehabilitation as minimal or bleak – as was the case with Bugmy – a minimum term should be fixed in light of that assessment[41]. And given that the sentencing judge had formed the view that the community needed to be protected from Bugmy, the judge was entitled to have regard to that as a significant factor in determining the minimum term[42].

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39 *Bugmy v The Queen* (1990) 169 CLR 525 at 533.

40 *Bugmy v The Queen* (1990) 169 CLR 525 at 533.

41 *Bugmy v The Queen* (1990) 169 CLR 525 at 533.

42 *Bugmy v The Queen* (1990) 169 CLR 525 at 533.

(v) Double punishment

The rule against double punishment – *nemo debet bis vexari pro una et eadam causa* – has a long history[43]. But it is possibly fair to say that the High Court's decision in *Pearce v The Queen*[44] gave it a significance not previously apprehended.

Pearce was charged with maliciously inflicting grievous bodily harm with intent to do grievous bodily harm and breaking and entering a dwelling-house and while in it inflicting grievous bodily harm. The charges arose out of a single episode in which Pearce broke into the victim's home and beat him, causing life-threatening injuries. The elements of the offences were not identical but shared the common element of a single act inflicting grievous bodily harm. Pearce applied for a stay of proceedings on the ground the indictment subjected him to double punishment and thus was oppressive or an abuse of process. That application was refused. Pearce then pleaded guilty and was sentenced to 12 years' imprisonment on each count, with each sentence to be served concurrently. From there, he appealed to the New South Wales

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43 See The Hon Justice Michael Kirby AC CMG, "Carroll, double jeopardy and international human rights law", (2003) 27 *Criminal Law Journal* 231 at 231-233. See also Sigler, "A History of Double Jeopardy", (1963) 7 *American Journal of Legal History* 283; Hunter, "The Development of the Rule Against Double Jeopardy", (1984) 5 *Journal of Legal History* 3.

44 (1998) 194 CLR 610.

Court of Criminal Appeal against the refusal to grant a stay and also on the basis that he had been doubly punished by the sentence imposed on him. That appeal was dismissed. On appeal to the High Court, however, the majority allowed the appeal against sentence.

The majority affirmed[45] that the availability of a plea in bar is confined to cases where the elements of each offence are identical; and thus, despite some commonality of elements, the prosecution of multiple charges where charges are different in important respects is not an abuse of process. But, as regards double punishment, the majority held[46] that, subject to contrary legislative intention, to the extent to which two offences contain common elements it would be wrong to punish an offender twice for the commission of the elements that are common. And, given that the sentencing judge had sentenced Pearce to identical terms of imprisonment for each of the offences, it was apparent that the sentence on each count contained a portion of punishment referable to the common element of inflicting grievous bodily harm. To that extent, Pearce had been doubly punished[47]. In order to avoid the infliction of double

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45 *Pearce v The Queen* (1998) 194 CLR 610 at 620-621 [25], [31] per McHugh, Hayne and Callinan JJ (Gummow J agreeing at 628-629 [63], [67]).

46 *Pearce v The Queen* (1998) 194 CLR 610 at 623 [40] per McHugh, Hayne and Callinan JJ (Gummow J agreeing at 629 [67]).

47 *Pearce v The Queen* (1998) 194 CLR 610 at 623 [41]-[43] per McHugh, Hayne and Callinan JJ (Gummow J agreeing at 629-630 [69]).

punishment, the proper application of principle required an appropriate reduction in one or other of the individual sentences; and, contrary to widespread previous practice, orders for reduced cumulation or increased concurrence did not suffice[48]. Consequently, even though each of the individual sentences imposed on Pearce was wholly concurrent, Pearce had been doubly punished and the matter needed to be remitted for resentencing.

Kirby J, writing separately, queried why that should be so. In effect his Honour agreed[49] with the majority that the sentencing judge had erred in failing to make express allowance for the fact that the offences involved the common element of inflicting grievous bodily harm. But, in contrast to the majority, Kirby J re-examined the sentences in light of the relevant circumstances and held that, because each was to be served concurrently, there was no risk that Pearce had been subjected to double punishment[50].

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48 *Pearce v The Queen* (1998) 194 CLR 610 at 623-624 [45]-[49] per McHugh, Hayne and Callinan JJ (Gummow J agreeing at 629-630 [69]).

49 *Pearce v The Queen* (1998) 194 CLR 610 at 654 [130].

50 *Pearce v The Queen* (1998) 194 CLR 610 at 654-655 [131]-[134].

Further jurisprudential developments during the time of the Gleeson High Court

The Gleeson High Court's decisions on sentencing reflected a change in focus. During that period, the Australian Capital Territory and New South Wales joined Australia's other five states and mainland territory in enacting sentencing legislation providing general as well as prescriptive guidance on sentencing[51]. Consequently or coincidentally, the Court's jurisprudential developments in sentencing law became increasingly focused on statutory interpretation.

(i) Proportionality and community protection

By way of illustration, in *McGarry v The Queen*[52] the High Court revisited the interrelation between proportionality and community protection in the context of indefinite term sentencing legislation. McGarry had pleaded guilty to one count of indecent dealing with a child under the age of 13 years and three counts of impersonating a police officer. The sentencing judge imposed a nominal term of five years' imprisonment but ordered McGarry to be imprisoned indefinitely pursuant to s 98 of the *Sentencing Act* 1995

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51 See *Crimes (Sentencing) Act* 2005 (ACT); *Crimes (Sentencing Procedure) Act* 1999 (NSW); *Sentencing Act* 1995 (NT); *Penalties and Sentences Act* 1992 (Q); *Criminal Law (Sentencing) Act* 1988 (SA); *Sentencing Act* 1997 (Tas); *Sentencing Act* 1991 (Vic); *Sentencing Act* 1995 (WA).

52 (2001) 207 CLR 121.

(WA): on the basis of being satisfied on the balance of probabilities that, when McGarry would otherwise be released from custody in respect of the nominal term of imprisonment, he "would be a danger to society, or a part of it" because of a clear risk that he would commit other indictable offences. The Western Australian Court of Criminal Appeal unanimously allowed an appeal against the nominal sentence and resentenced McGarry to three years' imprisonment but, by majority, dismissed an appeal against the order for indefinite imprisonment. The conclusions of the primary judge and the Court of Criminal Appeal were based on McGarry's extensive criminal history of sexual offences against children and a pre-sentence report prepared by a social worker.

A majority of the High Court allowed an appeal against the decision of the Court of Criminal Appeal and ordered that the order for indefinite imprisonment be quashed. Unsurprisingly, the plurality held[53] that, once the Court of Criminal Appeal had concluded that the sentencing discretion miscarried in relation to the fixing of the nominal sentence, the whole of the sentence, including the order for indefinite imprisonment, needed to be set aside and McGarry had to be resentenced from scratch.

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53 *McGarry v The Queen* (2001) 207 CLR 121 at 126 [9] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

More significantly for present purposes, however, the plurality also essayed the interrelationship between community protection and indeterminate sentences in the context of s 98 of the Western Australian *Sentencing Act*. As their Honours observed[54], identifying the meaning of "a danger to society, or a part of it" for the purposes of s 98 was not without difficulty. Nonetheless, they held[55] that an offender would be such a danger if at the end of the nominal sentence he or she would engage in conduct which would have consequences properly characterised as "grave" or "serious" for society as a whole, or for some part of it. In order to show that, the Crown needed to establish more than a probability of further offending[56]. And their Honours concluded[57] the material before the Court of Criminal Appeal was not sufficient to sustain the conclusion that, more probably than not, McGarry would engage in conduct the consequences of which could properly be called grave or serious for society, or a part of it.

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54 *McGarry v The Queen* (2001) 207 CLR 121 at 129 [20] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

55 *McGarry v The Queen* (2001) 207 CLR 121 at 130 [23] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

56 *McGarry v The Queen* (2001) 207 CLR 121 at 130 [23] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

57 *McGarry v The Queen* (2001) 207 CLR 121 at 131 [27] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

In a separate concurring judgment, Kirby J emphasised[58] that an order for indefinite imprisonment is wholly exceptional and a significant departure from the principles of sentencing ordinarily observed in Australian courts and as such constitutes a "serious and extraordinary step". His Honour held[59] that to justify the imposition of an indefinite imprisonment order it must be clear that the ordinary principles which resulted in the nominal sentence would not be adequate to satisfy the needs of society to respond to the offence of which the offender is convicted. The material before the sentencing judge and the Court of Criminal Appeal was not sufficient to justify such an exceptional order[60].

In dissent Callinan J considered[61] that satisfaction of the mind of a sentencing judge as to any one of the factors identified in s 98, including relevantly that a risk exists that the offender will commit other indictable offences, provided a foundation for the exercise of discretion to impose an order for indefinite imprisonment.
His Honour held[62] that evidence of the nature of the previous offences, their number and the social worker's pre-sentence report

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58 *McGarry v The Queen* (2001) 207 CLR 121 at 140-141 [59].

59 *McGarry v The Queen* (2001) 207 CLR 121 at 147 [76].

60 *McGarry v The Queen* (2001) 207 CLR 121 at 149 [83] per Kirby J.

61 *McGarry v The Queen* (2001) 207 CLR 121 at 159 [118].

62 *McGarry v The Queen* (2001) 207 CLR 121 at 157 [111], [114], 161 [125], 162 [129].

(which in his Honour's view was properly admissible as expert evidence) were a sufficient foundation for the imposition of indefinite imprisonment because they demonstrated a risk that McGarry would commit other indictable offences upon release. Callinan J also held[63] that the fact the nominal sentence was reduced by the Court of Criminal Appeal did not mean that everything that the sentencing judge had done was infected by error. It was permissible but not necessary for the Court of Criminal Appeal to alter the sentence of indefinite imprisonment.

In addition to what *McGarry* teaches about the interrelationship between proportionality and community protection in the context of indefinite term sentencing legislation, *McGarry* is also representative of a shift over the last 50 years in the High Court's apparent attitude towards the importance of sentencing: from the approach of the Dixon Court in, say, *White v The Queen*[64] in 1962, in which it was held that an appeal against a declaration that an offender was a "habitual criminal" did not involve a point of law of general application and importance sufficient to warrant the Court's attention, to the Gleeson Court's approach in *McGarry* in 2001 of treating questions of that kind, at least when

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63 *McGarry v The Queen* (2001) 207 CLR 121 at 162 [130].

64 (1962) 107 CLR 174 at 176 per Dixon CJ, McTiernan, Kitto, Windeyer and Owen JJ.

arising in a statutory context, as matters of principle eminently worthy of the Court's consideration.

(ii) Cumulation and totality

Although significantly informed by principles of statutory interpretation, the Gleeson Court's developments in sentencing jurisprudence were by no means limited to that. As was earlier noticed, in *Johnson*[65], the Gleeson Court returned to the vexed subject of cumulation and totality. Johnson had pleaded guilty to two counts of attempting to obtain possession of prohibited imports contrary to Commonwealth law. The sentencing judge determined that the appropriate sentences on the respective counts were 10 and five years' imprisonment respectively, to be served cumulatively, but that a deduction should be made in respect of the second count to accord with the totality principle, and that three and a half years should be deducted for Johnson's "fast-track" plea of guilty. The judge thus sentenced Johnson to eight years' imprisonment on the first count and three and a half years' imprisonment on the second count to be served cumulatively on the sentence imposed on the first. The Western Australian Court of Criminal Appeal dismissed Johnson's appeal. But an appeal to the High Court was unanimously upheld.

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65 (2004) 205 ALR 346.

The plurality held[66] that the two offences had elements in common and that the sentencing judge had erred in failing to have regard to that measure of commonality in sentencing Johnson on each count. As was earlier noticed, their Honours also observed[67] that although the sentencing judge's approach to totality – of moderating and cumulating individual sentences – was consistent with *Mill* and *Pearce,* sentencing judges should be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the applicable statutory regime. Kirby J agreed[68] but took the further step of concluding that, because the commonality between the counts had not been taken into account, the sentence was manifestly excessive.

To some extent, the decision in *Johnson* has since been passed by, particularly as regards the length of individual sentences and totality. Today, sentencing judges are more often invoked to bear in mind community expectations that some offences, particularly sexual offences and violent offences, should attract greater sentences than were previously considered appropriate. And there is also a growing body of sentencing legislation which

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66 *Johnson v The Queen* (2004) 205 ALR 346 at 357 [33] per Gummow, Callinan and Heydon JJ (Gleeson CJ and Kirby J agreeing at 347 [1], 358 [38]).

67 *Johnson v The Queen* (2004) 205 ALR 346 at 356 [26] per Gummow, Callinan and Heydon JJ (Gleeson CJ agreeing at 347 [1]).

68 *Johnson v The Queen* (2004) 205 ALR 346 at 358 [38]-[39].

demands cumulation regardless of criminality. Indeed, even before *Johnson*, in *R H McL v The Queen*[69] McHugh, Gummow and Hayne JJ observed that a section in the *Sentencing Act* 1991 (Vic) which required that terms of imprisonment imposed on serious sexual offenders be served cumulatively unless the court directed otherwise gave effect to a legislative policy that serious offenders be treated differently from other offenders. Their Honours considered[70] that the provision meant that "the scope for applying the totality principle must be more limited" in the case of sexual offending and that the object of the section would be compromised in most cases if the ordinary application of the totality principle were a sufficient ground to enliven the discretion to direct that the sentences not be served cumulatively.

(iii) Parole

In *Inge v The Queen*[71], it fell to the Gleeson Court to reconsider the Mason Court's approach to parole in *Bugmy*, in a statutory context. Inge was convicted of murder. The relevant sentencing regime mandated life imprisonment but gave the sentencing judge the discretion to fix a non-parole period. The judge sentenced Inge to life imprisonment and fixed a non-parole period of

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69 (2000) 203 CLR 452 at 476-477 [76].

70 *R H McL v The Queen* (2000) 203 CLR 452 at 477 [76].

71 (1999) 199 CLR 295.

20 years. Inge appealed to the South Australian Court of Criminal Appeal on the ground that the sentence was manifestly excessive but the appeal was dismissed. Relevantly, the Court of Criminal Appeal considered that, because there must be an appropriate proportionality between the length of the non-parole period and the duration of the head sentence, Inge's relative youth worked against him. In effect, it was necessary to impose a longer non-parole period than might be the case for an older offender.

The High Court allowed an appeal and ordered that the matter be remitted for redetermination according to law. The plurality held[72] that while both the seriousness of the offence and the severity of the mandatory penalty are matters to be taken into account in fixing a non-parole period, it does not follow, either as a matter of logic or as a matter of the proper exercise of the sentencing discretion considered in *Bugmy*, that the relative youth of an offender cannot operate in his or her favour. To calculate the non-parole period in the case of a young offender by reference to the supposed life expectancy of the offender would be "a somewhat unrealistic and artificial exercise"[73]. Kirby J similarly observed[74] that the fixing of a non-parole period must be open to the influence of all

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72 *Inge v The Queen* (1999) 199 CLR 295 at 302-303 [12] per Gleeson CJ, Gaudron, Hayne and Callinan JJ.

73 *Inge v The Queen* (1999) 199 CLR 295 at 302 [10] per Gleeson CJ, Gaudron, Hayne and Callinan JJ.

74 *Inge v The Queen* (1999) 199 CLR 295 at 316-318 [58], [63].

considerations, including age, but that to calculate it by reference to the life expectancy of a young offender would be to calculate it by reference to a factor that is "irrelevant or misleading".

(iv) Suspended sentences

During the 1960's and 1970's governments here and abroad became increasingly enamoured of suspended sentence regimes as an alternative to the construction of more prisons. By the turn of the century, the tide of public opinion and, in some quarters, political will, had turned against them[75]. Nonetheless, they remain available as a sentencing option in all Australian jurisdictions except Victoria[76]. In Victoria, they were abolished following a recommendation by the Sentencing Advisory Council informed in

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75 See Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments', (1999) 22(2) *University of New South Wales Law Journal* 535 at 538-549; Bartels, 'The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles', (2007) 31 *Criminal Law Journal* 113 at 113-114; Freiberg and Moore, 'Disbelieving Suspense: Suspended Sentences of Imprisonment and Public Confidence in the Criminal Justice System', (2009) 42 *Australian and New Zealand Journal of Criminology* 101 at 103-104.

76 See *Crimes (Sentencing) Act* 2005 (ACT), s 12; *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 12; *Sentencing Act* 1995 (NT), s 40; *Penalties and Sentences Act* 1992 (Q), s 144; *Criminal Law (Sentencing) Act* 1988 (SA), s 38; *Sentencing Act* 1997 (Tas), Pt 3 Div 4; *Sentencing Act* 1995 (WA), s 76.

part by perceived community concerns that suspended sentences violate the principle of proportionality[77].

The Gleeson Court's decision in *Dinsdale v The Queen*[78] set the current approach to suspended sentencing regimes. Dinsdale was convicted of one count of sexual penetration of a child under the age of 13 years and one count of indecent dealing with a child under the age of 13 years. He had no prior convictions for offences of that kind and only one prior conviction for another offence committed many years earlier. He was sentenced to 18 months' imprisonment on the first count and 18 months' imprisonment on the second to be served concurrently with the first. Both terms of imprisonment were suspended in full. The Western Australian Court of Criminal Appeal set aside the order for suspension and held that the sentence on the first count was manifestly inadequate. Dinsdale was resentenced on that count to 30 months' imprisonment.

He appealed to the High Court who held that the sentence originally imposed on the first count was not manifestly inadequate and that the order for suspension should not have been set aside. The Court reasoned[79] that the discretion to order a suspended

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77 See Sentencing Advisory Council, *Suspended Sentences: Final Report – Part 1*, (2006) at 29-30.

78 (2000) 202 CLR 321.

79 *Dinsdale v The Queen* (2000) 202 CLR 321 at 329 [18] per Gleeson CJ and Hayne J, 348 [84] per Kirby J (Gaudron and Gummow JJ agreeing at 330 [26]).

sentence was not confined by consideration of the effect which the suspension would have on the rehabilitation of the offender. It was necessary to look at all the matters relevant to the circumstances of the offence, which included its objective features as well as circumstances personal to the offender[80]. Gleeson CJ and Hayne J also held[81] that a sentencing judge should not impose an immediate term of imprisonment unless satisfied that it is not appropriate to impose a suspended term of imprisonment. By contrast, Kirby J in partial dissent pointed out[82] the apparent paradox in the Western Australian *Sentencing Act* that a suspended sentence cannot be ordered unless a sentence of imprisonment, and not some lesser sentence, is called for.

It is to be noted, however, that it is now the better part of 20 years since *Dinsdale* was decided and, although it remains a correct explication of sentencing principle, the result today might not be the same. In the last 20 years there has been a significant change in attitude towards sentencing for sexual offences, to which reference has already been made, and an evident increasing public

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80 *Dinsdale v The Queen* (2000) 202 CLR 321 at 329 [18] per Gleeson CJ and Hayne J, 348-349 [84]-[86] per Kirby J (Gaudron and Gummow JJ agreeing at 330 [26]).

81 *Dinsdale v The Queen* (2000) 202 CLR 321 at 327 [13].

82 *Dinsdale v The Queen* (2000) 202 CLR 321 at 346-347 [79]-[80].

disquiet about the propriety of sentencing serious offenders to suspended terms of imprisonment.

(v) Supervision and detention orders

During the last part of the 20th century, fears as to the innate recidivism of serious sexual offenders led governments abroad and in this country to legislate for detention of such offenders for periods following the completion of their sentences[83]. The legality of that kind of legislation first fell for consideration by the High Court in *Fardon v Attorney-General (Qld)*[84]. The question was whether an Act of the Queensland Parliament, which provided for the continuing detention or supervision of serious sexual offenders who had served their terms of imprisonment but who were regarded as serious dangers to the community, was constitutionally valid. Part of the Court's task was to determine whether the orders were for a punitive and, therefore, constitutionally impermissible purpose or for a legitimate non-punitive purpose.

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83 See Smallbone and Ransley, 'Legal and Psychological Controversies in the Preventive Incapacitation of Sexual Offenders', (2005) 28 *University of New South Wales Law Journal* 299 at 301-303; Keyzer and McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice', (2015) 38 *University of New South Wales Law Journal* 792 at 796-798.

84 (2004) 223 CLR 575.

A majority of the Court held[85] that orders under the Act were not punitive because they were not designed to punish the prisoner for past conduct but rather to protect the community against certain classes of convicted sexual offenders who have not been rehabilitated during their periods of imprisonment. Gleeson CJ noted[86] that, in view of the unreliability of such predictions at the time of sentencing, it was not surprising that the legislature attempted to postpone the time for predictions of future danger to the end of the term of imprisonment. As may be recalled, that was the difficulty in *Bugmy*.

Gleeson CJ acknowledged[87], however, that the existence of legislation which provided for sentencing judges to impose indefinite sentences, or sentences longer than would be commensurate with the seriousness of a particular offence, made it difficult to maintain a strict division between punitive and preventive detention. Similarly, Hayne J observed[88] that there is no sharp line that can be drawn

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85 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589-590 [12]-[14] per Gleeson CJ, 597 [34] per McHugh J, 610 [74], 620-621 [112], [118] per Gummow J (Hayne J relevantly agreeing at 647 [196]), 654-655 [216]-[217], [219] per Callinan and Heydon JJ.

86 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 589-590 [12].

87 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [20].

88 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 647 [196].

between detention that is punitive and detention that is not, and, once it is accepted that community protection is a legitimate purpose of sentencing (as it was held to be in *Veen [No 2]*), the line between preventative detention of those who have committed crimes in the past (for fear of what they may do in the future) and punishment of those persons for what they have done in the past becomes increasingly difficult to discern. Gummow J held[89] that the making of a continuing detention order with effect after the expiry of a term of imprisonment does not offend the common law rule against "double jeopardy" as it does not punish an offender twice or increase their punishment – it is in effect a new sentence imposed under its own normative structure. In dissent, Kirby J held[90] that the Act made provision for the continuous punishment of prisoners beyond the punishment judicially imposed in accordance with law and was thus punitive. It followed in his Honour's view that such orders resulted in double punishment[91].

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89 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 610 [74].

90 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 631 [147], 636-638 [161], [165].

91 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 643-644 [182].

(vi) Approach to fixing a head sentence

Arguably, the greatest contribution of the Gleeson Court to the High Court's sentencing jurisprudence was in the elucidation of principles which control the elemental construction of sentences. In part, that was a product of the Gleeson Court's focus on statutory construction. But there were also other equally notable developments. They include: (1) the correct approach to the determination of sentencing facts; (2) the disdain of guideline sentencing; and (3) the endorsement of intuitive synthesis.

(1) Finding sentencing facts

Not infrequently, a sentencing judge is faced with considerations other than the elements of an offence, for example motive, about which the jury may not necessarily have made findings but which nonetheless have an impact on sentence. To take the plurality's example from *Cheung v The Queen*[92], in the case of a charge of murder causing the death of an elderly person, the prosecution's case may be that the accused was motivated by a desire to inherit the elderly person's estate or, alternatively, by a desire to end the suffering of the person[93]. Although motive is not

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92 (2001) 209 CLR 1 at 11 [9] per Gleeson CJ, Gummow and Hayne JJ.

93 See and compare *Filippou v The Queen* (2015) 256 CLR 47 at 70-71 [65]-[68] per French CJ, Bell, Keane and Nettle JJ (Gageler J agreeing at 73 [74]).

an element of the offence of murder, and so in some cases might not play a role in leading to a verdict of guilt, a finding that an accused was motived by personal gain would ordinarily be an aggravating circumstance or unfavourable consideration for the purposes of sentencing.

Axiomatically, it is the role of a sentencing judge to determine the factual basis of a sentence. *Cheung*[94] confirmed that a sentencing judge must approach that task by making findings that are consistent with the jury's verdict and arrived at beyond reasonable doubt. It follows, as was held[95] in *Cheung*, that a sentencing judge may sentence an offender based on a view of the facts that might not have found favour with all, or perhaps even any, members of the jury. And, at least in principle, and sometimes in practice, a sentencing judge is not required to sentence an offender according to the view of the facts consistent with the verdict most favourable to the offender[96]. Of course, as was observed[97] in

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94 (2001) 209 CLR 1 at 13 [14] per Gleeson CJ, Gummow and Hayne JJ, 28-29 [76] per Gaudron J, 34 [99] per Kirby J, 53 [163]-[164] per Callinan J.

95 *Cheung v The Queen* (2001) 209 CLR 1 at 19 [36] per Gleeson CJ, Gummow and Hayne JJ, 35 [100] per Kirby J, 53 [166] per Callinan J.

96 *Cheung v The Queen* (2001) 209 CLR 1 at 11 [9], 13 [14] per Gleeson CJ, Gummow and Hayne JJ, 36 [103] per Kirby J, 53 [165]-[166] per Callinan J (Gaudron J dissenting at 31 [88]).

97 *Cheung v The Queen* (2001) 209 CLR 1 at 11 [9] per Gleeson CJ, Gummow and Hayne JJ, 53 [165] per Callinan J.

Cheung, there will be cases where a judge is required to resolve any reasonable doubt in favour of the offender and thus will be bound to sentence the offender based on the view of the facts most favourable to the offender. But if that occurs, it was said, it will be because of the application of principle to the facts and not the result of any *a priori* conception of taking the most favourable view which may be open.

By contrast, more recently in *Filippou v The Queen*[98] the High Court held that where the prosecution fails to prove a fact or circumstance which, if proved, would be adverse to the offender, but the offender fails to establish on the balance of probabilities an alternative version of the facts which if proved would be more favourable to him or her, the judge is not bound to sentence the offender on a basis which accepts the accuracy of the more favourable version. In such a case, the judge may proceed to sentence the offender on a basis that neither of the competing possibilities is known.

Further, as was recently established by the High Court's decision in *Chiro v The Queen*[99], the approach may be different again where the factual basis of a jury's verdict that is unknown to the

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98 (2015) 256 CLR 47 at 69-70 [64] per French CJ, Bell, Keane and Nettle JJ (Gageler J agreeing at 73 [74]).

99 (2017) 347 ALR 546.

sentencing judge is determinative of the extent of the offending. In *Chiro* the accused was convicted after a trial by jury of the offence of "persistent sexual exploitation of a child" which required the prosecution to prove two or more acts of sexual exploitation separated by not less than three days. Critically, in contradistinction to the matters considered by the jury in *Cheung*, the jury needed to be unanimous as to each of the acts, which ranged from kissing in circumstances of indecency to sexual penetration, and the sentencing judge did not ascertain from the jury which acts they had unanimously found to be proved.

A majority of the High Court held[100] that where a jury returns a verdict of guilty of a charge of persistent sexual exploitation of a child and the sentencing judge did not or could not get the jury then to identify which of the alleged acts of sexual exploitation the jury found to be proved, the offender has to be sentenced on the basis most favourable to the offender. That difference in approach was held[101] to be necessary because a sentencing judge's view of the acts may be inconsistent with the jury's view of the acts which founded the verdict, and, therefore, if the judge were permitted to sentence according to the judge's own view an offender could be

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100 *Chiro v The Queen* (2017) 347 ALR 546 at 564 [52] per Kiefel CJ, Keane and Nettle JJ, 569 [71]-[73] per Bell J (Edelman J dissenting at 585 [125]).

101 *Chiro v The Queen* (2017) 347 ALR 546 at 561-562 [44] per Kiefel CJ, Keane and Nettle JJ, 569 [71]-[72] per Bell J.

sentenced for an offence which the jury did not find them to have committed. Bell J noted[102] in effect that the approach endorsed in *Cheung* in this context would leave open the possibility that a judge could sentence an offender on the basis the offender committed all of the particularised acts, and that that would deny the requirement of consistency with the verdict of any practical content.

The application of *Chiro* to the offence of persistent sexual exploitation has since been abrogated by retrospective legislation. But the principle is of broader application than that[103].

(2) The disdain of guideline sentencing

The Gleeson Court's disdain of guideline sentencing was most notably demonstrated in *Wong v The Queen*[104]. A majority of the Court disapproved of a "guideline judgment" handed down by the New South Wales Court of Criminal Appeal that identified sentencing ranges for the offence of knowing importation of narcotics according to the weight of the narcotic imported. It was considered[105] that the "guideline judgment" was concerned with only one factor in the list

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102 *Chiro v The Queen* (2017) 347 ALR 546 at 569 [71].

103 See and compare *Kalbasi v Western Australia* (2018) 92 ALJR 305; 352 ALR 1.

104 (2001) 207 CLR 584.

105 *Wong v The Queen* (2001) 207 CLR 584 at 608-611 [65], [70]-[73], 616 [87] per Gaudron, Gummow and Hayne JJ, 631-632 [129]-[131] per Kirby J.

of sentencing factors prescribed by the legislation and thus was inconsistent with the legislation.

Nor was that the limit of the criticism. Gaudron, Gummow and Hayne JJ held[106] that the "guideline judgment" was intended to have prescriptive effect and that the Court of Criminal Appeal had neither jurisdiction nor power to prescribe what sentences should be passed in future matters. Their Honours added[107] that publishing a table of predicted or intended outcomes masked the task of identifying the relevant differences in the case, and that to attempt some statistical analysis of sentences for an offence which encompasses a wide range of conduct and criminality was fraught with danger. Numerical guidelines either take account of only some of the relevant considerations, or would have to be so complicated as to make their application difficult, if not impossible, and, importantly, they cannot address considerations of proportionality[108].

Kirby J likewise considered[109] that the Court of Criminal Appeal had no power to issue the "guideline judgment" because to do so was incompatible with the legislation. His Honour was less

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106 *Wong v The Queen* (2001) 207 CLR 584 at 601 [43]-[44], 603 [49], 615 [83]-[84].

107 *Wong v The Queen* (2001) 207 CLR 584 at 608 [65]-[66].

108 *Wong v The Queen* (2001) 207 CLR 584 at 612-613 [78] per Gaudron, Gummow and Hayne JJ.

109 *Wong v The Queen* (2001) 207 CLR 584 at 633-634 [136].

critical, however, of guideline judgments as such, concluding[110] that it was permissible for appellate courts to express guidelines provided they are consistent with statute and properly used, and that such guidelines could contribute to the attainment of uniformity and consistency.

Gleeson CJ, dissenting in the result, although not in point of principle, expressed[111] concern that the guidelines may be formulated in a way that distracts a sentencing judge from the statutory task. Similarly, Callinan J in dissent considered[112] that guidelines have "a legislative flavour about them" and, by their very nature, may detract from a proper consideration and application of the principles which the statute requires to be considered and applied in each case.

Unsurprisingly perhaps, the enthusiasm of intermediate appellate courts for guideline judgments waned a little in the aftermath of *Wong*[113]. There is, however, possibly greater, although

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110 *Wong v The Queen* (2001) 207 CLR 584 at 628-629 [123], 634 [137]-[139].

111 *Wong v The Queen* (2001) 207 CLR 584 at 597 [31].

112 *Wong v The Queen* (2001) 207 CLR 584 at 643 [167].

113 See Bagaric and Edney, *Sentencing in Australia*, 3rd ed (2016) at 50-59.

as yet largely unplumbed, scope for them in Victoria under particular sentencing legislation in that State[114].

(3) The triumph of intuitive synthesis over two part sentencing

Hand in glove with the Gleeson Court's disdain of guideline sentencing went that Court's endorsement of intuitive synthesis over two part sentencing. The two part approach to sentencing required a judge first to determine an hypothetical sentence by reference to the objective circumstances of the case and then to increase or reduce it incrementally or decrementally by reference to factors personal to the accused. The principal advantage of it was said to be that it promoted transparency in sentencing; which is logically hard to deny. By contrast, the intuitive or instinctive synthesis approach involves a judge identifying all relevant sentencing factors, considering their significance and then making a value judgment as to the appropriate sentence.

In *Markarian v The Queen*[115], a majority of the Gleeson Court endorsed the view expressed in *Wong*[116] that the two part approach to sentencing is apt to give rise to error, departs from principle and

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114 See *Sentencing Act* 1991 (Vic), Pt 2AA.

115 (2005) 228 CLR 357.

116 (2001) 207 CLR 584 at 611-612 [74]-[77] per Gaudron, Gummow and Hayne JJ.

should not be adopted. The plurality held[117] that, in general, a sentencing court should weigh all relevant factors and reach a conclusion that a particular penalty is the one that should be imposed. Their Honours rejected[118] a mathematical approach but allowed for the possibility that in some simple cases, involving a small number of sentencing considerations, indulgence in arithmetical deduction may be permitted as better achieving transparent and accessible reasoning.

Notably, McHugh J strongly endorsed[119] the instinctive synthesis approach and rejected the two part approach on the basis that a judge who concentrates on the objective circumstances of a crime inevitably gives greater weight to the factors which go towards the retributive or deterrent aspect of sentencing, due to the judge consciously or unconsciously downplaying the importance of the other factors which go towards the particular offender's criminality (such as the importance of mitigation, reformation and rehabilitation). Further, as McHugh J held[120], it is difficult – maybe

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117 *Markarian v The Queen* (2005) 228 CLR 357 at 373 [37] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

118 *Markarian v The Queen* (2005) 228 CLR 357 at 375 [39] per Gleeson CJ, Gummow, Hayne and Callinan JJ. See also *Johnson v The Queen* (2004) 205 ALR 346 at 358-359 [40]-[41] per Kirby J.

119 *Markarian v The Queen* (2005) 228 CLR 357 at 378-379 [53]-[54].

120 *Markarian v The Queen* (2005) 228 CLR 357 at 385-386 [69].

impossible – to reconcile the principle of proportionality with the two part approach because, by the end of the second part of the process, it would be "almost a miracle" if the sentence were proportionate to the offence. More generally, as his Honour put it[121], "[t]here is no Aladdin's Cave of accurate sentencing methodology, the door to which can be opened by chanting the magic words, 'two-tier sentencing'"; sentencing is a matter of human judgment. But, as his Honour emphasised[122], judicial instinct does not operate in a vacuum wherein the judge selects a number from thin air. On the contrary, instinctive synthesis involves the exercise of a discretion controlled by judicial practice, trends, statistics, appellate review and guidance, legislative indicators and public opinion. Statute, legal principle and community values all combine to confine the scope in which instinct may operate. The judicial wisdom involved in the instinctive synthesis approach is thus likely to lead to better outcomes than "the pseudo-science of two-tier sentencing".

Kirby J agreed[123] that sentencing is not a mechanical, numerical, arithmetical or rigid activity and acknowledged that because there are a multitude of factors pulling successively in

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121 *Markarian v The Queen* (2005) 228 CLR 357 at 386 [71].

122 *Markarian v The Queen* (2005) 228 CLR 357 at 388 [76], 390 [84].

123 *Markarian v The Queen* (2005) 228 CLR 357 at 405 [133].

opposite directions the evaluation is necessarily imprecise. In contrast to McHugh J, however, his Honour expressed[124] concern that the "instinctive synthesis" approach is "a formula that risks endorsement of the deployment of purely personal legal power" and runs contrary to the insistence that judicial officers must give reasons for their decisions. Kirby J did not accept that it was an error of sentencing principle for the sentencing judge to proceed in two or more stages, and his Honour considered that judicial officers engaged in sentencing should be encouraged to reveal their processes of reasoning[125]. Needless to say, however, it is the majority's approach which remains controlling.

The French High Court and the search for a jurisprudential theory of consistency

In contrast to the Gleeson Court, the work of the French High Court was marked by a more significant focus on the importance of consistency in sentencing and a more refined identification of the real meaning and application of sentencing consistency.

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124 *Markarian v The Queen* (2005) 228 CLR 357 at 403-404 [129].

125 *Markarian v The Queen* (2005) 228 CLR 357 at 406-407 [134]-[135], [139].

(i) Consistency in principle but not necessarily in number

In *Hili v The Queen*[126], the French Court considered the general question of consistency in sentencing for federal offenders and held that the consistency that is sought is consistency in the application of the relevant legal principle as opposed to numerical or mathematical equivalence. Such consistency, it was said, is incapable of mathematical expression or expression in tabular form. Rather, it is to be achieved by the application of the relevant legal principles including those contained in statutory provisions having proper regard not just to what has been done in other cases but why it was done. At the same time, however, with more than a nod to reality, their Honours cited[127] with approval Simpson J's statement in *Director of Public Prosecutions (Cth) v De La Rosa*[128] that, although past sentences "are no more than historical statements of what has happened in the past, they can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence".

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126 (2010) 242 CLR 520 at 527 [18], 535-536 [48]-[50], [53] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ (Heydon J relevantly agreeing at 541 [71]).

127 *Hili v The Queen* (2010) 242 CLR 520 at 537 [54] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ (Heydon J relevantly agreeing at 541 [71]).

128 (2010) 243 FLR 28 at 98 [304].

Hili also held[129] that, when sentencing offenders for federal offences, intermediate appellate courts should not depart from what has been decided by other Australian intermediate appellate courts unless they are convinced the decision is "plainly wrong". That view accords of course with the approach taken in the civil jurisdiction in *Australian Securities Commission v Marlborough Gold Mines Ltd*[130] and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[131] that intermediate appellate courts and trial judges in Australia should not depart from decisions of intermediate appellate courts in other jurisdictions on the interpretation of Commonwealth legislation, uniform national legislation or non-statutory law unless they are convinced that the interpretation is plainly wrong.

(ii) Consistency in principle and number in the case of Commonwealth offences

More recently, the approach to consistency in sentencing for federal offences has been taken a step further in *R v Pham*[132]. Pham was charged with importing a marketable quantity of a border controlled drug contrary to the *Criminal Code* (Cth). At the relevant

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129 *Hili v The Queen* (2010) 242 CLR 520 at 538 [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, 544 [76] per Heydon J.

130 (1993) 177 CLR 485 at 492.

131 (2007) 230 CLR 89 at 151-152 [135].

132 (2015) 256 CLR 550.

time, the sentences being imposed by courts in New South Wales, Queensland and Western Australia were substantially greater than the sentences being imposed in Victoria for offences involving similar quantities of drugs. Pham pleaded guilty to the charge with the expectation, it was said, that he would be sentenced in accordance with the current sentencing practices of Victorian courts. In fact, he was sentenced in line with current sentencing practices in the other States. On appeal the Victorian Court of Appeal held that, by reason only that he was so sentenced, the sentence was manifestly excessive.

The Crown then appealed to the High Court[133] which held that it was erroneous to sentence only in accordance with current sentencing practices in the State or Territory where the offender stands to be sentenced. To do so is likely to result in the kind of inconsistency the Australia-wide approach mandated by *Hili* was calculated to avoid. Their Honours emphasised[134] that a federal offence is in effect an offence against the whole Australian community and so is the same for every offender throughout the Commonwealth. Hence, absent a clear Commonwealth statutory indication that a different approach is to be adopted in a particular

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133 *R v Pham* (2015) 256 CLR 550 at 556 [19] per French CJ, Keane and Nettle JJ (Bell and Gageler JJ relevantly agreeing at 563 [42]).

134 *R v Pham* (2015) 256 CLR 550 at 557-558 [24] per French CJ, Keane and Nettle JJ (Bell and Gageler JJ relevantly agreeing at 563 [42]).

State or Territory, the approach to sentencing federal offenders needs largely to be the same throughout the Commonwealth. Moreover, it was said[135], consistency in sentencing federal offenders requires that sentencing judges have regard to what has been done in comparable cases throughout Australia as "yardsticks" that serve to illustrate (although not define) the possible range of sentences available, unless there is a compelling reason not to do so, such as where the circumstances of the crime are so distinguishable as to render the yardsticks irrelevant. In effect, *Pham* took *Hili* and *Barboro v The Queen*[136] the further step of extending consistency to numbers in the case of comparable Commonwealth offences.

Pham has since been applied, in effect, by the Victorian Court of Appeal in *Director of Public Prosecutions (Cth) v Besim*[137]. The case concerned a 10 year sentence of imprisonment imposed on an offender convicted of having done acts in preparation for, or planning, a terrorist act contrary to the Commonwealth *Criminal Code*. During the hearing of the appeal, the Court remarked that higher sentences seemed to be imposed for similar offending in New South Wales (a range centred around 20 years' imprisonment) and

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135 *R v Pham* (2015) 256 CLR 550 at 560 [29] per French CJ, Keane and Nettle JJ (Bell and Gageler JJ relevantly agreeing at 563 [42]).

136 (2014) 253 CLR 58 at 74 [40]-[41] per French CJ, Hayne, Kiefel and Bell JJ.

137 [2017] VSCA 158.

that it was "as if the Murray River is an enormous gap in terms of sentencing". Although without express reference to *Pham*, the Court of Appeal ultimately set aside the sentence on the basis it was manifestly inadequate and as not according with community expectations and the principles governing sentencing for terrorism offences[138]. In resentencing the offender, their Honours acknowledged[139] that significantly lower sentences had been imposed for very serious terrorism offences in a comparable Victorian case, and that those sentences were regarded as within range at the time, but held that the sentences seemed to be "unduly lenient" and that "[n]o such sentences would have been imposed today" in light of the scourge of modern terrorism and the development of more recent sentencing principles in the area.

(iii) The utility of current sentencing practices and what they mean

(1) The advent of the MacNeil-Brown phenomenon

As with other developments in sentencing jurisprudence, the increasing focus on consistency in sentencing has not been without its problems, or without an occasional, arguably, wrong turning. One example is what might be described as the rise and fall of the

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138 *Director of Public Prosecutions (Cth) v Besim* [2017] VSCA 158 at [106], [119].

139 *Director of Public Prosecutions (Cth) v Besim* [2017] VSCA 158 at [121].

MacNeil-Brown phenomenon. In *R v MacNeil-Brown*[140], a majority of the Victorian Court of Appeal held that a prosecutor's duty to assist the court to avoid appealable error extended to submitting a quantitative range of the sentences open to be imposed. The majority thus concluded[141] that a sentencing judge could reasonably expect a prosecutor to make a submission on sentencing range either if the judge requested such assistance or, in the absence of request, if the prosecutor perceived a significant risk that the judge would fall into error unless such a submission were made. A submission on sentencing range was characterised as a submission of law[142]. The majority observed[143] that the function of such submissions was to promote consistency of sentencing and to reduce the risk of appealable error. They also considered[144] that such a submission would not carry any risk of "interference" with the sentencing judge's exercise of discretion, given that Australia's

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140 (2008) 20 VR 677 at 678 [2], 684 [20] per Maxwell P, Vincent and Redlich JJA (Buchanan JA and Kellam JA dissenting at 710-711 [127]-[130], 712-713 [139]).

141 *R v MacNeil-Brown* (2008) 20 VR 677 at 678 [3] per Maxwell P, Vincent and Redlich JJA.

142 *R v MacNeil-Brown* (2008) 20 VR 677 at 691 [42] per Maxwell P, Vincent and Redlich JJA (Buchanan JA and Kellam JA dissenting at 710 [127], 714 [141]).

143 *R v MacNeil-Brown* (2008) 20 VR 677 at 679 [4] per Maxwell P, Vincent and Redlich JJA (Buchanan JA and Kellam JA dissenting at 710-711 [127]-[130], 712-713 [139]).

144 *R v MacNeil-Brown* (2008) 20 VR 677 at 691 [44] per Maxwell P, Vincent and Redlich JJA.

entire adversarial system is based on the premise that the judge will be able impartially to exercise the discretion.

(2) The High Court waives MacNeil-Brown through

Significantly, the High Court refused special leave to appeal from that decision in terms which, it might have been thought, were affirmative of the Court of Appeal's reasoning. Relevantly, the High Court stated[145] that the application for special leave proceeded on a misunderstanding of the task of the sentencing judge, and that the submissions of counsel are a necessary and important part of the process of sentencing but do not determine the issue of what sentence should be passed. It followed, the High Court said[146], that the Court of Appeal's reasons focused upon the orders and reasons of the sentencing judge, and it was not in the interests of justice for the High Court to consider those orders and reasons.

(3) The High Court has second thoughts about MacNeil-Brown

Nothing in sentencing is necessarily forever, however, or sometimes as it seems, even for a very long time. Thus, only five years later, in *Barbaro*[147], the French Court overruled *MacNeil-Brown* to the extent that it stood as authority for the practice of

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145 [2008] HCA Trans411 at 623-627 per Hayne and Kiefel JJ.

146 [2008] HCA Trans411 at 627-632 per Hayne and Kiefel JJ.

147 (2014) 253 CLR 58 at 69 [23] per French CJ, Hayne, Kiefel and Bell JJ (Gageler J dissenting at 78-79 [59]).

prosecuting counsel providing a quantitative range of sentences. The Court held that the practice was wrong in principle, and decreed that prosecutors should no longer be required or permitted to follow it.

In apparent contrast to the remarks of the High Court when rejecting the application for special leave to appeal in *MacNeil-Brown*, in *Barbaro* the Court expressly identified a number of considerations that were said to bespeak the impropriety of a *MacNeil-Brown* range. One was that stating the bounds of an "available range" of sentences is apt to mislead, as the conclusion that an error has or has not been made neither permits nor requires setting the range of sentences within which the sentence should (or could) have fallen[148]. Another was that fixing the bounds of a sentencing range wrongly suggested that sentencing is a mathematical exercise which *Wong* dictates that it is not[149]. A third was that it was feared that a submission as to the appropriate sentencing range might lead to erroneous views about its importance in the sentencing process with consequential blurring of what should be the sharp distinction between the role of the judge and the role of the prosecution[150]. By way of explication, the Court added[151] that,

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148 *Barbaro v The Queen* (2014) 253 CLR 58 at 71 [28] per French CJ, Hayne, Kiefel and Bell JJ.

149 *Barbaro v The Queen* (2014) 253 CLR 58 at 72 [34] per French CJ, Hayne, Kiefel and Bell JJ.

150 *Barbaro v The Queen* (2014) 253 CLR 58 at 72 [33] per French CJ, Hayne, Kiefel and Bell JJ.

if a judge sentenced within the Crown's posited range, he or she could be seen as swayed by the Crown, or, if the sentence were outside of the Crown's posited range, Crown appeals would be "well-nigh inevitable"; and, in any event, the practice assumed that the prosecution's sentencing range would be determined "dispassionately" when in reality that might not be the case (for example, the range might give undue weight to the avoidance of trial or to the assistance which the offender has given or promised).

The Court added[152] that a submission on sentencing range is a statement of opinion, not a submission of law, on the basis its expression advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. Rather, it necessarily reflects conclusions or assumptions (stated or unstated) which have been made about what considerations bear upon sentence and what weight should be given to each, and is often based upon prediction about what facts will be found by the sentencing judge[153]. And it would be impossible, difficult or

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151 *Barbaro v The Queen* (2014) 253 CLR 58 at 71-72 [29]-[33] per French CJ, Hayne, Kiefel and Bell JJ.

152 *Barbaro v The Queen* (2014) 253 CLR 58 at 66 [6]-[7], 75 [42]-[43] per French CJ, Hayne, Kiefel and Bell JJ (Gageler J dissenting at 78-79 [59]).

153 *Barbaro v The Queen* (2014) 253 CLR 58 at 72-73 [35]-[36] per French CJ, Hayne, Kiefel and Bell JJ

contrary to principle to expose those conclusions and assumptions in order to assist the judge in understanding why the range was fixed as it was[154]. Thus a sentencing range submission will not assist the judge in carrying out the sentencing task in accordance with proper principle[155].

By contrast, it is to be noted, that, following some differences of opinion about the application of *Barbaro* to the civil jurisdiction, in *Commonwealth of Australia v Fair Work Building Industry Inspectorate*[156] the High Court held that *Barbaro* does not apply to civil penalty proceedings and, therefore, that submissions can be made and, if appropriate, accepted as to an agreed amount of a pecuniary penalty to be imposed in a civil penalty proceeding. The difference in approach was justified on the basis of the different nature of civil proceedings, wherein there is generally greater scope for parties to agree on facts and consequences (settlement and orders by consent are ready examples); and given that civil penalties are imposed to deter wrongdoing (as opposed to criminal penalties which also import notions of retribution and rehabilitation), it was considered that there is significant value in a court receiving and, if

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154 *Barbaro v The Queen* (2014) 253 CLR 58 at 72-73 [35] per French CJ, Hayne, Kiefel and Bell JJ

155 *Barbaro v The Queen* (2014) 253 CLR 58 at 73 [38] per French CJ, Hayne, Kiefel and Bell JJ.

156 (2015) 258 CLR 482 at 503-504 [46] per French CJ, Kiefel, Bell, Nettle and Gordon JJ (Gageler J and Keane J agreeing at 511 [68], 513 [79]).

appropriate, accepting agreed penalty submissions. They increase certainty and predictability of outcome and thereby serve to deter persons by encouraging the implementation of corrective measures. Accordingly, it was considered that there is reason both in principle and policy to exclude the application of *Barbaro* from civil penalty proceedings.

(4) The Ashdown thesis of current sentencing practices

Another notable wrong turning in the search for sentencing consistency in sentencing was the *Ashdown* thesis. In *Ashdown v The Queen*[157], the Victorian Court of Appeal held that where an accused pleads guilty to an offence, and is not put on notice that the Crown will contend that current sentencing practices in relation to the offence are inadequate, the sentencing judge and appellate court may not depart (so far as it is a relevant consideration) from current sentencing practices even if of the opinion that they are inadequate. The concept was justified as a matter of fairness, on the basis the accused's plea of guilty would have been entered on the reasonable assumption that his or her sentence would be in line with current

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157 (2011) 37 VR 341 at 368 [132], 379 [151(15)] per Ashley JA, 410-411 [207] per Redlich JA (see and compare Maxwell P at 345-346 [5], 352 [32]).

sentencing practices[158]. The Crown did not seek special leave to appeal.

(5) The rejection of the Ashdown thesis

Six years later, however, in *Director of Public Prosecutions v Dalgleish (a pseudonym)*[159], the Crown did appeal to the High Court and the Court held that *Ashdown* was erroneous. In *Dalgleish*, the Victorian Court of Appeal had concluded that current sentencing practices for incest were "demonstrably inadequate" and that "[b]ut for the constraints of current sentencing which ... reflect the requirements of consistency" they would have had no hesitation in concluding that the sentence on appeal was manifestly inadequate. But, in accordance with *Ashdown*, the Court of Appeal declined to set aside the sentence because it was in line with current sentencing practices. The High Court unanimously rejected that reasoning. The plurality emphasised[160] that consistency in sentencing requires consistency in the application of legal principles and therefore does not mandate adherence to a range of sentences that is demonstrably contrary to principle. Thus, the Court of Appeal's acceptance that the manifestly inadequate sentencing practices must apply in the

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158 *Ashdown v The Queen* (2011) 37 VR 341 at 346 [5] per Maxwell P, 379 [151(15)] per Ashley JA, 410 [207] per Redlich JA.

159 (2017) 91 ALJR 1063.

160 *Director of Public Prosecutions v Dalgleish (a pseudonym)* (2017) 91 ALJR 1063 at 1073 [50], [53] per Kiefel CJ, Bell and Keane JJ, 1077-1078 [82]-[85] per Gageler and Gordon JJ.

case before them was not warranted by a need for consistency. Once the Court of Appeal concluded that current sentencing practices reflected a misapplication of principle, there was no good reason not to correct the effect of the error and determine the correct sentence according to law[161].

The Court added[162] that, contrary to what had been said in *Ashdown*, the perception of possible unfairness to an accused arising from an expectation assumed to attend a plea of guilty is not a sound reason to decline to give effect to a conclusion that a sentence imposed by a trial judge is manifestly inadequate. The only expectation that an accused can have is of the imposition of a just sentence according to law. A plea does not entitle him or her to be sentenced by reference to an erroneous understanding of the principles which inform a just sentence[163].

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161 *Director of Public Prosecutions v Dalgleish (a pseudonym)* (2017) 91 ALJR 1063 at 1074-1075 [60], [63] per Kiefel CJ, Bell and Keane JJ, 1078 [84] per Gageler and Gordon JJ.

162 *Director of Public Prosecutions v Dalgleish (a pseudonym)* (2017) 91 ALJR 1063 at 1075-1076 [65], [70] per Kiefel CJ, Bell and Keane JJ, 1078 [85] per Gageler and Gordon JJ.

163 *Director of Public Prosecutions v Dalgleish (a pseudonym)* (2017) 91 ALJR 1063 at 1075 [66]-[67] per Kiefel CJ, Bell and Keane JJ, 1078 [85] per Gageler and Gordon JJ.

(iv) Quo vadis Osenkowski?

In *R v Osenkowski*[164], King CJ memorably remarked that "[t]here must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view ... that leniency at that particular stage of the offender's life might lead to reform". And for more than 30 years thereafter, *Osenkowski* was the *cri de cœur* of sentencing pleaders. But now, given the increasing importance of consistency and the way in which it is interpreted, it is open to question the extent to which *Osenkowski* still applies.

At least at the level of principle, *Osenkowski* remains good law. In *Markarian*[165], Kirby J referred to it with approval in support of his Honour's conclusion that in sentencing there is a legitimate role for differences of judicial view. And in *Elias v The Queen*[166] the High Court emphasised that the administration of the criminal law involves individualised justice, the attainment of which involves the exercise of a wide sentencing discretion. Even so, the scope for application of *Osenkowski* is arguably becoming more limited.

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164 (1982) 30 SASR 212 at 212-213 (White J agreeing at 213).

165 (2005) 228 CLR 357 at 405-406 [133].

166 (2013) 248 CLR 483 at 494-495 [27].

For example, in the case of sexual offences, in *R H McL*[167] McHugh, Gummow and Hayne JJ observed that a provision in the Victorian *Sentencing Act* requiring that terms of imprisonment imposed on serious sexual offenders be served cumulatively gives effect to a legislative policy that serious offenders are to be treated differently from other offenders. Their Honours concluded[168] that the section means that "the scope for applying the totality principle must be more limited" in the case of sexual offending. *A fortiori* in the case of incestuous and paedophilic offences: in *Dalgleish*[169], the plurality emphasised that the "sexual abuse of children by those in authority over them has been revealed as a most serious blight on society" and that the maximum penalty for the crime of incest has been increased as a result.

The width of sentencing discretion appears also to have been crimped in relation to offences against women generally, as evidenced recently in *R v Kilic*[170]. Certainly *Kilic* was an horrific case involving an offender who doused his pregnant girlfriend with petrol as she sat trapped in the back seat of his car and then set her alight. The sentencing judge observed that there was a need for general deterrence of violence against women and sentenced accordingly.

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167 (2000) 203 CLR 452 at 476-477 [76].

168 *R H McL v The Queen* (2000) 203 CLR 452 at 477 [76].

169 [2017] HCA 41 at [57] per Kiefel CJ, Bell and Keane JJ.

170 (2016) 259 CLR 256.

The Court of Appeal set aside the sentence on the ground it was manifestly excessive by reference to sentences imposed in other cases in the "worst category". The High Court, however, held[171] that the sentence was not manifestly excessive, in part because a case which the Court of Appeal treated as comparable was not comparable in that it "was not a case of domestic violence perpetrated against a woman in abuse of a relationship of trust".

The changing jurisprudence of Crown appeals against sentence

It remains to say something of changes in the High Court jurisprudence of Crown appeals against sentence. Originally, the Court's approach to Crown appeals against sentence was similar to its approach to appeals against sentence generally. In *Skinner v The King*[172], in rejecting a prisoner's appeal against sentence under s 6(3) of the *Criminal Appeal Act* 1912 (NSW), Barton ACJ (with whom Isaacs, Gavan Duffy, Powers and Rich JJ concurred) stated that:

> "the sentence is arrived at by the Judge at the trial under circumstances, many of which cannot be reproduced before the tribunal of appeal. He hears the witnesses giving their evidence, and also observes them while it is being given, and tested by cross-examination. He sees every change in their demeanour and conduct, and there are often circumstances of that kind that cannot very

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171 *R v Kilic* (2016) 259 CLR 256 at 270 [29].

172 (1913) 16 CLR 336 at 339-340.

> well appear in any mere report of the evidence. It follows that 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."

Consonantly with the declaratory theory of judicial function which then held sway, Barton ACJ made no reference to any authority in support of the propositions which he thus articulated. But it is apparent that what his Honour stated was hardly novel. As appears from Isaacs J's concurring judgment, the analysis derived from a long line of English cases in which criminal appellate courts had applied an approach to sentencing appeals which was functionally similar to the English Court of Appeal's approach to civil discretionary judgments[173]. It was summarised by Alverstone CJ in *R v Sidlow*[174] thus:

> "[I]f 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."

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173 *Skinner v The King* (1913) 16 CLR 336 at 342-344.

174 (1907) 24 TLR 754 at 755.

In 1924 New South Wales became the first State of the Commonwealth to enact a Crown right of appeal against sentence: s 5D of the New South Wales *Criminal Appeal Act*. In 1928, in *Whittaker v The King*[175] the High Court held by majority that s 5D conferred an unfettered discretion on the Court of Criminal Appeal to reconsider a sentence passed below. But in a strong dissenting judgment Isaacs J posited[176] that the approach to Crown appeals against sentence should be the same as for prisoners' appeals against sentence under s 6(3) of the Act, in accordance with the settled law of curial discretion:

> "If, as Lord Loreburn L.C. said in *Brown v Dean*, a successful litigant in any civil Court has a vested interest in the judgment he has obtained, which ought not to be taken from him without proper recognized cause, even on grounds of discretion; still more should we respect the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal. ...
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> The just sentence to be passed on an offender after an open trial depends, or may depend, on many considerations not apparent or available to the Court of appeal. The condition and appearance of a prosecutor who has been assaulted or robbed, his manner of giving evidence, the demeanour of witnesses, the prisoner's conduct in Court, the impression produced by the words, the behaviour or the personal appearance of the accused, the 'atmosphere,' as it may shortly be called, of the trial, are or may be of very great worth in estimating the appropriate penalty for the crime. ...
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> It would be quite wrong, therefore, to treat the question of sentence, though in the discretion of the

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175 (1928) 41 CLR 230 at 235 per Knox CJ and Powers J, 253 per Gavan Duffy and Starke JJ.

176 (1928) 41 CLR 230 at 248-250.

> appeal Court, as a matter left to that body apart from the opinion of the trial Judge. But if it once be conceded that his opinion is to be taken into account, is it not a necessary corollary that if justice is to be maintained, that opinion must, not as a matter of law but as an element of fair play, be regarded as prima facie correct, and, in order that it should be displaced, it must be shown, as the Court of Criminal Appeal has said, that it is 'not merely inadequate, but manifestly so, because the learned Judge in imposing it either proceeded upon wrong principles, or undervalued or overestimated some of the material features of the evidence.' ...
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> It is on these principles that the decisions in England and in this country have so far proceeded. No distinction can, in my opinion, be made in this respect between sec. 6(3) and sec. 5D."

Six years after *Whittaker* was decided, in *Williams v The King [No 2]*[177], Dixon J referred to the right of appeal conferred by s 5D as a marked departure from the principles previously governing the exercise of penal jurisdiction, albeit that it was picked up and applied by s 68(2) of the *Judiciary Act* so as to confer on the Commonwealth Attorney-General a right of appeal against sentence for a Commonwealth offence. His Honour did not say, however, whether there should be any difference between the manner in which prisoners' appeals against sentence and Crown appeals against sentence are decided.

Ultimately, Isaacs J's approach to Crown appeals was approved in 1977 in *Griffiths v The Queen*[178] but with the rider that

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177 (1934) 50 CLR 551 at 561.

178 (1977) 137 CLR 293.

Crown appeals against sentences should be a rarity. Barwick CJ stated[179] that he agreed with the reasons for judgment of Isaacs J in *Whittaker* and accepted the citations which he had made in support of his views. His Honour then went on to add:

> "On my view of the proper meaning of s. 5D in the context of the *Criminal Appeal Act*, an appeal by the Attorney-General should be a rarity, brought only to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons."

To similar effect, Jacobs J observed[180] that, whereas in the case of a prisoner's appeal against sentence under s 6(3) of the New South Wales *Criminal Appeal Act* the Court of Criminal Appeal was bound to act once it reached the conclusion that the sentence the subject of appeal was not both warranted in law and one that should have been passed, in the case of a Crown appeal against sentence under s 5D of the Act, the Court of Criminal Appeal had a wide discretion whether or not to interfere even though it may reach the conclusion that another sentence should have been passed. Nevertheless, under s 5D the Court of Criminal Appeal may interfere in the exercise of discretion if the incorrectness of the sentence

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179 *Griffiths v The Queen* (1977) 137 CLR 293 at 310.

180 *Griffiths v The Queen* (1977) 137 CLR 293 at 326-327.

passed below was manifest. Jacobs J added that in his opinion any different interpretation of *Whittaker* was wrong.

Murphy J wrote in more emphatic terms which resonate in some of Deane J's later reasoning on the subject. Murphy J described[181] a Crown appeal as an extraordinary remedy intended to be invoked only rarely and then only for reasons of great public importance. His Honour stated[182] that a court of criminal appeal's discretion not to intervene may and should be used to minimise the increasing of primary sentences and to discourage frequent Crown appeals "so that the appeals may be invoked only rarely as the extraordinary remedy that was intended, and that it was until recent years".

Two years after *Griffiths*, in *R v Tait*[183], Brennan, Deane and Gallop JJ sitting as the Full Court of the Federal Court of Australia emphasised the idea that Crown appeals against sentence should be a rarity. They added that that was so because, quoting Barwick CJ in *Peel v The Queen*[184], Crown appeals cut across "time-honoured concepts of criminal administration" and, then quoting Isaacs J in

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181 *Griffiths v The Queen* (1977) 137 CLR 293 at 329.

182 *Griffiths v The Queen* (1977) 137 CLR 293 at 331.

183 (1979) 46 FLR 386 at 388-389.

184 (1971) 125 CLR 447 at 452.

Whittaker[185], put in jeopardy "the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal".

Possibly, the *Tait* idea of "time-honoured concepts of criminal administration" derived from Dixon J's observation in *Williams [No 2]* that the right of Crown appeal against sentence represents a marked departure from the principles that had previously governed the exercise of penal jurisdiction. Similarly, the notion of the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal, possibly harks back to Isaacs J's adoption in *Whittaker* of Lord Loreburn LC's mention of a litigant's vested interest in a judgment and still more so in his freedom. If so, neither of those pronouncements was essentially new. But what was said in *Tait* was then taken a considerable step further by Deane and McHugh JJ in their minority judgment in *Malvaso v The Queen*[186]. Their Honours there characterised[187] the statutory right of Crown appeal against sentence as "contrary to the deep-rooted notions of fairness and decency which underlie the common law principle against double jeopardy", and quoted with approval Isaacs J's statement in *Whittaker* that Crown appeals should be a

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185 (1928) 41 CLR 230 at 248.

186 (1989) 168 CLR 227.

187 *Malvaso v The Queen* (1989) 168 CLR 227 at 234.

rarity brought only to establish some matter of principle or to avoid manifest disparity or inconsistency in sentencing.

More pointedly again, five years later, in *Everett v The Queen*[188], in a joint judgment redolent of Deane and McHugh JJ's joint judgment in *Malvaso*, Brennan, Deane, Dawson and Gaudron JJ stated that:

> "a court of criminal appeal must, in the absence of clear statutory direction to the contrary, recognize that there are strong reasons why the jurisdiction to grant leave to the Attorney-General to appeal against sentence should be exercised only in the rare and exceptional case. An appeal by the Crown against sentence has long been accepted in this country as cutting across time-honoured concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed".

Thus remains the law. But, in view of more recent developments, three observations are warranted. First, whether there was long-standing acceptance of the idea that a Crown appeal against sentence cut across time-honoured concepts of criminal justice is, with respect, debatable. Granted, as Dixon J observed in *Williams [No 2]*, the introduction in 1924 of a right of Crown appeal against sentence was a marked departure from the principles governing criminal justice. Until then, it was accepted that the Crown had no interest in penalty. But, relatively speaking, the

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188 (1994) 181 CLR 295 at 299.

establishment of a Crown right of appeal was little more of a departure from the principles that had governed the administration of criminal justice than was the enactment in s 6(3) of the New South Wales *Criminal Appeal Act* of a prisoner's statutory right of appeal against sentence.

Secondly, seven years before *Everett* was decided, Kirby P, as his Honour then was, rightly concluded in *R v Hayes*[189] that there was a disparity of views as to the nature of Crown appeals. His Honour observed that in a number of cases it had been decided that precisely the same principles applied to Crown appeals against sentence as applied to appeals by prisoners complaining that their sentences were excessive. Isaacs J's judgment in *Whittaker* was the most notable example. Other cases had suggested that there were special considerations applicable to Crown appeals. Kirby P instanced *R v Withers*[190], *Griffiths* and *R v Stach*[191]. Even then, however, *Withers* and *Griffiths* had gone no further than reiterate the established and unexceptionable doctrine that an appellate court should not interfere with a sentence unless it be shown that the sentencing judge was in error in acting on wrong principle in either misunderstanding or wrongly assessing some salient feature of the

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189 (1987) 29 A Crim R 452 at 468-469.

190 (1925) 25 SR (NSW) 382 at 394 per Street CJ (James J and Campbell J agreeing at 398).

191 (1985) 5 FCR 518 at 522 per Bowen CJ and Beaumont J.

evidence. *Stach* alone among the cases mentioned embraced the idea posited in *Tait* that a Crown appeal against sentence raises considerations not present in a prisoner's appeal against sentence, such that it would be unjust to a prisoner whose freedom is in jeopardy for a second time to consider on appeal a case made against him or her on a new basis that might have been successfully challenged had it been fully present against him or her at trial.

Thirdly, inasmuch as the *Everett* notion of cutting across "time-honoured concepts of criminal justice" imported Deane and McHugh JJ's conception in *Malvaso* of something "contrary to deep-rooted notions of fairness and decency" it might be thought contestable. Why should it be regarded as contrary to notions of fairness and decency for the Crown to appeal against a manifestly inadequate sentence; and since manifestly inadequate sentences were not then all that rare and exceptional, what strong reasons were there for restricting the jurisdiction to grant leave to the Crown to appeal against sentence to rare and exceptional cases?

Viewed in retrospect, it may be that the concept of double jeopardy first articulated as such in *Tate* and later elevated to the level of principle in Deane J's judgments in *Malvaso* and *Everett* was designed to deter the increase in Crown appeals against sentence which had resulted from the increased focus, earlier mentioned, of intermediate courts of criminal appeals on consistency in sentencing and their consequent preparedness to entertain Crown appeals

against sentence. But, if so, as can also be seen in retrospect, the double jeopardy doctrine signally failed in the achievement of that objective. Even before the substance of the doctrine was abolished by statute[192], the incidence of Crown appeals against sentence continued to increase; and since the statutory abolition of the doctrine, the rate of increase has continued.

In the result, these days the idea that Crown appeals against sentence should be rare and exceptional is not as often articulated as such. The concentration is more upon the orthodox criteria of whether there has been error in principle either apparent in itself or as revealed by the manifest inadequacy of the sentence.

There are several reasons for that. As Kirby J noticed in his 2002 article "Why has the High Court become more involved in criminal appeals?"[193], the increase in the importance of consistency in sentencing and the consequent increase in the volume of criminal appeals as part of the regular work of intermediate appellate courts led to an increase in applications to the High Court for special leave to appeal in sentencing cases in both prisoners' appeals against sentence and Crown appeals against sentence. The consequent changing perception of the proper role of sentencing appeals coupled

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192 See, for example, *Crimes (Appeal and Review) Act* 2001 (NSW), s 68A; *Criminal Procedure Act* 2009 (Vic), ss 289-290.

193 (2002) 23 *Australian Bar Review* 4 at 10-13.

with the recognition of the need for full reasons in sentencing appeals, and the resultant emergence of differences of principle and approach between State and Territorial jurisdictions, presented issues for consideration by the High Court that had not previously arisen. Additionally, the increased and increasing public interest in sentencing, encouraged by tabloid journalism, talk-back radio and more recently social media, led to the statutory abrogation of the doctrine of double jeopardy and therefore a greater propensity on the part of the Crown to appeal[194]. And lastly, despite the residual discretion to dismiss a Crown appeal against sentence[195], the increased statutory regulation of sentencing principle, which included the introduction of minimum term legislation, serious offender legislation, special statutory cumulation provisions in the case of sexual offending, and the advent of preventative detention legislation, created a statutory framework which was more exacting and, therefore, more susceptible to appellate analysis than the bulk of broad common law discretionary sentencing considerations about which reasonable minds are more likely to differ. Of the cases already mentioned, *Pham* and *Dalgleish* are recent notable examples.

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194 See generally *R v JW* (2010) 77 NSWLR 7.

195 See *R v Green* (2010) 207 A Crim R 148 at 154 [11] per Allsop P and McCallum J.

Conclusion

What conclusions are then to be drawn from the jurisprudential developments to which I have referred? First, it appears that the High Court, like the courts of criminal appeal which are its tributaries, is now more disposed than in the past to entertain sentencing appeals in matters where the interests of justice either generally, or in the circumstances of the particular case, warrant consideration of the matter.

Secondly, the consequent focus on sentencing principle at the highest appellate level has yielded a developing body of sentencing jurisprudence to which sentencing judges once had little need to have regard but which now demands explicit consideration and application. Jurisprudential conceptions like proportionality and community protection, cumulation and totality, parity, double punishment, the setting of non-parole periods, the imposition of suspended sentences, indefinite sentences, and protective detention, afford a framework for consistency in sentencing which, even thirty years ago, was largely beyond contemplation.

Thirdly, the High Court's affirmation of the intuitive synthesis sentencing paradigm in principle leaves greater scope for individual justice than the more rigid taxonomical structure of two part sentencing. Yet, paradoxically, the breadth of individual sentencing

discretion, once regarded as sacrosanct, is now more restricted by established sentencing principle and statute.

Fourthly, although the *Hili* conception of consistency in sentencing is of consistency in the application of sentencing principle, increasingly the expectation has become that consistency in the application of principle should translate into consistency in numbers; at least within categories of what are conceived of as comparable cases. Yet at the same time, the embrace of sentencing statistics, charts, tabular comparisons and suchlike continues to be resisted, and the result of the demand for sentencing consistency is a trend towards ever increasing sentences.

Fifthly, the *Osenkowski* notion of individual justice remains valid and important. But, as it appears, these days it holds less sway in the case of sexual offences – especially incestuous and paedophilic sexual offences – and offences of violence, especially violence against women. The realpolitik of community expectations is too powerful to be denied.

Finally, Crown appeals against sentence are no longer as rare and exceptional as once they were. Over the last 20 years, it has come to be accepted that the Crown has a real and substantial interest in promoting consistency in sentencing and adherence to sentencing principle, even if not as much as was envisaged in *MacNeil-Brown*.